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## Unitariness and Independence: Solicitor General Control over Independent Agency Litigation

Neal Devins<sup>†</sup>

*With a few exceptions, the Solicitor General controls all aspects of independent agency litigation before the Supreme Court. Solicitor General control of Supreme Court litigation creates a tension between independent agency freedom and the Solicitor General's authority. On the one hand, Solicitor General control provides the United States with a unitary voice before the Supreme Court, and provides the Court with a trustworthy litigator to explicate the government's position. On the other hand, such control may undermine the autonomy of independent agency decisionmaking. In this Article, the author argues for a hybrid model of independent agency litigation in the Supreme Court: so long as there are independent agencies, Congress should allow independent agency self-representation whenever the Solicitor General is unwilling to advocate the agency's interests. Thus, when disagreements between the Solicitor General and an independent agency are irreconcilable, the independent agency should be allowed to go its own way. The author concludes by connecting the issue of Solicitor General-independent agency relations to the larger debate over the unitary executive, arguing that the unitary executive is the only theory which supports Solicitor General control of independent agency litigation. In other*

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words, to the extent that there is dissatisfaction with limiting Solicitor General control of Supreme Court litigation, that dissatisfaction speaks to the elimination of independent agency authority to reach decisions at odds with the executive.

#### INTRODUCTION AND OVERVIEW

Policymaking by government officials who cannot be removed by the President appears to be a secure fixture in the modern administrative state. Reagan and Bush Administration efforts to subordinate independent agency heads to a unitary executive have clearly failed.<sup>1</sup> In contrast to such efforts, the Clinton Administration refuses to wave the banner of unitariness.<sup>2</sup> While much of the war over unitariness appears over, unitariness-independence battles will nonetheless persist. This Article will focus on one of these battles, namely the battle for independent agency representation before the United States Supreme Court.

An essential attribute of independent agency autonomy is an agency's power to manage its own litigation and to represent itself in court. Before the Supreme Court, however, the Solicitor General, with some notable exceptions, controls all aspects of independent agency litigation, including the power to seek certiorari. The exercise of such control, as one Solicitor General recognized, "to some extent curtail[s]" agency freedom "[d]espite the self-restraint which most Solicitors General exercise."<sup>3</sup>

This Article examines implications of the tension between independent agency freedom and the Solicitor General's authority to control independent agency litigation. Through an examination of court filings, legislative hearings, and approximately fifty personal interviews with current and former officials of various independent agencies (commissioners, general counsel, and line attorneys),<sup>4</sup> the Department of Justice (political appointees and

1. See generally Neal Devins, *Tempest in an Envelope: Reflections on the Bush White House's Failed Takeover of the U.S. Postal Service*, 41 UCLA L. REV. (forthcoming April 1994); Geoffrey P. Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 GEO. WASH. L. REV. 401 (1989); Symposium, *Executive Branch Interpretation of the Law*, 15 CARDOZO L. REV. 21 (1993).

2. See *Bill Clinton and Administrative Law*, ADMIN. L. NEWS (ABA/Section of Administrative Law and Regulatory Practice), Fall 1992, at 1, 9.

3. Robert L. Stern, *The Solicitor General's Office and Administrative Agency Litigation*, 46 A.B.A. J. 154, 218 (1960). Stern served as Acting Solicitor General from 1952-1954. *Id.* at 156.

4. Independent agency officials interviewed include the following: Glen Robinson, Former Commissioner, Federal Communications Commission (Aug. 20, 1992); Paul Gonson, Solicitor, Securities and Exchange Commission (Sept. 2, 1992); Mark Fowler, Former Chairman, Federal Communications Commission (Sept. 3, 1992); Dan Goelzer, Former General Counsel, Securities and Exchange Commission (Sept. 3, 1992); Jeff Lubbers, Research Director, Administrative Conference of the United States (Sept. 3, 1992); Daniel Armstrong, Associate General Counsel, Federal Communications Commission (Sept. 4, 1992); Bruce Fein, Former General Counsel, Federal Communications Commission (Sept. 9, 1992); Diane Kilory, Former General Counsel, Federal Communications Commission (Sept. 10, 1992); Charles Shanor, Former General Counsel, Equal Employment Opportunity Commission (Sept. 16, 1992); Paul Brenner, Attorney, Equal Employment

careerists within the Solicitor General's office, the Office of Legal Counsel, and the Attorney General's office),<sup>5</sup> and congressional committees (counsel and staffers),<sup>6</sup> this Article analyzes the complex interactions between independent agencies and the Solicitor General and proposes changes in the basic nature of those interactions. The interactions extend well beyond the resolution of litigation strategy disputes. They also speak to an independent agency's understanding of its freedom from Executive Branch control and the Solicitor General's perception of whose interests he should represent before the Supreme Court.

The division of responsibility between independent agencies and the Solicitor General raises the spectre of a Solicitor General power grab of independent agency prerogatives. Despite the tension inherent in this relationship, independent agency officials and attorneys in the Solicitor General's office seem relatively content with the present arrangement. Agency officials tend to emphasize the benefits of the relationship with the Solicitor General attorneys: skillful representation; their familiarity with the Court; and their respect for, if not deference toward, agency interests. In exchange for these benefits, most agencies are willing to have their priorities occasionally undervalued.

Solicitor General attorneys likewise emphasize the quality of their representation. Moreover, most of these attorneys perceive that the Solicitor General provides a unitary voice for the United States before the Supreme

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Opportunity Commission (Sept. 22, 1992); Johnny J. Butler, Former Acting General Counsel, Equal Employment Opportunity Commission (Sept. 22, 1992); Peter Pitch, Former Chief of Staff, Federal Communications Commission (Sept. 22, 1992); Vince Blackwood, Attorney, Equal Employment Opportunity Commission (Sept. 23, 1992); Jerry Cummings, Associate General Counsel, Federal Trade Commission (Oct. 8, 1992); Ernie Eisenstadt, Associate General Counsel, Federal Trade Commission (Oct. 8, 1992); Calvin Collier, Former Chairman and Former General Counsel, Federal Trade Commission (Oct. 9, 1992); Rosemary Collyer, Former General Counsel, National Labor Relations Board (Jan. 18, 1993); Norton Come, Head of National Labor Relations Board Supreme Court Litigation Division (Jan. 18, 1993). Through my work as a consultant to the U.S. Postal Service, I have also spoken with numerous agency officials and members of the Postal Service's Board of Governors about Department of Justice control of independent agency litigation.

5. Department of Justice officials interviewed include the following: Ken Geller, Former Deputy Solicitor General (Sept. 2, 1992); Carter Phillips, Former Assistant to the Solicitor General (Sept. 3, 1992); Bruce Fein, Former Assistant to the Attorney General (Sept. 9, 1992); Douglas Kmiec, Former Assistant Attorney General, Office of Legal Counsel (Sept. 10, 1992); Toni Merrill, Former Deputy Solicitor General (Sept. 16, 1992); Lawrence Wallace, Deputy Solicitor General (Sept. 22, 1992); Terry Eastland, Former Assistant to the Attorney General (Sept. 23, 1992); John McGinnis, Former Deputy Assistant Attorney General, Office of Legal Counsel (Sept. 23, 1992); Drew Days, Former Assistant Attorney General, Civil Rights Division (Sept. 24, 1992); Mike Carvin, Former Deputy Assistant Attorney General, Civil Rights Division (Oct. 14, 1992).

6. Congressional interviews include the following: Toni Cook, Staff Member-Communications, Senate Commerce Committee (June 2, 1992); Lisa Gursky, Telecommunications Policy Analyst, House Telecommunications Subcommittee (June 2, 1992); Gina Keeny, Staff Member-Communications, Senate Commerce Committee (June 9, 1992); Colin Crowell, Staff Member, House Telecommunications Subcommittee (Sept. 25, 1992); Louis Fisher, Senior Specialist in Government, Congressional Research Service (Sept. 30, 1992); Mort Rosenberg, Senior Specialist in Law, Congressional Research Service (Sept. 30, 1992).

Court and that this voice serves both the government and the Court. The government is served by having its legal arguments skillfully coordinated; the Court is served by having a trustworthy litigator explicate the government's position and screen agency litigation for cases that are likely to meet the Court's standards for granting certiorari.

While somewhat awkward, the current system does allow for a reasonable degree of cooperation between independent agencies and the Solicitor General. Independent agencies typically have the final say in litigation until a case reaches the Supreme Court. Moreover, the Solicitor General usually defends the agency's position when a case is before the Supreme Court. When he does not, the agency is often allowed to present its views through separate filings. Indeed, even when the Solicitor General refuses to seek certiorari at an independent agency's behest, the agency will typically have the opportunity to relitigate the issue in another case. In such cases, Supreme Court adjudication is merely delayed, not foreclosed.

The contentment that seemingly characterizes Solicitor General-independent agency relations is somewhat surprising given the debate in recent years concerning the allegiance the Solicitor General owes the Executive Branch. Catalyzed by Solicitor General Charles Fried's July 1985 "abortion brief"<sup>7</sup> calling for the overturning of *Roe v. Wade*,<sup>8</sup> this debate pits advocates of an independent Solicitor General against proponents of a unitary Department of Justice.<sup>9</sup> This controversy, however, has not affected independent agency attitudes nor has it prompted Congress to reconsider Solicitor General control over independent agency litigation.

Unfortunately, contentment with the current arrangement disguises its shortcomings. The claim that conflict between the Solicitor General and independent agencies rarely surfaces is misleading. On an agency-by-agency basis, most conflicts are worked out. Nonetheless, the volume of public disputes between the Solicitor General and independent agencies is

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7. See Brief for the United States as Amicus Curiae in Support of Appellants, *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (No. 84-495). Fried served as Solicitor General from 1985-1989. The politics surrounding this brief are discussed in LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 135-54 (1987) and in CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 33-35 (1991). For a critique of Fried's participation in abortion cases, see Joshua I. Schwartz, *The President's Lawyer as Frie(n)d*, 60 GEO. WASH. L. REV. 1081, 1119-24 (1992) (reviewing FRIED, *supra*).

8. 410 U.S. 113 (1973).

9. Compare, e.g., CAPLAN, *supra* note 7, at 255-77 (arguing that the Reagan Administration's aggressive pursuit of its agenda compromised the Solicitor General's traditional independence and its special relationship with the Supreme Court) with John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 801-09 (1992) (reviewing FRIED, *supra* note 7) (describing the Solicitor General as a duty-bound subordinate of the White House) and Roger Clegg, *The Thirty-Fifth Law Clerk*, 1987 DUKE L.J. 964 (reviewing CAPLAN, *supra* note 7) (critiquing Caplan's view that the Solicitor General should be a servant of the Court and his view that the Reagan Administration eroded the Solicitor General's independence). See generally Symposium, *The Role and Function of the United States Solicitor General*, 21 LOY. L.A. L. REV. 1047 (1988).



far from insignificant. Substantive conflicts arise every year in cases argued before the Court. It is atypical but not unusual to see a Solicitor General brief that the affected agency refuses to join or an agency brief at odds with the "Brief for the United States." More significantly, the Solicitor General will sometimes refuse to seek certiorari or will affirmatively oppose certiorari because he disagrees with an independent agency on the merits.

Disputes are also understated because conflict resolution presupposes that independent agencies are well served by forgoing the power to present cases before the Supreme Court in order to benefit from the Solicitor General's counsel. By not allowing the agency to make the certiorari petition decision itself, the present arrangement often gives the Solicitor General the last word on judicial resolution of policy disputes between independent agencies and the Executive Branch.<sup>10</sup> The Solicitor General's power to trump independent agency desires and the conflict it creates are the starting points for analyzing Solicitor General-independent agency relations.

The current decisionmaking arrangement might make sense if the Solicitor General were viewed as an independent advocate who, in the words of Solicitor General Francis Biddle (1940-1941), is "responsible neither to the man who appointed him nor to his immediate superior . . . [and has] no master to serve except his country."<sup>11</sup> If the Solicitor General had such autonomy, Executive Branch entities as well as independent agencies would give up control of Supreme Court litigation to an omniscient "Celestial General."<sup>12</sup> However, like post-Watergate efforts to convert the Department of Justice into an independent agency,<sup>13</sup> such Solicitor General independence unconstitutionally infringes on the President's power to "take Care that the Laws be faithfully executed."<sup>14</sup>

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10. On this point, see Susan M. Olson, *Challenges to the Gatekeeper: The Debate over Federal Litigating Authority*, 68 JUDICATURE 70, 86 (1984) ("Centralized litigating authority means the choice of the Attorney General [rather than the courts] . . . as the proper place for the resolution of such [governmental] conflicts."); Robert L. Stern, "Inconsistency" in *Government Litigation*, 64 HARV. L. REV. 759, 769 (1951) ("[D]etermination [of intragovernmental disputes] by the judiciary is often more satisfactory than an effort by the Department of Justice to force its own views on the disagreeing agency by refusing to present the agency's position to the courts.").

11. FRANCIS BIDDLE, IN BRIEF AUTHORITY 97-98 (1962).

12. See CAPLAN, *supra* note 7, at 171 (noting that "Celestial General," a nickname coined by Justice Louis Brandeis, was "an emblem of the Solicitor General" until the onset of the Reagan Administration).

13. See *Removing Politics from the Administration of Justice: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974) [hereinafter *Politics Hearings*].

14. U.S. CONST. art. II, § 3. Specifically, by placing control of all federal legal policymaking before the Supreme Court in an official outside of the Executive Branch, presidential authority would be so severely undermined that the president would impermissibly be deprived of his authority to "faithfully execute" the laws.

In addition, this vision reflects little of the reality and limitations of Solicitor General advocacy, including occasional efforts by the White House and the Attorney General to circumscribe the Solicitor General's authority. While he is "not the pamphleteer general," as Rex Lee (1981-1985) aptly observed, the Solicitor General serves "the President's broader agenda" through "the special status that [he] enjoy[s]."<sup>15</sup> The Solicitor General's "special status" derives neither from his independence nor from his supposed role as an officer of the Court. His "special status" is a by-product of an often brilliant juggling act, rooted in tradition and a desire to maximize influence, which is responsive to the competing demands of the White House, agencies and departments, and the Supreme Court. However, the Solicitor General is the Executive Branch's advocate before the Supreme Court, and his loyalty properly belongs to the Attorney General and the President.

Solicitor General power over independent agencies would also make sense if the government presented itself as a unitary concern before the judiciary. But, for several reasons, this is not the case. First, independent agencies often square off with each other and with the Department of Justice in the lower federal courts. Congress authorizes this arrangement, and federal judges seem untroubled by it. Second, Congress has granted some agencies independent authority to litigate cases before the Supreme Court free of Solicitor General control. In addition, the Solicitor General occasionally allows independent agencies, as well as executive departments and agencies, to file briefs opposing his views. Indeed, on rare occasions, the Court has adjudicated lawsuits by independent agencies against the United States. While the Court may not prefer this arrangement, it does not stand in the way of such divided presentations.

For better or for worse, independent agencies are empowered to make policy at odds with White House priorities. To allow an Executive Branch official to control both the decision to seek certiorari and the arguments presented before the Supreme Court is to risk that power. Congress, of course, can solidify independent agency autonomy by extending independent agency litigating authority to Supreme Court matters. Alternatively, Congress may prefer that independent agency officials not air their disputes with each other and the Executive Branch in court. By making government litigation the Department of Justice's exclusive domain, Congress could nullify independent agency legal policymaking.

This Article will argue that so long as there are independent agencies, Congress should expand independent agency litigating authority in most instances. Legal policymaking is a critical feature of independent agency decisionmaking; full control of litigating authority is, therefore, essential to independent agency autonomy. That authority should extend to the

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15. Rex E. Lee, *Lawyer for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595, 600 (1986).

Supreme Court. At the same time, the Solicitor General should continue to work with independent agency counsel, advising agencies on the "cert-worthiness" of cases and participating in cases where the Solicitor General and the agency are of the same mind. When disagreements between the two are irreconcilable, an independent agency should be allowed to go its own way.

The Solicitor General would not be harmed by this arrangement. In most cases, the independent agency would cooperate with the Solicitor General. When differences could not be reconciled, the Solicitor General would avoid the awkward position of either frustrating agency interests by not seeking certiorari or authorizing the agency to take a position at odds with the "United States." Moreover, when an independent agency chose to stake out its own position, the Solicitor General would be free to share his views with the Court without the encumbrance of shooting his putative client in the foot.

Finally, the Court would not be burdened by this expansion of independent agency litigating authority. It would continue to benefit from the Solicitor General's certiorari recommendations and substantive arguments. Indeed, to ensure Solicitor General participation, Congress could make the Solicitor General a statutory litigant in all government litigation before the Supreme Court. The slight increase in dual filings that may result should not bother the Court since dual filings are already a well-accepted practice. The Court is sufficiently sophisticated to sort out the varying interests of the Solicitor General and independent agencies.

This analysis perhaps begs the question of whether we should have independent agencies. The more troubling one finds one part of the government opposing another part of the government in court, the more likely one prefers independent agencies to be replaced by executive agencies,<sup>16</sup> and conversely, the less troubling, the less likely. By examining the complexities of independent litigating authority, this Article provides some guidance to the question of whether independent agencies should exist.

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16. Congress, nonetheless, may specify that executive agencies control their own cases, rather than having such control rest with the Department of Justice. Congress may also be able to authorize executive agencies to bring suit against other parts of the Executive Branch. See generally Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991) (arguing that disputes between executive agencies sometimes present justiciable controversies and that standards for measuring the justiciability of executive agency disputes should be the same as for disputes involving independent agencies). The range of such authority is subject to question. See *infra* Part II.C.1. It is also unclear whether government attorneys have an ethical duty to heed Attorney General desires. See Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1298 (1987) [hereinafter Miller, *Government Lawyers' Ethics*] (supporting the premise that an agency attorney owes a general ethical duty to the Attorney General but arguing that the primary ethical duty is owed to the officer with the power of decision over an issue). However, it is clear that an individual who dislikes independent agencies is likely to prefer centralized control of government litigation in the hands of the Attorney General. See, e.g., Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 96-97 [hereinafter Miller, *Independent Agencies*] (attacking independent agencies as "anomalous institution[s] created without regard to the basic principle of separation of powers").



The remainder of this Article will fill in the details of the argument outlined above. Part I will describe the jerry-rigged structure that defines the respective litigating authority of independent agencies and the Department of Justice. Part II will examine the saliency of Solicitor General control of governmental litigation. Specifically, the Solicitor General's responsibility to the Executive Branch and the risk of significant disputes between the Solicitor General and independent agencies suggest that such control significantly limits independent agency autonomy. The virtues of Solicitor General representation do not ameliorate these problems; instead, these virtues speak to Solicitor General participation in—not control of—independent agency litigation. Finally, Part III will connect the issue of Solicitor General-independent agency relations to the larger debate over the unitary executive. Specifically, Part III will argue that the unitary executive is the only theory which truly supports Solicitor General control of independent agency litigation.

## I

### GOVERNMENT ADVOCACY BEFORE THE SUPREME COURT

The government does not always speak as a single voice before the Supreme Court. Cabinet-level departments and executive agencies sometimes air their disputes with each other, Congress, and independent agencies before the Supreme Court. Conflicts inevitably arise among these players. Congress, especially during times of divided government, cannot reasonably expect the Executive Branch to defend vigorously all legislative priorities in court. Intramural disputes within the Executive Branch are also commonplace. Department and executive agency heads, while appointed and subject to removal by a "unitary" President, rarely fall in line uniformly with White House attempts to coordinate a centralized vision of the President's public policy objectives.<sup>17</sup> These individuals have different visions of the social good, serve different constituency interests, and labor under different oversight committees. Independent agencies are even more prone to find themselves in the midst of conflict. Aside from facing varying constituency interests and oversight committee pressures, agency commissioners, who can only be fired for cause, are sometimes members of a different political party than the President and are often appointed by the sitting President's predecessor.<sup>18</sup>

While the existence of conflicts and disputes is not surprising, the volume of intragovernmental disputes that are publicly aired before the federal

17. See Neal Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723, 1749-63 (1991) (reviewing HUGH D. GRAHAM, *THE CIVIL RIGHTS ERA* (1990)) (discussing political and institutional obstacles that limit the President's ability to control agencies in seeking coordinated policy strategies).

18. For background discussion of intragovernmental constraints facing independent agencies, see PETER L. STRAUSS, *AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 51-92 (1989); Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979).

courts, including the Supreme Court, is noteworthy. Through a combination of politics, comity, and statutory right, the government often appears as a conglomeration of competing interests rather than a single, unified voice. This is evident in the following passage from Carter Attorney General Griffin Bell's oral argument in *Tennessee Valley Authority v. Hill*.<sup>19</sup>

ATTORNEY GENERAL BELL: . . .

. . . .

In this unusual case, as Attorney General I agreed that the Secretary of Interior could take a position opposite our position in this Court.

. . . .

QUESTION: Mr. Attorney General, with regard to your statement a moment ago about other agencies of the Government taking their own position here [supporting the Department of Commerce and the Tennessee Valley Authority] contrary to what the Solicitor General might be, I indicated that Congress has expressly authorized it in some instances.

ATTORNEY GENERAL BELL: Right.

QUESTION: And I just suggested that this afternoon or tomorrow we're hearing a case in which the Federal Communications Commission is taking a position flatly contrary to the Department of Justice on a case. It's not a rarity.

"Unusual" but "not a rarity"—that is the best way to describe intragovernmental conflict before the federal courts.

#### A. Attorney General Control of Government Litigation

The Attorney General's authority to manage government litigation is the norm, not the exception. Congress has specified that, "[e]xcept 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."<sup>20</sup> In principle, this hierarchical structure places the Attorney General, who answers only to the President, above all government litigants both within and outside the Department of Justice. The White House and Department of Justice endorse this conception of the Attorney General's role because it enables the government to speak as a unified voice in court, and it places the President or his Cabinet-level surrogate, the Attorney General, in charge of that voice. The realities of Attorney General control, however, diverge from this hierarchical scheme. Congress' power to make exceptions to Department of Justice

19. Oral Argument Transcript at 3, 32-33, *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (No. 76-1701).

20. 28 U.S.C. § 516 (1988).

control has severely eaten into the Attorney General's role as chief litigator for the United States. Through these exceptions, Congress protects its prerogatives from Department of Justice centralization by transferring litigating authority to an agency or department that is more likely to endorse congressional preferences.

Legislative grants of independent litigating authority ensure that a significant number of intragovernmental disputes are publicly aired before the federal courts. Congressional exceptions to Department of Justice control, moreover, lack a coherent pattern.<sup>21</sup> Some entities, including the Federal Election Commission,<sup>22</sup> the Senate's Office of Legal Counsel,<sup>23</sup> and special prosecutors appointed under the Ethics in Government Act,<sup>24</sup> have independent litigating authority on all matters before all courts; other entities (e.g., the Department of Agriculture,<sup>25</sup> the Federal Trade Commission<sup>26</sup>) can litigate independently before all courts but only on some matters. A second group of entities has litigating authority that extends only to some courts, either on all matters (e.g., the Securities and Exchange Commission,<sup>27</sup> the Equal Employment Opportunity Commission,<sup>28</sup> the Federal Energy Regulatory Commission,<sup>29</sup> the Internal Revenue Service,<sup>30</sup>) or some matters only (e.g., the Environmental Protection Agency,<sup>31</sup> the Department of Health and Human Services<sup>32</sup>). Other entities have independent litigating authority on some matters before all courts and on other matters before some courts (e.g., the Federal Communications Commission,<sup>33</sup> the Federal Maritime Commission<sup>34</sup>). Finally, ambiguities in statutory language make unclear both the scope and sweep of independent litigating authority for entities such as the U.S. Postal Service,<sup>35</sup> the National Labor Relations Board,<sup>36</sup> and the Tennessee Valley Authority.<sup>37</sup> Intragovernmental conflict, therefore, manifests itself in countless different forms depending on the issue and the court.

21. See Olson, *supra* note 10, at 73 n.12 (listing 35 federal entities that possessed some modicum of independent litigating authority in 1982).

22. 2 U.S.C. §§ 437c(f)(4), 437d(a)(6), (b) (1988); 26 U.S.C. §§ 9010(a), 9040(a) (1988).

23. 2 U.S.C. §§ 288b, 288c, 288d, 288f (1988).

24. 28 U.S.C. § 594(a) (1988).

25. 7 U.S.C. § 228a (1988); 28 U.S.C. § 2350(a) (1988).

26. 15 U.S.C. § 56 (1988).

27. 15 U.S.C. §§ 77t(b), (c), 78t(c), (d), (e), 78u(c), (d), (e) (1988).

28. 42 U.S.C. §§ 2000e-4(b), -5(f)(1), -5(f)(2), -5(i), -6 (1988).

29. 15 U.S.C. § 717s (1988); 28 U.S.C. § 518 (1988 & Supp. IV 1992); 42 U.S.C. 7171(i) (1988).

30. 26 U.S.C. § 7452 (1988).

31. 15 U.S.C. §§ 2604(e)(2)(a), (f)(3)(a)(ii), 2606(a), (c) (1988 & Supp. IV 1992); 33 U.S.C. § 1366 (1988); 42 U.S.C. §§ 300j-9(f), 7605(a) (1988).

32. 42 U.S.C. § 405(l) (1988).

33. 47 U.S.C. § 154(f)(1) (1988).

34. 28 U.S.C. § 2350 (1988); 46 U.S.C. app. § 1705(k) (1988).

35. 39 U.S.C. §§ 409(d), 3628 (1988).

36. 29 U.S.C. §§ 154(a), 155, 160(j), (l), 161(2) (1988).

37. For a discussion of TVA litigating authority, see *infra* note 104.

### 1. *From Decentralization Towards Centralization*

The patchwork nature of governmental representation dates back to the nation's beginnings.<sup>38</sup> Before the Department of Justice was established in 1870, the Attorney General's role was to advise the President and Cabinet officers and to represent the United States in the Supreme Court.<sup>39</sup> Government litigation was principally the province of solicitors who directly or through retained outside counsel represented executive departments and agencies in court.<sup>40</sup> This decentralized scheme, while giving way somewhat to the Department of Justice after its organization in 1870, persisted because departmental solicitors continued to wield enormous power through custom and/or statutory authorization.<sup>41</sup>

In 1933, a centralized Department of Justice began to wrestle control from departmental solicitors. That year, President Roosevelt issued an executive order placing control of governmental litigation in the Department of Justice.<sup>42</sup> The executive order was a mixed success. Congressional action empowering governmental departments and agencies, as well as agency efforts to side-step the executive order, limited its effectiveness.<sup>43</sup> In 1955, the Commission on Organization of the Executive Branch of the Government (the Hoover Commission) again called for the recognition of the Department of Justice "as the chief law office of the Government."<sup>44</sup> Congress instead authorized decentralization by providing independent agencies as well as executive departments and agencies with independent litigating authority.<sup>45</sup>

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38. For histories of Department of Justice litigating authority, see Olson, *supra* note 10, at 75-78; see also DONALD L. HOROWITZ, *THE JUROCRACY: GOVERNMENT LAWYERS, AGENCY PROGRAMS, AND JUDICIAL DECISIONS* 12-20 (1977); LUTHER A. HUSTON, *THE DEPARTMENT OF JUSTICE* (1967); DANIEL J. MEADOR, *THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE* 4-24 (1980); John F. Davis, *Department of Justice Control of Agency Litigation* 1-17 (Aug. 14, 1975) (unpublished report prepared for the Administrative Conference of the United States) (focusing on civil litigation).

39. See MEADOR, *supra* note 38, at 6; Olson, *supra* note 10, at 75.

40. See MEADOR, *supra* note 38, at 7-9.

41. In fact, at first, Department of Justice attorneys both came from and continued to be housed in the offices of the executive department and agency Solicitors. See Davis, *supra* note 38, at 4. By 1913, moreover, the Departments of Agriculture, Commerce, Interior, Labor, State, and Treasury all maintained separate Solicitor's offices. See *id.*

42. Section 5 of the executive order transferred to the Department of Justice "[t]he function[ ] of prosecuting in the courts of the United States claims and demands by, or offenses against the Government of the United States." Exec. Order No. 6166, § 5 (1933), reprinted in 5 U.S.C. § 901 (1988).

43. See, e.g., Emergency Price Control Act of 1942, ch. 26, § 201, 56 Stat. 23, 29 (granting independent litigating authority to attorneys appointed under § 201) (repealed 1966). See generally PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982) (discussing the Justice Department's litigation control battles with three agencies created after Roosevelt's order: the National Recovery Administration, the Agricultural Adjustment Administration, and the National Labor Relations Board).

44. Davis, *supra* note 38, at 5 (citing U.S. COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, *REPORT ON LEGAL SERVICES AND PROCEDURES* 6 (1955)).

45. See Olson, *supra* note 10, at 76; Davis, *supra* note 38, at 5.



Congress' continued use of decentralizing techniques is to be expected. Decentralization of litigating authority enlarges department and agency responsibility, thereby providing oversight committees greater opportunities to influence agency business.<sup>46</sup> The Department of Justice has nonetheless strengthened its hand in recent years. The Carter Administration, through a 1979 executive order, established a Federal Legal Council to, among other responsibilities, facilitate "coordination and communication among Federal legal offices" in order to "avoid inconsistent or unnecessary litigation by agencies."<sup>47</sup> The Reagan Administration attempted to build upon these efforts, with mixed success, by expanding the Federal Legal Council's size<sup>48</sup> and using Office of Legal Counsel opinions to strengthen Attorney General control of government litigation.<sup>49</sup>

The Carter and Reagan Departments of Justice also advanced centralization objectives through self-serving interpretations of their statutory litigating authority and the litigating authority of other governmental entities. The Carter Department of Justice, for example, rejected Department of State efforts to represent the United States in proceedings before the International Court of Justice.<sup>50</sup> Referring to "the Attorney General's plenary power over governmental litigation," the Department of Justice refused to accept arguments attempting to distinguish domestic from international courts.<sup>51</sup> The Reagan Department of Justice was even more aggressive in its attempts to centralize litigating authority. It openly challenged Equal Employment Opportunity Commission (EEOC) efforts to file an amicus brief before a federal appellate court.<sup>52</sup> The case, *Williams v. New Orleans*,<sup>53</sup> called into question the use of race-conscious hiring goals in the settlement of a statutory employment discrimination lawsuit brought against the city of New Orleans. Although the EEOC is statutorily authorized to represent its interests before lower federal courts, the Department of Justice argued that the EEOC lacked authority to participate in *Williams*.

46. See HOROWITZ, *supra* note 38, at 106-07.

47. Exec. Order No. 12,146, 3 C.F.R. 409, 410 (1980), *reprinted in* 28 U.S.C. § 509 (1988).

48. See Olson, *supra* note 10, at 77.

49. See The Attorney General's Role as Chief Litigator for the United States, 6 Op. Off. Legal Counsel 47, 61-62 (1982) [hereinafter The Attorney General's Role as Chief Litigator] (concluding that, in the absence of contrary legislative directives, "the Attorney General . . . has broad plenary authority over all litigation in which the United States, or its federal agencies or departments, are involved"); Removal of Members of the Advisory Council on Historic Preservation, 6 Op. Off. Legal Counsel 180, 187-88 (1982) (asserting that Congress did not, and could not, create a legislative scheme that allows the Council to sue other executive agencies and thereby skirt the President's supervisory control of the Executive Branch).

50. Litigation Responsibility of the Attorney General in Cases in the International Court of Justice, 4A Op. Off. Legal Counsel 233 (1980).

51. *Id.* at 234.

52. This episode is recounted at *infra* text accompanying notes 243-50. For a more detailed account, see Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 285-98 (1993).

53. 729 F.2d 1554 (5th Cir. 1984).



Specifically, since the EEOC is not authorized to be a party to suits against states and localities, the Department reasoned that the EEOC could not participate as an amicus in such suits.<sup>54</sup>

An even more dramatic example of Department of Justice efforts to strongarm independent agency self-representation occurred during the final days of the Bush Administration. In a dispute before the United States Court of Appeals for the D.C. Circuit between the U.S. Postal Service and the Postal Rate Commission, the Justice Department advised the Postal Service that it could not represent itself in court.<sup>55</sup> Referring to admittedly ambiguous statutory language, the Department argued that disputes between the Postal Service and the Rate Commission should not be decided in court but should instead be brokered within the Executive Branch.<sup>56</sup> In an effort to avoid having a court interpret the statutory language, the Department and later President Bush "direct[ed]" the Postmaster General and the Postal Service's Board of Governors to withdraw from the case.<sup>57</sup> The President went so far as to send a letter to each Postal Service Governor stating that, to ensure compliance with the directive, he would "if necessary exercise [his] authority to remove Governors of the Postal Service."<sup>58</sup> Although a preliminary injunction blocked the threatened removal, and the D.C. Circuit ended this dispute by validating the Postal Service's claim of independent litigating authority,<sup>59</sup> the Bush White House demonstrated its willingness to take any necessary steps to further Department of Justice control of government litigation.

The Bush and Reagan Administrations also went further than the Carter Administration in their pursuit of centralization objectives. The Carter Administration both ceded Congress' grant of independent litigating authority to the Federal Energy Regulatory Commission<sup>60</sup> and signed memoranda of understanding recognizing litigating authority in some departments and agencies within the Executive Branch.<sup>61</sup> In contrast, the Reagan Administration refused legislative initiatives designed to expand the litigating authority of government agencies and departments.<sup>62</sup> Reagan pocket-

54. Devins, *supra* note 52, at 286-88.

55. See Motion of the United States Postal Service For Leave to Appear as a Party on its Own Behalf at 3-4, *Mail Order Ass'n of Am. v. United States Postal Serv.*, 986 F.2d 509 (D.C. Cir. 1993) (No. 91-1058).

56. *Id.* at 8.

57. Memorandum from President George Bush to Postmaster General Marvin Runyon (Dec. 11, 1992).

58. Letter from President George Bush to Bert Mackie, Governor, U.S. Postal Service (Jan. 4, 1993).

59. *Mail Order Ass'n of Am. v. United States Postal Serv.*, 986 F.2d 509 (D.C. Cir. 1993).

60. See COMMITTEE ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATION, S. DOC. NO. 91, 95th Cong., 2d Sess. 61-62 (1977).

61. See Olson, *supra* note 10, at 77-78.

62. President Reagan, however, did approve the 1987 reauthorization of the Ethics in Government Act, which authorized independent counsel prosecutions of executive officials. See LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 146-48, 156-59 (1992).

vetoed the Whistleblower Protection Act of 1988, for example, because it empowered a special counsel to obtain judicial review of Merit Systems Protection Board decisions.<sup>63</sup> Congress dropped this provision and successfully reintroduced the Act in 1989.<sup>64</sup> The Bush Justice Department followed suit, objecting to a proposed Office of Federal Housing Enterprise Oversight with independent litigating authority that was to be established within the Department of Housing and Urban Development.<sup>65</sup>

The Reagan and Bush Administrations also challenged nonstatutory arrangements that executive departments and agencies had worked out with previous administrations. For example, the Reagan Administration vigorously challenged Environmental Protection Agency (EPA) independence. Among other things, it took issue with a 1973 EPA General Counsel opinion<sup>66</sup> supporting EPA enforcement authority against federal facilities. Heads of the Department of Justice's Land and Natural Resources Division and its Office of Legislative Affairs challenged such EPA enforcement both on policy grounds (improperly limiting Executive Branch policy coordination) and constitutional grounds (improperly asking the courts to resolve a nonjusticiable intragovernmental dispute).<sup>67</sup> This controversy emerged again during the Bush Administration in a dispute between the EPA and the Department of Energy. The Bush Department of Justice followed its predecessor's lead and argued that it was inappropriate for the EPA to launch enforcement actions against the Executive Branch without the approval of the Attorney General.<sup>68</sup>

Aggressive pursuit of centralization by the Reagan and Bush Administrations is understandable. These two administrations seriously examined and pursued a hierarchical vision of government. Their belief that the Attorney General was czar over all government litigation was reflected in Department of Justice efforts to limit executive and independent agency autonomy before Congress and the courts. That the Carter

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63. Memorandum of Disapproval for the Whistleblower Protection Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1377 (Oct. 26, 1988). For the president: "The litigation of intra-Executive branch disputes conflicts with the constitutional grant of the Executive power to the President, which includes the authority to supervise and resolve disputes between his subordinates." *Id.* at 1378.

64. See 135 CONG. REC. S2779-81 (daily ed. Mar. 16, 1989) (remarks of Sen. Levin).

65. See Memorandum from American Law Division, Congressional Research Service, to Senate Committee on Banking, Housing, and Urban Affairs (May 4, 1992) (discussing the legal bases for the Department of Justice's objections to establishing an Office of Federal Housing Enterprise Oversight).

66. EPA May Take Action Against Federal Facilities, Op. Gen. Counsel (Sept. 14, 1973), reprinted in *Environmental Compliance by Federal Agencies: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 648-67 (1987) [hereinafter *Compliance Hearing*].

67. See *Compliance Hearing*, *supra* note 66, at 182, 206-13 (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division); *id.* at 678-84 (letter from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs).

68. Memorandum of Understanding on Civil Enforcement Between the Justice Department and the Environmental Protection Agency, [1992] Env't Rep. (BNA) 879-80 (June 13, 1977) (representing the adoption of the 1977 memorandum by the Bush Administration).

Administration also pursued centralization reveals the widely shared preference, within the Executive Branch at least, for coordinated decisionmaking.

## 2. *Limits on Department of Justice Centralization*

White House efforts to preserve centralized litigating authority within the Department of Justice have ensured Attorney General control of virtually all government litigation.<sup>69</sup> However, the Attorney General's ability to truly reign in governmental litigation is an idea whose time is yet to come; statutory limits on Department of Justice litigating authority may not be typical but are hardly uncommon. Congress, for example, has created offices of legal counsel within the House and Senate to ensure adequate representation of legislative interests in court. Specialized courts, such as the Tax Court and Court of Military Appeals, are the domain of "specialized agencies," such as the Internal Revenue Service<sup>70</sup> and the Judge Advocate General.<sup>71</sup> Executive departments and agencies as well as government corporations have been granted independent litigating authority to put numerous statutory programs into place through lower federal court litigation. The Environmental Protection Agency and the Departments of Agriculture, Defense, Health and Human Services, Labor, and Treasury head up the list of such executive entities.<sup>72</sup> Before lower federal courts, most independent agencies are able to conduct the bulk of their own litigation using agency attorneys.<sup>73</sup>

The patchwork nature of governmental representation is often an outgrowth of political conflict. The experience of the Federal Trade

69. The Department of Justice broadly interprets 28 U.S.C. § 519 (1988), which provides that "[e]xcept as otherwise authorized by law, the Attorney General shall supervise all [governmental] litigation," and 5 U.S.C. § 3106 (1988), which similarly states that "[e]xcept as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney . . . but shall refer the matter to the Department of Justice." See *The Attorney General's Role as Chief Litigator*, *supra* note 49. According to that Office of Legal Counsel opinion, it is irrelevant that the Attorney General may allow agencies such as the Tennessee Valley Authority and the Federal Deposit Insurance Corporation to represent themselves separately without explicit statutory authority. "Presumably, the Attorney General may reassert his supervisory authority at any time." *Id.* at 48 n.1. This is precisely what occurred in *FTC v. Guigon*, 390 F.2d 323 (8th Cir. 1968), where the Department of Justice, through an amicus brief, successfully challenged the FTC's authority to enforce its subpoenas in federal district court without the Attorney General's consent. For further discussion of the relationship between the Department of Justice and the FTC, see *infra* text accompanying notes 74-86.

70. 26 U.S.C. § 7441 (1988).

71. 10 U.S.C. § 870 (1988).

72. See 15 U.S.C. §§ 2604(e)(2)(a), (f)(3)(a)(ii), 2606(a), (c) (1988 & Supp. IV 1992), 33 U.S.C. § 1366 (1988), 42 U.S.C. §§ 300j-9(f), 7605(a) (1988) (Environmental Protection Agency); 7 U.S.C. § 228a (1988), 28 U.S.C. § 2350(a) (1988) (Department of Agriculture); 10 U.S.C. § 1037 (1988) (Department of Defense); 42 U.S.C. § 405(1) (1988) (Department of Health and Human Services); 29 U.S.C. §§ 216(e), 663 (1988 & Supp. IV 1992), 30 U.S.C. § 822 (1988), 33 U.S.C. §§ 921a, 941 (1988) (Department of Labor); 26 U.S.C. § 7452 (1988) (Department of Treasury).

73. See generally ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, MULTI-MEMBER INDEPENDENT REGULATORY AGENCIES: A PRELIMINARY SURVEY OF THEIR ORGANIZATION (rev. ed. May 1992) [hereinafter MULTI-MEMBER INDEPENDENT REGULATORY AGENCIES]; Memorandum from American Law Division, Congressional Research Service (July 7, 1988).

Commission (FTC) provides an example. Prior to 1973, the Department of Justice represented the FTC in injunctive and mandamus proceedings, civil penalty suits, and through the Solicitor General, all Supreme Court litigation.<sup>74</sup> Commission attorneys handled judicial review and enforcement proceedings.<sup>75</sup> This division of responsibility proved problematic for the FTC. The Antitrust Division of the Department of Justice sometimes disagreed with FTC antitrust policymaking. Consequently, on matters referred by the FTC to the Department of Justice, significant delays in filing, unfavorable settlements, and the refusal to file cases became common practice.<sup>76</sup>

On occasion, the Department of Justice also took issue with FTC positions in court. In the 1968 *FTC v. Guigon* decision, Justice argued that the FTC lacked statutory authority to judicially enforce its own subpoenas and possibly even lacked the power to appear in court.<sup>77</sup> Justice's desire to maximize its litigating authority at the expense of the FTC is certainly understandable. Eyebrows were raised, however, when, after Justice's position prevailed before a federal appellate court, Solicitor General Erwin Griswold (1967-1973) refused to file a certiorari petition on the ground that "[w]hatever may be the merits of the Commission's position, [he did] not believe the issue [was] of sufficient general importance to warrant requesting the Supreme Court to review it."<sup>78</sup> By not seeking certiorari, the Solicitor General shielded a Department of Justice victory from FTC attack.

A second case that caused great distress at the FTC was *St. Regis Paper Co. v. United States*, a 1961 Supreme Court decision.<sup>79</sup> In that case, the Antitrust Division agreed with the FTC's position that the agency's interest in investigating possible antitrust violations outweighed confidentiality claims made by a company seeking to withhold reports filed with the Census Bureau. The Solicitor General, however, sided with the Census Bureau and the Bureau of the Budget in opposing the FTC. In a remarkable and much criticized brief, Solicitor General Archibald Cox (1961-1965), rather than "burdening the Court with briefs from different agencies," instead "attempt[ed] . . . to set forth the competing arguments as effectively

74. Davis, *supra* note 38, at 11-12.

75. *Id.* at 11.

76. See *Securities Exchange Act Amendments of 1973: Hearings Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. 343, 348-49, 355-57 (1978) [hereinafter *Exchange Act Hearings*] (testimony and statement of A. Everette MacIntyre, Commissioner, Federal Trade Commission); A. Everette MacIntyre, *The Status of Regulatory Independence*, 29 *FED. B.J.* 1, 8-9 (1968) (noting instances during the 1960s when the Solicitor General refused FTC requests to file petitions for certiorari or refused to support an agency's position after allowing it to file in its own name).

77. 390 F.2d 323, 329-30 (8th Cir. 1968). For an FTC commissioner's view of this litigation, see MacIntyre, *supra* note 76, at 15-18 (arguing that the "legislative history of . . . the Federal Trade Commission Act, long-established practice, . . . and applicable legal precedent did not intend the result achieved by the court" (footnote omitted)).

78. Davis, *supra* note 38, at 35 (quoting a letter from Solicitor General Erwin Griswold to Paul R. Dixon, Chairman, Federal Trade Commission (Apr. 26, 1968)).

79. 368 U.S. 208 (1961).



and objectively as possible.”<sup>80</sup> Since Cox disagreed with the FTC, the bulk of his brief, “while fully recognizing the delicate balance of opposing considerations,”<sup>81</sup> explained why the FTC position was in error.

Congress finally settled conflicts between the FTC and Justice to the benefit of the FTC. In 1973, Congress enacted legislation ensuring FTC independent litigating authority in enforcement actions before lower federal courts.<sup>82</sup> Congress expanded that authority in 1975 to include the power of the FTC to represent itself before the Supreme Court when the Solicitor General would not represent the agency.<sup>83</sup> Tensions between the FTC and Justice, exacerbated by both the Antitrust Division’s apparently successful attack on FTC litigating authority in *Guigon* and the Solicitor General’s questionable advocacy in *Guigon*, *St. Regis*, and other cases, may help explain this political response.<sup>84</sup> That tension, however, explains only a small part of the story. In 1974, the House Committee on Interstate and Foreign Commerce had concluded that Justice’s concern that “the government maintain[ ] consistent positions on matters of common interest to all government agencies”<sup>85</sup> outweighed the FTC’s claim that “its litigation is conducted in the manner best calculated to achieve the agency’s enforcement goals.”<sup>86</sup> The decision to transfer litigating authority to the FTC, therefore, cannot simply be tied to Congress’ displeasure with Justice’s representation of FTC interests.

Instead, the ascendancy of independent FTC litigating authority is a by-product of political circumstances unique to a particular moment in time.<sup>87</sup> First, White House opposition to independent litigating authority in general or to the FTC, specifically, was neutered in both 1973 and 1975. In 1973, President Nixon was willing to trade off the statutory specifications of FTC litigating authority because he strongly supported other bill provi-

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80. Brief for the United States at 10, *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961) (No. 47).

81. *Id.* at 27.

82. Trans-Alaska Oil Pipeline Authorization Act, Pub. L. No. 93-153, § 408, 87 Stat. 576, 591-92 (1973).

83. Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 204, 88 Stat. 2183, 2199 (1975).

84. The 1973 Act was predicated on congressional findings that “the investigative and law enforcement responsibilities of the Federal Trade Commission have been restricted and hampered because of inadequate legal authority.” Trans-Alaska Oil Pipeline Authorization Act § 408(a)(1), 87 Stat. at 591.

85. Letter from Assistant Attorney General for Legislative Affairs to Congressman Harley O. Staggers, reprinted in H.R. REP. NO. 1107, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 7702, 7732.

86. Letter from FTC to Congressman Harley O. Staggers, reprinted in H.R. REP. NO. 1107, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 7702, 7732. Indeed, the 1975 legislation reduced the scope of FTC litigating authority while expanding remaining litigating authority to include Supreme Court representation. FTC Improvement Act § 204(a)(3)(A), 88 Stat. at 2199-200.

87. These conclusions are principally drawn from interviews with current and former FTC officials. See Interview with Calvin Collier, *supra* note 4; interview with Ernie Eisenstadt, *supra* note 4.



sions establishing the Trans-Alaska Pipeline.<sup>88</sup> In 1975, the spectre of Watergate limited President Ford's ability to demand centralization of government litigation before the Supreme Court. Second, Congress' willingness to decentralize government litigating authority was part of a larger Watergate-era attempt to limit the "imperial presidency." At roughly the same time, Congress limited White House authority in fiscal policy through the 1974 Budget Act, considered making the Department of Justice an independent agency, and debated legislation to further insulate independent agencies from executive influence.<sup>89</sup> Third, Congress was set to act on FTC-related litigation in both 1973 and 1975 regardless of the question of independent litigating authority.<sup>90</sup> The costs to the FTC of raising the issue and to Congress of adding it to much larger statutory reform efforts were, therefore, low. Fourth, after Justice successfully attacked FTC litigating authority in *Guigon*, the FTC's independence was plainly at risk. These high stakes spurred the 1973 legislative action. Finally, public support of a powerful, independent FTC was strong in the mid-seventies' "age of consumerism."

This confluence of circumstances was clearly unique to the FTC, as demonstrated by the contrasting experience of the Securities and Exchange Commission (SEC). In 1973, Congress removed from proposed amendments to the Securities and Exchange Act language that would have granted the SEC independent litigating authority before the Supreme Court. This refusal to grant the SEC the same type of litigating authority that the FTC received two years later was also a by-product of political circumstances. Unlike the FTC, whose very independence was threatened by Department of Justice dominion over all litigation, the SEC already possessed independent litigating authority in all courts except the Supreme Court.<sup>91</sup> Before the Supreme Court, moreover, the SEC was generally satisfied with the Solicitor General's handling of its cases. Although the SEC technically supported the proposed amendments, it did a poor job of making its case before Congress. In fact, when Congress held hearings on the proposed amendments, former SEC Chairman William Cary testified that he favored Solicitor General control of the certiorari decision.<sup>92</sup> Philip Loomis, Jr.,

88. See Letter from Assistant Attorney General for Legislative Affairs to Congressman Harley O. Staggers, *supra* note 85, at 7732-33 (stating that President Nixon reluctantly accepted limitations on Department of Justice litigating authority "because of the Nation's pressing need for legislation authorizing construction of the pipeline").

89. On the 1974 Act, see LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* 177-204 (3d ed. 1993). On efforts to remove the Department of Justice from the Executive Branch, see *Politics Hearings*, *supra* note 13. On proposed legislation to authorize independent agency litigation before the Supreme Court, see *STUDY ON FEDERAL REGULATION*, *supra* note 60, at 62-67.

90. The focus of 1973 legislation was the Trans-Alaska Pipeline. See *supra* note 84. Legislation in 1975 involved a broad range of issues governing the structure and operations of the FTC.

91. 15 U.S.C. §§ 77t(b), (c), 78t(c), (d), (e), 78u(c), (d), (e) (1988).

92. See *Exchange Act Hearings*, *supra* note 76, at 232 (statement of former SEC Chairman William Cary).

serving as SEC Commissioner at the time, expressed uncertainty about the amendments' value because the Solicitor General "has generally been sympathetic" to the SEC and because the Solicitor "has clearly been of value in obtaining consideration of [SEC] cases by the Supreme Court and in presenting cases to that Court."<sup>93</sup>

The SEC presented a less convincing case for other reasons as well. Not only was the SEC's claim a weak one, but also Solicitor General Erwin Griswold launched a strong claim against the amendments. Griswold, who served both the Johnson and Nixon Administrations, invoked his personal prestige and that of his office in arguing that the proposed amendments challenged the integrity of the Solicitor General's office.<sup>94</sup> In 1975, Solicitor General Robert Bork (1973-1977), limited by his role in the dismissal of former Solicitor General Archibald Cox in the "Saturday Night Massacre," could not launch a comparable counterattack against FTC efforts.

Differences between the FTC and SEC experiences reveal that specific political pressures and circumstances, not a unified vision of independent litigating authority, define the existence, scope, and sweep of legislative exceptions to Department of Justice control of government litigation. These exceptions checker the landscape before lower federal courts. In addition to Congress and independent agencies (where limitations on Justice's authority are to be expected), many executive departments, executive agencies, and government corporations possess some independence in pursuing their interests through litigation.<sup>95</sup> While presidential control of the hiring and firing of executive officers provides some degree of centralizing control, legislative decentralization of litigating authority nonetheless impedes the coordination of Executive Branch arguments in court.

Before the Supreme Court, however, centralization predominates. Statutory exceptions to Department of Justice control rarely include Supreme Court litigation. Congress, for the most part, prefers the Solicitor General to be the government's lawyer before the Court.<sup>96</sup> At the same time, while the Solicitor General's control is much more than a shibboleth, his dominion over government litigation before the Supreme Court is illusory.

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93. *Id.* at 299 (statement of SEC Commissioner Philip Loomis, Jr.). This is still the SEC's view. See Interview with Dan Goelzer, *supra* note 4; Interview with Paul Gonson, *supra* note 4.

94. See *Exchange Act Hearings*, *supra* note 76, at 278-80 (statement of Solicitor General Erwin Griswold). Griswold concluded his opening presentation at the hearings with the statement, "I would be very sorry and would regard it as unfortunate if the function and prestige of the Office of the Solicitor General was impaired [by the amendment's passage]." *Id.* at 277.

95. See *supra* text accompanying notes 22-37. For a fairly complete list of governmental entities that possess independent litigating authority, see Memorandum from American Law Division, Congressional Research Service, *supra* note 73.

96. For Congress' reasons for preferring Solicitor General control, see *infra* text accompanying note 363.

### B. Solicitor General Control of Supreme Court Litigation

The Solicitor General is the Department of Justice's official voice before the Supreme Court<sup>97</sup> and is the only litigant who has a right to participate in Supreme Court litigation without seeking the Court's permission.<sup>98</sup> This authority is indeed awesome. Nonetheless, the prospect of government entities outside the Department of Justice separately representing their interests before the Supreme Court is quite real. Statutory grants of litigating authority outside Department of Justice control, political necessity, and comity between the Solicitor General's office and other government entities ensure that the government does not speak as a single voice before the Supreme Court.

Congress uses grants of independent litigating authority to legislative entities such as the Comptroller General and the Senate's Office of Legal Counsel to ensure the vigorous defense of its priorities.<sup>99</sup> Since these types of grants allow Congress to protect its interests as a coequal branch of government from a Solicitor General answerable to the Attorney General and the White House, they are the least surprising statutory exceptions to Department of Justice control. For similar reasons, the Supreme Court has approved court-appointed counsel to prosecute contempt of court actions in cases where the Department of Justice is unwilling to defend the independent interests of the judicial branch.<sup>100</sup>

Potential conflicts of interest with the Executive Branch explain statutory grants of independent litigating authority to the Federal Election Commission (FEC) and to special prosecutors appointed under the Ethics in Government Act.<sup>101</sup> Another type of statutory exception is harder to explain. It applies to some but not all independent agencies as well as to

97. See 28 C.F.R. § 0.20(a) (1992) (providing that the Solicitor General has authority for "[c]onducting, or assigning and supervising, all Supreme Court cases [within Department of Justice control], including appeals, petitions for and in opposition to certiorari, briefs and arguments." (emphasis added)).

98. 28 U.S.C. § 518(a) (Supp. IV 1992).

99. 2 U.S.C. § 687 (1988), 42 U.S.C. §§ 1320a-4(b), 6384(a), (c) (1988) (Comptroller General); 2 U.S.C. §§ 288b, 288c, 288d, 288f (1988) (Office of Senate Legal Counsel). Although the President possesses limited appointment and removal power over the Comptroller General, the Comptroller is typically thought to be an arm of Congress. See *Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down the Gramm-Rudman Act on separation of powers grounds because the Act gives an executive function to the Comptroller General, who is subject to control by Congress); Bernard Schwartz, *An Administrative Law "Might Have Been"—Chief Justice Burger's Bowsher v. Synar Draft*, 42 ADMIN. L. REV. 221, 232 (1990) ("[T]he key to *Bowsher* 'is that the Comptroller General is removable by Congress, and therefore may not be entrusted with executive powers.'" (quoting a letter from Chief Justice Warren Burger to Justice John Paul Stevens (June 10, 1986))).

100. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). The Solicitor General supports this position, recognizing that judicial authority here is "an ancillary aspect of its powers under Article III." Brief for the United States as Amicus Curiae at 8 n.2, *United States v. Providence Journal Co.*, 485 U.S. 693 (1988) (No. 87-65).

101. The independent litigating authority of these officials is established in 2 U.S.C. §§ 437c(f)(4), 437d(a)(6), (b) (1988) (Federal Election Commission) and 28 U.S.C. § 594(a) (1988) (special prosecutors) (referred to as "independent counsel").

the Department of Agriculture,<sup>102</sup> and it is clearly a by-product of political circumstances. Two independent agencies, the Interstate Commerce Commission (ICC) and the FTC, may represent themselves before the Supreme Court whenever the Solicitor General refuses to defend their position.<sup>103</sup> This authority may also extend to the National Labor Relations Board (NLRB) and the Tennessee Valley Authority (TVA).<sup>104</sup> Finally, through the Hobbs Act, specified agencies may seek certiorari regardless of Solicitor General approval, *but only* to defend an administrative order.<sup>105</sup> Hobbs Act cases are rare, for the agency can break free from the Solicitor General only when there is an irreconcilable divergence of views. In those cases, the agency and the Solicitor General each appear before the Court as named parties.

The Hobbs Act and similar statutory exceptions to Department of Justice control limit the Solicitor General in other ways. For example, while these statutory exceptions do not prevent the Solicitor General from expressing views contrary to the agency's, it is sometimes in the Solicitor General's broader political interests to support the agency before the Supreme Court in a case in which he would otherwise decline participation.

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102. The Department of Agriculture, as a matter of course, refers all Supreme Court cases to the Solicitor General. The special problem of intraexecutive disputes outside of the Solicitor General's control has yet to arise.

103. ICC power dates back to 1910, Pub. L. No. 475, ch. 231, § 212, 36 Stat. 1087, 1150-51 (1911), and has been reaffirmed several times. See generally Davis, *supra* note 38, at 6-11. For a discussion of FTC litigating authority, see *supra* text accompanying notes 82-86.

104. There is a lack of consensus about the litigating authority of the NLRB and the TVA before the Supreme Court. The NLRB enjoys independent litigating authority under its statute, but the statute does not speak to the issue of Supreme Court representation. 29 U.S.C. §§ 154(a), 155, 160(j), (l), 161(2) (1988). The Solicitor General perceives that this silence implicitly authorizes his control. See, e.g., FRIED, *supra* note 7, at 175-82 (discussing Fried's handling of Communications Workers of Am. v. Beck, 487 U.S. 735 (1988)); William E. Brigman, The Office of the Solicitor General of the United States 124 (1966) (unpublished Ph.D. dissertation, University of North Carolina (Chapel Hill)) (discussing Archibald Cox's management of NLRB cases). Like the NLRB, the TVA lacks specific authority to represent itself before the Court. The historic practice here, however, is for the TVA to assert complete independence. See The Attorney General's Role as Chief Litigator, *supra* note 49, at 47 n.1. In fact, when the TVA and Solicitor General jointly present a case to the Court, the TVA General Counsel insists that his name appear above the names of Solicitor General attorneys (except for the Solicitor General himself). See, e.g., Brief for the Petitioner, cover, Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) (No. 76-1701) (indicating the name of the General Counsel for the TVA above the names of the other Solicitor General attorneys but under the name of the Solicitor General).

105. The Hobbs Act applies to the Federal Communications Commission (FCC), the Federal Maritime Commission (FMC), the Secretary of Agriculture, and the U.S. Postal Service. Pub. L. No. 901, ch. 1189, § 8, 64 Stat. 1129, 1131 (1950) (current version at 28 U.S.C. § 2348 (1988) (FCC, FMC, Secretary of Agriculture); Mail Order Ass'n of Am. v. United States Postal Serv., 986 F.2d 509 (D.C. Cir. 1993) (Postal Service). Under the Hobbs Act, the Attorney General is a statutory defendant in charge of the government's interests. The FCC, FMC, and Department of Agriculture, however, are authorized to intervene as of right and, regardless of the Solicitor General's action, to file for certiorari. The Act is silent on the issue of whether the affected agencies may file briefs and argue cases before the Court.



According to FTC officials,<sup>106</sup> this is what occurred in *FTC v. Ticor Title Insurance Co.*,<sup>107</sup> a 1992 case in which the FTC almost certainly would have sought Supreme Court review with or without Solicitor General participation. As will be detailed below,<sup>108</sup> the Solicitor General, perhaps fearing the loss of controlling the government's arguments in the *Ticor* case, took charge of the case from the certiorari petition stage.

Political calculations occur regardless of the presence of statutory exceptions, and they occur in different forms. Witness the Solicitor General's bizarre handling of the *Bob Jones University*<sup>109</sup> litigation in an attempt to stave off political embarrassment.<sup>110</sup> *Bob Jones* concerned the IRS' longstanding practice of denying tax breaks to racially discriminatory private schools. After defending the government's policy in the early months of the Reagan Administration, the Treasury Department, persuaded by Attorney General William French Smith, reversed the IRS position.<sup>111</sup> This reversal proved to be a public policy debacle. The President felt compelled to tell the nation that he was not a racist, and the Department of Justice concluded that it was better to litigate than to moot the *Bob Jones* case. The rub, however, was that the Reagan Administration did not rescind its policy reversal. To escape this predicament, the Solicitor General asked the Court to appoint "counsel adversary" to Bob Jones University to defend the Treasury Department's earlier position.<sup>112</sup> The Court complied with this unorthodox request and heard arguments from William Ball on behalf of Bob Jones University, court-appointed "counsel adversary" William Coleman on behalf of the Treasury Department, and Assistant Attorney General William Bradford Reynolds on behalf of the United States.<sup>113</sup> That Coleman defended and Reynolds opposed the IRS' nondiscrimination policy did not bother the Court or the Department of Justice.

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106. Department of Justice officials did not corroborate FTC officials' account of *Ticor* and were skeptical of their description.

107. 112 S. Ct. 2169 (1992).

108. See *infra* text accompanying notes 310-11.

109. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

110. For a general background discussion and analysis of the *Bob Jones* litigation, see CAPLAN, *supra* note 7, at 51-64; Neal Devins, *Bob Jones University v. United States: A Political Analysis*, 1 J.L. & POL. 403 (1984); Jeremy A. Rabkin, *Taxing Discrimination: Federal Regulation of Private Education by the Internal Revenue Service*, in PUBLIC VALUES, PRIVATE SCHOOLS 133, 146-51 (Neal E. Devins ed., 1989).

111. Stuart Taylor Jr., *U.S. Drops Rule on Tax Penalty for Racial Bias*, N.Y. TIMES, Jan. 9, 1982, at 1. Accordingly, the Department of Justice filed a motion before the Supreme Court to moot *Bob Jones* and related litigation. Memorandum for the United States, *Goldsboro Christian Sch., Inc. v. United States and Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (Nos. 81-I, 81-3).

112. See Thomas McCoy and Neal Devins, *Standing and Adverseness in Challenges of Tax Exemptions for Discriminatory Private Schools*, 52 FORDHAM L. REV. 441, 464 (1984).

113. See Oral Argument Transcript, *Goldsboro Christian Sch., Inc. v. United States and Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (Nos. 81-I, 81-3).



Dual governmental presentations such as in *Bob Jones* are, to put it mildly, an anomaly. Yet, occasionally the Solicitor General either explains to the Court an intragovernmental conflict or authorizes an executive or independent agency to present before the Court a position at odds with the Solicitor General's.<sup>114</sup> Numerous factors explain the Solicitor General's willingness to limit his control in such a fashion. First, when the Solicitor General presents both sides of an issue to the Court but then chooses one, he in effect advocates that position. Second, sometimes amicus positions filed by other governmental entities serve the Solicitor General's interests better than his own filings. For example, in *Personnel Administrator of Massachusetts v. Feeney*, it would have been impolitic for the Solicitor General to refuse to defend Massachusetts' veterans' preference due to the prevalence of analogous federal preferences.<sup>115</sup> To address the gross disparities of the Massachusetts' preference on women, Solicitor General Wade McCree (1977-1981) authorized a coalition of executive and independent entities to file a joint amicus brief addressing "important considerations concerning the differences between the federal and the state statute and the relevant proof requirements."<sup>116</sup>

Third, Solicitor General authorization of dual representation sometimes improves its status as an impartial litigant before both the Court and Congress. In contrast, the Solicitor General shatters his imagined status as an objective nonpartisan advocate before the Supreme Court when he mutes the concerns of an agency with which he disagrees. This is especially true in cases where the independent agency is a party to the litigation and arguably the Solicitor General's client. Consequently, the Solicitor General authorized dual representation in *Dirks v. SEC*,<sup>117</sup> *Metro Broadcasting, Inc. v. FCC*,<sup>118</sup> *FCC v. Pacifica Foundation*,<sup>119</sup> and *United Rubber, Cork, Linoleum & Plastic Workers v. NLRB*.<sup>120</sup> This concern is less acute in cases where the United States appears as a party or in an amicus capacity. Nonetheless, in a variety of such cases involving the SEC, the EEOC, the

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114. See *infra* Part II.A.

115. See Brief for the United States as Amicus Curiae at 2, *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979) (No. 78-233) (acknowledging that "[t]he Court's constitutional analysis of the Massachusetts program may affect the federal program . . . in spite of the differences between the two").

116. See Brief of the Office of Personnel Management, the United States Department of Defense, the United States Department of Labor, and the Equal Employment Opportunity Commission as Amici Curiae at 3, *Feeney* (No. 78-233). Coincidentally, female Carter appointees were named counsel for each of these federal entities.

117. 463 U.S. 646 (1983). For further discussion of this case, see *infra* text accompanying notes 193-97.

118. 497 U.S. 547 (1990). For further discussion of this case, see *infra* text accompanying notes 224-32.

119. 438 U.S. 726 (1978). For further discussion of this case, see *infra* text accompanying note 219.

120. 362 U.S. 329 (1960) (per curiam). In this case, a joint memorandum was prepared explaining why the NLRB supported the granting of certiorari and why the Solicitor General opposed certiorari. The Court sided with the NLRB and granted certiorari.

FERC, and the Federal Power Commission, the Solicitor General either authorized separate filings or took note of a disagreement between his office and an independent agency.<sup>121</sup>

As shown above, the dual representations brought about by statutory exceptions and political accommodations extend well beyond Congress and its agents to independent agencies and parts of the Executive Branch. While the Solicitor General is the dominant voice of government before the Supreme Court, dual presentations in numerous Supreme Court cases suggest that Solicitor General control of that voice need not be, and in fact is far from, complete. It is simply wrong, therefore, to think of government litigation before the Supreme Court as being controlled by a monolithic Solicitor General.

*C. Summary: Independent Agencies and the Patchwork Nature of Independent Litigating Authority*

The reach of Department of Justice control in general and Solicitor General control in particular is ill-suited to generalization. Concomitantly, the nature and sweep of independent agency control over Supreme Court litigation are extraordinarily varied. For some agencies, independent litigating authority simply does not exist. This is the case with the National Transportation Safety Board;<sup>122</sup> it used to be so with the FTC and the now defunct Civil Aeronautics Board.<sup>123</sup> In other instances, agency authority extends to Supreme Court litigation, although it sometimes depends on the Solicitor General's refusal to participate. The FEC, FTC, ICC, and perhaps the NLRB, Postal Service, and TVA have such power.<sup>124</sup>

In most cases, however, agency litigating authority is a mixture of dependence and independence. Even the level of dependence varies. For the SEC, EEOC, and FERC, independent litigating authority extends to the

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121. See *infra* notes 185-209 and accompanying text (SEC); *infra* notes 233-68 and accompanying text (EEOC). For example, the Federal Power Commission was allowed to file an amicus brief opposing the Solicitor General's brief in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). In *Utah Power & Light Co. v. FERC*, 463 U.S. 1230 (1983), Solicitor General Rex Lee, instead of forcing the FERC to accede to his point of view, resolved the dispute by asking the Court to remand the case for further consideration of the FERC's position. See REBECCA M. SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 85 (1992). Another dispute involving the FERC was *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984), in which the FERC and the Department of Interior battled over an FERC license for a water project that affected numerous Indian reservations. The Solicitor General sided with the Secretary of Interior. For further discussion, see Herz, *supra* note 16, at 980 n.331.

122. See 49 U.S.C. § 1903 (1988).

123. See *supra* text accompanying notes 74-89 for a discussion of the development of FTC litigating authority. The Civil Aeronautics Board (CAB), like the FTC, claimed that the Department of Justice inadequately represented its interests in court. See Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 YALE L.J. 1442, 1451 n.48 (1969). Unlike with the FTC, Congress demurred on repeated CAB efforts to gain control over its litigation. See *id.*

124. See *supra* notes 101-05 and accompanying text.

federal courts of appeals.<sup>125</sup> The Consumer Product Safety Commission's independent litigating authority extends only to district court actions.<sup>126</sup> The independent litigating authority of the Nuclear Regulatory Commission and the Commodities Future Trading Commission is limited to appellate litigation.<sup>127</sup> Finally, there are several agencies whose arrangements are so complex that they defy description. The FCC is one of these.<sup>128</sup> In actions launched in district court, including suits to enforce Commission orders, the Department of Justice has plenary responsibility over the matter. The Commission handles appeals of radio and television licensing decisions before courts of appeals, but the Solicitor General handles them before the Supreme Court. Appeals of other FCC decisions are handled by the Commission before courts of appeals and in some instances up to the filing of a certiorari petition to the Supreme Court.<sup>129</sup>

That patchwork nature of independent agency litigating authority is rooted in historical and organizational bases. Independent agencies were formed at different times and by different interest groups. Organizationally, the authorizing committees within Congress that oversee independent agencies are driven by substantive issues, not structural arrangements. The Energy and Commerce Committee cares about FCC decisionmaking, not whether the FCC has more or less independent litigating authority than another agency. When structural issues bear on substance, as was the case when the Department of Justice ran roughshod over the FTC, oversight committees may well lead the charge for limiting executive control in favor of independent litigating authority. When structural issues do not bear on substance, as was the case with the SEC, Congress will not alter structure.

Far-ranging structural reform proposals do occasionally crop up. Senator Abraham Ribicoff led a post-Watergate effort to assess regulatory organization,<sup>130</sup> but nothing came of this effort to alter the patchwork struc-

125. See 15 U.S.C. §§ 77t(b), (c), 78t(c), (d), (e), 78u(c), (d), (e) (1988) (SEC); 42 U.S.C. §§ 2000e-4(b), -5(f)(1), -5(f)(2), -5(i), -6 (1988) (EEOC); 15 U.S.C. § 717(s) (1988); 28 U.S.C. § 518 (1988 & Supp. IV 1992); 42 U.S.C. § 7171(i) (1988) (FERC).

126. See 15 U.S.C. §§ 2061(e), 2071(a), 2076(b)(7) (1988) (granting *limited authority* to the Consumer Product Safety Commission to represent itself before federal district courts).

127. See 28 U.S.C. § 2348 (1988) (Nuclear Regulatory Commission); 7 U.S.C. § 4a(c) (1988) (Commodities Future Trading Commission). The Commodities Future Trading Commission can also represent itself in some district court actions. See 7 U.S.C. § 4a-1 (1988).

128. The Federal Mine Safety Commission is another. As described in an Administrative Conference Report:

The Commission has an understanding with the Department of Justice that should the Commission wish to file a brief or otherwise defend its decisions, the Commission would coordinate its efforts with the Department of Justice. The Commission, however, does file routine procedural motions, through the Office of General Counsel, in the Courts of Appeal. Under the Mine Act, the Department of Labor has specific litigating authority in the areas of injunctive relief and enforcement of Commission orders and decisions. . . . The Commission has subpoena [sic] enforcement authority in the United States District Courts.

MULTI-MEMBER INDEPENDENT REGULATORY AGENCIES, *supra* note 73, at 10-11.

129. See 28 U.S.C. §§ 516, 519, 2350 (1988); 47 U.S.C. § 154(f)(i) (1988).

130. See STUDY ON FEDERAL REGULATION, *supra* note 60.

ture of independent litigating authority. It is unlikely that future efforts will prove more consequential. Each agency serves a quite different constituency, and it is highly unlikely that these divergent interests will jointly pursue some effort to create uniform structural arrangements. The present haphazard structure is a far better reflection of divergent legislative interests.

The likely perseverance of the current discordant system does not make it preferable to others. The next Part will examine the appropriate reach of Solicitor General authority in managing independent agency litigation before the Supreme Court.

## II

### SOLICITOR GENERAL CONTROL OVER INDEPENDENT AGENCY LITIGATION

Independent agency authority to litigate before the Supreme Court without Solicitor General authorization is the exception, not the rule. This model of centralized decisionmaking, with the Solicitor General at the helm of government litigation before the Supreme Court, is almost uniformly supported both by independent agency officials and attorneys in the Solicitor General's office.<sup>131</sup> Exceptions to Solicitor General authority are tolerated not because these exceptions are necessary but because there are so few of them. This view is so pervasive that agencies with independent litigating authority nonetheless profess that extending such authority elsewhere might compromise the government's credibility before the Supreme Court.<sup>132</sup>

Supporters of centralization advance three principal contentions about Solicitor General representation.<sup>133</sup> First, the Solicitor General is unlikely to abandon his independent agency client in favor of the Executive Branch's political agenda since he is sensitive to his client's concerns and generally unaffected by White House priorities. Second, it is beneficial for an independent agency to give up control of litigation in exchange for the well-deserved prestige of Solicitor General representation in the petition for certiorari and in Supreme Court advocacy. Third, Solicitor General centralization is of great value to the Supreme Court. Centralization saves the Court from facing an incomprehensible morass of conflicting governmental presentations, and it enables the Court to manage its docket by relying on Solicitor General recommendations on a case's cert-worthiness.

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131. Among those interviewed for this study, only former Assistant to the Solicitor General Carter Phillips advocated independent agency self-representation before the Supreme Court. Interview with Carter Phillips, *supra* note 5.

132. Interview with Ernie Eisenstadt, *supra* note 4.

133. These contentions are advanced by centralization supporters who recognize independent agency authority to reach policy decisions at odds with the White House. Proponents of the unitary executive, in contrast, perceive that centralization is a necessary attribute of White House control of governmental departments and agencies. See *infra* text accompanying note 137.



While each of these arguments is powerful, none warrants complete Solicitor General control over independent agency litigation. There are too many counterexamples of Solicitor General insensitivity and hostility to independent agency priorities to allow the Solicitor General to define the legal policymaking of an entity outside of Executive Branch control.

Instead, assuming that independent agencies may reach policy decisions at odds with the Executive Branch, Congress should adopt a hybrid model where an independent agency, while otherwise bound to Solicitor General representation, has a presumptive right to pursue a case before the Court when the Solicitor General either perceives the case unworthy of certiorari or disagrees on the merits. This system, especially if Congress makes the Solicitor General a statutory litigant in all government cases before the Court, better serves the independent agency's interests without undermining the Solicitor General's critical roles in assisting the Court, advocating Executive Branch positions, or providing legal counsel to independent agencies. The balance of this Part will evaluate these arguments for centralization and, along the way, make a case for the hybrid model of Solicitor General-independent agency representation.<sup>134</sup>

#### A. *The Solicitor General and His "Client"*

The Solicitor General manages Supreme Court litigation that originates in governmental agencies, boards, commissions, corporations, departments, and services. This centralization naturally limits the ability of the affected governmental interest to define its own litigation strategy. The question remains, however, whether the Solicitor General views as his client the governmental entity he purportedly represents or the President, the head of the Executive Branch. The "traditional" view holds that, barring a direct conflict with stated White House policy, the Solicitor General's principal client is the governmental entity involved in the litigation.<sup>135</sup> Centralization of authority, under this view, serves a range of nonideological objectives, including having all governmental parties that might be affected by a Supreme Court decision express their concerns to an objective broker; "avoiding the litigation of significant legal issues that have government wide impact in a case which, because of its factual and procedural

134. This discussion assumes that independent agencies, for better or worse, are empowered to reach policy decisions at odds with the White House.

135. Proponents of this view include former Attorney General Griffin Bell, former Solicitors General Erwin Griswold and Robert Stern, and academic commentators Lincoln Caplan and Burt Neuborne. See *Exchange Act Hearings*, *supra* note 76, at 272-92 (testimony and statement of Solicitor General Erwin Griswold); *Solicitor General's Office: Hearing Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 36, 38-41 (1987) [hereinafter *Solicitor General Hearing*] (statement of Professor Burt Neuborne); CAPLAN, *supra* note 7, at 33-50; Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 *FORDHAM L. REV.* 1049, 1057-59 (1978); Stern, *supra* note 3.



coloration, may be a poor vehicle for litigating the question";<sup>136</sup> and transferring control on issues that apply to the government as a whole and are only of secondary concern to the governmental entity. In contrast, the "unitary executive" view, while generally supportive of these bureaucratic justifications, emphasizes that "the Attorney General alone is obligated to represent the broader interests of the Executive" and that centralization therefore facilitates "presidential supervision . . . over Executive Branch policies that are implicated in litigation."<sup>137</sup>

Independent agencies care a great deal about which of these views predominates. The unitary executive view places the Solicitor General squarely under the Attorney General's control in the Executive Branch and subordinates independent agency perspectives to those of the White House and Attorney General. The traditional model, in contrast, places a high value on Solicitor General representation of independent agency views before the Court.

### 1. *Locating the Solicitor General*

It is somewhat surprising that there is any dispute over whom the Solicitor General represents. The Solicitor General is appointed by the President, housed in the Department of Justice, and subject to supervision from the Attorney General and to removal by the President. Yet, while no one doubts that the Solicitor General can be compelled to advance a position he disfavors, it is nonetheless true, as the Carter Office of Legal Counsel (OLC) observed in 1977, that "[t]raditionally, . . . the Attorney General has given the Solicitor General the primary responsibility for presenting the Government's views to the Supreme Court, and in the discharge of that function the Solicitor General has enjoyed a marked degree of independence."<sup>138</sup>

This tradition of independence has led many to conclude that the Solicitor General properly occupies a quasi-independent status within the Department of Justice. For example, in the wake of White House and Cabinet-level intervention in the crafting of the Solicitor General's brief in *Regents of the University of California v. Bakke*,<sup>139</sup> the Carter OLC proclaimed, in accordance with Attorney General Griffin Bell's wishes, that:

The dual nature of the Attorney General's role as a policy and legal adviser to the President strengthens, in our view, the necessity for an independent Solicitor General. To the extent the Solicitor General can be shielded from political and policy pressures—without being unaware of their existence—his ability to serve the

136. *Exchange Act Hearings*, *supra* note 76, at 279 (statement of Solicitor General Erwin Griswold).

137. The Attorney General's Role as Chief Litigator, *supra* note 49, at 54.

138. Role of the Solicitor General, 1 Op. Off. Legal Counsel 228, 229 (1977).

139. 438 U.S. 265 (1978).

Attorney General, and the President, as "an officer learned in the law" is accordingly enhanced.<sup>140</sup>

Several Solicitors General have also proclaimed their independence, arguing that they have "no master to serve except [their] country,"<sup>141</sup> refusing to sign Supreme Court briefs that reflect White House policies with which they disagree,<sup>142</sup> and emphasizing that they have special responsibilities that limit their responsibility to the Executive Branch.<sup>143</sup> Even Charles Fried (1985-1989), whose alleged fidelity to the Reagan Administration's social agenda subjected him to blistering accusations of improperly politicizing his office, spoke of the Solicitor General as the Court's "handmaiden[ ]"<sup>144</sup> and claimed that he "had been appointed to exercise [his] judgment, rather than to try to guess what Ronald Reagan would have said about some particular technical matter."<sup>145</sup>

Executive Branch officials do not typically display such acts of independence or express such proclamations. This independence, however, is more ephemeral than real. The Solicitor General's traditional independence stems largely from the benefit the White House receives by allowing the Solicitor General to maximize his litigating capital and authority. Were the Solicitor General to appear overly partisan in his selection and presentation of cases, his credibility and his effectiveness as a litigant before the Court would be impaired.<sup>146</sup> Executive Branch interests, therefore, are well served by being represented before the Court by an advocate who has a special relationship with the Court. The centralization of litigating authority in an individual who operates at the pleasure of the President also serves

140. Role of the Solicitor General, *supra* note 138, at 232-33. Griffin Bell's support of Solicitor General independence is reflected in his firsthand account of the politics of *Bakke*. See GRIFFIN B. BELL & RONALD J. OSTROW, *TAKING CARE OF THE LAW* 29-32 (1982).

141. BIDDLE, *supra* note 11, at 98.

142. See CAPLAN, *supra* note 7, at 58-59 (discussing Acting Solicitor General Lawrence Wallace's initial refusal to sign a government brief supporting tax breaks for racist schools in *Bob Jones University*); FRIED, *supra* note 7, at 202 n.\* (discussing Solicitor General Philip Perlman's refusal to sign a government brief supporting the loyalty oath in *Peters v. Hobby*, 349 U.S. 331 (1955)); SALOKAR, *supra* note 121, at 74 (recounting Solicitor General Erwin Griswold's refusal to advocate delays of school desegregation in *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969)).

143. See Erwin N. Griswold, Book Review, *CONSTITUTION*, Spring-Summer 1991, at 73, 73 (reviewing FRIED, *supra* note 7, and taking issue with Fried's view and arguing that a Solicitor General's responsibility is to the Constitution before the President); see also Eric Schnapper, *Becket at the Bar—The Conflicting Obligations of the Solicitor General*, 21 *LOY. L.A. L. REV.* 1187 (1988) (identifying among the Solicitor General's primary responsibilities his duties as an officer of the Court); Richard G. Wilkins, *An Officer and an Advocate: The Role of the Solicitor General*, 21 *LOY. L.A. L. REV.* 1167, 1169 (1988) (arguing that the Solicitor General must temper his advocacy of an administration's views so that he "never sacrifice[s] his credibility and reliability as a trusted officer of the Court").

144. McGinnis, *supra* note 9, at 802 (quoting Charles Fried).

145. FRIED, *supra* note 7, at 191. For a penetrating attack of Fried's position, see McGinnis, *supra* note 9, at 802 (describing the "handmaiden" view as "deeply flawed" and asserting that the Solicitor General "must project vigorously, albeit respectfully, the President's distinctive constitutional voice").

146. See Michael W. McConnell, *The Rule of Law and the Role of the Solicitor General*, 21 *LOY. L.A. L. REV.* 1105, 1107-08 (1988).

Executive Branch interests. Consequently, it matters to the Executive Branch that Congress support centralization of Supreme Court litigating authority. Were the Solicitor General consistently to disregard independent agency interpretations in favor of Executive Branch preferences, Congress might well retaliate by limiting Solicitor General authority over government litigation, as it did with the FTC.

Solicitor General independence also serves the Executive Branch in other ways. The prestige of the White House and Attorney General is improved by preserving Solicitor General independence. Specifically, by freeing the Solicitor General from partisan politics, the White House places the national interest in an objective advocate before the Supreme Court ahead of narrow political interests. Richard Nixon appointed Erwin Griswold for this reason,<sup>147</sup> and Griffin Bell defended the insulation of the Solicitor General's office from the White House for similar reasons.<sup>148</sup>

Solicitor General independence is also a by-product of an administrative state too large not to be decentralized. The White House typically leaves political appointees to their own devices unless it cares deeply about an issue.<sup>149</sup> Consequently, White House and Attorney General involvement in Solicitor General litigation is usually a function of a case's political significance and its bearing on administration policy initiatives and/or constituency interests.

Supreme Court litigation is highly visible and, rather than involving one or two subject areas, cuts across all of government. Consequently, White House participation in Solicitor General advocacy arises with some frequency. Modern accounts of such intervention include the following: Harry Truman's involvement in an amicus curiae filing in *Shelly v. Kraemer*;<sup>150</sup> Dwight Eisenhower's drafting of portions of the government's brief in *Brown v. Board of Education*;<sup>151</sup> the Kennedy Administration's order to Archibald Cox to challenge private discrimination as unconstitutional state action;<sup>152</sup> the Nixon Administration's intervention in the Solicitor General's filing in the *Pentagon Papers*<sup>153</sup> case and its involve-

147. See CAPLAN, *supra* note 7, at 33.

148. See BELL & OSTROW, *supra* note 140, at 31 (describing Bell's efforts to protect Solicitor General Wade McCree from the pressure of White House views about McCree's brief in *Bakke*).

149. As Charles Fried put it: "Public office is an interpretive activity. The officer tries to make the best sense out of his assignment. He must judge how to make a coherent morally and politically good whole out of his political superior's directives, pronouncements, hints, and actions." FRIED, *supra* note 7, at 191. On the question of whether Fried actually embraced this interpretive loyalty model, see McGinnis, *supra* note 9, at 814 (concluding that Fried "lacked . . . a coherent theory" of the role of the Solicitor General's office in fulfilling "the administration's jurisprudential views").

150. 334 U.S. 1 (1948); see Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 817-19 (1987) (interviewing Philip Elman).

151. 347 U.S. 483 (1954); see CAPLAN, *supra* note 7, at 31; Silber, *supra* note 150, at 842.

152. See VICTOR S. NAVASKY, *KENNEDY JUSTICE* 287-90 (1971).

153. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

ment in school desegregation and antitrust matters;<sup>154</sup> Gerald Ford's brokerage of a dispute between the FEC and the Solicitor General in *Buckley v. Valeo*<sup>155</sup> and Ford Administration participation in school desegregation cases and Department of Interior matters;<sup>156</sup> the Carter White House's reversal of the Solicitor General's preliminary position in *Bakke*;<sup>157</sup> the Reagan Administration's reversal of the Solicitor General's stated position in *Bob Jones University* and its insistence that the Solicitor General file an amicus brief calling for the overturning of *Roe v. Wade* in *Thornburg v. College of Obstetricians*;<sup>158</sup> President Bush's order to the Solicitor General to reverse its position in the Supreme Court and support increased state aid to black public colleges to remedy discrimination;<sup>159</sup> and President Clinton's indirect rebuke of the Solicitor General's brief in *Knox v. United States*, a child pornography case.<sup>160</sup>

The frequency of such White House involvement varies from administration to administration. Carter Attorney General Griffin Bell disapproved of White House or Attorney General intervention in Department of Justice litigation. Bell sought to insulate the Solicitor General's office and to make sure that there was no "interfere[nce] with the policy prerogatives of our agency clients."<sup>161</sup> Carter Solicitor General Wade McCree used his office's independence to protect agency prerogatives, allowing agency officials to present conflicting positions to the Court whenever he and they disagreed.<sup>162</sup> In contrast, the Reagan Administration, especially the Department of Justice, believed more in hierarchical centralized control.<sup>163</sup> Centralization better enabled the administration to advance its vision of

154. See CAPLAN, *supra* note 7, at 34 (discussing Nixon Administration intervention in the *Pentagon Papers* case); SALOKAR, *supra* note 121, at 73-74 (discussing Nixon Administration intervention in school desegregation).

155. 425 U.S. 946 (1976).

156. Ford Administration involvement in *Buckley v. Valeo* is recounted in *Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 120-35 (1976) [hereinafter *Representation Hearings*]. Ford Administration intervention in Department of Interior matters is described in SALOKAR, *supra* note 121, at 75.

157. See BELL & OSTROW, *supra* note 140, at 29-32; CAPLAN, *supra* note 7, at 39-48; FISHER & DEVINS, *supra* note 62, at 286.

158. See CAPLAN, *supra* note 7, at 54-59, 139-44; FRIED, *supra* note 7, at 27-35.

159. See Linda Greenhouse, *Bush Reverses U.S. Stance Against Black College Aid*, N.Y. TIMES, Oct. 22, 1991, at B6; Carol Innerst, *Bush Orders Switch on Black College Aid*, WASH. TIMES, Oct. 23, 1991, at A4.

160. See David Johnson, *Clinton Calls for Expansion of Child Pornography Laws*, N.Y. TIMES, Nov. 12, 1993, at A14. For a more detailed examination of Clinton White House intervention in Solicitor General filings, see Joan Biskupic, *For Solicitor General's Office, New Directions in Old Cases*, WASH. POST, Feb. 22, 1994, at A1.

161. Bell, *supra* note 135, at 1061.

162. See Wade H. McCree, Jr., *The Solicitor General and His Client*, 59 WASH. U. L.Q. 337, 346 (1981) (contending that the Solicitor General should either present, or allow the agency to present, the agency's views where "well-grounded differences of opinion" exist).

163. See generally GEORGE C. EADS & MICHAEL FIX, *RELIEF OR REFORM?: REAGAN'S REGULATORY DILEMMA* (1984).



good government cohesively—a vision which coincidentally involved the government speaking in a unitary voice personified by the President. In addition to aggressively advancing its social agenda through the courts, the administration also openly urged the judiciary to practice judicial restraint.<sup>164</sup> Not surprisingly, dual presentations from agencies and the Solicitor General declined during this period as efforts by the Attorney General to oversee Solicitor General advocacy increased.<sup>165</sup>

Direct White House and Attorney General participation in Supreme Court advocacy should not be overstated. Aside from the natural tendency to let subordinate officials act independently, White House involvement is also lessened by the powerful disincentives of undermining the Solicitor General's effectiveness before the Court and spurring on Congress to pass statutes exempting independent and perhaps executive agencies from Solicitor General control. Nevertheless, there is no doubt that the Attorney General supervises the Solicitor General and that the President supervises the Attorney General. These clients hire the Solicitor General to be their representative, and they have the power to fire the Solicitor General. When either the White House or the Attorney General directs the Solicitor General to reverse his position, he complies. "When that happens," as Charles Fried explained at his confirmation hearing, "it would be peevish and inappropriate, for the Solicitor General to be anything but cheerful in accepting that reversal."<sup>166</sup> Representing administration policy, in Rex Lee's words, is simply "a part of [the] job."<sup>167</sup> The Solicitor General's obligation, like that of other Executive Branch attorneys, "is most reasonably seen as running to the Executive Branch as a whole and to the President as its head."<sup>168</sup> "He is unique . . . because of his duty to an individual—the President—who has a constitutional responsibility to interpret the law *independently* from the Supreme Court."<sup>169</sup>

The Solicitor General's status as part of the Executive Branch, however, is not at all inconsistent with the apparent independence that most Solicitors General exercise. First, Presidents appoint Solicitors General

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164. See William F. Smith, *Urging Judicial Restraint*, 68 A.B.A. J. 59, 59 (1982) (announcing the Reagan Justice Department's "undertaking [of] a conscious effort to encourage judicial restraint"); Steven Markman, *Judicial Selection: The Reagan Years* (stating that Reagan "was determined to appoint to the federal courts only those individuals who are committed to the rule of law"), reprinted in FISHER & DEVINS, *supra* note 62, at 204.

165. See CAPLAN, *supra* note 7, at 81-134 (describing the Solicitor General's working relationship with Attorney General Edwin Meese and Assistant Attorney General William Bradford Reynolds); FRIED, *supra* note 7, at 40-54 (same). For defenses of Reagan Administration intervention as typical, see Clegg, *supra* note 9, at 967; Albert Lauber, Jr., *An Exchange of Views: Has the Solicitor's Office Become Politicized?*, LEGAL TIMES, Nov. 2, 1987, at 22, 23. For a suggestion that dual representations were rare under Fried because Fried himself perceived his role as the ultimate interpreter of the law within the government, see McGinnis, *supra* note 9, at 803-04.

166. SALOKAR, *supra* note 121, at 70.

167. Lee, *supra* note 15, at 599.

168. Miller, *Government Lawyers' Ethics*, *supra* note 16, at 1298.

169. McGinnis, *supra* note 9, at 802.

whose personal views are compatible with the White House agenda. Solicitors General, for the most part, advocate positions that the President endorses or at least does not oppose.<sup>170</sup> Second, direct White House and Attorney General control is rare because executive officers typically are allowed to put their programs in place and because of the risks of harming Solicitor General relations with Congress and the Court. Third, since the Solicitor General enhances his institutional strength by appearing independent of executive control, he, too, has an incentive not to appear to be the Executive Branch's lackey.

Nevertheless, the appearance of independence is not independence. This is not simply a matter of semantics. When Solicitor General "independence" is at odds with the White House or Attorney General, his client can reign him in. When Solicitor General "independence" is at odds with Congress or some independent agency, he cannot be ordered to reverse course. Consequently, a lack of litigating authority places congressional and independent agency autonomy at risk. Congress, of course, inherently possesses and has statutorily granted itself such authority. Most independent agencies, however, are without this power. The next portion of this study will examine the Solicitor General's representation of independent agencies that lack independent litigating authority.

## 2. *The Solicitor General and Independent Agencies*

Independent agency litigation poses special problems for the Solicitor General. Unlike most governmental entities, independent agencies typically handle their own cases in lower federal courts. The Solicitor General, therefore, reviews independent agency cases without the benefit of input from Department of Justice lawyers who typically represent the government in the lower courts.<sup>171</sup> More significantly, although Congress limits these agencies' independence by entrusting their Supreme Court representation to the Solicitor General, independent agencies nonetheless are empowered to make policy decisions at odds with White House positions. The President apparently lacks the power to remove commissioners of whose conclusions

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170. Not surprisingly, when there is a change in administration, a new Solicitor General is typically appointed. Moreover, with a new administration, the substance, objectives, and management of Solicitor General advocacy change. The Supreme Court recognized in *United States v. Mendoza*, 464 U.S. 154, 161 (1984), that "the panoply of important public issues raised in governmental litigation may quite properly lead successive administrations of the Executive Branch to take differing positions with respect to the resolution of a particular issue." For an extended discussion of *Mendoza*, see Joshua I. Schwartz, *Two Perspectives on the Solicitor General's Independence*, 21 LOY. L.A. L. REV. 1119, 1123-51 (1988).

171. Department of Justice lawyers typically play a significant role in assisting the Solicitor General to determine the cert-worthiness of governmental litigation. See HOROWITZ, *supra* note 38, at 54-56. Donald Horowitz found that Department of Justice lawyers' recommendations not to seek certiorari in cases where the government lost in federal courts of appeals were followed 99% of the time. *Id.* at 57.

he disapproves,<sup>172</sup> but he is free to tell the commissioners' lawyer, the Solicitor General, whether the agencies' cases shall be pursued before the Supreme Court and how they shall be presented before the Court. This situation is delicate, and without question, the Solicitor General's record is mixed. At times, an agency's position receives great deference; at other times, the agency is accorded no deference. Sometimes, the Solicitor General allows the agency to present its argument independently when a conflict arises; sometimes, he shuts out the agency from the case.

The Solicitor General's office, for the most part, views independent agency litigation as substantively different from purely executive representation. One difference concerns the frequency of seeking certiorari. The Solicitor General seeks certiorari far more often in cases involving independent agencies than in those involving executive agencies. In a 1966 study, William Brigman emphasized the Solicitor General's willingness to pursue independent agency certiorari requests.<sup>173</sup> In 1973, Erwin Griswold testified against legislation that would expand independent agency litigating authority, in part because his office took great pains to advance agency claims before the Supreme Court. Noting that the Solicitor General had acceded to more than seventy-five percent of independent agency certiorari requests (98 out of 128) from 1963-1973, Griswold argued that independent agencies were especially well represented by his office.<sup>174</sup> Although these figures do not account for a great number of cases where the Solicitor General convinces an independent agency not to request certiorari,<sup>175</sup> and although more recent figures suggest that there has been a significant drop in the Solicitor General's independent agency certiorari requests,<sup>176</sup> the

172. Some scholars have argued that the President's constitutional duty to take care that the laws are faithfully executed extends to the statutory removal of commissioners for good cause when those commissioners frustrate presidential efforts to execute the law as the President sees fit. See Interview with Terry Eastland, *supra* note 5. See generally TERRY EASTLAND, *ENERGY IN THE EXECUTIVE: THE CASE FOR THE STRONG PRESIDENCY* (1992).

173. See Brigman, *supra* note 104, at 120.

174. *Exchange Act Hearings*, *supra* note 76, at 281 (statement of Solicitor General Erwin Griswold). Griswold presented the following figures:

Agency	No. of Requests	No. of Deprivals	Percentage
NLRB	62	48	77%
FTC	28	18	64%
FPC	26	24	93%
CAB	3	1	33%
FCC	1	1	100%
SEC	8	6	75%
Total	128	98	76.6%

175. One witness at the 1973 Hearings suggested that Griswold's figures were overstated because "there would be very few instances in which the Solicitor General would be unable to persuade the Commission to go along with his Office's judgment." *Id.* at 366 (statement of Professor Roy Schotland). This conclusion is borne out by the FTC's current practice of following Solicitor General recommendations in all but the most unusual of cases. See *infra* Part II.B.2.

176. See Todd Lochner, *The Relationship Between the Office of Solicitor General and the Independent Agencies: A Reevaluation*, 79 VA. L. REV. 549, 576-77 (1993).

Solicitor General gives independent agency requests a higher priority than Executive Branch requests.

A second measure of the special status of independent agencies is the Solicitor General's willingness to allow differences between independent agencies and other parts of the government to be aired before the Supreme Court. Solicitor General Griswold proclaimed that he tried "very hard to be sure that [independent] agencies had an opportunity to have their views before the Court," sometimes by indicating in a Solicitor General filing that the independent agency holds a different view and sometimes by allowing an independent agency to file a separate brief in its own name.<sup>177</sup> Other Solicitors General have generally followed this approach. At one extreme, Robert Stern (1952-1954) proclaimed that "[t]he Court is always appraised of the intragovernmental conflict, and I know of no case in which the Solicitor General has precluded an independent agency from presenting its position."<sup>178</sup> The Carter Department of Justice likewise was careful "not to interfere with the policy prerogatives of [its] agency clients" and was quite willing to allow dual governmental representation.<sup>179</sup> At times, Archibald Cox expressed similar sentiments. In responding to Justice Felix Frankfurter's exasperation with the government's presentation of competing independent agency and Solicitor General perspectives in the *St. Regis* case, Cox meekly suggested that "if the dispute were only [with the Antitrust Division of] the Justice Department, [he was] sure [he] could settle it."<sup>180</sup> Rex Lee, although perhaps seeking to deflect criticism for politicizing his office, took pains in one controversial Consumer Product Safety Commission case to state that his decision not to seek certiorari did "not reflect any disagreement with the merit of the commission's decision."<sup>181</sup> In other matters, Lee both took note of conflicting agency positions in his filings and authorized dual presentations.<sup>182</sup>

Independent agencies fare better in the Solicitor General's office than other governmental litigants. Their cases are pursued more often, and their differences with the Solicitor General are more likely to be presented before the Court. Especially when the independent agency is a named party, the Solicitor General's office typically views an independent agency as its prin-

177. *Exchange Act Hearings*, *supra* note 76, at 290 (testimony of Solicitor General Erwin Griswold).

178. Stern, *supra* note 3, at 157.

179. Bell, *supra* note 135, at 1061.

180. JAMES E. CLAYTON, *THE MAKING OF JUSTICE* 155 (1964) (quoting *St. Regis* oral argument).

181. Letter from Solicitor General Rex E. Lee to Nancy H. Steorts, Chair, Consumer Product Safety Commission, *reprinted in* N.Y. TIMES, Aug. 26, 1983, at A13. For further discussion of this issue, see Molly Sinclair, *7-Year Fight to Ban Foam Comes to an End*, WASH. POST, Aug. 26, 1983, at D7.

182. See *infra* note 235 and accompanying text (identifying two of Lee's disputes with the EEOC); *infra* text accompanying notes 194-97 (discussing Lee's approval of dual Solicitor General-SEC presentations in *Dirks v. SEC*).



cial client.<sup>183</sup> While the Solicitor General may seek to moderate the independent agency's position because of competing agency or executive interests,<sup>184</sup> he rarely tosses aside the independent agencies' views. This special status is sometimes considered a nuisance, but it exists.

Sensitivity to agency interests, of course, is not the same as uniformly vigorous advocacy on behalf of independent agency litigants. The Solicitor General must cautiously select and present cases to balance the interests of independent agencies and their oversight committees, White House policy priorities, the interests of other parts of the Executive Branch—especially other divisions within the Department of Justice—and the need to protect litigating capital with the Supreme Court. In some instances, this balancing act is responsive to independent agency concerns. Sometimes, however, the Solicitor General subordinates agency concerns to pursue some other agenda. A comparison of Solicitor General management of SEC, FCC, and EEOC litigation reveals the variability of Solicitor General representation.

*a. The SEC*

Solicitor General relations with the SEC have been quite positive.<sup>185</sup> Congress declined to grant the SEC independent litigating authority in 1973 in large measure because Erwin Griswold presented, and the SEC did not oppose, a convincing case for the adequacy of Solicitor General representation.<sup>186</sup> In the early 1980s, the SEC passed on a congressional invitation to revisit the independent litigating authority issue.<sup>187</sup> Up through the tenure of President Reagan's first Solicitor General, Rex Lee, the Solicitor General presented SEC positions to the Supreme Court.<sup>188</sup> When differences arose, the SEC position was either noted by the Solicitor General or independently

183. Interview with Lawrence Wallace, *supra* note 5; Interview with Ken Geller, *supra* note 5.

184. *Exchange Act Hearings*, *supra* note 76, at 274 (statement of Solicitor General Erwin Griswold); John A. Jenkins, *The Solicitor General's Winning Ways*, 69 A.B.A. J. 734, 738 (1983) (discussing *Marine Bank v. Weaver*, 455 U.S. 551 (1982)); Interview with Lawrence Wallace, *supra* note 5; Interview with Ernie Eisenstadt, *supra* note 4.

185. This is the unanimous view of current and former SEC officials as well as officials within the Solicitor General's office. See, e.g., *Exchange Act Hearings*, *supra* note 76, at 282-84 (statement of Solicitor General Erwin Griswold) (explaining the few instances in which the Solicitor General declined to file petitions for certiorari on behalf of the SEC); Daniel L. Goelzer, General Counsel, Securities and Exchange Commission, Address to the American Bar Association Committee on Federal Regulation of Securities 6 (Nov. 19, 1988) (transcript on file with author) (maintaining that the Solicitor General has been deferential to SEC views); see also Interview with Paul Gonson, *supra* note 4; Interview with Ken Geller, *supra* note 5; Interview with Dan Goelzer, *supra* note 4.

186. See *supra* text accompanying notes 92-94.

187. Interview with Paul Gonson, *supra* note 4.

188. Former SEC General Counsel Daniel Goelzer, while not critical of Charles Fried's management of the Solicitor General's office, perceived that Fried was less interested in representing SEC concerns than was Rex Lee. Interview with Dan Goelzer, *supra* note 4; see also *infra* text accompanying notes 200-02 (discussing *CTS v. Dynamics* litigation). Bush Solicitor General Ken Starr seems to have followed Fried's lead. This is reflected in Starr's handling of *Chicago Mercantile Exch. v. SEC*, 883 F.2d 537 (7th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990). See *infra* text accompanying notes 204-08.

presented by the agency. In *International Brotherhood of Teamsters v. Daniel*, the SEC filed an amicus brief supporting a worker's claim that involuntary noncontributory pension plans were entitled to federal securities protections.<sup>189</sup> The Department of Labor and the Solicitor General, who disagreed with this interpretation, filed a separate amicus brief on this point.<sup>190</sup> Another example of the Solicitor General's accommodation of SEC concerns was *Marine Bank v. Weaver*,<sup>191</sup> where the Solicitor General crafted a compromise to resolve an intragovernmental dispute between the Commission and bank regulatory agencies.<sup>192</sup>

*Dirks v. SEC*<sup>193</sup> presented a more striking example of Solicitor General willingness to accommodate SEC concerns. In *Dirks*, the SEC claimed that improperly fostering trading need not involve wrongfully obtained inside information.<sup>194</sup> In contrast, the Solicitor General argued that the disclosure of information legally available to others was not subject to sanction.<sup>195</sup> At the certiorari stage, the Solicitor General allowed the SEC to argue its position separately. Rather than file a separate petition, the Solicitor General added a footnote to the SEC petition stating his view that the SEC position was in error.<sup>196</sup> After the Court granted certiorari, the SEC continued to represent its interests in the case, including the presentation of oral arguments. The Solicitor General filed an amicus brief opposing the SEC interpretation but acceded to the SEC's request that his brief include "some generalized statements of support for the agency's insider trading enforcement program."<sup>197</sup> This deference is partially explained by the fact that the SEC was the named party in the case. Yet, the Solicitor General's willingness to moderate his own brief to assuage agency fears of dual representation was truly extraordinary.

SEC-Solicitor General relations have changed slightly in recent years. From 1986 to 1993, the Solicitor General's office became more restrictive, paying less attention to agency priorities in advancing the Solicitor General's vision of the government's position.<sup>198</sup> Although relations between the SEC and the Solicitor General remained good, dual filings and the acknowledgment of competing SEC perspectives in the Solicitor

189. See Brief for the Securities and Exchange Commission as Amicus Curiae, *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979) (No. 77-754).

190. See Motion of the United States for Leave to File Brief Amicus Curiae and Brief for the United States as Amicus Curiae, *Daniel* (No. 77-754).

191. 455 U.S. 551 (1982).

192. Jenkins, *supra* note 184, at 738.

193. 463 U.S. 646 (1983).

194. See Brief for the Securities and Exchange Commission, *Dirks v. SEC*, 463 U.S. 646 (1983) (No. 82-276).

195. See Brief for the United States as Amicus Curiae in Support of Reversal, *Dirks* (No. 82-276).

196. See Brief for the Securities and Exchange Commission in Opposition at 17 n.\*, *Dirks* (No. 82-276).

197. Jenkins, *supra* note 184, at 738. For an overview of *Dirks*, see *Justice Department Breaks with SEC on Dirks' Equity Funding Censure*, Daily Rep. for Executives (BNA) at A-3 (Oct. 29, 1982).

198. See Interview with Dan Goelzer, *supra* note 4.

General's filings diminished. In the 1987 *CTS v. Dynamics*<sup>199</sup> litigation, the Solicitor General agreed with the SEC that the Indiana Control Share Acquisition Act violated the Commerce Clause but disagreed with the SEC's assertion that the law also failed under federal preemption doctrine.<sup>200</sup> On the Commerce Clause issue, the Solicitor General stated that "[t]he Commission and the United States believe . . . that the Chapter violates the Commerce Clause."<sup>201</sup> On the preemption issue, rather than note the SEC's competing view, the brief simply asserted that "[t]he United States believes that the Indiana Chapter is not preempted by the Williams Act."<sup>202</sup> A careful reader of the brief might infer that mention to the "United States" and not "the Commission and the United States" signalled SEC disapproval of the preemption argument. Apparently, to secure Solicitor General representation, the SEC had to accept the "compromise" of having only arguments endorsed by the Solicitor General presented to the Court.

The Solicitor General did not offer the SEC a compromise in *Chicago Mercantile Exchange v. SEC*,<sup>203</sup> a 1990 lawsuit which involved the SEC's grant of permission to stock exchanges to trade so-called "index participations" as securities.<sup>204</sup> The Commodities Future Trading Commission (CFTC) successfully disputed this SEC interpretation before the Seventh Circuit, arguing that "index participations" were commodities subject to CFTC, not SEC, regulation.<sup>205</sup> The Solicitor General agreed with the CFTC and opposed the granting of certiorari, although the SEC was a named party to the litigation.<sup>206</sup> The Solicitor General stated in his brief, "While the SEC's views about its statute and the industry it regulates are entitled to weight, we cannot agree with the SEC that the decision below is incorrect . . . in dividing authority between the SEC and CFTC."<sup>207</sup> The SEC was not allowed to file a separate brief. Instead, the Solicitor General's filing summarized and discredited the SEC's views.<sup>208</sup>

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199. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987).

200. See Goelzer, *supra* note 185, at 6-7.

201. Brief for the Securities and Exchange Commission and the United States as Amici Curiae at 3, *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987) (No. 86-71).

202. *Id.*

203. 883 F.2d 537 (7th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990).

204. "Index participations are contracts of indefinite duration based on the value of a basket (index) of securities. The seller of an IP . . . promises to pay the buyer the value of the index as measured on a 'cash-out day.'" *Id.* at 539.

205. See Brief for the Commodities Future Trading Commission as Amicus Curiae, *Chicago Mercantile Exch. v. SEC*, 883 F.2d 537 (7th Cir. 1989) (No. 89-1528), *cert. denied*, 496 U.S. 936 (1990).

206. See Brief for the Federal Respondent in Opposition, *American Stock Exch., Inc. v. Chicago Mercantile Exch.*, 496 U.S. 936 (1990) (No. 89-1502).

207. *Id.* at 8.

208. See *id.* at 20 ("[P]etitioners and the SEC have cited the provision . . . known as the 'SEC savings clause.' That provision does not, in our view, justify limiting the CFTC's jurisdiction over IPs." (citations omitted)).

While occasionally disappointed by the Solicitor General, the SEC nonetheless endorses the current arrangement. Former General Counsel Dan Goelzer explained why: "[T]he Solicitor General is almost invariably deferential to the Commission's views. It is extremely rare that the Solicitor General has flatly opposed the Commission's urging a position it wanted to take."<sup>209</sup> The experiences of recent years, however, reveal that the Solicitor General is willing to prevent the SEC from advancing a position at odds with his own.

*b. The FCC*

FCC relationships with the Solicitor General are difficult to characterize because of an extraordinarily confusing statutory scheme. This scheme sometimes allows the FCC to appeal cases directly to the Supreme Court, sometimes makes the FCC entirely dependent on Department of Justice attorneys throughout the course of litigation, and sometimes authorizes FCC representation before federal courts of appeals and Solicitor General representation before the Supreme Court.<sup>210</sup> As a result, the type of case defines Solicitor General-FCC relationships.

FCC views are accorded the least weight when Department of Justice attorneys represent the FCC throughout the course of litigation. These cases originate in federal district court and include enforcement actions brought by the Commission as well as employment discrimination and Freedom of Information Act suits filed against the Commission. Although FCC and Department of Justice attorneys typically work together in preparing pleadings and other legal memoranda in these cases, policy-based disputes occasionally arise. One such dispute involved the League of Women Voters' challenge to a statutory prohibition of public television and radio station editorials, culminating in the Supreme Court's 1982 *FCC v. League of Women Voters*<sup>211</sup> decision. When the suit was first filed in 1979, the FCC and the Carter Justice Department concluded that the editorial ban was unconstitutional. The government filed motions in federal district court stating that it would not defend the ban's constitutionality.<sup>212</sup> However, two critical events reinvigorated *League of Women Voters* and precluded its dismissal.<sup>213</sup> First, Congress amended the editorial ban rule so that it would apply only to public television and radio stations that receive federally funded Corporation of Public Broadcasting grants.<sup>214</sup> Second, the Reagan Administration assumed office, and the Department of Justice softened its

209. Goelzer, *supra* note 185, at 6.

210. See *supra* note 129 and accompanying text.

211. 468 U.S. 364 (1984), *overruled by* Rust v. Sullivan, 500 U.S. 173 (1991).

212. See *League of Women Voters v. FCC*, 547 F. Supp. 379, 381 (C.D. Cal. 1982).

213. The case was kept alive by the Senate Legal Counsel, who moved to intervene in the case and defend the Senate's interest in the constitutionality of the editorial ban. See *id.* at 381.

214. Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, ch. 1, 95 Stat. 725, 725-36.



position on the constitutionality of editorial bans.<sup>215</sup> Disregarding the FCC's unchanged position, the Reagan Department of Justice unilaterally pursued the case from beginning to end. When the Supreme Court rejected the Department's defense of the ban and struck down the amended statute, the FCC rejoiced, calling the decision "a significant breakthrough."<sup>216</sup>

In sharp contrast to such instances of Department of Justice control stand cases where the FCC holds a statutory right to seek certiorari before the Supreme Court in appeals of FCC declaratory orders. *FCC v. Pacifica Foundation*<sup>217</sup> and *FCC v. MCI Telecommunications Corp.*<sup>218</sup> typify such cases. In both instances, the FCC and Solicitor General each presented their divergent views as statutory litigants before the Supreme Court. In *Pacifica*, the FCC successfully argued that certain words could be kept off the airwaves for most broadcasting hours while the Solicitor General challenged the FCC order as overbroad because the Commission did not consider "the context in which the offending words were used."<sup>219</sup> *MCI* concerned an FCC order mandating that AT&T had no obligation to interconnect its facilities with those of MCI. The D.C. Circuit invalidated this order. The FCC petitioned for certiorari, and the Solicitor General filed a petition in opposition.<sup>220</sup> The Court denied certiorari, but the case is noteworthy because of a blistering footnote in the FCC brief "question[ing] exactly what interests of the United States the Solicitor legitimately represents in this case."<sup>221</sup>

Licensing decisions, handled by the FCC before federal appellate courts and by the Solicitor General before the Supreme Court, involve a murkier division of responsibility. Sometimes, the Solicitor General resolves disputes with the FCC simply by refusing to petition the Supreme Court for certiorari;<sup>222</sup> other times, the Solicitor General authorizes the FCC

215. See Brief for the United States, *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (No. 89-912); see also Kathleen Sylvester, *Editorial Freedom Case Set for Court's Calendar*, NAT'L L.J., Mar. 14, 1983, at 5.

216. Fred Barbash, *High Court Rules for Public TV: Right to Comment Upheld Despite Federal Funding*, WASH. POST, July 3, 1984, at A1 (quoting FCC General Counsel Bruce Fein).

217. 438 U.S. 726 (1978).

218. 439 U.S. 980 (1978).

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

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

221. Petitioner's Reply to "Brief for the United States in Opposition" at 1 n.1, *MCI* (No. 78-270).

222. An example of Justice's willingness to exercise this authority involved FCC "must-carry" rules, which required cable companies to carry local television signals. The Department perceived these rules as unconstitutional, and the Solicitor General, therefore, refused the FCC's request to petition the Supreme Court to review an appeals court decision striking down these rules. See *Government Won't Appeal Must Carry*, BROADCASTING, Mar. 28, 1988, at 37.

to present its divergent views without Solicitor General interference.<sup>223</sup> These decisions are especially dependent upon the specific circumstances surrounding them.

*Metro Broadcasting, Inc. v. FCC*,<sup>224</sup> decided by the Supreme Court in 1990, exemplifies such fact-specific litigation. *Metro Broadcasting* called into question the constitutionality of FCC preferences and set-asides to increase the number of minority broadcasters. The case was a political battlefield. In response to FCC efforts to reexamine its affirmative action programs during the Reagan Administration, Congress had enacted prohibitions on FCC preference policy reconsideration.<sup>225</sup> The FCC, therefore, could not argue in its own name that its preference scheme was constitutionally suspect. Bush Solicitor General Kenneth Starr's (1989-1993) commitment to Reagan Administration challenges to affirmative action further complicated this highly visible litigation. The FCC and the Solicitor General jointly opposed the granting of certiorari<sup>226</sup> in an attempt to throw this politically hot issue back to Congress and to the D.C. Circuit, where new judicial appointments might resolve an apparent intracircuit conflict.<sup>227</sup> This would also enable the Solicitor General to avoid having to decide whether to allow the FCC to assert its position independently before the Court.<sup>228</sup> Finally, for supporters of preferences within the FCC and the Solicitor General's office, this strategy would prevent the Court from hearing a case that most thought would place another nail in the affirmative action coffin.<sup>229</sup>

Certiorari was granted, however. The Solicitor General was set to file a brief challenging the constitutionality of FCC preferences but still faced the question of whether to allow the FCC to file separately. By this time, the Commission strongly supported the preference program, thanks to President Bush's appointment of three pro-preference commissioners.<sup>230</sup> Perhaps because the Solicitor General's office was sensitive to the FCC's precarious position with Congress, perhaps because it feared that the FCC would claim independent litigating authority to argue the case, or perhaps

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223. This is precisely what occurred in *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978). Here, Carter Solicitor General Wade McCree resolved a dispute between the Department of Justice and the FCC by allowing the FCC to present its position to the Court. See Brief for Petitioner, *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (No. 76-1471). The Department of Justice's views were presented in a separate brief. See Brief for the United States, *National Citizens Comm. for Broadcasting* (No. 76-1471). For further discussion of this conflict, see *FCC Cross-Media Ban Backed*, FACTS ON FILE WORLD NEWS DIG., June 23, 1978, at 467.

224. 497 U.S. 547 (1990).

225. See Neal Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 138-41 (1990).

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

227. Interview with Tom Merrill, *supra* note 5; Interview with Daniel Armstrong, *supra* note 4.

228. Interview with Tom Merrill, *supra* note 5.

229. *Id.*

230. See Devins, *supra* note 225, at 152-53.

because the political repercussions were not worth the costs, the Solicitor General permitted the FCC to defend its preferences independently before the Court.<sup>231</sup> The agency did so successfully. One observation is clear: Solicitor General-FCC relations were defined by the specific circumstances of the case at the certiorari stage and at the time the case came before the Court.<sup>232</sup>

*Metro Broadcasting, MCI, Pacifica, and League of Women Voters* do not lend themselves to sweeping generalizations about Solicitor General involvement in FCC litigation. Rather, they suggest that variable presentation schemes and factual circumstances define this relationship.

c. *The EEOC*

The Solicitor General-EEOC relationship presents an example of extreme infringement on agency independence. The Solicitor General today refuses to recognize the EEOC as an independent agency. While the EEOC may influence Solicitor General decisionmaking on a given issue,<sup>233</sup> the Solicitor General seems disinclined to allow the EEOC to advance competing arguments before the Supreme Court. This practice is a relatively new one. During the Carter years, the Solicitor General allowed the EEOC to file briefs at odds with his positions.<sup>234</sup> During Reagan's first term, Solicitor General Rex Lee took note of disagreements between his office and the EEOC.<sup>235</sup> In recent years, however, the Solicitor General has freely

231. See Brief for Federal Communications Commission at 1, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (No. 89-453). The Solicitor General filed a brief arguing that the diversity preference was unconstitutional. See Brief for the United States as Amicus Curiae Supporting Petitioner, *Metro Broadcasting* (No. 89-453). It is less obvious why Solicitor General Starr authorized the Occupational Safety and Health Review Commission (OSHRC) to file an amicus brief opposing the Department of Labor in *Martin v. OSHRC*, 499 U.S. 144 (1991). See Motion for Leave to File Brief for the Occupational Safety and Health Review Commission as Amicus Curiae in Support of Respondents, *Martin v. OSHRC*, 499 U.S. 144 (1991) (No. 89-1541). By authorizing this filing, OSHRC was able to challenge the Solicitor General's representations that the Department of Labor, not the OSHRC, was empowered to definitively interpret an ambiguous regulation promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970. According to OSHRC General Counsel Earl Ohman, there was no controversy over the Solicitor General's granting of OSHRC's request to file an amicus brief. Telephone Interview with Earl Ohman, General Counsel, OSHRC (Dec. 2, 1993).

232. The fact-specific nature of Solicitor General-FCC relations is also revealed in the joint decision of the Solicitor General and FCC not to seek certiorari in *Lamprecht v. FCC*, 958 F.2d 382 (1992), where the D.C. Circuit refused to extend *Metro Broadcasting* to gender preferences. For further discussion of this case, see Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, 56 LAW & CONTEMP. PROBS., Autumn 1993, at 145.

233. In *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989), EEOC advocacy before the Solicitor General's office helped shape the government's amicus filing. Interview with Charles Shanor, *supra* note 4.

234. See *supra* text accompanying notes 115-16 (discussing separate filing by EEOC in *Personnel Administrator of Massachusetts v. Feeney*).

235. See Brief for the United States as Amicus Curiae in Support of Petitioners at 24 n.23, *Firefighters Local Union No. 1784 v. Stotts*, 464 U.S. 808 (1983) (No. 82-206) ("The Equal Employment Opportunity Commission disagrees with this interpretation of Section 706(g) and believes that its adoption might call into question numerous extant consent decrees and conciliation agreements

disregarded competing EEOC perspectives—even in cases where the EEOC is a party.<sup>236</sup>

The demise of the EEOC's relationship with the Solicitor General began with Congress' 1964 decision to give the EEOC significantly less independence than other independent agencies. Republican leadership, believing that EEOC cease and desist power would prove ruinous to business interests, limited the EEOC to a strictly advisory role.<sup>237</sup> The Department of Justice controlled government-initiated employment discrimination litigation. In 1972, Congress granted the EEOC independent litigating authority but not cease and desist authority.<sup>238</sup> Moreover, Congress limited the agency's independent litigating authority in two significant respects. First, the Department of Justice retained exclusive control of suits against state and local governments.<sup>239</sup> Second, the Department of Justice, through the Solicitor General's office, controlled EEOC Supreme Court litigation. In 1974, the EEOC challenged Solicitor General control by filing an amicus brief in a Supreme Court affirmative action case, *De Funis v. Odegaard*,<sup>240</sup> without seeking Department of Justice approval. Despite the EEOC's contention that "[i]ts independent character . . . gives it the same right as any other independent organization to ask the Court to consider its views,"<sup>241</sup> the Court refused to consider the brief, siding instead with the Department of Justice's claim of plenary control of EEOC Supreme Court litigation.<sup>242</sup>

The EEOC, therefore, lacked much of the power and prestige held by most independent agencies. Other than its independent litigating authority and the restrictions on presidential appointment and removal authority, the

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to which the EEOC is party."); Brief for the United States as Amicus Curiae at 1 n.\*, *Connecticut v. Teal*, 457 U.S. 440 (1982) (No. 80-2147) (noting that "[t]he EEOC has declined to join in this brief"). Justice Brennan, who rejected the Department of Justice's position in *Teal*, referred in his opinion to the EEOC's refusal to sign onto the Department of Justice brief. 457 U.S. at 451 n.11.

236. It is unclear whether Clinton Administration Solicitor General Drew Days will follow this approach. In a telephone interview conducted before he was nominated as Solicitor General, Days told me that he cautioned EEOC officials about a Carter Administration reorganization proposal, discussed *infra* text accompanying note 251, precisely because it might make them vulnerable to Executive Branch domination. Interview with Drew Days, *supra* note 5.

237. See generally HUGH D. GRAHAM, *THE CIVIL RIGHTS ERA* 141-52 (1990).

238. 42 U.S.C. §§ 2000e-4(b), -5(f)(1), (f)(2), (i), -6 (1988). For the politics behind this enactment, see GRAHAM, *supra* note 237, at 420-49.

239. 42 U.S.C. § 2000e-5(f)(1), (f)(2) (1988) (incorporating provisions of 1964 Civil Rights Act and 1972 amendments).

240. 416 U.S. 312 (1974).

241. Memorandum of the Equal Employment Opportunity Commission in Response to the Department of Justice at 2, *De Funis v. Odegaard*, 416 U.S. 312 (1974) (No. 73-295).

242. Solicitor General Robert Bork had earlier urged the Court to refuse the EEOC's unauthorized submission. See Warren Weaver Jr., *Law School's Plan to Aid Minorities Goes to High Court*, N.Y. TIMES, Feb. 25, 1974, at A1, A13. The Supreme Court ultimately refused the EEOC brief, although individuals attending oral argument in *De Funis* claim that some of the Justices took the EEOC brief to oral argument. Interview with Margaret Spencer, Former EEOC Attorney, in Washington, D.C. (Nov. 8, 1992) (discussing her work on the *De Funis* case).



EEOC was without a significant independent voice. The Department of Justice's Civil Rights Division, moreover, had great authority to enforce separately and interpret employment discrimination laws. Adding to this complexity, the Department of Justice's Civil Division, which represents the government when it is sued in employment discrimination matters, also had the power to interpret separately employment discrimination laws. This combustible combination of concurrent authority exploded during the Reagan Administration.

The triggering event occurred in *Williams v. City of New Orleans*,<sup>243</sup> where the EEOC intended to file before a federal appellate court an amicus brief supporting race-conscious affirmative action. The EEOC draft brief flatly contradicted an amicus brief that the Department of Justice Civil Rights Division had already filed in the case.<sup>244</sup> Indeed, the EEOC characterized as "deplorable" the Justice Department's failure to consult the EEOC before filing its amicus brief.<sup>245</sup> While the EEOC saw the expression of conflicting views as producing "considerable public benefit,"<sup>246</sup> Justice saw the EEOC brief as an outrageous challenge to the Civil Rights Division's exclusive authority to manage employment discrimination lawsuits involving state and local government. In the Civil Rights Division's view, the government should speak with one voice in state and local cases—the voice of the Civil Rights Division. To prove its point, the Civil Rights Division claimed it would block the EEOC's attempts to file its amicus brief.<sup>247</sup>

The EEOC ultimately capitulated and voted not to file an amicus brief in *Williams*.<sup>248</sup> Direct White House and Attorney General pressure and the fear of a losing court battle with the Civil Rights Division contributed to

243. 729 F.2d 1554 (5th Cir. 1984).

244. The Justice Department brief argued that the affirmative action plan infringed on the rights of "innocent nonblack employees." *Justice Department Seeks to Overturn Promotion Plan for New Orleans Police*, Daily Lab. Rep. (BNA) at A-8, A-9 (Jan. 10, 1983). The EEOC draft brief castigated the Department of Justice for making this argument:

Contrary to this uniform body of case law approving the use of prospective employment goals, however, the Department of Justice asks this Court to hold that judicial relief under Title VII must be limited to . . . actual victims of discrimination . . .

. . . .

No court has accepted the Justice Department's construction of [the relevant title VII section] . . . .

Draft EEOC Brief, *Williams v. New Orleans*, 729 F.2d 1554 (5th Cir. 1984) (No. 82-3435), reprinted in Daily Lab. Rep. (BNA) at E-1 (Apr. 6, 1983).

245. *EEOC Chides Justice for "Deplorable" Action on New Orleans Police Case*, Daily Lab. Rep. (BNA), at A-2 (Feb. 1, 1983).

246. Fred Barbash & Juan Williams, *Administration Prods EEOC on Quotas Brief*, WASH. POST, Apr. 7, 1983, at A1 (quoting EEOC).

247. See *EEOC Bows to White House Pressure, Says It Won't File New Orleans Brief*, Daily Lab. Rep. (BNA) at A-6, A-7 (Apr. 6, 1983).

248. See *id.* at A-6.

this decision.<sup>249</sup> Ironically, the appellate court in *Williams* made repeated reference to the EEOC's draft brief after receiving a leaked copy of the brief through another amicus brief.<sup>250</sup> The EEOC lost a much larger battle with the Solicitor General as a consequence of *Williams*. During the *Williams* controversy, the Office of Legal Counsel issued an opinion supporting the Civil Rights Division. This opinion went beyond the state and local authority issue and asserted that a Carter Administration reorganization, transferring authority from the Departments of Justice and Labor to the EEOC, *de facto* made the EEOC an executive agency "subject to the supervision and control of the President."<sup>251</sup> For the Solicitor General's office, this memo settled the issue of EEOC independence.<sup>252</sup>

*Local 28, Sheet Metal Workers' International Ass'n v. EEOC*<sup>253</sup> proved to be the culmination for the Solicitor General, if not for the EEOC's oversight committees in Congress, of the transplant of the EEOC into the Executive Branch. Although the EEOC, a party in the case, had successfully defended federal court authority to order affirmative action hiring in an employment discrimination lawsuit,<sup>254</sup> the Solicitor General unilaterally reversed the Commission's position in a brief it filed on the Commission's behalf before the Supreme Court.<sup>255</sup> That the EEOC was a party in the case mattered little to the Solicitor General. Charles Fried, in his autobiography *Order and Law*, did not even mention the EEOC in his account of the case.<sup>256</sup> Moreover, when the EEOC explained its position to Solicitor General attorneys, it was flatly told that it was a part of the Executive Branch and would have to swallow Department of Justice opposition to affirmative action.<sup>257</sup> The only concession offered by the Solicitor General was opposing certiorari in the case so that the Court could resolve the *Sheet Metal Workers* issue in two analogous cases already before the

249. Following the decision to withdraw, EEOC Chairman Clarence Thomas commented that the Commission was strongly influenced by the argument that it had no legal authority in public sector employment discrimination lawsuits. See Barbash & Williams, *supra* note 246, at A9.

250. See *Williams v. New Orleans*, 729 F.2d 1554, 1571 n.1, 1572 n.5 (1984) (Wisdom, J., concurring in part and dissenting in part).

251. The OLC opinion is described in *Report by House Committee on Government Operations on EEOC Handling of Sex-Based Wage Discrimination*, reprinted in Daily Lab. Rep. (BNA) at D-1, D-4 (May 25, 1984).

252. Interview with Lawrence Wallace, *supra* note 5; Interview with Ken Geller, *supra* note 5.

253. 478 U.S. 421 (1986).

254. *EEOC v. Local 638 . . . Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172 (2d Cir. 1985), *aff'd*, 478 U.S. 421 (1986).

255. See Brief for the Equal Employment Opportunity Commission, *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (No. 84-1656). Remarkably, then-Acting EEOC General Counsel Johnny J. Butler signed this brief. Butler, however, claimed in an interview that he and the EEOC vigorously opposed the Solicitor General's position. Interview with Johnny J. Butler, *supra* note 4. It is difficult to say whether Butler sought to win favor with Reagan Administration officials through his signature or whether he honestly felt obligated to sign on to the brief. Whatever the explanation, Butler and the EEOC did not alter their views on the permissibility of affirmative action.

256. See FRIED, *supra* note 7, at 110-16.

257. Interview with Johnny J. Butler, *supra* note 4.

Court.<sup>258</sup> It is unclear whether the Solicitor General made this concession to accord some respect to EEOC positions or whether he feared the repercussions of entirely disregarding EEOC views. Once the Court granted certiorari, however, EEOC prerogatives played no apparent role in the Solicitor General's handling of the case.<sup>259</sup>

*Sheet Metal Workers* is an extreme example of the Solicitor General's discounting of EEOC autonomy, but it is not an anomaly. In *Riverside v. Rivera*,<sup>260</sup> the Solicitor General rejected EEOC efforts to participate as an amicus supporting respondents' claims in an attorney's fees case.<sup>261</sup> Instead, the Solicitor General filed an amicus brief in opposition to respondents' claims without mentioning the EEOC's conflicting position.<sup>262</sup> Ironically, EEOC arguments were ultimately presented to the Court. The NAACP Legal Defense and Education Fund reproduced in its amicus filing a leaked draft of the EEOC memorandum recommending its participation as amicus curiae in support of respondents.<sup>263</sup> *Price Waterhouse v. Hopkins*<sup>264</sup> offers another recent example of Solicitor General unwillingness to note EEOC differences. In that case, the Solicitor General did not note EEOC disagreement with his view that an employer could rebut evidence of sexual stereotyping by a preponderance of the evidence rather than by clear and convincing evidence.<sup>265</sup>

Several factors explain the demise of EEOC independence relative to the Solicitor General. To start, the EEOC is vulnerable to attack because it lacks cease and desist authority and other significant attributes of independence. Moreover, during the Reagan years, three divisions of the Department of Justice took direct aim at the EEOC. The Civil Rights Division openly challenged EEOC authority in the *Williams* case, arguing that conflicting EEOC interpretations undercut the Division's ability to advance effectively its interpretation of Title VII in state and local government cases. The Civil Division, in order to defend effectively employment discrimination suits filed against the government, advanced arguments that

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258. See Brief for the Equal Employment Opportunity Commission at 9, *Sheet Metal Workers* (No. 84-1656) ("respectfully request[ing] the Court to hold the present case pending disposition of *Vanguards* and *Wygant*").

259. At the time *Sheet Metal Workers* was argued before the Court, a high-ranking EEOC official suggested to me that Justice's disregard of EEOC prerogatives was not necessarily unwelcome.

260. 477 U.S. 561 (1986).

261. See *Justice Department Rejects EEOC Advice, Seeks Limit on Lawyer Fees in Rights Cases*, Daily Lab. Rep. (BNA) at A-1 (Jan. 9, 1986).

262. See Brief for the United States as Amicus Curiae Supporting Petitioners, *Riverside v. Rivera*, 477 U.S. 561 (1986) (No. 85-224).

263. See Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, Inc. in Support of Respondents, *Rivera* (No. 85-224).

264. 490 U.S. 228 (1989).

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

were at odds with pro-plaintiff EEOC interpretations.<sup>266</sup> Finally, the Office of Legal Counsel joined this fray by declaring the EEOC an executive agency. These three divisions exerted far more influence on their Department of Justice brethren in the Solicitor General's office than did the EEOC.<sup>267</sup>

The decline of EEOC authority relative to the Solicitor General is an extreme and atypical case. The Carter reorganization, by placing clearly executive functions within the EEOC, transformed the EEOC into a hybrid between an independent and an executive agency. More significantly, the Civil Division and Civil Rights Division both have power to interpret employment discrimination legislation in statutorily designated spheres of authority. The erosion of EEOC independence before the Solicitor General is nonetheless striking. Empowered to argue cases before federal district and appellate courts,<sup>268</sup> the EEOC routinely finds its views withheld from the Supreme Court when they diverge from the views of the Solicitor General.

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The experiences of the SEC, FCC, and EEOC reveal the variable character of Solicitor General-independent agency relations. While no independent agency is immune to having its views ignored, some agencies receive far more respect than others. Factors that explain this variable treatment include the following: the likelihood of agency positions conflicting with other government positions, especially those of the Department of Justice; the willingness of Congress to intercede statutorily on an agency's behalf; the sweep of independent litigating authority, cease and desist authority, and other powers which empower an independent agency and insulate it from the Executive Branch; and the likelihood that independent agency action conflicts with White House agenda items.<sup>269</sup> With reference to these factors, one would expect the EEOC to fare far worse than the FCC and SEC.

That the Solicitor General, a political appointee, is influenced by political circumstances comes as no surprise.<sup>270</sup> Concerns over Solicitor

266. In *Turner v. Orr*, 759 F.2d 817 (11th Cir. 1985), for example, the Civil Division advanced arguments identical to those of the Civil Rights Division and contrary to those of the EEOC in its efforts to defend the Air Force from the terms of an affirmative action consent decree.

267. See HOROWITZ, *supra* note 38, at 54-60 (explaining that recommendations by Justice Department attorneys carry more weight than recommendations by agencies); Brigman, *supra* note 104, at 129 (discussing the power of Department of Justice divisions to shape Solicitor General positions).

268. 42 U.S.C. §§ 2000e-4(b), -5(f)(1), -5(f)(2), -5(i), -6 (1988).

269. Another factor is the quality of agency representation. Rex Lee, for example, noted that the Solicitor General often "give[s] deference to those people that we know will perform their own screening functions." SALOKAR, *supra* note 121, at 84 (quoting Rex Lee). Under Lee, the Solicitor General's office often deferred to NLRB recommendations because "[w]e knew that they were the ones that had done a very careful job and had done good lawyering before they sent us the recommendations." *Id.*

270. This sensitivity to political circumstances dates back to the rise of the administrative state. "A study of all requests by the [independent] commissions for review over a five year period from July,



General politicization led to mid-seventies legislative reform efforts involving the Justice Department itself and agencies such as the FTC and SEC.<sup>271</sup> Lincoln Caplan's *The Tenth Justice* accused the Reagan Administration of placing its political agenda ahead of supposed Solicitor General independence.<sup>272</sup> A 1992 study of the Solicitor General likewise concluded that "[a]lthough solicitors general enjoy a functional autonomy from the administration, this independence does not translate into substantive freedom from the policies and politics of the White House."<sup>273</sup>

This perception of the Solicitor General as a political agent is problematic not just for independent agencies but for the Solicitor General himself. For some Solicitors General, balancing agency independence concerns against the traditional measures of a case's cert-worthiness creates a catch-22. On one hand, Solicitors General may take a great deal of heat for not seeking certiorari. For example, consumer groups attacked as political foul play a 1983 Solicitor General decision not to seek certiorari to defend a Consumer Product Safety Commission ban on urea-formaldehyde foam insulation.<sup>274</sup> On the other hand, Solicitors General such as Erwin Griswold have deferred to agency independence by seeking certiorari in a disproportionate number of independent agency cases.<sup>275</sup> In some of these cases, an agency's independence determines whether the Solicitor General seeks certiorari. The Solicitor General, in these cases, is not always speaking his mind on the case's cert-worthiness.

Politics tells only part of the story. SEC, FCC, and EEOC experiences also reveal that Solicitor General attitudes toward independent agencies change significantly from administration to administration. As a result, independent agency autonomy likewise will ebb and flow. Wade McCree preferred to allow dual governmental representation rather than have his office trump independent agency desires. He claimed that it was "essential" for the Solicitor General "to avoid any appearance of formulating 'policy' for the agencies."<sup>276</sup> Rex Lee took a more lawyerly approach, noting independent agency disagreements in Solicitor General filings and allowing independent agencies to separately argue cases in which they were a

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1957, through June, 1962, shows that denial of access to the Supreme Court is no mere threat and that it is based, to a significant degree, on policy considerations." Brigman, *supra* note 104, at 120; *see also id.* at 130 (discussing a policy dispute between the Department of Justice and the Federal Maritime Commission in *Federal Maritime Bd. v. Pacific Far East Line, Inc.*, 363 U.S. 827 (1960)). For further discussion of the partisan nature of Solicitor General advocacy, see Lochner, *supra* note 176, at 562-65.

271. *See, e.g.,* STUDY ON FEDERAL REGULATION, *supra* note 60, at 54-67; *Politics Hearings*, *supra* note 13, at 3; *Exchange Act Hearings*, *supra* note 76, at 272-92 (testimony and statement of Solicitor General Erwin Griswold).

272. CAPLAN, *supra* note 7, at 277 ("[O]ne of the great misdeeds of the Reagan Administration was to diminish the institution that . . . once stood for the nation's commitment to the rule of law.").

273. SALOKAR, *supra* note 121, at 175.

274. *See* David Shribman, *Foam Insulation is Cleared of Ban*, N.Y. TIMES, Aug. 26, 1983, at A-1.

275. *See supra* note 174.

276. McCree, *supra* note 162, at 345.

party.<sup>277</sup> Lee, although a strong believer of the Solicitor General's responsibility to further presidential priorities, acknowledged that the Solicitor General, as a "litigating lawyer, . . . is an advocate for a client whose objective is to achieve the most favorable result possible in that particular case."<sup>278</sup>

In contrast, Charles Fried, believing that the government should speak as one through the Solicitor General, strongly disfavored dual presentations or any acknowledgment of conflict. Fried saw himself as the kingpin of government litigation before the Supreme Court. He was "appointed to exercise [his] judgment," and he perceived public office to be "an interpretive activity."<sup>279</sup> Fried once informed NLRB General Counsel Rosemary Collyer that he would "'plead error on behalf of the government'" were the Board to file a case without his approval.<sup>280</sup> Indeed, even in the rare case where he authorized an independent agency to present its views to the Court, Fried made the independent agency pay a price. For example, in allowing the U.S. Sentencing Commission to file a separate brief in *Mistretta v. United States*,<sup>281</sup> Fried "succeed[ed] in getting the Commission to tone down its brief a little" by insisting that the Commission "back off from using this as an occasion to establish" a theory of separation of powers that Fried disfavored.<sup>282</sup>

White House desires, statutory grants of authority, political circumstances, and Solicitor General philosophies all contribute to the Solicitor General's uneven representation of independent agency interests. Although the Solicitor General is often a dedicated advocate for independent agency interests, he is ultimately an unreliable advocate. The Solicitor General should not be faulted, for Congress created a system which places responsibility for independent agency litigation in the hands of an Executive Branch official duty-bound to White House and Attorney General priorities. Under this scheme, it is inevitable that conflicts will arise and that resolution of those conflicts will often occur to the detriment of independent agency per-

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277. See *supra* text accompanying notes 195, 235.

278. Lee, *supra* note 15, at 595.

279. FRIED, *supra* note 7, at 191.

280. Interview with Rosemary Collyer, *supra* note 4.

281. 488 U.S. 361 (1989).

282. FRIED, *supra* note 7, at 168. Lincoln Caplan, therefore, goes too far in suggesting that Fried embodied the Reagan Administration's politicization of the Solicitor General's office. See CAPLAN, *supra* note 7, at 195-209, 264-67. In fact, Fried has been criticized for putting his principles of interpretation ahead of those of the Reagan Administration. See McGinnis, *supra* note 9, at 803-04. Nevertheless, it is beyond dispute that, when it came to complying with specific demands of the Attorney General, Fried perceived the Attorney General to be his supervisor. On the question of the constitutionality of independent agencies, for example, Fried remarked:

I did not come to any office committed to this program of submitting the independent agencies to the President's power, but here more than anywhere else the Attorney General's attraction to theoretical discussion had its effect. . . . I was convinced. I had to be, since in the end this battle would have to be waged by me in the Supreme Court."

FRIED, *supra* note 7, at 158.

spectives. While the Solicitor General does not want to risk losing the power he holds under this scheme by persistently and outrightly defying agency wishes, it is equally true that he need not view the independent agencies whose Supreme Court litigation he controls as clients.

### B. *The Solicitor General as Advocate*

The Solicitor General, contrary to bureaucratic folklore, is not "a reliable, non-ideological and, essentially, non-political" advocate for the government before the Supreme Court.<sup>283</sup> The experiences of the SEC, FCC, and especially the EEOC attest to this conclusion. Nonetheless, most independent agency officials and attorneys in the Solicitor General's office perceive that the benefits of Solicitor General representation outweigh the costs of Solicitor General control.<sup>284</sup> However, independent agency officials and Solicitor General attorneys typically do not consider the viability of an FTC-type hybrid arrangement where independent agencies may take control of cases that the Solicitor General refuses to pursue on their behalf. This hybrid structure preserves most of the advantages of Solicitor General representation without unduly restricting agency autonomy.

Solicitor General counsel provides significant benefits. Solicitor General lawyers are extraordinarily able and skilled at Supreme Court advocacy. The "skills, experience and knowledge that the office has gained over many years"<sup>285</sup> manifest themselves in a number of ways, including superlative briefs and oral advocacy before the Court. Since the Solicitor General's office limits its advocacy to a group of nine individuals, it has a far better sense than most litigants about which buttons to push before the Supreme Court.

Solicitor General advocacy also confronts the often difficult decision whether or not to seek certiorari. Some cases contain "bad facts," and an agency would, therefore, be "ill-advised to litigate in the Supreme Court an important legal issue in a factual context in which the Court's sympathies are likely to be with the other side."<sup>286</sup> This "broader perspective and greater objectivity"<sup>287</sup> save the independent agency from a potentially devastating Supreme Court decision. For independent agencies, this "perspective and objectivity" are a mixed blessing. The Solicitor General does not

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283. *Solicitor General Hearing*, *supra* note 135, at 40 (testimony of Professor Burt Neuborne).

284. Interview with Paul Gonson, *supra* note 4; Interview with Ernie Eisenstadt, *supra* note 4; Interview with Ken Geller, *supra* note 5; Interview with Tom Merrill, *supra* note 5; see also *Exchange Act Hearings*, *supra* note 76, at 278-80 (statement of Solicitor General Erwin Griswold), 299 (statement of SEC Commissioner Philip Loomis, Jr.).

285. *Exchange Act Hearings*, *supra* note 76, at 279-80 (statement of Solicitor General Erwin Griswold).

286. *Id.* at 279. Charles Fried, too, has spoken of the dangers of "bad facts," referring to *Sheet Metal Workers* as an "unattractive . . . case in which to oppose preferences." *FRIED*, *supra* note 7, at 110. Current and former Deputy Solicitors General have also spoken of this danger. See Interview with Ken Geller, *supra* note 5; Interview with Lawrence Wallace, *supra* note 5.

287. *Stern*, *supra* note 3, at 158.

seek certiorari in many independent agency cases because he considers the legal issue, while quite significant to the agency, relatively unimportant. Although this screening function enhances the likelihood of success when the Solicitor General pursues a case, it offers little solace to an independent agency that is forced to take defeat on the chin.

The prospects that a particular case will not be deemed cert-worthy are of significant but not overriding concern to independent agencies. The issue presumably can be relitigated and, perhaps with a better set of facts or some other development, the issue will ultimately be presented to the Supreme Court. Yet when certiorari is not sought for political reasons or when independent agency perspectives are tossed aside or severely limited in cases presented to the Court, Solicitor General authority compromises independent agency autonomy in a fundamental way. In such circumstances, independent agencies should be allowed to separately advance their arguments before the Court—assuming, that is, that independent agencies are constitutionally authorized to make policy decisions at odds with other parts of the Executive Branch and the President.<sup>288</sup>

Some Solicitors and Attorneys General view proposals of this type as heretical challenges to the Solicitor General's authority as the government's spokesperson before the Supreme Court. Attorney General Tom Clark cautioned Congress against independent agency appeals before the Supreme Court because "their objective [would] be so single-minded that they will ignore . . . the broad objectives of the United States."<sup>289</sup> Solicitor General Erwin Griswold likewise objected to independent agency autonomy saying that "it would seriously affect the handling of the Government's legal work before the Supreme Court."<sup>290</sup>

These reactions are understandable but overstated. Limitations on Solicitor General control do not necessarily undermine Solicitor General authority. By allowing the Solicitor General to opt out of independent agency litigation, the hybrid model serves Solicitor General interests without significantly intruding upon the ability to represent governmental interests before the Court. First, in cases where the Solicitor General either agrees with the agency or can convince the agency of his position, Solicitor General authority is unaffected. In these instances, the independent agency benefits from Solicitor General counsel, and the Solicitor General protects its government litigation prerogatives. Second, in cases where the Solicitor General might feel constrained either to seek certiorari or to advance arguments with which he does not fully concur, the hybrid arrangement frees him from involvement without the opprobrium of undermining agency independence. Third, cases where the Solicitor General is castigated for

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288. See *infra* Parts II.C.1, III.

289. Schnapper, *supra* note 143, at 1259 n.225 (quoting Tom Clark) (alteration in original).

290. *Exchange Act Hearings*, *supra* note 76, at 294 (statement of Solicitor General Erwin Griswold).



giving short shrift to independent agency concerns will be less likely to arise. Fourth, the Solicitor General will still present his views either explicitly or implicitly before the Court. Cases in which the Solicitor General remains silent will send a signal to the Court that he does not support the granting of certiorari; these signals are quite effective, as shown in a 1966 study of Solicitor General-ICC relations.<sup>291</sup> More significantly, the Solicitor General may express his views directly to the Court at either the certiorari or argument phase. To ensure that the Solicitor General's views are presented to the Court, Congress could statutorily mandate his participation. Fifth, in presenting his views to the Court, the Solicitor General will not be encumbered by the need to balance independent agency perspectives in his litigation strategy. Instead, he may more easily wave the Executive Branch banner before the Court.

The above projections are not merely idle speculation. The ICC, FEC, and FTC all possess authority to represent themselves before the Supreme Court. Their experiences with the Solicitor General and before the Court speak to the workability of a hybrid litigation scheme.

### 1. *The ICC*

ICC independent litigating authority dates back to 1910, with Congress reaffirming that authority in 1975.<sup>292</sup> For the most part, the ICC and Solicitor General have worked cooperatively, preparing joint briefs in the majority of ICC cases before the Supreme Court. According to Erwin Griswold, "in at least 85 percent of the cases [they] have been side by side."<sup>293</sup> Where differences exist, they sometimes involve disputes solely between the Solicitor General and the ICC. For example, in *Henderson v. United States*,<sup>294</sup> the Solicitor General successfully opposed a 1950 ICC ruling upholding racial segregation on railway dining cars. Solicitor General-ICC disputes more typically involve squabbles between the ICC and another governmental department or agency, with the Solicitor General weighing in on the side of the non-ICC interest. These disputes, which have involved the Departments of Agriculture, Labor, and Defense, feature such strangely named cases as *United States v. ICC*<sup>295</sup> and *United States v. United States*.<sup>296</sup> The Solicitor General's position almost always prevails in these cases.<sup>297</sup>

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291. Brigman, *supra* note 104, at 134-41.

292. See *supra* note 103.

293. *Exchange Act Hearings*, *supra* note 76, at 294 (testimony of Solicitor General Erwin Griswold).

294. 339 U.S. 816 (1950).

295. 337 U.S. 426 (1949).

296. 417 F. Supp. 851 (D.D.C. 1976), *aff'd sub nom.* *National Classification Comm. v. United States*, 430 U.S. 961 (1977). For a discussion of these and other similar cases, see Herz, *supra* note 16; Stern, *supra* note 10, at 760-63; Brigman, *supra* note 104, at 117-41.

297. See Stern, *supra* note 10, at 761-62; Brigman, *supra* note 104, at 135-40.

The ICC and Solicitor General have both gained from this arrangement. As stated above, the Solicitor General and the ICC work cooperatively in the vast majority of cases—including cases where other Executive Branch interests, such as the EPA, oppose the ICC.<sup>298</sup> While the ICC gained a measure of independence, this arrangement hardly compromised the prestige of Solicitor General representation. Most significantly, when conflicts arise, the Solicitor General almost always comes out on top. The Solicitor General is also able to speak his mind on ICC cases without shutting the courthouse doors to the agency. In one antitrust case, for example, the Solicitor General bluntly criticized the agency for not making the proper analysis and not keeping “its eyes open.”<sup>299</sup> Erwin Griswold’s comment that ICC litigating authority was not “a major difficulty or problem”<sup>300</sup> suggests the Solicitor General’s apparent contentment with this arrangement.

## 2. *The FTC*

Relations between the FTC and the Solicitor General also suggest that independent litigating authority improves independent agency representation before the Supreme Court without causing the Solicitor General “major difficulty.” Congress granted the FTC independent litigating authority in the 1975 Federal Trade Commission Improvements Act. Rooted in the perceived failure of the Department of Justice to represent FTC interests in court adequately, the Act authorized the FTC to defend agency orders before the Supreme Court whenever the Solicitor General declined to represent the Commission.<sup>301</sup> However, this litigating authority has not undercut Solicitor General influence. The Solicitor General has proven himself to be

298. In *ICC v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), the EPA sought to challenge an ICC order increasing freight rates. The EPA apparently agreed with SCRAP’s claim that increasing freight rates would lead to a decrease in recyclable materials and, therefore, would harm the environment. See Davis, *supra* note 38, at 47-48. After the Solicitor General joined forces with the ICC in defending the freight increase, the EPA General Counsel wrote a letter to Solicitor General Robert Bork “requesting permission to submit to the Supreme Court the views of the Environment Protection Agency . . . [that] the environmental impact statement of the Interstate Commerce Commission [is insufficient.]” *Id.* at 48-49 (quoting Appellees’ Supplemental Brief at 11a, *ICC v. SCRAP*, 413 U.S. 917 (1973) (No. 72-535)). Solicitor General Bork rejected this request because “it appears EPA has no independent regulatory authority in regard to the actions of the Interstate Commerce Commission . . .” *Id.* at 49 (quoting Appellees’ Supplemental Brief at 10a, *SCRAP* (No. 72-535)). Bork won both this battle with the EPA and the war over the ICC order, as the Supreme Court upheld the freight increase in *SCRAP*, 412 U.S. 669 (1973). For further discussion of this case, see Davis, *supra* note 38, at 47-50.

299. Memorandum for the United States at 8, *Florida East Coast Ry. v. United States*, 386 U.S. 544 (1967) (No. 638). For further discussion of this case, see *Government Litigation in the Supreme Court*, *supra* note 123, at 1461-62.

300. *Exchange Act Hearings*, *supra* note 76, at 293 (testimony of Solicitor General Erwin Griswold).

301. See *supra* text accompanying notes 82-87.

a respected advisor to the FTC on the cert-worthiness of its claims and a more earnest representative of FTC interests before the Court.<sup>302</sup>

This dynamic, in many respects, mirrors ICC-Solicitor General relations. Like the ICC, the Solicitor General and FTC rarely disagree with each other. In fact, unlike ICC orders which may adversely affect other governmental interests, the FTC has typically been in sync with White House preferences these past several years.<sup>303</sup> Conflicts which have arisen usually involve a case's cert-worthiness and not the substantive outcome desired by the FTC. With two exceptions, the FTC followed the Solicitor General's recommendations during this period.<sup>304</sup> The FTC heeded the Solicitor General sometimes because it agreed with him and sometimes because it thought the costs of litigating without the Solicitor General's backing were too high. These costs included the risk of damaging its litigating capital by going to the Court too often, going to the Court without the benefit of Solicitor General representation, and harming its relationship with the Solicitor General's office. The FTC's adherence to Solicitor General advice suggests that the FTC recognized that the added value of Solicitor General representation was so significant that the agency felt severely constrained in appearing before the Supreme Court without it.

The two cases that the FTC initially pursued without Solicitor General counsel have also defined the status of Solicitor General-FTC relations. One case, *FTC v. Indiana Federation of Dentists*,<sup>305</sup> concerned the type of proof necessary to establish a conspiratorial restraint of trade; the other case, *FTC v. Superior Court Trial Lawyers Ass'n*,<sup>306</sup> concerned whether a boycott for greater compensation by court-appointed lawyers should be considered political speech warranting First Amendment protection. The Solicitor General, although unwilling to petition the Court on the FTC's behalf, did not disagree with the FTC on the merits in either case. The Solicitor General simply thought the cases undeserving of Supreme Court consideration.<sup>307</sup> Despite this belief, the Solicitor General did not seek to hinder Court consideration by opposing the FTC's petition. In both instances, to the surprise of the FTC and Solicitor General,<sup>308</sup> the Supreme Court granted certiorari. Once certiorari was granted, the Solicitor General

302. Interviews with Ernie Eisenstadt, *supra* note 4, and Tom Merrill, *supra* note 5, were particularly helpful in understanding the present-day dynamic between the Solicitor General's office and the FTC.

303. See Roger E. Schechter, *A Retrospective on the Reagan FTC: Musings on the Role of an Administrative Agency*, 42 ADMIN. L. REV. 489, 489-500 (1990) (describing the Reagan Administration's ideological domination of the FTC).

304. See Brief for the Federal Trade Commission at 1 n.1, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (No. 88-1198); Brief for the Federal Trade Commission at 1 n.1, *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (No. 84-1809).

305. 476 U.S. 447 (1986).

306. 493 U.S. 411 (1990).

307. Interview with Tom Merrill, *supra* note 5; Interview with Ernie Eisenstadt, *supra* note 4.

308. Interview with Tom Merrill, *supra* note 5; Interview with Ernie Eisenstadt, *supra* note 4.

worked with the FTC in preparing the cases.<sup>309</sup> Yet, since the FTC had been granted certiorari by its own rights, it called the shots on presenting the cases to the Court.

The FTC's lead role apparently did not sit well with the Solicitor General's office. Because he represents the government in a wide range of cases, the Solicitor General—even when he agrees with the outcome desired by a particular agency—frames a case to balance how best to present that case to the Court with his long-range litigation strategy. The FTC's success in *Indiana Federation of Dentists* and *Superior Court Trial Lawyers Ass'n* allowed the FTC to frame its own arguments. Consequently, the Solicitor General faced the choice of advocating FTC positions at the certiorari stage or declining participation in a case and risking a successful independent FTC cert petition. This, according to FTC officials, is what occurred in *FTC v. Ticor Title Insurance Co.*,<sup>310</sup> a case determining the necessary degree of state supervision of anticompetitive conduct for private actors to claim immunity from FTC antitrust enforcement. By petitioning the Court for certiorari and then representing the FTC throughout the litigation, the Solicitor General exercised significant control in defining the case.<sup>311</sup>

Pressure to seek certiorari in cases such as *Ticor* and *Indiana Federation of Dentists* does not significantly inconvenience the Solicitor General. After all, the Solicitor General agrees with the agency on the merits in these cases but decides not to seek certiorari. The FTC experience suggests that such cases occur few and far between. Moreover, were the Solicitor General and FTC unable to come to terms over the government's position, the Solicitor General would remain free to file a supplemental brief explaining his views. In the end, the Solicitor General-FTC experience has been successful. Although the dynamic is more complex, the prestige and influence of the Solicitor General remain high. That the FTC almost always decides on its own to do what the Solicitor General recommends suggests that the Solicitor General has gained in persuasive power what he has lost in statutory authority.

### 3. *The FEC*

The limited FEC experience tells a far different story. In *Buckley v. Valeo*,<sup>312</sup> the Department of Justice and FEC fought over the Commission's very existence. The dispute centered on Congress' decision to split the

309. See Brief for the Federal Trade Commission, *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (No. 84-1809); Brief for the Federal Trade Commission, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (No. 88-1198).

310. 112 S. Ct. 2169 (1992). Department of Justice officials do not necessarily subscribe to this accounting. See *supra* note 106.

311. See Brief for Federal Trade Commission, *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992) (No. 91-72).

312. 425 U.S. 946 (1976).



power to appoint FEC commissioners between Congress and the President. Attorney General Edward Levi thought that this mixed-appointment scheme was unconstitutional and that the Department of Justice had no obligation to consider FEC interests since "the Commission is an agency dominated by Congress."<sup>313</sup> FEC Chairman Tom Curtis strongly disputed Levi's conclusions. Although the FEC was statutorily empowered to represent itself before the Supreme Court,<sup>314</sup> Curtis pleaded with the Attorney General to provide "a spirited and wholehearted defense of this legislation"<sup>315</sup> and "state[d] as forcefully" as he possibly could that the Attorney General's position was "dangerously wrong."<sup>316</sup> Indeed, Curtis complained both to the White House and to congressional leadership about Levi's handling of the case.<sup>317</sup> Curtis' efforts to strongarm the Department of Justice did not succeed. The Department of Justice and FEC filed separate briefs before the Supreme Court on this question;<sup>318</sup> the Department of Justice position prevailed, forcing a drastic reworking of FEC statutory responsibilities.<sup>319</sup>

Without independent litigating authority, the FEC would not have had its views represented in court. In plain terms, the interests of both the Attorney General (who could advocate his position without fear of provoking political reprisals in Congress) and the FEC (which could have representation as a party in the case) were served by dual representation. The eventual repudiation of the FEC's position does not undermine this conclusion—as the saying goes, it is better to have litigated and lost than never to have litigated at all. Indeed, the feud between Curtis and Levi in part

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313. Letter from Edward H. Levi, Attorney General, to Thomas B. Curtis, Chairman, Federal Election Commission (June 12, 1975), reprinted in *Representation Hearings*, *supra* note 156, at 125.

314. 2 U.S.C. §§ 437c(f)(4), 437d(a)(6), (b) (1988); 26 U.S.C. §§ 9010(a), 9040(a) (1988).

315. Letter from Thomas B. Curtis, Chairman, Federal Election Commission, to Edward H. Levi, Attorney General (May 27, 1975), reprinted in *Representation Hearings*, *supra* note 156, at 121.

316. Letter from Thomas B. Curtis, Chairman, Federal Election Commission, to Edward H. Levi, Attorney General (June 5, 1975), reprinted in *Representation Hearings*, *supra* note 156, at 122.

317. See Letter from Thomas B. Curtis, Chairman, Federal Election Commission, to President Gerald R. Ford (June 9, 1975), reprinted in *Representation Hearings*, *supra* note 156, at 124-25; Letter from Thomas B. Curtis, Chairman, Federal Election Commission, to James G. Abourezk, Chairman, Subcommittee on Separation of Powers, Senate Judiciary Committee (June 12, 1975), reprinted in *Representation Hearings*, *supra* note 156, at 130.

318. See Brief of the Federal Election Commission at 6, *Buckley v. Valeo*, 425 U.S. 946 (1976) (No. 75-436) ("This brief defends the legitimacy of the means chosen by Congress to establish the Federal Election Commission (the method of appointment) . . . [because] the Constitution confers upon the Congress broad and pervasive responsibilities in relation to the federal electoral process . . ."); Brief for the Attorney General as Appellee and for the United States as Amicus Curiae at 6, *Buckley* (No. 75-436) ("[T]he grant of enforcement powers to the Federal Election Commission is unconstitutional. . . . Most of its members are appointed by Congress . . . Just as the executive branch cannot make the laws, so Congress (or its delegate, the Commission) cannot enforce them.").

319. Sections 437c(f)(4) and 437d(a)(6) and (b) were modified by the Federal Election Campaign Act, Pub. L. No. 92-225, 86 Stat. 3 (1972), and §§ 9010(a) and 9040(a) were modified by the Presidential Election Campaign Fund Act, Pub. L. No. 92-178, 85 Stat. 563.

prompted the establishment of the Office of Senate Legal Counsel to ensure institutional representation of legislative interests before the Court.<sup>320</sup>

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The experiences of the ICC, FTC, and FEC suggest that grants of litigating authority improve independent agency representation before the Supreme Court without substantially undermining Solicitor General authority. The fear expressed by Erwin Griswold that extending independent litigating authority to "12 or 15 agencies . . . would seriously affect the handling of the Government's legal work before the Supreme Court"<sup>321</sup> is unlikely to be realized. Built-in restraints are likely to offset the so-called "commons problem" of each independent agency overvaluing the importance of its own cases, thereby disregarding the cautionary Solicitor General and flooding an already overburdened Supreme Court with certiorari petitions.<sup>322</sup>

Independent agencies gain a good deal from Solicitor General representation. The Solicitor General wins roughly three fourths of his cases because of his care in selecting cases,<sup>323</sup> his experience in presenting them, and his reputation before the Supreme Court. Independent agencies recognize that victory is less likely without the Solicitor General and that maintaining good relations with this powerful advocate is critically important.<sup>324</sup> Consequently, when the Solicitor General recommends against seeking certiorari, independent agency counsel will likely listen. The FTC's decision to seek certiorari on its own only twice in more than a decade exemplifies independent agency self-restraint and suggests that fears of a Supreme Court litigation explosion are exaggerated.

When conflicts between the Solicitor General and independent agencies do arise, however, the power to go it alone can be critically important to independent agencies. In *Buckley v. Valeo*, for example, independent litigating authority enabled the FEC to fight for its institutional life. The Solicitor General is not ill-served by this arrangement. Without the hindrance of competing independent agency interests, he may be better able to advance his favored position. Other times, in order to retain control of a case, he will feel compelled to heed independent agency wishes. On balance, especially since independent agencies are desirous of his counsel and

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320. Interview with Mort Rosenberg, *supra* note 6. The FEC continues to make use of its self-representation authority. In 1993, for example, the Commission unsuccessfully petitioned the Court in a dispute with Lyndon LaRouche. See Brief for the Federal Election Commission in Support of Certiorari, *FEC v. LaRouche*, 114 S. Ct. 550 (1993) (No. 93-519).

321. *Exchange Act Hearings*, *supra* note 76, at 293-94 (testimony of Solicitor General Erwin Griswold).

322. Interview with Tom Merrill, *supra* note 5; Interview with Ken Geller, *supra* note 5; Interview with Ernie Eisenstadt, *supra* note 4.

323. See SALOKAR, *supra* note 121, at 126-30 (focusing on Solicitor General Griswold), 145-50.

324. For an argument that independent agency counsel may be nearly as good and in some cases better than their counterparts in the Solicitor General's office, see *Lochner*, *supra* note 176, at 572-73.

solicitous of his recommendations, the Solicitor General's influence would not be significantly reduced under FTC-type hybrid arrangements.

The real question seems to be one of power. If independent agencies should be limited in their ability to reach conclusions at odds with the Executive Branch, then centralizing litigating authority within the Department of Justice seems appropriate. If independent agencies are to have an independent voice, avoiding the risk of suppressing that voice outweighs confronting the unproven and quite speculative risk that Solicitor General authority will be undermined through a hybrid litigation scheme.

### *C. The Solicitor General as Protector of the Supreme Court*

Centralizing government litigating authority before the Supreme Court involves more than the question of whom the Solicitor General represents and how well he represents them. It also concerns the needs of the Supreme Court. Proponents of centralization speak both of fears that the Court is ill-equipped to resolve disputes involving multiple governmental presentations and the valuable screening function the Solicitor General performs for the Court by controlling the filing of certiorari petitions. These arguments for centralization are forceful. Undoubtedly, centralized control of government litigation simplifies the Court's task of deciding whether to hear a case and determining whether the government's position is correct. Otherwise, the Court would sometimes have to choose between opposing governmental assessments of a case's cert-worthiness and merits. Fears of decentralization are nevertheless overstated. The Supreme Court is quite capable of managing intragovernmental disputes. The screening function performed by the Solicitor General, moreover, is not contingent on plenary Solicitor General control over governmental litigation.

#### *1. Intragovernmental Disputes Before the Supreme Court*

Agency counsel, Department of Justice officials, Supreme Court Justices, and members of Congress join the Solicitor General in proclaiming that it is certainly unbecoming and quite possibly destructive to have conflicting governmental interests presented before the Supreme Court. Their argument is typically not about some constitutional demand that the unitary executive speak as one voice for all of government before the Court.<sup>325</sup> The argument, instead, focuses on the difficulty that the Court would have in

325. Some advocates of Department of Justice centralization *do* claim that the Executive Branch is "unitary" and, therefore, that it needs to speak in a single voice. See *The Attorney General's Role as Chief Litigator*, *supra* note 49. At the same time, many proponents of the "unitary executive" pay little attention to the Department of Justice centralization issue. See, e.g., DOUGLAS W. KMIEC, *THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT* 47-68 (1992) (omitting the issue of Department of Justice centralization from his otherwise excellent discussion of how the President asserts power over the Executive Branch).

sorting out such conflicts and in comprehending governmental arguments made by lawyers outside the Solicitor General's control.

The pervasiveness of this belief is nearly overwhelming. One general counsel endorsed centralization before the Supreme Court because "[w]ithout coordination . . . the Court might well be faced with conflicting or even diametrically opposed views of different branches of Government on specific questions, which would be intolerable."<sup>326</sup> An Office of Legal Counsel memorandum suggested that the Solicitor General "protects the Court" in presenting "a single, coherent position."<sup>327</sup> Solicitors General agree with this assessment, arguing that multiple independent agency presentations on a single legal issue "would border on the chaotic."<sup>328</sup> Supreme Court Justices, too, support a unified governmental presentation. In response to a congressional inquiry regarding the consequences of extending to the SEC the right to petition the Supreme Court, Chief Justice Warren Burger expressed "the unanimous view of the Justices that it would be unwise to dilute the authority of the Solicitor General as to Supreme Court jurisdiction in cases arising within the Executive Branch and independent agencies."<sup>329</sup> Individual Justices have also complained at oral argument about independent agency cases where the Solicitor General does not present a unified governmental position.<sup>330</sup>

Although Justices may prefer a cleaner, unified government presentation over the more complex and chaotic litigation that could result from independent agency litigating authority, the suggestion that the Supreme Court is somehow ill-equipped to face this hydra is a bit surprising. Independent agencies and the Department of Justice often air intragovernmental conflicts before lower federal courts of appeals.<sup>331</sup> No one, however, has endorsed centralized litigating authority to spare federal appellate court judges the confusion of conflicting governmental presentations in

326. Stern, *supra* note 3, at 217 (quoting anonymous General Counsel).

327. Role of the Solicitor General, *supra* note 138, at 230-31.

328. *Exchange Act Hearings*, *supra* note 76, at 279 (statement of Solicitor General Erwin Griswold).

329. Letter from Warren E. Burger, Chief Justice of the United States, to John E. Moss, Chairman, House Subcommittee on Commerce and Finance (Nov. 9, 1971) [hereinafter Letter from Chief Justice Burger to Congressman Moss], reprinted in *Study of the Securities Industry: Hearings Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. 1809-10 (1971).

330. Justice Felix Frankfurter complained in the *St. Regis* case: "How do you expect us to decide this matter if you can't even get an agreement inside the Justice Department?" Brigman, *supra* note 104, at 155 (quoting Justice Frankfurter). For further discussion of *St. Regis*, see *supra* text accompanying notes 79-81.

331. Numerous examples of these cases can be found in Herz, *supra* note 16. Some of these cases include: *United States v. FDIC*, 881 F.2d 207 (5th Cir. 1989); *Confederated Tribes and Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466 (9th Cir. 1984) (involving a suit brought by the National Marine Fisheries Service and others against the FERC); *United States v. Federal Maritime Comm'n*, 694 F.2d 793 (D.C. Cir. 1982); *United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980); *United States v. Civil Aeronautics Bd.*, 511 F.2d 1315 (D.C. Cir. 1975); see also *supra* text accompanying notes 203-08 (discussing *Chicago Mercantile Exchange v. SEC*).



their courts. It is unlikely that Supreme Court Justices would be less able to deal with such conflicts.

The Supreme Court, in fact, has never suggested that it could not effectively resolve multiple government presentations. The record supports just the opposite: the Supreme Court is comfortably resigned to adjudicating dual government presentations. Having had a considerable number of intragovernmental disputes presented before it, the Supreme Court is clearly familiar with and hardly phased by this practice. The few statements of disapproval found in oral argument transcripts are of little significance; the Court has described this practice as "not a rarity."<sup>332</sup>

Supreme Court acquiescence to dual government representation extends not just to independent agencies but to cases involving competing interests within the Executive Branch. In *TVA v. Hill*, the Solicitor General appended to his brief supporting TVA efforts to construct the Tellico Dam a Department of Interior memorandum claiming that Endangered Species Act protection of the snail darter prohibited the dam's construction.<sup>333</sup> In *Personnel Administrator of Massachusetts v. Feeney*, a brief filed on behalf of the EEOC, the Office of Personnel Management, and the Departments of Labor and Defense raised concerns about the Massachusetts' veterans' preference scheme that were neglected by the Solicitor General.<sup>334</sup> A more striking example appeared in *Bob Jones University v. United States*, where the Solicitor General successfully requested that the Court appoint counsel to represent the Treasury Department's position denying tax breaks to racist schools while the Department of Justice separately argued that, until Congress passed specific legislation on the issue, racist schools were entitled to tax breaks.<sup>335</sup> The Court's compliance with this unorthodox request, as well as its willingness to allow intraexecutive disputes to be presented to it in *Hill* and *Feeney*, suggest that the Court recognizes that the Executive Branch sometimes behaves more like a conglomeration of divergent and occasionally antagonistic concerns than as a unitary voice.

The Court, nevertheless, has not spoken definitively on the issue of whether suits can be maintained between different parts of the Executive Branch—for instance, the EPA bringing an enforcement action against the Department of Energy.<sup>336</sup> *Bob Jones University*, *Feeney*, and *Hill* all

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332. Oral Argument Transcript at 33, *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (No. 76-1701).

333. See Brief for the Petitioner at 1a-13a, Appendix: Views of the Secretary of the Interior, *Hill* (No. 76-1701).

334. See Motion for Leave to File and Brief of the Office of Personnel Management, the United States Department of Defense, the United States Department of Labor, and the Equal Employment Opportunity Commission as Amici Curiae, *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979) (No. 78-233).

335. See *supra* text accompanying notes 110-13.

336. See generally Herz, *supra* note 16; Michael W. Steinberg, *Can EPA Sue Other Federal Agencies?*, 17 *ECOLOGY L.Q.* 317 (1990).

involved a "nongovernmental 'real party in interest'"<sup>337</sup> who could separately maintain the lawsuit against the principal governmental defendant. A more vivid example of an intraexecutive dispute is *United States v. Nixon*.<sup>338</sup> In opposing executive-controlled efforts by the special prosecutor to gain access to the Nixon tapes,<sup>339</sup> the President's counsel claimed that "[t]his entire dispute, between two entities within the executive branch" is nonjusticiable because Article II of the Constitution vests "ultimate authority over all executive branch decisions . . . in the President."<sup>340</sup> While recognizing that the dispute was indeed between a subordinate and superior officer of the Executive Branch (suggesting that Nixon could fire Leon Jaworski just as he fired Archibald Cox), the Court nonetheless ruled against Nixon. Noting the presence of "concrete adverseness,"<sup>341</sup> the Court stated that "[t]he mere assertion of a claim of an 'intra-branch dispute,' without more, has never operated to defeat federal jurisdiction; justiciability does not depend on such a surface inquiry."<sup>342</sup> It is unclear whether the Court interpreted *Nixon* to embrace a "real party in interest" standard or, instead, simply insisted that "the issues were of the sort which are traditionally justiciable and . . . the setting assured concrete adverseness."<sup>343</sup>

The Court's handling of intraexecutive disputes suggests that the Court does not demand that the Executive Branch act as a singular entity. This recognition of a multidimensional government is quite apparent in the case of independent agencies. Disputes between the Solicitor General and independent agencies can sometimes be seen in certiorari petitions, briefs, and oral arguments. In fact, the Court has even chided the Solicitor General in some of its opinions for not reporting conflicting government views. In *Connecticut v. Teal*, Justice Brennan's majority opinion took note of the fact that the EEOC, "which shares responsibility [with the Department of

337. Proposed Tax Assessment Against the United States Postal Service, 1 Op. Off. Legal Counsel 79, 83 (1977) (assessing the justiciability of a dispute between the Postal Service and the IRS). The Reagan Administration likewise endorsed this "real party in interest" standard in opposing EPA enforcement actions against another federal agency. See Memorandum from John M. Harmon, Assistant Attorney General, to Michael J. Egan, Associate Attorney General 5-8 (June 23, 1978), reprinted in *Compliance Hearing*, *supra* note 66, at 668, 672-75. The Bush Administration, not surprisingly, also endorsed this real party in interest standard. See Memorandum of Understanding on Civil Enforcement Between the Justice Department and the Environmental Protection Agency, *supra* note 68.

338. 418 U.S. 683 (1974). For a commentary on the justiciability of *Nixon*, see Philip B. Kurland, *United States v. Nixon: Who Killed Cock Robin?*, 22 UCLA L. Rev. 68, 71-72 (1974).

339. The *Nixon* litigation, of course, predated the Ethics in Government Act's creation of independent counsels insulated from the Executive Branch. The independence of special prosecutor Leon Jaworski, who handled the *Nixon* litigation, hinged on regulations promulgated (and repealable) by the Attorney General. See Brief for the United States at 17, *United States v. Nixon*, 418 U.S. 683 (1974) (No. 73-1766) (arguing that such regulations ensured a "concrete controversy").

340. Brief for the Respondent, Cross-Petitioner Richard M. Nixon, President of the United States at 28, *Nixon* (No. 73-1766).

341. 418 U.S. at 697 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

342. *Id.* at 693.

343. Hertz, *supra* note 16, at 969.

Justice] for federal enforcement of Title VII<sup>344</sup> declined to join the Department of Justice's brief. In *Sheet Metal Workers*, Justice Brennan's plurality opinion likewise signalled his recognition that the Solicitor General's office had *de facto* overruled the EEOC, noting that "throughout this litigation, [the EEOC] joined the other plaintiffs in asking the courts to order [the] numerical goals [it now opposes]."<sup>345</sup>

The Court also recognizes the propriety of lawsuits launched by independent agencies against the Executive Branch and vice versa. Lawsuits between the Federal Power Commission and the Department of Interior,<sup>346</sup> the Interstate Commerce Commission and the Department of Agriculture,<sup>347</sup> the Postal Service and the Postal Rate Commission,<sup>348</sup> the Comptroller of the Currency and the Department of Justice,<sup>349</sup> and other combinations have been found justiciable.<sup>350</sup> The best known of these cases is *United States v. ICC*,<sup>351</sup> a 1949 case concerning a Department of Justice challenge to the ICC's rejection of a Department of Army complaint against unreasonable railroad rates. The ICC sought to have the case dismissed because "the United States was both plaintiff and defendant and [the case,] therefore, was one presenting no actual case or controversy."<sup>352</sup> The Department of Justice attacked this intragovernmental fiction, arguing that "some determinations made by the Commission, an independent governmental agency, will be regarded as erroneous by the highest legal officers of the Government."<sup>353</sup> In other words, since independent agencies are free to make decisions at odds with the Executive Branch, the Department of Justice reasoned that it is improper to invoke an intragovernmental fiction to shield those decisions from the courts. "[S]ubstance, not form, is controlling."<sup>354</sup> The Supreme Court agreed, holding that "courts must look behind the names that symbolize the parties to determine whether a justiciable case or controversy is presented."<sup>355</sup>

The Court could not have held otherwise without contradicting the 1935 *Humphrey's Executor*<sup>356</sup> decision that affirmed the constitutionality of

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344. 457 U.S. 440, 451 n.11 (1982).

345. *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 444 n.24 (1986).

346. See *Udall v. Federal Power Comm'n*, 387 U.S. 428 (1967); *United States ex rel Chapman v. Federal Power Comm'n*, 345 U.S. 153 (1953).

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

348. *Mail Order Ass'n of Am. v. United States Postal Serv.*, 986 F.2d 509 (D.C. Cir. 1993).

349. See, e.g., *United States v. Connecticut Nat'l Bank*, 418 U.S. 656 (1974); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974). These decisions are both cited in *Nixon* to support the Court's conclusion that *Nixon* is justiciable. *United States v. Nixon*, 418 U.S. 683, 693 (1974).

350. Most of the examples listed above and several others are mentioned in Herz, *supra* note 16.

351. 337 U.S. 426 (1949).

352. Brief for the Interstate Commerce Commission at 21, *United States v. ICC*, 337 U.S. 426 (1949) (No. 330).

353. Brief for the United States at 26, *United States v. ICC* (No. 330) (emphasis added).

354. *Id.* at 11.

355. *United States v. ICC*, 337 U.S. at 430.

356. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

independent regulatory agencies. In that case, the Court had validated administrative decisionmaking outside complete Executive Branch control and, with it, the possibility of a truly adversarial policy dispute within the government. If this intragovernmental dispute were nonjusticiable, one wonders whether controversies between the legislative and executive branches over the constitutionality of legislation or between the judiciary and the executive over the enforcement of subpoenas would be similarly nonjusticiable.

*United States v. ICC*, however, is more than the justiciability counterpart to *Humphrey's Executor*. Its emphasis on "substance, not form" suggests that the Court recognizes that governmental operations are organized in a seemingly endless variety of shapes and forms. One of the forms validated by the Court was regulation outside the control of the President. Once the Court legitimized independent agencies, it was to be expected that the Court would facilitate their independence by approving their participation in litigation. Inevitably, some of that litigation would involve the Executive Branch. That some of that litigation would occur before the Supreme Court was also inevitable. The notion that the Court somehow is poorly served or confused by dual governmental representation is misguided. The Court has invited this dual representation.

## 2. *The Solicitor General as Gatekeeper*

Supporters of Solicitor General control of government Supreme Court litigation most commonly argue that the Solicitor General's screening of governmental cases "guard[s] the door to the Supreme Court, to make sure that only the most important cases are appealed."<sup>357</sup> This vision of the Solicitor General as the Court's erstwhile gatekeeper is so prevalent that a principal focus of Solicitor General scholarship has been to sort out "the conflicting obligations of the Solicitor General"<sup>358</sup> as "an officer and an advocate."<sup>359</sup> More significantly, Solicitors General, Congress, and the Supreme Court have all given credence to this gatekeeper function in their words and deeds. Solicitors General see themselves as "first-line gatekeeper[s]"<sup>360</sup> and accordingly defend centralization because "[s]uch control insures that the government presents to the Supreme Court only those cases that meet the Court's own exacting standards for review."<sup>361</sup> Under this view, formally embraced by the Carter Justice Department, "as an officer of the Court," the Solicitor General "protects the Court's docket

357. Jenkins, *supra* note 184, at 737 (quoting former Deputy Solicitor General Ken Geller).

358. Eric Schnapper so titled his article: "Becket at the Bar—The Conflicting Obligations of the Solicitor General." Schnapper, *supra* note 143.

359. Richard Wilkins so titled his article: "An Officer and an Advocate: The Role of the Solicitor General." Wilkins, *supra* note 143.

360. McCree, *supra* note 162, at 341.

361. *Exchange Act Hearings*, *supra* note 76, at 278 (statement of Solicitor General Erwin Griswold).



by screening the Government's cases and relieving the Court of the burden of reviewing unmeritorious claims."<sup>362</sup>

The Solicitor General and Department of Justice preserve power through this argument and have great incentive to make this claim. That Congress and the Supreme Court likewise embrace this view is all the more significant. The Senate Committee on Governmental Affairs endorsed Solicitor General coordination of Supreme Court litigation to ensure that the Court would not be "overburdened by requests for certiorari filed by the Government."<sup>363</sup> The Supreme Court in 1971 likewise spoke out against the expansion of independent agency litigating authority, expressing its unanimous view that "the Solicitor General exercises a highly important role in the selection of cases to be brought [before the Court] in terms of the long-range public interest."<sup>364</sup> Moreover, in its 1988 *Providence Journal* decision, the Court suggested that "[w]ithout the centralization of the decision whether to seek certiorari, [it] might well be deluged with petitions from every federal prosecutor, agency, or instrumentality."<sup>365</sup>

Solicitor General and Supreme Court conduct reveals that both entities take seriously this gatekeeper role. The Solicitor General seeks certiorari in roughly five to fifteen percent of the cases presented to him. In the 1984 term, for example, certiorari was sought in only forty-three of the several hundred cases sent to the Solicitor General by departments, agencies, and divisions.<sup>366</sup> For its part, the Supreme Court follows the Solicitor General's lead. From 1959-1989, Solicitors General successfully obtained certiorari in almost seventy percent of the 1294 cases they presented to the Court.<sup>367</sup> Private litigants, in contrast, succeeded in only about five percent of their cases.<sup>368</sup>

As gatekeeper, the Solicitor General surely pays attention to many of the indicia of cert-worthiness that the Supreme Court has itself identified.<sup>369</sup> The Solicitor General must also balance concerns far removed from the standard criteria for cert-worthiness, including policy objectives of the Department of Justice and the White House, desires of affected governmental interests, and the risk of legislative intervention. These competing concerns explain the Solicitor General's unsuccessful efforts to oppose certiorari in two critical affirmative action cases—*Metro Broadcasting* and

362. Role of the Solicitor General, *supra* note 138, at 231.

363. STUDY ON FEDERAL REGULATION, *supra* note 60, at 66. The Governmental Affairs Committee, however, did recommend that all independent agencies be allowed to "petition the Supreme Court to review adverse decisions of lower courts." *Id.* at 66-67.

364. Letter from Chief Justice Burger to Congressman Moss, *supra* note 329.

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

366. SALOKAR, *supra* note 121, at 114.

367. *Id.* at 25.

368. *Id.*

369. The Court has identified such factors as conflicts among federal courts, conflicts between state and federal courts, departures from applicable Supreme Court precedents, and important questions of federal law. *See Sup. Ct. R.* 10.

*Sheet Metal Workers*. In each case, the Solicitor General disagreed with the independent agency's support of affirmative action but feared the backlash that might ensue if he reversed the agency's position.<sup>370</sup> Concerns outside the Supreme Court's objective criteria might also explain the Solicitor General's decision to seek certiorari in *Ticor* rather than let the FTC manage the litigation.<sup>371</sup>

Solicitors General Fried and Starr should not be faulted for their interjection of political concerns in the handling of these cases. After all, the Solicitor General must operate within the delegation of authority granted him by the Attorney General. During the Carter years, that delegation was quite broad. Attorney General Bell spoke proudly of how he insulated the Solicitor General from the White House, and his Office of Legal Counsel issued a memorandum opinion defending Solicitor General independence.<sup>372</sup> During the Reagan years, a greater attempt was made to coordinate Solicitor General action with Attorney General preferences. Daily meetings were scheduled, and Attorney General delegates frequently lobbied the Solicitor General.<sup>373</sup> Whatever the scope of the delegation, however, the Solicitor General will be influenced by political concerns.

The Court, undoubtedly, is aware that the Solicitor General exists within a political culture and that he must be influenced by it.<sup>374</sup> However, the Solicitor General's frequent appearances before the Court, his need to preserve good relations with the Court as part of his litigation strategy, and a sense of duty that many Solicitors General feel towards the Court warrant some degree of solicitude by the Court towards the Solicitor General. This solicitude, coupled with the deference the Court accords a coequal branch of government, supports the preservation of the Solicitor General's gatekeeper function.

The question remains whether the gatekeeper function can be maintained while allowing independent agencies greater litigating authority before the Court. The answer is yes. The Solicitor General is always free to express his opinion on a case's cert-worthiness. The Solicitor General's assessment of a case does not become less persuasive simply because an independent agency speaks its own voice before the Court. Indeed, as stated above, Congress could ensure Solicitor General participation at the certiorari stage by mandating that the Solicitor General be a statutory litigant in all cases involving the government. Alternatively, the Court, acknowledging that the gatekeeper function supposedly is performed on its

370. See *supra* text accompanying notes 224-31 (discussing *Metro Broadcasting*), 253-58 (discussing *Sheet Metal Workers*).

371. See *supra* text accompanying notes 310-11.

372. See CAPLAN, *supra* note 7, at 47-50; Role of the Solicitor General, *supra* note 138.

373. See generally FRIED, *supra* note 7, at 40-44; CAPLAN, *supra* note 7, at 51-64 (focusing on the *Bob Jones* litigation), 81-115, 135-54.

374. For a discussion of the Court's recognition that the Solicitor General changes position when there is a new president, see *supra* note 170.

behalf, may itself ask the Solicitor General to comment on the cert-worthiness of independent agency litigation.<sup>375</sup>

Nonetheless, allowing independent agencies to petition the Court separately would somewhat diminish the Solicitor General's power since he could not maintain a veto over independent agency litigation. In certain instances, however, the Solicitor General used that veto to keep a case out of court on the merits and not because the case lacked cert-worthiness.<sup>376</sup> Merits-based decisionmaking of this nature is at odds with the gatekeeper function, namely, to assist the Court in identifying cases worth hearing on the merits. Consequently, enhanced independent agency litigating authority better enables the Supreme Court to understand which cases the Solicitor General opposes on the merits and which cases he opposes for failure to meet measures of cert-worthiness. In other words, independent litigating authority may well serve and would be unlikely to hinder the gatekeeper function performed by the Solicitor General.

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Centralization arguments rooted in the needs of the Supreme Court are exaggerated. While centralization does ensure a cleaner presentation of a smaller number of cases, its benefits are somewhat illusory. The Court is relatively untroubled by conflicting governmental presentation and Solicitor General input is not contingent on centralization. However, the costs of centralization to independent agencies are significant. As Robert Stern observed some forty years ago:

[When conflict arises,] determination by the judiciary is often more satisfactory than an effort by the Department of Justice to force its own views on the disagreeing [independent] agency by refusing to present the agency's position to the courts. The Attorney General has no authority to give binding legal advice to the independent agencies. Only the judiciary has authority to give the conclusive answer to the question in dispute.<sup>377</sup>

This analysis, however, does not address the question of whether there *should* be governmental agencies able to reach policy conclusions at odds with the President. It presupposes that independent agencies are empowered to speak their own voice.

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375. The Court now asks the Solicitor General several times each year to provide his views on a matter before the Court. Interview with Ken Geller, *supra* note 5. There is no reason to think that an alteration in independent agency litigating authority will make the Court less likely to seek Solicitor General counsel.

376. See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Chicago Mercantile Exch. v. SEC*, 496 U.S. 936 (1990); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986).

377. Stern, *supra* note 10, at 769.

## III

MUSINGS ON DEPARTMENT OF JUSTICE AUTHORITY AND  
INDEPENDENT AGENCY AUTONOMY

By creating independent agencies, Congress has sought to insulate some regulatory decisionmaking from the control of elected government. Although the President has power to submit budget requests, name the chairman, and appoint at least some commissioners as well as key staffers, "[t]he multiple membership of these agencies, with terms expiring at staggered intervals, does tend to serve as a buffer against Presidential control and direction."<sup>378</sup> Limiting presidential control, however, does not mean that independent agencies are mouthpieces for Congress.<sup>379</sup> Indeed, ranking majority and minority leadership of several Senate committees have proclaimed that the final word on independent agency decisionmaking is to be spoken by Article III judges. A joint letter to President Carter expressed this sentiment, arguing that "in exercising the quasi-judicial and quasi-legislative authority which Congress had delegated to the agencies, agency actions shall not be subject to review or modification by either Congress or the Executive; only the courts may review final agency actions."<sup>380</sup>

Independent agencies, according to Congress, are supposed to reach policy determinations according to their own dictates. In these circumstances, where Congress wants a voice within government freed from presidential control, grants of independent litigating authority are perfectly sensible. Because these independent agencies, on occasion, will find themselves at odds with the White House, the Department of Justice should be able neither to compel these agencies to advocate in court a position with which they disagree nor to foreclose their access to the Supreme Court by refusing to seek certiorari on their behalf.

Congress has not followed its own design, however. Rather than empower independent agencies with independent litigating authority, Congress has crafted an extraordinarily incoherent system of unpredictably varying degrees of litigating authority. Some agencies are virtually independent; others entirely dependent; and most somewhere in the middle.<sup>381</sup> Specific political circumstances, not cohesive thinking about the

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378. *STUDY ON FEDERAL REGULATION*, *supra* note 60, at 75.

379. Independent agencies are sometimes depicted as "arm[s] of Congress." *Id.* at 31. As one Senator put it: "The commissions, if I may risk oversimplification, are ours." *Id.* (quoting Senator Hart).

380. Letter from Bipartisan Senate Leadership to President Jimmy Carter 3 (Dec. 16, 1977), reprinted in *Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 170, 172 (1981); see also Olson, *supra* note 10, at 86 (discussing the view that courts should review agency actions).

381. See *supra* text accompanying notes 21-37.



attributes of independent agency autonomy, explain this patchwork structure.<sup>382</sup>

To expect that Congress would have a coherent vision of the structure and purposes of independent agencies is perhaps to expect the impossible. The Senate Committee on Governmental Operations admitted as much, casually noting that "[a] decision on structure is after all a political issue, very much influenced by the prevailing political situation. And that situation can neither be quantified nor predicted."<sup>383</sup> It is not surprising that "random selection"<sup>384</sup> may explain Congress' choice of an independent over an executive format. The confluence of oversight committee preferences, interest group pressures, and legislative-executive relations inevitably yields different organizational structures. In the end, the only certainty about independent agencies is that they are multimember bodies headed by individuals who cannot be appointed or removed "at will" by the President.

Congress' failure to articulate why it sometimes prefers the independent agency model has resulted in allocations of authority with little rhyme and less reason.<sup>385</sup> This incoherency is present with respect to concerns of both subject matter authority and structure. On matters of substance, for example, regulation of the banking industry, antitrust enforcement, and employment discrimination prosecutions are concurrently managed by both the executive and independent agencies.<sup>386</sup> On the matters of structure, some independent agencies are free of, and others very much dependent on, the Department of Justice and the Office of Management and Budget.

The haphazard nature of independent litigating authority is certainly expected.<sup>387</sup> Since the independent agency structure is far from preordained,<sup>388</sup> Congress' decision to make some independent agencies more dependent on the Executive Branch than others seems an acceptable state of affairs. Nonetheless, there is something unsettling about Department of Justice control of independent agency litigating authority. Granted, Congress may confine the substance and scope of independent agency action either by limiting the sweep of independent agency jurisdiction or by

382. See *supra* text accompanying notes 82-94 (discussing reasons why Congress approved FTC authority to represent itself before the Supreme Court but refused to give similar power to the SEC).

383. STUDY ON FEDERAL REGULATION, *supra* note 60, at 79.

384. Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 258.

385. See Miller, *Independent Agencies*, *supra* note 16, at 72-73; Verkuil, *supra* note 384, at 258-59.

386. See Miller, *Independent Agencies*, *supra* note 16, at 72-73.

387. This haphazard nature proves fatal for those who demand that "[d]eviations from the classical model of separation of powers . . . be justified by sufficiently compelling considerations of policy." *Id.* at 72.

388. The first independent agency, the ICC, was not designed to be independent. Instead, Democrats in Congress apparently altered the ICC structure in response to the pending presidential inauguration of Republican railroad lawyer Benjamin Harrison. *Id.* at 75. This legislative history supports the conclusion that "the concept of the independent commission arose from a desire by Congress to insulate the agency from Presidential influence." STUDY ON FEDERAL REGULATION, *supra* note 60, at 28.

empowering the President with great authority to influence independent agency decisionmaking. Yet, once the initial policy decision is made, the agency should be free to defend its position. If not, limits on litigating authority may well force an independent agency to sit idly by and watch the Department of Justice abandon the agency's publicly stated position. This is precisely what happened to the SEC in the *Chicago Mercantile Exchange* litigation, to the FCC in *League of Women Voters*, and to the EEOC in *Sheet Metal Workers*.<sup>389</sup>

The prospect of Department of Justice domination of independent agency decisionmaking does not seem to trouble Congress. Some independent agencies have no litigating authority. Moreover, with only three clear exceptions,<sup>390</sup> Congress has left it to the Solicitor General to represent independent agency interests before the Supreme Court. If Congress truly intends independent agencies to be able to reach policy decisions at odds with the White House, the current arrangement is at best counterproductive. The Solicitor General's loyalty is first owed to the President and Attorney General and then to the affected agencies.<sup>391</sup>

Perhaps Congress should not be judged too harshly for giving an Executive Branch official, and not the courts, the last word in reviewing independent agency decisionmaking. After all, bureaucratic folklore treats the Solicitor General as somehow removed from the confines of White House politics. However, Congress' jerry-rigged approach to independent litigating authority before the lower federal courts suggests a more pervasive legislative insensitivity to whether independent agencies speak their own voice in court.

Congress' insensitivity to the independent litigating issue, however, does not answer the question of whether centralization or decentralization of litigating authority is good public policy. The argument for centralization, at least as applied to executive departments and agencies, is persuasive. Centralization of litigating authority within the Department of Justice provides a chief mechanism by which the Executive Branch can coordinate governmental decisionmaking. With most government policy subject to court challenge, Department of Justice control over litigation is a fundamental attribute of presidential power. Were Congress to empower all governmental entities with independent litigating authority, presidential control of the Executive Branch would suffer a serious, perhaps fatal, blow. As the Attorney General has noted, there is a "responsibility to ensure that the interests of the United States as a whole, as articulated by the Executive,

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389. See *supra* text accompanying notes 203-09 (*Chicago Mercantile Exchange*), 211-16 (*League of Women Voters*), 253-58 (*Sheet Metal Workers*).

390. These exceptions are the ICC, FTC and FEC. See *supra* Part II.B.

391. See *supra* text accompanying notes 166-69.

are given a paramount position over potentially conflicting interests between subordinate segments of the government."<sup>392</sup>

Centralization is about much more than the preservation of presidential authority. The President is accountable to a national electorate; administrative agencies are "unelected, bureaucratic, [and] fragmented."<sup>393</sup> By reducing intragovernmental disputes, centralization is also more likely to result in more coordinated, more efficient policymaking.<sup>394</sup> Centralization of litigating authority is not without its pitfalls, however. An overly ambitious President could frustrate legislative desires through the power to control all government litigation.

Congress, of course, does not need to respond to such presidential intrusiveness through exemptions to Department of Justice litigating authority. Statutes can be made more specific. Funding bans can limit specified executive initiatives. Appropriations can be cut to disfavored agencies. In the case of executive departments and agencies, these types of legislative controls should be preferred to limitations on Department of Justice litigating authority. The conferral of independent litigating authority to sub-units within the Executive Branch enables and encourages executive agencies and departments to stake out a policy position at odds with the President's. Statutory controls do not present this danger. Congress is the supreme law-making branch and it is, therefore, appropriate that the President live within the policymaking confines of legislative delegations.<sup>395</sup> Substantive legislative directives, therefore, must be heeded by the President. Yet, once Congress has granted discretion to the Executive Branch to put into place broadly phrased legislative mandates, it is appropriate that some centralizing force under the President's direct control define the meaning of such legislative delegations.

Congress would be well served by systematically thinking through the independent litigating authority issue. In the end, it may prefer the current system where independent agency decisionmaking can be overturned by the Executive Branch. Alternatively, it may prefer to draw cleaner lines separating independent agencies from executive entities. Whatever conclusion it reaches, however, Congress should not place the Solicitor General in too exalted a position. If an independent agency voice is to be spoken, Solicitor General control can and should be limited. Otherwise, the Solicitor General

392. The Attorney General's Role as Chief Litigator, *supra* note 49, at 54 (emphasis added).

393. Colin S. Diver, *Presidential Powers*, 36 AM. U. L. REV. 519, 530 (1987); see also Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 449 (1987).

394. See McGarity, *supra* note 393, at 447-48; The Attorney General's Role as Chief Litigator, *supra* note 49, at 54.

395. See generally Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 228-42 (1987).

will sometimes thwart that voice. It is this aspect of Solicitor General control that is in need of repair.<sup>396</sup>

Although change is necessary, it need not require a diminution of Solicitor General control in favor of independent agency autonomy. The subordination of independent agency decisionmaking to Executive Branch control offers another type of change. The limited and unsuccessful efforts of some Reagan and Bush Administration officials to push the unitariness banner,<sup>397</sup> however, reveal that subordinating independent agencies to a unitary executive is an idea whose time is yet to come.

With that bit of political reality in mind, this Article has focused on the day-to-day interchanges between the Solicitor General and the independent agencies. The solution proposed in this Article is to allow independent agency self-representation whenever the Solicitor General is unwilling to advocate the agency's interests. This solution, as the FTC experience reveals, would greatly benefit independent agencies with little harm to the Solicitor General. Moreover, especially if Congress makes the Solicitor General a statutory litigant in all cases involving the government, this hybrid model would enable the Supreme Court to continue reaping the benefits of Solicitor General counsel.

The hybrid model is also sensitive to the culture of expectations surrounding Solicitor General advocacy. Congress, hesitant to extend independent litigating authority beyond federal courts of appeals, clearly prefers a unitary governmental voice before the Supreme Court. In exchange for this grant of authority, however, Congress expects that the Solicitor General will be a responsible gatekeeper and an "objective advocate" who seriously considers the merits of independent agency arguments. Most Solicitors General, like Congress, seem comfortable with this mixed approach. Certiorari is more likely to be sought in independent agency cases than in cases involving purely executive offices. The flagging of independent agency-Solicitor General disagreements in briefs and certiorari petitions likewise is common. Finally, independent agencies are sometimes allowed to separately advance their views to the Court. These accommodations reveal a willingness on the part of most Solicitors General to give up some unitariness in independent agency cases.

The hybrid model, moreover, is sensitive to the twin and somewhat contradictory goals of unitariness and independence. *First*, the hybrid model does not undermine Solicitor General authority. Under it, the Solicitor General is the presumptive government advocate before the Supreme Court. As such, independent agencies recognizing the benefits of

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396. For this reason, I reject Todd Lochner's proposal to preserve the Solicitor General's absolute control over certiorari petitions and government advocacy before the Court but to allow independent agencies an "unqualified right to file an amicus brief in any case in which its interests were directly affected." Lochner, *supra* note 176, at 580.

397. See generally Symposium, *Executive Branch Interpretation of the Law*, *supra* note 1.



Solicitor General representation would typically heed Solicitor General recommendations. At the same time, knowing that an independent agency may seek self-representation, the Solicitor General would be attentive to independent agency desires in order to maximize control of government litigation. *Second*, when conflicts emerge between the Solicitor General and independent agencies, the hybrid model does not stifle the interests of either advocate. Independent agencies gain the right to ensure that their views are fairly presented to the Court. The Solicitor General, while no longer possessing the authority to influence the Court's agenda by denying a forum to disfavored independent agency litigants, could nonetheless participate as a statutory litigant in all independent agency cases. Additionally, by being free of the pressure to sometimes advocate independent agency positions as a matter of comity, the Solicitor General may gain from this arrangement.

The hybrid model would be an improvement, but it is far from a panacea. In some instances, a singular governmental position should be presented to the Court. For example, statutes that cut across all governmental operations, such as the Freedom of Information Act, should not be subject to myriad conflicting interpretations. In other instances, the risk that an independent agency might be subject to interest group capture may prove so acute that Solicitor General control appears the lesser of two evils. To take into account the possibility that plenary Solicitor General control over independent agency litigation is sometimes sensible, the hybrid model must give way when a convincing case can be made for Executive Branch control. Furthermore, although responsive to instances where the Solicitor General thwarts independent agency prerogatives, the hybrid model cannot prevent a renegade independent agency from either routinely disregarding Solicitor General input or insistently seeking certiorari after each appellate court defeat. This risk, however, does not warrant Solicitor General control of independent agency litigation.

Between the dangers of too strong a Solicitor General or too persistent an independent agency there is no choice. A principal rationale for independent agencies is to make policy judgments free of executive control. Consequently, while an overly aggressive independent agency may prove a nuisance to an already overburdened Supreme Court, a Solicitor General who is too strong poses a real threat to the structural division between independent agencies and the Executive Branch. Unless and until the purposes of independent agency autonomy change, the Solicitor General should not control independent agency litigation. To argue otherwise, that the Solicitor General should maintain dominion over independent agency litigation, is to argue against the propriety of independent agencies being truly independent; as this Article demonstrates, unitariness is the only mooring which supports Solicitor General control of independent agency litigation.

Unitariness, of course, is not without appeal. But unitariness cannot be reconciled with independent agency autonomy. Although unitariness and independence may peacefully coexist under the hybrid model, unitariness nonetheless will occasionally give way to dual governmental presentations. For those who find dual governmental presentations before the Supreme Court unseemly and inappropriate, the current model of Solicitor General control is generally satisfactory. The issue of dual presentations before lower federal courts, however, must also be confronted. Supporters of a unitary Solicitor General should oppose this system of independent agency autonomy before lower courts as well. Since unitariness is the only value which supports Solicitor General control of independent agency litigation, there is no reason to think it somehow matters less in lower court adjudication where nearly all independent agency litigation is resolved.

Proponents of the current scheme cannot have it both ways. Unitariness before the Supreme Court suggests unitariness before all courts. Independence before lower federal courts implies the right to speak one's voice before the Supreme Court. Unitariness and independence are values in tension. A choice between values must be made. That choice, whatever it may be, requires change.