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EXECUTIVE ADMINISTRATION

72 STAN L. REV. (forthcoming)

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The current account of executive power is incomplete. In a famous article, now-Justice Elena Kagan wrote that the President seeks control over the executive branch. Kagan referred to this paradigm as "presidential administration." As groundbreaking as it was, Kagan's work and the significant body of literature it spawned has a flaw: it assumes that only the President wields executive influence over the administrative state.

This Article reveals that executive agencies also wield control for reasons unrelated to the President's interests, which results in what this Article calls "executive administration." More specifically, executive agencies exert influence via litigation brought on their behalf by the Department of Justice against independent agencies before Article III courts. This contention is supported by an original data set of approximately 175 cases brought to light by this Article. This litigation spans the mid-twentieth century through the present day.

Litigation has consistently furthered the interests of executive agencies, including their desire to limit independent agencies' power over them and in overlapping areas of regulation. For instance, courts have reversed independent agency decisions binding executive agencies, and limited independent agencies' authority to implement their enabling statutes. This may be for the better, but also for the worse. On the one hand, litigation offers a meaningful vehicle for beneficial, ex post executive oversight of independent agencies. On the other hand, a recent Supreme Court decision suggests litigation may be used to walk back Chevron *deference to independent agencies.*

Finally, recent cases brought by the Trump administration, which have sought to dislocate independent agencies in pursuit of a more unitary executive branch,

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suggest that litigation may become a tool of presidential *administration as well. Fundamentally, this litigation exemplifies a constitutional prophylactic; in order to intensify control over the administrative state, the executive branch must cede power to the judiciary. However, courts will continue to serve as barriers to presidential abuse only as long as they remain nonpartisan.*

INTRODUCTION

President Trump has pursued significant control over the executive branch,[1] but this in no way makes him exceptional. As now-Justice Elena Kagan

[1] *See*, *e.g.*, Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43, 47-49 (2017) (suggesting that "early actions by President Donald Trump signal that exertions of presidential authority over administrative agencies will continue—if not even be taken to new extremes")*; see generally* John

has famously argued, all modern presidents have pursued a system of "presidential administration."[2] Kagan also noted that presidential administration "almost exclusively concerns the constitutionality (and, to a lesser extent, the desirability) of Congress's creation of independent agencies—that is, agencies whose heads the President may not remove at will."[3] Indeed, she conceded, "The existence of independent agencies can pose a particularly stark challenge to the aspiration of Presidents to control administration."[4] Despite the well-known limitations to the President's power to direct or even influence independent agencies,[5] however, scholars have overlooked possibilities beyond presidential administration for executive control over the "fourth branch."[6]

This Article argues that influence over independent agencies may be wielded by *executive agencies themselves*, as opposed to the President. This Article refers to this non-presidential form of executive influence as "executive administration." *Executive* administration secures the power of executive agencies vis-à-vis independent agencies, and is motivated by interests that are common to executive agencies and *not* attributable to any given presidency. *Presidential* administration furthers the President's policy agenda or desire to secure more power over independent agencies.

Dickerson, *The Hardest Job in the World*, THE ATLANTIC (May 2018) (arguing that the executive branch may be over-centralized).

[2] Through "presidential administration," the President should wields influence over administrative activity. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246 (2001); *see also* Kevin M. Stack, *Obama's Equivocal Defense of Agency Independence*, 62 CONST. COMMENTARY 583, 584 (2010) (arguing that Obama and Reagan's view of the fourth branch are not so far apart after all); Coglianese, *supra* note 1, at 47-49 (describing actions taken by President Obama as part of the "modern trend toward an administrative presidency"); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV 683, 692-720 (2016) (illustrating how Presidents W. Bush and Obama exerted "significant control over the regulatory state"); Kagan, *id.* at 2246 ("President Clinton, building on a foundation President Reagan laid, increasingly made the regulatory activity of the executive branch agencies into an extension of his own policy and political agenda."); Geoffrey P. Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 GEORGE WASH. L. REV. 401, 401 (1989) (noting that the Nixon administration was "characterized by aggressive assertions of presidential power vis-a-vis Congress"); *infra* notes 241 & 269-274 and accompanying text.

[3] Kagan, *supra* note 2, at 2274.

[4] *Id.*; *see also* DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN 4 (2003) (discussing institutional incentives driving the presidential interest in control over independent agencies); *Judicial Resolution of Inter-Agency Legal Disputes*, 89 YALE L. J. 1595, 1595 n.1 (1980) (hereinafter *Judicial Resolution of Inter-Agency Disputes*) (noting that reference to "'executive-branch' agencies, as opposed to 'independent' agencies, rely on the traditional distinction between authorities whose leadership serves at the President's pleasure and those whose heads enjoy significantly independent tenure").

[5] *See infra* notes 206-217 and accompanying text.

[6] "The headless 'fourth branch' of government consists of independent agencies having significant duties in both the legislative and executive branches but residing not entirely within either." Bijal Shah, *Congress's Agency Coordination*, 103 MINN. L. REV. (forthcoming) (citations omitted).

One potential framework of executive administration flows from decisions made by the Solicitor General on behalf of independent agencies who lack litigating authority before the Supreme Court; this dynamic is well-documented.[7] However, this framework offer only a partial account, because it is often driven by the President's agenda.[8]

This Article brings to light a longstanding and more consistent mechanism of executive administration: litigation brought on behalf of executive agencies by the Department of Justice (DOJ) against independent agencies before Article III courts. An original data set of approximately 175 relevant cases reveals this litigation has existed from 1945 through the present day. Nonetheless, few have examined it,[9] and no one has presented a comprehensive account. This Article, which is the first to catalogue this body of law, uncovers three overarching categories of cases:

- The first is litigation seeking to reverse adjudications made by independent agencies that bind or circumscribe the actions of executive agencies.[10] For example, the DOJ has appealed several decisions by the Federal Labor

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[7] *See infra* notes 59-63 and accompanying text.

[8] *See infra* notes 62, 241-244 and accompanying text

[9] Email from Anne Joseph O'Connell, Professor, Stan. L. School, to author (Sept. 12, 2018) (on file with author). Interagency litigation as a whole is common and "often aris[es] in interesting contexts where a lot is at stake[, but] the scholarship has largely ignored it." Joseph Mead, *Interagency Litigation and Article III*, 47 GEORGIA L. REV. 1217, 1219 (2013); *see generally*, *id*. (exploring whether intragovernmental litigation satisfies the traditional threshold standards of Article III, including standing and adverse parties). Even scholars that study intra-governmental litigation have cited litigation between executive and independent agencies only sporadically. *See*, *e.g*., Elliott Karr, *Independent Litigation Authority Calls for the Views of the Solicitor General*, 77 GEORGE WASH. L. REV. 1080, 1092-93 (2009); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 291 (2006); Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 561 n.11 (2003); James R. Harvey III, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1572 (1996); Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 895-96, 991 (1991); *Judicial Resolution of Inter-Agency Disputes*, *supra* note 4, at 1596 n.4. Likewise, scholarship examining the relationship between the executive branch and independent agencies have considered only a few of these cases. *See*, *e.g*., Richard H. Pildes, *Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act*, 5 N.Y.U. J.L. & BUS. 485, 495 (2009); Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL L. REV. 255, 291 (1994) (hereinafter Devins, *Unitariness*); Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV, 273, 281 n.30 (1993) (hereinafter Devins, *Political Will*); Paul R. Verkuil, *The Independence of Independent Agencies: The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 269 (1988).

[10] *See infra* Part I.B.1.

Relations Authority sanctioning an executive agency for committing an unfair labor practices.[11]

- The second is litigation pursuing limits to independent agencies' authority to implement statute, in order to protect executive agencies' jurisdiction in overlapping areas of regulation.[12] For example, the DOJ has challenged actions by the Occupational Safety and Health Review Commission that interfere with the Department of Labor's statutory authority or with its authority to interpret its own regulations.[13]

- The third category, which is far rarer than the others, is litigation seeking the invalidation of merger or price fixing agreements approved by an independent agency.[14] Examples include DOJ litigation disputing the certification of airline mergers or price fixing in the railroad shipping industry.[15]

The DOJ has brought these types of cases relatively often—approximately 80% of this dataset falls into the first two categories—and fairly successfully, with a win rate of between 60% and 70% in the first two categories, depending on the time frame.[16] In this way, litigation against independent agencies has helped concentrate power in executive agencies and away from independent agencies.

This Article makes two normative arguments regarding this litigation that bear on the relationship between the executive branch and independent agencies, sometimes referred to as the "internal" separation of powers,[17] which is a key framework underlying presidential administration. First, it argues that litigation is an instrument for executive reform that appears to improve the quality of independent agency activity. More specifically, the data set reveals that courts have often applied the "arbitrary and capricious" standard of review to support the DOJ's position in cases appealing a decision by an independent agency.[18] In this way, litigation may help ameliorate independent agencies'

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[11] *See infra* notes 76-81 and accompanying text.
[12] *See infra* Part I.B.2.
[13] *See infra* notes 95 & 100 and accompanying text.
[14] *See infra* Part I.B.3.
[15] *See infra* notes 110 & 116.
[16] *See infra* notes 71-73 and accompanying text.
[17] The internal separation of powers framework suggests that the benefits of the traditional separation of powers may be further accomplished by separation among entities within the executive branch. Bijal Shah, *Toward An Intra-Agency Separation of Powers*, 92 N.Y.U. L. REV. ONLINE 101, 101 (2017).
[18] *See infra* Part I.C.1.

issuance of subpar decisions due to a lack of accountability to the executive branch.[19]

Next, this Article hypothesizes that litigation may become a means for the executive branch to cabin or supersede independent agencies' power to interpret their organic legislation. It bases this theory on a 2018 Supreme Court decisions that declined to grant *Chevron* deference to an independent agency's interpretation of its enabling statute because of a conflict with an executive agency's interpretation of a general statute.[20] If this case is any indication, litigation could facilitate a reduction in the rightful exercise of independent agencies' discretionary authority. Regardless of whether this litigation benefits or harms the administrative state in the long run, it nonetheless casts some doubt on the contention that the judiciary is "quite unlikely" to act in ways that reduce agency independence.[21]

Finally, this Article also highlights instances in which this litigation has been used as a tool of presidential administration. This cases, which are far rarer than litigation brought for purposes of executive administration,[22] can be divided into two categories:

- First, the DOJ has disputed an independent agency's exercise of its authority in order to further the President's agenda.[23] For example, the DOJ has sought to limit the Equal Employment Opportunity Commission's (EEOC) scope of authority on behalf of Presidents who have been vocally opposed to civil rights mandates.[24]

- Second, the DOJ has sought to reduce the insulation of independent agencies from the President.[25] For example, Reagan and H.W. Bush sought, unsuccessfully,[26] to exercise at-will removal of independent agency commissioners,[27] while Trump directed the DOJ to argue that the for-cause

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[19] *See generally*, Cary Coglianese, *Improving Regulatory Analysis at Independent Agencies*, 67 AM. U. L. REV. 733 (2018) (suggesting ways to ameliorate the consequences of the lack of executive oversight of independent agency policymaking); Susan Bartlett Foote, *Independent Agencies under Attack: A Skeptical View of the Importance of the Debate*, 1988 DUKE L.J. 223, 223 (1988); Address of Edwin Meese III, Federal Bar Association (September 13, 1985) (Attorney General under President Reagan arguing that agencies and bureaucrats in general are not accountable because they answer to neither the President nor Congress).

[20] *See infra* Part I.C.2.

[21] *See* Metzger, *supra* note 118, at 436.

[22] Cases furthering presidential administration comprise fewer than 10% of the litigation in the data set.

[23] *See infra* Part II.B.1.

[24] These include Presidents Carter, Reagan, H.W. Bush and Trump. *See infra* notes 238-263 and accompanying text.

[25] *See infra* Part II.B.2.

[26] *See infra* notes 226 & 230 and accompanying text.

[27] *See infra* notes 275-278 & 279-282 and accompanying text.

> removal provisions governing an independent agency with a single head are unconstitutional.[28]

The quick succession of uniquely aggressive[29] cases brought by President Trump to limit the function and autonomy of the fourth branch[30] suggests that litigation might become a more commonly deployed instrument for presidential administration. If so, this litigation has implications for the traditional separation of powers framework.

Litigation could impact both the formal and functional boundaries between executive and legislative power.[31] For one, it may allow the executive branch to undercut Congress's authority to define the scope of independent agency jurisdiction. In addition, it may offer the President a way to change statute without being vetted by conventional processes for legislative reform. However, while this litigation potentially allows the executive branch to infringe on legislative authority, it nonetheless requires the President to cede power to the judiciary in order to gain greater access to the fourth branch.[32] Therefore, this litigation ultimately reinforces judicial supremacy in statutory interpretation,

So far, the judiciary has limited the use of litigation for the president's purposes. Cases brought by Trump have been unsuccessful,[33] and the DOJ's previous success in furthering the President's agenda through litigation has been mixed.[34] Nonetheless, this litigation may grow to more profitably further the President's interests, particularly since the Supreme Court appears to be more inclined towards augmenting presidential power now than ever before.[35] If so, this litigation could allow the President to pursue a more unitary executive in the near future, for better or for worse.[36]

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[28] *See infra* notes 283-286 and accompanying text.

[29] Cases brought by the Trump administration have been uniquely aggressive in that they involve the DOJ submitting unnecessary briefs in cases between an independent agency and a private party. *See infra* notes 253-264 & 283-287 and accompanying text.

[30] *See id.*

[31] *See infra* Part II.C.1.

[32] *See infra* Part II.C.2.

[33] *See infra* notes 228-230 and accompanying text.

[34] *See infra* notes 225-227 and accompanying text.

[35] *See infra* note 312-315 and accompanying text.

[36] *Compare* Kagan, *supra* note 3, at 2274 (arguing that centralized executive control of agencies comports with separation of powers because Congress has left authority in the President to direct executive branch officials in the exercise of their delegated discretion, and asserting that this form of controlling agency action advances core values of accountability and effectiveness) *to* PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009); Aziz Huq & Tom Ginsburg, *How to Lose A Constitutional Democracy*, 65 UCLA L. REV. 78, 92 (2018) (cautioning against partisanship leading to increasingly authoritarian presidential norms); Jerry Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 551 (2018) (suggesting that "'presidential administration' or 'presidentialism,' mean[s] roughly, muscular presidential direction and control of administrative policy").

This Article proceeds in two parts. Part I both contributes an account of executive administration and provides a framework for understanding the use of litigation for this purpose. First, it offers a basis for the DOJ's authority to litigate independent agencies on behalf of executive agencies. Then, it presents an overview of the categories of cases that further executive administration. Finally, it considers the impact of this litigation on power dynamics between the executive branch and independent agencies. More specifically, it argues that litigation is a valid form of *ex post* executive oversight of independent agencies, particularly given the limited options for *ex ante* accountability measures. In addition, it argues that the judiciary's application of the *Chevron* doctrine, culminating in a 2018 decision by the Supreme Court, shows that courts are willing to limit deference to independent agencies' interpretations of statute at the request of executive agencies.

Parts II offers an account of litigation as a tool of presidential administration. For instance, it illustrates that Presidents with an explicitly deregulatory agenda and marked interest in augmenting their power—primarily, Presidents Reagan and Trump—have sought to reduce independent agencies' authority to regulate civil rights. It also highlights presidential efforts to deteriorate independent agency heads' protection from at-will removal. This Part concludes by considering the implications of this litigation for the separation of powers among the branches of government. On the one hand, this litigation may allow the executive branch to encroach on Congress's authority to determine the scope of independent agencies' jurisdiction and to insulate the fourth branch from political influence. On the other hand, this litigation reaffirms judicial supremacy in administrative statutory interpretation. Therefore, regardless of whether it becomes a legitimate tool for presidential administration, litigation against independent agencies nonetheless dampens the claim that courts are unable to serve as a safeguard for the administrative state.

Before proceeding, here is a note about methodology. The data analyzed in this Article was gathered from a review of all the cases and briefs resulting from approximately 350 discrete searches. These searches were conducted using several databases, including Westlaw case search and brief search (which includes searches of all briefs and of Supreme Court briefs only, both of which track case and brief names by parties), Lexis case search, Bloomberg, Proquest and various Google search engines, as well as through the review of media and of citations to litigation from several relevant secondary sources found on Westlaw, Lexis and Hein Online.[37] In addition, our approach to research incorporated a concerted effort to uncover cases representative of every administration from 1900 (McKinley) onward, as well as additional searches

[37] For additional information about the methodology and substance of research, please contact the author.

focusing on ten important [38] independent agencies: the EEOC, Federal Communications Commission (FCC), Federal Trade Commission (FTC), General Services Administration (GSA), National Science Foundation (NSF), Nuclear Regulatory Commission, Office of Personnel Management (OPM), Securities and Exchange Commission (SEC), Smithsonian Institution and the Social Security Administration (SSA).[39]

Overall, over 300 hours of review of relevant sources were conducted by the author, a law librarian and three upper-level law student research assistants. This labor resulted in hundreds of thousands of hits that yielded approximately 175 cases in which the DOJ opposed an independent agency in an Article III court, almost all of which are analyzed in this Article.[40] While these cases comprise a small percentage of all public and private action against independent agencies, they constitute a significant portion of interagency litigation.[41] Furthermore, this data set illustrates that this litigation has existed under every presidential administration beginning with Harry Truman until the present day, which suggests that it is both enduring and not limited to any time period or political party. For additional information about and an overview of the cases discussed in this Article, please consult the Appendix.

I. EXECUTIVE ADMINISTRATION

Scholars debate the extent to which "litigation is at all possible between government entities."[42] However, as now-Justice Kavanaugh has noted, "Consistent with the…understanding that Presidents cannot (or at least do not) fully control independent agencies, and that an independent agency therefore can be sufficiently adverse to a traditional executive agency to create a justiciable case, the Supreme Court and [the D.C. Circuit] have entertained suits between

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[38] These agencies are identified as "important" because they a) issue significant regulations or fulfil a unique role in the executive branch and b) have over one thousand employees. Only seventeen independent agencies total fit the latter criterion.

[39] The DOJ does not often litigate the GSA, NSF, Smithsonian and even the SSA. This may because they are not as regulatory in nature as the others on this list, and because the SSA only became independent in 1994. Comments from Michael E. Herz, Professor, Benjamin N. Cardozo School of L., to author (Oct. 31, 2018) (on file with author).

[40] Of course, this data set may not be exhaustive. For instance, it does not include any unreported cases.

[41] This is because litigation between executive agencies is very rare, perhaps because of the variety of other mechanisms available to influence policies issued by and arbitrate conflicts between executive agencies. *See infra* notes 64-66 and accompanying text.

[42] "The question is far from settled. Most courts find that one agency of the government cannot sue another (based on the black-letter view that a party cannot sue itself) and have found exceptions only where in the court's view 'the [real] party in interest' is not a governmental agency…." Marshall J. Breger & Gary J. Edles, INDEPENDENT AGENCIES IN THE UNITED STATES 171 (2015) (citations omitted); *but see id*. ("But the situation may change if one or both parties are independent agencies.").

an independent agency and a traditional executive agency."[43] The DOJ has litigated independent agencies dating back to the mid-1900s. The cases in this data set include, primarily, instances in which the DOJ sues the independent agency and is therefore the original plaintiff.[44] This first two sections of this Part illustrate that through litigation, the DOJ has amassed authority in executive agencies (including itself) and away from independent agencies. More specifically, this Part shows that the DOJ consistently maintains the autonomy and expands the statutory jurisdiction of executive agencies vis-à-vis independent agencies, regardless of the President in power.

The last section of this Part explores the internal separation of powers implications of litigation brought by the DOJ against independent agencies. As an initial matter, this litigation demonstrates that intra-branch dynamics not only serve to constrain executive power, but may also enhance it,[45] an outcome overlooked by the relevant literature. This litigation also offers a beneficial tool for executive oversight that could improve independent agency decisionmaking. More specifically, litigation allows the executive branch some measure of *ex post* oversight of independent agencies, which may improve the quality and outcomes of in independent agency adjudications. However, by allowing the executive branch to limit the activity and authority of independent agencies, this litigation may undercut the insulation from politics that allows independent agencies to make decisions with impartiality and expertise. More specifically, a recent Supreme Court case suggest that executive agencies may be able to use litigation to reduce the application of *Chevron* deference to independent agencies' statutory interpretations.

A. The DOJ's Authority to Litigate Interagency Disputes

Why might the DOJ litigate on behalf of executive agencies against independent agencies—and that too, independently of the President—particularly when most interagency disputes are resolved *within* the executive branch?[46] One answer is that it is customary for the DOJ to determine its own

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[43] S.E.C. v. Fed. Labor Relations Auth., 568 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J., concurring); *but see id.* (referring to litigation between executive and independent agencies as a "constitutional oddity").

[44] This data set excludes those in cases in which the DOJ is defending an executive agency from a suit initiated by an independent agency to enforce its regulation of the executive agency. However, while this dynamic is not the focus of this project, it factors into some of the examples. Moreover, the motivations of the DOJ in these cases are likely similar to those in which the DOJ brought suit first: an interest in defending an executive agency from labor-related or other oversight by an independent agency, or in preserving its statutory turf.

[45] *See infra* notes 118-120 and accompanying text.

[46] *Judicial Resolution of Administrative Disputes Between Federal Agencies*, 62 HARV. L. REV. 1050, 1051 (1949) (hereinafter *Judicial Resolution of Administrative Disputes*) ("The vast majority of interagency disputes are now resolved within the executive branch; [q]uestions of this

goals in litigation.[47] For instance, in *Hayburn's Case*, the Supreme Court took the Attorney General to task for attempting to litigate *ex officio*, without an actual client.[48] Furthermore, the DOJ has long acted of its own volition,[49] and continues to do so,[50] including in order to "frequently conduct litigation in those cases that involve issues…common to all departments and agencies."[51]

Moreover, in addition to its support of the President, the DOJ is counsel to executive branch as a whole.[52] Accordingly, the DOJ is far from monolithic in its approach to representing agencies,[53] and furthermore is often perceived by Congress to be at odds with the interests of independent agencies.[54] Like any team of in-house counsel, DOJ litigators have views about the validity, legality, and drawbacks of its clients' (agencies') activities. In addition, in conflicts between an executive and independent agency, DOJ's loyalties may logically lie with executive agencies, as this is consistent with the broader division between the more presidentially-oriented DOJ/executive agencies and the relatively insulated fourth branch. More specifically, the fact that many independent

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type are normally submitted by the president, or by one of the parties immediately interested, to the Attorney General for solution.").

[47] Breger & Edles, *supra* note 42, at 169 (noting that "the DOJ has broad authority to conduct the government's litigation in the absence of an express statutory directive to the contrary, or as a matter of convenience or convention").

[48] Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) (well-known for the proposition that judicial decisions must be final and unreviewable). According to Michael Herz, this case is also the exception that proves the rule that "the Supreme Court has never dismissed an action as nonjusticiable because it could be characterized as United States v. United States." Herz, *supra* note 9, at 896 (noting the "judiciary's receptiveness to intragovernmental lawsuits").

[49] Jerry L. Mashaw & Avi Perry, *Administrative Statutory Interpretation in the Antebellum Republic*, 2009 MICH. ST. L. REV. 7, 19 (2009) (discussing how antebellum Attorneys General both sought and ceded control over agencies' interpretations of statute); *id*. ("Moreover, Attorneys General were often deferential to administrative practice. When dealing with departmental matters, several Attorneys General suggested that their views would be guided by settled departmental customs rather than by their independent construction of the statute.").

[50] *See generally*, Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1 (2018) arguing that "the Department of Justice is independent of the President, and its decisions in individual cases and investigations are largely immune from his interference or direction").

[51] Breger & Edles, *supra* note 42, at 169 (listing as examples Freedom of Information Act or "FOIA cases, damage actions against agency officials and suits involving personel matters").

[52] "Except as otherwise authorized, the conduct of the federal government's litigation rests with the DOJ." *Id*. at 167 (citing 28 U.S.C. §§ 516-19 (1994)); Harvey, *supra* note 9, at 1569. Indeed, Neal Devins and Michael Herz have discussed several reasons for unease over the DOJ's unilateral control of governmental litigation. *See*, *e.g*., Devins & Herz, *supra* note 9; Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, 61 LAW & CONTEMP. PROBS. 205, 205 (1998).

[53] Breger & Edles, *supra* note 42, at 167; Devins, *Unitariness*, *supra* note 9, at 33.

[54] *See* Breger & Edles, *supra* note 42, at 167 ("Congress has authorized various independent agencies to represent themselves in certain situations, often in response to received failure by the DOJ to adequately represent these agencies.") (citations omitted).

agencies have their own counsel to litigate (at least in the lower courts)[55] both exacerbates the distant relationship between the DOJ and independent agencies[56] and reduce the likelihood than an independent agency will seek legal advice from the DOJ. The relationship may be fraught, as well, as a result of independent agencies efforts' to dispute the DOJ's authority to represent them before the Supreme Court.[57]

By acting as counsel on behalf of agencies, the DOJ is able to influence their substantive programs.[58] However, because independent agencies with independent litigation authority are not beholden to the DOJ in this manner, the DOJ may seek to influence them in other, more unusual ways. For one, the Attorney General and Solicitor General are most often in charge of governmental litigation before the Supreme Court.[59] Because of the varied interested of his charges,[60] the Solicitor General may choose to misrepresent or omit the true views of an independent agency while litigating on its behalf.[61] This may be at the behest of the President[62] or for reasons—such as protecting the interests of

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[55] *See id.*; 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 (1978) ("Since about 1969-1970, new grants of independent litigating authority have literally seemed to explode…Today, some thirty-one separate federal governmental units have or exercise authority to conduct at least some of their own litigation.") (Author was Attorney General at time of publication.); Devins & Herz, *supra* note 9, at 561 n.11 ("Congress has significantly eroded the Attorney General's role as chief litigator for the United States, vesting at least some independent litigating authority in approximately three-dozen governmental entities, ranging from Congress itself, to independent regulatory agencies, to governmental corporations, to executive departments and agencies.").

[56] *See Judicial Resolution of Administrative Disputes*, *supra* note 46, at 1051-52 (noting that independent agencies "are under little compulsion to mold their conduct to the Attorney General's views").

[57] *See*, *e.g.*, Brief for Petitioner Federal Election Commission, Fed. Elec. Comm'n v. NRA Political Victory Fund, 513 U.S. 88 (1994) (No. 93-1151) (arguing that Federal Election Campaign Act authorizes the FEC to conduct litigation at all levels of the judiciary, independent of the DOJ).

[58] *See generally* Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN L. REV. 1345, 1346 (2000) (arguing that "[a]llowing DOJ to control agency litigation [reduces] the scope and effectiveness of agency enforcement [and allows the DOJ to] directly influence or interfere with the agencies' substantive decisions").

[59] Robert L. Stern, *"Inconsistency" in Government Litigation*, 64 HARV. L. REV. 759, 759 (1951).

[60] *See* Karr, *supra* note 9, at 1092-93 (noting that "the Solicitor General faces [conflict] when representing a government that is composed of various agencies that do not always come to the same position").

[61] *See* Comments from Peter Strauss, Professor, Colum. L. School, to author (Dec. 2, 2018) (on file with author) (detailing accounts from his tenures on the National Labor Relations Board and the Nuclear Regulatory Commission in which a lack of litigating authority kept these agencies from preventing the initiation of "silly" litigation by the Solicitor General or an Assistant U.S. Attorney).

[62] *See* Eric Schnapper, *Becket at the Bar--The Conflicting Obligations of the Solicitor General*, 21 LOY. L. A. L. REV. 1187, 1220–21 (1988) (noting in passing that "[t]he Solicitor General's litigation authority could in theory be used…to impose on an independent agency the views of

executive agencies[63]—unrelated to the White House's agenda. The former, which constitute a non-presidential form of centralized executive control over independent agencies, are a form of executive administration.

Furthermore, the DOJ Office of Legal Counsel (OLC) could theoretically influence independent agencies by offering an opinion on administrative conflict,[64] which may also act as a bar to interagency litigation.[65] However, despite OLC's traditional role in "settling disputes among departments

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the administration"); *see*, *e.g.*, Devins & Herz, *supra* note 52, at 206 (noting that a case in which the Postal Service refused to bend to demands that it withdraw from a lawsuit that it filed against the Postal Rate Commission—demands made by the Justice Department, the White House counsel, and, ultimately, the President, who threatened to remove the Postal Service's Board of Governors for insubordination—garnered "several front-page *Washington Post* stories").

[63] *See* Margaret H. Lemos, *The Solicitor General as Mediator between Court and Agency*, 2009 MICH. ST. L. REV. 185, 195–96 (2009) ("[T]he [Solicitor General]'s control of agency litigation in the Supreme Court—and in particular his ability to prevent the Justices from hearing agency arguments with which he disagrees or which conflict with the arguments advanced by other governmental units—is difficult to square with the concept of *independent* agencies.") (emphasis in original); *see also*, *id*. at 219-20 (noting that "the [Solicitor General] can refuse to defend arguments presented by an agency (or other government client) [but this] minimizes the part that might be played by the agency charged with administering the relevant statute"); Stern, *supra* note 59, at 760 & 776 (1951) (discussing how the Solicitor General determines the government's position before the Supreme Court, even if an agency lawyer argued a different position in the court below); Devins & Herz, *supra* note 52, at 209-210 (discussing conflicts between the Solicitor General and the EEOC, as well as between the Solicitor General and the EPA); Devins, *Unitariness*, *supra* note 9 (discussing briefs purporting to represent the government as a whole that nonetheless suggest conflicts between the Solicitor General's views and those of a number of independent agencies: the Securities and Exchange Commission, Federal Trade Commission, Federal Communications Commission and the EEOC); George F. Fraley, *Is the Fox Watching the Henhouse: The Administration's Control of FEC Litigation through the Solicitor General*, 9 ADMIN. L.J. 1215, 1245-46 (1996) ("numerous examples of Solicitor General disregard for [independent] agency autonomy can be found"); Karr, *supra* note 9 (considering conflicts of interest between the Solicitor General and the Federal Trade Commission).

[64] *See* Mead, *supra* note 9, at 1219 n.3 (listing OLC opinions grappling with interagency litigation); *see also* Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1311 (2000).

[65] *See* Daniel A. Farber & Anne Joseph O'Connell, *Agencies As Adversaries*, 105 CAL. L. REV. 1375, 1415 (2017) (noting briefly that only in "rare cases, the courts function as the primary [intra-governmental] dispute-resolution mechanism [and that the Attorney General] typically controls litigation in the administrative state"); Breger & Edles, *supra* note 42, at 171 ("The OLC has mostly opposed interagency litigation on the grounds that 'intra-executive branch litigation would likely contravene Articles II and III of the Constitution.'") (citing several OLC opinions with language to this effect); Herz, *supra* note 9, at 896 (arguing overall that "to permit two agencies that disagree, as regulators, as to the merits of a decision to bring their disagreement to the courts is inconsistent with the proper functioning of the executive branch"); Mead, *supra* note 9 (proposing that "a judicially cognizable 'case' may not be premised on dueling notions of the public good"); *Judicial Resolution of Administrative Disputes*, *supra* note 46.

and non-independent agencies of the executive branch,"[66] it does not have the authority or capacity to enforce decisions against unwilling parties.[67] Given that independent agencies rarely seek an opinion from OLC, this option does not offer the DOJ much purchase.[68] Another option includes the similarly limited potential for the Office of Management and Budget, specifically the Office of Information and Regulatory Affairs (OIRA), to oversee independent agencies. (The impotency of these options stands in contrast to the fact that independent agencies do submit to interagency mediation by the Government Accountability Office, which furthers legislative oversight.[69])

While there are a few avenues by which the DOJ might influence independent agencies to compromise with executive agencies without involvement from the President, they are inconsistent in their potential to harness independent agencies. The DOJ may therefore turn to litigation to influence independent agency policy- or decisionmaking. Put another way, litigation before an Article III court offers the DOJ additional recourse in its role as the agency charged with representing the government—not only against private parties, but also, it seems, in defense of independent agencies whose actions constrain the power of the executive branch.

B. Typology of Litigation: Preserving Executive Agencies' Power

Litigation brought by the DOJ against independent agencies has long consisted of challenges to independent agencies for purposes that transcend the sitting President's political ideology—what this Article refers to as executive administration. For the most part, this litigation can be divided into three categories. The first involves the DOJ appealing individual decisions by independent agencies, often to reduce their regulation of the labor and promotion policies of executive agencies. In the second type of case, the DOJ disputes an independent agency's implementation of legislation in order to defend an executive agency's statutory authority. The legislation at issue is sometimes, but not always, the independent agency's enabling mandate. The DOJ has also, on occasion, sought to constrain independent agencies' authority to certify mergers

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[66] *Judicial Resolution of Inter-Agency Disputes*, *supra* note 4 (arguing in favor of the judicial settlement of inter-agency disputes, even though "[t]radition has assigned to the President the task of settling disputes among departments and non-independent agencies of the executive branch").
[67] *Judicial Resolution of Administrative Disputes*, *supra* note 46, at 1052.
[68] One reason for this may be that, OLC is located at the core of the executive branch and generally acts with the President's interests in mind, which may render its judgement unnecessary or worthy of skepticism to independent agencies.
[69] Conversation between Gene Dodaro, Comptroller General of the United States, and author (Jan. 10, 2019) (discussing examples of this, including an instance in which the GAO arbitrated a disagreement between the SSA, an independent agency, and the Health and Human Services Centers for Medicare & Medicaid Services regarding payment of Medicare and Medicaid claims granted by the SSA).

or price fixing agreements in particular industries, in order to reduce the potential for a monopoly.

These types of cases have constituted at least half, and more often the majority, of litigation brought by the DOJ against independent agencies under every presidential administration surveyed in this Article. While the Roosevelt through Johnson years may be the most difficult to categorize because they represent the first, tentative usage of this litigation, cases furthering executive administration appear to represent approximately 50% of all cases, or eight cases out of fifteen. For the Nixon through Carter, Reagan and first Bush, and Clinton through Obama administration, this cases represent about 80-90% of the cases—eighteen out of twenty, nineteen out of twenty-three and fifty-three out of sixty-six cases, respectively. In general, this litigation has been employed very often, particularly by the DOJ under Clinton and Obama,[70] both Presidents who did not appear to espouse a strong conception of presidential power.

Further analysis of these cases shows that the DOJ is fairly successful in these cases as well. Courts tend to favor the Justice Department in appeals of narrow independent agency orders and related claims that the agency has overreached in its regulation of a cabinet agency in a specific instance (very commonly, in the labor context), but not overwhelmingly so. From the Nixon through the Obama administrations, courts affirmed the DOJ's position in these types of cases between 58% to 71% of the time, and approximately 40% of the time in the pre-Nixon era.[71]

Courts have tended to favor the DOJ even a bit more when making determinations concerning the jurisdictional limits of independent agencies' authority. In these conflicts of statutory power between executive and independent agencies, courts validated the DOJ's position between 60% and 75% of the time from the Reagan through Obama administrations.[72] Finally, in regards to independent agency certification of industries, the DOJ won about half of its cases, leading to the judicial overturning or vacatur of the independent agency certification.[73] Overall, this suggests, the DOJ has been successful in

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[70] There were at least three to four times as many cases under Clinton, Bush II and Obama than during any of the other timeframes covered in this Part, involving many more independent agencies than before; most cases in this timeframe were furthered during the Obama administration. More specifically, research has uncovered no more than twenty-five cases for each of the following ranges of presidencies: Roosevelt through Johnson (1945-1969, twenty-one years), Nixon through Carter (1969-1981, twelve years) and Reagan and H.W. Bush (1981-1993, twelve years), while over sixty-five cases from the Clinton through Obama years have been identified (1993-2009, sixteen years).

[71] This means approximately six out of ten, ten out of fourteen and twenty-two out of thirty-nine cases were won by DOJ under Nixon through Carter, Reagan and Bush 1 and Clinton through Obama, respectively, while pre-Nixon saw a win rate of two out of five cases.

[72] This translates to a win rate of three out of five and twelve out of sixteen cases during the Nixon through Carter and Clinton through Obama eras, respectively.

[73] The DOJ won approximately six out of nine cases in this category.

making use of this litigation to guard the authority of the executive branch and even to entrench its views on the proper jurisdiction of independent agencies.

1. Disputing an Independent Agency's Binding Adjudication

The first type of case that furthers executive administration disputes an independent agency's regulation of an executive agency through adjudication. Particularly from the 1990s onward, these cases have involved appealing an decisions concerning a conflict over labor rights or promotion impacting an employee of an executive agency. In some instances, these cases have also concerned other areas in which independent agencies oversee or regulate executive agencies. For instance, under the short Ford administration, the DOJ brought suit on behalf of the Department of Defense to stop the ICC from raising the Department of Defense's freight costs.[74]

Under Nixon, the DOJ litigated an independent agency to dispute a labor matter for the first time; here, the DOJ argued on behalf of another independent agency.[75] Later, most cases in this vein involved the DOJ litigating the Federal Labor Relations Authority (FLRA). The DOJ disputed the FLRA's narrow oversight of several different executive agencies under Reagan,[76] H.W. Bush,[77]

[74] Nat'l Class. Comm. v. U.S., *infra* note 352.
[75] *See*, *e.g.*, NY Shipping Ass'n, Inc. v. Fed. Mar. Comm'n, *infra* note 347.
[76] *See* Dep't of Agriculture v. FLRA, *infra* note 361; Div. of Military & Naval Affairs v. FLRA, *infra* note 362; Dep't of Treasury v. FLRA, *infra* note 372; I.N.S. v. FLRA, *infra* note 374; Dept. of Air Force v. FLRA, *infra* note 371.
[77] *See* Herz, note 9, at 895 (noting, at the end of H.W. Bush's tenure, that the "Federal Labor Relations Authority (FLRA) is in constant litigation with other agencies over labor practices"); *see*, *e.g.*, U.S. Dep't of Interior, Bureau of Indian Affairs v. FLRA, *infra* note 375; Dep't of Treasury, I.R.S. v. FLRA, *infra* note 376; Fort Stewart Sch. v. FLRA, *infra* note 377; Texarkana v. FLRA, *infra* note 380.

Clinton,[78] W. Bush,[79] Obama[80] and Trump.[81] Under Clinton,[82] Bush II,[83] and Obama,[84] the DOJ also sought the reversal of decisions by the Merit Systems Protection Board (MSPB) and the National Transportation Safety Board.

Finally, the Reagan administration also made arguments claiming that the adjudications of independent agencies were procedurally flawed,[85] which is unusual in this type of litigation. In these cases, the DOJ litigated to improve flaws in independent agencies' decisionmaking processes.[86] This Article argues further that litigation is a form of executive oversight in Part I.C.1.

2. Defending An Executive Agency's Statutory Jurisdiction

The second type of case furthering executive administration involves the DOJ bringing suit to defend the jurisdiction or resources of an executive agency from encroachment by an independent agency. These cases began under Truman, during which time the DOJ litigated the Federal Maritime Commission on an essential matter of jurisdiction: to avoid the executive branch's categorization as a "person" over whom the Maritime Commission has some adjudicatory jurisdiction.[87] From Truman onward, cases have been decided in matters involving agencies such as the Interstate Commerce Commission (ICC

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[78] *See*, *e.g.*, I.N.S. v. FLRA, *infra* note 383; I.N.S. v. FLRA, *infra* note 384; I.N.S. v. FLRA, *infra* note 385; DOJ v. FLRA, *infra* note 386; Dep't of Treas. v. FLRA, *infra* note 388; Dep't of Vet. Aff. v. FLRA, *infra* note 389; GSA v. FLRA, *infra* note 394; Dep't of Energy v. FLRA, *infra* note 397; DOJ v. FLRA, *infra* note 399; NASA v. FLRA, *infra* note 402; Nat'l Fed'n of Fed. Employees v. Dep't of Interior, *infra* note 403; Luke Air Force Base v. FLRA, *infra* note 404.

[79] *See*, *e.g.*, DOJ v. FLRA, *infra* note 410; Air Force v. FLRA, *infra* note 413; Air Force v. FLRA, *infra* note 417.

[80] *See*, *e.g.*, NLRB. v. FLRA, *infra* note 421; FLRA, Bureau of Prisons v. FLRA, *infra* note 422; Dep't of Homeland Security v. FLRA, *infra* note 423; Air Force v. FLRA, *infra* note 424; of Treas. v. FLRA, *infra* note 426; Navy v. FLRA, *infra* note 427; Bureau of Prisons v. FLRA, *infra* note 428; Dep't of Treas. v. FLRA, *infra* note 431; Broadcasting Bd. of Governors Office of Cuba Broad. v. FLRA, *infra* note 433; Dep't of Homeland Security v. FLRA, *infra* note 435; Air Force v. FLRA, *infra* note 439.

[81] *See*, *e.g.*, FLRA v. Michigan Army Nat'l Guard, *infra* note 442; Bureau of Prisons v. FLRA, *infra* note 443.

[82] *See*, *e.g.*, King v. Reid, *infra* note 392; Lachance v. MSPB, *infra* note 401; Lachance v. Devall, *infra* note 406; White v. Air Force, 174 F.3d 1378 *infra* note 407.

[83] *See*, *e.g.*, Lachance v. Von Zemenszky, *infra* note 414; James v. Santella, 328 F.3d 1374 *infra* note 415.

[84] *See*, *e.g.*, Springer v. Adkins, 525 F.3d 1363 *infra* note 420; Berry v. Conyers, *infra* note 429; Archuleta v. Miller, *infra* note 438; Kaplan v. Hopper, 786 F.3d 1340 *infra* note 436.

[85] *See*, *e.g.*, Prof. Air Traffic Controllers Org. v. FLRA, 685 F.2d 547 *infra* note 360; Confederated Tribes v. Federal Energy Regulatory Commission (FERC), *infra* note 368.

[86] *S*ee *infra* notes 128-130 and accompanying text. For additional discussion of litigation against independent agencies as a form of executive oversight, see *infra* Part I.C.1.

[87] Far East Conf. v. U.S., *infra* note 334.

or "Commission"), Federal Power Commission, Federal Trade Commission (FTC) and SEC.

For instance, under Truman, the DOJ claimed the ICC incorrectly applied its organic act (the Interstate Commerce Act) in a matter regarding the recovery of fees, a decision of relatively narrow import.[88] In another case from that time period, the DOJ argued that because a recently passed statute expanded the authority of the Department of the Interior, an adjudication by the Federal Power Commission infringed on Interior as a result.[89] Under Eisenhower, the DOJ argued that the Census Bureau should be accorded greater authority under the Census Act, and that the FTC's competing authority under both the Federal Trade Commission Act and Clayton Acts should be circumscribed.[90] Like the decision involving the Department of the Interior, this case also included a conflict between the enabling acts of the executive and the independent agency; however, it was settled by the Solicitor General behind the scenes, in that he was able to refuse to air the independent agency's position altogether,[91] given that the FTC did not have separate litigating power at the time.[92]

During Johnson's tenure, the DOJ appealed the Federal Power Commission's licensing of a dam in order to preserve the Department of Interior's prerogative to lease the relevant land itself.[93] In a case brought during the Ford administration, the DOJ drew on the Sherman Act to dispute the SEC's jurisdiction over self-regulatory organizations (like the New York Stock Exchange and the National Association of Securities Dealers, now the Financial Industry Regulatory Authority), but lost in light of the significant authority delegated to the SEC by its enabling statute.[94]

In addition, there have been a number of jurisdictional battles over the regulation of labor involving the Occupational Safety and Health Review Commission (OSHRC), FLRA and, most recently, the National Labor Relations Board (NLRB). Some—but not all—of these disputes have arisen within DOJ petitions for review of independent agency decisions (like those discussed in Part I.B.1). During Nixon, the DOJ litigated nationwide to maintain the Secretary of Labor's authority in the face of encroaching OSHRC decisionmaking jurisdiction.[95] Two more cases concerning similar matters, while decided under

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[88] Here, we also see one of the first instances of the executive branch suing to recover fees from the independent agency. U.S. v. I.C.C., *infra* note 331.
[89] Chapman v. Fed. Power Comm'n, *infra* note 335.
[90] St. Regis Paper Co. v. U.S., 368 U.S. 208 *infra* note 339.
[91] *See* Karr, *supra* note 9, at 1092-93 ("In another case, *St. Regis Paper Co. v. United States*…the Solicitor General represented the FTC by arguing that the position the FTC proffered was not the proper one.").
[92] *Id.*
[93] Udall v. Fed. Power Comm'n, *infra* note 340; *see also* Herz, *supra* note 9, at 895.
[94] Gordon v. N.Y. Stock Exchange, *infra* note 349.
[95] *See* Brennan v. OSHRC, *infra* note 345; Brennan v. Southern Contractors Service, *infra* note 346; Brennan v. Gilles & Cotting, Inc., *infra* note 344.

the first year of the Ford presidency, continued this DOJ litigation agenda.[96] Reagan's DOJ argued for limits to the FLRA's power to regulate an executive agency.[97] Under H.W. Bush, the DOJ also challenged statutory interpretation by the FLRA[98] and continued efforts to preserve the Department of Labor's authority to interpret its own regulation from an override by OSHRC.[99] Of the latter set of cases, Judge Patricia Wald suggested the inevitability of interagency conflict.[100]

During Clinton's tenure, the Department of Labor sought to maintain its authority and the limit the jurisdiction of the Federal Mine Safety and Health Review Commission in regulatory matter where both have authority.[101] During the Clinton and Obama administrations, the DOJ continued to limit the FLRA's power to interpret its enabling act within the shadow of other legislation.[102] And during W. Bush's tenure, the DOJ similarly argued for limits to the FLRA and to the Merit Systems Protection Board's authority to interpret statutes within their expertise that were nonetheless not their respective organic acts.[103] (Interagency litigation during this time-frame was not always labor-related, however, as the Reagan DOJ also reprised the battle for jurisdiction between the Department of Interior and the Federal Power Commission in the licensing of dams.[104])

Finally, last year, the DOJ fought for an interpretation of the National Labor Relations Act that would limit the ability of the independent NLRB to protect public and private employees' opportunities to engage in collective action.[105] In many ways, this case fits into the long tradition of DOJ efforts to reduce the impact of labor regulations on executive agencies, which is why it is included in the category of executive administration. However, President Trump impacted the DOJ's decision to oppose the NLRB this case.[106] In this instance,

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[96] *See* Brennan v. OSHRC, *infra* note 346; Brennan v. OSHRC, *infra* note 350.
[97] *See*, *e.g*., Bureau of Alcohol, Tobacco & Firearms v. FLRA, *infra* note 365; Air Force Base v. FLRA, *infra* note 371; Illinois Nat'l Guard v. FLRA, *infra* note 373; Donovan v. Amorello, *infra* note 369; FLRA v. Aberdeen, *infra* note 370.
[98] Dep't of Def. v. FLRA, *infra* note 381, at 27.
[99] Martin v. OSHRC, *infra* note 379.
[100] *See* Judge Patricia M. Wald, *"For the United States": Goverment Lawyers in Court*, 61 LAW & CONTEMP. PROBS. 107, 127 (1998) ("Our court is by now inured to cases in which the government is a house divided. Some statutory schemes are structured so as to make intragovernmental disputes inevitable.").
[101] Meredith v. Federal Mine Safety and Health Review Com'n, *infra* note 405.
[102] *See*, *e.g*., Dep't of the Interior v. FLRA, *infra* note 411; FLRA v. Dep't of Defense, *infra* note 390; Nuclear Reg. Comm'n v. FLRA, *infra* note 391; Dep't of Treas. v. FLRA, *infra* note 395; Air Force v. FLRA, *infra* note 396; FLRA v. DOJ, *infra* note 398; Dep't of Transp. v. FLRA, 145 F.3d 1425 *infra* note 400; SSA v. FLRA, *infra* note 409; I.R.S. v. FLRA, *infra* note 419; Dep't of Homeland Security, v. FLRA, *infra* note 432.
[103] *See* Dep't of Interior v. FLRA, *infra* note 411; Meeker v. MSPB, *infra* note 416.
[104] Escondido Mut. Water Co. v. F.E.R.C., *infra* note 367.
[105] NLRB v. Murphy Oil USA, Inc., *infra* note 446.
[106] Marianne Levine, *Justice Department Switches Sides in Supreme Court case*, POLITICO (June 16, 2017) ("The DOJ acknowledged that it previously supported the NLRB's position, but that

there was a convergence in executive agencies' interest in limiting the jurisdiction of independent agencies to regulate labor matters and the President's interest in reducing the scope of the NLRB's influence as a policy matter.[107]

Ultimately, the Supreme Court decided in favor of the executive branch's position. In doing so, it declared that no *Chevron* deference is due an independent agency when it is enforcing its own enabling statute if there is a conflicting interpretation of a second statute—even if the second statute is non-organic and was implemented by an executive agency that has no special claim to its interpretation.[108] Arguably, this decision affirms scholars who have argued that there is—or at least, should be—a generalized judicial reluctance to grant *Chevron* deference to independent agencies, relative to executive agencies[109] This theory of the case is discussed in depth in Part I.C.2.

3. Questioning Independent Agency Certification of Monopolies

One final type of litigation brought by the DOJ disputes independent agency decisions certifying mergers or other industry agreements. In this way, the DOJ has used litigation to further the traditional, public interest-oriented governmental responsibility to break up monopolies and ensure fair competition. On the one hand, the specific regulatory areas in which the DOJ has bought suit may be driven by the political views of the time. On the other hand, the tactic of bringing suit against independent agencies to uphold anti-trust norms has transcended presidential administrations.

During Roosevelt and Eisenhower's tenure, the DOJ appealed orders issued by the ICC and Federal Maritime Commission on behalf of the Department of Agriculture, in order to ensure competition in shipping.[110] Under Ford, the DOJ brought suit to dispute an independent agency's certification of a merger in the airline industry.[111] Under Carter, the DOJ pursued a governmental interest in reducing corporate monopoly in media and communication.[112] The DOJ also pushed back against independent agencies' certification of mergers

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'after the change in administration, the office reconsidered the issue and has reached the opposite conclusion.'").

[107] As Justice Breyer noted during oral argument, the new position taken by the DOJ "undermines and changes radically" the labor laws that are the "entire heart of the New Deal." Transcript of Oral Argument, NLRB v. Murphy Oil, *supra* note 105 (No. 16-307) (Justice Breyer commenting).

[108] *See infra* notes 180-184 and accompanying text. In this case, the Court limited the NLRB's interpretation of its enabling act in order to privilege an executive agency's interpretation of the Federal Arbitration Act.

[109] *See infra* notes 121 & 125 and accompanying text.

[110] *See*, *e.g*., ICC v. Inland Waterways Corp., *infra* note 330; Dept. of Agric. v. U.S, *infra* note 336; Fed. Mar. Board v. Isbrandtsen Co., *infra* note 337.

[111] U.S. v. Civil Aeronautics Bd., 511 F.2d 1315 *infra* note 348.

[112] *See*, *e.g*., MCI Telecom. Corp. v. F.C.C., 561 F.2d 365 *infra* note 353; U.S. v. F.C.C., *infra* note 358.

during Nixon.[113] More broadly, the DOJ sought a limit to the FCC's authority, in order to preserve the power of DOJ's own Antitrust Division.[114] In addition, a number of Reagan-era cases involve the DOJ litigating to dispute price fixing agreements approved by independent agencies in industries such as railroad and telephone services.[115]

Finally, it is worth noting that the DOJ has not always litigated to further anti-trust norms. For instance, the DOJ supported the ICC's certification of a railway fee structure for the transportation of recyclable goods under Carter, while simultaneously preventing the EPA from filing an amicus brief detailing the environmental cost of the certification.[116] In this case, political influence or capture may have overcome the DOJ's general interest in maintaining anti-trust values.

C. Power Shifts within the Executive Branch

The internal separation of powers [117] is "most often equated with measures that check or constrain the Executive Branch, particularly presidential power."[118] According to this view, the preservation of independent agencies is a key component to internal checks on presidential power.[119] However, dynamics that *intensify* executive power at the expense of independent agencies must also be factored into this paradigm. For instance, that independent agencies may be exempt from adequate executive oversight,[120] in addition to the potential aggrandizement of the executive branch in relation to the fourth branch, also raises "internal" separation of powers concerns.

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[113] *See*, *e.g.*, U.S. v. I.C.C., *infra* note 342; U.S. v. Marine Bancorporation, *infra* note 343. As Michael Herz notes while commenting on the latter case, the DOJ "challenged mergers and rate agreements that other federal agencies explicitly approved and defended in court." Herz, *supra* note 9, at 895.

[114] F.C.C. v. Nat'l Citizens Committee for Broadcasting, *infra* note 355.

[115] *See*, *e.g.*, U.S. v. Fed. Mar. Comm'n, *infra* note 359; U.S. v. F.C.C., *infra* note 363; Ford Motor Co. v. I.C.C., *infra* note 382.

[116] U.S. v. Students Challenging Reg. Agency Proc. (S.C.R.A.P.), 412 U.S. 669 (1973) (deciding in favor of the DOJ/ICC).

[117] *See supra* note 17.

[118] *See* Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 428-31 (2009).

[119] *Id.*; David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 57-58 (2018) (Leading features of the internal separation of powers "include the separation of adjudication from rulemaking or prosecutorial functions within administrative agencies, and the creation of 'independent' agencies that exercise a measure of policy discretion free of presidential control.").

[120] More specifically, independent agencies can act without accountability because there is no intra-branch check on their decisionmaking processes and outcomes. *See* Metzger, *supra* note 118, at 433 ("[U]nilateral agency decisionmaking is also problematic from a separation of powers perspective, raising dangers of an unaccountable fourth branch and ineffective government."); Meese, *supra* note 19; Coglianese, *supra* note 19.

This Section argues that litigation brought by the DOJ against independent agencies contributes to the internal separation of powers paradigm. The first part of the Section analyzes the scope and success of DOJ challenges to independent agency action on the basis of arbitrary and capricious review, and finds them to be narrowly-focused and relatively fruitful. Thus, as a mechanism of executive control, this litigation has the potential to improve the quality of independent agency activity by allowing executive agencies contribute to the President's limited internal oversight of independent agencies, which scholars have deemed problematic. Therefore, in addition to existing suggestions for ex ante oversight, some measure of oversight may also be accomplished ex post, through judicial review.

The second part of this Section cautions, however, that litigation may also reduce independent agencies' statutory authority vis-à-vis the executive branch. Some have argued that *Chevron* deference should be less accessible to independent agencies than to executive agencies, citing the doctrine's emphasis on political accountability as a basis for deference.[121] In this vein, a Supreme Court decision from last year declined to defer to an independent agency's interpretation of its organic act, despite the agency's claim to expertise and authority to interpret the statutory scheme. This Section argues, nonetheless, that this decision is an indefensible dilution of *Chevron* deference to an independent agency in the face of a less persuasive executive agency interest. While this case is the first to go so far, it nonetheless builds on the common use of this litigation as a way for the executive branch to check the authority of independent agencies in favor of preserving its own reach.

1. Arbitrary and Capricious Review as Executive Oversight

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[121] *See* Catherine M. Sharkey, *State Farm "With Teeth": Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1606 n.64 (2014) (citing John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 203 n.456 (1998) ("If the courts really followed the common law logic of *Chevron*, they should have balked at extending *Chevron* to [independent] agencies, which have less democratic accountability than agencies like the EPA, whose heads serve at the pleasure of the President."); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 164 n.31 (2002) ("Especially with regard to independent agencies, under control of officials appointed much like Supreme Court Justices, [deference under the *Chevron* principle based on accountability] is more than a little difficult to support...."); David M. Gossett, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 689 n.40 (1997) (arguing that *Chevron*'s political accountability rationale "would imply that independent agencies might not deserve *Chevron* deference")); Kagan, *supra* note 3, at 2376-77 (suggesting that presidential involvement in agency rulemaking should render courts more deferential to the agency under *Chevron*); Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 440-46 (2006) (arguing that independent agencies should not receive Chevron deference because they are not politically accountable, and that furthermore, courts should treat executive with more deference).

The President has very few *ex ante* means for influencing independent agencies,[122] to the dismay of many commentators.[123] Accordingly, other scholars[124] and even Supreme Court justices[125] have debated whether the actions of independent agencies should receive additional judicial scrutiny, given that they are insulated from the Presidential. Litigation may offer a balm to this view while also adhering to the more common view that independent agencies require insulation from the President in order to bring to bear impartiality and expertise while implementing their mandates.

More specifically, litigation allows executive agencies to draw on courts to oversee the quality of independent agency activities. It does so by allowing executive agencies to bring narrowly-focused, *ex post* challenges to independent agency decision- and policy making, without the involvement of the President. Instead of relying on the harnessing effects of political accountability, which may lead to partisan influence on independent agencies, the "friction" caused by litigation between executive and independent agencies may lead to better regulatory outcomes without presidential involvement.[126]

One such set of cases furthering oversight includes Reagan-era litigation casting a watchful eye on the integrity of administrative adjudication processes.[127] More specifically, in at least a few instances, the DOJ argued that there were procedural defects in adjudications by an independent agency. In one case, the DOJ asserted that impermissible *ex parte* communications by the FLRA irrevocably tainted its decision.[128] Although the D.C. Circuit ultimately found that the *ex parte* contacts in question did not taint the agency's final decision, it

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[122] *See infra* Part II.A.

[123] *See supra* note 19 and accompanying text.

[124] For instance, Catherine Sharkey argues that "[c]ourts should probe the underlying cost-benefit analyses of independent regulatory agencies [not subject to OIRA review] with more vigor…." Sharkey, *supra* note 121, at, 1592. Furthermore, Kathryn Watts argues that arbitrary and capricious review should award credit to agencies' transparent use of political influence, which suggests that the lack of such influence—for instance, over an insulated independent agency—might validly be penalized by courts. *See generally*, Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009).

[125] *See* Sharkey, *supra* note 121, at 1615 (noting that the discussion between Justices Scalia and Breyer in FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009) "draws attention to the possibility that judicial review could apply differently to independent regulatory agencies and executive agencies").

[126] *C.f.* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2324 (2006) (suggesting that conflict comes from "partially overlapping agency jurisdiction could create friction" that leads to improved policies); Farber & O'Connell, *supra* note 65, at 1454 (suggesting that Congress delegates overlapping authority to agencies to promote conflict that leads to better-reasoned outcomes) (citing Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 226 (2006)).

[127] *See supra* note 85 and accompanying text.

[128] Prof. Air Traffic Controllers Org. v. FLRA, *supra* note 85; *infra* note 360.

nonetheless opined that the judiciary should have a role in overseeing independent agencies on behalf of the executive branch:

> The laxness with which FLRA protected the integrity of its adjudicatory processes in this case ought be a matter of deep concern for this court, which routinely is asked to accord substantial deference to the decisions rendered by the agency on questions of considerable import to federal employees.[129]

In another case, DOJ won its argument that the Federal Energy Regulatory Commission maintained a poor decisionmaking recording by failing to prepare and include an environmental impact statement.[130]

More commonly, the DOJ has sought judicial review of independent agencies' actions on the basis of the "arbitrary and capricious" standard.[131] This approach to reviewing independent agency actions supports, in turn, the theory that more intense or "hard look" judicial review is especially important when there is a lack of *ex ante* oversight of agencies' decisionmaking processes.[132] Accordingly, courts have engaged in arbitrary and capricious review from the earliest of these cases onwards, and in approximately 30% of all the cases in this data set, and won more than half of these cases *on that basis*.[133] That the application of this standard has favored the DOJ somewhat more frequently than the independent agency[134] means that litigation has the potential to correct, and perhaps even to deter, lower-quality administrative activity.

The Supreme Court has made decisions on this basis. For example, during the Truman administration, a Supreme Court affirmation of the reversal of an ICC decision on the basis of the arbitrary and capricious standard.[135]

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[129] *Id*.

[130] Confederated Tribes v. FERC, *supra* note 85; *infra* note 368; *see also* Herz, *supra* note 9, at 895 (noting that the "Secretary of Commerce has gone after the Federal Energy Regulatory Commission (FERC) for not preparing an environmental impact statement").

[131] The Administrative Procedure Act authorizes courts to set aside agency actions and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

[132] *C.f. supra* note 124 and accompanying text. This view is also consistent with Mark Seidenfeld's suggestion that hard look review should apply at Step Two of the *Chevron* analysis. *See* Mark Seidenfeld, *Chevron's Foundation*, 86 NOTRE DAME L. REV (2011).

[133] The court mentioned the arbitrary and capricious standard in 53 cases in the data set, and decided in favor of the DOJ explicitly on the basis of its application of this statute in over half of these cases.

[134] *See infra* notes 135-144 and accompanying text. Occasionally, a case is resolved in favor of the independent agency by a determination that the court does not have statutory jurisdiction to review the agency's decisions—for instance, regarding the adjudications of the FLRA.

[135] Indeed, the Supreme Court noted the "careful" use of the arbitrary and capricious standard by the lower court in making its decision. U.S. v. I.C.C., *supra* note 88; *infra* note 331, at 429-31 (noting that the complaint below "charged that the Commission's conclusions were not supported by its findings, that the findings were not supported by any substantial evidence [and] that the

During the Nixon presidency, the Supreme Court decided in favor of the DOJ's argument that, as a result of its arbitrariness, an independent agency's decision encroached on the purview of the Department of Defense.[136] During Carter, on the other hand, the Supreme Court disagreed with the court below to rule that the independent agency had not regulated in an arbitrary or capricious manner.[137] Since then, lower courts have also decided in favor of the DOJ's position on this basis in several cases. For instance, during Reagan's tenure, the D.C. Circuit limited the decisionmaking jurisdiction of an independent agency because of its determination that its order approving a price-fixing scheme was decided in an arbitrary and capricious manner.[138] Similar cases followed suit.[139]

In a few instances from that timeframe, dissenting opinions suggested that the arbitrary and capricious standard may be the most stable doctrinal mooring for judicial review in this type of litigation. In one case assessing the legitimacy of the FLRA's statutory construction, the dissent opposed the majority by asserting that the court's scope of review was in fact limited to arbitrary and capricious review only.[140] In another case in which the majority refused to grant deference to the FLRA under *Chevron*, the dissent suggested that instead, the proper standard for review was arbitrary and capricious (and that furthermore, the agency's decision met this standard).[141]

More recently, under the first Bush, through Obama and into the Trump presidency, courts have applied the arbitrary and capricious standard to mixed effect, deciding in turn on behalf of the independent agency[142] and somewhat

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order was based on a misapplication of law and was 'otherwise arbitrary, capricious and without support in and contrary to law and the evidence'").

[136] *See* Nat'l Class. Comm. v. U.S., *supra* note 74; *infra* note 352 ("To prevent arbitrary or unreasonable classifications, the ICC as well as the National Classification Board and the National Classification Committee cannot ignore cost and revenue date….").

[137] *See* F.C.C. v. Nat'l Citizens Committee for Broadcasting, *supra* note 114; *infra* note 355 ("[W]e cannot agree with the Court of Appeals that it was arbitrary and capricious for the Commission to" regulate as it did.).

[138] U.S. v. Fed. Mar. Comm'n, *supra* note 115; *infra* note 359, at 821-24 (deciding that a dearth of evidence rendered the agency's decision arbitrary and capricious).

[139] *See*, *e.g.*, Ford Motor Co. v. I.C.C., *supra* note 115; *infra* note 364, at 1165 ("The peremptory dismissal of DOD's rate challenge, we believe, fully warrants the description, arbitrary and capricious administrative action."); I.N.S. v. FLRA, *supra* note 76; *infra* note 374, at 1458 & 1456-57 (paying lip service to arbitrary and capricious review as the governing standard, but readjudicating substance of the case).

[140] Dep't of Agriculture v. FLRA, *supra* note 76; *supra* note 361, at 1247-1251 (deciding that the FLRA's construction of statute rendered it no longer within the FLRA's jurisdiction).

[141] *See* Div. of Military & Naval Affairs v. FLRA, *supra* note 76; *infra* note 362, at 49-51 ("The agency's "construction is entitled to considerable deference [and] I do not find the FLRA's interpretation either arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

[142] *See*, *e.g.*, I.N.S. v. FLRA, *supra* note 78; *infra* note 383, at 885; I.N.S. v. FLRA, *supra* note 78; *infra* note 385, at 271 (stating that arbitrary and capricious is the correct standard, but failing to apply it); Dep't of Vet. Aff. v. FLRA, *supra* note 78; *infra* note 389, 1394-95; DOJ v. FLRA,

more often) on behalf of the DOJ/cabinet.[143] (These include cases concerning various postal battles.[144]) On occasion, courts have referenced the arbitrary and capricious standard, but made final decisions based on their own statutory interpretation.[145]

Certainly, litigation is not an ideal vehicle for the "day-to-day oversight of the care and thoroughness of independent agency reasoning,"[146] and is perhaps, at best, a blunt instrument for effecting improvements as compared to other potential options for executive oversight of independent agencies.[147] Furthermore, one might expect that the DOJ is unlikely to pursue a case against independent agencies for purposes of quality control—in other words, that the DOJ litigates only on the basis of some larger concern, and not primarily in response to poorly-reasoned decisionmaking.[148] Nonetheless, the relative frequency with which the courts have reviewed narrowly-focused independent agency adjudications[149] and the DOJ's reasonable win rate under the arbitrary and capricious standard suggest that litigation may function, to some extent, as a safeguard against lower-quality decisionmaking by independent agencies.

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supra note 78; *infra* note 399, at 92-95; James v. Santella, *supra* note 83; *infra* note 415, at 1377; Dep't of Homeland Security v. FLRA, *supra* note 80; *infra* note 423, at 362-66.

[143] *See*, *e.g.*, U.S. Dep't of Interior, Bureau of Indian Affairs v. FLRA, *supra* note 77; *infra* note 375, at 176; Texarkana v. FLRA, *supra* note 77; *infra* note 380; DOJ v. FLRA, *supra* note 78; *infra* note 386, at 289-92; U.S. Nuclear Reg. Comm'n v. FLRA, *supra* note 102; *infra* note 391, at 232-36 (stating that arbitrary and capricious is the correct standard, but failing to apply it); Dep't of Energy v. FLRA, *supra* note 78; *infra* note 397, at 1162-64; Dep't of Transp. v. FLRA, *supra* note 102; *infra* note 400, at 1426; Luke Air Force Base v. FLRA, *supra* note 78; *infra* note 404, at 221; Lachance v. White, *supra* note 82; *infra* note 407, at 1380-81; Garvey v. Nat'l Transp. Safety Bd., *infra* note 408 (determining that independent agency decision was not arbitrary or capricious and affirming the DOJ on the other grounds that the NTSB failed to raise its issue in a timely manner); Air Force v. FLRA, *supra* note 79; *infra* note 413, at 198; Bureau of Prisons v. FLRA, *supra* note 80; *infra* note 422, at 94-97; Bureau of Prisons v. FLRA, *supra* note 80; *infra* note 428, at 786; Dep't of Treas. v. FLRA, *supra* note 80; *infra* note 431, at 21; Cobert v. Miller, *supra* note 84; *infra* note 436, at 1347-48; Huerta v. Ducote, *infra* note 437, at 153; DOJ v. FLRA, *supra* note 81; *infra* note 443, at 676-77.

[144] *See*, *e.g.*, U.S. Postal Serv. v. Postal Regulatory Comm'n, *infra* note 434, at 913; U.S. Postal Serv. v. Postal Regulatory Comm'n, *infra* note 440, at 886-87; U.S. Postal Serv. v. Postal Regulatory Comm'n, *infra* note 445, at 1254-55; *but see* U.S. Postal Serv. v. Postal Regulatory Comm'n, *infra* note 444, at 1262 (mentioning the arbitrary and capricious standard, but deciding against the DOJ on the basis of statutory interpretation).

[145] *See infra* notes 167-168 and accompanying text; *see*, *e.g.*, I.R.S. v. FLRA, *supra* note 102; *infra* note 419, at 1153; Springer v. Adkins, *supra* note 84; *infra* note 420, at 1366; NLRB v. FLRA, *supra* note 80; *infra* note 421, at 279; Dep't of Homeland Security v. FLRA, *supra* note 102; *infra* note 432, at 668.

[146] Herz, *supra* note 39 (responding to earlier draft of this Article).

[147] Email from Cary Coglianese, Professor, Univ. of Penn L. School, to author (Aug. 8, 2018) (on file with author); *see also*, Coglianese, *supra* note 19.

[148] Herz, *supra* note 39 (suggesting that in this litigation, "there's always an important legal issue to be resolved [and that] the executive branch wants to win on that ground and doesn't want the court to get sidetracked").

[149] *See supra* Part I.B.1.

Arguably, litigation offers an imperfect and *ad hoc*, but nonetheless accessible, option for *ex post* executive oversight of independent agencies.

2. Reduced *Chevron* Deference to Independent Agencies

"In the wake of *Chevron*, courts have been left to resolve procedural and structural distinctions between independent agencies and executive agencies."[150] Indeed, approximately *half* of the decisions in this Article's data set of cases brought by the DOJ against independent agencies mention *Chevron* or related principles. In addition, this litigation often involves conflicts between the statutory interpretation by an executive agency and a competing interpretation by an independent agency, either or both of which may merit *Chevron* deference. Therefore, in many of these cases, the judiciary decides whether to privilege an executive agency's interpretation or an independent agency's interpretation of a statutory scheme, particularly when there is any uncertainty about the scope of the independent agency's delegated authority or—per a recent Supreme Court case—if an executive agency's interpretative power is at stake.

Some commentators have argued that independent agencies merit less deference under *Chevron* than executive agencies,[151] including going so far as to suggest that courts are skeptical of independent agencies as well.[152] On the one hand, while the DOJ has a considerable win rate on behalf of executive agencies (between 60-75%, depending on administration[153]) in cases involving *Chevron* in some capacity, the outcomes of these cases can generally be squared with a neutral application of the doctrine. That having been said, a Supreme Court decision from last year suggests a willingness on the part of the judiciary to privilege the statutory interpretations of executive agencies over those of the more technocratic fourth branch.

Chevron was decided in 1984.[154] Before then, courts accorded weight to independent agencies' policies under *Skidmore* and similar, agency-specific

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[150] Breger & Edles, *supra* note 42, at 169 (theorizing briefly).
[151] S*ee supra* note 121 and accompanying text.
[152] *See* May, *supra* note 121, at 447 (arguing that "the agency expertise justification plays second fiddle to the primary political accountability rationale in *Chevron*"); Epic Systems Corp. v. Lewis, 584 U.S. __, at 19-20 ("Another justification the *Chevron* Court offered for deference is that 'policy choices' should be left to Executive Branch officials 'directly accountable to the people,' as opposed to independent agencies).
[153] After the Chevron decisions came out, the DOJ win rate has been as high as 80%, depending on the time frame, in cases in which the *Chevron* has been explicitly applied. This is in contrast to cases in which courts mentioned the potential for deference prior to the *Chevron* decision; in this subset of cases, the independent agency was at least 50% likely to win on the basis of some philosophy of respect for agency expertise. Perhaps this is because, prior to *Chevron*, courts had less reason to pay lip service to the idea of deference.
[154] Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

principles valuing administrative discretion and expertise.[155] These principles included, for instance, a pre-*Chevron* doctrine per which the court deferred to OSHRC interpretations of Department of Labor regulations.[156] In this context, the court suggested:

> [T]he interpretation given a statute by the administrative agency charged with carrying out the mandate of the statute should be given great weight. Indeed, the interpretation given a statute by the administrative agency charged with its enforcement should be accepted by the courts, if such interpretation be a reasonable one. And this is true even though there may be another interpretation of the statute which is itself equally reasonable.[157]

Furthermore, prior to *Chevron*, at least one court chose to affirm an agency determination out of respect for its "experience and expertise."[158] These cases are in keeping with the contention that "the Court was highly deferential to agency interpretations *before Chevron*."[159]

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[155] *See*, *e.g.*, Fed. Maritime Bd. v. Isbrandtsen Co., *supra* note 110; *infra* note 337, at 499-500 (citing *Skidmore* to say: "'(T)he rulings, interpretations and opinions of the (particular agency), while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); MCI Telecom. Corp. v. F.C.C., *supra* note 112; *infra* note 353, at 380-81 ("For this reason the deference normally owed to our agency's interpretation of its own decisions is not appropriate here."); Dep't of Agriculture v. FLRA, *supra* note 76; *infra* note 361 (citing *Skidmore* standard); Bureau of Alcohol, Tobacco & Firearms v. FLRA, *supra* note 97; *infra* note 365 ("[T]he Authority is entitled to considerable deference when it exercises its 'special function of applying the general provisions of the Act to the complexities' of federal labor relations—an agency acting within its authority to make policy choices consistent with the congressional mandate should receive considerable deference from courts….").

[156] *See* Brennan v. Gilles & Cotting, Inc., *supra* note 95; *infra* note 344, at 1267 ("The Commission is subject to a narrow scope of review which requires the courts of appeals to defer to Commission decisions of policy questions within their relatively broad area of discretion."); Brennan v. OSHRC, *supra* note 95; *infra* note 345, at 1344 (noting that the court's review "may be unduly deferential to the Commission, since the Act entrusts only adjudicatory functions to the Commission while assigning rulemaking power and initiation of enforcement proceedings to the Secretary"); Brennan v. Southern Contractors Service, *supra* note 95; *infra* note 346, at 501 ("Since…the Secretary is authorized to promulgate regulations, his interpretation is entitled to great weight."); Brennan v. OSHRC, *supra* note 96; *infra* note 350, at 715-16 ("The Secretary[s'] recommendation does not necessarily control the Commission's conclusion.").

[157] Brennan v. OSHRC, *supra* note 96; *infra* note 351, at 554.

[158] *See* Usery v. Hermitage Concrete Pipe Co., *infra* note 356, at 134 ("On the other hand, we also hold that the quantum of proof which the Commission, as an independent body appointed by the President, may deem necessary to satisfy it of the existence of the "condition" within the meaning of the statute is a matter on which its experience and expertise is entitled to great deference.").

[159] William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1120 (2008) (emphasis in original); *see*, *e.g.*, Confederated Tribes v. FERC, *supra* note 85; *infra* note

However, courts also sometimes declined to affirm independent agencies prior to 1984. One justification for this was that "[n]o great deference is due an agency interpretation of *another agency's* statute."[160] Another was based on the passage of recent legislation reducing the independent agency's authority to regulate the relevant issue.[161] In addition, there was some disagreement among courts regarding whether an adjudicatory commission should be granted more deference because of its role as independent adjudicator, or less because it may, in fact, be subordinate to an agency head.[162] As Michael Herz notes, the issue of how much deference to accord an Article I adjudicatory body is not limited to consideration of independent regulatory commissions, as opposed to adjudicatory bodies housed in executive agencies.[163] However, the language of the relevant decisions makes clear that courts are privileging independence in determining how much power the enabling act gives the commission in question.[164] The Supreme Court also considered, but rebuffed, a fairly expansive argument by the Reagan administration that presidential for-cause removal decisions are entitled to great deference.[165]

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368 (decided before *Chevron*) ("[A]n agency interpretation of the statute it administers is entitled to deference to the extent the interpretation is reasonable and comports with the intent of the statute.").

[160] Div. of Military & Naval Affairs v. FLRA., *supra* note 76; *infra* note 362, 47-48 ("Our review of the FLRA's decision is not inhibited by the deference normally due the Authority's construction of its enabling statute [because n]o great deference is due an agency interpretation of another agency's statute.") (emphasis added). Since then, the D.C. Circuit has also adopted this approach. See, *e.g*., Dep't of Treasury v. FLRA, *supra* note 76;; *infra* note 372, at 1167 ("Under the law of this circuit, when an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to deference. The FLRA's decision in this case rests on its interpretation of [statute], none of which is a constituent of or issued pursuant to the statute the FLRA administers [and is therefore accorded] no deference….."); Illinois Nat'l Guard v. FLRA, *supra* note 97; *infra* note 373, at 1401; Dep't of Interior v. FLRA, *supra* note 102; *infra* note 411, at 522.

[161] Ford Motor Co. v. I.C.C., *supra* note 115; *infra* note 364, at 1159 ("The Commission gave the term 'market dominance' an expansive interpretation. Congress reacted to the ICC's encompassing reading, and moved further in the direction of deregulation in 1980 when it passed the Staggers Act. That Act largely removed rail rate regulation from ICC oversight.") (citations omitted).

[162] *Compare* Brennan v. OSHRC, *supra* note 95; infra note 345, at 1344 (noting that the court's review "may be unduly deferential to the Commission, since the Act entrusts only adjudicatory functions to the Commission while assigning rulemaking power and initiation of enforcement proceedings to the Secretary") *to* Escondido Mut. Water Co. v. F.E.R.C., *supra* notes 104; *infra* note 367, at 777-79 ("The fact that in reality it is the Secretary's, and not the Commission's, judgment to which the court is giving deference is not surprising since the statute directs the Secretary, and not the Commission, to decide what conditions are necessary for the adequate protection of the reservation. There is nothing in the statute or the review scheme to indicate that Congress wanted the Commission to second-guess the Secretary on this matter.").

[163] Herz, *supra* note 39.

[164] *See* parentheticals in *supra* note 162.

[165] Berry v. Reagan, *infra* notes 275; *infra* note 366 and accompanying text ("Defendant maintains that this phrase [serve 'during the pleasure of the President'] is entitled to great deference by the

As is well-known, *Chevron* changed the opportunity to consult with agencies into something more like an obligation, once the agency's authority to interpret the statute has been established. In reality, the case law suggests a slightly more complicated framework in regards to independent agencies, albeit one that does not appear to stem from particular hostility towards the fourth branch. Certainly, courts defer to independent agencies, particularly when statutory authority is clearly conferred to the agency.[166]

However, courts do not defer as a matter of course. In some cases, courts have decided against the independent agency based on the arbitrary and capricious standard.[167] In others, they were willing to apply *Chevron*, but ultimately determined that the independent agency's interpretation of statute was unreasonable.[168] In addition, courts' previous predisposition towards OSHRC changed,[169] with both a court of appeals and the Supreme Court altering course after *Chevron* to decide that the independent agency is inherently *less* deserving of deference to its interpretation of a regulation than the Department of Labor/OSHA if the executive agency issued the rule.[170] Herz argues that "the explanation was not that executive agencies trump independent ones, but rather that regulators (with delegated policymaking authority) trump adjudicators."[171] It is worth noting, however, that decisions favoring regulators over adjudicators necessarily privilege politically accountable bureaucrats over those that operate with greater independence, which is a shift from courts' earlier preference.[172]

Furthermore, as discussed earlier in this Part, the DOJ has also sought and won judicial limitations to independent agencies' implementation of their enabling acts when they are in conflict with statutes administered by executive agencies.[173] These cases serve, perhaps, as precursors to a recent Supreme Court decision limiting an independent agency's implementation of its organic statute, when doing so interfered with an executive agency's ability to implement another, *general* act (that was not the executive agency's enabling legislation).

The Supreme Court case at issue, *NLRB v. Murphy Oil*,[174] concerned whether the Federal Arbitration Act is constrained by the National Labor

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Court when construing the intent of Congress. Defendant's argument sounds in persuasion; however, the words used provide the Court with little if any guidance than it initially possessed.").

[166] *See*, *e.g*. Fort Stewart Sch. v. FLRA, *infra* note 377, at 641-45; INS v. FLRA, *supra* note 142, at 273.

[167] *See, e.g*., I.N.S. v. FLRA, *supra* note 139, at 1458; U.S. Dep't of Interior, Bureau of Indian Affairs v. F:RA, *supra* note 143, at 175.

[168] *See*, *e.g*., Dep't of Treasury, I.R.S. v. FLRA, *infra* note 376, at 931-32; U.S. Dep't of Justice, I.N.S. v. FLRA, *supra* note __; *infra* note 384, at 48 n.14; DOJ v. FLRA, *infra* note 386, at 291.

[169] *See supra* note 156 and accompanying text.

[170] *See*, *e.g*., Donovan v. Amorello, *supra* notes 97; *infra* note 369; Martin v. OSHRC, *supra* note 99; *infra* note 379.

[171] Herz, *supra* note 39.

[172] *See supra* notes 162-164 and accompanying text.

[173] *See supra* Part I.B.2.

[174] This case was discussed briefly in Part I.B.2. *See supra* notes 105-109 and accompanying text.

Relations Act such that the latter limits the enforcement of arbitration agreements that may infringe on an employee's ability to engage in collective action. The Solicitor General argued broadly that the Arbitration Act should not yield to the National Labor Relations Act,[175] and the Supreme Court agreed.[176]

Despite the statutory precept that particularized authority trumps general authority,[177] the Court decided that the NLRB may not limit the administration of a general regulatory statute—in this case, the Arbitration Act—in the process of exercising the authority granted by its enabling act, the National Labor Relations Act. In doing so, the Supreme Court illustrates that the *exercise of general statutory authority by an executive agency may constrain an independent agency's administration of its particularized, organic legislation*. This constitutes a change from previous doctrine. While Supreme Court has found that an independent agency interpretation of statutes *besides* its enabling act must take a back seat to interpretations of the same statutes by executive agencies,[178] it has not otherwise allowed a general act to limit an independent agency's interpretation of its enabling act.[179]

Moreover, the *Murphy Oil* Court declares that the new principle is justified by *Chevron*. Per Justice Gorsuch's 5-4 opinion:

> The *Chevron* Court justified deference on the premise that a statutory ambiguity represents an "implicit" delegation to an agency to interpret a "statute which it administers." Here, though, the Board hasn't just sought to interpret its statute, the NLRA, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act. And on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a

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[175] *See generally* Transcript of Oral Argument, NLRB v. Murphy Oil, *supra* note 107; *see also* Brief for the United States as Amicus Curiae Supporting Petitioners in Nos. 16-285 and 16-300 and Supporting Respondents in No. 16-307, Epic Systems Corp. v. Lewis, 138 S.Ct. 1612 (2018) (No. 16-285, 16-300, 16-307).

[176] *See generally* NLRB v. Murphy Oil, *infra* note 446. While there is some evidence that this decision is in keeping with a trend in the Court's decisions, the majority in any case affirmed the position taken by the White House against the NLRB's interpretation of law. *See id*. at 24 (Ginsburg, J., dissenting) ("noting that the Court has limited defenses of the Arbitration Act's savings clause, which has been used to reconcile National Labor Relations Act and the Arbitration Act, that "discriminate against arbitration"); *see also*, Robert Barnes, *Supreme Court rules that companies can require workers to accept individual arbitration*, WASH. POST (May 21, 2018) (quoting an area attorney: "Most employers expected this decision, and did not hesitate where desired to insert individualized arbitration provisions into employment agreements").

[177] Citation.

[178] *See supra* note 160 and accompanying text.

[179] For instance, a previous Supreme Court decision found that the Sherman Act, a general anti-trust statute, need not limit the SEC's power. *See supra* note 94 and accompanying text.

> second statute it does not administer. One of *Chevron's* essential premises is simply missing here. [180]

Puzzlingly, the Court neglects to explain why Department of Transportation (DOT) enforcement of the Arbitration Act is not likewise or instead itself limited by the National Labor Relations Act, instead of the other way around. A few scholars have suggested that "*Chevron* may have left some ambiguity or suggestion that independent agencies should not receive the same level of deference" as executive agencies.[182] Nonetheless, this view does not advise how to assess deference in a conflict between two agencies' statutory interpretations, especially when an executive agency's implementation of a *general* statute limits an independent agency's interpretation of its *organic* statute. Indeed, it is unclear on what basis *Chevron* limits deference to the latter in order to safeguard the former, as implied by Justice Gorsuch.[183]

Presumably, any agency's interpretation of its enabling legislation is based on greater subject-matter expertise[184] than another agency's interpretation of a general statute impacting the same regulatory area. Indeed, independent agencies' "deep engagement with and knowledge of their organic statutes" render them well-suited to interpreting these statutes.[185] Furthermore, courts "have emphasized procedural safeguards and the role of agency expertise, rather than political accountability, in justifying deference to agencies' interpretations[, and] independent agencies fit particularly well with these values, as their enabling statutes require a greater transparency and administrative process than many other agencies."[186] In addition, to the extent independent agencies have a stronger pipeline to Congress than executive agencies do,[187] it seems deference to interpretation by the former would better uphold the purpose of *Chevron*—

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[180] *See Epic Systems Corp*., 584 U.S. at 19-20.
[182] Breger & Edles, *supra* note 42, at 170.
[183] *Supra* note 180 and accompanying text.
[184] *See* Eskridge & Baer, *supra* note 159, at 1108 & 1120-21 (arguing that independent agencies rely on specialized precedent in their decisionmaking and therefore, that courts are well-advised follow their lead).
[185] Jonathan R. Siegel, Guardians of the Background Principles, 2009 MICH. ST. L. REV. 123, 124 (2009).
[186] *Id*. (emphasis added).
[187] Trevor Morrison and Peter Strauss suggest that, due to their more intimate relationship with Congress, agencies can draw on sources of statutory meaning not accessible to courts. Trevor W. Morrison, Constitutional Avoidance in the Executive Branch, 106 COLUM. L. REV. 1189, 1241 (2006); Peter Strauss, *When the Judge is the Not the Primary Official With Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321 (1990) (discussing the differences between agency and judicial use of legislative history and arguing that agencies have a direct relationship with Congress that gives them insights into legislative purposes and meaning that are likely to be much more sure-footed than those available to courts in episodic litigation). This principle would appear to apply in greater force to independent agencies, due to their often unique or closer connection to the legislature.

which is to favor administrative interpretations by entities in the best position to anticipate legislative intent—than deference to executive agencies.

All of this suggests that, in *Murphy Oil*, the NLRB's authority and expertise in its enabling act is stronger than the DOT's authority and expertise in the Arbitration Act. Accordingly, the NLRB's claim to interpretation is greater under *Chevron* Step Zero and its interpretation is additionally more likely to be reasonable under Step Two. Furthermore, while the DOT's interpretation might be informational and persuasive, it concerns a general statute, not one for which the DOT is uniquely responsible. For this reason, it would seem to have no claim to *Chevron* deference, even if there were no conflict. At best, the Solicitor General's authority to speak for the United States—and OLC's capacity to render informed judgment about statutory issues of general importance—might be given some weight (but not deference), as a factor influencing the Court's independent judgment. This is not a situation, however, that calls for foregoing deference to another agency's competing interpretation of its organic act.

In addition to limiting the interpretive power of an independent agency, Justice Gorsuch also denies an argument for deference on the basis of political accountability, thus foreclosing this avenue as a justification for limiting the National Labor Relations Act in the face of a competing interest in the Arbitration Act. In doing so, he also fails to characterize the DOT, or even the Solicitor General, as more politically accountable that the NLRB.

> Another justification the *Chevron* Court offered for deference is that "policy choices" should be left to Executive Branch officials "directly accountable to the people." But here the Executive seems of two minds, for we have received competing briefs from the Board and from the United States (through the Solicitor General) disputing the meaning of the NLRA. And whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable.[188]

Under the political accountability justification for *Chevron* deference,[189] the Court might have affirmed the Solicitor General's position, on the grounds that

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[188] *Id*. at 20.

[189] *See* Lisa Schultz Bressman, *Procedures As Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1763-65 (2007) (suggesting that the *Chevron* doctrine is part of the current administrative law trend legitimating "presidential control of agency decision") (citing Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1076-82 (1986) and work by Jerry Mashaw, both of which note the benefit of White House-led cost/benefit analyses to the grounding of agency decisionmaking); Kagan, supra note 3, at 2377 (arguing tentatively in favor by suggesting deference might be more legitimately accorded in such cases because "presidential involvement rises to a certain level of

the DOT is more accountable to the President than an insulated independent agency like the NLRB. This approach would have reinforced the intuition that courts might "balk" at the idea of giving deference to independent agencies due to their lack of clear political accountability. But if presidential influence on the agency is inapposite to determinations of deference, as both the *Murphy Oil* Court and some scholars[190] suggest, deference is owed the independent agency's position at the expense of the DOT, given the former's clearer delegation of authority and more significant expertise in its organic act. Even under the political accountability rationale, deferring to an independent agency such as the NLRB might be justifiable, given its special connection to the democratically-controlled legislature.

Finally, one possible motivation for the Court's opaque decision may be sui generis—in particular, the desire to limit deference to the NLRB's interpretation of its enabling act in order to preserve the judiciary's *own* power to interpret the Arbitration Act.[191] In a case involving the SEC, the Court chose not to defer to an independent agency interpretation of its enabling legislation because the Court was concerned that the agency was expanding its own jurisdiction.[192] In regards to a case against the FLRA,[193] one scholar notes that the Court was particularly concerned with constraining the FLRA's implementation of policy choices beyond those specified by Congress.[194] More

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substantiality, as manifested in executive orders and directives, rulemaking records, and other objective indicia of decision making processes"); *see also supra* note 121 and accompanying text.

[190] *See* Emily Hammond, Chevron's Generality Principles, 83 FORDHAM L. REV. 655, 666-77 (2014) (arguing that the political considerations underlying the *Chevron* doctrine are not, as a matter of fact, taken into account in second-order *Chevron* decisions); Peter M. Shane, *Chevron Deference, the Rule Of Law, and Presidential Influence in the Administrative State*, 46 FORDHAM L. REV. 694-95 (2014) (arguing against by suggesting that several virtues of presidential administration—in particular, the doctrinal backing for, voter representativeness of and accountability associated with presidential involvement in agency policymaking—have been overstated). Shane notes that unitary executive theorists would likely argue in favor of deference in those instances in which the President has had a hand in the agency's decisionmaking process (although he also goes on to dispute unitary executive theory as a whole); *see id*. at 691-93.

[191] The Court is a proponent of a broad reading of this statute. Furthermore, the Arbitration Act has a reputation as a statute whose interpretative authority has been accorded the judiciary, as opposed to any agency alone.

[192] *See* Dirks v. S.E.C., 463 U.S. 646, 668 n.1 (1983) (Blackmun, J., dissenting) ("Moreover, the Court continues to refuse to accord to SEC administrative decisions the deference it normally gives to an agency's interpretation of its own statute.").

[193] *See* Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth., *supra* note 155; *infra* note 365, at 97-98; John H. Reese, *Bursting the* Chevron *Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV 1103, 1132 (2004).

[194] *See* Reese, *supra* note 193, at 1135 (quoting the case: "'[T]here are undoubtedly areas in which the FLRA, like the National Labor Relations Board, enjoys considerable freedom to apply its expertise to new problems, provided it remains faithful to the fundamental policy choices made by Congress.' Thus, the Court concluded 'that the FLRA's interpretation..., constitutes an 'unauthorized assumption by [the] agency of [a] major policy decisio[n] properly made by Congress.'"). This ideology has also been echoed by courts post-*Chevron*. *See*, *e.g*., INS. v.

recently, the dissent in *City of Arlington v. FCC*[195] argued that according *Chevron* deference to the FCC was in discord with the judiciary's interest in limiting agencies' opportunity to infringe on Congress's right to determine administrative jurisdiction. Similarly, the majority in *Murphy Oil* may have sought to limit the NLRB's jurisdiction because the Court wished to limit the agency's potential to undercut an expansive interpretation of the Arbitration Act. In any case, these cases suggest that there is some truth to the idea that judges are interested in dismantling *Chevron* in favor of increasing their own powers of review.[196]

II. PRESIDENTIAL ADMINISTRATION

Litigation brought by the DOJ against independent agencies may also further presidential administration. For instance, litigation may be used to pursue the President's substantive policymaking agenda, or to deteriorate independent agencies' insulation from the President. Litigation as a tool of presidential administration is far rarer than its use to foster executive administration. Nonetheless, presidential administration via litigation has proliferated—relatively speaking—under President Trump.

To the extent it succeeds, litigation promoting presidential interests bears on the proper scope of presidential power vis-à-vis the other branches of government. For instance, litigation may allow the President to infringe on the legislature's authority to insulate independent agencies. In other words, if

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FLRA, 4 F.3d at 271 ("FLRA's decisions are entitled to special deference when they reflect policy choices, involve complex issues within FLRA's special expertise, or constitute reasonable interpretations of FSLMRS. We must keep in mind that, though it serves a quasi-judicial role between government agencies and their employees, FLRA is a part of the executive branch, and, so long as it remains within the broad confines imposed upon it by its enabling statute, FLRA is entitled to formulate executive policy without interference from us. On the other hand, the 'deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' Accordingly, while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act, they must not 'rubber-stamp ... administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' (citations omitted).").

[195] *See* Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 YALE J. ON REG. 279, 322-23 (2017) (While "the Supreme Court recently decided, in *City of Arlington v. FCC*, that agencies may be granted *Chevron* deference to negotiate the scope of their own authority in some instances, it also determined that this is constitutionally permissible only as long agencies act 'based on a permissible construction of the statute.' Further, a vocal minority of the Court made clear the concern that agencies may be accumulating too much power if allowed to determine their own jurisdiction under any circumstances."); City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013).

[196] Jonathan H. Adler, *Shunting Aside Chevron Deference*, UPENN REG. REVIEW (Aug. 7, 2018), *at* https://www.theregreview.org/2018/08/07/adler-shunting-aside-chevron-deference/ ("Members of Congress, academic commentators, and even a few federal judges [as well as some Supreme Court Justices] have suggested that *Chevron* should be reconsidered.")

Congress intended for an independent agency to be free to act on the basis of its delegated authority without regard to the President's interests, the use of litigation to overcome this structural barrier may be problematic as both a formal and a functional matter. Litigation may also allow the executive branch to sidestep the proper channels for statutory reform.

That having been said, litigation requires judicial sanction to be an effective tool for leveraging executive influence of any kind. Simply put, for litigation to work as a form of presidential administration, courts have to decide in favor of the President. This means that courts are in a position to limit the use of litigation for presidentialist purposes. Overall, litigation brought by the President against independent agencies may be defensible to those who advocate for a more unitary executive, as well as to those (often the same crowd) who support greater judicial involvement in administrative statutory interpretation,[197] but perhaps only to the extent it does not interfere with the legislature's constitutional authority.

A. The Limits of Intra-Branch Administration

Why might the President turn to litigation for purposes of administration? Perhaps because, despite her position as head of the executive branch, the President has only limited and tenuous control over independent agencies. As an initial matter, despite a longstanding presidential interest in wielding administrative control,[198] the Supreme Court has ruled that the neither the Take Care nor the Vesting Clause allows the president to diminish the independent authority of any agency to interpret and carry out its statutory duties.[199] As the Court put it, "To contend that the obligations imposed on the President to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the Constitution, and is entirely inadmissible."[200]

This tension between the constitutional powers of the President and statutory authority of agencies is particularly pronounced in regards to

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[197] *See infra* note 312 and accompanying text.

[198] Mashaw & Perry, *supra* note 49, at 20 (noting that "presidents from the very beginning seem to have viewed themselves as interpreters- in-chief of both federal statutes and the federal Constitution").

[199] Kendall v. U.S. ex rel. Stokes, 37 U.S. 524 (1838) (noting that neither the Take Care nor Vesting Clauses allow this).

[200] *Id*. at 525. Scholars have argued that this case, *Kendall*, is the companion to *Marbury v. Madison* for the proposition that "when a statute grants authority to an official to perform a merely ministerial, nondiscretionary act, the President may not order the official to withhold the action." Stack, *supra* note 9, at 273; *see also* Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2492-94 (2011).

independent agencies.[201] Although Justice Kagan contended that presidential administration comports with the President's authority to direct executive branch officials in the exercise of their delegated discretion,[202] even she admitted that Congress intends independent agencies be at least somewhat insulated from the President.[203]

On the one hand, qualities of independence do not require the President to forgo all formal control over an agency. For instance, she is able to appoint the chair and other members of independent regulatory commissions, subject to Senate confirmation, once the term of the previous member has ended. She also has limited opportunity to remove independent agency heads with good cause,[204] and even to seek changes to for-cause removal provisions.[205] On the other hand, the menu of formal options for control has long been limited by convention.[206]

The President may also engage in informal consultation or oversight of her branch, for instance, by shaping the scope and substance of governmental

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[201] *See supra* note 4 and accompanying text.

[202] Kagan, *supra* note 3, at 2274.

[203] *Id.* at 2327 ("In…delegating power to [an independent] agency (rather than to a counterpart in the executive branch), Congress must be thought to intend the exercise of that power to be independent. In such a case, the agency's heads are not subordinate to the President in other respects; making the heads subordinate in this single way would subvert the very structure and premises of the agency.").

[204] Even a President's strong desire to remove an independent agency head may not overcome a for-cause removal provision. See, e.g., Paul Kiernan & Nick Timiraos, *Q&A: Can Trump Remove Powell as Fed Chairman?*, WALL ST. J. (Dec. 28, 2018) (noting that the President cannot remove the Fed Chairman at will).

[205] Kristin E. Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 NOTRE DAME L. REV. 1475, 1476 (2018) (discussing recent cases in which courts have "sever[e]d a sentence or two from the agency's governing statute to allow particular agency officials to be removed from office by the President at will rather than only for cause"); *see also infra* notes 285-287 (discussing how President Trump argued in *PHH Corp. v. CFPB* that the protection of a single head of an independent by a for-cause removal provision is unconstitutional).

[206] "Presidents have resisted Congress's efforts to insulate agencies from presidential control, including restrictions on the President's power to direct and discharge agency heads, but successes in these efforts have been few and far between. Congress continues to empower independent agencies to exercise control over important policy matters and the federal courts have made only marginal inroads on Congress's power to insulate officials from presidential control." Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1626 (2018); *see also* Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 488 (2008) ("Presidents cannot fire independent-agency heads on policy grounds and, as such, have been constrained in their efforts to direct independent-agency policy making."); Zarda v. Altitude Express, Inc., *infra* note 448 (noting that "the President often cannot make effective use of [for-cause removal provisions,] given the political costs of doing so"); Hickman, *supra* note 205, at 1476 (noting that despite changes to removal provisions, "the courts left the actions of the challenged agency, and the structures and actions of identically or similarly designed agencies, largely or entirely untouched"); Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 275 (1988) ("The 'arm of Congress' view of independent agencies has successfully thwarted executive branch attempts significantly to reorganize them for over fifty years.").

litigation,[207] issuing broad mandates like executive orders,[208] creating presidential councils[209] and guiding agencies' implementation of their statutory mandates. Presidents have also attempted to direct agencies' actions through communications such as letters, conversations, rose garden speeches, legislative proposals, and bill signing statements.[210] However, these types of indirect actions tend not to have much impact on independent agencies.[211]

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[207] *See* Harvey, *supra* note 9, at 1572. ("the power of wielding litigation authority can be a great tool for a president with little control over much of the administrative state"); Jerry L. Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Exercise*, 55 U. TORONTO L.J. 497, 518-19 (2005) ("An agency that wants to be effective in its overall program…will almost certainly allow current politics to guide not only its interpretive agenda, but sometimes the interpretations themselves."); Devins, *Unitariness*, *supra* note 9, at 266 (chronicling the establishment of a Federal Legal Council by which the Carter and Reagan administrations "facilitate[d] 'coordination and communication among Federal legal offices' in order to 'avoid inconsistent or unnecessary litigation by agencies.'….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"); *id*. at 268 (suggesting that the Reagan and Bush 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."); *id*. at 268-69 (suggesting that the Solicitor General's control over the scope and substance of governmental litigation is a tool of executive control); *see*, *e.g*. FTC v. Guignon, *infra* note 341.

[208] Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 506 (2005) ("Executive orders demanding that agencies engage in regulatory cost-benefit analyses or consider the effects of their actions on small, public and private entries, or consult with affected state and local authorities, are intended to shape the way agencies interpret their mandates and carry out their statutory duties. Put another way, they are meant to shape agency interpretation by nudging discretionary judgments in one direction or another."); *see*, *e.g*. Exec. Order 13,771, 82 C.F.R. § 61431 (2017) (directing agencies to limit the issuance of regulations); *see also* Jodi L. Short, *The Trouble with Counting: Cutting through the Rhetoric of Red Tape Cutting*, 103 MINN. L. REV. (forthcoming) (arguing that EO 13,771 is irrational and empirically unsound); Cheryl Bolen, *Trump's 2-for-1 Regulatory Policy Yields Minimal Results*, BLOOMBERG NEWS (Sept. 2017); Bouree Lamb, *Trumps 'Two-for-One' Regulation Executive Order*, THE ATLANTIC (Jan. 2017); Lydia Wheeler & Lisa Hagen, *Trump signs '2-for-1' order to reduce regulations*, THE HILL (Jan. 2017). In addition,

[209] Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 223 (1993) ("The President's Council on Competitiveness ('the Council') was the most visible expression of recent Administrations' commitment to the unitary executive. Until disbanded in the opening days of the Clinton administration, the Council sat atop the regulatory review process. In several visible instances it derailed agency initiatives that it deemed inconsistent with the Administration's overall regulatory program.").

[210] *Id.* at 506.

[211] *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 589–591 (1984) (noting that while "one may be certain that independent commission consultation with the White House about appointments often occurs," that it is "subdued—as in so many other matters—by the lack of obligation so to consult"); Devins & Lewis, *supra* note 206206, at 488 (suggesting that Presidents are able to influence the policymaking of independent agencies only whenever a majority of the

In addition, the President sometimes participates in the rulemaking process,[212] including through efforts to coordinate agencies[213] or by enlisting a monitoring agency[214] or the Attorney General[215] to oversee regulatory activity on the President's behalf. However, these measures have generally been limited to executive agencies only.[216] Even then, a distinct lack of uniformity across agencies, opacity in administrative process and limited presidential access to judicial review of agencies[217] mean that the President is often precluded from directly impacting an executive agency's actions and must instead use her power to hire and fire agency heads to influence administrative policymaking.

Generally speaking, intra-branch mechanisms of presidential administration are far less effective on independent agencies than on executive

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commissioners are from the President's party); Cass R. Sunstein & Peter L. Strauss, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 182 (1986) (discussing generally two executive orders issued by President Reagan "that give the Office of Management and Budget (OMB) considerable power over the rulemaking activities of executive agencies," and noting that these could be extended to independent agencies—but that they were not).

[212] *See* Neil Komesar & Wendy Wagner, *The Administrative Process from the Bottom Up: Reflections on the Role, If Any, for Judicial Review*, 69 ADMIN L. REV. 891 (2017); *compare* Kagan, *supra* note 3, at __ (suggesting that presidential involvement in agency rulemaking should render courts more deferential to the agency under *Chevron*) to Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (arguing that democratic values are better wrought through bottom-up administration).

[213] *See generally* Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L.J. 461, 468 (1994).

[214] *See* Mashaw, *supra* note 208, at 506 (suggesting that "presidential delegations of authority to monitor agency compliance with [regulatory] demands—to the Office of Management and Budget or the Vice-President or the President's Council on Environmental Quality—are a common feature of the modern 'managerial' presidency").

[215] *See* Mashaw & Perry, *supra* note 49, at 19 (discussing how antebellum Attorneys General both sought and ceded control over agencies' interpretations of statute); Moss, *supra* note 64, at 1307 (citing Exec. Order No. 12,146, 3 C.F.R. 409, 411 (1979); Exec. Order No. 11,030, 3 C.F.R. 610, 611 (1959-63), *reprinted in* 44 U.S.C. § 1505 (1994)); Herz, *supra* note 209, at 222 (discussing how these measures impacted agency statutory interpretation); Devins, *Unitariness supra* note 9, at 266 (suggesting that the Reagan Administration used "Office of Legal Counsel opinions to strengthen Attorney General control of government litigation").

[216] *Id*. at 221-222 (noting that Executive Order 12,291 applied to executive agencies only); Coglianese, *supra* note 19, at 734-35 ("Over the last fifteen years, a group of seventeen major independent agencies—including the Federal Communications Commission (FCC) and the Securities and Exchange Commission (SEC)—collectively issued nearly 5000 federal regulations. Yet not one of these rules has been subject to the usual legislative or presidential requirements for regulatory analysis that executive branch agencies must follow when developing new rules. The Unfunded Mandates Reform Act (UMRA) and Executive Order 12,866 exempt independent agencies from the normal requirements for regulatory impact analysis."); *see also* Devins & Lewis, *supra* note 206, at 488 ("[U]nlike executive agencies, independent agencies need not submit their regulatory proposals to OMB for approval. They often manage to escape OMB review of budget requests or at least submit their budget requests to Congress directly at the same time.").

[217] Mashaw & Perry, *supra* note 49, at 10-11.

agencies, likely because of the purposeful lack of an official hierarchy in place between the President and the fourth branch. Perhaps as a result of the relative ineffectiveness of *ex ante* measures,[218] the President has chosen, on occasion, to rely on the *ex post* tool of litigation. After all, litigation forces a disagreement between the Executive and an independent agency into a judicial forum, which requires the agency to respond to the President in some way and may even secure court affirmation of the President's administrative preferences.

B. Typology of Litigation: Increasing Substantive and Structural Control

As noted, the DOJ may litigate independent agencies to further the President's policy agenda or to change the structure of independent agencies—in particular, by seeking to augment the President's exercise of Article II power to remove agencies heads. There are a handful of scenarios that imply presidential interests may have motivated the DOJ to bring suit. The first involves a clear statement from the White House to this effect.[219] The second is when the DOJ has reversed its position in litigation immediately after a new president has taken office.[220]

Furthermore, the DOJ may be doing the work of popular constitutionalism,[221] which is often synonymous with presidential constitutional interpretation,[222] when it argues for a broad constitutional theory in response to an agency's narrow exercise of constitutional or statutory interpretation. In addition, the DOJ may seek to implement a statute in a manner that furthers the

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[218] Herz, *supra* note 39 (characterizing these measures for influencing independent agencies as "unproductive").

[219] *See*, *e.g.*, *infra* notes 256 and accompanying text.

[220] *See*, *e.g.*, *supra* note 106; *infra* notes 236 & 283-284 and accompanying text. Presidential influence may also be present if the SG reverses, before the Supreme Court, the position taken by the agency on behalf of the government in the lower court. *See supra* note 8 and accompanying text.

[221] Popular constitutionalism holds that the ultimate authority in constitutional interpretation resides in "the people themselves." *See generally*, Larry D. Kramer, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959 (2004); *see also* Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1616 (2005) (book review) ("In sum, popular constitutionalism is the theory that the Constitution is nothing more and nothing less than the will of the people, interpreted by the people and backed by the threat of popular enforcement."). Mark Tushnet refers to this as "political law." *See generally*, Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991 (2006).

[222] Popular constitutionalism provides the foundation for those who take the "departmentalist" view that the President, as opposed to only the judiciary, should have some influence on constitutional interpretation. Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1028 (2004); *see also* David L. Franklin, *Popular Constitutionalism as Presidential* Constitutionalism, 81 CHI.-KENT L. REV. 1069, 1079-80 (2006) (noting that all of the "heroes" of Larry Kramer's popular constitutionalism proposed are U.S. presidents).

President's agenda—or pursue "popular statutory interpretation," if you will[223]—when it asserts an interpretation of legislation 1) that is in opposition to an agency's interpretation that is based in expertise and 2) that is not founded in a longstanding normative framework (like the defense of executive agencies from labor requirements or anti-trust values) to which the executive branch generally subscribes,

Regardless of the potential reasons for bringing suit, these cases are not brought very often. Prior to Trump, the use of this litigation for presidential administration was rare relative to its use for executive administration. Only three out of the fifteen cases from the pre-Nixon era involved either broad statutory or constitutional conflicts between the White House and an independent agency, or disputes over the removal of a commissioner. In addition, only 10% to 13% of cases from the Nixon through the Bush I administrations consisted of this type of litigation.[224] Perhaps surprisingly, no challenge of this type were brought under Clinton, Bush II and Obama. In contrast, these cases are becoming more common under the Trump administration, under which the DOJ seems to be focusing on litigation for presidential purposes more so than on the basis of other executive concerns.

In addition, although litigation is less commonly deployed for presidential purposes, it is still less effective as a tool of presidential administration than as a mechanism for executive administration. On the one hand, courts have been open to challenges brought by the President to assert jurisdictional limits to independent agencies and reverse agency decision-making that limited the progress of labor and civil rights. Courts are also receptive to the defense of the President's removal of particular independent regulatory commissioners. During the Roosevelt through Johnson and Nixon through Carter eras, the DOJ's position was affirmed by courts in 67% and 50% of these types of high-profile cases, respectively.[225]

On the other hand, under Reagan/Bush I and Trump, these cases have fared differently, with a win rate of zero. This may be because these Presidents sought broader victories than other. For instance, in the 1980s and early 90s, the courts both were unwilling to entertain arguments that the Presidential may remove an independent agency head at-will[226] and decided against a presidential challenge to the constitutionality of an independent agency's decision to maintain civil rights protections.[227] And under Trump, the courts have rebuffed

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[223] Just as popular constitutionalism is often, in practice, presidential constitutionalism, so too might the President's interpretation of statute be understood as populist.

[224] About two out of twenty, three out of twenty-three and three out of sixty-six cases were category *(c)* cases under Nixon through Carter, Reagan and Bush I and Clinton through Obama, respectively.

[225] Two out of three and one out of two cases, respectively.

[226] *Infra* notes 275-282 and accompanying text.

[227] *Infra* notes 249-252 and accompanying text.

both an attempt to limit the broader interpretative authority of an independent agency to expand civil rights[228]—questioning, instead, the very legitimacy of the DOJ in taking a position against the agency[229]—and an argument seeking to diminish the for-cause removal protections enjoyed by independent agency heads.[230] On the other hand, the Supreme Court recently decided in favor of the DOJ in a case the President seems to have had a role in shaping.[231]

1. Furthering the President's Agenda

DOJ litigation to further the President's policy interests has been rare, but always noteworthy. While this litigation has more recently involved presidential efforts to limit an independent agency's maintenance or expansion of labor and civil rights protections, President Truman was a champion of these rights vis-à-vis the ICC. In one case, the DOJ argued that labor principles required the extension of protections for railroad workers to account for the actual amount of time they would be displaced by new railway construction.[232] In another case, the DOJ argued that the ICC's segregation of Black and white passengers by railroad car was unlawful both under the Interstate Commerce Act and the Constitution.[233] As Supreme Court litigator Robert Stern noted at the time, "[t]he conflicting position arises [in both of these cases] because the Department of Justice attorneys…are so convinced that the Commission's position is wrong that they are unwilling to accommodate their views to those of the Commission."[234] Perhaps, at the time, the more politically accountable executive branch was ahead of the labor and equal rights curve due to its greater responsiveness to changing popular mores.

In a case involving the decency of broadcast language, and related to the preservation of executive authority,[235] the DOJ originally joined the FCC in defending its order before the court of appeals. However, it switched positions when President Carter took office, which suggests it did so in order to support his views.[236] Accordingly, the DOJ argued before the Supreme Court for a more permissive interpretation of the statutory term "indecency" than was applied by the FCC.[237]

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[228] *Infra* notes 254-263 and accompanying text.
[229] *Infra* note 257 and accompanying text.
[230] *Infra* notes 283-287 and accompanying text.
[231] *See supra* notes 105-109 and accompanying text.
[232] Railway Labor Executives Ass'n v. U.S., *infra* note 333.
[233] Henderson v. U.S., *infra* note 332.
[234] Stern, *supra* note 59, at 761.
[235] Fed. Comm. Comm'n v. Pacifica Found., *infra* note 354.
[236] Brief for the U.S., Fed. Comm. Comm'n v. Pacifica Found., *infra* note 354 (No. 77-528).
[237] *Id*.

In another Carter-era case [238] the DOJ determined that equal protection law does not limit pro-veteran hiring preferences, even when these preferences curb the hiring of women. No agency involved in this case took a progressive stance, and the DOJ shared the view taken by all the agencies involved that it is within states' rights to shape hiring selection. Nonetheless, the DOJ submitted a brief that cast the collective position of several agencies—including the EEOC, and, for that matter, the Departments of Labor and Defense—as problematic[239] because these agencies suggested that an extreme preference for hiring veterans might not survive a constitutional challenge.[240] The fact that the DOJ was in opposition to both independent and executive agencies, and that it is making a broad constitutional argument, suggests its view was influenced by the President's popular support for veterans—which was unsettled at the agency level, perhaps, by a budding interest in equal protection.

Under Reagan and George H.W. Bush, DOJ litigation against independent agencies became a more obvious tool for deregulation in the civil rights context, somewhat more similar to its recent use under by the Trump administration. Because of Reagan's well-known orientation as an "anti-regulatory" President,[241] as well as one opposed to affirmative action,[242] he instigated skirmishes between the Solicitor General and the EEOC. Nonetheless, these conflicts between the President and the agency technically remained and were resolved within the executive branch itself.

More specifically, Reagan's Solicitor General "defended" the EEOC before the Supreme Court in multiple cases by making arguments that were counter to the EEOC's view; as a result, the EEOC was either minimized in or

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[238] Personnel Adm'r of Mass. v. Feeny, *infra* note 357.

[239] Brief for the Solicitor General, Personnel Adm'r of Mass. v. Feeny, *infra* note 357 (No. 78-233) (arguing that only explicit and purposeful discrimination against women would render Massachusetts veterans' hiring preference in conflict with the Equal Protection Clause).

[240] Brief for the Departments of Defense and Labor, the Office of Personnel Management and the EEOC, Personnel Adm'r of Mass. v. Feeny, *infra* note 357 (No. 78-233) ("As the Solicitor General has stated, the extent and form of veterans' benefits is a matter for Congress and the state legislatures. This is not to say, however, that any veterans' preference, no matter how extreme or irrational, must survive constitutional challenge.").

[241] Nicholas Parillo, Moderator, The ABA Section of Administrative Law and Regulatory Practice Administrative Law Legal History Committee: Deregulation, Past and President (June 8, 2018) (discussing the deregulation efforts of the 1970s and 1980s, including President Reagan's famous passage of Executive Order 12,291 instituting a cost/benefit analysis for rulemaking, significant efforts to pass deregulation, and decisions to hire of agency heads—such as Anne Gorsuch, James Watt and others—that actively campaigned against the interests of their agencies); Herz, *supra* note 209, at 222 (discussing how Presidents Reagan and Bush influenced agency interpretations through the President's Council on Competitiveness); *see also* Office of Legal Policy, U.S. Dep't of Justice, Report to the Attorney General, The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation (1988); Exec. Order 12,291 3 C.F.R. § 127 (1981); Phillip Shabecoff, *Reagan Order on Cost-Benefit Analysis Stirs Economic and Political Debate*, N.Y. TIMES (1981).

[242] *See infra* notes 244-245, 277 and accompanying text.

excluded from governmental briefing on its behalf.[243] As Neal Devins and Michael Herz note, the Solicitor General did so based both on "the interests of DOJ's Civil Division, which defends employment discrimination challenges filed against executive agencies and departments, and, more importantly, due to the interests of the Reagan White House, which opposed affirmative action."[244] This episode highlights the use of this method for both executive *and* presidential administration.

Furthermore, these conflicts between the President and the EEOC[245] can be directly contrasted to the "striking example of Solicitor General willingness

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[243] *See*, *e.g*., Connecticut v. Teal, 457 U.S. 440 (1982) (EEOC declining to join government's brief); Williams v. City of New Orleans, 729 F.2d 1554 (5th Cir. 1984); Local 28 of Sheet Metal Workers' Intern. v. EEOC, 478 U.S. 421 (1986) (DOJ reversing before the Supreme Court the position taken by the EEOC before the court of appeals); Brief for the United States as Amicus Curiae Supporting Petitioners. Riverside v. Rivera, 477 U.S. 561 (1986) (No. 85-224) (DOJ outright ignoring the EEOC's views in its brief before the court); Brief for the United States as Amicus Curiae at 23-24 n.10, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (No. 87-1167). "In Price Waterhouse, the Solicitor General did not note EEOC disagreement with its view that evidence of sexual stereotyping could be rebutted by a preponderance of the evidence, rather than clear and convincing evidence…The Solicitor General's failure to comment on EEOC's position . . . is curious.'" Devins, *Unitrainess*, *supra* note 9, at 291. In regards to *Teal*, Neal Devins notes more generally that during Reagan's first term, the Solicitor General "sometimes resolved conflicts between the Justice Department and independent agencies by either noting disagreements between his office and the agency in Solicitor General filings or by allowing the agency to represent itself." *Id*. at 281 n.32. Devins also discusses the *Williams* case, noting that the DOJ pressured the EEOC to *not* "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….[T]he EEOC characterized as 'deplorable' the Justice Department's failure to consult the EEOC before filing its amicus brief…..[T]he Civil Rights Division claimed it would block the EEOC's attempts to file its amicus brief. The EEOC ultimately capitulated and voted not to file"). *See id*. at 298. In regards to *Riverside*, Devins notes that "the Solicitor General rejected EEOC efforts to participate as an amicus supporting plaintiffs' claims in an attorney fee case [and instead] filed an amicus brief in opposition to plaintiffs' claims without mention of the EEOC's conflicting position. Ironically, EEOC arguments were presented to the Court—the NAACP Legal Defense and Education Fund reproduced a leaked draft of the rejected EEOC brief in its amicus filing." *Id*. at 291.

[244] *See* Devins & Herz, *supra* note 52, at 209 (discussing *Local 28*, *supra* note 243). "For its part, the Supreme Court, referring to this flip flop, embraced the lower court arguments of EEOC attorneys, refusing to defer to the EEOC's newly minted position. Had DOJ attorneys controlled the case from its inception, there is good reason to think that the case would have settled or, alternatively, that a different substantive outcome would have been reached." Id.

[245] In regards to one of the EEOC cases, *Williams*: "The Reagan administration has repeatedly opposed quotas, but administration officials said they consider the issue not a policy decision but 'a jurisdictional decision made by the Department of Justice.' The administration argues that, as an agency of the executive branch, the EEOC is subordinate to the president's representative, the Justice Department. 'This case has clarified our standing,' commission chairman Thomas said yesterday. 'It points out to Congress the chink in our armor. We were created to take the lead responsibility in setting civil rights policy in court but we are in the executive branch which has its own opinions. So there is a contradiction there that has to be ironed out....this commission

to accommodate SEC concerns"[246] by allowing the SEC to argue its position separately at the certiorari stage and argue on its own behalf before the Supreme Court in a high profile case, even though the DOJ held an opposing position.[247] This is due, perhaps, to President Reagan's somewhat less beleaguered view of the SEC. (Note, however, that this trend has changed in recent years, in that the SEC has since been prevented by the Solicitor General from litigating on its own behalf.[248])

Despite Bush I's similarly anti-affirmative action stance,[249] his administration sought to appease Congress, which led to litigation[250] in which the Solicitor General allowed the FCC to "represent itself in defending the program, while [the Solicitor General himself] filed an amicus brief" against the FCC, arguing that its efforts to encourage minority ownership of new and existing radio and television licenses were unconstitutional.[251] Ultimately, the President sanctioned this because "Bush FCC nominees needed to convince Congress that they would defend…this affirmative action program."[252]

Trump's has also expressed an interest in "deregulation"[253] —in particular, in regulatory areas disfavored by his political supporters. For instance, the Trump administration has rescinded or reversed policies by the Obama administration that empowered the EEOC to better implement civil rights

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should be independent and this case clearly shows why.'" Juan Williams, *Lawmaker Urges EEOC Not to Quit Rights Case*, WASH. POST (Apr. 10, 1983) ("'As subcommittee chairman I am very concerned about executive branch pressure...which has resulted in the Equal Employment Opportunity Commission's withdrawal from participation in Williams vs. City of New Orleans,' Rep. Don Edwards (D-Calif.) wrote to the commission last week. 'This is especially disturbing since...your March 21st correspondence to Justice states that adoption of its position would significantly impact on the existing and future remedies in cases to which EEOC is a party.").

[246] Devins, *Unitariness*, *supra* note 9, at 291.

[247] Dirks v. SEC, 463 U.S. 646 (1983); *supra* note 192.

[248] *See* Lucia v. SEC, 585 U.S. __ (2018); Devins & Lewis, *supra* note 206, at 495 (noting that Clinton and W. Bush administration prevented the FEC and SEC from filing competing briefs with the Supreme Court).

[249] "The (first) George Bush's DOJ was beholden to social conservatives and had a general anti-affirmative action position." Devins & Herz, note 9, at 579.

[250] Metro Broadcasting, Inc. v. F.C.C., *infra* note 378.

[251] Devins & Herz, *supra* note 9, at 579.

[252] *Id*.

[253] *See* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2 (2017); Caroline Cecot, Michael A. Livermore, *The One-in, Two-Out Executive Order Is A Zero*, 166 U. PA. L. REV. ONLINE 1 (2017); Gillian E. Metzger, *Constitutionalizing Systemic Administration*, ADMIN. & REG. L. NEWS, Spring 2017; Congressmen John Conyers, Jr., et al., *The Dangers of Legislating Based on Mythology: The Serious Risks Presented by the Anti-Regulatory Agenda of the 115th Congress and the Trump Administration*, 54 HARV. J. ON LEGIS. 365 (2017); Lisa Rein & Juliet Eilperin, *White House installs political aides at Cabinet agencies to be Trump's eyes and ears*, WASH. POST (Mar. 19, 2017); Jennifer Nou, *Taming the Shallow State*, YALE J. ON REG. NOTICE & COMMENT (Feb. 28, 2017).

protections.[254] In addition, the administration also sought to advocate against the EEOC's interpretation of the Civil Rights Act,[255] by directing[256] the DOJ to take the unusual step of inserting itself into a dispute involving an independent agency's interpretation of statute with respect to a private regulated party.[257] Indeed, this is one of only a few cases in this Article's dataset,[258] both brought by Trump, in which the DOJ has done so. This is in stark contrast to its usual involvement in contesting an independent agency's regulation of an executive agency.

In its amicus brief, the DOJ argued against the EEOC's determination that Title VII prohibits discrimination on the basis of sexual orientation.[259] Ultimately, the Second Circuit reversed itself in order to affirm the EEOC's interpretation of statute,[260] thus deepening a circuit split[261] and possibly opening the door to resolution by the Supreme Court.

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[254] *See generally* Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, YALE L.J. (forthcoming 2019).

[255] Zarda v. Altitude Express, Inc., *infra* note 448.

[256] *See* Alan Feuer, *Justice Department Says Rights Law Doesn't Protect Gays*, NY TIMES (July 27, 2017) (The DOJ's insertion into this case was an "unusual example of top officials in Washington intervening in court in what is an important but essentially private dispute between a worker and his boss over gay rights issues."); Amanda B. Protess & Frederick H. Rein, *Awkward Positions: Second Circuit Confronts Dueling Claims for Deference*, NY L. JOUR. (May 15, 2018) ("The court also asked why the DOJ had not filed an amicus brief in the [similar] *Hively* case previously before the Seventh Circuit. Its attorney replied that he was 'not sure.' But judges noted that the *Hively* briefing preceded the 2016 presidential election's political change in administration. The DOJ agreed that this 'might' have affected its sudden decision to intervene".); Julia Manchester, *Federal appeals court rules in favor of gay rights*, THE HILL (Feb. 26, 2018) (noting that senators suggested mindful involvement in the case by the president).

[257] Even the Second Circuit judges found the DOJ's participation unusual, in light of the fact that the EEOC was already representing the government's view. *See* Protess & Rein, *supra* note 256 ("At oral argument, the judges began to press the DOJ attorney about how the DOJ came to appear in the case. One judge wondered: "Doesn't DOJ ordinarily defer to the EEOC on Title VII questions?" [and another] noted that the case affected only private parties."); Mark Joseph Stern, *Department of Wackadoodle*, SLATE (Sept. 26, 2017) ("Judge Rosemary Pooler couldn't resist drawing his attention to the strangeness of the arguments. 'We love to hear from the federal government…but it's a bit awkward to hear from them on both sides.'").

[258] *See infra* note 264 and accompanying text (discussing another case in which DOJ has inserted itself into a dispute between independent agency and private party).

[259] Brief for the United States as Amicus Curiae at 1, *Zarda*, *infra* note 448 (No. 15-3775) (arguing that the statutory bar is violated only if "men and women are treated unequally").

[260] *See generally*, *Zarda*, *infra* note 448. In addition, the Second Circuit made the decision en banc, which is unusual for this court. *See id.*; David Lat, *Fast Times At 40 Foley: Second Circuit Drama In Zarda v. Altitude*, Above the Law (Feb. 28, 2018) *at* https://abovethelaw.com/2018/02/fast-times-at-40-foley-second-circuit-drama-in-zarda-v-altitude-express/ ("It's a special treat when the Second Circuit goes en banc, since it's so rare.")

[261] The Second Circuit's decision aligns it with the Seventh Circuit and places it squarely at odds with the Eleventh Circuit. *See Zarda*, *infra* note 448.

In some ways way, Trump's actions harken back to the efforts of Reagan to reduce the effectiveness of the EEOC.[262] However, by convincing the EEOC to drop its involvement prior to litigation, the Reagan administration kept the conflict within the executive branch. In contrast, the Trump administration aired its opposition to the independent agency before a court of appeals, even though it had no obligation to appear in this matter,[263] thus using an interbranch mechanism to influence the agency. Finally, as noted earlier,[264] the DOJ was also compelled by Trump's deregulatory interests to litigate the NLRB's authority to protect both public *and* private employees' opportunities to engage in collective action.

2. Defending and Augmenting the President's Removal Power

The DOJ has also sought to protect and increase the President's power over the fourth branch. These cases have ranged from narrow to quite broad. On one end of the spectrum, they involve an individualized presidential contention that a particular exercise of for-cause removal was valid. On the other end, they articulate a request to change the very structure of independent agencies. While these cases are separate from the category of litigation in which the President is explicitly pursuing a policymaking agenda, they may likewise be driven by deregulatory interests.

Even the narrow category of cases is fairly uncommon. The Eisenhower era saw at least one case in which a former independent regulatory commissioner (of the War Claims Commission) disputed his removal by the President.[265] Under both Clinton and Bush II, there were a few cases in which the removal of an independent regulatory commissioner was contested. For Clinton, this involved the removal of a holdover member of the National Credit Union Administration.[266] For W. Bush, the administration sought to remove a transitioning member of the Civil Rights Commission appointed by Clinton,[267] which both was motivated by a difference in the two presidents' substantive views on civil rights and echoed a similar conflict between Reagan and the Commission.[268]

Reagan, Trump and H.W. Bush, to some extent, made broader efforts to wield power over the fourth branch. Generally speaking, Reagan's presidency illustrated "increasingly systematic efforts…to gain control of the federal

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[262] Scholarly commenters have noted both similarities and differences between the exercise of presidential power by Reagan and Trump, but agree that both emphasized a deregulatory agenda. *Supra* note 241 and accompanying text.
[263] *See supra* note 257.
[264] *See supra* notes 105-109 and Part I.C.2.
[265] Wiener v. U.S., *infra* note 338.
[266] Swan v. Clinton, *infra* note 393.
[267] U.S. v. Wilson, *infra* note 412.
[268] *See supra* notes 275, 277-278 and accompanying text.

bureaucracy."[269] Moreover, as Geoffrey Miller and Kevin Stack note, the Reagan administration "questioned the constitutionality of independent agencies"[270] and "actively sought a Supreme Court ruling overturning the removal restrictions on independent agencies as violating the President's power under Article II."[271]

H.W. Bush's administration also asserted additional presidential power,[272] despite the potential for congressional sanction.[273] Furthermore, his Attorney General declared that disputes between the President and independent agencies "would properly be resolved within the executive branch rather than through interagency litigation."[274] In doing so, the DOJ seems to be asserting the President's power to administer the executive branch as she sees fit, instead of ceding to the judiciary the authority to define the boundaries of the internal separation of powers.

Nonetheless, both Reagan[275] and Bush I[276] became engaged in litigation when they sought to remove independent regulatory commissioners at will. Reagan's case showcases his generally embattled attitude towards the Civil Rights Commission[277] and arguably related contention that the Commission was

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[269] Herz, *supra* note 209, at 219; *see also* Miller, *supra* note 2, at 402 (noting that by the Reagan era, "[t]he federal bureaucracy ha[d] grown huge, creating a natural battleground in which the President, Congress, bureaucrats, and interest groups vie[d] to control the political power of administrative agencies"); *id*. at 411 (noting that Reagan's was "a resurgent and aggressive presidency" during which time he was "quick to assert powers that either had lain dormant during the Ford and Carter years or had been used with great caution and discretion"). Accordingly, Reagan made efforts to "centralize presidential control of rulemaking by executive branch agencies[,] asserted executive privilege against congressional demands for information [and] suggested that presidential signing statements should have weight in statutory interpretation." *Id*. at 411.

[270] Miller, *supra* note 2, at 411.

[271] Stack, *supra* note 2, at 584-590 (discussing ultimately unsuccessful Reagan-era efforts "to implement a view of Article II under which there was no place for a set of officers that existed outside of the President's direct control" based on the "view that independent agencies were critical barriers to the President's agenda").

[272] *See*, *e.g*., Memorandum from William P. Barr, Assistant Attorney General, U.S. Dep't of Justice, to the General Counsel Department of the Air Force (June 8, 1989) (declaring the independent Nuclear Regulatory Commission (an "agency subject to [the President's] supervisory authority"), *available at* https://www.justice.gov/file/24221/download (memorandum begins at page 131).

[273] *See id*. ("Congress may not deprive the President of an opportunity to review a decision made by an agency subject to his supervisory authority.").

[274] *See id*.

[275] Berry v. Reagan, *supra* note 165; *infra* note 366 (disputing president's authority to remove members of Civil Rights Service Commission at will) (District Court enjoined Reagan, D.C. Circuit vacated as moot).

[276] Mackie v. Bush, *infra* note 382.

[277] Robert Pear, *Surprise Clash: Reagan v. Rights Chief*, NY TIMES (March 21, 1983) (characterizing the events that gave rise to Berry as "[t]he latest dispute between the Reagan Administration and the United States Commission on Civil Rights"); Robert Pear, *Reagan Ousts*

not "independent."[278] Neal Devins notes that Bush I's case against the Post Office[279] was likewise part of an 'episode' that "is generally understood as a last gasp effort by proponents of the 'unitary executive' to flex their political muscle by treating independent agency heads as if they were at-will employees of the executive."[280] In direct contrast to Bush I's declaration,[281] this case also spurred the court to recognize the need for the judiciary to address interagency disputes.[282]

Finally, on behalf of President Trump, the DOJ argued in *PHH Corporation v. Consumer Financial Protection Bureau* that the statutory protection from removal afforded the Director of the Consumer Financial Protection Bureau (CFPB) is unconstitutional, because the Director is the only head of the independent agency (in contrast to the more common form of leadership by multi-member commission).[283] This case also involved a reversal of the government's position after a change in administration. Indeed, the original argument made by the DOJ under Obama was in support of the independent agency. Furthermore, a panel on the D.C. Circuit initially ruled, in a decision penned by now-Justice Kavanaugh, against the Obama DOJ. In doing so, it determined that the provision limiting the President's authority to remove the Director was a constitutional violation and that the proper remedy was to sever it.[284]

Under Trump, the DOJ filed a brief reversing its Obama-era position and arguing against the independent agency that any limitations on at-will removal of a single agency head violate the constitution.[285] In its second decision (with now-Justice Kavanaugh in dissent), the D.C. Circuit determined—again,

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3 From Civil Rights Panel, NY TIMES (Oct. 26, 1983) ("President Reagan today dismissed three members of the United States Commission on Civil Rights who have sharply criticized his policies toward blacks, women and Hispanic people over the last two years.").

[278] Prominent unitary executive theorists Steven Calabresi and Christopher Yoo support this view. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 498 n.7 (2008) (arguing that the statute establishing the Commission placed it "in the executive branch of the Government").

[279] *See supra* note 276 and accompanying text.

[280] 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. 1035, 1036 (1994).

[281] *See supra* note 274 and accompanying text.

[282] *See* Mead, *supra* note 9, at 1219.

[283] PHH Corp. v. CFPB, *infra* note 447.

[284] *Id*. (ruling that CFPB's current structure allows the director to wield "significantly more unilateral power than any single member of any other independent agency"). The court did not, however, declare the entire agency and/or its operations unconstitutional. *Id*.

[285] "In sum, a removal restriction for the Director of the CFPB is an unwarranted limitation on the President's executive power…." Brief for the U.S. as Amicus Curiae at 5-19, PHH Corp. v. CFPB, *infra* note 447 (No. 15-1177) (seeking the severability of 12 U.S.C. § 5491(c)(3)). Notably, both the DOJ filings for and against the CFPB were limited to the issue of whether the CFPB director is removable for cause or not; even in the latter brief, the DOJ did not ask for the abolishment of the CFPB (as the petitioner did). *Id*. at 37.

contrary to the DOJ's now-reversed position—that there is "no constitutional defect in Congress's choice to bestow on the CFPB Director protection against [at-will] removal,"[286] and that to rule otherwise would affirm a "wholesale attack on independent agencies [that,] if accepted, would broadly transform modern government."[287]

Interestingly, the alignment of the President's interest in this structural change and his political agenda have become more clear, given that after appointing his own Director, President Trump is no longer taking a position against the CFPB in the appeal of this case. Moreover, this case was the first time the judiciary seriously considered such a broad constitutional argument by the President against for-cause removal restrictions. Although the Trump administration's effort to diminish this fundamental feature of independent agencies was ultimately unsuccessful, the D.C. Circuit's first panel decision—written by a judge who is now on the Supreme Court—suggests that the judiciary is open to the argument that for-cause removal protections for independent agencies may be unconstitutional in some instances.

C. Dynamics Among the Branches of Government

Litigation allows the President to influence independent agencies through an interbranch mechanism, litigation, rather than by relying on somewhat ineffective intra-branch methods for shaping administrative policy.[288] For those that favor more centralized governance and subscribe to the canon of political accountability,[289] litigation may be a welcome addition to the limited arsenal of presidential administration. However, as other scholars[290] have cautioned, "presidential interventions and assertions of decisionmaking power can undermine [administrative] expertise and independence,"[291] and lead to the overamplification of executive power.[292]

In addition, just as external forces like Congress and the Courts can influence the internal balance within the executive branch,[293] both beneficial and harmful dynamics between entities within the executive branch may impact the separation of powers between the executive and other branches. For instance, by forcing independent agencies to respond to her interests, litigation may allow the President to impose on the legislature's authority to insulate the administrative state. Nonetheless, despite their potential to trespass on

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[286] PHH Corp. v. CFPB *infra* note 447, at 10; *Id*. at 18-19.
[287] *Id*. at 10.
[288] *See supra* Part II.A.
[289] *See*, *e.g*., *supra* notes 19, 121, 189 and accompanying text.
[290] *See supra* note 190 and accompanying text.
[291] Metzger, *supra* note 118, at 432.
[292] *See generally*, Katyal, *supra* note 126.
[293] Metzger, *supra* note 118, at __.

legislative power, executive efforts to influence independent agencies through litigation strengthen the judiciary's role as the ultimate arbiter of statutory and constitutional meaning.

By airing intra-executive conflict over jurisdiction before the judiciary, litigation elevates Article III courts above the executive branch in the hierarchy of entities with authority to negotiate the jurisdiction of independent agencies vis-à-vis executive agencies, for better or for worse.[294] As has been asserted about departmentalism,[295] the President's pursuit of judicial validation for her interpretation of an independent agency's statutory mandate also indicates that she acknowledges and accedes to judicial supremacy in interpretative matters. That having been said, courts must maintain their perhaps tenuous status[296] as relatively apolitical institutions in order to maintain a barrier to the presidential misuse of litigation.

1. Executive Encroachment on the Legislature

As Part I.C.1 suggested, litigation may allow the DOJ to hold independent agencies to a higher standard of quality. In addition, the previous Section illustrated how litigation may force independent agencies to hew to the President's priorities. In this way, litigation could improve the fourth branch's accountability, both procedural and political. However, litigation circumscribing the autonomy of independent agencies may allow the executive branch to encroach on the legislature's power to authorize and define the jurisdiction of the fourth branch. For instance, litigation that results in an unjustified decision not to defer to an independent agency's interpretation of its organic legislation, as explored in Part I.C.2, may interfere with the legislature's expectation that the independent agency is in charge of implementing its own statutory authority. This, in turn, may threaten the pluralist values of reasoned

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[294] *See*, *e.g.*, *Judicial Resolution of Administrative Disputes*, *supra* note 46, at 1052-58 (grappling with the benefits and drawbacks, both functional and formal, of the judicial resolution of interagency disputes); *Judicial Resolution of Inter-Agency Disputes*, *supra* note 4, at 1595-96 (suggesting "that executive-branch departments and agencies should have an opportunity to litigate disputes about congressional allocations of regulatory power as principal and adverse parties in federal court").

[295] *See* Franklin, *supra* note 222, at 1070-71 (arguing that popular constitutionalists have a "populist sensibility model" that "is willing to accommodate judicial supremacy"); Tabatha Abu El-Haj, *Linking the Questions: Judicial Supremacy as a Matter of Constitutional Interpretation*, 89 WASH. U. L. REV. 1309, 1311 (2012) (noting that "neither President Obama nor his administration has asserted that the Executive (or Congress) is entitled to determine independently the First Amendment's constraints on corporate political spending, or that they will continue to refuse to enforce the Defense of Marriage Act ("DOMA") should the Court find it constitutional" and that in general, departmentalists have not shifted popular views on judicial supremacy).

[296] *See infra* notes 312-315 and accompanied text.

decisionmaking and expertise that underlie our modern nondelegation doctrine.[297]

Litigation against independent agencies may also allow executive agencies or the President to bypass traditional avenues for the evolution of statutory interpretation. Executive mechanisms for effecting statutory revisions include exerting influence over administrative rulemaking and adjudication processes, negotiating with agencies, exercising for-cause removal provisions and engaging head-on with the legislative process. Somewhat like the executive order, litigation offers the President a shortcut to working with agencies or Congress to foster a change in the law. Furthermore, while executive orders are unilateral, they are easily reversed; in contrast, while litigation is not as nimble and outcomes are determined by a court, it nonetheless allows the President to seek permanent changes to the implementation of a statute that may undercut the process of creating legislation.

Furthermore, ambiguous statutory authority is more susceptible to presidential influence,[298] perhaps particularly when the matter at hand goes beyond the "four corners" of the agency's organic statute[299] or if involves the Constitution[300] (perhaps even to the detriment of the ensuing constitutional interpretation[301]). To avoid potential circumscription of an agency's jurisdiction, Congress could specify whether an independent agency has the authority to interpret its enabling legislation in the face of competing statutory interests or

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[297] *See*, *e.g.*, PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009); ADRIAN VERMEULE, LAW'S ABNEGATION (2016) (arguing that courts should continue to defer to agencies' interpretation of statute because they have greater legitimacy and technical competence to confront many issues than judges do); Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653 (2018) (arguing that a deeper bureaucratic state, staffed by people with diversity and expertise, is key to increasingly sound administrative policy).

[298] *C.f.* Mashaw, *supra* note 208, at 512 (suggesting briefly that "presidential direction in shaping statutory meaning" may downplay "the relevance of the original context of statutory enactments").

[299] Lemos, *supra* note 63, at 186–87 (2009); *see also id*. at 201 ("[M]y survey of the briefing indicates some degree of SG-agency conflict in roughly 27% of the cases involving agency statutory interpretation.").

[300] *See* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1461 & 1474 (2010) (Agencies "typically turn to OLC when the issue is sufficiently controversial or complex (especially on constitutional questions) that some external validation holds special value."); *id*. at 1487 n157 ("During the Reagan Administration, the Justice Department explicitly laid out an overarching approach to constitutional interpretation…that it hoped to see advanced going forward.").

[301] *See* Lemos, *supra* note 63, at 291-20 ("[A]gencies' practical experience and policy judgment nevertheless could contribute to the development of constitutional law. That distinctive contribution is lost when agencies' views are muted or suppressed altogether by the [Solicitor General]."); Mashaw, *supra* note 208, at 507-508 (arguing that *agencies* must make constitutional determinations to uphold their legislative mandates) (emphasis added); *id*. at 508 ("Constitutionally timid administration…compromises faithful agency….");

general legislation that bears on the agency's area of expertise.[302] Put another way, Congress could make explicit that an independent agency has the authority to interpret any statute within its ambit of expertise. And indeed, Congress seems to have done just that in at least one instance: the Dodd-Frank Act.[303] Then again, Congress may not wish or be able to define the power of its independent creatures precisely, given that they may be expected to exercise discretion on the basis of a purposive[304] or context-driven[305] approach to statutory interpretation. After all, the sharp delineation of authority does not lend itself to the exercise of discretion that is responsive to shifting considerations.

Another option is that Congress does not, or should not, care if agencies litigate one another.[306] As scholars have noted, Congress may delegate overlapping authority to agencies to promote conflict that leads to better-reasoned outcomes.[307] Similarly, the legislature might perceive disagreements between the White House and independent agencies as leading to better policies as a result of compromise between opposing viewpoints.[308] For instance, litigation by the President could improve administrative quality if it forces outcomes resulting from compromise between "short-term partisan interests and longer-term systemic goals."[309]

There are, however, some noteworthy distinctions between interagency and President/independent agency conflict. First, it is certain that Congress intends independent agencies to develop policies with some level of insulation from the President, while there is less of an assumption of structural separation between executive agencies engaged in overlapping enforcement. Second, battling executive agencies have several mechanisms for compromising, while

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[302] *See* Devins, *supra* note 280, at 1037 ("Congress must pay attention to structural concerns to reduce conflicts between the executive and other government entities free of White House control.").

[303] *See* Breger & Edles, *supra* note 42, at 170 ("In the recent Dodd-Frank Act, Congress took the unusual step of directing that interagency conflicts over statutory interpretation be resolved in favor of the interpretation contained in regulations by the new CFPB, thus validating *Chevron* in approach if not in terms."); *see generally*, Kent Barnett, *Codifying* Chevmore, 90 NYU L. REV. 1 (2015) (arguing that Dodd-Frank is the "best direct evidence" that Congress legislates with *Chevron* in mind and acquiesces to its principles).

[304] Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 875 (2015) ("Not only do [enabling statutes] vest agencies with authority, but they also impose obligations to exercise that authority in accordance with purposes or principles that Congress has established in the statute.").

[305] Stack also suggests that the form an agency's statutory interpretation—for instance, rule-making, rather than adjudication—takes may allow it greater interpretative discretion than courts. Kevin M. Stack, *Agency Statutory Interpretation and Policymaking Form*, 2009 MICH. ST. L. REV. 225, 237 (2009).

[306] Devins & Herz, *supra* note 52, at 206.

[307] *Supra note* 126.

[308] *See supra* note 126 and accompanying text.

[309] *C.f.* David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional* Law, 85 U. CHI. L. REV. 58 (2018); *see also* Watts, *supra* notes 2 & 124.

President/agency battles before the judiciary are a zero-sum game, to some extent. In regards to the latter, the court will affirm one side or the other—indeed, even if it remands the decision to the agency, the court has effectively rejected the independent agency's original view. Therefore, litigation is less likely to result in the sort of interagency compromise that Congress may have envisioned when assigning shared authority to more than one executive agency.

2. Judiciary as Gatekeeper of Executive Administration

Courts have entertained and affirmed litigation furthering executive administration since the mid-1900s. This suggests that courts have validated the executive branch's ongoing project of centralizing and concentrating its power. That having been said, the very nature of appealing to a court to arbitrate an intra-executive dispute reinforces judicial supremacy in administrative law. On the one hand, this may allow the court to impermissibly intrude on the President's power to oversee her own branch.[310] On the other hand, this means that litigation as a mechanism of presidential control has a built-in check on abuse, in the form of judicial review—a check that courts seem to have taken seriously thus far.[311]

The Trump administration's strategic use of litigation to further the President's agenda may have rendered courts more sensitive to the use of litigation to further the President's agenda. For instance, Trump's influence on the DOJ's new position in *PHH v. CFPB* may have shifted the court's focus away from its interest in limiting the over-insulation of an independent agency, and towards curbing the expansion of presidential power.[316] Likewise, the DOJ's involvement in *Zarda*[317] for baldly political reasons[318] may have been perceived as an assault on the authority of an independent agency (or at least, as unfaithful to the President's duty to defend and enforce agencies' implementation of the law[319]). Given these outcomes, presidentialists might wish to avoid the currently haphazard and forceful reliance on litigation as a tool of presidential administration, because judicial rulings against the President's interests might render it more difficult for the executive branch to further like-minded policies in the future than if the question had remained open in the courts.

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[310] *Judicial Resolution of Administrative Disputes*, *supra* note 46, at 1053 (noting that "in dealing with inter-agency disputes the courts [may] be departing from their traditional and constitutional sphere of activity and impinging on functions which should properly be exercised by the executive branch of the Government").

[311] *See supra* notes 33-34 and accompanying text (suggesting that courts have been generally closed off to presidential efforts to exploit litigation).

[316] *See supra* notes 283-287 and accompanying text.

[317] *See supra* notes 256-263 and accompanying text.

[318] *See supra* notes 253-254 and accompanying text.

[319] And as Gillian Metzger suggests, agency independence may in some cases even benefit a president's agenda. Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1992 (2013).

Arguably, a more nuanced approach may render this litigation a more effective mechanism for furthering the President's agenda, especially if the President maintains apparent respect for legislative authority in the process.[320] Furthermore, a more delicate approach to presidential administration may pass greater muster among courts, constitutionalists and administrative law scholars (particularly those who do not subscribe to unitary executive theory) than litigation that aggressively seek to dismantle independent agencies.

For instance, Kevin Stack argues that the Obama administration's (and in particular, then-Solicitor General Kagan's) decision to litigate in favor of the good-cause removal protection for the head of the Public Company Accounting Oversight Board[321] was recognized as giving wide berth to Congress's sweeping authority to structure the executive branch, which then allowed Obama to exercise "a similar level of control over independent agencies [as Reagan], just on different legal grounds."[322] In keeping with this theory of executive control flying under the radar, the DOJ litigated independent agencies on behalf of executive agencies more frequently under Obama than under any other President.[323]

However, the landscape of the judiciary appears to be changing, for instance, by the appointment of more judges with partisan alignments or who are interested in enhancing presidential power, even as they remains jealous of its own.[325] For instance, recent litigation has suggested that the two newest members of the Supreme Court, Justices Gorsuch[326] and Kavanaugh,[327] are both open to broad presidential attacks on agency independence. This suggests, in

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[320] *See* Metzger, *supra* note 118, at 434 (drawing on the work of David Barron and David Lewis) ("Presidents may well be willing to forego politicization or centralization and opt for a form of administration they can less easily control if they believe that doing so will yield more effective performance.")

[321] Free Enterprise Fund v. Public Company Oversight Board, 561 U.S. 477 (2010).

[322] Kevin M. Stack, *Obama's Equivocal Defense of Agency Independence*, 62 CONST. COMMENTARY 583, 584-600 (2010).

[323] *See supra* note 70 and accompanying text.

[325] "The conservative legal movement has always had…two distinct strains. One strain might be called 'Article II conservatism'—deferential to presidential and executive power in constitutional law [and] deferential to agencies in administrative law.... Another strain might be called 'Article III conservatism'—emphasizing *de novo* review by judges, suspicious of executive power [and] suspicious of deference in administrative law." Adrian Vermeule, *Article II Conservatism Is Alive and Well*, LAWFARE (June 26, 2017), https://www.lawfareblog.com/article-ii-conservatism-alive-and-well (noting that these judicial ideologies have "co-existed uneasily" in the past and continue to do so during the Trump administration). Put another way, the judiciary's response to cases litigated to assist goals of presidential administration may be reflective of the dynamics of a "separation of parties" as it involves the executive and judicial branches. *See generally*, Daryl Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006) (arguing that whether the branches are divided or united in political party has a greater impact on interbranch dynamics than their constitutional distinctions).

[326] *See supra* notes 105-109 and Part I.C.2.

[327] *See supra* notes 283-287 and accompanying text.

turn, that courts may no longer be capable of limiting the impact of litigation brought by the DOJ in overt pursuit of political aims. Even courts that are not naturally sympathetic to the unitarian project may be receptive to this litigation, given that it reaffirms the judiciary's role in shaping administrative matters. For these reasons, this litigation may become increasingly helpful to a president interested in orienting the executive branch towards her political interests.

CONCLUSION

This Article presents a theory of "executive administration," which argues that executive agencies pursue their own interests vis-à-vis administrative agencies. In this way, this Article challenges the scholarly assumption that the President is the only executive entity that wields influence over the fourth branch. This Article bases its argument in a granular analysis of a comprehensive, original data set that consists of litigation brought by executive agencies against independent agencies from the mid-1900s through the present day. Like presidential administration, executive administration impacts relationships within the executive branch. On the one hand, this litigation allows the executive branch to invite judicial review to influence independent agency decisionmaking for the better. On the other hand, courts have acquiesced to executive agencies' requests to limit *Chevron* deference to independent agencies, which may reduce the reach and legitimacy of the fourth branch over time.

Arguably, this litigation is a celebration of agency independence. After all, litigation is a powerful mechanism for exerting influence, gaining resources and concentrating power—but it is also a mechanism of last resort. Indeed, that executive agencies use litigation to reach independent agencies suggests that there are so few intra-branch options available to do so that the executive branch is sometimes forced to pursue control via this burdensome, interbranch mechanism. Nonetheless, cases furthering executive administration do shift power toward the core of the executive branch and away from independent agencies. Furthermore, litigation will likely remain an attractive, nonpartisan mechanism for executive administration, both because it promotes the executive branch's interest in concentrating power and because it allows the judiciary to maintain primacy in administrative statutory interpretation.

Litigation against independent agencies also has the potential to further presidential administration, which may have a paradoxical impact on the relationship between the executive and each of the other two branches of the government. Although cases brought on behalf of the President could allow her to trespass on Congress's authority, they also reaffirm the judiciary's key role in interpreting the law. For those that worry more generally that a growing concentration of power in the White House may lead to a reduction in administrative autonomy and expertise, the litigation suggests that independent agencies are increasingly vulnerable to the President's influence. As judicial support for the convergence of Article II and Article III power continues to grow,

courts may become more amenable to the use of litigation to intensify presidential power, thus further endangering the independence that is key to a functional fourth branch.

APPENDIX

The main body of this Article examines the litigation brought by the Department of Justice (DOJ) against independent agencies from the last half-century in depth. This Appendix provides a quickly accessible typology, organized by date/presidential administration, the most salient issue at stake and winning party in each case. In the chart below, categories (a)-(c) of executive administration and (a)-(b) of presidential administration correspond with the typologies of litigation presented in Part I.B and II.B. in the main body of the Article.[329] Overall, this Appendix reveals that this litigation can be categorized, in general, by one of two trends: either the DOJ sought to centralize executive power by reducing the regulation and oversight of executive agencies by independent agencies of its own accord (Ford, Carter, Clinton, Bush I and Obama), or it initiated at least a few broader claims against independent agencies on behalf of the President (Nixon, Reagan, Bush II, and Trump).

Table 1: Roosevelt through Johnson—Early Litigation

Case Name	**Year Decid-ed**	**President**	**Independent Agency**	**Exec. Admin. or Pres. Admin.**	**Exec. Admin.: (a)** Appeal of decision binding an executive agency, **(b)** Defense of executive agency jurisdiction, or **(c)** Appeal of merger or price-fixing. **Pres. Admin.**: **(a)** Furthering the President's agenda or **(b)** Augmenting President's removal power	**Court / Winner / Arbitrary & Capricious or *Chevron***
ICC v. Inland Waterways Corp.[330]	1943	Roosevelt	Interstate Commerce Commission	Exec. Admin.	DOJ defending jurisdiction of Dep't of Agriculture rate against price-fixing by independent agency. **(c)**	Supreme Court: independent agency win
U.S. v. ICC[331]	1949	Truman	Interstate Commerce Commission	Exec. Admin.	DOJ seeking to recover money for government from high rate set by independent agency. **(b)**	Supreme Court: DOJ win Pre-APA, but using term

[329] A handful of miscellaneous cases in the data set have been omitted from the Article and Appendix. These include instances in which DOJ disputes an independent entity's authority to sue independently or to represent a private party in court, or in which the DOJ argues against an independent agency's efforts to recover damages or land from the government.
[330] 319 U.S. 671 (1943).
[331] 337 U.S. 426 (1949).

						"arbitrary & capricious"
Henderson v. U.S.[332]	1950	Truman	Interstate Commerce Commission	Pres. Admin.	DOJ challenging constitutionality of independent agency decision. **(a)**	Supreme Court: DOJ win
Railway Labor Executives Ass'n[333]	1950	Truman	Interstate Commerce Commission	Pres. Admin.	DOJ challenging validity of independent agency interpretation of labor principles. **(a)**	Supreme Court: DOJ win
Far East Conference [334]	1952	Truman	Federal Maritime Commission	Exec. Admin	DOJ challenging independent agency jurisdiction to adjudicate Sherman Act because U.S. is not a "person." **(b)**	Supreme Court: independent agency win
U. S. ex rel. Chapman [335]	1953	Truman [argued under]	Federal Power Commission	Exec. Admin	DOJ arguing that independent agency order infringes on jurisdiction of Dep't of Interior. **(a)**	Supreme Court: independent agency win
Dep't of Agric. of U.S.[336]	1954	Eisenhower	Interstate Commerce Commission	Exec. Admin.	DOJ appealing order issued by independent agency against Dept. of Agriculture, in order to ensure competition in shipping. **(c)**	Supreme Court: DOJ win
Fed. Maritime Bd. v. Isbrandtsen Co., Inc.[337]	1958	Eisenhower	Federal Maritime Board	Exec. Admin.	DOJ appealing order issued by independent agency against Dept. of Agriculture, in order to ensure competition in shipping. **(c)**	Supreme Court: independent agency win Applying *Skidmore*
Wiener v. U.S.[338]	1958	Eisenhower	War Claims Commission	Pres. Admin.	DOJ defense of President's for-cause removal of independent agency commissioner. **(b)**	Supreme Court: independent agency win
St. Regis Paper Co.[339]	1961	Eisenhower	Federal Trade Commission	Exec. Admin.	DOJ defense of Census Bureau jurisdiction from encroachment by independent	Supreme Court:

[332] 339 U.S. 816 (1950).
[333] 339 U.S. 142 (1950).
[334] 342 U.S. 570 (1952).
[335] 345 U.S. 153 (U.S. 1953).
[336] 347 U.S. 645 (1954).
[337] 356 U.S. 481 (1958).
[338] 357 U.S. 349 (1958).
[339] 368 U.S. 208 (1961).

					agency and effort to circumscribe independent agency authority. **(b)**	independent agency win
Udall v. Fed. Power Comm'n[340]	1967	Johnson	Federal Power Commission	Exec. Admin.	DOJ defending jurisdiction of Dep't of Interior from encroachment by independent agency. **(b)**	Supreme Court: DOJ win
FTC v. Guignon[341]	1968	Johnson	Federal Trade Commission	Pres. Admin.	DOJ challenging independent agency authority to enforce its own subpoenas and appear in court to seek enforcement. **(b)**	8th Circuit: DOJ win

Table 2: Nixon through Carter—Consistent Checks

Case Name	**Year Decided**	**President**	**Independent Agency**	**Exec. Admin. or Pres. Admin.**	**Exec. Admin.: (a)** Appeal of decision binding an executive agency, **(b)** Defense of executive agency jurisdiction, or **(c)** Appeal of merger or price-fixing **Pres. Admin.**: **(a)** Furthering the President's agenda or **(b)** Augmenting President's removal power	**Court / Winner / Arbitrary & Capricious or *Chevron***
U.S. v. ICC[342]	1970	Nixon	Interstate Commerce Commission	Exec. Admin.	DOJ challenging agency decision to approve a particular railway merger (opposing sides had differing views of legislative intent). **(c)**	Supreme Court: independent agency win
U.S. v. Marine Ban-corporation[343]	1974	Nixon	Office of the Comptroller of the Currency	Exec. Admin.	DOJ disputing corporate merger approved by independent agency in Dept. of Treasury. **(c)**	Supreme Court: independent agency win
Brennan v. Gilles & Cotting, Inc.[344]	1974	Nixon [argued under]	Occupational Safety and Health Review Commission	Exec. Admin.	DOJ defending jurisdiction of Dep't of Labor from encroachment by independent agency. **(b)**	4th Circuit: independent agency win

[340] 387 U.S. 428 (1967).
[341] 390 F.2d 323 (8th Cir. 1968).
[342] 396 U.S. 491 (1970).
[343] 418 U.S. 602 (1974).
[344] 504 F.2d 1255 (4th Cir. 1974).

Brennan v. OSHRC[345]	1974	Nixon	Occupational Safety and Health Review Commission	Exec. Admin.	DOJ defending jurisdiction of Dep't of Labor from encroachment by independent agency. **(b)**	2nd Circuit: DOJ win
Brennan v. Southern Contractors Service[346]	1974	Nixon	Occupational Safety and Health Review Commission	Exec. Admin	DOJ defending jurisdiction of Dep't of Labor from encroachment by independent agency. **(b)**	5th Circuit: DOJ win
NY Shipping Ass'n, Inc. v. Fed. Maritime Comm.[347]	1974	Nixon	National Labor Relations Board	Exec. Admin.	DOJ siding with independent agency Maritime Board against independent agency (and against Dep't of Labor). **(a)**	2nd Circuit: DOJ win
U.S. v. Civil Aero. Bd.[348]	1975	Ford	Civil Aeronautics Board	Exec. Admin.	DOJ challenging independent agency decision to allow airlines to create an anti-competitive agreement. **(c)**	D.C. Circuit: independent agency win
Gordon v. New York Stock Exchange, Inc.[349]	1975	Ford	Security Exchange Commission	Exec. Admin	DOJ seeking limits to independent agency jurisdiction over fixed commission rates. **(b)**	Supreme Court: independent agency win
Brennan v. OSHRC [350]	1975	Ford	Occupational Safety and Health Review Commission	Exec. Admin.	DOJ defending jurisdiction of Dep't of Labor from encroachment by independent agency. **(a)**	8th Circuit: independent agency win
Brennan v. OSHRC[351]	1975	Ford	Occupational Safety and Health Review Commission	Exec. Admin.	DOJ defending jurisdiction of Dep't of Labor from encroachment by independent agency. **(a)**	10th Circuit: DOJ win
Nat'l Class. Comm.[352]	1976	Ford	Interstate Commerce Commission	Exec. Admin.	DOJ defending resources of the Dep't of Defense. **(a)**	Supreme Court: DOJ win

[345] 491 F.2d 1340 (2nd Cir. 1974).
[346] 492 F.2d 498 (5th Cir. 1974).
[347] 495 F.2d 1215 (2d Cir. 1974).
[348] 511 F.2d 1315 (D.C. Cir. 1975).
[349] 422 U.S. 659 (1975).
[350] 513 F.2d 713 (8th Cir. 1975).
[351] 513 F.2d 553 (10th Cir. 1975).
[352] 430 U.S. 961 (1977).

						Arbitrary & capricious
MCI Telecom. Corp. v. FCC[353]	1977	Carter	Federal Communi-cations Commission	Exec. Admin.	DOJ challenging agency certification of corporate monopoly. **(c)**	D.C. Circuit: DOJ win Pre-*Chevron* (declining to defer)
FCC. v. Pacifica Found.[354]	1978	Carter	Federal Communi-cations Commission	Pres. Admin.	DOJ challenging independent agency regulation censuring broadcast as indecent at behest of new President. **(a)**	Supreme Court: independent agency win
FCC. v. Nat'l Citizens Com. for Broadcast-ing[355]	1978	Carter	Federal Communi-cations Commission	Exec. Admin.	DOJ disputing an individual rulemaking as encroaching on its own Antitrust Division. **(c)**	Supreme Court: independent agency win Not arbitrary & capricious
Usery v. Hermitage Concrete Pipe Co.[356]	1978	Carter	Occupational Safety and Health Review Commission	Exec. Admin.	DOJ represents independent agency against Dep't of Labor to support independent agency non-penalization of a violation of independent agency's enabling act. **(a)**	6th Circuit: DOJ, on behalf of independent agency
Personnel Adm'r of Mass. v. Feeny[357]	1979	Carter	Equal Employment Opportunity Commission	Pres. Admin.	DOJ furthers constitutional argument in opposition to independent and executive agencies (EEOC and Dep'ts of Defense and Labor). **(a)**	Supreme Court: DOJ win
U.S. v. FCC[358]	1980	Carter	Federal Communi-cations Commission	Exec. Admin.	DOJ disputing independent agency's grant of corporate merger. **(c)**	D.C. Circuit: independent agency win

Table 3: Reagan and H.W. Bush—Political Battles

[353] 561 F.2d 365 (D.C. Cir. 1977).
[354] 438 U.S. 726 (1978).
[355] 436 U.S. 755 (1978).
[356] 584 F.2d 127 (6th Cir. 1978).
[357] 442 U.S. 256 (1979).
[358] 652 F.2d 72 (D.C. Cir. 1980).

Case Name	**Year Decided**	**President**	**Independent Agency**	**Exec. Admin. or Pres. Admin.**	**Exec. Admin.: (a)** Appeal of decision binding an executive agency, **(b)** Defense of executive agency jurisdiction, or **(c)** Appeal of merger or price-fixing **Pres. Admin.**: **(a)** Furthering the President's agenda or **(b)** Augmenting President's removal power	**Court / Winner / Arbitrary & Capricious or *Chevron***
U.S. v. Fed. Mar. Comm'n[359]	1982	Reagan	Federal Maritime Commission	Exec. Admin.	DOJ disputing independent agency approval of corporate price-fixing. **(c)**	D.C. Circuit: DOJ win Arbitrary & capricious
Prof. Air Traffic Control. Org.[360]	1982	Reagan	Federal Labor Relations Authority	Exec. Admin	DOJ representing Federal Aviation Administration in asserting that independent agency engaged in ex parte communication. **(a)**	D.C. Circuit: independent agency win
Dep't of Agriculture v. FLRA[361]	1982	Reagan	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Dept. of Agriculture disputing independent agency order. **(a)**	8th Circuit: DOJ win
Div. of Military & Naval Affairs v. FLRA[362]	1982	Reagan	Federal Labor Relations Authority	Exec. Admin.	DOJ represents National Guard disputing independent agency order. **(a)**	2nd Circuit: DOJ win
U.S. v. FCC[363]	1983	Reagan	Federal Communications Commission	Exec. Admin.	DOJ challenging independent agency decision to approve price-fixing of telephone rates. **(c)**	D.C. Circuit: independent agency win
Ford Motor Co. v. ICC[364]	1983	Reagan	Interstate Commerce Commission	Exec. Admin.	DOJ disputing independent agency refusal to award reparations to rail carriers for overcharges by railroads. **(c)**	D.C. Circuit: DOJ win Arbitrary & capricious

[359] 694 F.2d 793 (D.C. Cir. 1982).
[360] 685 F.2d 547 (D.C. Cir. 1982).
[361] 691 F.2d 1242 (8th Cir. 1982).
[362] 683 F.2d 45 (2d. Cir. 1982).
[363] 707 F.2d 610 (D.C. Cir. 1983).
[364] 714 F.2d 1157 (D.C. Cir. 1983).

Bureau of Alcohol, Tobacco & Firearms v. FLRA[365]	1983	Reagan	Federal Labor Relations Authority	Exec. Admin	DOJ claims that agency overregulated by extending statute beyond proper meaning in labor context. **(b)**	Supreme Court: DOJ win Pre- *Chevron* deference (declined to defer)
Berry v. Reagan[366]	1983	Reagan	Commission on Civil Rights	Pres. Admin.	DOJ arguing that President has power to remove independent regulatory commissioners at will.. **(b)**	D.C. Circuit: independent agency win
Escondido Mut. Water Co. v. FERC[367]	1984	Reagan	Federal Energy Regulatory Commission	Exec. Admin.	DOJ defending jurisdiction of Dep't of Interior from encroachment by independent agency. **(b)**	Supreme Court: DOJ win
Confederated Tribes & Bands of Yakima Indian Nation v. FERC[368]	1984	Reagan	Federal Energy Regulatory Commission	Exec. Admin.	DOJ disputing an order against Dept. of Commerce because of poor decisionmaking record lacking an environmental impact statement. **(a)**	9th Circuit: affirm'd in part / remanded in part
Donovan A. Amorello & Sons, Inc.[369]	1985	Reagan	Occupational Safety and Health Review Commission	Exec. Admin.	DOJ defending Dep't of Labor/OSHA interpretation of its own regulation against conflicting interpretation by independent agency. **(b)**	1st Circuit: DOJ win
FLRA v. Aberdeen Proving Ground[370]	1988	Reagan	Federal Labor Relations Authority	Exec. Admin.	DOJ arguing for deference to Dep't of the Army instead of independent agency because former can better anticipate its own labor needs. **(b)**	Supreme Court: DOJ win
Air Force v. FLRA[371]	1988		Federal Labor Relations Authority	Exec. Admin	DOJ litigating on behalf of Air Force against independent agency's interpretation of the	7th Circuit: independent agency win

[365] 464 U.S. 89 (1983) (deciding that by extending its enabling statute beyond its plain meaning, the FLRA was creating legislation—an activity only Congress may undertake).
[366] 732 F.2d 949 (1983).
[367] 466 U.S. 765 (1984).
[368] 746 F.2d 466 (9th Cir. 1984).
[369] 761 F.2d 61 (1st Cir. 1985).
[370] 485 U.S. 409 (1988).
[371] *See* U.S. Dept. of Air Force, Scott Air Force Base, Ill. v. F.L.R.A., 838 F.2d 229 (7th Cir. 1988) (citing Petition For A Writ Of Certiorari To The United States Court Of Appeals for the Seventh Circurit [sic]).

					Freedom of Information Act (not the latter's enabling act) **(b)**	
Dep't of Treasury v. FLRA[372]	1988	Reagan	Federal Labor Relations Authority	Exec. Admin	DOJ representing Dep't of Treasury in dispute involving conflict between statute governing merit system and independent agency's enabling statute—labor dispute. **(a)**	D.C. Circuit: independent agency win
Illinois Nat'l Guard v. FLRA[373]	1988	Reagan	Federal Labor Relations Authority	Exec. Admin.	DOJ seeking primary jurisdiction for the National Guard and the Army over the interpretation of statutes that the independent agency does not administer either. **(b)**	D.C. Circuit: DOJ win Pre-*Chevron* deference (declined to defer)
INS v. FLRA[374]	1988	Reagan	Federal Labor Relations Authority	Exec. Admin	DOJ represents Imm. and Naturalization Services disputing independent agency order. **(a)**	9th Circuit: DOJ win Arbitrary & capricious
Dep't of Interior, Bureau of Indian Affairs v. FLRA[375]	1989	H. W. Bush	Federal Labor Relations Authority	Exec. Admin	DOJ represents Dept. of Interior disputing independent agency order. **(a)**	9th Circuit: DOJ win Arbitrary & capricious
Dep't of Treasury, IRS v. FLRA[376]	1990	H. W. Bush	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Internal Revenue Service disputing independent agency order. **(a)**	Supreme Court: DOJ win *Chevron* (application of statute was unreasonable)

[372] 837 F.2d 1163 (D.C. Cir. 1988) (DOJ arguing statute governing merit system is not superseded by the FLRA's enabling statute governing).
[373] 854 F.2d 1396 (D.C. Cir. 1988) (DOJ asking the court to "deny[] deference for FLRA's interpretation of Technician Act and Schedules Act because FLRA does not administer either").
[374] 855 F.2d 1454 (9th Cir. 1988).
[375] 887 F.2d 172 (9th Cir. 1989).
[376] 494 U.S. 922 (1990).

Fort Stewart Sch. v. FLRA[377]	1990	H. W. Bush	Federal Labor Relations Authority	Exec. Admin	DOJ represents Dep't of Army disputing independent agency order. **(a)**	Supreme Court: independent agency win
Metro Broad-casting, Inc. v. FCC[378]	1990	H. W. Bush	Federal Communications Commission	Pres. Admin.	DOJ asserting that independent agency decision is unconstitutional. **(a)**	Supreme Court: independent agency win
Martin v. OSHRC[379]	1991	H. W. Bush	Occupational Safety and Health Review Commission	Exec. Admin.	DOJ defends Dep't of Labor's authority to interpret its own regulation against encroachment by independent agency. **(b)**	Supreme Court: DOJ win
Dep't of Army, Red River Depot, Texarkana, TX v. FLRA[380]	1992	H. W. Bush	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Army disputing independent agency order. **(a)**	D.C. Circuit remanded: DOJ win Not arbitrary & capricious
Dep't of Def., Dep't of Military Affairs v. FLRA[381]	1992	H. W. Bush	Federal Labor Relations Authority	Exec. Admin.	DOJ litigating on behalf of Department of Defense to dispute independent agency's interpretation of the Freedom of Information Act (not the latter's enabling act) **(b)**	D.C. Circuit: DOJ win
Mackie v. Bush[382]	1993	H.W. Bush	Postal Service	Pres. Admin.	DOJ arguing that President has power to remove independent regulatory commissioners at will. **(b)**	District Court: independent agency win

Table 4: Clinton through Obama—Narrow Challenges to Agency Decisionmaking

[377] 495 U.S. 641 (1990).
[378] 497 U.S. 547 (1990).
[379] 499 U.S. 144 (1991).
[380] 977 F.2d 1490 (D.C. Cir. 1992).
[381] 964 F.2d 26 (D.C. Cir. 1992).
[382] 809 F. Supp. 144 (D.D.C. 1993).

Case Name	Year Decided	President	Independent Agency	Exec. Admin. or Pres. Admin.	**Exec. Admin.: (a)** Appeal of decision binding an executive agency, **(b)** Defense of executive agency jurisdiction, or **(c)** Appeal of merger or price-fixing **Pres. Admin.**: **(a)** Furthering the President's agenda or **(b)** Augmenting President's removal power	**Court / Winner / Arbitrary & Capricious or *Chevron***
INS, Border Patrol v. FLRA[383]	1993	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Imm. and Naturalization Services disputing independent agency order. **(a)**	9th Circuit: independent agency win Not arbitrary & capricious
INS v. FLRA[384]	1993	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Imm. and Naturalization Services disputing independent agency order. **(a)**	5th Circuit: DOJ win *Chevron* (application of statute was unreasonable)
INS v. FLRA[385]	1993	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Imm. and Naturalization Services disputing independent agency order. **(a)**	4th Circuit: affirm'd in part / remanded in part *Chevron* (deferring to agency)
DOJ v. FLRA[386]	1993	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Imm. and Naturalization Services disputing independent agency order. **(a)**	5th Circuit: DOJ win *Chevron* (application of statute was arbitrary & capricious, thus unreasonable)

[383] 12 F.3d 882 (9th Cir. 1993).
[384] 995 F.2d 46 (5th Cir. 1993).
[385] 4 F.3d 268 (4th Cir. 1993).
[386] 991 F.2d 285 (5th Cir. 1993).

Dep't of Interior, Bureau of Reclamation v. FLRA[387]	1994	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Dep't of Interior interpretations against independent agency's interpretations of the Prevailing Rate Systems and the Civil Service Reform Act. (b)	D.C. Circuit: DOJ win *Chevron* (declined to defer)
Dep't of Treasury v. FLRA[388]	1994	Clinton	Federal Labor Relations Authority	Exec. Admin	DOJ represents Dep't of Treasury disputing independent agency order—anti-labor. **(a)**	D.C. Circuit: DOJ win
Dep't of Veterans Affairs v. FLRA[389]	1994	Clinton	Federal Labor Relations Authority	Exec. Admin	DOJ represents Dep't of Veterans Affairs disputing independent agency order. **(a)**	D.C. Circuit: independent agency win Not arbitrary & capricious
Dep't of Def. v. FLRA[390]	1994	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ argues on behalf of Dep't of Defense against independent agency's interpretation of the Privacy Act. **(b)**	Supreme Court: DOJ win *Chevron* (declined to defer)
Nuclear Reg. Comm'n v. FLRA[391]	1994	Clinton	Nuclear Regulatory Commission, Federal Labor Relations Authority	Exec. Admin.	DOJ represents Nuclear Reg. Comm'n arguing that FLRA order not consistent with Inspector General Act. **(b)**	4th Circuit: DOJ win Arbitrary & capricious
King v. Reid[392]	1995	Clinton	Merit Systems Protection Board	Exec. Admin.	DOJ represents OPM seeking reversal of independent agency order against Navy. **(a)**	Federal Circuit: DOJ win
Swan v. Clinton[393]	1996	Clinton	National Credit Union Administration	Pres. Admin.	DOJ defense of President's for-cause removal of independent agency commissioner. **(b)**	District Court: DOJ win
General Services	1996	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ represents disputes independent agency order, argues lack of jurisdiction	D.C. Circuit: DOJ win

[387] 23 F.3d 518 (D.C. Cir. 1994).
[388] 43 F.3d 682 (D.C. Cir. 1994).
[389] 33 F.3d 1391 (D.C. Cir. 1994).
[390] 510 U.S. 487 (1994).
[391] 25 F.3d 229 (4th Cir. 1994).
[392] 59 F.3d 1215 (Fed. Cir. 1995).
[393] 100 F.3d 973 (D.D.C. 1996).

Administration v. FLRA[394]					over certain GSA policies. **(a)**	
Dep't of Treasury, Bureau of Engraving & Printing v. FLRA[395]	1996	Clinton	Federal Labor Relations Authority	Federal Labor Relations Authority	DOJ represents Dep't of Treasury disputing independent agency application of the Prevailing Rate Systems Act. **(b)**	D.C. Circuit: independent agency win
Air Force v. FLRA[396]	1997	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ argues on behalf of Air Force disputing independent agency's interpretation of the Privacy Act. **(b)**	D.C. Circuit: independent agency win
Dep't of Energy v. FLRA[397]	1997	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Dep't of Energy disputing independent agency interpretation of statute. **(b)**	4th Circuit: DOJ win Arbitrary & capricious
FLRA v. DOJ[398]	1998	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ represents its own Office of Insp. Gen and Imm. and Naturalization Services arguing that independent agency decision not consistent with the Inspector General Act. **(b)**	2nd Circuit: DOJ win
DOJ v. FLRA[399]	1998	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Imm. and Naturalization Services disputing independent agency order. **(a)**	D.C. Circuit: independent agency win Not arbitrary & capricious
Dep't of Transp., Fed. Aviat. Admin v. FLRA[400]	1998	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Federal Aviation Administration against independent agency's interpretation of gov't-wide regulations. **(b)**	D.C. Circuit: DOJ win
Lachance v. MSPB[401]	1998	Clinton	Merit Systems Protection Board	Merit Systems	DOJ represents OPM seeking reversal of	

[394] 86 F.3d 1185 (D.C. Cir. 1996)
[395] 88 F.3d 1279 (D.C. Cir. 1996).
[396] 104 F.3d 1396 (D.C. Cir. 1997).
[397] 106 F.3d 1158 (4th Cir. 1997).
[398] 137 F.3d 683 (2d Cir. 1998).
[399] 144 F.3d 90 (D.C. Cir. 1998).
[400] 145 F.3d 1425 (D.C. Cir. 1998).
[401] 147 F.3d 1367 (Fed. Cir. 1998).

				Protection Board	independent agency order against U.S. Mint. **(a)**	Federal Circuit: DOJ win
NASA v. FLRA[402]	1999	Clinton	National Aeronautics and Space Administration, Federal Labor Relations Authority	Exec. Admin.	DOJ represents NASA disputing independent agency order. **(a)**	Supreme Court: independent agency win
Nat'l Fed'n of Fed. Employees, Local 1309 v. Dep't of Interior[403]	1999	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ argues on behalf of Dep't of Interior for limitations to the authority granted the independent agency by its enabling act. **(a)**	Supreme Court: independent agency win
Luke Air Force Base v. FLRA[404]	1999	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ defends Air Force against independent agency charge that union should have been notified of Equal Employment Opportunity complaint. **(a)**	9th Circuit: DOJ win Arbitrary & capricious
Meredith v. Federal Mine Safety and Health Review Com'n[405]	1999	Clinton	Federal Mine Safety and Health Review Commission	Exec. Admin.	DOJ argues on behalf of Dep't of Labor / Mine Safety and Health Administration against independent agency interpretation of the Mine Act (independent agency's enabling act). **(b)**	D.C. Circuit: DOJ win
Lachance v. Devall[406]	1999	Clinton	Merit Systems Protection Board	Exec. Admin.	DOJ represents OPM seeking reversal of independent agency order against Navy. **(a)**	Federal Circuit: DOJ win
Lachance v. White[407]	1999	Clinton	Merit Systems Protection Board	Exec. Admin.	DOJ represents OPM seeking reversal of independent agency order against Air Force. **(a)**	Federal Circuit: DOJ win Arbitrary & capricious
Garvey v. Nat'l Transp. Safety Bd. [408]	1999	Clinton	National Transportation Safety Board	Exec. Admin.	DOJ represents Federal Aviation Administration	

[402] 527 U.S. 229 (1999).
[403] 526 U.S. 86 (1999).
[404] 208 F.3d 221 (Table) (9th Cir. 1999).
[405] 177 F.3d 1042 (D.C. Cir. 1999).
[406] 178 F.3d 1246 (Fed. Cir. 1999).
[407] 174 F.3d 1378 (Fed. Cir. 1999).
[408] 190 F.3d 571 (D.C. Cir. 1999).

					disputing independent agency order. **(a)**	D.C. Circuit: DOJ win
SSA v. FLRA[409]	2000	Clinton	Social Security Administration, Federal Labor Relations Authority	Exec. Admin.	DOJ argues on behalf of the SSA against FLRA's interpretation of the Back Pay Act. **(b)**	D.C. Circuit and Supreme Court: DOJ win
DOJ v. FLRA[410]	2001	W. Bush	Federal Labor Relations Authority	Exec. Admin	DOJ represents Office of Insp. Gen disputing independent agency order. **(a)**	D.C. Circuit: independent agency win
Dep't of Interior v. FLRA[411]	2002	W. Bush	Federal Labor Relations Authority	Exec. Admin.	DOJ argues on behalf of the Dep't of the Interior against independent agency's interpretation of the Civil Service Reform Act. **(b)**	9th Circuit and Supreme Court: DOJ win
U.S. v. Wilson[412]	2002	W. Bush	Commission on Civil Rights	Pres. Admin.	DOJ defends President's appointee to independent agency and removal of holdover appointee from previous administration. **(b)**	D.C. Circuit: DOJ win
Air Force, 315th Airlift Wing v. FLRA[413]	2002	W. Bush	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Air Force disputing independent agency order. **(a)**	D.C. Circuit: DOJ win
Lachance v. Von Zemenszky[414]	2002	W. Bush	Merit Systems Protection Board	Exec. Admin.	DOJ represents OPM seeking reversal of independent agency order against Vet. Affairs. **(a)**	Federal Circuit: independent agency win
James v. Santella[415]	2003	W. Bush	Merit Systems Protection Board	Exec. Admin.	DOJ represents Office of Special Counsel seeking reversal of independent agency order against Vet. Affairs. **(a)**	Federal Circuit: independent agency win Not arbitrary & capricious

[409] 201 F.3d 465 (D.C. Cir. 2000).
[410] 266 F.3d 1228 (D.C. Cir. 2001).
[411] 279 F.3d 762 (9th Cir. 2002).
[412] 290 F.3d 347 (D.C. Cir. 2002).
[413] 294 F.3d 192 (D.C. Cir. 2002).
[414] 301 F.3d 1364 (Fed. Cir. 2002).
[415] 328 F.3d 1374 (Fed. Cir. 2003).

Meeker v. MSPB[416]	2003	W. Bush	Merit Systems Protection Board	Exec. Admin.	DOJ argues on behalf of OPM against independent agency's interpretation of Veterans Preference Act. **(b)**	Federal Circuit and Supreme Court: DOJ win
Air Force, 436th Airlift Wing, Dover Air Force Base v. FLRA[417]	2003	W. Bush	Federal Labor Relations Authority	Exec. Admin	DOJ defends Air Force against independent agency charge that union should have been notified of Equal Employment Opportunity complaint. **(a)**	D.C. Circuit: independent agency win
Collins v. Nat'l Transp. Safety Bd.[418]	2003	W. Bush	National Transportation Safety Board	Exec. Admin.	DOJ represents Coast Guard disputing independent agency order. **(a)**	D.C. Circuit: DOJ win
Dep't of Treasury, IRS v. FLRA[419]	2008	Obama	Federal Labor Relations Authority	Exec. Admin	DOJ represents Internal Revenue Service asserting primacy of Portal-to-Portal Act over enabling act of independent agency. **(b)**	9th Circuit: independent agency win
Springer v. Adkins[420]	2008	Obama	Merit Systems Protection Board	Exec. Admin.	DOJ represents OPM disputing independent agency order. **(a)**	Federal Circuit: independent agency win
NLRB v. FLRA[421]	2010	Obama	National Labor Review Board, Federal Labor Relations Authority	Exec. Admin.	DOJ represents National Labor Relations Board disputing independent agency order. **(a)**	D.C. Circuit: DOJ win
Bureau of Prisons v. FLRA[422]	2011	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Bureau of Prisons disputing independent agency order. **(a)**	D.C. Circuit: DOJ win Arbitrary & capricious
Dep't of Homeland	2011	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Dep't of Homeland Security disputing independent agency order. **(a)**	D.C. Circuit: independent agency win

[416] 319 F.3d 1368 (Fed. Cir. 2003).
[417] 316 F.3d 280 (D.C. Cir. 2003).
[418] 351 F.3d 1246 (D.C. Cir. 2003).
[419] 521 F.3d 1148 (9th Cir. 2008) (holding that U.S. waived sovereign immunity with respect to Portal-to-Portal Act).
[420] 525 F.3d 1363 (Fed. Cir. 2008).
[421] 613 F.3d 275 (D.C. Cir. 2010).
[422] 654 F.3d 91 (D.C. Cir. 2011).

Sec., CBP v. FLRA[423]						Not arbitrary & capricious
Air Force, 4th Fighter Wing, Seymour Johnson Air Force Base v. FLRA[424]	2011	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Air Force disputing independent agency order. **(a)**	D.C. Circuit: DOJ win
Postal Serv. v. Postal Regulatory Comm'n[425]	2011	Obama	Postal Regulatory Commission, Postal Service	Exec. Admin.	DOJ arguing on behalf of Postal Regulatory Commission in favor of limits to rate increases by Postal Service post financial crisis. **(a)**	D.C. Circuit: affirm'd in part / remanded in part
Dep't of the Treasury, Bureau of the Pub. Debt v. FLRA[426]	2012	Obama	Federal Labor Relations Authority	Exec. Admin	DOJ represents Dep't of Treasury disputing independent agency order. **(a)**	D.C. Circuit: independent agency win
Navy v. FLRA[427]	2012	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Dep't of Navy disputing independent agency order. **(a)**	D.C. Circuit: DOJ win
Bureau of Prisons v. FLRA[428]	2013	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Bureau of Prisons disputing independent agency order. **(a)**	D.C. Circuit: affirm'd in part / remanded in part Arbitrary & capricious
Berry v. Conyers[429]	2013	Obama	Merit Systems Protection Board	Exec. Admin.	DOJ represents OPM disputing independent agency order against Dep't of Defense. **(a)**	Federal Circuit: DOJ win

[423] 647 F.3d 359 (D.C. Cir. 2011).
[424] 648 F.3d 841 (D.C. Cir. 2011).
[425] 640 F.3d 1263 (D.C. Cir. 2011).
[426] 670 F.3d 1315 (D.C. Cir. 2012).
[427] 665 F.3d 1339 (D.C. Cir. 2012).
[428] 737 F.3d 779 (D.C. Cir. 2013).
[429] 733 F.3d 1148 (Fed. Cir. 2013).

Dep't of the Interior, Southwestern Power Admin. v. FERC[430]	2014	Obama	Federal Energy Regulatory Commission	Exec Admin.	DOJ argues on behalf of subcomponent of the Dep't of Energy that independent agency's enabling act does not create a waiver for the U.S.'s sovereign immunity from monetary penalties. **(a)**	D.C. Circuit: DOJ win
Dep't of the Treasury, IRS v. FLRA[431]	2014	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Dep't of Treasury disputing independent agency order. **(a)**	D.C. Circuit: DOJ win
Dep't of Homeland Sec., CBP v. FLRA[432]	2014	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ argues on behalf of Department of Homeland Security against independent agency, both sides have different interpretations of the independent agency's enabling act. **(b)**	D.C. Circuit: DOJ win
Broad. Bd. of Governors v. FLRA[433]	2014	Obama	Broadcasting Board of Governors, Federal Labor Relations Authority	Exec. Admin.	DOJ represents Broadcasting Board of Governors, an independent agency, disputing independent agency order. **(a)**	D.C. Circuit: independent agency win
U.S. Postal Serv. v. Postal Regulatory Comm'n[434]	2014	Obama	Postal Service, Postal Regulatory Commission	Exec. Admin	DOJ arguing on behalf of Postal Regulatory Commission in favor of its regulation of the Postal Service. **(a)**	D.C. Circuit: DOJ win
Dep't of Homeland Sec. v. FLRA[435]	2015	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Dep't of Homeland Security disputing independent agency order. **(a)**	D.C. Circuit: independent agency win
Cobert / Kaplan v. Miller / Hopper[436]	2015	Obama	Merit Systems Protection Board	Exec. Admin.	DOJ represents OPM disputing independent agency order against Dep't of Interior. **(a)**	Federal Circuit: DOJ win

[430] 763 F.3d 27 (D.C. Cir. 2014).
[431] 739 F.3d 13 (D.C. Cir. 2014).
[432] 751 F.3d 665 (D.C. Cir. 2014).
[433] 752 F.3d 453 (D.C. Cir. 2014).
[434] 747 F.3d 906, 913 (D.C. Cir. 2014).
[435] 784 F.3d 821 (D.C. Cir. 2015).
[436] 786 F.3d 1340 (Fed. Cir. 2015).

Huerta v. Ducote[437]	2015	Obama	National Transportation Safety Board	Exec. Admin.	DOJ represents Federal Aviation Administration disputing independent agency order. **(a)**	D.C. Circuit: DOJ win
Archuleta v. Hopper / Miller[438]	2015	Obama	Merit Systems Protection Board	Exec. Admin.	DOJ represents OPM disputing independent agency order against SSA. **(a)**	Federal Circuit: independent agency win
Air Force v. FLRA[439]	2016	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Air Force disputing independent agency order. **(a)**	D.C. Circuit: DOJ win
Postal Serv. v. Postal Regulatory Comm'n[440]	2016	Obama	Postal Service, Postal Regulatory Commission	Exec. Admin.	DOJ arguing on behalf of Postal Services against denial of request for rate changes by Postal Regulatory Commissions. **(a)**	D.C. Circuit: DOJ win
Postal Serv. v. Postal Regulatory Comm'n[441]	2016	Obama	Postal Service, Postal Regulatory Commission	Exec. Admin.	DOJ arguing on behalf of Postal Regulatory Commission in favor of its regulation of the Postal Service. **(a)**	D.C. Circuit: DOJ win

Table 5: Trump—Seeking Broad Constraints on the Fourth Branch

Case Name	**Year Decided**	**President**	**Independent Agency**	**Exec. Admin. or Pres. Admin.**	**Exec. Admin.: (a)** Appeal of decision binding an executive agency, **(b)** Defense of executive agency jurisdiction, or **(c)** Appeal of merger or price-fixing **Pres. Admin.**: **(a)** Furthering the President's agenda or **(b)** Augmenting President's removal power	**Court / Winner / Arbitrary & Capricious or *Chevron***
FLRA v. Mich. Army Nat'l Guard[442]	2017	Trump	Federal Labor Relations Authority	Exec. Admin.	DOJ represents component of the Army disputing independent agency order and agency's interpretation of its enabling statute. **(a)**	6th Circuit: independent agency win

[437] 792 F.3d 144, 153 (D.C. Cir. 2015);
[438] 800 F.3d 1340 (Fed. Cir. 2015).
[439] 844 F.3d 957 (D.C. Cir. 2016).
[440] 816 F.3d 883 (D.C. Cir. 2016).
[441] 816 F.3d 883 (D.C. Cir. 2016).
[442] 878 F.3d 171 (6th Cir. 2017).

DOJ v. FLRA[443]	2017	Trump	Federal Labor Relations Authority	Exec. Admin.	DOJ represents Bureau of Prisons disputing independent agency order. **(a)**	D.C. Circuit: DOJ win Arbitrary & capricious
Postal Serv. v. Postal Reg. Comm'n[444]	2018	Trump	Postal Service, Postal Reg. Comm.	Exec. Admin.	DOJ arguing on behalf of Postal Regulatory Commission in regulating the Postal Service. **(a)**	D.C. Circuit: Postal Service win
Postal Serv. v. Postal Reg. Comm'n[445]		Trump	Postal Service, Postal Reg. Comm.	Exec. Admin	DOJ arguing on behalf of Postal Regulatory Commission in favor of its regulation of the Postal Service. **(a)**	D.C. Circuit: Postal Service win
Consoli-dated cases of NLRB v. Murphy Oil, Inc.[446]	2018	Trump	National Labor and Relations Board	Exec. Admin AND Pres. Admin.	DOJ argues that the generally administrable Federal Arbitration Act should not have to yield to the National Labor Relations Act (independent agency's enabling act). Exec. Admin **(b)** & Pres. Admin. **(b)**	Supreme Court: DOJ win
PHH Corp. et al. v. CFPB[447]	2018	Trump	Consumer Financial Protection Bureau	Pres. Admin.	DOJ arguing that at-will removal provision is unconstitutional. **(b)**	D.C. Circuit: independent agency win
Zarda v. Altitude Express[448]	2018	Trump	Equal Employ-ment Opportu-nity Com-mission	Pres. Admin.	DOJ argues that agency's interpretation of Title VII of the Civil Rights Act is barred by agency and court precedent, and by the statute itself. **(a)**	2nd Circuit: independent agency win

[443] 875 F.3d 667 (D.C. Cir. 2017).
[444] 886 F.3d 1261, 1262 (D.C. Cir. 2018).
[445] 886 F.3d 1253, 1254-55 (D.C. Cir. 2018).
[446] 584 U.S. __ (2018) (consolidated with *Epic Systems Corp. v. Lewis* (No. 16-285) and *Ernst & Young LLP v. Morris* (No. 16-300)).
[447] 839 F.3d 1 (D.C. Cir. 2018) (en banc).
[448] 883 F.3d 100 (2d Cir. 2018).