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Neal Devins

William & Mary Law School, nedeви@wm.edu

Michael Herz

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THE UNEASY CASE FOR DEPARTMENT OF JUSTICE CONTROL OF FEDERAL LITIGATION

Neal Devins & Michael Herz***

INTRODUCTION

On the cover of a recent annual report, the United States Department of Justice (DOJ) billed itself as: "The Nation's Litigator—Yesterday . . . today . . . tomorrow."¹ The claim has some truth to it and may be, as Justice Scalia likes to say, good enough for government work. But it is incorrect as to yesterday (or at least as to the day before yesterday, since DOJ did not even come into existence until 1870), and an exaggeration as a description of today's practice. In this article, we will consider whether it is, or should be, inaccurate also as a prediction of who will be the nation's litigator "tomorrow."

This symposium's topic posits a particular opponent: the government. In the actual struggle of litigation, however, the opponent is in a very real sense not the nominal *party* on the other side of the case; it is the *attorney* representing that party. In this paper, we examine not the government as a party to a lawsuit, nor the substantive or procedural rules that control litigation against the government. Rather, we are concerned with the lawyers representing the government. The identity, priorities, skills, and role of those lawyers play a not insignificant role in determining the nature and outcome of litigation against the government.

In general, the lawyers in litigation against the government are from DOJ. The prevailing rule is that federal agencies hold their own legal counsel, but if they find themselves in court they are represented by DOJ. This arrangement has built-in tensions for the participants, and almost all agencies have chafed under it at times. Though this is the standard arrangement, it is by no means the exclusive one. To a greater degree than is often realized or acknowledged, though without any particular pattern or underlying theory, Congress

* Goodrich Professor of Law and Professor of Government, College of William and Mary.

** Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. Preliminary versions of this article were presented at faculty workshops at Cardozo, Vanderbilt, and William and Mary law schools. Thanks to participants at those workshops and to Joel Mintz for helpful comments. Thanks also to participants at the Sparer Conference, especially Ed Rubin and Hal Krent, and to Michele Filorimo, Cardozo '04, for very helpful research assistance.

¹ UNITED STATES DEP'T OF JUSTICE, LEGAL ACTIVITIES 1997-1998 (1997).

has placed responsibility for government lawyering with attorneys outside DOJ.

In this article, we cast a fresh eye on the standard arguments for DOJ control of litigation. We conclude that the case is not nearly as compelling as generally assumed. Nonetheless, in the final analysis our proposals for reform are minor. It is for this reason that we have borrowed our title from Harry Kalven and Walter Blum's classic book, *The Uneasy Case for Progressive Taxation*.² Kalven and Blum took a careful look at a phenomenon everyone assumed made sense—progressive income tax rates—and found the case to be surprisingly “uneasy.” We conclude, similarly, that the case for centralizing litigating authority in DOJ is also surprisingly uneasy.

We divide our comments into three parts. In Part I, we detail the different lawyering tasks performed by DOJ and government agencies. This discussion will also highlight differences between types of cases: criminal, civil, and administrative enforcement, as well as the defense of agency decisions. Part II identifies and assesses the traditional arguments advanced in favor of DOJ control of government litigation. This assessment will call attention to shortcomings in the traditional arguments. In Part III, we argue that in two categories of cases, namely (1) trial, but not appellate proceedings, in civil enforcement and (2) petitions for judicial review of regulations, litigation authority should be transferred to agency lawyers. We also conclude, however, that in other settings DOJ control makes sense.

I. LAWYERS FOR THE FEDERAL GOVERNMENT

A. *The Structure of Federal Lawyering*

Prior to 1870, the federal government's legal affairs were handled in a diffuse and decentralized manner. The Attorney General had no, or virtually no, staff; district attorneys (as U.S. Attorneys were then called) operated without centralized control; and much of the work was farmed out to private counsel. There existed what one author has labeled a state of “near anarchy in the nation's legal affairs.”³ The key step toward centralization was creation of DOJ in 1870. Congress had two primary goals. First, it sought to eliminate the reliance on private lawyers in litigation. Handling government lawsuits with lawyers working for the government itself would be more efficient, ensure consistent litigating positions, and provide high quality

² WALTER J. BLUM & HARRY KALVEN, JR., *THE UNEASY CASE FOR PROGRESSIVE TAXATION* (1953).

³ NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990*, at 49 (1992).

lawyering. In addition, and apparently most important, it would be less expensive than relying on outside counsel. Second, and no less weighty, Congress sought to centralize the *counseling* function.⁴ Accordingly, the 1870 Act creating DOJ provided that the legal officers of other departments "shall exercise their functions under the supervision and control of the head of the Department of Justice."⁵

The 1870 centralization never quite took hold. Attorneys within the departments retained significant independence both as to litigation and counseling. It was with the New Deal that the modern framework was put in place. By executive order,⁶ pursuant to congressionally delegated reorganization authority,⁷ the Attorney General was given control of nearly all the litigation of the federal government; however, agencies were left to conduct their own internal legal and counseling work without DOJ interference.⁸

In general, then, the Department of Justice is the litigator for the United States and its administrative agencies.⁹ Agencies may not employ outside counsel for litigation and must refer all matters to DOJ.¹⁰

⁴ See CONG. GLOBE, 41st Cong., 2d Sess. 3036 (April 27, 1870) (remarks of Rep. Jenckes); *id.* at 3038 (remarks of Rep. Lawrence) ("One great object of this bill is to provide a law officer whose opinion shall be asked upon all questions admitting of doubt, and whose opinions shall become the rule of action for the Departments and for the several heads of bureaus."); *id.* at 3065-66 (April 28, 1870) (remarks of Rep. Lawrence); *id.* at 4490 (June 16, 1870) (remarks of Sen. Patterson) (noting the "absolute necessity of harmony in the legal business of the Government" and arguing that a benefit of having a department of justice would be that "the opinions given by the law officers of the Government will be a unit, will be in harmony with each other").

⁵ Act of June 22, 1870, ch. 150, 16 Stat. 162 (creating the Department of Justice). For additional discussion, see Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237 (1996).

⁶ Exec. Order No. 6166 (June 10, 1933), reprinted in 5 U.S.C.A. § 901 (1996).

⁷ Act of March 3, 1933, Pub. L. No. 72-428, 47 Stat. 1489, 1517.

⁸ On the division of labor with regard to counseling, see *infra* notes 44-49, 124-26 and accompanying text.

⁹ 28 U.S.C. § 516 (2000) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."); *id.* at § 519:

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

See also *id.* at § 518(a) (giving the Attorney General and the Solicitor General control of federal litigation before the Supreme Court); 28 C.F.R. § 0.20(a) (2002) (giving the Solicitor General control of federal litigation before the Supreme Court). Agency lawyers do represent their agencies in formal administrative adjudications, which are trial-type proceedings but do not qualify as "litigation" within the meaning of these provisions.

¹⁰ See 5 U.S.C. § 3106 (2000):

Except as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice.

Although this is the standard arrangement, the law does "otherwise authorize" with surprising frequency. Congress has significantly eroded the Attorney General's role as chief litigator for the United States, vesting at least some independent litigating authority in approximately three-dozen governmental entities, ranging from Congress itself, to independent regulatory agencies, to governmental corporations, to executive departments and agencies.¹¹ Not surprisingly, independent litigating authority is especially common among the independent agencies.¹² In this Section, we lay out the basic model and its variations.

1. Criminal Prosecutions

DOJ is particularly dominant in criminal prosecutions. Uniformly, DOJ lawyers handle criminal prosecutions; even agencies that otherwise handle their own litigation lack authority to initiate or prosecute a criminal case. Most agencies have criminal investigators, but if the agency decides a criminal prosecution is warranted, it must refer the case to DOJ.¹³ Furthermore, DOJ has its own criminal investigatory apparatus¹⁴ and can pursue a prosecution even without an agency referral.¹⁵ In addition, DOJ by no means automatically pursues a criminal referral. For example, declination rates in the early years of environmental criminal enforcement were as high as 60%;¹⁶

¹¹ See Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 263-64, 269-70 (1994). Former Attorney General Griffin Bell counted with dismay "thirty-one separate units of the federal government [that] have authority to conduct at least some of their own litigation." GRIFFIN B. BELL, WITH RONALD J. OSTROW, *TAKING CARE OF THE LAW* 176 (1982). See, e.g., *Fed. Deposit Ins. Corp. v. Irwin*, 727 F. Supp. 1073 (N.D. Tex. 1989) (holding, contrary to DOJ's argument, that the FDIC has independent litigating authority); *Comptroller of the Currency v. Lance*, 632 F. Supp. 437 (N.D. Ga. 1986) (holding that the Comptroller has independent litigating authority).

¹² For a thorough description of the litigating authority (among other characteristics) of 32 independent agencies, boards, and commissions, see Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1236-94 (2000).

¹³ For a full account of the process of criminal investigation and prosecution in one particular setting, see ENVIRONMENTAL CRIMINAL LIABILITY: AVOIDING AND DEFENDING ENFORCEMENT ACTIONS (Donald A. Carr ed., 1995).

¹⁴ Between 1988 and 1993, for example, over 61% of environmental cases considered for criminal prosecution were referred by EPA and 34% were developed by DOJ investigators, with almost all of the latter coming from the FBI. See EPA's *Criminal Enforcement Program: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 103d Cong., 1st Sess. 78 (1993) (statement of L. Nye Stevens) [hereinafter *1993 Dingell Hearing*].

¹⁵ United States Attorney's Manual, § 5-11.110 (8/23/94 Bluesheet).

¹⁶ Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remains*, 59 GEO. WASH. L. REV. 900, 907 (1991) (describing period from 1979-81). On the tension between EPA and DOJ over the quality of the agency's criminal referrals, see WILLIAM J. CORCORAN ET AL., UNITED STATES DEPT' OF JUSTICE, INTERNAL REVIEW

in the last decade DOJ has reportedly declined Security & Exchange Commission (SEC) referrals at about the same rate.¹⁷ In short, in a criminal case DOJ represents the United States, not the agency, and its decision whether to prosecute is relatively autonomous.¹⁸

If DOJ does pursue a criminal prosecution, agency lawyers have little or no involvement in the actual lawyering. In civil cases, DOJ takes the lead but agency lawyers may be part of the litigating team. In criminal cases, the agency is wholly in the background, only helping to build a case. For example, each Environmental Protection Agency (EPA) Region has a Regional Criminal Enforcement Counsel (RCEC), but that office works to prepare cases, not to litigate them or present them to a grand jury. Indeed, the RCEC's status as odd man out in criminal prosecutions has been a source of tension between the agency and the department.¹⁹

2. Civil Judicial Enforcement

When it comes to civil judicial enforcement actions, the arrangements are more variable. However, there is one significant and consistent difference between criminal and civil actions: in the latter, DOJ will not proceed without a client. In the words of the U.S. Attorney's Manual, "[a]s a matter of policy and practice, civil prosecutions are initiated at the request of the" relevant agency head.²⁰ Indeed, the most plausible reading of the statutes is that DOJ *could not* proceed in a civil case without the agency even if it wanted to. Should DOJ learn of possible violations warranting investigation, it

OF THE DEPARTMENT OF JUSTICE ENVIRONMENTAL CRIMES PROGRAM (1994) [hereinafter DOJ INTERNAL REVIEW].

¹⁷ Walter Hamilton, *Corporate Scandals Bring Calls for Jail*, L.A. TIMES, July 9, 2002, at C1 (reporting that in the last decade the SEC has referred 523 cases for criminal prosecution, of which DOJ pursued 231 and rejected 292, or 56%). See also Clifton Leaf et al., *White-Collar Criminals: Enough is Enough*, FORTUNE, Mar. 18, 2002, at 60 (reporting that from 1992 to 2001 the SEC referred 609 cases and that DOJ acted on 525 of those cases, of which it declined to prosecute just over 64%). Both of these sources base their figures on searches of the Transaction Records Access Clearing House (TRAC), a web-based data clearinghouse at Syracuse University.

¹⁸ Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2460 (1995).

¹⁹ DOJ INTERNAL REVIEW, *supra* note 16 (noting that disputes over the proper role of RCECs are "[a]nother source of tension between the EPA" and Justice's Environmental Crimes Section); see also Letter from Earl E. Devaney, Director, EPA Office of Criminal Enforcement, to Vicki A. O'Meara, Acting Assistant Attorney General, Environment and Natural Resources Division, at 2 (Dec. 22, 1992), reprinted in 1993 Dingell Hearing, *supra* note 14, at 420, 421 (noting that a "division . . . has infused itself between our two agencies" characterized by a "them vs. us" perception that we have long been working to overcome").

²⁰ United States Attorney's Manual, § 5-12-111(a).

forwards the information to the agency; an actual civil action will not go forward without a referral from the agency to DOJ.²¹

While it is consistently true that DOJ will not pursue a civil enforcement action without an agency referral, how cases are brought varies. In the most common arrangement, an agency has no authority to bring civil actions on its own. When the agency wishes to go to court it prepares a referral package, describing the case and justifying the need for judicial action, which it sends to the relevant division or section within DOJ. The decision whether to proceed, and then the actual handling of the litigation if such a decision is made, is in the hands of DOJ. Cases generally begin with an agency's regional office. The role that agency headquarters has in screening or preparing referrals changes over time and varies depending on the agency and on the type of case.²² Whatever the internal arrangements, preparation of a referral memo tends to be a serious and time-consuming undertaking, producing a fairly lengthy document and voluminous supporting materials.

Under this standard arrangement, DOJ has two key powers: it decides whether or not a case goes to court and, if it does go to court, it handles the lawyering. Elimination of either of these roles shifts power to the agency. Consider the Fair Housing Act and its 1988 Amendments. Complaints alleging housing discrimination are filed with the Department of Housing and Urban Development (HUD). If the agency determines that there is reasonable cause to believe that discrimination has in fact occurred, it in turn files a charge with the Office of Administrative Law Judges. At that point, either party can "elect" to have the case adjudicated in federal district court rather than before an ALJ. In a majority of cases, such an election is made.²³

²¹ *Id.* at § 5-12-111(b).

²² For example, within the Food and Drug Administration, the regional offices prepare a referral package, but it is the Office of the Chief Counsel that authorizes the referral and signs the cover letter. See FDA OFFICE OF REGULATORY AFFAIRS, REGULATORY PROCEDURES MANUAL 2001 (chapter 6, "Judicial Actions," injunctions subchapter), available at http://www.fda.gov/ora/compliance_ref/rpm_new2/ch6.html#pu (last visited Apr. 24, 2003) [hereinafter U.S. FDA]. Within the EPA, in the 1970s and 1980s referrals went through headquarters. In 1988, the policy was changed to allow direct referral of most but not all cases from the Regional Office to DOJ, with a copy provided to EPA headquarters. See Mem. From Thomas L. Adams, Ass't Admin., USEPA, to Regional Administrators et al., available at <http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/expand-ref-mem.pdf> (last visited Apr. 27, 2003) (regarding "Expansion of Direct Referral of Cases to the Department of Justice"). Thereafter, practice has continued to vary, although a key question has consistently been whether a case is of "national significance."

²³ From 1989 until 1998, one or the other party elected to proceed in district court in 913 (64.8%) of the 1408 cases in which HUD made a reasonable cause finding. MICHAEL H. SCHILL & SAMANTHA FRIEDMAN, CTR. FOR REAL ESTATE & URB. POL'Y, N.Y.U. SCHOOL OF LAW, ENFORCING THE FAIR HOUSING ACT: A REPORT TO THE U.S. DEP'T OF HOUS. & URB. DEV. 52

In cases that stay before an ALJ, HUD and the complainant are represented by an attorney from HUD's Office of General Counsel. In election cases, HUD and the complainant are represented by an attorney from DOJ. As a practical matter, then, DOJ cannot decline to pursue an enforcement action.²⁴ As long as HUD has made the requisite probable cause finding, and one or the other party has elected to proceed in district court, the case goes forward and DOJ must handle it. Thus, DOJ is still the lawyer, but it is not the gatekeeper.²⁵

In some settings, however, DOJ acts as neither lawyer nor gatekeeper. A number of agencies handle civil judicial enforcement on their own. Among the executive agencies, the Department of Labor is the primary example.²⁶ This arrangement is more common among the independent agencies. For example, the SEC handles all of its own civil enforcement litigation.²⁷ The Commission has a large Division of Enforcement, with scores of attorneys, accountants, and investigators and its own counsel's office. The Enforcement Division conducts a preliminary review of a case; with approval of the SEC General Counsel and the Commissioners it can then pursue an informal inquiry; with further approval of the General Counsel and the Commissioners and issuance by the latter of a Formal Order of Investigation, it can pursue a further investigation. Final decision as to termination, settlement, administrative enforcement, civil judicial en-

(2000). The rate varied from year to year, with a peak of 74.4% in 1995 and a low of 44.9% in 1998 (the only year in the study period in which the election rate was below 50%). *Id.*

²⁴ This arrangement does not apply to all types of Fair Housing Act cases. For example, HUD can refer "pattern or practice" cases to DOJ, which the Department can pursue or not as it sees fit. 42 U.S.C. §§ 3610(e)(2), 3614(a) (2000). Unusually, DOJ can also pursue such cases *without* a referral. Indeed, between 1992 and 1998, DOJ filed over fifty "pattern or practice" suits resulting from its own investigations without HUD referrals. John Reiman, *Federal Fair Housing Enforcement: The Second Clinton Administration*, in *THE TEST OF OUR PROGRESS: THE CLINTON RECORD ON CIVIL RIGHTS* 231 (Corrine Yu & William Taylor eds., 1999).

²⁵ This is not to say that this arrangement is devoid of the tensions that arise from the gatekeeping function. For example, DOJ is authorized to decline to pursue an action if new legal developments or new evidence cast doubt on HUD's underlying reasonable cause determination. HUD has objected that DOJ returns cases, in contravention of its statutory obligation to pursue them, simply because it disagrees with the substantive underpinnings of the reasonable cause determination; DOJ has maintained that it returns cases only when new information or developments indicate them to be frivolous. U.S. COMM'N ON CIVIL RIGHTS, *THE FAIR HOUSING AMENDMENTS ACTS OF 1988: THE ENFORCEMENT REPORT* 213-14 (1994). The Civil Rights Commission has chided DOJ for being insufficiently deferential to HUD, and recommended that DOJ should authorize HUD attorneys to pursue cases that DOJ cannot or will not pursue. *Id.* at 231.

²⁶ See, e.g., 29 U.S.C. § 663 (2000) (providing that "the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under [the Occupational Safety and Health Act] but all such litigation shall be subject to the direction and control of the Attorney General"); *id.* at § 2005(b) (providing that the Solicitor may represent the Secretary in actions under the Employee Polygraph Protection Act); *id.* at § 2617(e) (providing same for actions under the Family and Medical Leave Act).

²⁷ 15 U.S.C. §§ 77t(b)-(d), 78u(c)-(e) (2000).

forcement, or referral to DOJ for criminal prosecution is made by the Commissioners upon the recommendation of the Division of Enforcement and the General Counsel.²⁸ If a civil judicial enforcement action is brought, the lawyering is handled by the Division of Enforcement.

The SEC's ability to pursue civil enforcement actions on its own seems to have had two consequences worth noting here. First, it is striking that the agency itself has developed several layers of internal review, in some ways duplicating, if not exceeding, the process of DOJ review of agency referrals that exists for agencies without litigating authority. The "winding road that an enforcement action follows at the Commission . . . is tortuous at best and lengthy, with numerous layers of bureaucratic review."²⁹ Second, because it is not forced to choose between enforcement alternatives, the SEC sometimes pursues more than one at the same time. In a significant number of cases, for example, the Commission pursues civil judicial relief in a case that DOJ is prosecuting criminally.³⁰ Similarly, the Commission may pursue a matter through simultaneous civil judicial *and* administrative enforcement actions.³¹

3. Administrative Enforcement

In general, criminal prosecutions are understood to be the top of a pyramid of enforcement alternatives. Civil judicial cases are a tier below, and at the broad bottom of the pyramid are administrative proceedings.³² While possible monetary penalties can be comparable in all three regimes,³³ in practice, penalties actually imposed are, not surprisingly, smaller in administrative cases than in judicial cases.³⁴ In

²⁸ See Thad A. Davis, *A New Model of Securities Law Enforcement*, 32 CUMB. L. REV. 69, 99-103 (2001).

²⁹ *Id.* at 99.

³⁰ *Id.* at 106. Davis estimates that approximately 10% of the SEC's judicial civil enforcement cases have parallel criminal proceedings. *Id.* at 85-86.

³¹ See The Investor's Advocate: How the SEC Protects Investors and Maintains Market Integrity, available at <http://www.sec.gov/about/whatwedo.shtml#org> (last visited Apr. 12, 2003) (describing enforcement options and stating that "[o]ften, when the misconduct warrants it, the Commission will bring both" administrative and civil judicial enforcement actions against the same wrongdoer).

³² For a literal depiction of this pyramid, see 1994 EPA FY ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REP., figs. 2-1, 2-2 (1995), available at <http://www.epa.gov/compliance/resources/reports/planning/results/fy94accomplishment.pdf> (last visited Apr. 27, 2003) [hereinafter 1994 EPA ENFORCEMENT REP.].

³³ Under the Clean Air Act, for example, civil judicial penalties and administrative penalties both have a maximum of \$25,000 per day per violation, although the latter cannot exceed a total of \$200,000. Clean Air Act, §§ 113(b), (d)(1), 42 U.S.C. §§ 7413(b), (d)(1) (2000).

³⁴ Thus for fiscal year 1999, the EPA obtained civil judicial penalties of over \$141.2 million while it imposed 1,654 administrative penalties totaling \$25.5 million. EPA, ANNUAL REP. ON

general, the majority of enforcement matters are handled administratively through actions ranging from informal, cooperative undertakings, through a warning letter or a notice of violation, with a view to informal discussion and resolution, through an order requiring compliance, to agency imposed penalties.³⁵ With the rarest of exceptions, administrative enforcement proceedings are handled by agency attorneys. DOJ is simply not involved (unless, of course, the agency's final decision is challenged in court).

We have written elsewhere that these two phenomena are linked; that is, that one reason for agencies' strong preference for administrative enforcement is freedom from DOJ oversight and control.³⁶ This conclusion is further borne out by an examination of the more balanced ratio of administrative to civil judicial enforcement actions in agencies that have litigating authority.³⁷

ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS IN 1999, at B-5, B-7 (2000), available at <http://www.epa.gov/compliance/resources/reports/planning/results/fy99accomplishment.pdf> (last visited Apr. 27, 2003) [hereinafter 1999 EPA ENFORCEMENT REP.]. Criminal fines assessed were less than civil fines, but were handed out on top of prison sentences: 322 criminal defendants were assessed over \$61.5 million in fines and 208 years in prison. *Id.* Five years earlier, the gap between civil judicial and administrative penalties was small but still significant; in FY 1994 the 166 civil defendants were assessed almost \$65.7 million in penalties while the 1596 administrative penalty orders totaled \$48 million. 1994 EPA ENFORCEMENT REP., *supra* note 32, at 4-5, 4-6. The 250 criminal defendants were assessed \$36.8 million in fines and 99 years in prison. *Id.* at 4-2. One would expect that in the current administration the gap between civil and administrative penalties would narrow, and that both judicial and criminal environmental enforcement would decline.

³⁵ In fiscal year 1999, the EPA made 21,847 regional inspections and issued 1,516 administrative compliance orders and 1,654 administrative penalty order complaints. 1999 EPA ENFORCEMENT REP., *supra* note 34, at B-3. There were administrative penalty settlements in 1,358 cases. *Id.* at B-4. During the same period there were only 403 new civil referrals and 241 criminal referrals from the EPA to DOJ. *Id.* at B-4, B-5.

³⁶ Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1369-71 (2000).

³⁷ For example, the SEC has regularly initiated almost as many civil judicial actions as administrative proceedings. The following table comes from its 2001 Annual Report:

	FY97	FY98	FY99	FY00	FY01
Civil Judicial Actions	189	214	198	223	205
Administrative Proceedings	285	248	298	244	248
Contempt Proceedings	14	15	29	36	31
Reports of Investigation	0	0	0	0	0
Total	489	477	525	503	484

2001 SEC ANN. REP. 1, available at <http://www.sec.gov/about/annrep/01.shtml> (last visited Apr. 12, 2003). This stands in contrast to the ratio of administrative proceedings compared to civil actions initiated at other agencies with less litigating authority. See *supra* note 35. The contrast is probably not solely the result of the different litigating arrangements. It likely also stems from the fact that historically, the SEC's administrative enforcement powers were significantly less potent than its civil judicial enforcement powers. For an overview, see Mathew Scott Morris, *The Securities Enforcement Remedies and Penny Stock Reform Act of 1990: By Keeping Up With the Joneses, the SEC's Enforcement Arsenal is Modernized*, 7 ADMIN. L.J. AM. U. 151 (1993). In some cases, the SEC now has significant administrative enforcement authority, including the power to impose "civil penalties comparable to those obtainable in court." Barbara Black & Jill I. Gross, *Making it*

4. *Defensive Actions*

The government is not always the plaintiff. Indeed, most of the articles in this symposium are devoted to settings in which the government is the defendant or respondent. Agency lawyers provide advice on legal issues surrounding the action now being challenged—be it a final regulation (or the failure to promulgate one), denial (or grant) of a permit, imposition of an administrative penalty, the agency's own failure to comply with regulatory requirements, or whatever. But once the matter is the subject of a lawsuit, DOJ generally takes over, as in the case of civil enforcement. This setting is no different than affirmative litigation with regard to the allocation of lawyering tasks; if an agency has litigating authority, it has it in both enforcement actions and in defensive actions. However, DOJ's gate-keeping function is quite different. In theory, DOJ could refuse to defend an agency action; but in practice, such defense is all but automatic.³⁸ Not surprisingly, for example, lawyers at EPA generally see the Environmental Defense Section as having a stronger sense of EPA as a *client* than do the other sections in the Environment Division.³⁹ Similarly, the real-world opportunity for agency lawyers to participate in the litigation—even, occasionally, presenting or sharing the oral argument⁴⁰—is greatest in this setting.

5. *Supreme Court Litigation*

Litigation in the Supreme Court is the most highly centralized form of government litigation.⁴¹ The Solicitor General's Office un-

Up As They Go Along: The Role of Law in Securities Arbitration, 23 CARDOZO L. REV. 991, 1019 (2002).

³⁸ DONALD HOROWITZ, *THE JUROCRACY: GOVERNMENT LAWYERS, AGENCY PROGRAMS, AND JUDICIAL DECISIONS* 40 (1972) ("[T]he first-instance defense is routinely and sympathetically accorded the agencies . . ."). See generally *id.* at 39-44. This is not to say that DOJ will pursue an appeal or a petition for certiorari if the initial defense is unsuccessful. That decision is up to the Solicitor General, and particularly in the case of petitions for certiorari, involves different considerations than the first-instance defense. See 28 C.F.R. §§ 0.20(a), (b) (2002) (certiorari and appeals to appellate courts, respectively).

³⁹ Interview with Gary Jonesi, Chief of the Waste Identification and Enforcement Policy Branch of the RCRA Enforcement Division of the Office of the Regulatory Enforcement of the Office of Enforcement and Compliance Assurance, USEPA, in Washington, D.C. (Nov. 15, 1994) [hereinafter Jonesi Interview]. We know of only one case in which DOJ refused to defend an EPA action and EPA went to court with its own lawyers. See *Env'tl. Def. Fund v. Costle*, 631 F.2d 922 (D.C. Cir. 1980). The agency won.

⁴⁰ See, e.g., *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 557 (D.C. Cir. 2002) (noting that EPA and DOJ attorneys shared oral argument).

⁴¹ There is now an extensive literature on the Solicitor General's office. See, e.g., LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987); CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* (1991); REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* (1992); Devins, *supra*

dertakes virtually all of it, and most exceptions occur with the Solicitor General's approval. With just a couple of exceptions, even agencies that otherwise enjoy litigating authority cannot represent themselves before the Court.⁴² That means not only that agency lawyers are out of the picture altogether or cast in decidedly supporting roles, it also means that the work is highly centralized within DOJ.

6. Counseling

Although our topic is DOJ control of *litigation*, the arrangements with regard to counseling bear some mention, if only because they are in such contrast. Recall that the reformers who created DOJ in 1870 thought that they were centralizing both litigation and counseling, and that the two were equally important.

Just when litigating authority was finally effectively centralized under the control of the Attorney General,⁴³ the explosion of regulatory statutes and the attendant administrative activity hugely increased the role of lawyers in the agencies outside DOJ.⁴⁴ President Roosevelt's executive order, and the later (and current) statutes were silent with regard to the counseling function, implicitly endorsing its decentralization. No pretense of Attorney General control was even made. Accordingly, it is the agency lawyers, who in total far outnumber the DOJ lawyers, who tell officials what they can and cannot do under the law.⁴⁵

To be sure, Congress has never repealed the provision, dating back to the Judiciary Act of 1789, *allowing* (but not requiring) agency heads to obtain legal advice from the Attorney General.⁴⁶ And such opinions are deemed binding by both DOJ and the agency. But the reality is that instances in which DOJ gives an agency a formal opinion number in the dozens per year—a drop in the bucket. More importantly, DOJ cannot insist on giving an opinion on a question of

note 11; John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799 (1992). One striking aspect of this massive literature is how much it takes centralization of Supreme Court litigation for granted.

⁴² One of us has described and analyzed this arrangement at length, with particular focus on the independent agencies. See Devins, *supra* note 11.

⁴³ See *supra* notes 6-8 and accompanying text.

⁴⁴ See generally PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982).

⁴⁵ For a more complete description of the nature and role of the agency general counsel, see Michael Herz, *The Attorney Particular: Governmental Role of the Agency General Counsel*, in GOVERNMENTAL LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS 143 (Cornell W. Clayton ed., 1995).

⁴⁶ For the current version, see 28 U.S.C. § 512 (2000) (department head "may require the opinion of the Attorney General on questions of law arising in the administration of his department").

law facing the agency; the agency must come to it.⁴⁷ As a result, agencies hold their own counsel on the huge majority of legal issues without any advice or assistance from DOJ. Moreover, agency autonomy can hardly be said to be threatened by the possibility of an authoritative DOJ opinion. Because the agency itself must initiate the process, either the legal issue will be one outside its area of interest and expertise, or it will perceive some strategic *advantage* in having DOJ render an opinion.⁴⁸

B. Federal Lawyering and Its Discontents

For as long as the current division of responsibility between agencies and DOJ has been in place, it has generated friction and complaints. Writing in the 1930s, Carl Swisher described the "[s]ignificant struggles over" centralized control of litigation, the "bad grace" with which some agency attorneys "submitted" to DOJ control and the resulting "strain."⁴⁹ In the words of Barbara Babcock, former head of DOJ's Civil Division, "[t]he warfare over litigation authority never ends."⁵⁰ And as the then-head of EPA's Office of Criminal Enforcement put it in a letter to the head of the Environment Division, a "division . . . has infused itself between our two agencies" characterized by a "'them vs. us' perception that we have long been working to overcome."⁵¹ Of course, the amount of resentment and animosity toward DOJ from agency lawyers ebbs and flows, dependent on particular individuals and their personalities and varying from both administration to administration and agency to agency. But the issue never disappears. In this article we consider whether, given all the smoke, there is actually a fire.

For agency lawyers, much of the tension results from the personal and professional resentment that naturally results from being told to step aside by someone with greater power and prestige (who is not infrequently younger and less experienced) just when a controversy becomes most important and most interesting or, worse, having DOJ

⁴⁷ Even in the case of interagency disputes, the relevant Executive Order does not flatly require submission of the dispute to the Attorney General, it only states that the agencies must go to the Attorney General before going to court. Exec. Order No. 12,146, 3 C.F.R. 409 (1979), *reprinted in* 28 U.S.C. § 509 (2000). Presumably if they are not planning to go to court, they need not go to the Attorney General.

⁴⁸ For a discussion of what such advantages might be, see Herz, *supra* note 45, at 161-62; Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 492-95 (1993) (discussing when an agency will seek DOJ advice).

⁴⁹ Carl Brent Swisher, *Federal Organization of Legal Functions*, 33 AM. POL. SCI. REV. 973, 974, 986 (1939).

⁵⁰ Barbara Allen Babcock, *Defending the Government: Justice and the Civil Division*, 23 J. MARSHALL L. REV. 181, 186 (1990).

⁵¹ Letter from Earl E. Devaney, *supra* note 19, at 420-21.

simply refuse to pursue a case.⁵² But the tension arises not simply from the hierarchy (and its attendant impact on personality), but also from a difference in lawyering style⁵³ and a difference in the missions and priorities of DOJ and its client agencies.

The question is whether the frustrations of individuals should be ignored, dealt with, or avoided altogether by giving agencies the authority to litigate their own cases.⁵⁴ And while we would not recalibrate the current arrangement simply to improve the job satisfaction of agency lawyers, the common discontent cannot be dismissed simply as sour grapes. In the remainder of this paper we discuss more substantive concerns about the pros and cons of the current division of labor.

II. JUSTIFICATIONS AND CONSEQUENCES OF CENTRALIZATION

DOJ's status as the government's litigator is justified on the grounds that a single, highly talented "law firm" will ensure quality representation, consistency, efficiency, and responsiveness to presidential preferences. This argument asserts the absolute necessity that the government speak with one voice in the courts, a consistency that can be achieved only by centralizing litigation authority. In addition, because the Attorney General sees the big picture—and sees it with the same eyes as the President—centralization will ensure that representation is consistent with the broader policy concerns of the Administration. This perspective ensures that parochial agency concerns are not overemphasized at the expense of larger policy commitments and that conflicts between agencies are appropriately

⁵² See, e.g., Wallace H. Johnson, *Our Nation's Energy and Resources—Decision Making in Conflict*, 23 J. MARSHALL L. REV. 197, 200 (1990) (speaking about former chief of the Lands Division, who observed that "client agency lawyers were often professionally unfulfilled, being limited to [m]aking recommendations. Understandably, they wanted the power and opportunity to follow a litigation matter through to its conclusion."); Swisher, *supra* note 49, at 997-98. On this tension, see generally JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES 76-77 (1995) (noting destructive "institutional rivalry" that peaked in the late 1970s and mid-to late 1980s, prompting "discord between the agency and its Justice Department attorneys [that] affected enforcement in all environmental media"). Within the Justice Department the same dynamic occurs with respect to Supreme Court litigation, when the Solicitor General's Office takes over a case that other lawyers within the department have worked on for years.

⁵³ There are many counterexamples, but as a generalization, agencies seem far more willing than DOJ to run the litigation risks. See *infra* notes 105-106 and accompanying text. Thus, the agency and DOJ may be on exactly the same page in terms of their assessment of the likely outcome of a lawsuit, and DOJ will still refuse to proceed.

⁵⁴ In exploring this question, we will not examine the political dynamics that help explain the allocation of litigation authority, especially Congress' decision to give DOJ a near monopoly over executive agency litigation. For a general treatment of this subject, see Neal Devins & Michael Herz, *Government Lawyering: The Battle that Never Was: Congress, the White House, and Agency Litigation Authority*, 61 LAW & CONTEMP. PROBS. 205 (Winter 1998).

resolved. Third, for DOJ, the expertise of the litigator is litigation; DOJ lawyers have courtroom skills and familiarity with recurrent non-agency-specific legal questions that agency lawyers lack.

In this Part, we examine these familiar justifications for DOJ control of litigation and argue that they are weaker than they first appear.

A. Unity and Consistency

DOJ frequently asserts the absolute necessity that the government speak with one voice in the courts. This proposition has three separate strands: a concern with the uniformity of government positions, a desire to avoid open conflicts between parts of the government, and a commitment to presidential authority.

1. Consistency in Litigating Positions

Supporters of DOJ control of litigation emphasize that the federal government should espouse consistent, uniform positions in court. It should not argue for broad deference to agency interpretation one day and against it the next; it should not argue for reliance on legislative history one day and against it the next; it should not claim the Constitution protects the right to abortion one day and deny it the next.⁵⁵ This proposition is usually stated as if it is self-justifying; for example, a Deputy Attorney General, arguing against the grant of independent litigating authority to EPA, wrote: "Only a single, coordinated agency of legal representation can insure that consistent positions are asserted by the United States when disputes arise regarding the proper interpretation of the Constitution, specific statutes, and the Federal Rules of Civil Procedure and Evidence."⁵⁶ Accepting, for the moment, that it is true that consistency can be achieved only through "a single, coordinated agency," this argument does not explain why consistency is so critical. Although consistency is usually

⁵⁵ See, e.g., Mem. from the DOJ, reprinted in 118 CONG. REC. 21882, 21883 (1972) (stressing the "need for uniformity in the litigating positions of the United States"); United States Dep't of Justice, Office of Legal Counsel, *The Attorney General's Role as Chief Litigator for the United States* (Jan. 4, 1982), in 6 Op. Off. Leg. Counsel 47 [hereinafter *OLC Memo*]; Interview with Lois Schiffer, Assistant Attorney General, Environment & Natural Resources Division, United States Dep't of Justice, in Washington, D.C. (Dec. 13, 1994) (stressing that the government must "speak with one voice in court").

⁵⁶ Letter from Edward C. Schmults, Deputy Attorney General, to Rep. James Florio (May 4, 1983), reprinted in *Hazardous Waste Control and Enforcement Act of 1983: Hearings Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 98th Cong. 387, 388 (1983). See also UNITED STATES DEP'T OF JUSTICE, STRATEGIC PLAN 1997-2002 (1997) ("The Department works to ensure that the Federal Government speaks with one voice with respect to law.").

invoked as a self-evident imperative, two separate justifications can be identified.

a. *Integrity and Strategy*

The first justification is quite abstract: the United States is a single entity and as such should not be at odds with itself. This is a comfortable and familiar idea. It surfaced, for example, in the Supreme Court's opinion in *United States v. Providence Journal Co.*,⁵⁷ in which the Court refused to allow the Solicitor General to relinquish his role as lawyer for the United States even though the governmental interest concerned the judicial rather than the executive branch. Reflecting a basic assumption about the unity of the federal government, the Court rejected as "startling" the suggestion that "there is more than one United States' that may appear before this Court."⁵⁸ This view of the federal government as a single entity is untenable. Certainly, the idea of the United States as a single litigant is extraordinarily abstract. After all, the government is composed of millions of actual persons who are frequently at odds with one another. Its enormous range of activities and interests means that there will be conflicts of goals, policies, and positions. While this potential for conflict to some extent *supports* efforts to minimize the inconsistencies, it also belies any conception of a unified federal government or even executive branch. And, of course, at least *over time* the government contradicts itself constantly, as elected officials change.

An equally abstract version of this idea is more jurisprudential and lies in the intuition that like cases should be treated alike. Ronald Dworkin coins the phrase "the virtue of political integrity" to capture the idea that the government must "act on a single, coherent set of principles."⁵⁹ This imperative of integrity—which for Dworkin is something distinct from justice, or fairness, or procedural due process—"requires government to *speak with one voice*, to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some."⁶⁰ It is rather difficult to translate this abstract proposition into a practical argument about who should control federal litigation.

The idea of law as integrity is broad enough, and, we will posit, important enough, to include concern about how the government acts in court. For example, if two individuals are potentially subject

⁵⁷ 485 U.S. 693 (1988).

⁵⁸ *Id.* at 701. For a more recent and a more ancient example of Supreme Court hostility to placing litigation authority outside of DOJ, see *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 96 (1994); *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1889).

⁵⁹ RONALD DWORKIN, *LAW'S EMPIRE* 166 (1986).

⁶⁰ *Id.* at 165.

to an enforcement action, there are important equality values in the same standards being applied to both, just as such values require the same substantive law to be applied to both. Similarly, it is problematic if a given merger will be approved if DOJ reviews it but disapproved if the FTC reviews it, and the outcome depends on the happenstance of who's turn it is.

So the question is not whether government consistency is important. The equal protection clause tells us it is. But these interests are *far* more importantly at stake with regard to (1) the substantive laws laid down and agency interpretations of them,⁶¹ (2) the consistency of individual agencies when confronted with recurrent sorts of cases, and (3) the millions of daily discretionary decisions made by agency officers, prosecutors, and law enforcers. The subtle differences in consistency in courtroom positions that would flow from having DOJ or agency lawyers represent agencies in court are about the last place one would look to ensure respect for the law as integrity principle. The key point is that litigation occurs *ex post*; efforts to ensure overall governmental consistency are best made *ex ante*.⁶²

The second idea behind the proposition that the government should not contradict itself in court is, in contrast, intensely practical. Inconsistency makes the government a less effective litigant.⁶³ Former D.C. Circuit Judge Patricia Wald has commented on the consistency of governmental positions taken in court, which she describes as "one of the most vexing aspects of the relationship between judges and government lawyers."⁶⁴ She makes clear that inconsistent stances by the government are, at best, poor strategy: they make judges "wary," if not "outraged"; they are "irritating," for, in her view, "judges do have, and should have, a right to expect consistency in the positions the government takes in different aspects of the same underlying case," or in similar cases.⁶⁵ Inconsistency will not only annoy judges, it will

⁶¹ But see H.R. REP. NO. 95-294, at 336 (1977) (explaining proposed provision that would have given the EPA independent litigating authority under the Clean Air Act and rejecting need for government-wide consistent policy on highly technical and specific questions that arise under particular statutes).

⁶² On executive control of the regulatory bureaucracy, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Richard H. Pildes & Cass Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995).

⁶³ This is one of several ways in which centralization might improve the government's success in court; others include the development of litigation expertise in individual attorneys, the ability to draw highly capable attorneys because of the promise of interesting work and the attendant prestige, and the development of a strong rapport with federal judges. These are discussed below.

⁶⁴ Patricia M. Wald, "For the United States": *Government Lawyers in Court*, 61 LAW & CONTEMP. PROBS. 107, 122 (Winter 1998).

⁶⁵ *Id.* at 123-24 ("A private lawyer sometimes argues one meaning of a precedent one day and another meaning in a different case another day, but we would be outraged if the government did the same.").

eliminate the otherwise natural tendency to defer to the government's presumably well-thought-out position.⁶⁶ Both in her direct admonitions, and indirectly through the evident importance that she attaches to the matter and her somewhat testy tone, Judge Wald makes clear that simply as a matter of litigating strategy it is a bad idea for the government to contradict itself.⁶⁷

Third, and again distinct, is the possibility that today's happy litigation triumph for Agency A will be tomorrow's disastrous precedent for Agency B. Handicapped by its narrow, parochial perspective, a particular agency may pursue its agenda in ways that are harmful in the long term to other parts of the government. In theory, the Department of Justice is in a better position to avoid having the government shoot itself in the foot and harm its long-term interests; because it has multiple agency clients, it will have some sense of these risks.⁶⁸

b. *How Much of a Risk, and How to Control?*

For the foregoing reasons, inconsistency in litigating positions is a legitimate concern, though hardly profoundly troubling. There remains the additional question of whether eliminating DOJ control would lead to significant inconsistencies. We know of no real evidence that the instances in which agencies have been given independent litigating authority have led to intolerable inconsistencies. With regard to "the government's" positions under specific statutes, the risk of greater inconsistency is nil. Indeed, if agencies have litigating authority, consistency under specific statutes or within specific programs is likely to *increase*, if anything, because the litigating position will be the agency's alone, without mediation or massaging by DOJ.

⁶⁶ *Id.* at 127 ("In these cases [i.e., where separate governmental attorneys take conflicting positions in the same case], the court feels more at liberty to decide on its own where right and justice lie. Deference is diffused . . .").

⁶⁷ To the same effect, the Supreme Court concluded in *FEC v. NRA*:

But the practice also serves the Government well; an individual Government agency necessarily has a more parochial view of the interest of the Government in litigation than does the Solicitor General's office, with its broader view of litigation in which the Government is involved throughout the state and federal court systems. Whether review of a decision adverse to the Government in a court of appeals should be sought depends on a number of factors which do not lend themselves to easy categorization. The Government as a whole is apt to fare better if these decisions are concentrated in a single official.

FEC v. NRA Political Victory Fund, 513 U.S. 88, 96 (1994).

⁶⁸ See, e.g., Michael Davidson, *Claims Involving Fraud: Contracting Officer Limitations During Procurement Fraud Investigations*, 2002 ARMY LAW. 21, 29 ("A centralized authority is necessary to determine if fraud exists; otherwise subsequent litigation may be handicapped by different agencies taking inconsistent positions on the same alleged misconduct.").

With regard to overarching legal questions, consistency often will also take care of itself, because the government position is apparent and would be adopted by any government attorney. The most obvious examples are administrative law doctrines such as judicial deference to agency interpretations or the hard look doctrine; any government lawyer, from DOJ or the agency, will argue for deferential review. Other settings—the Freedom of Information Act (FOIA), for example—will have some variance but are still likely to produce generally consistent positions.

Another area where there might be inconsistency is in the reliance on “technical” defenses, especially jurisdictional arguments. Agencies interested in a ruling on the merits will not raise technical defenses; agencies interested in avoiding such a ruling will raise jurisdictional arguments. This type of inconsistency, however, can be tolerated. The failure to raise a technical defense, for the most part, means either that the issue will not be adjudicated or that the court will raise the issue on its own. In the first category, there will be no conflict—because the agency failing to raise the defense did not assert an inconsistent legal position with the agency that did assert the defense. In the second instance, the court may well resolve the issue on its own initiative (so that an agency’s legal argument is not especially relevant to the court’s decision). Of course, there will be instances where agencies make inconsistent arguments. But even here courts will often look to precedent outside the context of government litigation—so that the arguments of agency attorneys are somewhat less consequential here than elsewhere.⁶⁹

Perhaps the risk of inconsistent governmental litigating positions is highest with regard to methodological questions. There is no systemic or *a priori* reason that it should be in the government’s interest always to be a textualist or always to look at legislative history; always to read remedial statutes broadly or to read them narrowly; or for appellate courts always to review certain issues *de novo* or always defer to the trial court. However, even here we would not be too concerned if EPA in one case relied on legislative history and the Department of Health and Human Services in another urged the court to ignore it. First, such a methodological issue raises the underlying concerns of integrity and strategy in quite dilute form. Second, some such inconsistency already occurs with DOJ handling litigation. In-

⁶⁹ One possible exception is intra-governmental litigation. In a centralized system, these cases may never be brought in the first instance, if only because DOJ will not represent opposing parties. In a decentralized system, enforcement agencies might well bring lawsuits against other parts of the government; for example, the EPA might sue the Army Corps or Department of Energy for violating environmental regulations. We return to this point in at Part II(A)(1)(c) below.

deed, it should occur: such inconsistency is the necessary outcome of good advocacy, which is always in part situational and takes advantage of what is at hand.⁷⁰ Third, such variations will occur to an even greater degree, notwithstanding centralized litigation authority, over time. While inconsistencies separated in time are less problematic than simultaneous ones, they still do raise some concerns.⁷¹

In addition, the agency officials who would ultimately control the agency's actions, policy, and basic litigating decisions are part of the same administration, and appointed by the same president, as the Attorney General. Like-mindedness does not guarantee consistency, but it does at least promote it. Thus, allowing agency litigating authority would not result in chaos and contradiction; the room for variation is fairly constrained; agencies are still part of the administration and will still want the government to win.

Lastly, the question is not simply whether decentralization would produce inconsistencies, but rather how much *more* inconsistency would result. DOJ is a vast and sprawling entity. It cannot perfectly coordinate its own activities.⁷² The Department is itself not altogether centralized; significant independent authority is delegated to the U.S. Attorney's Offices. Nor is it so intimately familiar with the details of each agency's program to be able to anticipate whether a particular outcome in one agency's lawsuit will come back to haunt other agencies (a task that can be hard enough for a single entity). We would not claim that there will be no loss of consistency from decentralization; of course there would be. We only suggest that it would not be so great as might first appear.

Finally, accepting that there would be a greater risk of the government speaking out of both sides of its mouth were litigating authority decentralized, it is not necessary for DOJ to handle all litigation itself to prevent, or at least significantly reduce, such occurrences. For example, DOJ could issue general guidance or instruction; it could review filings prepared by agency attorneys, much the way the Office of Management and Budget (OMB) reviews agency testimony;⁷³ it could conduct training sessions for agency at-

⁷⁰ Hence, the old piece of lawyer's advice: if the law is against you, pound on the facts; if the facts are against you, pound on the law; if both the law and the facts are against you, pound on the table.

⁷¹ Cf. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (noting that an agency interpretation consistently held over time merits heightened deference).

⁷² See, e.g., Susan M. Olson, *Challenges to the Gatekeeper: The Debate Over Federal Litigating Authority*, 68 JUDICATURE 71, 81 (1984) (noting that several persons have pointed out that DOJ cannot effectively coordinate the activities of United States Attorneys).

⁷³ See United States Office of Management and Budget, *Legislative Coordination and Clearance, Circular A-19*, § 7 (rev'd Sept. 19, 1979), available at <http://www.whitehouse.gov/omb/circulars/a019/a019.html> (last visited Mar. 30, 2003).

torneys; and the Solicitor General could continue to authorize appeals.⁷⁴

c. *Interagency Litigation*

The starkest example of the government taking inconsistent positions in court occurs when two parts of the government are on opposite sides of the same lawsuit. This happens more than rarely at present—sufficiently often that, to quote Judge Wald, federal judges have become “inured” to such cases.⁷⁵ However, it does not happen unless one agency is able to represent itself; DOJ will not bring an action in which its attorneys appear on both sides. Were more agencies able to do so, it is almost certain that the number of instances would increase, a prospect that, depending on one’s point of view, may be embarrassing, unseemly, inappropriate, or unconstitutional.⁷⁶

This is not the place to enter into this debate about the legitimacy or constitutionality of intragovernmental litigation.⁷⁷ Suffice it to say that *if* interagency litigation is in some circumstances inappropriate or even unconstitutional, the way to prevent is for the courts to hold it nonjusticiable, or for the President to use his constitutional authority to keep it from occurring, or for Congress to proscribe it in whole or in part. Relying on the allocation of litigating authority to keep it from happening is the tail wagging the dog. Additionally, if interagency litigation is *not* inappropriate or unconstitutional, then the fact that it does not occur because of centralized litigating authority is a cost of the current regime, not a benefit.

2. *Respect for Presidential Prerogatives*

Closely related to the “one voice” principle is a concern about authority. If the government speaks with two contradictory voices, one of those (at a minimum) will not be the President’s. If the executive branch is unitary and must reflect the President’s views and policies—views and policies for which the President will be held electorally ac-

⁷⁴ By regulation, the Solicitor General is responsible for “[d]etermining whether, and to what extent, appeals will be taken by the Government to all appellate courts.” 28 C.F.R. § 0.20(b) (2002). Whether the Solicitor General should maintain this authority seems to us a distinct, though related, question from whether DOJ should handle all government litigation.

⁷⁵ See Wald, *supra* note 64, at 127.

⁷⁶ See Griffin B. Bell, *The Attorney General: The Federal Government’s Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1058 (1978).

⁷⁷ On intragovernmental litigation in general, see Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 990 (1991) (concluding that interagency enforcement actions are justiciable but regulatory disputes are not). For a recent judicial rejection of the argument, made on EPA’s behalf by DOJ, that intrabranch litigation is nonjusticiable, see *Tenn. Valley Auth. v. EPA*, 278 F.3d 1184, 1193-98 (11th Cir. 2002).

countable—then the system has broken down if parts of the branch take inconsistent positions in court. This is the heart of OLC's defense of centralized litigation authority:

[I]t is essential that the Attorney General *not* relinquish his supervisory authority over the agency's litigation functions, for the Attorney General alone is obligated to represent the broader interests of the Executive. It is this responsibility to ensure that the interests of the United States as a whole, as articulated by the Executive, are given a paramount position over potentially conflicting interests between subordinate segments of the government of the United States which uniquely justifies the role of the Attorney General as the chief litigator for the United States. Only the Attorney General has the overall perspective to perform this function.⁷⁸

On this account, an important aspect of DOJ's role is to rein in overzealous or tunnel-visioned agency attorneys, ensuring that agency litigation is consistent with the Administration's overall priorities.⁷⁹ These concerns with presidential prerogatives are relevant and important, but, we conclude, badly overstated.

a. *Distinguishing Law and Policy*

This argument rests on a rather "non-lawyerly" understanding of DOJ's role. It treats litigation decisions as policy decisions; the Attorney General is, on this account, not interpreting legal requirements and making legal arguments, but pursuing policy objectives. We would readily grant that the President has important authority over executive department policymaking (notwithstanding our skepticism over the strong version of the unitary executive theory). But actual policymaking authority in any given area belongs to the agency, not DOJ. Giving DOJ control of federal litigation is certainly an inadequate, arguably an irrelevant, and possibly a perverse way of achieving presidential control of agency policymaking. The White House has far better and ultimately more effective means for doing so, including appointing like-minded officials, jawboning, the threat of removal, and OMB review.

It may also be that the White House *wants* government agencies to advance conflicting legal arguments in court. The political interests of the President, for example, might be served by having the EPA and Department of Energy advance conflicting arguments on the appropriate scope of environmental enforcement. That way the President can simultaneously embrace environmental and industry interests (or, at least, can avoid choosing one set of interests ahead of the

⁷⁸ OLC Memo, *supra* note 55, at 54.

⁷⁹ Interview with Roger Clegg, General Counsel, Center for Equal Opportunity, former Deputy Assistant Attorney General, Civil Rights and Environment Divisions, United States Dep't of Justice, in Washington, D.C. (Nov. 15, 1994) [hereinafter Clegg Interview].

other). Another example of this phenomena occurs within DOJ—the Civil Division regularly defends employment discrimination lawsuits and has incentive to take a pro-defendant position; the Civil Rights Division files employment discrimination cases and has incentive to advance a pro-plaintiff understanding of antidiscrimination legislation. Again, rather than pick sides, the President may prefer to let courts resolve these conflicts. Consider, for example, *Metro Broadcasting, Inc. v. Federal Communications Commission* (FCC),⁸⁰ in which the Supreme Court upheld FCC preferences for minority broadcasters. The (first) George Bush's DOJ was beholden to social conservatives and had a general anti-affirmative action position. At the time of *Metro Broadcasting*, however, Bush FCC nominees needed to convince Congress that they would defend race preferences and, in so doing, disavowed Reagan FCC efforts to undo this affirmative action program.⁸¹ The solution was for Solicitor General Kenneth Starr to allow the FCC to represent itself in defending the program, while Starr filed an amicus brief arguing that the program was unconstitutional. And while proponents of a unitary executive may have disapproved of these dual filings, it is noteworthy that the Bush White House embraced this practice.

As was true in *Metro Broadcasting*, lawyers in DOJ might best serve their President by advancing and defending the policy decisions that result under the system rather than second-guessing them. Indeed, in its insistence to the contrary, DOJ reflects something of the tunnel vision and lack of "overall perspective" that it attributes to the agencies. It is pre-occupied with litigation, as if all that an agency does is go to court and so the key mechanism for controlling wayward agencies is control of litigation.⁸²

b. *Who is the Government Lawyer's Client?*

The basic arrangement might be justified by analogy to the private sector. Corporations have in-house lawyers who are responsible for

⁸⁰ *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990).

⁸¹ See Devins, *supra* note 11; Neal E. Devins, Comment, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 138-41 (1990).

⁸² Reconciling "potentially conflicting interests" is not something one generally thinks of a lawyer as doing. To the contrary, when multiple clients have one lawyer but conflicting interests, the usual response is that they should go out and find new lawyers. Thus, where DOJ asserts the need to reconcile different agency positions and ensure intra-executive uniformity, the agencies see only a conflict of interest. These may be indirect, as where DOJ takes a position on behalf of one agency that is in the abstract in tension with another's agenda or goals (e.g., arguing that federal facilities are immune from state environmental regulation, when EPA sees them as under-regulated polluters), or quite direct, as when DOJ refused to allow EPA to submit an amicus brief in *United States v. SCRAP*, 412 U.S. 669 (1973). See generally H. R. REP. NO. 95-294, at 334 (1977).

counseling (like the agency general counsel) and handle minor litigation where the stakes are not too high (like agency lawyers handling administrative enforcement cases). When the stakes rise or the corporation is in serious trouble, it is more likely to turn to outside counsel. For example, an outside firm will handle major litigation or render an especially important legal opinion, just as agencies rely on DOJ for representation in the courtroom or may turn to the Office of Legal Counsel to resolve the occasional thorny legal problem.⁸³

This easy analogy cannot itself justify DOJ control of litigation, however, because the structure of the DOJ/agency relationship in fact does not tidily track the attorney/client relationship in the private sector.⁸⁴ First and foremost, the agency is a captive client; it cannot choose to use its own lawyers or retain a different "firm." One would expect that as a result DOJ would be less solicitous toward the agency than is the normal private attorney toward her client.⁸⁵ Certainly agencies lack the prerogatives enjoyed by private clients. Most obviously, basic decisions about the litigation, such as whether to file suit or whether to appeal a loss, lie with DOJ, not the client agency. And while there is significant variation from case to case, agency to agency, and administration to administration, decisions about litigation strategy as to which a private sector client makes the ultimate call (although it will in practice defer to the lawyer's advice), lie with DOJ in federal agency litigation. Is it appropriate, then, to label a federal agency DOJ's "client?"⁸⁶

⁸³ Lois Schiffer, who later became head of DOJ's Environment Division, has invoked this analogy in defending centralized litigation authority. See Proceedings of the Fortieth Annual Judicial Conference of the District of Columbia Circuit, 85 F.R.D. 155, 187 (1979) (transcript of comment of Lois Schiffer) [hereinafter *D.C. Circuit Conference*].

⁸⁴ For a well-reasoned rejection of the reflexive application of the private lawyering model to the governmental context in a related setting, see Melanie Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L.J. 469 (2002) (arguing that only a limited attorney-client privilege, at most, should apply to communications between government officials and government attorneys).

⁸⁵ See *D.C. Circuit Conference*, *supra* note 83, at 168 (statement of Richard M. Cooper, General Counsel of the Food and Drug Administration) ("The Department . . . is in a monopoly position; it has no competition, and its performance is not subject to the discipline of attracting, retaining or losing clients."); Clegg interview, *supra* note 79 (stressing that private attorney/client model is inapt because DOJ does not need EPA's business and EPA has no place else to go anyway). Of course, while the agency cannot pick or change its lawyers, neither need it pay for their services. This, too, must result in a different dynamic than in the private setting. One former Justice Department official commented that precisely because the agency does not have to pay for DOJ's services, it "is not subject to the discipline that fee-paying imposes" and therefore has no incentive to minimize the burdens on its lawyers. *D.C. Circuit Conference*, *supra* note 83.

⁸⁶ There is something of a cottage industry in putting together lists of possible persons or entities that might be said to be the "client" of the government lawyer. Roger Cramton identifies five: "[1] the public, [2] the government as a whole, [3] the branch of government in which the lawyer is employed, [4] the particular agency or department in which the lawyer works, and

DOJ's stance has generally been one of grudging acknowledgment that the agencies have the primary policymaking responsibilities.⁸⁷ But it has often been wary about accepting the "client" label for the agencies it represents, presumably out of a reluctance to endorse the deference and zealous advocacy owed to clients.⁸⁸ After all, DOJ may have other clients, most notably, the White House. Drawing from the Reagan and (first) Bush Administrations' emphasis on the unitary executive, this view of the agency/DOJ relationship is one of colleagues within the executive branch, both subordinate to the President's authority and policy vision, with DOJ perhaps *prima inter pares*. This version of the relationship rests on the need for consistency, coordinated legal policymaking, and the ultimate loyalty of all parts of the executive branch to their shared boss.⁸⁹

[5] the responsible officers who make decisions for the agency." Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991). For the DOJ lawyer, the situation is further complicated by working in one department and representing another; so the last two items on Cramton's list might be DOJ and the Attorney General, or they might be the Department and Secretary of, say, Agriculture. See James R. Harvey, III, Note, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1571 (1996).

⁸⁷ See Discussion, *In The Hotseat at Justice*, ENVTL. F., Jan./Feb. 1994, at 40, 45 (comment of Richard B. Stewart) ("EPA or the agency is the client, and the client is going to make the fundamental policy decisions In the end, you have to follow what the client says, even if the client is wrong."); Bell, *supra* note 76, at 1061 (noting DOJ's obligation to accede to "the policy prerogatives of our agency clients"); Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 279 (1993); Olson, *supra* note 72, at 82 (describing DOJ's official position as being "that the Department does not make policy—that is the responsibility and the right of the client agencies").

⁸⁸ Among the clearest examples of this reluctance can be found in the much-cited OLC Memorandum concerning the Attorney General's control over federal litigation. There, Assistant Attorney General Theodore Olson carefully put quotation marks around every reference to the Department's "client agencies." For example:

[T]he Attorney General is better able to coordinate the legal involvements of each "client" agency with those of other "client" agencies, as well as with the broader legal interests of the United States overall. Yet, while the "client" agencies may be involved, to varying degrees, in carrying out the litigation responsibilities necessary to assist the Attorney General in representing the agency's particular interests, it is essential that the Attorney General *not* relinquish his supervisory authority over the agency's litigation functions, for the Attorney General alone is obligated to represent the broader interests of the Executive.

OLC Memo, *supra* note 55, at 54; see also *id.* at 62; D.C. Circuit Conference, *supra* note 83, at 173 (statement of Michael J. Egan, Associate Attorney General):

There's too much talk in the Department of Justice, mostly started by me, I suppose in an effort to maintain our position, of talking about our client-agencies, and in the sense they are our client-agencies, but we in the Department must recognize that, at all times, that the people of the United States are our clients, and I think it's quite different, the relationship we have and the responsibilities that we have to the people of the United States than the responsibilities that we have to the particular agencies making up the Executive Branch of the United States Government.

⁸⁹ See Bruce E. Fein, *Promoting the President's Policies Through Legal Advocacy: An Ethical Imperative of the Government Attorney*, 30 FED. B.J. 406, 406 (1983) (arguing that the client of the government attorney is the President, and that the attorney has an ethical obligation to emphati-

This model assumes a greater policymaking role for DOJ. If the only way for DOJ to achieve its policies is to aggravate EPA, then it will aggravate EPA.⁹⁰ One might distinguish between different sorts of policies that DOJ might seek to further. First, DOJ might pursue legal or judicial policies such as judicial restraint, a particular conception of how to read statutes, sovereign immunity, or federalism. These broad legal issues cut across agencies and have important policy consequences outside the courtroom; they are central to the judicial system and therefore closest to DOJ's ostensible area of expertise and authority and of greatest consequence beyond the "parochial" concerns of a particular agency. A second category might consist of the administration's general policies with regard to government regulation—for or against free markets, risk assessment, cost/benefit analysis, etc. These too involve multiple agencies, but involve less law and more policy. Finally, DOJ might have policy views on particular substantive issues as to which Congress and the President have delegated policymaking authority to a particular agency. The executive hierarchy model is least compelling with regard to this last set of issues.

Agencies, of course, would reject the executive hierarchy model in favor of the private attorney/client model, with its notions of deference to client wishes and zealous advocacy. As one EPA attorney expressed in an interview, his main complaint about his counterparts at DOJ is that "they do not recognize or appreciate the lawyer/client relationship. The agency is supposed to be the client."⁹¹ This model begins with the undeniable premise that Congress has delegated environmental policymaking authority to EPA, not DOJ. The agency writes the regulations. The agency determines overall enforcement

cally serve the President through legal advocacy, providing "unremitting assistance through [any non-frivolous] legal argument to the incumbent Administration in furtherance of the policies championed by the President"); McGinnis, *supra* note 41 (arguing that the Solicitor General's only client is the President and that the Solicitor General has a constitutional obligation to advance the President's interpretation of the Constitution and the laws made under it); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987) (arguing that government attorneys' representative obligations run not to particular agencies but to the executive branch as a whole and to the President in particular).

⁹⁰ As the OLC memo concludes:

[S]ituations may arise where the Attorney General is faced with conflicting demands, e.g., where a "client" agency desires to circumvent the law, or dissociate itself from legal or policy judgments to which the Executive subscribes; where a "client" agency attempts to litigate against another agency or department of the federal government; or where a "client" agency desires a legal result that will benefit the narrow area of law administered by the agency, without regard to the broader interests of the United States government as a whole. In such cases, the Attorney General's obligation to represent and advocate the "client" agency's position must yield to a higher obligation to take care that the laws be executed faithfully.

OLC Memo, *supra* note 55, at 62. See also Clegg interview, *supra* note 79.

⁹¹ Jones Interview, *supra* note 39.

priorities. DOJ assists and facilitates, it does not dictate. The justification for DOJ involvement in EPA's litigation is essentially one of expertise. Like the litigators in an outside firm, the DOJ lawyers have a particular set of skills that can be used to the agency's benefit.⁹² On this account, the agency would be very much DOJ's client. DOJ's task would be to do its best to implement the policy desires of the agency. It should inform the agency of its assessment of litigation risks, deferring to the agency's judgment as to whether to run those risks, and in general doing its best to assist the agency in getting where the agency wants to go. Such a model has at times had support within DOJ as well.⁹³

This ties in with a much larger debate that is beyond the scope of this paper. For present purposes, we would make three brief points. First, the question of independent litigation authority is part of the unitary executive debate; unitary executive enthusiasts should prefer centralization, unitary executive skeptics should be more open to decentralization. Second, it is only a small part of that debate. Decentralization of litigating authority would not unmake the unitary executive. As noted above, the president has many additional, and more important, mechanisms of control. Third, in some circumstances the president may *prefer* some variation or competing interpretations within the executive branch.

B. The Nature and Quality of Government Lawyering

The second general set of issues about DOJ control of federal litigation concerns the nature and quality of the lawyering that results. In this Section, we consider the practical consequences, benefits, and drawbacks of centralization.

1. Inherent versus Acquired Characteristics of DOJ and Agency Lawyers

Arguments for DOJ representation must be evaluated in light of whether they reflect what might be termed "inherent" or "acquired" differences between the DOJ and its client agencies. For example, it is sometimes suggested that agencies must rely on DOJ for represen-

⁹² Cf. Devins, *supra* note 11, at 304 (noting benefits of Solicitor General's representation of independent agencies because "Solicitor General lawyers are extraordinarily able and skilled at Supreme Court advocacy").

⁹³ See, e.g., Bell, *supra* note 76, at 1061 (noting his efforts to ensure that the White House did not "interfere with the policy prerogatives of our agency clients"); Wade H. McRee, Jr., *The Solicitor General and His Client*, 50 WASH. U. L.Q. 337, 345, 346 (1981) (stating that it is "essential" for the Solicitor General "to avoid any appearance of formulating 'policy' for the agencies" and that when the Solicitor General and an agency disagree on a legal issue, the Solicitor General should either present or allow the agency to present the latter's views where "well-grounded differences of opinion exist").

tation because they lack the manpower to take on litigation responsibilities on top of their existing counseling and administrative enforcement functions. This is no doubt true, but irrelevant for our purposes. Were agency legal staffs to take on more responsibility, they would need, and could get, more staffing. By the same token, at certain points, DOJ has simply lacked the resources to handle all agency referrals, leading to significant delays and justified impatience on the part of particular agencies.⁹⁴ But that is a budgetary problem and cannot be a reason for decentralizing litigating authority.⁹⁵

Other standard arguments for DOJ control involve more complex combinations of acquired and inherent characteristics. For example, it is often said that DOJ is a more prestigious position that does more interesting work and therefore attracts and can pick from a more talented applicant pool. Since it has better lawyers, it should handle the high-stakes, difficult work of litigation. This is a wholly circular or self-fulfilling argument for DOJ litigating authority. If, say, EPA represented itself in court, then all the hot-shots now hoping to work in the Environment Division would be applying to EPA, because that is where the exciting, high-stakes, prestigious work would be.⁹⁶ Similarly, DOJ attorneys have the benefit of the Department's own highly successful trial advocacy training program. Yet there is no reason

⁹⁴ The mid-1970s were such a period. See PETER CLEARY YEAGER, *THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION* 259 n.14 (1991) (referring to a 1976 EPA Region II memorandum complaining that referrals "languish[ed] for over nine months without ever being filed"). As were the mid- to late-1980s. See MINTZ, *supra* note 52, at 77. Mintz quotes one regional EPA attorney, speaking in 1991, as follows:

Frankly, [the Department of] Justice is swamped. They're working as hard as they possibly can, but they just don't have the people to do all the work that has to be done. There is a problem just moving paper through DOJ. It's not unusual for it to take six months for a Consent Decree that's been negotiated and signed by the defendants to be entered. Things are really slowing down. They're good attorneys. I have a lot of respect for them. I just wish there were more people there.

Id. (quoting T. Leverett Nelson, Section Chief, Solid Waste and Emergency Response Branch, Office of Regional Counsel, EPA Region V). See also Interview with Walter Mugdan, Deputy Regional Counsel, USEPA, Region II, in New York, NY (Apr. 4, 1995) [hereinafter Mugdan Interview] (noting that DOJ was overburdened in the mid-1980s).

⁹⁵ With two caveats. First, if there was some reason why one would expect understaffing and inadequate resources at one agency rather than the other, that would be a reason for allocating more tasks to the inherently better-staffed agency. We perceive no such tendency here, however. Second, to the extent the problem is one of inadequate *overall* resources, this is a reason for streamlining the process. See *infra* notes 115-121 and accompanying text.

⁹⁶ This may not be true of every agency. Horowitz argues that "some agencies simply will not enhance their recruitment capacity significantly if they have litigation authority." HOROWITZ, *supra* note 38, at 132. See also *D.C. Circuit Conference*, *supra* note 83, at 175 (statement of Associate Attorney General Michael Egan) (claiming that DOJ "ideally should have the best litigators there are in the United States, and to the extent that we start d[iff]using among agencies, litigation expertise, the whole thing will go down"). Moreover, when it comes to Supreme Court litigation, it probably is true that the Solicitor General can attract better lawyers than could any individual agency, even one that handled its own Supreme Court litigation.

that, or a similar program, could not be provided to federal litigators outside the Department. Indeed DOJ's Office of Legal Education currently offers a course on Advocacy Skills for agency lawyers, among many other courses.⁹⁷

Likewise, although it is certainly true that DOJ lawyers have courtroom expertise and familiarity with recurrent non-agency-specific legal questions that agency lawyers lack, it is far from clear whether the agency benefits from having experienced generalist litigators representing it. On the one hand, the generalist's merely passing familiarity with the relevant legal regime can be an advantage, since the judicial audience that must be convinced also consists of generalists. Moreover, DOJ lawyers are aware of trends within the judiciary and know the tendencies of particular judges.⁹⁸ On the other hand, if agencies represented themselves, they would develop the courtroom expertise DOJ attorneys now boast. Furthermore, DOJ attorneys' generalist courtroom skills are not the only relevant skills. From the agency's point of view, *it* has the edge in expertise, because, particularly in a complex and technical field, what is really necessary is an in-depth understanding of the particular substantive area.⁹⁹

Another example: Since DOJ sometimes turns down agency referrals, agencies, almost by definition, have looser standards for referring a case than DOJ has for bringing it. To DOJ, this divergence demonstrates that it must supervise and control agency litigation. Yet here again, DOJ checking functions results at least in part from the

⁹⁷ See www.usdoj.gov:80/usao/eousa/ole/descript.html (last visited Apr. 21, 2003).

⁹⁸ HOROWITZ, *supra* note 38, at 130.

⁹⁹ It is a longstanding and predictable complaint of agency lawyers that DOJ simply lacks sufficient knowledge of the particulars of agency programs and the underlying statutes to defend them adequately in court. The following statement of FDA General Counsel Richard Cooper is typical:

[A]n agency lawyer who has worked on a regulation since its inception or has worked on a program for a number of years simply knows more about it and knows more about the needs that gave rise to it, the policies that it reflects, and the practical problems that arise in its implementation, than does his counterpart in the Department of Justice. Because successful advocacy in a regulatory case depends very much on presenting to the court the practical reasons for the regulation or decision, and a thorough understanding of the real world context that it addresses, the lawyers for the agency, I would argue, have a significant advantage over the lawyers from the Department of Justice.

D.C. Circuit Conference, *supra* note 83, at 172 (statement of Richard Cooper). Thus, one reads the following in the FDA's current regulatory procedures manual with regard to the preparation of referral packages for DOJ:

To forestall a potential negative impression about the case by AUSAs who are often unaware of the very strong case law in support of injunctions under the Act, the cover letter will also contain standard legal paragraphs. One paragraph will explain, with case citations, the special rules that apply to statutory injunctions under the Act; for example, the fact the irreparable harm need not be shown. The other standard paragraph, where appropriate, will contain a brief legal discussion of the law with respect to the violation at issue.

U.S. FDA, *supra* note 22 (citations omitted).

current allocation of tasks, not from inherent characteristics of DOJ and the agency. Precisely because agencies lack litigation authority, their effectiveness is judged, by congressional overseers for example, by the number of cases they refer to DOJ.¹⁰⁰ Consequently, rather than screen out weak cases, agencies have strong incentives to make use of looser standards than DOJ whose effectiveness is measured by how well it does in court. If agencies represented themselves, and therefore could not rely on DOJ to say no, insist on fuller referral packages, or tighten up a proposed complaint, then they would behave more like DOJ. To our knowledge agencies *with* litigating authority are not bringing carelessly prepared, inappropriate cases; to the contrary, they have developed their own internal review mechanisms.¹⁰¹

To be sure, we must to some extent take the world as we find it. In a sense, *all* characteristics of an agency are "acquired" rather than "inherent," because the agency is an artificial creation that can be eliminated or remade. The Department of Justice will not disappear. Its litigating responsibilities across the government are not going to be handed over to all the client agencies in one fell swoop. Our point is only that we are skeptical about claims for DOJ control that are self-justifying, relying on characteristics that are themselves the *product* of the current allocation of authority to justify that allocation.

2. *Gatekeeping*

DOJ centralization is sometimes seen as a necessary check on unthought-through litigation. At first blush, this argument seems sensible. Specifically, while there is no control group (so it is impossible to know what would have happened in unlitigated cases), the agency undoubtedly would have lost some—perhaps even many—of the cases DOJ refuses to bring, and thus is benefited rather than harmed by DOJ's restraint. Not all the declined cases *should* be brought. At the same time, for reasons already detailed, not all the declined cases *would* be brought if agencies controlled their own litigation. If an agency represented itself, for example, it would need to develop its own screening process. In some measure, this system would replicate the current regime except it would exist within the single agency. Consider, for example, the Department of Labor, an agency with un-

¹⁰⁰ At the EPA, for example, the pressure to refer cases is sufficiently strong that referrals have been known to skyrocket at the end of the Fiscal Year in order to pad statistics. See Kevin Gaynor, *Too Many Cooks* . . . , 6 ENVTL. F. 9, 10 (Jan.-Feb. 1989) ("In the fourth quarter of every fiscal year, the DOJ is deluged with referrals as each [EPA] region tries to meet its referral goals."). See also Clegg Interview, *supra* note 79 (referring to this end of the year phenomenon as "the lump in the snake").

¹⁰¹ See *supra* notes 27-30 and accompanying text and *infra* note 102.

qualified litigating authority under various statutes. The Department makes use of a screening process to sort out whether to appeal trial court defeats—a process that has created tensions between trial attorneys who want to appeal any and all defeats and appellate attorneys who exercise great caution in screening appeals.¹⁰²

The importance of DOJ's gatekeeping role, therefore, seems overstated. There is no reason to assume that "[i]f the DOJ monopoly were removed . . ." agencies would "press weak arguments, in perhaps insignificant cases, leading to a system-wide loss in credibility" and, with it, "a reduction in success because agencies would deplete the pool of goodwill generated by the DOJ monopoly."¹⁰³ Instead, it seems more likely that agencies will screen cases with some care. This is what agencies with litigation authority have done.¹⁰⁴ Moreover, if some agencies pursue ill considered cases, it seems likely that those agencies—rather than all agencies—will be the ones who will suffer the consequences of their actions.¹⁰⁵

All that said, we would not expect a decentralized litigation scheme to replicate the current arrangement. Agencies *would* bring some cases that DOJ refuses to because in general agencies are more willing to run litigation risks than is DOJ.¹⁰⁶ This different attitude about risk has the same source as DOJ's relatively greater enthusiasm for "technical" defenses—sovereign immunity, lack of jurisdiction, statute of limitations—that agencies may be reluctant to rely on.¹⁰⁷

¹⁰² Interview with Seth Zinmann and Steve Mandell, lawyers in charge of the screening process in 1995, Department of Labor, in Washington, D.C. (March 7, 1995).

¹⁰³ Nicholas S. Zeppos, *Government Lawyering: Department of Justice Litigation: Externalizing Costs and Searching for Subsidies*, 61 LAW & CONTEMP. PROBS. 171, 181 (Spring 1998).

¹⁰⁴ See Devins, *supra* note 11 (discussing the practices of independent agencies).

¹⁰⁵ See *id.* (noting reputational differences among independent agencies).

¹⁰⁶ Telephone interview with Ray Ludwizewski, Partner, Gibson, Dunn & Crutcher, former Acting Gen. Counsel, USEPA (Dec. 20, 1994) (noting that EPA was more willing than DOJ to run litigation risks, which resulted at least in part from the fact that the agency itself would not get chewed up in court if things went badly) [hereinafter Ludwizewski Interview]; Mugdan Interview, *supra* note 94. But see Interview with Allan Eckert, Office of the Gen. Counsel, USEPA, in Washington, D.C. (Nov. 13, 1994) (stating that there is not a significant difference between EPA lawyers' willingness to run litigation risks and DOJ lawyers' willingness to do so). Thus, practitioners share a sense that if their case involves "bad facts" for the government, they will be more successful in trying to negotiate a settlement with DOJ than with EPA, because DOJ will be more sensitive to the possibility of a loss and more concerned about the impact of a bad precedent on the overall enforcement effort.

¹⁰⁷ See HOROWITZ, *supra* note 38, at 41 ("Generally, challenges are met by a comprehensive motion for dismissal or summary judgment, often emphasizing jurisdictional and procedural arguments and deemphasizing the importance or complexity of arguments on the merits."); Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 983 (1991) (noting that "federal government lawyers routinely raise procedural and technical defenses on behalf of their agency clients"); Allan B. Morrison, *Defending the Government: How Vigorous is Too Vigorous?*, in VERDICTS ON LAWYERS 242 (Ralph Nader & Mark Green eds., 1976) (noting that government lawyers are instructed, "to paraphrase the closing command in *Casablanca*, to 'round up the usual defenses'").

The different attitudes toward litigation risk and nonsubstantive grounds of decision are predictable given the different interests and agendas between DOJ and a programmatic agency. For DOJ, success is measured solely by winning percentage in the courts; the basis of a favorable decision does not matter, and winning is an end in itself. For the agency, success is a function of: (a) winning percentage not just in the courts, but in an overall enforcement effort most of which occurs outside the judiciary;¹⁰⁸ and (b) the advancement of a particular policy agenda, to which an individual striking judicial victory may contribute much more than a particular loss will detract. Thus, an agency and DOJ may be in exact agreement in their assessment of the likely outcome of a lawsuit the agency wants to bring but still disagree as to whether it should be brought.

Our suggestion is that the agency's greater willingness to run litigation risks can be a strength, not a weakness.¹⁰⁹ By analogy, consider fee-shifting statutes for private litigation. The general understanding is that without a fee-shifting statute, potential plaintiffs will bring fewer risky cases because the expected return does not justify the risk. But by increasing the possible return, the statute encourages plaintiffs to bring actions that may not be obvious winners but a certain percentage of which will succeed, and that such litigation is a good thing in advancing legal change. Risk-taking means more losses, but it also means more striking, and law-changing, wins.

Beyond the question of litigation risks is the question of what substantive positions, winnable or not, DOJ is willing to pursue or defend. Here again, agency lawyers will tend to be somewhat more open-minded. What for DOJ is craftsmanship, to an agency is nit-

Thus, the Consumer Product Safety Commission has complained to Congress that DOJ has far too great a tendency to "emphasize procedural over substantive arguments." Richard E. Cohen, *Government Lawyers Battle for Independence*, NAT'L J., Aug. 12, 1978, at 1286.

¹⁰⁸ EPA Regional Attorney Walter Mugdan observed that he prevails in almost all administrative cases, and that those victories as well as administrative and judicial settlements "count" for him, whereas all that counts for DOJ attorneys are courtroom victories. Thus, if EPA wins only two-thirds of its judicial cases, its overall success rate is still near 100% whereas DOJ's is only 67%. Mugdan Interview, *supra* note 94.

¹⁰⁹ For similar reasons, we think that agency control of settlement agreements and consent decrees will allow agencies best to advance their positions. In particular, in deciding whether to settle or to litigate, agencies are more likely than DOJ to focus on their policy priorities rather than simply the chance of success in court. Of course, any government lawyer (whether she works for the agency or DOJ) may fail to serve the public interest. For example, government lawyers may agree to settlement provisions that are too politically costly to embrace in the rulemaking process. For this very reason, Jim Rossi has argued that courts should play an active role in reviewing rulemaking settlements. Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015 (2001). For Professor Rossi, the openness of notice and comment rulemaking protects the public interest; in contrast, agencies who can advance their policy priorities by "negotiating in secret" are apt to sacrifice the public interest. *Id.*

picking.¹¹⁰ For example, EPA has historically been drawn to settlements that include a commitment by the violator to undertake so-called "Supplemental Environmental Projects," or SEPs. SEPs include such things as a donation to an environmental group, an environmental education program, or construction of a park or wildlife sanctuary—beneficial projects that bear no direct connection to the violation with which the project sponsor has been charged. EPA has always been more enthusiastic about SEPs than has DOJ. For EPA, they make sense from the point of view of environmental policy. For DOJ, they are dubious as a matter of legality. DOJ has consistently expressed reservations about the government's authority to enter into a settlement that includes a commitment to do something unconnected to the underlying violation. This is a lawyer's issue, the sort of objection that frustrates policymakers. For DOJ, objecting to SEPs is an example of professional craft; for EPA, it is niggling.

Differences between agency and DOJ attitudes underscore the difficulty of assessing the costs and benefits of DOJ gatekeeping. And while we do not mean to suggest that DOJ gatekeeping is of little to no benefit to agency interests, we do think that the standard DOJ arguments are misleading. They overestimate the benefits of DOJ control of agency arguments and underestimate the types of screening processes that agencies with litigating authority are likely to employ.

3. *Impacts on Agency Activities*

Might the fact that agency regulators know that DOJ will represent them in court, should litigation occur, affect the way that they go about their jobs? Such an effect would be extraordinarily difficult to discern or measure. Nonetheless, it is plausible that agency personnel might behave differently in light of the perceived costs or nature of litigation.

In a separate article, we considered the effect that centralization might have on agencies' substantive programs.¹¹¹ One might imagine significant harm to an agency's program if DOJ was an ineffective litigator, so that agencies lost cases they should have won, if DOJ refused to bring important, winnable cases or to defend regulations, if DOJ's penchant for non-substantive arguments precluded rulings on the merits, or if agencies were forgoing judicial enforcement in favor of administrative enforcement.¹¹² Our conclusions were, frankly, disappointingly inconclusive. All of these difficulties are *possible*, and all

¹¹⁰ See MINTZ, *supra* note 52, at 31.

¹¹¹ See Herz & Devins, *supra* note 36.

¹¹² Such an indictment, save for the last point, of DOJ's representation of EPA can be found in H.R. REP. NO. 95-294, at 333-35 (1977).

have occurred in individual instances (although a refusal to defend regulations has never been a significant concern). But their significance is impossible to quantify, and the problem, if problem it is, will vary from setting to setting and depend hugely on the individuals involved, the nature of the administration, and the working relationships that develop.

Professor Jason Johnston has suggested two other ways in which centralized litigation authority might affect the writing of regulations.¹¹³ Johnston's economic analysis focuses on the fact that the costs of litigation are borne by the Justice Department rather than the agency, but the benefits of the regulation flow, as between the two, to the agency rather than DOJ. Therefore, DOJ's litigation effort should be expected "to vary much less with the actual net regulatory benefits than would the regulatory agency's."¹¹⁴ In other words, for DOJ, a regulation is a regulation is a regulation; for the agency, some are no big deal, for others, it would fight to the death. Johnston suggests that this variation has two consequences: "Justice Department lawyers tend to over-invest in defending relatively unimportant regulations (as measured by the agency's perceived net benefit) and under-invest in defending relatively significant regulations."¹¹⁵ This in turn may affect what regulations get written. In particular, a regulation with very high compliance costs but also, from the agency's point of view, very high benefits, will generate intense opposition and a run-of-the-mill DOJ defense, meaning higher chances of the regulation being set aside. Anticipating this, the agency may simply forgo the regulation in the first place. On the other hand, the agency knows that the DOJ will vigorously defend regulations with relatively low compliance costs and, therefore, minor opposition. Because the agency does not bear litigation costs itself, it has an incentive to pursue regulations that impose relatively small costs (even if they also have relatively small benefits), because they are most likely to be successfully defended by DOJ. Johnston concludes: "Delegation of litigation expenses tends to clog the courts with litigation over regulations that regulatory agencies would not defend, and therefore

¹¹³ See Jason Scott Johnston, *A Game-Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, 150 U. PA. L. REV. 1343, 1378-80 (2002).

¹¹⁴ *Id.* at 1379.

¹¹⁵ *Id.* One might accept that the variation exists without drawing Johnston's implicit conclusion that the agency's evaluation of the relative importance or benefits of particular regulations is *correct* (although it is one that we tend to share). What he considers greater expertise and familiarity with particular situations, unitary-executive enthusiasts might characterize, at least in specific instances, as tunnel vision and a failure to go along with the President's program. Much of the standard defense of DOJ control of litigation also assumes a variation between DOJ's and agencies' evaluations of cases' importance; on this account, it is the *agency* that will under or over-invest in defense of regulations.

not finalize in the first place, if they had to bear the full cost of judicial review."¹¹⁶

This analysis seems to us plausible but overstated. In particular, there is no indication that in fact what is "clogging" the courts are challenges to regulations that agencies would not even have issued if they bore the burden of defending them. In addition, in the real world, while DOJ will lack the agency's commitment to a particular regulation, it does have an intense commitment to winning the cases it litigates. There is little real-world evidence that once DOJ has agreed to litigate a case—and it almost always agrees to defend agency regulations—it does not try hard enough to win. Put differently, Johnston's point that DOJ will invest relatively equal resources in the defense of all regulations, regardless of their benefits, would be irrelevant if those resources were "everything we've got." While of course DOJ does not spend equal amounts of time and effort on every case, its lawyers' own sense of pride is bound up in litigation success, and the incentives to try to win are pretty strong.

In short, the dynamic that Professor Johnston identifies may be real, and it argues for greater agency control of litigation. In particular, it suggests agencies should defend their own regulations. But we are inclined to think this effect is quite marginal.

4. *Redundancy and Waste*

The current regime results in a good deal of redundancy. Cases are arguably overstaffed; work is repeated; the process is slowed down by unnecessary layers of review and reconsideration. There is little dispute that "[c]onsiderable delay and waste of resources is usually consumed by these overlapping layers of review."¹¹⁷

It is not enough to counter that in fact all the lawyers involved are working hard. All members of a bureaucracy always *look* like they are doing something. That is an important means of bureaucratic survival. That does not mean that they *are* doing something, or that what they are doing is important, or that they are not simply *undoing* someone else's mistakes. One manifestation of this is that if someone is assigned to review or oversee another's work, the higherup can only justify his position by finding fault with what he is reviewing.

One striking area of overlap is the layered approach to settlements. Hank Habicht, who served in both DOJ and EPA, describes the matter succinctly in discussing the fact that the EPA Region, EPA Headquarters, and DOJ all have a say with regard to a settlement:

¹¹⁶ *Id.* at 1380.

¹¹⁷ 4 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES 287 n.100 (1992) (quoting R.A. MacFarlane).

This situation is the source of repeated frustration for the private litigant who believes he has reached settlement on some issue only to find that while it is acceptable to an EPA regional office it will not clear EPA headquarters or the Justice Department. For this reason, it is especially important to establish and understand the authority of the attorneys on the other side of the table in an environmental suit. The private litigant should anticipate that, if settlement is reached with only part of the governmental structure, another office will look for the opportunity to add some icing to the settlement cake in order to justify and maintain its position within the government.¹¹⁸

A second redundancy lies in the repeated reviews of cases during the referral process. Many people we interviewed were unable to justify the duplicative memo writing, with the agency preparing a lengthy litigation memo for DOJ, only to have a DOJ attorney write a separate, equally lengthy litigation memo.¹¹⁹ Of course there is a value in having two people have a crack at this task, but it is hard to find someone who believes that the gains are worth the time and effort.

In the actual conduct of the litigation, there is further redundancy. It is easy to overstate the problem here, and the mere fact that an appellate brief goes out over the names of, say, four DOJ lawyers and two agency lawyers does not in itself mean that scarce resources were squandered employing six lawyers to do what two could have done. How many lawyers are actually necessary to write a brief depends on the lawyers and the brief. And having a slew of lawyers on the brief does not in itself indicate a waste of resources; even if fifteen lawyers are on a brief, it does not mean that they all spent a significant amount of time preparing it. Nonetheless, the fact remains that if *just* EPA or *just* DOJ were handling the brief, it would assign fewer lawyers to the task.

The extra effort is not merely the result of additional bodies on the case. It also results from the fact that in both enforcement and defense matters agency attorneys will have already invested a large amount of time in any dispute before DOJ becomes involved. When DOJ attorneys are added, it will take time for them to get up to speed on the particular dispute and (usually to a lesser extent) to be educated in the general program. The result is delay and duplication.

The question then becomes whether this is a bad thing. Duplication can have advantages:

[T]here is something to be said . . . on behalf of duplication and overlap. In some governmental systems as in many mechanical ones, redundancy

¹¹⁸ F. Henry Habicht II, *Settling a Case with the Land and Natural Resources Division*, in NAT. RESOURCES & ENV'T 5, 10 (Winter 1985).

¹¹⁹ Ludwizewski Interview, *supra* note 106; Mugdan Interview, *supra* note 94.

is useful. Overlapping agencies, like back-up computers on the space shuttle, can detect errors; duplicating functions is not always wasteful. The problem, of course, is to choose between good and bad redundancies, a matter on which scholars have made little progress.¹²⁰

There are really three points here. First, having a backup is insurance against having the one person assigned to a case turn out to be a dud. The value of this insurance, however, is undercut by the hierarchical nature of the collaboration. If the DOJ lawyer is the dud, the agency lawyer is limited in how much she can compensate, since final authority lies with the former. If the agency lawyer is the dud, having her on board is only a burden.

Second, two heads are better than one. This is usually, but not always true, depending on who the heads are and how well they work together.

Third, collaboration (to use a more optimistic phrase) in litigation might even be synergistic, with each party enhancing the other's strengths and a final product that is greater than the sum of its parts. At least one observer has offered such a happy account of the "multitiered" decisionmaking process in government environmental litigation.¹²¹ We are somewhat less sanguine. Historically, DOJ/agency relations seem to have been an example of destructive acrimony more than healthy interaction.¹²² Such relations are in large measure the predictable result of the existing structure and culture, in which a group of elite, often younger, often somewhat snooty, lawyers take over just when a case is getting interesting, though with the suspicion that mission-oriented agency lawyers are unable to see the big picture. From the point of view of the agency lawyer, the case is taken away at the critical moment, after months or years of work, by a knowing nothing generalist. From the point of view of the DOJ lawyer, any

¹²⁰ JAMES Q. WILSON, *BUREAUCRACY* 274 (1989). For a general, rather abstract, defense of duplication of systems within bureaucracies, see Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346 (1969). Landau concludes:

"Streamlining an agency," "consolidating similar functions," "eliminating duplication," and "commonality" are powerful slogans which possess an obvious appeal. But it is just possible that their achievement would deprive an agency of the properties it needs most—those which allow rules to be broken and units to operate effectively without doing critical injury to the agency as a whole. Accordingly, it would be far more constructive, even under conditions of scarcity, to lay aside easy slogans and turn attention to a principle which lessens risks without foreclosing opportunity.

Id. at 356. Unfortunately, Landau does not identify that principle.

¹²¹ Carl Tobias, *Environmental Litigation and Rule 11*, 33 WM. & MARY L. REV. 429, 452-53 (1992) (offering a glowing account of the cooperative case preparation by lawyers, technical staff, and policymakers within EPA, Main Justice, and the U.S. Attorney's Offices). Tobias is offering an explanation for why Rule 11 sanctions are virtually nonexistent in this area of the law (which is not to suggest that the best the government can do is to avoid such sanctions).

¹²² See, e.g., Gaynor, *supra* note 100, at 9, 11 (discussing such problems).

challenges or set-backs are easily attributed to mistakes made before DOJ got the case.¹²⁸

These difficulties are not eliminated when an agency litigates its own cases, because some of the same structures, with their attendant acrimony and jealousies, are recreated within the agency. Indeed, one sees something of the same phenomenon within DOJ with regard to the Solicitor General's control of Supreme Court litigation. Nonetheless, they are significantly reduced because all the players are on the same team.

C. Summary

The standard arguments for DOJ control of litigation seem overblown. Were litigation authority to be decentralized, there is good reason to think that agencies would screen cases, hire top flight lawyers, and usually make arguments similar to those now made by DOJ lawyers. There would be less waste and redundancy. Interagency conflicts might increase, but it may be that the President, in fact, prefers that a certain amount of conflict bubble over. And while agencies would sometimes make riskier arguments than DOJ, undertaking those risks would in some instances significantly advance the agency's substantive agenda.

None of this is to say that DOJ centralization is necessarily a mistake. Rather, we have simply shown that the standard arguments are vulnerable and, as such, it is appropriate to reconsider whether the current arrangement should be reconfigured. It is to that task that we now turn.

III. STRUCTURING THE AGENCY/DOJ RELATIONSHIP

The Department of Justice is engaged in a never-ending task of determining when the U.S. Attorneys' offices will handle cases on their own and when main Justice will be involved as well or instead. Many agencies face a similar struggle to define the division of authority between headquarters and the regions. EPA purports to follow a "value-added approach to case involvement"; headquarters staff will

¹²⁸ As one author wrote about the prosecution of white-collar crime in general some years ago:

The agency attorneys assigned to the local federal prosecutor are usually treated as "second class" assistants [T]he agency attorneys feel that they are asked to act as "clerks" for the local prosecutor. There is a reluctance among many agency attorneys to work with a local federal prosecutor. There is no "status," no enjoyment in prosecuting a case, and certainly no "glory." When the matter is finally prosecuted, if it succeeds, the US Attorney receives the glory and credit. If it fails, the agency often gets the blame.

August Bequaie, *White-Collar Plea Bargaining*, TRIAL, July 1977, at 38, 41.

be involved in cases when in doing so they "add value."¹²⁴ The same test can be applied to the allocation of overall lawyering tasks. The question is in what settings would agency lawyers be equal or even superior to DOJ lawyers, and in which do DOJ attorneys "add value." Where the benefits of DOJ representation are relatively low, and/or the costs relatively high, it makes sense to shift litigating responsibility to the agencies.

The costs of any such change would not be insignificant. Individuals would likely be reassigned, sometimes to their dismay. Agency management structures, hiring, training, and space would need to change. A full-scale dismantling of DOJ is inconceivable if for no other reason than the "transaction costs" involved—not that we would propose it in any event. The costs of change are themselves one argument in favor of the status quo. On the other hand, such costs would be short-lived and would not be dramatic in the case of marginal adjustments. Therefore, we begin with a presumption in favor of, but not an inflexible commitment to, the existing structure.

In this part we consider first what sort of taxonomy is appropriate for categorizing the cases in which decentralized litigation authority might be appropriate. We then examine the different categories of cases, concluding that the uneasy case for DOJ control for the most part has been made. However, we would shift litigation authority away from DOJ and to agency attorneys in two settings: (a) trial, but not appellate, civil enforcement proceedings; and (b) petitions for judicial review of regulations.

A. Choosing a Taxonomy

One could draw these lines according to the issues at stake or according to the type of case being litigated. For the reasons that follow, we almost always favor the latter.

1. Distinguishing Strategy from Policy

DOJ has always said that it cannot and should not displace the agency's policymaking function.¹²⁵ Accordingly, DOJ should only

¹²⁴ Memorandum from Steven A. Herman, Assistant Administrator, USEPA, to Assistant Administrators et al., *Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases 2* (July 11, 1994), available at <http://www.epa.gov/Compliance/resources/policies/civil/rcra/hqregenfcases-mem.pdf> (last visited Apr. 21, 2003).

¹²⁵ See Bell, *supra* note 76, at 1061 (noting DOJ's obligation to accede to "the policy prerogatives of our agency clients"); Devins, *supra* note 87, at 279 (describing a model that "envision[s] the affected agent or department as the policy-making client, and agency counsel of the Justice Department as the dutiful advocate"); Olson, *supra* note 72, at 82 (describing DOJ's official position as being "the Department does not make policy—that is the responsibility and the right of the client agencies").

make decisions about litigation strategy, not substantive policy. Experience has shown, and one might have predicted, that assigning tasks according to this distinction will not work. For one thing, that is a near impossible line to draw. Not only is there a large class of "policy" questions that are not peculiar to the particular agency—for example, federalism—but distinguishing strategy and policy here is doomed. Even if we could agree on the distinction in theory, someone would have to apply it, that is, decide which is which. The resulting jurisdictional battles would be unseemly, unproductive, time-consuming, and likely to lead to DOJ dominance. Finally, for reasons we will soon detail, dividing authority along these lines does not capture the sort of situations in which it would be appropriate to shift litigating authority to the agency.

In short, the policy/strategy distinction is, in theory, in place. It is working about as well as it can. Announcing it, even with enthusiasm and fanfare, would not be a change. Using it as a basis for allocating *lawyering* tasks would fail.

2. *Distinguishing Agency-Specific Issues from General Issues*

A somewhat more promising way of distinguishing between DOJ issues and agency issues would be to ask under what statute they arise. All constitutional questions, and all questions that arise under statutes that cut across agency boundaries (FOIA, the Administrative Procedure Act, the Sunshine Act, the Rules of Civil Procedure, the Federal Torts Claim Act) could be for DOJ; those arising under the specific substantive statutes could be for the agency. While such a division of labor makes a certain amount of sense, it is hard to see how it could be effectively implemented. For one, the lines will not always be clear; for another, individual cases are likely to involve both sets of issues. At the same time, the benefits of such a division can be realized through mechanisms for allocating *tasks* rather than *cases* according to the nature of the issue. As we explain below, such mechanisms need not rely on the cooperation and good faith of individual attorneys.

In short, we do not think it possible to shift greater authority to agencies according to distinctions between types of issues that arise in litigation. Practically and conceptually, it is more fruitful to think in terms of allocating litigating authority for particular types of lawsuits.

B. Decentralized Counseling

To start at one extreme, it might be argued that what should be expanded is the role of DOJ lawyers. Perhaps DOJ ought to play a greater role in counseling, as the creators of DOJ in 1870 anticipated. DOJ has to defend the agency's decisions in court; it will be able to

do so more effectively if it has the greater familiarity with the statutory scheme and the particulars of the challenged action or regulation that comes from working on its development. In addition, it may be that agency lawyers are too committed to the narrow mission of the agency and lack the detachment necessary to see the big picture or the neutrality to adhere to legal requirements. Indeed, because legal counseling is a form of, or overlaps with, policymaking, under the executive hierarchy model the President's chief legal officer, or her designee, *should* influence agency decision making. Finally, DOJ could ensure consistency between agencies.

Although these considerations are not negligible, they are in the final analysis unconvincing. The first is absolutely true, but, we think, not a sufficient reason for bringing DOJ into agencies' decision making process. For the reasons we discuss below, it is more a reason for ensuring that agency lawyers are adequately involved in defending the action in court.

The second reason—agency lawyers' parochial excess of loyalty to the agency's policy goals—seems overstated. For the most part, agency lawyers will raise the same objections and concerns during the rulemaking process that DOJ lawyers would raise were they more intimately involved.¹²⁶ Even in the individual instances where it is arguable that DOJ attorneys might have steered the rulemaking in a slightly different direction, it is not at all clear that this is because DOJ is "neutral" whereas the agency lawyers are "partisan." While DOJ has a strong tradition of independence and legal professionalism, we take that self-image with a grain of salt. Agency attorneys will have a tendency to provide the sought-for answer, but so will DOJ attorneys, just for a different client.

The third argument—the need for DOJ control of legal policymaking—also fails. For one thing, it directly contradicts the second argument; instead of focusing on the need for independent legal judgment, this argument justifies DOJ control on the opposite ground that something other than independent legal judgment is needed. Accepting that *is* what is at stake, then involving DOJ at the predecision stage risks a significant intrusion on agency policymaking authority. We accept the principle that executive branch policymaking should be hierarchical and subject to some overall centralized executive oversight.¹²⁷ However, DOJ involvement is the least appropri-

¹²⁶ Telephone interview with John Nagle, Seton Hall University School of Law, former Attorney, Environment Division, U.S. Dep't of Justice (Mar. 24, 1995).

¹²⁷ Presidential control of agency rulemaking—from the Nixon quality of life review through the Reagan Executive Order 12,291 and the Bush Competitiveness Council, to Clinton's E.O. 12,866, which has been left essentially intact by the second Bush administration—has generated more than a little controversy. Nonetheless, there is a remarkable overall consensus, in which we share, that presidential oversight of the federal rulemaking apparatus is appropriate and

ate and effective way of achieving that goal. Not only are other mechanisms for doing so in place, but the goals of accountability and coordination are paramount when an agency is formulating policy, not when it is merely determining what Congress already has found the appropriate policy to be.¹²⁸

The argument for DOJ counseling is strongest in situations of agency disagreement. No claim can be made for a particular program agency's expertise or authority; by definition there is a competition between two agencies. Here an ultimate decision maker is needed not because of a linear hierarchy but because dispute resolution requires an ultimate decisionmaker. Thus, DOJ's role under E.O. 12,146 is sensible and appropriate,¹²⁹ but it should not extend beyond that.

As for the consistency argument, it is not especially strong in the counseling context and certainly less strong than in the litigation context. Uniformity of an important sort is achieved by having an Environmental Protection Agency, rather than a Water Protection Agency, an Air Protection Agency, etc., all operating independently. In addition, EPA's statutes are different from OSHA's, which are different from the Department of Transportation's, and so on. There is large, inescapable, congressionally created disuniformity between different agencies that undercuts the claim that a single lawyer is needed for them all in order to ensure consistency. And even to the extent different agencies consider recurrent or overlapping issues, there may be a value in allowing each to work it out for itself to ensure that these issues receive the fullest development and consideration. In short, agencies, like states, can be Brandeisian laboratories.

Finally, making DOJ the sole legal counselor to the entire federal bureaucracy would be virtually impossible simply as a practical matter. The point is not just one of resources, although plainly DOJ

important. See, e.g., American Bar Association Section of Administrative Law and Regulatory Practice, *Twenty-First Century Governance: Improving the Federal Administrative Process—A Report for the President-Elect of the United States*, 52 ADMIN. L. REV. 1099, 1104 (2000) (recommending that the President "should promote coordination, efficiency, and openness in agency rulemaking by . . . overseeing a carefully-executed process of centralized review of significant agency regulations"); Admin. Conf. of the U.S., *Recommendation 88-9*, in RECOMMENDATIONS AND REPORTS 42, 42 (1988) ("An effective mechanism is needed to coordinate agency decisions with the judgments of officials having a broader perspective, such as the President and Congress.").

¹²⁸ See Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 251-70 (1993).

¹²⁹ E.O. 12,146 requires agencies "whose heads serve at the pleasure of the President" to submit to the Attorney General disputes over who can "administer a particular program or . . . regulate a particular activity." In practice, this means that disputes between agencies without litigating authority will be resolved by DOJ and without going to court. However, agencies that possess independent litigating authority may assert jurisdiction and leave it to the courts to stop them.

would have to grow many-fold to truly take over the counseling function for each executive agency. It is also that even if DOJ was given the resources to do this task, it would no longer resemble DOJ. It would become so far-flung as to be beyond the capacity of the Attorney General, or her relatively immediate subordinates, to oversee. In other words, it would be impossible to "centralize" counseling in any meaningful way given the sheer size of the federal apparatus.

C. Criminal Litigation¹³⁰

At the opposite extreme from counseling is criminal prosecution. DOJ's exclusive control over federal criminal prosecutions has largely gone unchallenged. It sounds right to most people. Nonetheless, proposals for private prosecution are sometimes made, and some writers have argued that agencies should possess at least some independent criminal enforcement authority.¹³¹ Particular attention recently has been given to granting the SEC power to bring criminal prosecutions in light of recent corporate scandals and a perceived lack of sufficient ferocity on DOJ's part with regard to white-collar crime.¹³²

We do not propose an increased litigation role for agency attorneys in criminal litigation. For the reasons that follow, the arguments for DOJ control are particularly potent in the criminal setting. (As we shall see, their relative diluteness in the civil setting provides an instructive comparison.)

As we write this, in the shadow of Enron, Worldcom, and similar scandals, the prevailing public and congressional sense is that the securities laws have been under-enforced, that we should be sending more executives to jail, and that a redoubling of SEC enforcement efforts is called for.¹³³ An obvious way to achieve this would be to give

¹³⁰ For a more comprehensive discussion of the issues in this section, see Michael Herz, *Structures of Environmental Criminal Enforcement*, 7 FORDHAM ENVTL. L.J. 679 (1996), from which the following is drawn.

¹³¹ Writing about environmental crimes in 1991, Robert Adler and Charles Lord of the Natural Resources Defense Council urged that EPA be given greater independent enforcement authority. While conceding that DOJ should be "brought in for the most egregious violations that require more complex enforcement actions," Adler and Lord felt that EPA should be able to act on its own for initial or less complicated violations. Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781, 812 (1991).

¹³² See, e.g., *Ensuring Corporate Responsibility: Using Criminal Sanctions to Deter Wrongdoing*, Hearing Before the Senate Comm. on the Judiciary, 108th Cong. (2002) (testimony of James R. Doty, former General Counsel, U.S. Sec. & Exch. Comm'n) (arguing against granting SEC criminal enforcement authority), available at http://judiciary.senate.gov/hearing.cfm?id=329&wit_id=768 (last visited Apr. 21, 2003).

¹³³ See, e.g., Leaf et al., *supra* note 17, at 70:

[T]he SEC's power . . . lies more in persuasion than in punishment. The commission can force companies to comply with securities rules, it can fine them when they don't, it

the SEC power to bring its own criminal prosecutions without DOJ. At present, the SEC refers more cases than DOJ brings; its attorneys are (speaking relatively and generally) more committed to the regulatory cause and place a higher priority on securities prosecutions; the duplication of effort inherent in referral and prosecution by DOJ automatically reduces enforcement resources. In light of these circumstances, it would seem that enforcement would be enhanced by allowing SEC to bring its own prosecutions.¹³⁴ There is reason to be concerned, however, about agency lawyers armed with independent criminal prosecution authority going too far.

First, generations of administrative law scholars and DOJ attorneys have assumed that agencies have tunnel vision and are unable to perceive countervailing factors that should make a reasonable person hesitate about the agency's single-minded pursuit of its particular mission. While these complaints may be overstated, it is undoubtedly true that agency attorneys are more apt than DOJ lawyers to prosecute morally blameless conduct that violates an incomprehensible technicality. Consider, for example, SEC attorneys. Not only are they likely to have a particular commitment to securities enforcement, but they know the statutes and regulations perhaps too well, failing to appreciate how overwhelming and confusing they are to someone whose entire job is not understanding them.¹³⁵

Second, recall the differences in lawyering style between DOJ and agency attorneys. Because they are, relatively speaking, generalists without an affiliation to a particular programmatic agenda, DOJ lawyers tend to be (a) more interested in "technical" lawyers' arguments and (b) less willing to run litigation risks, than their agency counterparts.¹³⁶ These attributes can be frustrating to agency lawyers, particularly in defensive cases. But they are important safeguards in the criminal context.

Third, DOJ's arguments about consistency are especially powerful in the criminal setting. Because the sanction is so severe and the stakes so high, the norm of treating like cases alike is compelling here. The same impulse that lies behind the creation of the sentenc-

can even charge them in civil court with violating the law. But it can't drag anybody off to prison. To that end, the SEC's enforcement division must work with federal and state prosecutors—a game that often turns into weak cop/bad cop.

¹³⁴ Cf. Adler & Lord, *supra* note 131, at 812 (making a similar argument for EPA authority to prosecute environmental crimes).

¹³⁵ While this is the dominant concern, the threat of overzealousness does not come solely from the agency. See Herz, *supra* note 130, at 708-09. It is sometimes argued that criminal prosecutions of regulatory offenses have gotten out of hand precisely because they are pursued by individual prosecutors (often with other political ambitions) rather than by the expert agency operating in a transparent and even-handed manner. See, e.g., Susan Geiger & Elizabeth Fleming, *The Criminalization of the Regulatory Process*, 10 METROPOLITAN CORP. COUNCIL 19 (2002).

¹³⁶ See *supra* notes 106-07 and accompanying text.

ing guidelines, which were supposed to eliminate disparities in the sentencing of similar defendants who had committed similar crimes, of course applies to the criminal enforcement regime generally. Fairness and consistency are inescapably enhanced by centralization. The SEC might overemphasize securities prosecutions at the expense of other criminal enforcement priorities.

The final standard argument for DOJ litigating authority is that the agency's substantive expertise is outweighed by the department's litigation expertise. In a petition for review of an agency regulation, the agency lawyer's familiarity with the details and history of statute, regulation, and overall regulatory scheme are an important advantage that litigating experience does little to counterbalance. In the criminal setting, however, the situation is just the opposite. There is a separate litigator's skill, wholly independent of the particular substantive law violated, in criminal prosecutions—more so than in any other area of litigation. As many have noted, environmental attorneys learned this the hard way in the early 1980s.¹³⁷ Technical environmental expertise is much less important. Indeed, if one really needs the highly specialized understanding of the statutes and regulations found only in the agency in order effectively to prosecute a case, it is surely a case that should not have been brought as a criminal prosecution in the first place.

One final point about expertise. DOJ also claims a sort of "expertise" in its supposed neutrality and objectivity. As a general proposition this is a valid but limited point. However, it has some force in the criminal setting. Regulatory enforcement is multi-tiered; it almost never *begins* with a criminal prosecution. If a matter has reached that stage, it is almost always because the defendant is a repeat violator, or particularly recalcitrant, and administrative efforts to achieve compliance have failed. By this point, the agency and the defendant know each other. The dispute can easily become personal. Again, if the concern is excessive prosecutions, that concern would be especially strong when the prosecutor is angry at the defendant and has a personal stake in the prosecution. Turning to a new attorney outside the agency is therefore an important protection.

¹³⁷ See, e.g., Lazarus, *supra* note 18, at 2460-61; Starr, *supra* note 16, at 907. The usual example of an EPA attorney in over his head is *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979), in which the EPA lawyer's appearance before the grand jury as both attorney and witness resulted in the dismissal of the indictment. See also DOJ INTERNAL REVIEW, *supra* note 16; Lazarus, *supra* note 18, at 2460-61 n.240; Starr, *supra* note 16, at 906.

D. Supreme Court Litigation

Supreme Court litigation is another area where centralization of litigation authority makes sense.¹³⁸ With the Supreme Court hearing only a handful of the thousands of cases that agencies are a party to each year, the executive is well served by the current system. In particular, Solicitor General control of litigation helps the government in three distinctive ways. First, as the Court recognized in 1988, "[w]ithout the centralization of the decision whether to seek certiorari, [we] might well be deluged with petitions from every federal prosecutor, agency, or instrumentality."¹³⁹ More to the point, agencies (focusing on their regulatory agenda) are likely to overestimate both the doctrinal and practical significance of lower court defeats. Consequently, if agencies could petition the Court for certiorari, there would be a dramatic increase in the number of petitions. Were this to happen, the Court could not give special deference to petitions for certiorari filed by government agencies. In contrast, the Justices typically grant certiorari in roughly seventy percent of the cases that the Solicitor General presents to the Court (as compared to a five percent success rate for private litigants).¹⁴⁰ Agencies therefore are unlikely to benefit from a decentralized system in which they need to convince the Justices that their case is cert-worthy; instead, agencies may stand a better chance of securing Supreme Court review by participating in the current system.

Second, since no agency regularly appears before the Court, agencies cannot replicate the experience and talents of the Solicitor General. By centralizing Supreme Court litigation in a single office, the Solicitor General regularly recruits the best and the brightest, who then gain experience that sets them apart. When it comes to oral arguments, brief writing, etc., Solicitor General lawyers have an advantage over lawyers who rarely participate in Supreme Court litigation. Finally, Solicitor General lawyers, like the Justices themselves, are likely to have a generalist perspective, to focus on Supreme Court precedent, and to emphasize a case's broader ramifications. The result of all this is that Solicitor General lawyers are extremely effective advocates.¹⁴¹

¹³⁸ As the Court itself is wholly convinced. See *supra* note 58 and cases cited therein.

¹³⁹ *United States v. Providence Journal Co.*, 485 U.S. 693, 706 (1988).

¹⁴⁰ See SALOKAR, *supra* note 41, at 25.

¹⁴¹ We do not mean to suggest that agency lawyers would not do reasonably well before the Court. Indeed, independent agency lawyers who have argued cases before the Court have done nearly as well as Solicitor General lawyers. See Devins, *supra* note 11 (explaining why the argument for Solicitor General control of independent agency litigation is overstated).

Third, the costs and benefits of a Supreme Court decision are "larger for the federal government than for other litigants."¹⁴² The Supreme Court does not limit itself to correcting the mistakes of lower courts; instead, Supreme Court decisions have greater "scope and scale" than lower court decisions and, as such, "are likely to affect agencies, companies, or individuals not parties to the original suit."¹⁴³ For this reason, the government must exercise great care in deciding which cases to ask the Court to hear. Since any Supreme Court decision is likely to cut across agencies, the Solicitor General has a strong incentive to manipulate the Court's docket in ways that favor the government.¹⁴⁴ Needless to say, such manipulation can only be managed by a centralized gatekeeper.

E. Civil Litigation

In contrast to criminal prosecutions and litigation before the Supreme Court, in the civil setting in the lower courts the arguments in favor of DOJ litigating authority are significantly more dilute. Indeed, in two settings we think they may be outweighed by the agency's need to develop an effective and coherent enforcement regime and agency attorneys' greater familiarity with the relevant law and regulations.

Some civil cases, however, are best left in the hands of DOJ. First, agencies are sometimes sued for violating a statute/regulation as to which they have no subject matter expertise. Examples include employment discrimination, labor, and worker safety. Here, the issue cuts across all of government, so there may be significant costs of an agency defeat. Here, DOJ centralization makes sense. DOJ is better positioned than the agency to develop expertise. In particular, DOJ can have a group of attorneys that focus on one of these issues; agencies, in contrast, will not handle enough of these cases to develop that type of expertise. Moreover, there is significant risk of spillover costs.

Second, for similar reasons, DOJ centralization makes sense in cases involving FOIA, the Sunshine Act, and other cross-cutting statutes. If a case focused on only one of these cross-cutting statutes, DOJ should handle it. On the other hand, these types of issues might arise in a case that is otherwise best handled by agency lawyers. When that happens, DOJ should be able to screen the relevant portions of briefs and other filings. Moreover, DOJ should prepare a litigation manual specifying what can and cannot be argued in court.

¹⁴² Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391, 402 (2000).

¹⁴³ *Id.* at 397.

¹⁴⁴ See generally *id.* (supporting the claim that the Solicitor General has such incentive).

Third, in cases involving constitutional challenges to a statute or regulation, DOJ should handle the defense. In critical respects, Congress is the real client in these cases. This is obviously true when there is a direct challenge to a statute.¹⁴⁵ But it is often also true in constitutional challenges to agency regulations; for example, these challenges sometimes turn on a court's view of whether Congress would delegate to an agency the power to craft a regulation that raises serious constitutional questions.¹⁴⁶ Also, there are significant spillover costs in constitutional cases, both Congress and other agencies must navigate constitutional rulings when pursuing their legislative/regulatory agendas.

Finally, since constitutional cases cut across all of government, DOJ has more expertise than agency lawyers. Of course, it may be that a constitutional issue is raised in a case that otherwise should be handled by agency lawyers. When this happens, DOJ should screen both filings and oral arguments.

In cases more directly based in an agency's regulatory program, however, we believe it would make sense to shift litigating authority to the agency. First, when an agency regulation is challenged (almost always, on the administrative record in a Court of Appeals), agency attorneys will have important advantages over DOJ attorneys. They will be more familiar with the specifics of the regulation and its development, as well as the surrounding statutory scheme. An on-the-administrative-record review of an agency rule is likely to involve complex legal questions requiring familiarity with the agency's programs and the history of the rule, and is less likely to turn on knowing the tricks of the litigation trade. To be sure, in many settings intimate familiarity can be a disadvantage in litigation: the case must be made to a generalist (the judge), not another specialist; the lawyer's personal investment in the action being defended can cloud his

¹⁴⁵ For this very reason, DOJ treats constitutional challenges to federal statutes differently than other types of cases. In particular, DOJ claims that it will defend federal statutes whenever a good faith argument can be advanced in support of the statute. See Joshua I. Schwartz, *Two Perspectives on the Solicitor General's Independence*, 21 LOY. L.A. L. REV. 1119, 1155 (1988) ("The constitutionality of acts of Congress is to be defended in all cases, unless no professionally respectable argument can be made in defense of the statute."); Seth Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1088 (2001). For additional discussion, see Neal Devins, *Politics and Principle: An Alternative Take on Seth P. Waxman's Defending Congress*, 81 N.C. L. REV. (forthcoming June 2003) (suggesting that politics and ideology may enter into the Solicitor General's decision to defend the constitutionality of federal statutes).

¹⁴⁶ See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 222 (1991) (Stevens, J., dissenting) ("In a society that abhors censorship and in which policymakers have traditionally placed the highest value on the freedom to communicate, it is unrealistic to conclude that statutory authority to regulate conduct implicitly authorized the Executive to regulate speech."); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (assuming Congress did not want to delegate the power to make rules interfering with basic human liberties).

judgment and/or make him too unwilling to yield; the lawyer's personal commitment and confidence in the challenged regulation may blind him to pitfalls or weaknesses. These concerns are very real. However, they are relatively weaker in the challenge to a regulation than in the enforcement setting. Moreover, in a defensive case, the deed is done; the regulation has been promulgated, now it needs the best defense. DOJ virtually never declines to defend regulations, so its much vaunted capacity to objectively review the case is given no room to operate here.¹⁴⁷ We would transfer the defense of regulations from DOJ to the agency.

Second, there may be some defense cases that are so straightforward that DOJ cannot add value. For example, EPA is frequently sued for failing to issue a regulation within a statutory deadline. It is generally understood that EPA cannot meet all its deadlines, and as a practical matter its regulatory agenda is set in part by what it chooses to work on and in part by what the environmental community decides to sue it over. The legal claims in these cases are utterly straightforward: the statute requires that something be done by a date certain, and EPA has failed to meet the deadline. The plaintiff will win, the only question is the relief. That in turn is a function of how much time the agency can convince the plaintiff or the judge it needs to complete the task. DOJ is not needed for such a negotiation and has little to bring to the table.

Third, we would argue, though with somewhat less confidence, that agency lawyers should decide when to bring, and should then handle, civil judicial enforcement actions in the district courts. Several gains would be had by doing so. The agency's overall enforcement program will be better served by being able to decide when to pursue civil judicial enforcement. Agency lawyers will know the case best, and be familiar with its history. Technical or specialized issues, both legal and scientific, are more likely to be involved than in criminal or Supreme Court cases. The present regime involves significant redundancies and duplication of effort; leaving these actions to the agency would be more efficient. Moreover, while there is some risk that overzealous agency lawyers will pursue weak cases, we think that agencies are likely to develop workable screening procedures.¹⁴⁸ Finally, if allowed to pursue civil judicial enforcement cases, agency

¹⁴⁷ For this very reason, agency lawyers perceive DOJ as having the strongest sense of the agency as client in cases involving challenges to agency regulations. See Herz & Devins, *supra* note 36, at 1366 (discussing EPA attitudes towards the Environmental Defense Section).

¹⁴⁸ It is also noteworthy that DOJ typically pursues referrals. For example, from 1989-1992, DOJ approved anywhere from 73% to 93% of EPA referrals. See David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not be a Crowd When Enforcement Authority is Shared by the United States, the States, and their Citizens*, 54 MD. L. REV. 1552, 1613-14 n.348 (1995).

lawyers will no longer have an incentive to pursue relatively weaker administrative enforcement devices to avoid DOJ.¹⁴⁹ This will allow enforcement alternatives to be chosen on the merits.

The advantages of agency control of civil judicial enforcement in the district courts, however, do not extend to the federal court of appeals. In cases where an agency loses in the trial court, there is reason to question the adequacy of agency screening and, as such, DOJ screening may weed out weak cases and weak arguments. Also, agency expertise is less critical than litigation experience in appeals of civil enforcement cases (especially as compared to challenges to agency rulemaking). Specifically, although sometimes raising specialized issues, appellate enforcement cases typically do not involve highly technical issues.

CONCLUSION

This article has called for a rethinking of DOJ control of government litigation. By highlighting limits in the standard argument, we have shown how the interests of executive agencies (and the President who manages them) might well be served by a modest reconfiguration of lawyering tasks. And while it is unlikely that anyone in Congress or the executive branch will pursue our reform agenda,¹⁵⁰ we do hope that this article will prompt a rethinking of the justifications for centralizing litigation in DOJ. In our view, proponents of DOJ centralization have yet to make their case. That is not to say that they cannot make their case; it is to say that they should take aim at our analysis and explain why—notwithstanding limits in the standard argument—DOJ centralization is sound public policy.

¹⁴⁹ See Herz & Devins, *supra* note 36, at 1369-71.

¹⁵⁰ For a detailed explanation, see Devins & Herz, *supra* note 54.