ARTICLE

Executive (Agency) Administration

Bijal Shah*

Abstract. The current account of executive power is incomplete. Before joining the Supreme Court, Elena Kagan noted that the President seeks control over the executive branch. Kagan referred to this paradigm as “presidential administration.” Kagan’s work and the significant body of literature it spawned have also acknowledged, however, that independent agencies are generally outside the ambit of presidential power. Nonetheless, this scholarship has not looked beyond the White House to consider other forms of overarching executive influence on the administrative state.

This Article reveals that not only the President but also executive agencies seek and wield control over independent agencies for reasons that are distinct from the President’s interests. This 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 dataset of approximately 120 cases spanning the mid-twentieth century through mid-2018.

Litigation has consistently furthered the interests of executive agencies, including their desire to limit independent agencies’ power to regulate them and in overlapping areas of policymaking authority. For instance, courts have reversed independent agency decisions binding executive agencies and have constrained independent agencies’ authority to implement their enabling statutes. This may be for the better, but may also be for the worse. On the one hand, litigation offers a meaningful vehicle for beneficial, ex post executive oversight of independent agencies, particularly in light of the dearth of

* Associate Professor, Arizona State University (ASU), Sandra Day O’Connor College of Law. Many thanks to Kent Barnett, Neal Devins, Zack Gubler, Michael Herz, Sharon Jacobs, Rhett Larson, Stephen Lee, Justin Levitt, Kaipo Matsumura, Alan Morrison, Victoria Nourse, Anne Joseph O’Connell, Trevor Reed, Victoria Sahani, Erin Scharff, Chris Schroeder, Mark Seidenfeld, Josh Sellers, Neil Siegel, Jarrod Shobe, Kevin Stack, Peter Strauss, Ilan Wurman, David Zaring, and Adam Zimmerman; commentators from the Association of American Law Schools New Voices in Administrative Law program, the Administrative Law New Scholarship Roundtable, the symposium on Regulatory Change and the Trump Administration held at Yale Law School, and the Culp Colloquium hosted by Duke University School of Law; and faculty colloquia at Loyola Law School, Boston College Law School, and ASU College of Law. Thanks are owed as well to Elise Adams, Rees Atkins, and Gregory Fay, and to Tara Mospan of the Ross-Blakley Law Library, for their tremendous research assistance. All errors are my own.
presidential mechanisms of quality control. On the other hand, a recent Supreme Court decision suggests litigation may be used to walk back *Chevron* deference to independent agencies—to the detriment of their ability to enforce the law with nonpartisanship and expertise.

Finally, recent cases brought by the Trump Administration have sought to dislocate independent agencies in pursuit of a more unitary executive branch. These cases suggest that litigation could be a tool of presidential administration as well. Theoretically, 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.
# Table of Contents

Introduction ............................................................................................................................................................ 644

I. Executive Administration.............................................................................................................................. 652
   A. The DOJ’s Authority to Litigate Interagency Disputes................................................................. 654
   B. Typology of Litigation: Preserving Executive Agencies’ Power .................................................. 659
      1. Disputing an independent agency’s binding adjudication ....................................................... 661
      2. Defending an executive agency’s statutory jurisdiction ............................................................ 663
      3. Questioning independent agency certification of monopolies .............................................. 666
   C. Power Shifts Within the Executive Branch ....................................................................................... 667
      1. Arbitrary and capricious review as executive oversight ............................................................ 669
      2. Reduced *Chevron* deference to independent agencies ............................................................ 674

II. Presidential Administration............................................................................................................................ 684
   A. The Limits of Intrabranch Administration ....................................................................................... 685
   B. Typology of Litigation: Increasing Substantive and Structural Control........................................ 689
      1. Furthering the President’s agenda .................................................................................................. 692
      2. Defending and augmenting the President’s removal power ....................................................... 698
   C. Dynamics Among the Branches of Government ............................................................................. 701
      1. Executive encroachment on the legislature .................................................................................. 703
      2. Judiciary as gatekeeper of executive administration ................................................................. 705

Conclusion................................................................................................................................................................ 708

Appendix A: Methodology & Summary Tables ............................................................................................ 711

Appendix B: Dataset ............................................................................................................................................. 717
Introduction

President Trump has pursued significant control over the executive branch, but this in no way makes him exceptional. As Elena Kagan famously argued before joining the Supreme Court, all modern Presidents have pursued a system of administrative control. In other words, Kagan asserted, not only do political officials, legislators, interest groups, and others outside of the executive branch wield influence over administrative activity, but the President does so as well, from within the branch itself.

Kagan also noted that presidential administration, while focused on executive agencies, is nonetheless thwarted by "Congress's creation of independent agencies—that is, agencies whose heads the President may not remove at will." Indeed, she conceded, “the existence of independent agencies can pose a particularly stark challenge to the aspiration of Presidents to control
administration.\textsuperscript{5} This is because, as is well known, there are significant limitations to the President’s power to direct or even influence independent agencies,\textsuperscript{6} sometimes called the “fourth branch” of government.\textsuperscript{7} Despite acknowledging these limitations, scholars have failed to acknowledge the salience of other possible frameworks of executive control, particularly as it concerns the independent agencies. This Article asserts that holistic influence over the administrative state—and in particular, independent agencies—may be wielded by executive agencies themselves, as opposed to exclusively by or on behalf of the President. This Article refers to this nonpresidential form of overarching executive influence as “executive administration.” This Article does not maintain that there has been no previous recognition of influence over the administrative state from within the executive branch; as Kagan noted, the “internal staff of the agencies’ impact administrative activity,”\textsuperscript{8} at least on an agency-by-agency basis. Rather, this Article modifies the assumption that independent agencies act independently of administration from within the executive branch.

This Article argues that 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. As a general matter, executive agency goals that are unrelated to specified presidential interests include the defense of executive agency autonomy and turf at the expense of independent agencies. Presidential administration furthers the President’s policy agenda or desire to secure more power over administrative agencies, notwithstanding the President’s lack of control over independent agencies.

\textsuperscript{5} Id. at 2274; see id. at 2247 (arguing that the general understanding that independent agencies escape presidential oversight has caused commentators to overlook the extent of presidential administration); see also DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1977, at 4 (2003) (discussing institutional incentives driving presidential interest in control over independent agencies); Bijal Shah, Congress’s Agency Coordination, 103 MINN. L. REV. 1961, 2027-28 (2019) (noting that by legislating interagency coordination, Congress can create independence in agencies); Note, Judicial Resolution of Inter-Agency Legal Disputes, 89 YALE L.J. 1595, 1595 n.1 (1980) (noting that references 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”). Part II.A below discusses the extent to which executive agencies generally operate within the ambit of presidential control more so than independent agencies.

\textsuperscript{6} See infra Part II.A.

\textsuperscript{7} See, e.g., Ameron, Inc. v. U.S. Army Corps of Eng’rs, 787 F.2d 875, 886 (3d Cir.) (“[T]he headless ‘fourth branch’ of government consist[s] of independent agencies having significant duties in both the legislative and executive branches but residing not entirely within either.”), aff’d on reh’g en banc, 809 F.2d 979 (3d Cir. 1986), cert. granted, 485 U.S. 958, and cert. denied, 488 U.S. 918 (1988).

\textsuperscript{8} Kagan, supra note 2, at 2246.
One potential framework of executive administration flows from decisions made by the Solicitor General on behalf of independent agencies that lack the authority to litigate before the Supreme Court. The use of this authority to deprioritize the interests of independent agencies, primarily by downplaying or ignoring the interests of independent agencies while defending them in the Supreme Court, has been documented. However, this dynamic offers only a partial account of executive administration, in part because it is often driven by the President's agenda.

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 dataset of approximately 120 relevant cases, most of which have been made available in the Appendix, reveals this litigation has existed from 1945 through the present day. Nonetheless, few have examined it, 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:

a. The first is litigation seeking to reverse adjudications made by independent agencies that bind or circumscribe the actions of executive agencies. For example, the DOJ has appealed several decisions by the Federal Labor Relations Authority (FLRA) sanctioning executive agencies for committing unfair labor practices.

9. See infra notes 63-67 and accompanying text.
10. See infra notes 65, 266, 268-71 and accompanying text (discussing how the President can influence the Solicitor General's decision to exclude an independent agency's views from litigation).
11. For an explanation of why some cases were excluded from the dataset found in the Appendix, see infra note 359.
14. See sources cited infra note 86 (listing cases from the Reagan through Trump Administrations in which the DOJ disputed an FLRA order against an executive agency).
b. The second is litigation pursuing limits to independent agencies’ authority to implement statutes, in order to protect executive agencies’ jurisdiction in overlapping areas of regulation. For example, the DOJ has challenged actions by the Occupational Safety and Health Review Commission (OSHRC) that interfere with the Department of Labor’s statutory authority or its authority to interpret its own regulations.

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

The DOJ has brought cases furthering executive administration relatively often—approximately 80% of this dataset falls into the first two categories—and fairly successfully, with a win rate between 60% and 70% in the first two categories overall.

As a descriptive matter, litigation against independent agencies has helped shift power toward the priorities of executive agencies, at the expense of independent agencies. In the first set of cases appealing independent agency adjudications decided against executive agencies, litigation is the mechanism that preserves governmental machinery by holding the line against increasing independent agency restriction of executive agencies, primarily in the labor regulation context. These “everyday” cases, as a whole, have allowed executive agencies to stave off regulation by certain independent agencies, thereby limiting the clout of the latter. The second and third sets of cases have curtailed independent agencies’ statutory jurisdiction and decisionmaking authority, respectively. In this way, they have served to circumscribe independent agencies’ policymaking power in broader strokes. In addition, this litigation contributes to the complicated framework of agency coordination and conflict,
much of which has focused on mechanisms within the executive branch, rather than on Article III courts.  

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 (a framework that arguably undergirds presidential administration as well). First, it argues that litigation is an instrument for executive reform that appears to improve the quality of independent agency activity, somewhat analogous to Kagan’s claim that presidential administration advances “values of accountability and effectiveness.” More specifically, the dataset reveals that courts have often applied the “arbitrary and capricious” standard of review to support the DOJ’s position in cases appealing the result of an administrative adjudication by an independent agency. In this way, litigation may help ameliorate independent agencies’ issuance of subpar decisions due to their lack of accountability to the executive branch.

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 (that is, enabling) legislation. It bases this theory on a 2018 Supreme Court decision that declined to grant Chevron deference to an independent agency’s interpretation of its enabling statute because of a conflict.

20. For a rich discussion of administrative conflict, see Daniel A. Farber & Anne Joseph O’Connell, Agencies as Adversaries, 105 CALIF. L. REV. 1375, 1408-16 (2017) (presenting an astounding institutional account of agency conflicts and dispute resolution mechanisms). See also infra text accompanying notes 338-40 (discussing similarities and differences between interagency litigation and interagency conflict).


with an executive agency’s interpretation of a general statute.\footnote{25} If this case is any indication, litigation could facilitate a reduction in the rightful exercise of independent agencies’ discretionary authority. And 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.\footnote{26}

Finally, this Article also highlights instances in which this litigation has been used as a tool of presidential administration. As noted earlier, the ability of the President and her surrogates to control the behavior of independent agencies is limited.\footnote{27} However, the President has pursued opportunities to constrain the behavior of independent agencies through litigation. These cases, which are far rarer than litigation brought for purposes of executive administration,\footnote{28} can be divided into two categories:

a. First, the DOJ has disputed independent agencies’ exercise of authority in order to further the President’s agenda.\footnote{29} For example, on behalf of Presidents who have been vocally opposed to civil rights mandates, the DOJ has sought to limit the scope of authority of the Equal Employment Opportunity Commission (EEOC).\footnote{30}

b. Second, the DOJ has sought to reduce the insulation of independent agencies from the President.\footnote{31} For example, Presidents Reagan and H.W. Bush sought, unsuccessfully, to exercise at-will removal of independent agency commissioners,\footnote{32} while President Trump directed the DOJ to argue that the for-cause removal provisions governing an independent agency with a single head are unconstitutional.\footnote{33}

\footnote{26. \textit{See} Metzger, \textit{supra} note 21, at 436.}
\footnote{27. \textit{See supra} text accompanying note 6; \textit{see also infra} Part II.A (exploring the limitations of presidential control over independent agencies).}
\footnote{28. Cases furthering presidential administration comprise less than 15% of the litigation in the dataset. \textit{See infra} Table A.1.1.}
\footnote{29. \textit{See infra} Part II.B.1.}
\footnote{30. These Presidents include Presidents Carter, Reagan, H.W. Bush, and Trump. \textit{See infra} notes 263-93 and accompanying text (discussing cases in which the DOJ or Solicitor General has been opposed to the EEOC’s position in litigation).}
\footnote{31. \textit{See infra} Part II.B.2.}
The quick succession of uniquely aggressive cases brought by the Trump Administration to limit the function and autonomy of the fourth branch 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. 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 effectively change a 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. Therefore, this litigation ultimately reinforces judicial supremacy in legal interpretation.

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

34. 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 text accompanying notes 279-94, 306-13.
35. See infra Part II.C.1.
36. See infra Part II.C.2.
38. See infra notes 250-53, 301-05 and accompanying text.
39. See infra text accompanying notes 349-51 (discussing recent decisions written by Justices Gorsuch and Kavanaugh).
40. Compare Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive: Presidential Power from Washington to Bush (2008) (arguing in favor of a unitary executive), and Kagan, supra note 2, at 2251-52 (arguing that centralized executive control of agencies fits with separation of powers because Congress gave the President the power to direct executive branch officials, and asserting that form of executive control "focuses on the values of accountability and effectiveness"), with Peter M. Shane, Madison's Nightmare: How Executive Power Threatens American Democracy, at vii-ix (2009) (arguing that "aggressive presidentialism" is a threat to the American democracy), Aziz Huq & Tom Ginsburg, How to Lose a Constitutional Democracy, footnote continued on next page
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 against independent agencies on behalf of executive agencies. Then, it presents an analysis of the three 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. On the one hand, 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. On the other hand, it argues that the judiciary’s application of the Chevron doctrine—culminating in a 2018 decision by the Supreme Court, Epic Systems Corp. v. Lewis—shows that courts are willing to limit the deference afforded to independent agencies’ interpretations of statutes at the request of executive agencies, which may be to the detriment of administrative independence and expertise.

Part II offers an account of litigation as a tool of presidential administration. For instance, it illustrates that Presidents with explicitly deregulatory agendas and marked interests 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 diminish 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 allows courts to safeguard agency independence.

Before proceeding, a brief note on methodology is warranted: No formal statistical methods were used for this Article. Rather, information was gathered from a review of all the cases and briefs resulting from approximately 350 discrete searches during mid-summer 2018 using several databases and a review of media sources. In addition, this approach to research incorporated a
concerted effort to uncover cases representative of every administration from 1900 (the McKinley Administration) onward, as well as additional searches focusing on ten important 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 Social Security Administration (SSA). While this dataset is not exhaustive, it illustrates that litigation in which the DOJ opposed an independent agency in an Article III court has existed under every presidential administration beginning with the Franklin D. Roosevelt Administration continuing to the present day, which suggests that this type of litigation is both enduring and not limited to any particular President, time period, or political party. The Appendix offers additional information about and an overview of the cases discussed in this Article.

I. Executive Administration

Scholars debate the extent to which “litigation is at all possible between government entities.” However, as then-Judge Kavanaugh noted:

43. While there are ongoing disputes about which agencies should be identified as “independent,” each of the agencies in this list self-identifies as such. Federal Agencies List, U.S. OFF. PERSONNEL MGMT., https://perma.cc/X6GR-VFWZ (archived Dec. 20, 2019) (listing independent agencies ranging in size from the FTC’s roughly 1100 employees to the SSA’s more than 67,000). In addition, these agencies are identified as “important” because they are among those that (1) issue significant regulations or fulfill a unique role in the executive branch and (2) have over one thousand employees. See id.

44. The DOJ does not often litigate against the GSA, the NSF, the Smithsonian, or even the SSA. This may be because these agencies are not as “regulatory” in nature as the others on this list, and because the SSA only became independent in 1995. See Comments from Michael E. Herz, Professor, Benjamin N. Cardozo School of Law, to author (Oct. 31, 2018) (on file with author) (noting that the GSA, NSF, Smithsonian, and SSA seem less regulatory than the other agencies on the list); see also Rita L. DiSimone, Social Security Administration Created as an Independent Agency: Public Law 103-296, SOC. SECURITY BULL., Spring 1995, at 57, 57.

45. See, e.g., MARSHALL J. BREGER & GARY J. EDEL, INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS 171 (2015). Sometimes, “Congress allows agencies to sue each other” in order to allow courts to oversee administrative conflict resolution, although these provisions raise constitutional concerns. See Farber & O’Connell, supra note 20, at 1464-66. Barring this sort of congressional provision, however, “[m]ost 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 government agency.” BREGER & EDEL, supra, at 171 (second alteration in original) (footnote omitted) (quoting United States v. Interstate Commerce Comm’n, 337 U.S. 426, 432 (1949)).
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 an independent agency and a traditional executive agency . . . .

Broadly speaking, this Part argues that executive agencies have long litigated against independent agencies in pursuit of long-term interests spanning administrations, including executive agencies’ desire to protect their boundaries from encroachment and to preserve their policy choices in the face of opposition from independent agencies.

The cases in the dataset collected for this Article indicate that the DOJ has litigated against independent agencies since the mid-1900s. The dataset primarily includes instances in which the DOJ sues the independent agency on behalf of the executive agency and is therefore the original plaintiff. The next two Subparts show that through litigation, the DOJ has amassed authority in executive agencies (including itself) and away from independent agencies. More specifically, the DOJ has consistently maintained the autonomy of and expanded the statutory jurisdiction of executive agencies in the face of independent agencies, regardless of the President in power.

This is not to say that the distinction between the President’s and agencies’ (executive and independent) interests is wholly stable, nor that the DOJ is likely to pursue executive agency interests that conflict with those of a sitting President. That said, it is also unlikely that the President has directed guidance or offered intentional imprimatur to the DOJ for each of its decisions to litigate against an independent agency on behalf of an executive agency, given the often narrow and nuanced matters at issue. Litigation in pursuit of executive administration is neither inconsistent with the President’s interests, nor done at her bidding. Rather, it occupies a middle ground by favoring the concentration

\[\text{see id. ("But the situation may change when one or both parties are independent agencies.").}\]

\[\text{46. SEC v. FLRA, 568 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J., concurring). But see id. at 996 (referring to litigation between executive and independent agencies as a "constitutional oddity").}\]

\[\text{47. This dataset excludes those cases in which the DOJ is defending an executive agency from a suit initiated by an independent agency to enforce its regulation over the executive agency. However, while this dynamic is not the focus of this project, it factors into some of the examples. Moreover, the motivations of the DOJ in these cases are likely similar to those in which the DOJ brought suit first: an interest in defending an executive agency from labor-related or other oversight by an independent agency, or in preserving the executive agency’s statutory turf.}\]

\[\text{48. This is particularly the case with respect to labor regulation, as these cases often involve the particularized treatment of a single employee by an agency. See sources cited infra note 86. These cases also involve a generally deferential application of the arbitrary and capricious standard. See infra Part I.C.1.}\]
of power in executive agencies, as opposed to in the President herself (unlike presidential administration, which draws statutory power away from agency heads and focuses it on the President’s interests).

The final Subpart explores the internal separation of powers implications of litigation brought by the DOJ against independent agencies. As an initial matter, this litigation demonstrates that intrabranch dynamics not only serve to constrain executive power, which is the focus of the relevant literature, but may also enhance it. Accordingly, litigation may bolster executive oversight of independent agency decisionmaking. More specifically, litigation allows the executive branch some measure of ex post review of independent agencies, which may improve the quality of and outcomes in independent agency adjudications. However, a recent Supreme Court case, Epic Systems Corp. v. Lewis, suggests that executive agencies may also be able to use litigation to reduce Chevron deference to independent agencies’ statutory interpretations. By allowing the executive branch to limit the activity and authority of independent agencies, litigation may undercut the insulation from politics that allows independent agencies to make decisions with impartiality and expertise.

A. The DOJ’s Authority to Litigate Interagency Disputes

In a concrete sense, the source of power within the executive administration model is the DOJ, as opposed to executive agencies themselves, given that the DOJ litigates on their behalf. Then again, the DOJ’s decision to litigate is certainly based on the needs and interests of its “clients,” the executive agencies. Why might the DOJ litigate on behalf of executive agencies against independent agencies—even without explicit direction from the President—particularly when most interagency disputes are resolved within the executive branch?50 In other words, why does the DOJ take on executive agencies as its clients vis-à-vis other executive institutions?

49. See infra notes 122-23 and accompanying text.
50. See Jody Freeman & Jim Rossi, Agency Coordination in Shared Regulatory Space, 125 HARV. L. REV. 1131, 1175 (2012) (noting that "the President relies in the normal course on the [OLC] . . . to help resolve jurisdictional disputes among agencies"); Daphna Renan, The Law Presidents Make, 103 VA. L. REV. 805, 848 (2017) (noting that the "OLC has long been an intra-executive branch mechanism for resolving" interagency disputes); Note, Judicial Resolution of Administrative Disputes Between Federal Agencies, 62 HARV. L. REV. 1050, 1051 (1949) ("The vast majority of interagency disputes are now resolved within the executive branch . . . . Questions of this type are normally submitted by the president, or by one of the parties immediately interested, to the Attorney General for solution.").
One answer is that it is customary for the DOJ to determine its own goals in litigation, although these efforts are sometimes limited by the courts.\footnote{51. See BREGER & EDLES, supra note 45, 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”).}

For instance, in \textit{Hayburn’s Case}, the Supreme Court took the Attorney General to task for attempting to litigate ex officio, without an actual client.\footnote{52. 2 U.S. (2 Dall.) 409, 409 (1792). 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 \textit{United States v. United States}.” Herz, supra note 12, at 896 & n.12 (emphasis omitted) (noting the “judiciary’s receptiveness to intragovernmental lawsuits”).} Furthermore, the DOJ has long acted of its own volition\footnote{53. See Jerry L. Mashaw & Avi Perry, \textit{Administrative Statutory Interpretation in the Antebellum Republic}, 2009 Mich. St. L. Rev. 7, 19 (discussing how antebellum Attorneys General both sought and ceded control over agencies’ interpretations of statutes).} and continues to do so,\footnote{54. See Bruce A. Green & Rebecca Roiphe, \textit{Can the President Control the Department of Justice?}, 70 Ala. L. Rev. 1, 75 (2018) (“Congress has acquiesced in a relationship in which the President may express views to the Attorney General, but the ultimate authority rests with the Attorney General or with subordinate prosecutors to whom the Attorney General delegates authority.”).} including to “frequently conduct[] litigation in those cases that involve issues . . . common to all departments and agencies.”\footnote{55. BREGER & EDLES, supra note 45, at 169 (listing as examples “[Freedom of Information Act] cases, damage actions against agency officials and suits involving personnel matters”).}

Moreover, in addition to supporting the President’s interests, the DOJ acts as counsel to the executive branch as a whole.\footnote{56. That is, “[e]xcept as otherwise authorized by statute, the conduct of the federal government’s litigation rests with the DOJ.” \textit{Id.} at 167 (citing 28 U.S.C. §§ 516-519 (1994)); \textit{see also} Harvey, supra note 12, at 1573. Indeed, Neal Devins and Michael Herz have expressed unease over the DOJ’s unilateral control of governmental litigation. See, e.g., Neal Devins & Michael Herz, \textit{Essay, The Battle That Never Was: Congress, the White House, and Agency Litigation Authority}, \textit{Law & Contemp. Probs.}, Winter 1998, at 205, 205 [hereinafter Devins & Herz, \textit{The Battle That Never Was}] (questioning whether “the interests of the United States [are] better represented by generalist litigators in the [DOJ] or agency lawyers with subject matter expertise”); Devins & Herz, supra note 12, at 559 (arguing that “the standard arguments for DOJ control of litigation” are “not nearly as compelling as generally assumed”).} Accordingly, the DOJ is “far from monolithic” in its approach to representing agencies.\footnote{57. BREGER & EDLES, supra note 45, at 167; \textit{see also} Neal Devins, \textit{Unitariness and Independence: Solicitor General Control over Independent Agency Litigation}, 82 Calif. L. Rev. 255, 278 (1994).} And like any team of in-house counsel, DOJ litigators have views about the validity, legality, and drawbacks of their clients’ (agencies’) activities. Furthermore, the DOJ’s strategy is often particularly at odds with the interests of independent
agencies. Indeed, in conflicts between an executive agency and an independent agency, the DOJ’s loyalties may logically lie with the executive agency, as this is consistent with the broader division between the more presidentially oriented DOJ and executive agencies, and the relatively insulated fourth branch. More specifically, the fact that many independent agencies have their own counsel to litigate (at least in the lower courts) both exacerbates the distant relationship between the DOJ and independent agencies and reduces the likelihood that an independent agency will seek legal advice from the DOJ. The relationship may also be fraught as a result of independent agencies’ efforts to dispute the DOJ’s authority to represent them before the Supreme Court.

By acting as counsel on behalf of agencies, the DOJ is able to influence their substantive programs. However, because independent agencies with independent litigation authority do not retain the DOJ as counsel, at least in the lower courts, the DOJ may seek to influence those agencies 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.

58. See BREGER & EDLES, supra note 45, at 167 (“Congress has authorized various independent agencies to represent themselves in court in certain situations, often in response to perceived failure by the DOJ to adequately represent these agencies.”).

59. 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) (writing as then-Attorney General that “[s]ince about 1969-1970, new grants of independent litigating authority have literally seemed to explode” and that “[t]oday, some thirty-one separate federal governmental units have or exercise authority to conduct at least some of their own litigation”); Devins & Herz, supra note 12, at 561 (“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 . . . .”).

60. See Note, supra note 50, at 1051-52 (noting that independent agencies “are under little compulsion to mold their conduct to conform to the Attorney General’s views”).

61. See, e.g., FEC v. NRA Political Victory Fund, 513 U.S. 88, 91-97 (1994) (rejecting the FEC’s argument that the Federal Election Campaign Act authorizes the FEC to conduct litigation at all levels of the judiciary independent of the DOJ).

62. As Herz and Devins have articulated:

Allowing DOJ to control agency litigation might have such an effect [on the agency’s substantive program] in three ways. First, and most obviously, it might reduce the scope and effectiveness of agency enforcement. Second, it might lead to avoidable courtroom losses—for example, setting aside a regulation—through which the judiciary creates obstacles to the agency’s program. Third, it might encourage DOJ to adopt an aggressive stance toward its “client” agencies, directly influencing or interfering with the agencies’ substantive decisions.


order to prioritize the interests of one agency, the Solicitor General may choose to misrepresent or omit the true views of another agency while litigating on its behalf. This practice may be at the behest of the President or for reasons—such as protecting the interests or legislative mandates of executive agencies over those of independent agencies—that are unrelated to the White House’s agenda. The latter is a form of executive administration in that it constitutes a nonpresidential mechanism for exercising centralized executive control over independent agencies.

The DOJ’s Office of Legal Counsel (OLC) could theoretically influence independent agencies by offering an opinion on an administrative

64. See Elliott Karr, Essay, Independent Litigation Authority and Calls for the Views of the Solicitor General, 77 Geo. Wash. L. Rev. 1080, 1092-93 (2009) (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”).

65. See Eric Schnapper, Becket at the Bar—The Conflicting Obligations of the Solicitor General, 21 Loy. L.A. L. Rev. 1187, 1220 (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 the administration”); see also, e.g., Devins & Herz, The Battle That Never Was, supra note 56, at 206 (commenting on 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 President, who threatened to remove the Postal Service’s Board of Governors for insubordination”).

66. See Margaret H. Lemos, The Solicitor General as Mediator Between Court and Agency, 2009 Mich. St. L. Rev. 185, 195-96 (“[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.”); see also Devins & Herz, The Battle That Never Was, supra note 56, at 209-10 (discussing conflicts between the Solicitor General and the EEOC); Devins, supra note 57, at 363, 277-78, 307 (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, including the FCC, SEC, EEOC, and FTC); Lemos, supra, at 220 (noting that the Solicitor General “can refuse to defend arguments presented by an agency (or other government client)” but that this “minimize[s] the part that might be played by the agency charged with administering the relevant statute”); Stern, supra note 63, at 760 (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); George F. Fraley, III, Note, Is the Fox Watching the Henhouse? The Administration’s Control of FEC Litigation Through the Solicitor General, 9 Admin. L.J. Am. U. 1215, 1249 (1996) (“[N]umerous examples of Solicitor General disregard for [independent] agency autonomy can be found.”); Karr, supra note 64, at 1085-91 (considering conflicts of interest between the Solicitor General and the FTC).

67. A “core precept of our administrative order is the principle that an administrative agency . . . exercise[s] only the authority delegated to it by Congress.” Gillian E. Metzger, Administrative Constitutionalism, 91 Tex. L. Rev. 1897, 1916 (2013). Because even executive agencies are authorized to act by statute, their interests and mandates can be separated from those of the President, and likewise, advocated for separately by the DOJ.
conflict, which would act as a bar to interagency litigation. However, despite the OLC's traditional role in "settling disputes among departments and non-independent agencies of the executive branch," it does not have the authority or capacity to enforce its opinions against unwilling parties in courts. Given that independent agencies are not even bound, as a matter of internal branch practice, to abide by the OLC's advice, this option does not offer the DOJ much purchase. Another option, with limited potential thus far, is the oversight of independent agencies by the Office of Management and Budget (OMB), specifically the Office of Information and Regulatory Affairs (OIRA). In the past, OIRA review of independent agencies has not been established as a formal matter, although this state of affairs may be in flux.

---

68. See Mead, supra note 12, 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, 1305, 1311 (2000).

69. See BREGER & EDLES, supra note 45, 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.'" (quoting Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Employment Practices, 16 Op. O.L.C. 121, 128 (1992))); Farber & O'Connell, supra note 20, at 1415 (noting briefly that in "rare cases, the courts function as the primary [intragovernmental] dispute-resolution mechanism" and that the "Attorney General . . . typically controls litigation in the administrative state"); Herz, supra note 12, at 990 (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"); Note, supra note 50, at 1051 (noting that the "general dearth of federal inter-agency adjudication" suggests that there are "alternative methods by which these conflicts are disposed of in the federal administrative framework").

70. See note 5, supra note 50, at 1052.


72. See Peter L. Strauss & Cass R. Sunstein, The Role of the President and OMB in Informal Rulemaking, 38 ADMIN. L. REV. 181, 181-82 (1986) (discussing two executive orders issued by President Reagan "that give the [OMB] considerable power over the rulemaking activities of executive agencies," and noting that these could have been extended to independent agencies—but were not).

Barring an official requirement, agencies will not readily submit to OIRA oversight; this is because even more than the OLC, perhaps, OIRA is viewed as an agency with an interest in imposing the President’s agenda on agency action.75 (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 oversees agencies on behalf of the legislature.76)

While there are a few avenues by which the DOJ might push independent agencies to compromise with executive agencies, they are unlikely to be successful. The DOJ may therefore turn to litigation to sway independent agencies’ 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, against independent agencies.

B. Typology of Litigation: Preserving Executive Agencies’ Power

Agencies are continuing entities that exist from President to President and are made up primarily of career appointees who are committed to continuing institutional mandates and goals. Given this fact, it makes sense that the DOJ has long litigated on behalf of executive agencies against independent agencies for reasons that transcend any sitting President’s political ideology. 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 interpretation or implementation of legislation to defend an executive agency’s statutory authority. The legislation at issue is sometimes, but not always, the independent agency’s enabling mandate. In the third type of case, the DOJ has also, on occasion, sought to constrain independent agencies’ authority to certify mergers or price-fixing agreements to reduce the potential for a monopoly.

These three types of cases have constituted at least half of litigation brought by the DOJ against independent agencies under each presidential

---


75. OIRA “oversees a regulatory review process to ensure that agency regulations are consistent with the President’s priorities and economically justified.” Freeman & Rossi, supra note 50, at 1178.

76. Conversation Between Gene Dodaro, Comptroller Gen., U.S., 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).
administration surveyed in this Article. While the Roosevelt through Johnson Administrations 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 67% of all cases during that time period. For the Nixon through Obama Administrations, these cases represent over 90% of litigation brought by the DOJ against independent agencies. Litigation for purposes of executive administration was employed relatively often by the DOJ under Presidents Clinton, W. Bush, and Obama.

Further analysis shows that the DOJ is fairly successful in these cases as well. Courts tend to favor the DOJ in appeals of narrow independent agency orders and related claims that the independent agency has overreached in its regulation of a cabinet agency in a specific instance (commonly, in the labor context), but not overwhelmingly so. Courts have also tended to favor the DOJ when making determinations concerning the jurisdictional limits of independent agencies’ authority. Finally, in regard to independent agency certification of industries, the DOJ has won about half of its cases, leading to the judicial overturning or vacatur of the independent agency certification. Overall, this suggests that litigation has assisted the DOJ both in preserving the

77. For a full list of cases ordered by presidential administration, please consult Tables B.1-.5 below. See also infra Tables A.1.1-2 (providing overall percentages of types of executive administration cases brought in each time period).
78. Infra Table A.1.1.
79. Infra Table A.1.1.
80. See infra Table B.4. There were at least twice as many executive administration cases under Presidents Clinton, W. Bush, and Obama than during any of the other timeframes covered in this Article, involving many more independent agencies than before. See infra Table A.1.1. Almost half of the executive administration cases in this timeframe were brought during the Obama Administration. See infra Table B.4. More specifically, this Article’s research has uncovered no more than twenty-one of these cases for each of the following timeframes: Roosevelt through Johnson Administrations (1933-1969), Nixon through Carter Administrations (1969-1981), and Reagan and H.W. Bush Administrations (1981-1993). Meanwhile, fifty-four executive administration cases from the Clinton through Obama Administrations have been identified (1993-2017). See infra Table A.1.1.
81. This means approximately 100%, 60%, and 63% of these cases were won by the DOJ under Presidents Nixon through Carter, Reagan and H.W. Bush, and Clinton through Obama, respectively. See infra Table A.2.2 (illustrating the DOJ’s win ratios in cases classified as “Executive Administration (a)”).
82. This translates to a win rate of 50%, 100%, and 77% during the Nixon through Carter, Reagan and H.W. Bush, and Clinton through Obama eras, respectively. See infra Table A.2.2 (illustrating the DOJ’s win ratios in cases classified as “Executive Administration (b)”).
83. The DOJ won 50% of cases in this category prior to the Clinton Administration; there are no cases like this in the dataset occurring during or after the Clinton presidency. See infra Table A.2.2 (illustrating the DOJ’s win ratios in cases classified as “Executive Administration (c)”).
autonomy of executive agencies in the face of regulation by independent agencies, and in entrenching its views on the jurisdiction of independent agencies vis-à-vis executive agencies.

1. Disputing an independent agency’s binding adjudication

In the first type of litigation furthering executive administration, the DOJ disputes an independent agency’s efforts to regulate an executive agency via administrative adjudication. Particularly from the 1990s onward, these cases have often involved appealing independent agency decisions concerning conflicts over labor rights or promotions impacting employees of executive agencies. 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 Interstate Commerce Commission (ICC) from raising the Department of Defense’s freight costs.84

Under President Nixon, the DOJ litigated one of the earlier cases against an independent agency disputing a labor matter; in that case, the DOJ argued on behalf of another independent agency.85 Later, most cases in this vein involved the DOJ litigating against the FLRA. The DOJ disputed the FLRA’s narrow oversight of several different executive agencies under Presidents Reagan, H.W. Bush, Clinton, W. Bush, Obama, and Trump.86 Under President Clinton,

---

86. President Reagan: See, e.g., INS v. FLRA, 855 F.2d 1454, 1456 (9th Cir. 1988); Dep’t of the Treasury v. FLRA, 837 F.2d 1163, 1164-65 (D.C. Cir. 1988); U.S. Dep’t of Agric. v. FLRA, 691 F.2d 1242, 1243 (8th Cir. 1982); Div. of Military & Naval Affairs v. FLRA, 683 F.2d 45, 46 (2d Cir. 1982).
President H.W. Bush: See, e.g., Fort Stewart Schs. v. FLRA, 495 U.S. 641, 642-44 (1990) (noting that the DOJ argued on behalf of a federal government employer); IRS v. FLRA, 494 U.S. 922, 924 (1990); U.S. Dep’t of the Army, Red River Depot v. FLRA, 977 F.2d 1490, 1491 (D.C. Cir. 1992); Bureau of Indian Affairs v. FLRA, 887 F.2d 172, 173 (9th Cir. 1989); see also Herz, supra note 12, at 895 (noting, at the end of President H.W. Bush’s tenure, that the “FLRA is in constant litigation with other agencies over labor practices”).
the DOJ also sought the reversal of decisions by the Merit Systems Protection Board (MSPB) and the National Transportation Safety Board (NTSB), a practice that continued under Presidents W. Bush and Obama as well.  

Around the same time, the D.C. Circuit also recognized the need for the judiciary to address interagency disputes.

Finally, the Reagan Administration also brought claims asserting that adjudications of independent agencies were procedurally flawed, which is unusual in this type of litigation. In these cases, the DOJ litigated ostensibly to improve independent agencies’ decisionmaking processes.

---

President W. Bush: See, e.g., Dep’t of the Air Force, 436th Airlift Wing v. FLRA, 316 F.3d 280, 281 (D.C. Cir. 2003); Dep’t of the Air Force, 315th Airlift Wing v. FLRA, 294 F.3d 192, 193-94 (D.C. Cir. 2002); U.S. Dep’t of Justice v. FLRA, 266 F.3d 1228, 1229 (D.C. Cir. 2001).


President Obama: See, e.g., Cobert v. Miller, 800 F.3d 1340, 1341-42 (Fed. Cir. 2015) (MSPB); Huerta v. Ducote, 792 F.3d 144, 147 (D.C. Cir. 2015) (NTSB); Archuleta v. Hopper, 786 F.3d 1340, 1343 (Fed. Cir. 2015) (MSPB); Kaplan v. Conyers, 733 F.3d 1148 (Fed. Cir. 2013) (en banc) (MSPB).

See Mead, supra note 12, at 1219 (citing Mail Order Ass’n of Am. v. USPS, 986 F.2d 509, 527 n.9 (D.C. Cir. 1993)).

See, e.g., Confederated Tribes & Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466, 467-70 (9th Cir. 1984); Prof’l Air Traffic Controllers Org. v. FLRA, 685 F.2d 547, 551-75 (D.C. Cir. 1982).

See infra text accompanying notes 134-38. For additional discussion of litigation against independent agencies as a form of executive oversight, see Part I.C.1 below.
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 President Truman. In one such case brought under the Truman Administration, the DOJ litigated against the Federal Maritime Commission on an essential matter of jurisdiction: whether the executive branch could be categorized as a "person" in regard to whom the Maritime Commission might adjudicate claims under the Sherman Act. Starting with and since the Truman Administration, the DOJ has brought cases disputing the jurisdiction of agencies such as the ICC, Federal Power Commission, FTC, and SEC.

For instance, under President Truman, the DOJ claimed the ICC incorrectly applied its organic act (the Interstate Commerce Act) in a matter regarding the recovery of fees. In another case litigated under the same Administration, the DOJ argued that because a recently passed statute expanded the authority of the Department of the Interior, adjudication by the Federal Power Commission actually infringed on the Department's authority as a result. Under President Eisenhower, the Solicitor General argued that a confidentiality privilege involving copies of reports submitted to the Census Bureau pursuant to the Census Act should trump the FTC's investigatory subpoena power under the Federal Trade Commission Act. 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 agencies; however, it was effectively settled by the Solicitor General behind the scenes, in that he chose, while arguing ostensibly on behalf of the independent agency, to represent the independent agency's position as incorrect because the FTC did not have separate litigating power at the time.

During President Johnson's tenure, the DOJ appealed the Federal Power Commission's licensing of a dam in order to preserve the Department of

---

91. See infra Table B.1.
93. United States v. Interstate Commerce Comm'n, 337 U.S. 426, 428-29 (1949). This case also represents an early instance of the executive branch suing to recover fees from the independent agency. See id.
96. See Karr, supra note 64, at 1091-92 (noting that in St. Regis Paper Co., "the Solicitor General represented the FTC by arguing that the position the FTC proffered was not the proper one," which "illustrates the conflict that the Solicitor General faces when representing a government that is composed of various agencies that do not always come to the same position, as well as the difficulties that the FTC had in obtaining adequate representation before it was granted independent litigating authority").
Interior’s prerogative to lease the relevant land itself. 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), but lost in light of the significant authority delegated to the SEC by its enabling statute.98

In addition, there have been a number of jurisdictional battles over the regulation of labor involving the OSHRC, FLRA and, most recently, the National Labor Relations Board (NLRB). Some of these disputes have arisen from DOJ petitions for review of independent agency decisions (like those discussed in Part I.B.1 above). Others are as follows: Under President Nixon, the DOJ litigated nationwide to maintain the Secretary of Labor’s authority in the face of encroaching OSHRC decisionmaking jurisdiction.99 Two more cases concerning similar matters were decided under the first year of the Ford presidency and continued the DOJ’s litigation agenda on behalf of the Secretary of Labor.100 President Reagan’s DOJ argued for limits to the FLRA’s and OSHRC’s power to regulate an executive agency.101 Under President H.W. Bush, the DOJ also challenged statutory interpretation by the FLRA and continued the efforts to preserve the Department of Labor’s authority to interpret its own regulations from an override by OSHRC.102 In referencing some of these cases, then-Judge Patricia Wald suggested the inevitability of interagency conflict.103

During President Clinton’s tenure, the Department of Labor sought to maintain its authority and limit the jurisdiction of the Federal Mine Safety and Health Review Commission in a regulatory matter where both agencies had

---

99. See Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1256-57 (4th Cir. 1974); Brennan v. S. Contractors Serv., 492 F.2d 498, 499 (5th Cir. 1974); Brennan v. OSHRC, 491 F.2d 1340, 1341-42 (2d Cir. 1974).
100. See Brennan v. OSHRC, 513 F.2d 713, 714 (8th Cir. 1975); Brennan v. OSHRC, 513 F.2d 553, 554 (10th Cir. 1975).
102. See Martin v. OSHRC, 499 U.S. 144, 146-47 (1991); U.S. Dep’t of the Navy v. FLRA, 975 F.2d 348, 349-50 (7th Cir. 1992); U.S. Dep’t of Def. Dep’t of Military Affairs v. FLRA, 964 F.2d 26, 27 (D.C. Cir. 1992).
103. See Patricia M. Wald, Essay, “For the United States”: Government Lawyers in Court, 61 LAW & CONTEMP. PROBS. 107, 127 & n.85 (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.”).
During the Clinton, W. Bush, and Obama Administrations, the DOJ continued to seek limits to the FLRA’s power to interpret its enabling act in the shadow of other legislation. And during President W. Bush’s tenure, the DOJ also argued for limits to the MSPB’s authority to interpret statutes within its expertise that were nonetheless not within its organic act. (Interagency litigation was not always labor related, however, as the Reagan DOJ also reprised the battle for jurisdiction between the Department of the Interior and the Federal Energy Regulatory Commission in the licensing of dams.) Under President Obama, the DOJ also argued on behalf of a Department of Energy entity and the Department of Interior that the Federal Energy Regulatory Commission’s enabling act did not create a waiver for U.S. sovereign immunity from monetary penalties.

Finally, in 2018, the DOJ fought for an interpretation of the National Labor Relations Act (NLRA) that would limit the ability of the independent NLRB to protect employees’ opportunities to engage in collective action. Like DOJ efforts to reduce the impact of labor regulations on executive agencies, this case is an “illustration of the declining power of workers in the U.S. political system,” which is why it is included in the category of executive administration. However, the DOJ’s decision to oppose the NLRB in this case was influenced by President Trump. In this instance, there was a

---

111. See Marianne Levine, Justice Department Switches Sides in Supreme Court Case, POLITICO (June 16, 2017, 6:30 PM EDT), https://perma.cc/NZG6-S225 (“The DOJ acknowledged that it previously supported the NLRB’s position, but that ‘after the change in...”).
convergence of 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 as a policy matter.\footnote{As Justice Breyer noted during oral argument, the petitioner’s position, newly supported by the DOJ, “undermin[es] and chang[es] radically” the “interpretation” of labor laws that are the “entire heart of the New Deal.” Transcript of Oral Argument at 7-9, Epic Sys. Corp., 138 S. Ct. 1612 (Nos. 16-285, 16-300 & 16-307), 2017 WL 4517132 [hereinafter Epic Systems Transcript of Oral Argument].}

Ultimately, the Supreme Court decided in favor of the executive branch’s position. In doing so, it declared that no \textit{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 nonorganic and was implemented by an executive agency that has no special claim to its interpretation.\footnote{See Epic Sys. Corp., 138 S. Ct. at 1629.} Arguably, this decision affirms scholars who have argued that there is—or at least should be—a generalized judicial reluctance to grant \textit{Chevron} deference to independent agencies, relative to executive agencies, because of independent agencies’ relative lack of political accountability as compared to executive agencies.\footnote{See infra notes 125, 162 and accompanying text.} This theory of the case is discussed in depth in Part I.C.2 below.

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 government’s longstanding public interest in breaking up monopolies and ensuring fair competition. Certainly, the DOJ may have focused on demonopolizing certain industries due to the political views of the time. That said, the tactic of bringing suit against independent agencies to uphold antitrust norms has transcended presidential administrations.

During the Roosevelt and Eisenhower Administrations, in order to ensure competition in shipping, the DOJ, on behalf of the Department of Agriculture, appealed orders issued by the ICC and the then-existing Federal Maritime Board.\footnote{See, e.g., Fed. Mar. Bd. v. Isbrandtsen Co., 356 U.S. 481, 482-83, 488, 500 (1958); Sec’y of Agric. v. United States, 347 U.S. 645, 646-47, 650, 652-54 (1954); Interstate Commerce Comm’n v. Inland Waterways Corp., 319 U.S. 671, 673, 679-80, 682-83, 691-92 (1943).} The DOJ pushed back against independent agencies’ certification of
mergers under President Nixon. Under President Ford, the DOJ brought suit to dispute an anticompetitive agreement that an independent agency allowed three airline companies to make among themselves. And under President Carter, the DOJ pursued a governmental interest in reducing corporate monopolies in media and communication. In addition, the DOJ under President Carter sought limits to the FCC’s attempts to relax rules restricting market power, to better align with antitrust enforcement values. A number of Reagan-era cases involve the DOJ litigating to dispute rate-fixing orders approved by independent agencies in industries such as railroad and telephone services.

Finally, it is worth noting that the DOJ has not always litigated in furtherance of antitrust norms. For instance, the DOJ supported the ICC’s certification of a railway fee structure for the transportation of freight goods under President Carter, while simultaneously preventing the Environmental Protection Agency (EPA) from filing an amicus brief detailing the environmental cost of the certification. In this case, political influence or capture may have overcome the DOJ’s general interest in maintaining antitrust values.

C. Power Shifts Within the Executive Branch

The “internal separation of powers,” that is, the internal balance of power within the executive branch, is “most often equated with measures that check or constrain the [e]xecutive [b]ranch, particularly presidential power.” According to this view, the preservation of independent agencies is a key component to internal checks on presidential power. Nonetheless, dynamics

---


121. See United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 676-78 (1973); Devins & Herz, supra note 12, at 579 n.82 (noting that the “DOJ refused to allow EPA to submit an amicus brief in United States v. SCRAP”).

122. See Metzger, supra note 21, at 428-29; see also supra note 21.

that intensify executive power at the expense of independent agencies must also be factored into this paradigm. In other words, the potential for aggrandizement of the executive branch at the expense of the fourth branch also raises "internal" separation of powers concerns.

This Subpart argues that litigation brought by the DOJ against independent agencies contributes to the internal separation of powers paradigm. It does so both by highlighting shifts in power between executive and independent agencies that have resulted from this litigation and by considering the impact of those shifts on administrative values. Part I.C.1 analyzes the scope and success of DOJ challenges to independent agency actions 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, and therefore contributes to the limited menu of options for executive oversight of independent agencies. In other words, litigation has offered a measure of ex post oversight, through judicial review, that complements others' suggestions for ex ante oversight of independent agency activity.124

Part I.C.2 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 granted less frequently to independent agencies than to executive agencies, citing the doctrine's emphasis on political accountability as a basis for denying deference.125 That said, a recent Supreme

---

124. See, e.g., Coglianese, supra note 24, at 734-36 (suggesting that analysis by independent agencies suffers because it is not subject to "legislative or presidential requirements for regulatory analysis").

125. See 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

---
Court decision, *Epic Systems Corp. v. Lewis*, declined to defer to an independent agency's interpretation of its organic act on a basis other than the political rationale.\(^{126}\) Rather, this decision claimed that an independent agency did not merit deference for its interpretation of its organic act—despite the agency's claim to expertise and authority to interpret the statutory scheme—because this interpretation conflicted with an executive agency's interpretation of a second, general act.\(^{127}\) While this case is the first to go so far, it 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. This Subpart argues, nonetheless, that this decision is an indefensible denial of *Chevron* deference to an independent agency in the face of a less persuasive executive agency interest, and is therefore not a justifiable motivation for litigation against independent agencies moving forward.

1. Arbitrary and capricious review as executive oversight

The President has very few ex ante means for influencing independent agencies,\(^ {128}\) to the dismay of some commentators.\(^ {129}\) Accordingly, scholars have debated whether the actions of independent agencies should receive additional judicial scrutiny given that they are insulated from the President.\(^ {130}\)

much like Supreme Court Justices, this claim [of deference under the *Chevron* principle based on accountability] is more than a little difficult to support . . . .”); Kagan, supra note 2, 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, 442-50 (2006) (arguing that independent agencies should receive less *Chevron* deference because they are not politically accountable, and furthermore, that courts should treat executive agencies with more deference); David M. Gossett, Comment, *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”).

\(^ {126}\) 138 S. Ct. 1612, 1630 (2018). For further discussion of the Court’s decision, written by Justice Gorsuch, to withhold deference in this case, see text accompanying notes 203-06 below.

\(^ {127}\) See *Epic Systems*, 138 S. Ct. at 1629; see also infra text accompanying notes 192-94.

\(^ {128}\) See infra Part II.A.

\(^ {129}\) See, e.g., sources cited supra note 24.

\(^ {130}\) See, e.g., Catherine M. Sharkey, State Farm “with Teeth”: *Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1592-93 (2014) (arguing that “[c]ourts should probe the underlying cost-benefit analyses of independent regulatory agencies (not subject to OIRA review) with more vigor”); see also Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 7-8, 42-45 (2009) (arguing 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).
Even Supreme Court Justices have considered the “possibility that judicial review could apply differently to independent regulatory agencies and executive agencies.” Litigation may offer a balm to these concerns while also adhering to the common view that independent agencies are separated from the President within the executive branch so that they can implement their mandates with impartiality and expertise.

Rather than reducing this internal separation, litigation allows executive agencies to draw on courts to oversee the quality of independent agency activities. More specifically, executive agencies have brought narrowly focused, ex post challenges to independent agency decisionmaking and policymaking, 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.

One such set of cases furthering oversight includes Reagan-era litigation casting a watchful eye on the integrity of administrative adjudications. In at least a few instances, the DOJ argued that there were procedural defects in adjudications by independent agencies. In one case, the DOJ asserted that impermissible ex parte communications by the FLRA irrevocably tainted its decision. Although the D.C. Circuit found that the ex parte contacts in question did not corrupt the agency’s final decision, one judge nonetheless

---

132. See Kirti Datla & Richard L. Revesz, Deconstructing Independent Agencies (and Executive Agencies), 98 CORNELL L. REV. 769, 770-72 (2013) (observing that independent agencies’ “structural features [were] recharacterized from promoting expertise to fostering independence from the President”); see also Emily Hammond Meazell, Presidential Control, Expertise, and the Deference Dilemma, 61 DUKE L.J. 1763, 1776-77 (2012) (noting that independent agencies “are designed to be insulated from politics to ensure that they exercise more neutral judgment” because “the goal of independent agencies is to separate expertise and politics”).
133. See Farber & O’Connell, supra note 20, at 1454 (suggesting that Congress delegates overlapping authority to agencies to promote conflict that leads to outcomes more in line with Congressional intent) (citing Jacob E. Gersen, Overlapping and Underlapping Jurisdiction in Administrative Law, 2006 SUP. CT. REV. 201, 226); Neal Kumar Katyal, Essay, Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within, 115 YALE L.J. 2314, 2324-27 (2006) (suggesting that “[p]artially overlapping agency jurisdiction could create friction” and conflict that leads to improved policies).
134. See, e.g., Confederated Tribes & Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466, 467-70 (9th Cir. 1984); Prof’l Air Traffic Controllers Org. v. FLRA, 685 F.2d 547, 551-75 (D.C. Cir. 1982); see also supra text accompanying note 89.
135. Prof’l Air Traffic Controllers Org., 685 F.2d at 556-57, 561, 564.
136. Id. at 574-75.
opined that the judiciary should have a role in overseeing independent agencies on behalf of the executive branch because “[t]he laxness with which FLRA protected the integrity of its adjudicatory processes in this case ought [to] 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.”\footnote{Id. at 600 (Robinson, J., concurring in part, and concurring in the judgment).}

In another case, the DOJ won its argument that the Federal Energy Regulatory Commission maintained a poor decisionmaking record by failing to prepare and include an environmental impact statement.\footnote{Confederated Tribes & Bands of the Yakima Indian Nation, 746 F.2d at 472, 475; see also Herz, supra note 12, at 895 (noting that the “Secretary of Commerce has gone after the Federal Energy Regulatory Commission (FERC) for not preparing an environmental impact statement”).}

More commonly, the DOJ has sought judicial review of independent agencies’ actions on the basis of the “arbitrary and capricious” standard.\footnote{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) (2018).}

This approach to reviewing independent agency action is supported by 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.\footnote{See sources cited supra note 130 (listing scholars who argue for more probing and skeptical judicial review when an agency is perceived to have less accountability or transparency); cf. Mark Seidenfeld, Chevron’s Foundation, 86 NOTRE DAME L. REV. 273, 307 (2011) (noting the view that hard look review should apply at Step Two of the Chevron analysis). Step Two of the Chevron analysis, at which point the court decides whether an agency’s interpretation of ambiguous statute is reasonable, tends to be permissive; generally, the agency’s interpretation is upheld at that level. Kenneth A. Bamberger & Peter L. Strauss, Essay, Chevron’s Two Steps, 95 VA. L. REV. 611, 623-24 (2009) (“In other words, Step Two analysis considers whether agencies have permissibly exercised the interpretive authority delegated to them by reasonably employing appropriate methods for elaborating statutory meaning.”); Kent Barnett & Christopher J. Walker, Chevron Step Two’s Domain, 93 NOTRE DAME L. REV. 1441, 1448 (2018) (“[T]he Court has rarely provided significant guidance on step two. Indeed, it has only rejected agency statutory interpretations at step two three times.”).}

Accordingly, courts have engaged in arbitrary and capricious review from the earliest of these cases onwards—these cases represent approximately 20% of all the cases in this dataset, and the DOJ won more than half of these cases on that basis.\footnote{See infra Table A.3.} That the application of this standard has favored the DOJ somewhat more frequently than the independent agency means that litigation has the
potential to correct, and perhaps even to deter, lower-quality administrative activity.142

Even the Supreme Court has decided cases brought by the DOJ against independent agencies on this basis. For example, during the Truman Administration, the Court reversed a lower court’s dismissal of a complaint that was brought against an ICC decision on the basis of the arbitrary and capricious standard.143 Under President Carter, on the other hand, the Supreme Court disagreed with the court below to rule that an independent agency had not regulated in an arbitrary or capricious manner.144

Around this time, lower courts decided in favor of the DOJ’s position on this basis in a number of cases. During the Nixon presidency, the Court affirmed the lower court’s decision in favor of the DOJ’s argument that an independent agency’s decision was arbitrary because it did not take into account data submitted by the Department of Defense.145 And during President Carter’s tenure, the D.C. Circuit limited the decisionmaking jurisdiction of an independent agency after determining that the agency’s order approving a price-fixing scheme was decided in an arbitrary and capricious manner.146 Similar cases followed suit.147

142. 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. See, e.g., Dep’t of the Treasury, Bureau of the Pub. Debt v. FLRA, 670 F.3d 1315, 1319 (D.C. Cir. 2012) (holding that the court of appeals lacked subject matter jurisdiction to consider the petition for review).

143. United States v. Interstate Commerce Comm’n, 337 U.S. 426, 429-30 (1949) (“The complaint 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 order was based on a misapplication of law and was ‘otherwise arbitrary, capricious and without support in and contrary to law and the evidence.’”).

144. See FCC v. Nat’l Citizens Comm. for Broad., 436 U.S. 775, 809 (1978) (holding that the Court “cannot agree with the Court of Appeals that it was arbitrary and capricious” for the FCC to regulate as it did).

145. See United States v. United States, 417 F. Supp. 851, 856 (D.D.C. 1976) (per curiam), aff’d mem. sub nom. Nat’l Classification Comm. v. United States, 430 U.S. 961 (1977) (“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 data . . . .”).

146. The D.C. Circuit’s panel opinion was then vacated as moot in relevant part by the court en banc during the Reagan Administration. United States v. Fed. Mar. Comm’n, 694 F.2d 793, 795 (D.C. Cir. 1982) (en banc) (per curiam); id. at 821-24 (reproducing the relevant vacated portions of the panel opinion).

147. See, e.g., Ford Motor Co. v. Interstate Commerce Comm’n, 714 F.2d 1157, 1165 (D.C. Cir. 1983) (“The peremptory dismissal of [the Department of Defense’s rate challenge, we believe, fully warrants the description, arbitrary and capricious administrative action.”). But see INS v. FLRA, 855 F.2d 1454, 1457-58 (9th Cir. 1988) (paying lip service to arbitrary and capricious review as the governing standard while readjudicating the substance of the case).
In a few cases 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 in light of the scope of the agency’s authority,148 the dissent asserted that the court’s scope of review was in fact limited to arbitrary and capricious review only.149 In another case in which the majority refused to grant deference to the FLRA,150 the dissent suggested that instead, the proper standard for review was arbitrary and capricious (and that the agency’s decision was defensible under this standard).151

More recently, since President H.W. Bush’s tenure, courts have applied the arbitrary and capricious standard to mixed effect, deciding alternately in favor of the independent agency152 and (somewhat more often in the dataset for this Article) in favor of the DOJ litigating on behalf of an agency.153 (These include cases involving various battles between independent agencies concerned with postal services.)154 On occasion, courts have referenced the arbitrary and

148. U.S. Dep’t of Agric. v. FLRA, 691 F.2d 1242, 1243, 1246-47 (8th Cir. 1982) (declining to defer to the FLRA because of its lack of expertise in "a provision not within the FLRA’s enabling statute").

149. See id. at 1250-51 (Heaney, J., dissenting) (arguing that, although the majority acknowledged its review was limited by the arbitrary and capricious standard, the majority did not appropriately apply the standard).

150. Div. of Military & Naval Affairs v. FLRA, 683 F.2d 45, 48-49 (2d Cir. 1982).

151. See id. at 51 (Oakes, J., dissenting) ("I do not find the FLRA’s interpretation either arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."); see also id. at 49 (arguing that the agency’s "construction is entitled to considerable deference").

152. See infra Table A.3; see also, e.g., U.S. Customs & Border Prot. v. FLRA, 647 F.3d 359, 362-66 (D.C. Cir. 2011); James v. Santella, 328 F.3d 1374, 1377 (Fed. Cir. 2003); Dep’t of Justice v. FLRA, 144 F.3d 90, 92-96 (D.C. Cir. 1998); Dep’t of Veterans Affairs v. FLRA, 33 F.3d 1391, 1394-95 (D.C. Cir. 1994); U.S. Border Patrol v. FLRA, 12 F.3d 882, 883-85 (9th Cir. 1993). Courts also sometimes state the arbitrary and capricious standard but fail to apply it. See, e.g., U.S. INS v. FLRA, 4 F.3d 268, 270-74 (4th Cir. 1993). These cases are not noted as "arbitrary and capricious" in the Appendix.


154. "Today, the two independent agencies [the Postal Service and the Postal Regulatory Commission, formerly known as the Postal Rate Commission] seem to generate several

footnote continued on next page
capricious standard but made final decisions based on their own statutory interpretation.\textsuperscript{155}

Certainly, litigation is not an ideal vehicle for the “day to day oversight of the care and thoroughness of independent agency reasoning,”\textsuperscript{156} and is perhaps, at best, a “blunt instrument” for effecting improvements.\textsuperscript{157} Furthermore, one might expect that the DOJ is unlikely to pursue cases 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.\textsuperscript{158} Nonetheless, the relative frequency with which the courts have reviewed narrowly focused independent agency adjudications\textsuperscript{159} 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. Arguably, litigation offers an imperfect and ad hoc, but nonetheless accessible, option for ex post executive oversight of independent agencies.

2. Reduced \textit{Chevron} deference to independent agencies

Since \textit{Chevron}, “[c]ourts have been left to resolve procedural and structural distinctions between independent agencies and executive branch agencies.”\textsuperscript{160} In addition, some commentators have argued that independent agencies merit
less deference under *Chevron* than executive agencies. Others point to skepticism by some courts toward independent agencies’ ability to make reasonable policy choices because those agencies lack political accountability.

Cases brought by the DOJ against independent agencies often involve conflicts between the statutory interpretation of an executive agency and a competing interpretation by an independent agency, either or both of which may merit *Chevron* deference. In many of these cases, the judiciary must decide 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 the recent *Epic Systems* decision—if an executive agency’s interpretative power is at stake.

While the DOJ has a considerable win rate on behalf of executive agencies in cases involving *Chevron* in some capacity, the outcomes of these cases are not clearly inconsistent with a neutral application of the doctrine. In other words, courts have not applied *Chevron* in a manner that is obviously hostile toward independent agencies. While a court may have decided not to defer to an independent agency in a given instance, there is, for the most part, no indication that a court withheld deference because the agency is independent. That said, *Epic Systems* 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. Before then, courts accorded some weight to independent agencies’ interpretations under *Skidmore v. Swift & Co.* and similar agency-specific principles valuing administrative discretion and

---

161. See *infra* text accompanying note 125.

162. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (noting that “[a]nother 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 (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984))); *May*, *infra* note 125, at 447 (“*F*orty years after *Skidmore*, it is not surprising that the Court in *Chevron* justified the new deference rationale in part by referencing agency expertise. Nevertheless, the agency expertise justification plays second fiddle to the primary political accountability rationale in *Chevron.*” (footnote omitted)).


164. The DOJ has won approximately 60% of all cases in this Article’s dataset. See *infra* Table A.2.1. The DOJ has won approximately 80% of *Chevron* cases in this Article’s dataset. See *infra* Table A.3.


166. See 323 U.S. 134 (1944).
expertise. These principles included, for instance, a pre-
Chevron doctrine under which some courts deferred to OSHRC interpretations of Department of Labor regulations.

Furthermore, prior to Chevron, at least one court acknowledged an independent agency's "experience and expertise." These cases are in keeping with the contention that "the Court was highly deferential to agency interpretations before Chevron."

However, courts also sometimes declined to affirm independent agencies' decisions prior to 1984. One justification for this was that "[n]o great deference is due an agency interpretation of another agency's statute." Another was

167. See, e.g., Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 97 (1983) ("[T]he FLRA 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." (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963))); id. at 97 ("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.' (quoting Am. Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965)); U.S. Dep't of Agric. v. FLRA, 691 F.2d 1242, 1247 (8th Cir. 1982) (declining to defer to the FLRA because of its lack of expertise on "a provision not within the FLRA's enabling statute"); MCI Telecomms. Corp. v. FCC, 561 F.2d 365, 379 & n.67 (D.C. Cir. 1977) (noting that "the deference normally owed to our agency's interpretation of its own decisions is not appropriate" where the agency's analysis was not sound (citation omitted)).

168. See Brennan v. OSHRC, 513 F.2d 713, 715-16 (8th Cir. 1975) (holding that the Secretary of Labor's "recommendation does not necessarily control the [OSHRC]'s conclusion"); Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1267 (4th Cir. 1974) ("The [OSHRC] is subject to a narrow scope of review which requires the courts of appeals to defer to [OSHRC] decisions of policy questions within their relatively broad area of discretion."). But see Brennan v. S. Contractors Serv., 492 F.2d 498, 501 (5th Cir. 1974) ("Since . . . the Secretary [of Labor] is authorized to promulgate regulations, his interpretation is entitled to great weight.").

169. See Usery v. Hermitage Concrete Pipe Co., 584 F.2d 127, 134 (6th Cir. 1978) ("[W]e also hold that the quantum of proof which [OSHRC], 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."). The court ultimately held, however, that OSHRC's standard to determine a violation under its enabling act to be too stringent. Id. at 129.

170. 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). For example, a case decided before Chevron noted that "an 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." Confederated Tribes & Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466, 470 (9th Cir. 1984).

171. Div. of Military & Naval Affairs v. FLRA, 683 F.2d 45, 48 (2d Cir. 1982) (emphasis added). The D.C. Circuit has also adopted this approach. See, e.g., U.S. Dep't of the Interior, Bureau of Reclamation v. FLRA, 23 F.3d 518, 522 (D.C. Cir. 1994); Ill. Nat'l Guard v. FLRA, 854 F.2d 1396, 1400 (D.C. Cir. 1988); Dep't of the Treasury v. FLRA, 837 F.2d 1163, 1167 (D.C. Cir. 1988) ("Under the law of this circuit, when an agency..." footnote continued on next page
based on the passage of legislation reducing the independent agency's authority to regulate the relevant issue.\textsuperscript{172} In addition, there was some disagreement among courts regarding whether an adjudicatory commission should be granted more deference because of its role as an independent adjudicator, or whether it should be granted less deference because it may, in fact, be subordinate to an agency head.\textsuperscript{173} The issue of how much deference to accord an Article I adjudicatory body is not limited to independent regulatory commissions, and may include adjudicatory bodies housed in executive agencies.\textsuperscript{174} However, the language of the relevant decisions makes clear that courts privilege independence in determining how much power the enabling act gives the commission in question.\textsuperscript{175} A court also considered, but rebuffed, an expansive argument by the Reagan Administration that presidential for-cause removal decisions are always entitled to great deference.\textsuperscript{176}

As is well known, \textit{Chevron} changed the opportunity to consult with agencies into more of an obligation, once the agency's authority to interpret the statute has been established.\textsuperscript{177} In reality, the case law suggests a slightly more complicated framework in regard to independent agencies, albeit one that does not appear to stem from particular hostility toward the fourth

\textsuperscript{172} Ford Motor Co. v. Interstate Commerce Comm'n, 714 F.2d 1157, 1158-59 (D.C. Cir. 1983) (noting that Congress passed the Staggers Act to "largely remove[] rail rate regulation from ICC oversight" after the ICC "gave the term 'market dominance' an expansive interpretation").

\textsuperscript{173} Compare Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 778-79 (1984) ("The fact that in reality it is the Secretary [of the Interior]'s, and not [FERC]'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." (footnote omitted)), \textit{with} Brennan v. OSHRC, 491 F.2d 1340, 1344 (2d Cir. 1974) (noting that the court's review "may be unduly deferential to the [OSHRC], since the Act entrusts only adjudicatory functions to the Commission while assigning rulemaking power and initiation of enforcement proceedings to the Secretary [of Labor]").

\textsuperscript{174} See Comments from Michael E. Herz, \textit{supra} note 44, at 58.

\textsuperscript{175} See \textit{supra} note 173.

\textsuperscript{176} Berry v. Reagan, No. 83-3182, 1983 WL 538, at *3 (D.D.C. Nov. 14, 1983) ("Defendant [President Reagan] maintains that this phrase [that Commissioners serve 'during the pleasure of the President']... is entitled to great deference by the 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."). \textit{Vacated as moot mem.}, 732 F.2d 949 (D.C. Cir. 1983).

branch. Certainly, courts defer to independent agencies, particularly when statutory authority is clearly conferred to the agency.\textsuperscript{178}

However, courts do not defer as a matter of course. In some cases, courts have invoked the deference doctrine for which \textit{Chevron} stands, but ultimately decided against the independent agency based on the arbitrary and capricious standard.\textsuperscript{179} In others, they were willing to defer to the agency, but ultimately determined that the independent agency’s interpretation of statute was unreasonable.\textsuperscript{180} In addition, similar to the concept of deference enshrined in \textit{Auer},\textsuperscript{181} courts’ previous predisposition toward OSHRC changed,\textsuperscript{182} with both a court of appeals and the Supreme Court altering course after \textit{Chevron} to decide that the independent agency is inherently less deserving of deference to its interpretation of a regulation than the executive agency if the executive agency issued the rule.\textsuperscript{183} It is possible that “the explanation was not that executive agencies trump independent ones,” but that “regulators (with delegated policymaking authority) trump adjudicators.”\textsuperscript{184} It is worth noting, however, that decisions favoring regulators over adjudicators necessarily privilege politically accountable bureaucrats over those who operate with greater independence, which is a shift from courts’ earlier preference.\textsuperscript{185}

Furthermore, as discussed earlier in this Part, the DOJ has also sought and won judicially imposed limitations to independent agencies’ implementation of their enabling acts when they are in conflict with statutes administered by

\textsuperscript{178} See, e.g., Fort Stewart Schs. v. FLRA, 495 U.S. 641, 644-45 (1990) (“[T]he [FLRA] was interpreting the statute that it is charged with implementing. We must therefore review its conclusions under the standard set forth in \textit{Chevron},” (citations omitted)); U.S. INS v. FLRA, 4 F.3d 268, 271 (4th Cir. 1993) (“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 [its enabling statute].”).

\textsuperscript{179} See, e.g., Bureau of Indian Affairs v. FLRA, 887 F.2d 172, 175-76 (9th Cir. 1989) (saying that “the Authority is correct in its contention that deference is owed its decision” but also that “the Authority’s order was arbitrary and not in accordance with the law”).

\textsuperscript{180} See, e.g., IRS v. FLRA, 494 U.S. 922, 928 (1990); INS v. FLRA, 995 F.2d 46, 48 & n.14 (5th Cir. 1993); INS. v. FLRA, 855 F.2d 1454, 1457-62 (9th Cir. 1988) (referring to “deference” but ultimately deciding based on whether the agency’s decision was “reasoned and supportable”).

\textsuperscript{181} Auer v. Robbins, 519 U.S. 452 (1997) (holding that federal courts should yield to an agency’s interpretation of an ambiguous regulation that the agency itself has promulgated).

\textsuperscript{182} For further discussion of the courts’ pre-\textit{Chevron} decisions related to the OSHRC, see supra text accompanying note 168.

\textsuperscript{183} See, e.g., Martin v. OSHRC, 499 U.S. 144, 146-47, 152-53 (1991); Donovan v. A. Amorello & Sons, 761 F.2d 61, 64-66 (1st Cir. 1985).

\textsuperscript{184} Comments from Michael E. Herz, supra note 44, at 55.

\textsuperscript{185} See supra text accompanying notes 173-75.
executive agencies. These cases were, perhaps, precursors to *Epic Systems*, which limited 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).

*Epic Systems Corp. v. Lewis* concerned whether the Federal Arbitration Act is constrained by the NLRA such that the latter limits the enforcement of arbitration agreements that may infringe on an employee’s ability to engage in collective action. The Principal Deputy Solicitor General argued broadly that the Arbitration Act should not yield to the NLRA, and the Supreme Court agreed.189

Despite the statutory precept that particularized authority trumps general authority, 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 NLRA. In doing so, the Supreme Court illustrated 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 in which the Court did not allow a general act to limit an independent agency’s interpretation of its enabling statute.191

186. See supra notes 93-96, 104-05 and accompanying text.
188. See Epic Systems Transcript of Oral Argument, supra note 112, at 21; see also Epic Systems United States Amicus Brief, supra note 111, at 9-10.
189. See Epic Sys. Corp., 138 S. Ct. at 1619, 1623-30. There is some evidence that this decision keeps with a trend in favor of the Arbitration Act in the Court’s decisions. See id. at 1645 (Ginsburg, J., dissenting) (noting limited defenses based on the Arbitration Act’s saving clause, which has been used to reconcile the NLRA and the Arbitration Act, when doing so would “discriminate against arbitration”); see also Robert Barnes, Supreme Court Rules That Companies Can Require Workers to Accept Individual Arbitration, WASH. POST (May 21, 2018, 11:22 AM EDT), https://perma.cc/D3S3-N42Y (quoting a Washington attorney saying that “[m]ost employers expected this decision, and did not hesitate where desired to insert individualized arbitration provisions into employment agreements”). But the majority in any case affirmed the position taken by the White House against the NLRB’s interpretation of law. Epic Sys. Corp., 138 S. Ct. at 1619, 1623-30.
191. For instance, a previous Supreme Court decision found that the Sherman Act, a general antitrust statute, need not limit the SEC’s power, especially when it was reinforced by a long regulatory practice, congressional approval, and new legislation. See Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659, 660-61, 681-91 (1975); see also supra text accompanying note 98.
Moreover, the Epic Systems Court declared that the new principle is consistent with Chevron. Justice Gorsuch, writing for a 5-4 majority, explained:

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 second statute it does not administer. One of Chevron’s essential premises is simply missing here.192

Puzzlingly, the Court neglected to explain why Department of Transportation enforcement of the Arbitration Act is not likewise or instead limited by the NLRA, instead of the Board’s enforcement of the NLRA being limited by the Department of Transportation’s implementation of the Arbitration Act.

Some scholars have noted that “Chevron may have left some ambiguity or suggestion that independent agencies should not receive the same level of deference” as executive agencies.193 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 the Epic Systems decision.194

As a general matter, agencies tend to have a closer relationship to Congress than to courts.195 Presumably, any agency’s interpretation of its enabling legislation is based on greater subject matter expertise196 than another agency’s interpretation of a general statute impacting the same regulatory area.


193. BREGER & EDLES, supra note 45, at 170.


196. See Eskridge & Baer, supra note 170, at 1108, 1120-21 (arguing that independent agencies rely on specialized precedent in their decisionmaking, and therefore, that courts are well-advised to follow their lead).
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.” Indeed, independent agencies “deep engagement with and knowledge of their organic statutes” render them well suited to interpreting these statutes. While the doctrine of administrative deference acknowledges that agencies are often in a better position to anticipate legislative meaning than courts, this view also suggests that certain agencies are better suited to this than others—namely, independent agencies, which are more closely aligned with Congress than executive agencies. To the extent independent agencies have a stronger connection to Congress than do executive agencies, deference to an interpretation by the former might better uphold this purpose of Chevron—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 Epic Systems, the NLRB’s authority and expertise in its enabling act is stronger than the Department of Transportation’s authority and expertise in the Arbitration Act. Accordingly, the NLRB’s claim to interpretation is greater under Chevron Step Zero, which allows for deference only in those instances in which Congress intended an agency to have the power to further an interpretation of statute in the first place, and its interpretation is additionally more likely to be reasonable under Step Two, which allows for deference only when an agency’s interpretation of statute is reasonable.

Furthermore, while the Department of Transportation’s interpretation might be informational and persuasive, it concerns a general statute (the Federal Arbitration Act), not one for which the Department 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 the OLC’s capacity to render informed judgments about statutory issues of general importance—might be

197. See BREGER & EDLES, supra note 45, at 170.
199. “Chevron deference, or something much like it, is a necessary consequence of and corollary to Congress’s longstanding habit of relying on agencies to exercise substantial policymaking discretion to resolve statutory details.” Nicholas R. Bednar & Kristin E. Hickman, Chevron’s Inevitability, 85 GEO. WASH. L. REV. 1392, 1398 (2017).
200. See Seidenfeld, supra note 140, at 299-300.
201. See id. at 307.
202. See supra notes 63, 68-69 and accompanying text.
given some weight in the Court’s analysis, even though the Court would be unlikely to automatically defer to the Department based on the Solicitor General’s view. This is not a situation, however, that calls for forgoing deference to another agency’s competing interpretation of its organic act.

In addition to limiting the interpretive power of an independent agency, the Epic Systems majority also denied an argument for deference on the basis of political accountability when the executive internally disagrees, thus foreclosing this avenue as a justification for limiting the NLRA in the face of a competing interest in the Arbitration Act:

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 [NLRB] 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.203

Under the political accountability justification for Chevron deference,204 the Court might have affirmed the Solicitor General’s position on the grounds that the Department of Transportation 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.205 Instead, the Court decidedly refused to characterize the Department, or even the Solicitor General, as more politically accountable than the NLRB.206 If presidential influence on the agency is inapposite to determinations of deference, as both the Epic Systems decision and some scholars suggest,207 deference is owed the NLRB’s position at the expense of the

204. See Lisa Schultz Bressman, Procedures as Politics in Administrative Law, 107 COLUM. L. REV. 1749, 1758, 1763-65, 1764 n.98 (2007) (suggesting that the Chevron doctrine is part of the current administrative law trend legitimating “presidential control of agency decisionmaking” and noting the benefit of White House-led cost-benefit analyses to the grounding of agency decisionmaking); Kagan, supra note 2, at 2377 (suggesting Chevron deference might be more legitimately accorded when “presidential involvement rises to a certain level of substantiality, as manifested in executive orders and directives, rulemaking records, and other objective indicia of decisionmaking processes”); see also supra text accompanying note 125.
206. See supra text accompanying note 203.
207. See Emily Hammond, Essay, Chevron’s Generality Principles, 83 FORDHAM L. REV. 655, 667 (2014) (listing the factors that courts consider in second-order Chevron decisions, footnote continued on next page
Department, given the former's clearer delegation of authority and more significant expertise with respect to 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.

One possible motivation for the Court's opaque decision is 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. In a case involving the SEC, the Court chose not to defer to an independent agency's interpretation of its enabling legislation because the Court was concerned that the agency was expanding its own jurisdiction. In regard to Bureau of Alcohol, Tobacco & Firearms v. FLRA, one scholar notes that the Court was particularly concerned with constraining the FLRA's implementation of policy choices beyond those specified by Congress as within the FLRA's authority.

---

which fail to include political considerations); Peter M. Shane, Essay, Chevron Deference, the Rule of Law, and Presidential Influence in the Administrative State, 83 FORDHAM L. REV. 679, 694-95 (2014) (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.

208. 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 to the judiciary, as opposed to any agency alone. Cf. Hiro N. Aragaki, Equal Opportunity for Arbitration, 58 UCLA L. REV. 1189, 1193 (2011) (discussing how the Supreme Court often applies the Federal Arbitration Act in a manner that displaces state law).

209. In this case, the SEC sought to expand its jurisdiction to compel information under its own rules. See Dirks v. SEC, 463 U.S. 646, 654 (1983) (holding that the SEC could not compel information from someone who has it unless there is a duty to disclose information that arises from a financial relationship with one of the impacted parties); id. at 668 n.1 (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.”).


211. John H. Reese, Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times, 73 FORDHAM L. REV. 1103, 1132-35 (2004). This ideology has also been echoed by courts post-Chevron. See, e.g., U.S. INS v. FLRA, 4 F.3d 268, 271 (4th Cir. 1993) (“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.’”) (quoting Bureau of Alcohol, Tobacco & Firearms, 464 U.S. at 97)).
Executive (Agency) Administration  
72 STAN. L. REV. 641 (2020)

recently, the dissent in City of Arlington v. FCC 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.212 Similarly, the majority in Epic Systems may have curtailed the NLRB's statutory authority because it wished to limit the agency's potential to undercut an expansive interpretation of the Arbitration Act. More broadly, 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.213

II. Presidential Administration

The DOJ may also litigate against independent agencies on behalf of the President. This litigation may pursue the President’s substantive policymaking agenda, or seek to diminish independent agencies’ insulation from the President. Litigation as a tool of presidential administration is far rarer than its use to foster executive administration.214 Nonetheless, presidential administration via litigation has proliferated—relatively speaking—under President Trump.215

To the extent that it succeeds, litigation promoting presidential interests bears on the proper scope of presidential power vis-à-vis the other branches of government. If 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

212. See City of Arlington v. FCC, 569 U.S. 290, 312, 317 (2013) (Roberts, C.J., dissenting) (arguing that an “agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency”); see also 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.” (footnotes omitted) (quoting City of Arlington, 569 U.S. at 296 (majority opinion))).

213. See Jonathan H. Adler, Opinion, Shunting Aside Chevron Deference, REG. REV. (Aug. 7, 2018), https://perma.cc/H8RX-V82E (“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 . . . .”). For further discussion of judicial interest in enhancing executive power, see note 349 below.

214. Whereas executive administration cases make up nearly 90% of this Article’s dataset, presidential administration cases represent just over 10%. See infra Table A.1.1.

215. By mid-2018, the DOJ under President Trump had already litigated three presidential administration cases, compared to only two under the Clinton, W. Bush, and Obama Administrations. See infra Table A.1.1.
problematic as both a formal and a functional matter. For instance, this litigation may allow the President to infringe on the legislature's authority to insulate independent agencies, as in *Epic Systems*, in which the DOJ sought to circumscribe the NLRB's authority in pursuit of the Trump Administration's goals.\footnote{216} Litigation may also allow the executive branch to sidestep the proper channels for statutory reform.

That 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;\footnote{217} as well as to those who support greater judicial involvement in administrative statutory interpretation\footnote{218}—but perhaps only to the extent it does not interfere with the legislature's constitutional authority.

A. The Limits of Intrabranch 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—and despite a longstanding presidential interest in wielding administrative control\footnote{219}—the Supreme Court has ruled that the neither the powers conferred on the President by the Take Care Clause nor those provided by the Vesting Clause allow her to diminish the independent authority of any agency to interpret and carry out its statutory duties.\footnote{220} This tension between the constitutional powers of the President and statutory authority of agencies is particularly pronounced in regard to independent agencies.

\footnote{216. See *supra* note 109-112 and accompanying text.}
\footnote{217. See, e.g., CALABRESI & YOO, *supra* note 40, at 3-9; Kagan, *supra* note 2, at 2251-52.}
\footnote{218. See *supra* text accompanying note 213; *infra* note 349 and accompanying text.}
\footnote{219. Mashaw & Perry, *supra* note 53, 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").}
\footnote{220. Kendall v. United States *ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610, 612-613 (1838). Scholars have argued that Kendall is the companion to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), 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 12, 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).}
agencies. Indeed, although Kagan contended that presidential administration comports with the President’s authority to “direct administrative officials as to the exercise of their delegated discretion,” even she admitted that Congress intends that independent agencies be at least somewhat insulated from the President.

On the one hand, independence does 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 any previous member has ended. She also has limited opportunity to remove independent agency heads with good cause, and even to sue seeking changes to for-cause removal provisions. On the other hand, the menu of formal options for control has long been limited by convention.

221. See supra text accompanying note 5.
222. Kagan, supra note 2, at 2251, 2326-27 ("In then 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.").
224. Even a President’s strong desire to remove an independent agency head may not itself overcome a for-cause removal provision. See Paul Kiernan & Nick Timiraos, @Q&A: Can Trump Remove Powell as Fed Chairman?, WALL ST. J. (updated Dec. 28, 2018, 2:13 PM ET), https://perma.cc/7NM8-4EEM (noting that the President cannot remove the Chairman of the Federal Reserve from the Board of Governors at will); Charlie Savage, Does Trump Have the Legal Authority to Demote the Federal Reserve Chairman?, N.Y. TIMES (June 20, 2019), https://perma.cc/X4UZ-BTU3 (“Most senior government officials are subject to political control by Mr. Trump because he can fire them at will. But the Fed is one of several independent executive agencies that work differently. Congress wrote into the law that its governors, once confirmed by the Senate and appointed by the president, cannot be removed except 'for cause,' like personal misconduct.”).
225. 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[ed]" 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 311-13 (discussing how the Trump Administration argued in PHH Corp. v. Consumer Financial Protection Bureau, 881 F.3d 75 (D.C. Cir. 2018) (en banc), that the protection of a single head of an independent agency by a for-cause removal provision is unconstitutional).
226. See Jack M. Beermann, The Never-Ending Assault on the Administrative State, 93 NOTRE DAME L. REV. 1599, 1626 (2018) (“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.”); see also PHH Corp., 881 F.3d at 148 n.8 (Henderson, J., dissenting) (suggesting that there are political costs to exercising at-will removal); Neal Devins & David E. Lewis, Not-So Independent Agencies: Party Polarization and the Limits of Institutional
The President may also engage in informal consultation or oversight of her branch, for instance, by shaping the scope and substance of governmental litigation, issuing broad mandates via directed memoranda and executive orders, creating presidential councils 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."

227. See Devins, supra note 57, at 266 (chronicling the establishment of the Federal Legal Council, which the Carter and Reagan Administrations used to "avoid inconsistent or unnecessary litigation by agencies" (quoting Exec. Order No. 12,146, 3 C.F.R. 409, 410 (1979), reprinted as amended in 28 U.S.C. § 509 note at 176 (2018))); id. at 268-69 (suggesting that the Attorney General's control over the scope and substance of governmental litigation is a tool of executive centralization); Mashaw, supra note 195, at 516 ("[T]he Justice Department (under presidential direction) controls the agency's litigating authority."); Harvey, supra note 12, at 1572 & n.10 ("The power of wielding litigation authority can be a great tool for a president with little control over much of the administrative state." (citing FTC v. Guignon, 390 F.2d 323 (8th Cir. 1968))); see also Jerry L. Mashaw, Norms, Practices, and the Paradox of Defe 1: 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 . . . are intended to shape the way agencies interpret their mandates and carry out their statutory duties."); Bourree Lam, Trump's "Two-for-One" Regulation Executive Order, ATLANTIC (Jan. 30, 2017), https://perma.cc/PE78-JK5M; Lydia Wheeler & Lisa Hagen, Trump Signs 2-for-1 Order to Reduce Regulations, HILL (Jan. 30, 2017, 10:23 AM EST), https://perma.cc/2FZH-UW4G. Executive orders, however, may not always be an effective form of executive control.

228. See, e.g., Memorandum from Russell T. Vought, supra note 74, at 1-3 (reaffirming OIRA oversight of all federal agencies).


230. See Michael Herz, Impo ing Unified Executive Branch Statutory Interpretation, 15 CARDozo L. REV. 219, 223 (1993) ("Until disbanded in the opening days of the Clinton administration, the [President's Council on Competitiveness] 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." (footnote omitted)).

231. See Kagan, supra note 2, at 2282, 2284-2303 (introducing "techniques Clinton developed to direct administrative policymaking").

232. Mashaw, supra note 229, at 506.
However, these types of indirect actions tend not to have much impact on independent agencies.\textsuperscript{233} In addition, the President sometimes participates in the rulemaking process,\textsuperscript{234} including through efforts to coordinate agencies,\textsuperscript{235} or by enlisting a monitoring agency\textsuperscript{236} or the Attorney General\textsuperscript{237} to oversee regulatory activity on the President’s behalf. However, these measures have generally been limited to executive agencies only.\textsuperscript{238} Even in regard to executive agencies, a distinct lack of uniformity across agencies, opacity in administrative process,

\textsuperscript{233} See Devins & Lewis, supra note 226, at 489-91 (suggesting that “Presidents are able to influence the policymaking of independent agencies only whenever a majority of the commissioners are from the President’s party”); Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 589-91 (1984) (“One may be certain that independent commission consultation with the White House about appointments often occurs, even if subdued . . . by the lack of obligation so to consult.”); Strauss & Sunstein, supra note 73, at 185-186, 202-04 (commenting on executive orders that apply to executive agencies but not to independent agencies).

\textsuperscript{234} See Neil Komesar & Wendy Wagner, Essay, The Administrative Process from the Bottom Up: Reflections on the Role, if Any, for Judicial Review, 69 Admin. L. Rev. 891, 912 (2017) (“Over the last few decades, the President has directed agencies to use plain English and include executive summaries in their rules to make them more accessible to a broader range of stakeholders.”); see also Kagan, supra note 2, at 2372-80 (suggesting that presidential involvement in agency rulemaking should render courts more deferential to the agency under Chevron).


\textsuperscript{236} See Mashaw, supra note 229, at 506 (“[P]residential delegations of authority to monitor agency compliance with [their 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.”).

\textsuperscript{237} See Devins, supra note 57, at 266 (“[T]he Reagan Administration . . . us[ed] Office of Legal Counsel opinions to strengthen Attorney General control of government litigation.”); Herz, supra note 230, at 228-29 (discussing the Attorney General’s role in interagency disputes); Mashaw & Perry, supra note 53, at 19 (discussing how antebellum Attorneys General both sought and ceded control over agencies’ interpretations of statute); Moss, supra note 68, at 1307 (citing Exec. Order No. 12,146, 3 C.F.R. 409, 411 (1979), reprinted as amended in 28 U.S.C. § 509 note at 176 (2018)).

\textsuperscript{238} Coglianese, supra note 24, at 734-35 (“[N]ot one of these rules [issued by an independent agency] has been subject to the usual legislative or presidential requirements for regulatory analysis that executive branch agencies must follow when developing new rules.”); Herz, supra note 230, at 221-22 (noting that Executive Order 12,291, requiring submission of proposed rules to the OMB, only applied to executive agencies); see also Exec. Order No. 12,291, 3 C.F.R. 127 (1981); Devins & Lewis, supra note 226, at 488 (“[U]nlike executive agencies, independent agencies need not submit their regulatory proposals to OMB for approval.”). But see Brian Naylor, Obama Urges Opening Cable TV Boxes to Competition, NPR (Apr. 15, 2016, 4:46 PM ET), https://perma.cc/X7BT-PYED (illustrating that the White House sometimes comments on independent agency rulemakings).
and longstanding limited presidential access to judicial review of agencies\textsuperscript{239} mean that the President is often precluded from directly shaping an agency’s actions and must instead use her power to hire and fire agency heads to influence administrative policymaking.

As this Subpart has illustrated, intrabracnch mechanisms of presidential administration have far less of an impact on independent agencies than on executive agencies, perhaps in large part because of the purposeful lack of a structural hierarchy between the President and the fourth branch. As a result of the relative ineffectiveness of ex ante measures\textsuperscript{240} perhaps, 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 an Article III forum, which requires the agency to respond to the President in some way and may even secure judicial affirmation of the President’s administrative preferences.

B. Typology of Litigation: Increasing Substantive and Structural Control

The DOJ may litigate against independent agencies to further the President’s policy agenda or to change the structure of independent agencies to augment the President’s exercise of her provisional power to remove independent agency 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. The second is when the DOJ has reversed its position in litigation immediately after a new president has taken office.\textsuperscript{241}

Furthermore, the DOJ could be doing the work of popular constitutionalism,\textsuperscript{242} which is often synonymous with presidential constitutional

\textsuperscript{239} See Mashaw & Perry, supra note 53, at 10 (noting that before the Civil War, “administrative action was virtually free from appellate-style judicial review”).

\textsuperscript{240} See, e.g., Adam B. Cox & Cristina M. Rodriguez, The President and Immigration Law, 119 YALE L.J. 458, 485 (2009) (arguing that the President possesses “substantial authority to shape immigrant screening policy at the back end of the system . . . but little power to shape screening policy at the front end of the system”); see also Bijal Shah, Uncovering Coordinated Interagency Adjudication, 128 HARV. L. REV. 805, 858-60 (2015) (discussing the merits of ex ante versus ex post executive oversight).

\textsuperscript{241} See, e.g., supra text accompanying note 111; infra text accompanying notes 260-62, 282-83, 306-10 (discussing cases in which this shift occurred after a change in administration). Presidential influence may also be present if the Solicitor General reverses, before the Supreme Court, the position taken by the agency on behalf of the government in the lower court. See supra text accompanying note 65; infra notes 268-69 and accompanying text.

\textsuperscript{242} Popular constitutionalism holds that the ultimate authority in constitutional interpretation resides in “the people themselves.” LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7-8 (2004) (discussing the concept of popular constitutionalism as it relates to the judiciary’s power to
interpretation. More specifically, the President seems more likely than an agency to have a partisan interest in furthering sweeping constitutional change. Therefore, one potential example of the DOJ acting in furtherance of popular constitutionalism is 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 President’s agenda—or “popular statutory interpretation”—when it asserts an interpretation of legislation that is (1) in opposition to an agency interpretation based in expertise; and (2) not founded in a longstanding normative framework (like the defense of executive agencies from labor requirements or antitrust values) to which the executive branch generally subscribes. There may be instances in which the President’s influence on the DOJ’s decision to litigate against an independent agency has been even less transparent, but the dataset in this Article categorizes as “presidential administration” only those cases that bear a presidential thumbprint, further the President’s agenda, or advance a position that is orthogonal or unrelated to the interests of executive agencies.

Regardless of the potential reasons for bringing suit, these cases are not brought very often. Prior to President Trump, the use of this litigation for presidential administration was rare relative to its use for executive administration. Only four out of the twelve 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, less than 15% of cases from the Nixon through

243. Popular constitutionalism provides a 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, 1031-32 (2004); see David L. Franklin, Popular Constitutionalism as Presidential Constitutionalism?, 81 CHI.-KENT L. REV. 1069, 1080 (2006) (noting that all of the heroes of Larry Kramer’s popular constitutionalism are U.S. Presidents).

244. Just as popular constitutionalism is often, in practice, presidential constitutionalism, so too might the President’s interpretation of statute be understood as populist.

245. See infra Table A.1.1 For additional details about cases prior to the Nixon Administration, please consult Table B.1 below.
H.W. Bush Administrations consisted of this type of litigation. Perhaps surprisingly, less than 5% of cases brought under Presidents Clinton, W. Bush, and Obama were of this type. In contrast, these cases may become more common under the Trump Administration, under which the DOJ seems to be focusing on litigation (and other actions) in pursuit of the President's interests more so than on the basis of other executive branch concerns. In his zeal to enhance presidential power, President Trump may be less attuned to the benefits to his branch of concentrating power in cabinet agencies—or may even be interested in actively diluting their reach, as evidenced by his nomination of agency heads that have energetically sought to undercut their own institutions.

Although litigation is only rarely 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, as will be illustrated, courts have been open to challenges brought by the President to assert jurisdictional limits to independent agencies and reverse agency decisionmaking 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 periods spanning the Roosevelt through Johnson and Nixon through Carter Administrations, respectively, the DOJ's position was affirmed by courts in 75% and 50% of cases involving presidential administration.

246. See infra Table A.1.1. For additional details about cases during the Nixon through H.W. Bush Administrations, please consult Tables B.2 and B.3 below.

247. See infra Table A.1.1. For an overview of cases during the Clinton, W. Bush, and Obama Administrations, please consult Table B.4 below.

248. See infra Table A.1.1 (showing an increase in presidential administration cases litigated in the early Trump Administration). Information on cases brought by the Trump Administration through mid-2018 can be found in Table B.5 below.


250. See infra Table A.2.1.
On the other hand, under Presidents Reagan, H.W. Bush, and Trump, these cases have fared differently, with a win rate of just about zero. 251 This may be because these Presidents sought broader victories than others. For instance, in the 1980s and early 1990s, the courts were unwilling to entertain arguments that the President may remove an independent agency head at will 252 and decided against a presidential challenge to the constitutionality of an independent agency’s decision to maintain civil rights protections. 253 And during the Trump presidency, the courts have rebuffed both an attempt by the Administration to limit the broader interpretative authority of an independent agency to expand civil rights—questioning, instead, the very legitimacy of the DOJ in taking a position against the agency 254—and an argument by the DOJ seeking to diminish the for-cause removal protections enjoyed by independent agency heads. 255 That said, the Supreme Court recently decided in favor of the position advanced by the DOJ in Epic Systems, a case the President had a role in shaping. 256

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. In one case, the DOJ argued that labor principles required the ICC to extend protections for railroad workers to account for the actual amount of time they would be displaced by new railway construction. 257 In another case, the DOJ argued that the ICC’s approval of racially segregating passengers by railroad car was unlawful both under the Interstate Commerce Act and the Constitution. 258 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

251. See infra Table A.2.1.
252. See infra text accompanying notes 301-05.
253. See infra note 270 and accompanying text.
254. See infra text accompanying notes 282-88.
255. See infra text accompanying notes 306-13.
256. See supra text accompanying notes 109-14.
Commission.” 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, 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. After this transition, the DOJ argued before the Supreme Court that only a narrower category of “indecent” broadcasts may be prohibited than was applied by the FCC.

In another Carter-era case, the DOJ argued 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, OPM, and the Departments of Labor and Defense—as problematic because these agencies suggested that an extreme preference for hiring veterans might not survive a constitutional challenge. The fact that the DOJ was in opposition to both independent and executive agencies, and that it made 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 Presidents Reagan and H.W. Bush, DOJ litigation against independent agencies became a more obvious tool for deregulation in the civil rights

259. Stern, supra note 63, at 761.
262. Id. at 2.
265. Compare Pers. Adm’r of Mass. United States Amicus Brief, supra note 263, at 18-19 (arguing that only explicit and purposeful discrimination against women would render Massachusetts’s veterans hiring preference in conflict with the Equal Protection Clause), with Pers. Adm’r of Mass. Amicus Brief of the OPM et al., supra note 264, at 11 (“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.” (citation omitted)).
context, and therefore more similar to its recent use by the Trump Administration. Because of President Reagan's well-known orientation as an antiregulatory President, as well as one opposed to affirmative action and civil rights protections, 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, President Reagan's Solicitor General "defended" the EEOC before the Supreme Court in multiple cases by making arguments that ran counter to the EEOC's view; as a result, the EEOC's perspective was either minimized in or excluded from governmental briefing on its behalf. As Neal Devins and Michael Herz note, the Solicitor General did so based 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." However, the Supreme Court did not always buy in to the DOJ's arguments. This episode highlights that the Solicitor General may make litigation decisions in pursuit of both executive and presidential administration.

266. See Herz, supra note 230, at 223-26, 224 n.26 (discussing how Presidents Reagan and H.W. Bush influenced agency interpretations through the President's Council on Competitiveness and its predecessor, the President's Task Force on Regulatory Relief); see also Exec. Order No. 12,291, § 2, 3 C.F.R. 127, 128 (1981) (imposing a requirement that, "to the extent permitted by law," regulatory action should not be taken unless the potential benefits outweigh the potential costs); Philip Shabecoff, Reagan Order on Cost-Benefit Analysis Stirs Economic and Political Debate, N.Y. TIMES (Nov. 7, 1981), https://perma.cc/6LZ8-CR3N (noting that opponents of Executive Order 12,291 "view[ed] the cost-benefit requirement as little more than a justification for deregulating business and industry").

267. See infra text accompanying notes 268-69, 303-04.


269. See Devins & Herz, supra note 56, at 209 (citing Local 28, 478 U.S. 421).

270. For example, in Local 28, the DOJ reversed, before the Supreme Court, the position that the EEOC had taken before the court of appeals. But:

    [T]he 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.
Furthermore, these conflicts between President Reagan’s Solicitor General and the EEOC can be directly contrasted with a “striking example of Solicitor General willingness to accommodate SEC concerns” around the same time by allowing the SEC both to argue its position separately at the certiorari stage and to represent itself before the Supreme Court in a high-profile case, even though the DOJ held an opposing position. (Note, however, that the trend of deferring to the SEC has changed in recent years, in that the SEC has since been prevented by the Solicitor General from litigating on its own behalf.)

The H.W. Bush Administration also asserted presidential power. During this Administration, the OLC declared that disputes between the President and independent agencies “may be resolved by an executive branch agency and without resort to interagency litigation.” In doing so, the DOJ seemed to be asserting unilateral presidential power, instead of ceding to the judiciary the authority to define the boundaries of the internal separation of powers.

However, despite the fact that President H.W. Bush had an anti-affirmative action stance that was similar to that of President Reagan, the H.W. Bush Administration also sought to appease Congress, which led to litigation in which the Solicitor General allowed the FCC to “represent itself in defending [an affirmative action] program, while [the Solicitor General] filed an amicus brief” against the FCC, arguing that the FCC’s efforts to encourage minority

---

271. In regard to one of the EEOC cases, Williams, the “Reagan administration had[] 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.” Juan Williams, Lawmaker Urges EEOC Not to Quit Rights Case, WASH. POST (Apr. 10, 1983), https://perma.cc/FH4T-8YHA. (“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 should be independent and this case clearly shows why.” (quoting EEOC Chair Clarence Thomas)).

272. See Devins, supra note 57, at 291.

273. See Devins & Lewis, supra note 226, at 495 (noting that the Clinton and W. Bush Administrations prevented the FEC and SEC from filing briefs that competed with those filed by the DOJ in the Supreme Court); see also Lucia v. SEC, 138 S. Ct. 2044 (2018).

274. See, e.g., Constitutionality of Nuclear Regulatory Comm’n’s Imposition of Civil Penalties on the Air Force, 13 Op. O.L.C. 131, 131 (1989) (suggesting that the independent Nuclear Regulatory Commission is “subject to [the President’s] supervisory authority” and “Congress may not deprive the President of an opportunity to review a decision made by an agency subject to his supervisory authority”).

275. See id. at 132.

276. Devins & Herz, supra note 12, at 579 (“The (first) George Bush’s DOJ was beholden to social conservatives and had a general anti-affirmative action position.”); supra text accompanying note 269 (discussing the Reagan Administration’s anti-affirmative action stance).
ownership of radio and television licenses were unconstitutional.277 Ultimately, the President permitted this practice because “[H.W.] Bush FCC nominees needed to convince Congress that they would defend . . . this affirmative action program.”278

President Trump also has expressed an interest in “deregulation”—particularly in regulatory areas disfavored by his political supporters.279 For instance, the Trump Administration has rescinded or reversed Obama Administration policies that empowered the EEOC to implement stronger civil rights protections.280 In addition, the Administration also opposed the EEOC’s interpretation of the Civil Rights Act281—directing the DOJ to take the unusual step of inserting itself into a dispute involving an independent agency’s interpretation of a statute with respect to a private regulated party.282 Indeed, this Article’s dataset suggests that the DOJ has taken this bold action rarely, and only at the behest of the Trump Administration.283


278. Id.


280. See, e.g., sources cited supra note 249 (listing regulatory areas disfavored by President Trump, like environmental protection, healthcare, and education).

281. See generally Blake Emerson, The Claims of Official Reason: Administrative Guidance on Social Inclusion, 128 YALE L.J. 2122 (2019) (noting that several agency guidance documents issued under President Obama have been rescinded under the Trump Administration).


283. See Alan Feuer, Justice Department Says Rights Law Doesn’t Protect Gays, N.Y. TIMES (July 27, 2017), https://perma.cc/VBJ5-4RLG (stating that 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”). 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 Mark Joseph Stern, Department of Wackadoodle, SLATE (Sept. 26, 2017, 7:43 PM), https://perma.cc/XEW8-GXFN (“Judge Rosemary Pooler couldn’t resist drawing . . . 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.’”).

284. See supra text accompanying notes 109-14, 187-91 (discussing Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018), another case in which the DOJ inserted itself into a dispute between an independent agency and private party).
brief, the DOJ argued against the EEOC’s determination that Title VII prohibits discrimination on the basis of sexual orientation. Ultimately, the Second Circuit, sitting en banc, affirmed the EEOC’s interpretation of the statute and thus deepening a circuit split and opening the door to resolution by the Supreme Court. Since then, the DOJ has urged the EEOC to change its position that businesses cannot discriminate against LGBT workers; as in several instances during the Reagan Administration, the DOJ will ultimately decide the government’s litigation posture before the Supreme Court.

In some ways, President Trump’s actions harken back to President Reagan’s efforts to reduce the effectiveness of the EEOC. 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 the matter thus using an interbranch mechanism to influence the agency. Finally, as noted earlier, the DOJ was also compelled by President Trump’s deregulatory interests to litigate the NLRB’s authority to protect both public and private employees’ opportunities to engage in collective action.

286. Zarda, 883 F.3d at 107-08. In addition, the Second Circuit made the decision en banc, which is unusual for that court. See David Lat, Fast Times at 40 Foley: Second Circuit Drama in Zarda v. Altitude Express, ABOVE THE LAW (Feb. 28, 2018, 7:17 PM), https://perma.cc/2L3K-37GV (“It’s a special treat when the Second Circuit goes en banc, since it’s so rare.”).
287. The Second Circuit’s decision aligns it with the Seventh Circuit and places it squarely at odds with the Eleventh Circuit. See Zarda, 883 F.3d at 108 (citing Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (en banc); and Evans v. Ga. Reg’l Hosp., 850 F.3d 1248 (11th Cir. 2017)).
290. See supra notes 268-71 and accompanying text (describing how the DOJ’s posture took primacy over the EEOC’s position in litigation involving employment discrimination).
291. See supra text accompanying note 266 (describing President Reagan’s exercise of presidential power and noting his emphasis on a deregulatory agenda).
292. See supra text accompanying notes 266-70.
293. See supra note 283 (noting that the Second Circuit found the DOJ’s position against the EEOC to be odd in Zarda).
2. Defending and augmenting the President’s removal power

The DOJ has also sought to protect and increase the President’s raw power over the fourth branch. These cases have ranged from narrow to broad. At the narrow end of the spectrum, they involve an individualized presidential contention that a particular exercise of for-cause removal of an independent regulatory commissioner was valid. At the broad end, these cases seek to change the very structure of independent agencies so they become more vulnerable to presidential influence. While these cases are separate from 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.295 Under both Presidents Clinton and W. Bush, there were a few cases in which the removal of an independent regulatory commissioner was contested. For President Clinton, this included the removal of a holdover member of the National Credit Union Administration.296 For President W. Bush, it included the attempted removal of a transitioning member of the Commission on Civil Rights appointed by President Clinton.297

Presidents Reagan and H.W. Bush, in particular, made a great effort to wield power over the federal bureaucracy.298 Moreover, as Geoffrey Miller notes, the Reagan Administration “questioned the constitutionality of independent agencies,”299 and Kevin Stack observed that the Administration “actively sought a Supreme Court ruling overturning the removal restrictions on independent agencies as violating the President’s power under Article II.”300

---

298. See Herz, supra note 230, at 219; see also Miller, supra note 2, at 402 (noting that by the Reagan era, “[t]he federal bureaucracy had 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 402, 411 (noting that President Reagan’s tenure was “a resurgent and aggressive presidency” during which 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, President Reagan made efforts to “centralize presidential control of rulemaking by executive branch agencies,” he “asserted executive privilege against congressional demands for information,” and “[h]is Attorney General suggested that presidential signing statements should have weight in statutory interpretation.” Id. at 411.
299. Miller, supra note 2, at 411.
300. Stack, supra note 2, at 584-94 (discussing the ultimately unsuccessful Reagan-era efforts “to implement a view of Article II under which there was no place for a set of officers...
Both Presidents Reagan\textsuperscript{301} and H.W. Bush\textsuperscript{302} became engaged in litigation when they sought to remove independent regulatory commissioners at will. President Reagan’s case, in which he aimed to remove members of the Commission on Civil Rights at will, showcased his general embattled attitude toward the Commission\textsuperscript{303} and his arguably related contention that the Commission was not “independent.”\textsuperscript{304} Neal Devins notes that President H.W. Bush’s case against the Postal Service 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.”\textsuperscript{305}

Finally, on behalf of President Trump, the DOJ argued in \textit{PHH Corp. v. Consumer Financial Protection Bureau}\textsuperscript{306} 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 (not, as is more common, one member of a multimember commission).\textsuperscript{307} This case also involved a reversal of the government’s position after a change in administration. Indeed, President Obama’s DOJ supported for-

\begin{itemize}
\item[(301).] Berry v. Reagan, No. 83-3182, 1983 WL 538, at *1-2, 6 (D.D.C. Nov. 14, 1983) (disputing the President’s authority to remove members of the Commission on Civil Rights at will), \textit{vacated as moot mem.}, 732 F.2d 949 (D.C. Cir. 1983).
\item[(302).] Mackie v. Bush, 809 F. Supp. 144, 146, 148 (D.D.C.) (granting a preliminary injunction that prevented the President from removing governors of the Postal Service Board at will), \textit{vacated as moot mem. sub nom.} Mackie v. Clinton, 10 F.3d 13 (D.C. Cir. 1993).
\item[(304).] Prominent unitary executive theorists Steven Calabresi and Christopher Yoo support this view. See CALABRESI & YOO, \textit{ supra} note 40, at 498 n.7 (arguing that the statute establishing the Commission placed it “in the executive branch of the Government”); see also Christopher S. Yoo et al., \textit{The Unitary Executive in the Modern Era, 1945-2004}, 90 \textit{IOWA L. REV.} 601, 692 (2005).
\item[(306).] \textit{881 F.3d 75} (D.C. Cir. 2018) (en banc).
\item[(307).] Brief for the United States as Amicus Curiae at 8-19, \textit{PHH Corp.}, \textit{881 F.3d 75} (D.C. Cir. 2018) (No. 15-1177), 2017 WL 1035617 [hereinafter \textit{PHH Corp. United States Amicus Brief}].
\end{itemize}
cause removal protection for the Director of the CFPB. Furthermore, the first D.C. Circuit panel ruled against the DOJ in a decision penned by then-Judge Kavanaugh. In doing so, the panel determined that the provision limiting the President’s authority to remove the Director was unconstitutional and should be severed.

Under President Trump, the DOJ filed a brief reversing its Obama-era position and arguing, in opposition to the independent agency, that any limitations on at-will removal of a single agency head violate the Constitution. In its en banc decision (with then-Judge Kavanaugh in dissent), the D.C. Circuit disagreed and determined that there is “no constitutional defect in Congress’s choice to bestow on the CFPB Director protection against [at-will] removal,” and that to rule otherwise would affirm a “wholesale attack on independent agencies . . . that, if accepted, would broadly transform modern government.”

Interestingly, the alignment of the President’s support for this structural change and his political agenda have become even more clear—after President Trump appointed his own CFPB Director, the CFPB joined the position held by the DOJ and the Administration that the CFPB’s structure is unconstitutional. In any event, this case was the first time since Humphrey’s

---

308. Eric J. Mogilnicki & Ethan (Eitan) Levisohn, PHH v. CFPB: The Impact on the Bureau’s Future, NAT’L L. REV. (Feb. 2, 2018), https://perma.cc/YRD6-2BDS (“In November 2016, the [CFPB], with the support of the Obama Administration Justice Department, appealed the panel’s decision to the full D.C. Circuit.”).


310. Id. at 16, 37–39 (ruling that the CFPB’s current structure allows the director to wield “significantly more unilateral power than any single member of any other independent agency” (emphasis omitted)). The panel did not, however, declare the entire agency or its operations unconstitutional. Id. at 37–39.

311. See Mogilnicki & Levisohn, supra note 308 (“Notably, the U.S. Department of Justice, now under new leadership, filed an amicus brief . . . supporting the original ruling [in PHH].”) In its brief, the DOJ argued that “a removal restriction for the Director of the CFPB is an unwarranted limitation on the President’s executive power.” PHH Corp. United States Amicus Brief, supra note 307, at 19–21. Notably, the DOJ’s filing against the CFPB was limited to the issue of whether the CFPB director is removable for cause or not and did not ask for the abolishment of the CFPB (as the petitioner did). Id. at 19 (declaring that the “proper remedy for the constitutional violation is to sever the provision limiting the President’s authority to remove the CFPB’s Director, not to declare the entire agency and its operations unconstitutional”); see also PHH Corp., 881 F.3d at 101-10 (rejecting the petitioner’s arguments that the CFPB is unconstitutional).

312. PHH Corp., 881 F.3d at 80, 110.

313. Id. at 80.

Executor that the judiciary has seriously considered such a broad constitutional argument against for-cause removal restrictions, as evidenced by the D.C. Circuit’s initial decision.\textsuperscript{315} Although the Trump Administration’s effort to diminish this fundamental feature of independent agencies was unsuccessful before the D.C. Circuit, the D.C. Circuit’s panel decision—written by a judge who is now a Justice on the Supreme Court—suggests that the judiciary is open to the argument that for-cause removal protections for independent agencies are unconstitutional, at least in some instances.

Currently, this matter is before the Supreme Court.\textsuperscript{316} While the Trump Administration is not the petitioner, the DOJ and CFPB have filed a brief arguing that the structure of the CFPB violates the President’s executive authority.\textsuperscript{317} This case is unusual in that the agency is arguing in favor of the petitioner’s position that the agency is unconstitutional. Unlike in previous litigation against independent agencies for the purposes of presidential administration, the independent agency in this case is complicit in the President’s efforts to enhance his own power vis-à-vis both the independent agency at issue and independent agencies as a whole.

C. Dynamics Among the Branches of Government

Interagency litigation allows the President to influence independent agencies through an interbranch mechanism rather than by relying on somewhat ineffective intrabranch methods for shaping administrative policy.\textsuperscript{318} For those that favor more centralized governance and subscribe to the canon of political accountability,\textsuperscript{319} litigation may be a welcome addition to the limited arsenal of presidential administration. However, as other scholars have cautioned,\textsuperscript{320} “presidential interventions and assertions of decisionmaking...
power can undermine [administrative] expertise and independence,"\(^{321}\) and lead to the overamplification of executive power.\(^{322}\)

In addition, just as external forces like Congress and the courts can influence the internal balance within the executive branch,\(^{323}\) both beneficial and harmful dynamics between entities within the executive branch may impact the separation of powers between the executive and each of the other branches—in particular, by bolstering rather than constraining the power of the executive branch. 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 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.\(^{324}\) As has been asserted about departmentalism, 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.\(^{325}\) That said, courts must maintain their status as relatively apolitical institutions in order to serve as effective barriers against the presidential misuse of litigation.\(^{326}\)

---

321. Metzger, supra note 21, at 432.
322. See generally Katyal, supra note 133 (referring to the executive branch as the “most dangerous,” partially in light of the fact that it, rather than the legislature, is making much of the law today).
324. See, e.g., Note, supra note 50, at 1052-58 (grappling with the benefits and drawbacks, both functional and formal, of the judicial resolution of interagency disputes); Note, supra note 5, 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”).
325. See Tabatha Abu El-Haj, Linking the Questions: Judicial Supremacy as a Matter of Constitutional Interpretation, 89 WASH. U. L. REV. 1309, 1311, 1320, 1327 (2012) (noting that departmentalists, or those that subscribe to the view that “each department of government” has “an independent responsibility to interpret the Constitution,” have not shifted popular views on judicial supremacy); Franklin, supra note 243, at 1070-71 (arguing that popular constitutionalists have a “populist sensibility model” that “is willing to accommodate judicial supremacy”).
326. See infra text accompanying notes 348-51.
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 through arbitrary and capricious review. In addition, Part II.B 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—and function as a check on legislative overreach by preventing Congress from crafting independent agencies in a manner that contravenes the Constitution. However, litigation circumscribing the autonomy of independent agencies may also 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 decisionmaking and expertise that underlie our modern, flexible nondelegation doctrine.327

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.328 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 and obtain longer-lasting changes to the implementation of a statute that may undercut the traditional process of creating and modifying legislation.

Ambiguous statutory authority is more susceptible to presidential influence,329 perhaps particularly when the matter at hand goes beyond the “four

---

327. See generally ADRIAN VERMEULE, LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE (2016) (noting that courts might continue to defer to agencies’ interpretations of statutes because agencies 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).

328. Cf. Part IIA (discussing how the President can influence agencies through intrabranch mechanisms).

329. Cf. Mashaw, supra note 229, at 512 (suggesting briefly that “presidential direction in shaping statutory meaning” may “downplay[] the relevance of the original context of statutory enactments”).
corners” of the agency’s organic statute or if it involves the Constitution (potentially even to the detriment of the ensuing constitutional interpretation).

To avoid future judicial circumscription of an independent agency’s jurisdiction, Congress could specify whether the agency has the authority to interpret its enabling legislation in the face of competing statutory interests or general legislation that bears on the agency’s area of expertise. Or 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. Then again, Congress may not wish or be able to define the power of its independent creatures precisely, given that those agencies may be expected to exercise discretion on the basis of a purposive or context-driven approach to

330. See Lemos, supra note 66, at 186-87, 190-91, 202 (discussing presidential influence over shaping agency statutory interpretations through the Solicitor General); see also id. at 201 (finding “some degree of [Solicitor General]-agency conflict in roughly 27% of the cases involving agency statutory interpretation”).

331. See Morrison, supra note 70, at 1461 (“[Agencies] typically turn to OLC when the issue is sufficiently controversial or complex (especially on constitutional questions) that some external validation holds special value.”). The OLC is particularly susceptible to the President’s interests. See id. at 1455. For this reason, if it is the final arbiter of a constitutional (or other) agency decision, there is a greater likelihood that the constitutional matter will be resolved with the President’s interests in mind than if the OLC had not become involved. See Metzger, supra note 67, at 1906-07, 1907 n.54 (providing examples of constitutional opinions given by the OLC that furthered presidential national security interests).

332. See Lemos, supra note 66, at 219-20 (”[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].” (footnote omitted)); cf. Mashaw, supra note 229, at 507-08 (arguing that agencies must make constitutional determinations to uphold their legislative mandates).

333. See Devins, supra note 305, at 1037 (“Congress must pay attention to structural concerns to reduce conflicts between the executive and other government entities free of White House control.”).

334. See BREGER & EDLES, supra note 45, 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.”); Kent Barnett, Codifying Chevmore, 90 N.Y.U. L. REV. 1, 33-38 (2015) (arguing that Dodd-Frank provides evidence that Congress legislates with Chevron in mind and acquiesces to its principles).

335. See 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.”).

336. Stack also suggests that the form of an agency’s policymaking—for instance, rulemaking rather than formal adjudication—may allow it greater interpretative

footnote continued on next page
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 against one another.337 As scholars have noted, Congress may delegate overlapping authority to agencies to promote conflict that leads to better-reasoned outcomes,338 including by legislating interagency litigation.339 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. 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.”340

There are, however, some noteworthy distinctions between interagency conflict and President-independent agency conflict. First, executive agencies are sometimes delegated overlapping jurisdiction, while for-cause removal provisions suggest that Congress intends independent agencies to operate with some level of insulation from the President. Second, executive agencies that are in conflict with each other have several mechanisms for reaching a compromise, while battles between the President and an independent agency (or, for that matter, fights between executive and independent agencies) before the judiciary are a zero-sum game to some extent. In regard to the latter, the court will affirm one side or the other. Even if it remands the decision to the independent 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-twentieth century. This suggests that courts have validated the executive branch’s ongoing project of centralizing and concentrating its power. That said, the very nature of appealing to a court to

337. See Devins & Herz, The Battle That Never Was, supra note 56, at 206.
338. See supra text accompanying note 133.
339. See Farber & O’Connell, supra note 20, at 1464-68.
340. Fontana & Huq, supra note 123, at 58; cf. Watts, supra note 130, at 8 (arguing that, given the benefits of “political influences from the President” and other parties, arbitrary and capricious review should be made more expansive and transparent).
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. On the other hand, this means that litigation as a mechanism of presidential control has a built-in check on potential abuse in the form of judicial review—a check that courts seem to have taken seriously thus far, although this may be short-lived. The Trump Administration’s strategic insertion of its views into ongoing cases may have rendered courts more sensitive to the use of litigation to further the President’s agenda. For instance, President Trump’s influence on the DOJ’s new position in *PHH Corp.* may have shifted the court’s focus away from its interest in limiting the over-insulation of an independent agency and toward curbing the expansion of presidential power. Likewise, the DOJ’s involvement in *Zarda* could be 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).

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 render it more difficult for the executive branch to further similar policies in the future than if the question had remained open in the courts. Instead, a more nuanced approach could transform litigation into a more effective mechanism for furthering the President’s agenda, especially if the President maintains apparent respect for legislative authority in the process. Indeed, a more delicate style of litigation may pass muster among courts, constitutionalists, and administrative law scholars (particularly those who do not subscribe to the unitary executive theory) more easily than litigation that aggressively seeks to dismantle independent agencies.

For instance, 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 was recognized as giving wide berth to Congress’s sweeping authority to structure the executive branch, which then allowed President Obama to exercise “a similar level of control over independent

---

341. See Note, *supra* note 50, at 1053 (noting that “in dealing with inter-agency disputes the courts would 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”).

342. See, e.g., *supra* text accompanying notes 37-38 (suggesting courts have been closed off to the Trump Administration’s efforts to exploit litigation).

343. See *supra* text accompanying notes 306-13.

344. For further discussion of *Zarda*, see text accompanying notes 279-83 above.
agencies [as President Reagan], just on different legal grounds. 345 In keeping with this theory of executive control flying under the radar, the DOJ both defended the CFPB on this same basis in a high-profile case during President Obama's tenure, 346 and litigated against independent agencies on behalf of executive agencies more frequently under President Obama than under any other President. 347

That said, the landscape of the judiciary appears to be changing, for instance, as a result of the appointment of more judges interested in reducing or eliminating deference to agencies, 348 or who are interested in enhancing presidential power, 349 perhaps even as courts jealously guard their own power too. Arguably, the federal judiciary as a whole, but especially the Supreme Court, has veered into this territory. For instance, recent litigation has suggested that the two newest members of the Supreme Court, Justices Gorsuch and Kavanaugh, are both open to broad presidential attacks on agency independence. In a decision by Justice Gorsuch, the President's agenda and

345. Stack, supra note 2, at 584 (arguing that President Obama's and President Reagan's views of the fourth branch are not as far apart as they may seem); see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010); Metzger, supra note 21, at 434 (drawing on the work of David Barron and David Lewis to argue that "Presidents may well be willing to forgo 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").

346. See supra notes 307-10 and accompanying text (discussing a case in which the Obama DOJ defended the CFPB's structural independence). In this case, the DOJ was advocating for reduced presidential—and by extension, greater legislative—control over agency heads. See id.

347. See supra note 80; see also infra Table A.1.1.


349. For example, Adrian Vermeule observes:

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, 4:58 PM), https://perma.cc/SJ26-4FXL (noting that these judicial ideologies have “co-existed uneasily” in the past and continue to do so during the Trump Administration). Arguably, 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 J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 HARV. L. REV. 2311 (2006) (arguing that whether the branches are divided or united in terms of political party often has a greater impact on interbranch dynamics than the branches' constitutional distinctions do).
Supreme Court’s growing anti-labor interests converged to diminish the regulatory authority of the NLRB. 350 In addition, then-Judge Kavanaugh wrote a D.C. Circuit panel decision eliminating the at-will removal protection granted to an independent agency head, and will be involved in deciding this very issue at the Supreme Court. 351

This all suggests that while courts may have been interested in limiting the impact of litigation brought by the DOJ in overt pursuit of political aims, this past inclination may not predict the future. In other words, courts may become more open to the bold use of litigation for presidentialist purposes. More pessimistically, courts’ ability to forestall the abuse of litigation against independent agencies could be reduced by judicial capture. 352 Even courts composed of judges that are not clearly 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 could become increasingly helpful to a President interested in orienting the executive branch toward her political interests.

Conclusion

This Article presents a theory of “executive administration,” arguing that executive agencies pursue their own interests vis-à-vis independent administrative agencies by litigating against them. In this way, this Article challenges the scholarly assumption that the President is the only executive entity that wields holistic influence over the independent regulatory state. This Article also notes that litigation may augment the somewhat sparse toolkit available for presidential administration of the independent fourth branch. These descriptive arguments are based in a granular analysis of a comprehensive, original dataset that consists of litigation brought by executive agencies against independent agencies from the mid-twentieth century through mid-2018.

As a normative matter, executive administration, like presidential administration, impacts relationships within the executive branch. On the one
hand, this litigation allows the executive branch to invite judicial review to improve independent agency decisionmaking. On the other hand, courts have acquiesced to executive agencies’ requests to limit *Chevron* deference to independent agencies, which may reduce their reach and legitimacy 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 intrabranch 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, by allowing executive agencies to stave off regulation by independent agencies and to expand their policymaking turf by limiting independent agencies’ statutory and decisionmaking jurisdiction. Indeed, litigation will likely remain an attractive, nonpartisan mechanism for executive administration, not only because it promotes the executive branch’s interest in holding the line against regulation and maintaining—or even increasing—its own regulatory power, but also because it allows the judiciary to maintain primacy in administrative statutory interpretation.

While famously an advocate of presidential administration, Elena Kagan nonetheless surmised that, “the practice of presidential control over administration likely will continue to evolve in ways that raise new issues and cast doubt on old conclusions.” To the extent litigation against independent agencies has the potential to further presidential administration, it may also have a paradoxical impact on the relationship between the executive and each of the other two branches of the government. For instance, although cases brought on behalf of the President could allow her to trespass on Congress’s authority to empower independent regulatory commissions, they also reaffirm the judiciary’s key role in interpreting the law.

Kagan also noted that new “developments in the relationship between the President and the agencies may suggest different judicial responses” than the deference to presidential involvement that she advised; accordingly, courts have been less than wholly receptive to the use of litigation for presidentialist purposes. Still, for those who worry more generally that a growing concentration of power in the White House may lead to a reduction in administrative autonomy and expertise, recent cases suggest that independent agencies are increasingly vulnerable to the President’s influence. Furthermore,

---

354. *Id.*
355. *See id.* at 2372-83.
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 administrative state.
Appendix A: Methodology & Summary Tables

The main body of this Article examines the litigation brought by the Department of Justice (DOJ) against independent agencies from the last seventy-five years in depth. This Appendix provides a quickly accessible typology organized by date and presidential administration, the most salient issue at stake, and the winning party in each case. In the tables below, categories (a), (b), and (c) of executive administration and categories (a) and (b) of presidential administration correspond with the typologies of litigation presented in Parts I.B and II.B in the main body of the Article. Overall, this Appendix reveals that this litigation can be categorized, in general, by one of two trends: Either (1) the DOJ sought to centralize executive power by reducing the regulation and oversight of executive agencies by independent agencies of its own accord under Presidents Ford, Carter, Clinton, H.W. Bush, and Obama; or (2) it initiated at least a few broader claims against independent agencies on behalf of Presidents Nixon, Reagan, W. Bush, and Trump.

A note about methodology: No formal statistical methods were used for this Article. Rather, information was gathered from a review of all the cases and briefs resulting from approximately 350 discrete searches during mid-summer 2018. These searches were conducted using several databases, including Westlaw case search and brief search (including searches of all case briefs and of Supreme Court briefs only, both of which track case names and briefs by party), Lexis case search, Bloomberg, ProQuest, and various internet search engines, as well as through the review of major U.S. newspapers and of citations to litigation from several relevant secondary sources found on Westlaw, Lexis, and HeinOnline. In addition, the research incorporated a concerted effort to uncover cases representative of every administration from 1900 (the McKinley Administration) onward, as well as additional searches focusing on ten important 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 Social Security Administration (SSA).

356. A handful of miscellaneous cases in the dataset have been omitted from the Article and Appendix. These include instances in which the 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.
357. See supra note 43.
358. See supra note 44.
Over three hundred 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
120 cases in which the DOJ opposed an independent agency in an Article III court,
all of which were analyzed extensively through the application of a detailed rubric,
and almost all of which are included in this Article.359 While these cases comprise a
small percentage of all public and private action against independent agencies, they
constitute a significant portion of interagency litigation.360 This dataset is not
exhaustive. For instance, it does not include many unreported cases. Rather, it
illustrates simply that this litigation has existed under every presidential
administration beginning with Franklin D. Roosevelt until the present day, which
suggests that it is both enduring and not limited to any particular President, time
period, or political party.

359. For the most part, cases omitted from this Article are those in which the DOJ sued or
defended an agency from suit by a federally owned corporation. See, e.g., Tenn. Valley
Auth. v. Whitman, 336 F.3d 1236 (11th Cir. 2003) (considering the DOJ’s defense of the
Environmental Protection Agency against claims by a federally owned corporation);
Tenn. Valley Auth. v. United States, 51 Fed. Cl. 284 (2001) (allowing, during the
W. Bush Administration, a federally owned corporation to maintain a suit against the
Department of Energy to enforce a contract).

Cases in this vein also establish that the United States cannot sue itself or be sued
without its own or Congress’s consent. See, e.g., Def. Supplies Corp. v. U.S. Lines Co., 148
F.2d 311 (2d Cir. 1945) (considering, during the Roosevelt Administration, a matter in
which a subsidiary corporation of an independent agency argued it had standing to sue
the United States despite a lack of statutory authority to do so); United States ex rel.
determining, during the Kennedy Administration, that the claim was nonjusticiable
on the grounds that a party—in this case, the United States—cannot sue itself.

In addition, in the Clinton Administration and early during President W. Bush’s tenure,
there were a handful of disputes in which the Federal Deposit Insurance Corporation
(FDIC) sought to sue the executive branch so that it could be “successor to the interests of
a failed financial institution.” Mead, supra note 12, at 1243; see, e.g., Fed. Deposit Ins. Corp.
v. United States, 342 F.3d 1313 (Fed. Cir. 2003) (deciding a case in which the FDIC acted as
the receiver for a savings and loan institution); Glass v. United States, 258 F.3d 1349,
amended on reh'g, 273 F.3d 1072 (Fed. Cir. 2001) (deciding a case in which the FDIC intervened
as the receiver on behalf of a thrift institution); Landmark Land Co. v. Fed. Deposit Ins.
corp., 256 F.3d 1365 (Fed. Cir. 2001) (deciding a case in which the FDIC intervened as the
successor in interest to an insolvent thrift institution); Plaintiffs in All Winstar-Related
Cases at the Court v. United States, 44 Fed. Cl. 3, 4 (1999) (deciding a case in which the
FDIC sued to “substitute itself as sole party-plaintiff” in cases involving “failed thrift
institutions”); see also Mead, supra note 12, at 1243 & nn.137-38 (“But when any judgment
will only accrue to the FDIC’s coffers, no justiciable controversy exists, because’none of the
money paid by the government in satisfaction of such a judgment would leave the
government.” (footnotes omitted)) (quoting Landmark Land Co., 256 F.3d at 1380).

360. This is because litigation between executive agencies is very rare, perhaps because of
the variety of other mechanisms available to influence policies issued by executive
agencies and arbitrate conflicts arising between executive agencies. See supra notes 68-
70 and accompanying text.
Table A.1.1
Types of Cases

<table>
<thead>
<tr>
<th>Administration</th>
<th>Total Cases</th>
<th>Executive Administration Cases</th>
<th>Presidential Administration Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Roosevelt, Truman, Eisenhower, Kennedy, Johnson (Table B.1)</td>
<td>12</td>
<td>8 (67%)</td>
<td>4 (33%)</td>
</tr>
<tr>
<td>Nixon, Ford, Carter (Table B.2)</td>
<td>17</td>
<td>15 (88%)</td>
<td>2 (12%)</td>
</tr>
<tr>
<td>Reagan, H.W. Bush (Table B.3)</td>
<td>24</td>
<td>21 (87%)</td>
<td>3 (13%)</td>
</tr>
<tr>
<td>Clinton, W. Bush, Obama (Table B.4)</td>
<td>56</td>
<td>54 (96%)</td>
<td>2 (4%)</td>
</tr>
<tr>
<td>Trump (Table B.5)</td>
<td>7</td>
<td>4 (57%)</td>
<td>3 (43%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>116</strong></td>
<td><strong>102 (88%)</strong></td>
<td><strong>14 (12%)</strong></td>
</tr>
</tbody>
</table>

One case, *Epic Systems Corp. v. Lewis*, is both an executive administration and presidential administration case. In this Table and the Tables that follow, however, *Epic Systems* is counted only once as a presidential administration case.

Table A.1.2
Executive Administration (EA) Cases

<table>
<thead>
<tr>
<th>Administration</th>
<th>Total EA Cases</th>
<th>EA (a) Cases</th>
<th>EA (b) Cases</th>
<th>EA (c) Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Roosevelt, Truman, Eisenhower, Kennedy, Johnson (Table B.1)</td>
<td>8</td>
<td>0</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>Nixon, Ford, Carter (Table B.2)</td>
<td>15</td>
<td>3</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td>Reagan, H.W. Bush (Table B.3)</td>
<td>21</td>
<td>10</td>
<td>8</td>
<td>3</td>
</tr>
<tr>
<td>Clinton, W. Bush, Obama (Table B.4)</td>
<td>54</td>
<td>41</td>
<td>13</td>
<td>0</td>
</tr>
<tr>
<td>Trump (Table B.5)</td>
<td>4</td>
<td>4</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>102</strong></td>
<td><strong>58</strong></td>
<td><strong>32</strong></td>
<td><strong>12</strong></td>
</tr>
</tbody>
</table>

Executive administration cases are classified into three groups: (a) appeal of decision binding an executive agency, (b) defense of executive agency jurisdiction, and (c) appeal of merger or price fixing. For further discussion of executive administration cases, see Part I.B above.
Table A.1.3
Presidential Administration (PA) Cases

<table>
<thead>
<tr>
<th>Administration</th>
<th>Total PA Cases</th>
<th>PA (a) Cases</th>
<th>PA (b) Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Roosevelt, Truman, Eisenhower, Kennedy, Johnson (Table B.1)</td>
<td>4</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Nixon, Ford, Carter (Table B.2)</td>
<td>2</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Reagan, H.W. Bush (Table B.3)</td>
<td>3</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Clinton, W. Bush, Obama (Table B.4)</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Trump (Table B.5)</td>
<td>3</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>14</strong></td>
<td><strong>6</strong></td>
<td><strong>8</strong></td>
</tr>
</tbody>
</table>

Presidential administration cases are classified into two groups: (a) furthering the President’s agenda and (b) defending and augmenting the President’s removal power. For further discussion of presidential administration cases, see Part II.B above.

Table A.2.1
Total DOJ Wins

<table>
<thead>
<tr>
<th>Administration</th>
<th>Cases Won by DOJ (% Win Rate)</th>
<th>EA Cases Won by DOJ (% Win Rate)</th>
<th>PA Cases Won by DOJ (% Win Rate)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Roosevelt, Truman, Eisenhower, Kennedy, Johnson (Table B.1)</td>
<td>7 (58%)</td>
<td>4 (50%)</td>
<td>3 (75%)</td>
</tr>
<tr>
<td>Nixon, Ford, Carter (Table B.2)</td>
<td>9 (53%)</td>
<td>8 (53%)</td>
<td>1 (50%)</td>
</tr>
<tr>
<td>Reagan, H.W. Bush (Table B.3)</td>
<td>16 (67%)</td>
<td>16 (76%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Clinton, W. Bush, Obama (Table B.4)</td>
<td>38 (68%)</td>
<td>36 (67%)</td>
<td>2 (100%)</td>
</tr>
<tr>
<td>Trump (Table B.5)</td>
<td>2 (29%)</td>
<td>1 (25%)</td>
<td>1 (33%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>72 (62%)</strong></td>
<td><strong>65 (64%)</strong></td>
<td><strong>7 (50%)</strong></td>
</tr>
</tbody>
</table>

Cases in which the DOJ had only a partial win are still counted as a win for the purposes of this Article. More details on the winner of each case can be found in Tables B.1–5 below.
**Table A.2.2**

DOJ Wins in Executive Administration (EA) Cases

<table>
<thead>
<tr>
<th>Administration</th>
<th>EA Cases Won by DOJ (% Win Rate)</th>
<th>EA (a) Cases Won by DOJ (% Win Rate)</th>
<th>EA (b) Cases Won by DOJ (% Win Rate)</th>
<th>EA (c) Cases Won by DOJ (% Win Rate)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Roosevelt, Truman, Eisenhower, Kennedy, Johnson (Table B.1)</td>
<td>4 (50%)</td>
<td></td>
<td>2 (40%)</td>
<td>2 (67%)</td>
</tr>
<tr>
<td>Nixon, Ford, Carter (Table B.2)</td>
<td>8 (53%)</td>
<td>3 (100%)</td>
<td>3 (50%)</td>
<td>2 (33%)</td>
</tr>
<tr>
<td>Reagan, H.W. Bush (Table B.3)</td>
<td>16 (76%)</td>
<td>6 (60%)</td>
<td>8 (100%)</td>
<td>2 (67%)</td>
</tr>
<tr>
<td>Clinton, W. Bush, Obama (Table B.4)</td>
<td>36 (67%)</td>
<td>26 (63%)</td>
<td>10 (77%)</td>
<td>-</td>
</tr>
<tr>
<td>Trump (Table B.5)</td>
<td>1 (25%)</td>
<td>1 (25%)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>65 (64%)</strong></td>
<td><strong>36 (62%)</strong></td>
<td><strong>23 (72%)</strong></td>
<td><strong>6 (50%)</strong></td>
</tr>
</tbody>
</table>

Cases in which the DOJ had only a partial win are still counted as a win for the purposes of this Article. More details on the winner of each case can be found in Tables B.1–5 below.

**Table A.2.3**

DOJ Wins in Presidential Administration (PA) Cases

<table>
<thead>
<tr>
<th>Administration</th>
<th>PA Cases Won by DOJ (% Win Rate)</th>
<th>PA (a) Cases Won by DOJ (% Win Rate)</th>
<th>PA (b) Cases Won by DOJ (% Win Rate)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Roosevelt, Truman, Eisenhower, Kennedy, Johnson (Table B.1)</td>
<td>3 (75%)</td>
<td>2 (100%)</td>
<td>1 (50%)</td>
</tr>
<tr>
<td>Nixon, Ford, Carter (Table B.2)</td>
<td>1 (50%)</td>
<td>1 (50%)</td>
<td>-</td>
</tr>
<tr>
<td>Reagan, H.W. Bush (Table B.3)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Clinton, W. Bush, Obama (Table B.4)</td>
<td>2 (100%)</td>
<td>-</td>
<td>2 (100%)</td>
</tr>
<tr>
<td>Trump (Table B.5)</td>
<td>1 (33%)</td>
<td>0 (0%)</td>
<td>1 (50%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>7 (50%)</strong></td>
<td><strong>3 (50%)</strong></td>
<td><strong>4 (50%)</strong></td>
</tr>
</tbody>
</table>

Cases in which the DOJ had only a partial win are still counted as a win for the purposes of this Article. More details on the winner of each case can be found in Tables B.1–5 below.
Table A.3
Standard of Review: Arbitrary & Capricious (A&C) and Chevron Cases

<table>
<thead>
<tr>
<th></th>
<th>Total A&amp;C and Chevron Cases</th>
<th>A&amp;C Cases</th>
<th>Chevron Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Cases</td>
<td>49</td>
<td>26</td>
<td>23</td>
</tr>
<tr>
<td>% of Dataset</td>
<td>42%</td>
<td>22%</td>
<td>20%</td>
</tr>
<tr>
<td>Number of Cases Won by DOJ</td>
<td>35</td>
<td>17</td>
<td>18</td>
</tr>
<tr>
<td>% DOJ Win Rate</td>
<td>71%</td>
<td>65%</td>
<td>78%</td>
</tr>
</tbody>
</table>

Cases in which the DOJ had only a partial win are still counted as a win for the purposes of this Article. A case was classified as “arbitrary and capricious” if the decision resulted from an application of the Administrative Procedure Act § 706(2)(A) arbitrary and capricious standard, or under a theory of deference (either before or after Chevron was issued). The cases decided under a theory of deference before Chevron was issued are marked as “pre-Chevron” cases in the Appendix B Tables below and are counted here as “Chevron” cases. More details on each case can be found in Tables B.1-.5 below.
Appendix B: Dataset

Table B.1
Roosevelt Through Johnson (1933-1969): Early Litigation

This Table categorizes cases into two types: executive administration and presidential administration. Executive administration cases fall into three subtypes: (a) appeal of decision binding an executive agency, (b) defense of executive agency jurisdiction, or (c) appeal of merger or price fixing. Presidential administration cases fall into two subtypes: (a) furthering the President’s agenda or (b) defending and augmenting the President’s removal power. This Table also indicates if a decision resulted from an application of the Administrative Procedure Act § 706(2)(A) arbitrary and capricious standard, or under a theory of deference (either before or after Chevron was issued).

<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interstate Commerce Comm’n v. Inland Waterways Corp. 361 (U.S. 1943)</td>
<td>Roosevelt</td>
<td>Interstate Commerce Commission</td>
<td>Exec. Admin.</td>
<td>DOJ defending jurisdiction of Department of Agriculture to appeal rates fixed set by independent agency. (c)</td>
<td>Arbitrary &amp; capricious</td>
<td>Independent agency</td>
</tr>
<tr>
<td>United States v. Interstate Commerce Comm’n 362 (U.S. 1949)</td>
<td>Truman</td>
<td>Interstate Commerce Commission</td>
<td>Exec. Admin.</td>
<td>DOJ challenging independent agency order to deny government from recovering money. (b)</td>
<td>Arbitrary &amp; capricious</td>
<td>DOJ</td>
</tr>
</tbody>
</table>

361. 319 U.S. 671 (1943).
362. 337 U.S. 426 (1949).
<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Henderson v. United States&lt;sup&gt;364&lt;/sup&gt;</td>
<td>Truman</td>
<td>Interstate Commerce Commission</td>
<td>Pres. Admin.</td>
<td>DOJ challenging constitutionality of independent agency decision. &lt;sup&gt;(a)&lt;/sup&gt;</td>
<td>DOJ challenging constitutionality of independent agency decision. &lt;sup&gt;(a)&lt;/sup&gt;</td>
<td>DOJ</td>
</tr>
<tr>
<td>Far E. Conference v. United States&lt;sup&gt;365&lt;/sup&gt;</td>
<td>Truman</td>
<td>Federal Maritime Board</td>
<td>Exec. Admin.</td>
<td>DOJ challenging independent agency jurisdiction to adjudicate under Sherman Act because U.S. is not a &quot;person.&quot; &lt;sup&gt;(b)&lt;/sup&gt;</td>
<td>DOJ challenging independent agency jurisdiction to adjudicate under Sherman Act because U.S. is not a &quot;person.&quot; &lt;sup&gt;(b)&lt;/sup&gt;</td>
<td>Independent agency</td>
</tr>
<tr>
<td>United States ex rel. Chapman v. Fed. Power Comm’n&lt;sup&gt;366&lt;/sup&gt;</td>
<td>Truman (argued under)</td>
<td>Federal Power Commission</td>
<td>Exec. Admin.</td>
<td>DOJ arguing that independent agency order infringes on jurisdiction of Department of Interior. &lt;sup&gt;(b)&lt;/sup&gt;</td>
<td>DOJ arguing that independent agency order infringes on jurisdiction of Department of Interior. &lt;sup&gt;(b)&lt;/sup&gt;</td>
<td>Independent agency</td>
</tr>
<tr>
<td>Sec’y of Agric. v. United States&lt;sup&gt;367&lt;/sup&gt;</td>
<td>Eisenhower</td>
<td>Interstate Commerce Commission</td>
<td>Exec. Admin.</td>
<td>DOJ appealing order issued by independent agency against Department of Agriculture to ensure competition in shipping. &lt;sup&gt;(c)&lt;/sup&gt;</td>
<td>DOJ appealing order issued by independent agency against Department of Agriculture to ensure competition in shipping. &lt;sup&gt;(c)&lt;/sup&gt;</td>
<td>DOJ</td>
</tr>
<tr>
<td>Fed. Mar. Bd. v. Isbrandtsen Co.&lt;sup&gt;368&lt;/sup&gt;</td>
<td>Eisenhower</td>
<td>Federal Maritime Board</td>
<td>Exec. Admin.</td>
<td>DOJ appealing order issued by independent agency against Department of Agriculture to ensure competition in shipping. &lt;sup&gt;(c)&lt;/sup&gt;</td>
<td>DOJ appealing order issued by independent agency against Department of Agriculture to ensure competition in shipping. &lt;sup&gt;(c)&lt;/sup&gt;</td>
<td>DOJ</td>
</tr>
</tbody>
</table>

<sup>364</sup> 339 U.S. 816 (1950).  
<sup>365</sup> 342 U.S. 570 (1952).  
<sup>366</sup> 345 U.S. 153 (1953).  
<sup>367</sup> 347 U.S. 645 (1954).  
<sup>368</sup> 356 U.S. 481 (1958).
<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Wiener v. United States</em> 369 (U.S. 1958)</td>
<td>Eisenhower</td>
<td>War Claims Commission</td>
<td>Pres. Admin.</td>
<td>DOJ defending President's at-will removal of independent agency commissioner. (b)</td>
<td></td>
<td>Independent agency</td>
</tr>
<tr>
<td><em>St. Regis Paper Co. v. United States</em> 370 (U.S. 1961)</td>
<td>Kennedy</td>
<td>Federal Trade Commission</td>
<td>Exec. Admin.</td>
<td>DOJ defending jurisdiction of Census Bureau from encroachment by independent agency and arguing to circumscribe independent agency's investigatory subpoena power. (b)</td>
<td></td>
<td>Independent agency</td>
</tr>
<tr>
<td><em>FTC v. Guignon</em> 372 (8th Cir. 1968)</td>
<td>Johnson</td>
<td>Federal Trade Commission</td>
<td>Pres. Admin.</td>
<td>DOJ challenging independent agency's authority to enforce its own subpoenas and appear in court to seek enforcement. (b)</td>
<td></td>
<td>DOJ</td>
</tr>
</tbody>
</table>

372. 390 F.2d 323 (8th Cir. 1968).
This Table categorizes cases into two types: executive administration and presidential administration. Executive administration cases fall into three subtypes: (a) appeal of decision binding an executive agency, (b) defense of executive agency jurisdiction, or (c) appeal of merger or price fixing. Presidential administration cases fall into two subtypes: (a) furthering the President’s agenda or (b) defending and augmenting the President’s removal power. This Table also indicates if a decision resulted from an application of the Administrative Procedure Act § 706(2)(A) arbitrary and capricious standard, or under a theory of deference (either before or after *Chevron* was issued).

<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brennan v. OSHRC (2d Cir. 1974)</td>
<td>Nixon</td>
<td>Occupational Safety and Health Review Commission</td>
<td>Exec. Admin.</td>
<td>DOJ defending jurisdiction of Department of Labor from encroachment by independent agency. (b)</td>
<td></td>
<td>DOJ</td>
</tr>
<tr>
<td>N.Y. Shipping Ass’n v. Fed. Mar. Comm’n (2d Cir. 1974)</td>
<td>Nixon</td>
<td>National Labor Relations Board</td>
<td>Exec. Admin.</td>
<td>DOJ siding with independent agency Maritime Commission against independent agency NLRB (and against Department of Labor). (a)</td>
<td></td>
<td>DOJ, on behalf of Federal Maritime Commission</td>
</tr>
</tbody>
</table>

374. 491 F.2d 1340 (2d Cir. 1974).
375. 495 F.2d 1215 (2d Cir. 1974).
### Executive (Agency) Administration

72 STAN. L. REV. 641 (2020)

<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Brennan v. S. Contractors Serv.</em> 376 (5th Cir. 1974)</td>
<td>Nixon</td>
<td>Occupational Safety and Health Review Commission</td>
<td>Exec. Admin.</td>
<td>DOJ defending jurisdiction of Department of Labor from encroachment by independent agency. (b)</td>
<td>Pre-Chevron (declining to defer to OSHRC)</td>
<td>DOJ</td>
</tr>
<tr>
<td><em>Brennan v. Gilles &amp; Cotting, Inc.</em> 378 (4th Cir. 1974)</td>
<td>Nixon (argued under)</td>
<td>Occupational Safety and Health Review Commission</td>
<td>Exec. Admin.</td>
<td>DOJ defending jurisdiction of Department of Labor from encroachment by independent agency. (b)</td>
<td>Independent agency</td>
<td>Independent agency</td>
</tr>
<tr>
<td><em>Brennan v. OSHRC</em> 379 (10th Cir. 1975)</td>
<td>Ford</td>
<td>Occupational Safety and Health Review Commission</td>
<td>Exec. Admin.</td>
<td>DOJ defending jurisdiction of Department of Labor from encroachment by independent agency. (b)</td>
<td>Pre-Chevron (deferring to Department of Labor)</td>
<td>DOJ</td>
</tr>
</tbody>
</table>

---

376. 492 F.2d 498 (5th Cir. 1974).
378. 504 F.2d 1255 (4th Cir. 1974).
379. 513 F.2d 553 (10th Cir. 1975).
# Executive (Agency) Administration

72 STAN. L. REV. 641 (2020)

<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brennan v. OSHRC 380 (8th Cir. 1975)</td>
<td>Ford</td>
<td>Occupational Safety and Health Review Commission</td>
<td>Exec. Admin.</td>
<td>DOJ defending jurisdiction of Department of Labor from encroachment by independent agency. (b)</td>
<td>Pre-Chevron (deferring to OSHRC)</td>
<td>Independent agency</td>
</tr>
<tr>
<td>United States v. Civil Aeronautics Bd. 381 (D.C. Cir. 1975)</td>
<td>Ford</td>
<td>Civil Aeronautics Board</td>
<td>Exec. Admin.</td>
<td>DOJ challenging independent agency decision to allow airlines to enter into anticompetitive agreement. (c)</td>
<td></td>
<td>DOJ (in part) &amp; independent agency (in part)</td>
</tr>
<tr>
<td>Gordon v. N.Y. Stock Exch., Inc. 382 (U.S. 1975)</td>
<td>Ford</td>
<td>Securities and Exchange Commission</td>
<td>Exec. Admin.</td>
<td>DOJ seeking limits to independent agency jurisdiction over fixed commission rates. (b)</td>
<td></td>
<td>Independent agency</td>
</tr>
</tbody>
</table>

380. 513 F.2d 713 (8th Cir. 1975).
381. 511 F.2d 1315 (D.C. Cir. 1975) (holding that the independent agency could issue a noncompetitive order in cases of emergency but setting aside the later order continuing noncompetitive behavior after the emergency had passed).
382. 422 U.S. 659 (1975).
<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>MCI Telecomms. Corp. v. FCC</td>
<td>Carter</td>
<td>FCC</td>
<td>Exec. Admin.</td>
<td>DOJ challenging agency certification of corporate monopoly. (c)</td>
<td>Pre-Chevron (declining to defer to FCC)</td>
<td>DOJ</td>
</tr>
<tr>
<td>(D.C. Cir. 1977)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(U.S. 1978)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FCC v. Pacifica Found.</td>
<td>Carter</td>
<td>FCC</td>
<td>Pres. Admin.</td>
<td>DOJ challenging independent agency regulation censuring broadcast as indecent at behest of new President. (a)</td>
<td></td>
<td>Independent agency</td>
</tr>
<tr>
<td>(U.S. 1978)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Usery v. Hermitage Concrete Pipe Co.</td>
<td>Carter</td>
<td>Occupational Safety and Health Review Commission</td>
<td>Exec. Admin.</td>
<td>DOJ representing independent agency OSHRC against Department of Labor to support OSHRC’s decision not to penalize violation of OSHRC’s enabling act. (a)</td>
<td>Pre-Chevron (noting when OSHRC is owed deference)</td>
<td>DOJ, on behalf of OSHRC (in part) &amp; Department of Labor (in part)</td>
</tr>
<tr>
<td>(6th Cir. 1978)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

386. 438 U.S. 726 (1978); see also supra text accompanying notes 260-61 (explaining how the DOJ changed its position to litigate against the FCC after President Carter took office).
387. 584 F.2d 127 (6th Cir. 1978) (holding that OSHRC applied too strict a standard and that certain factual findings by OSHRC under the standard are owed great deference, and remanding to OSHRC for further proceedings).
<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States v. FCC^{389}</td>
<td>Carter</td>
<td>FCC</td>
<td>Exec. Admin.</td>
<td>DOJ disputing independent agency’s grant of corporate merger. (c)</td>
<td>Independent agency</td>
<td></td>
</tr>
</tbody>
</table>

^{388} 442 U.S. 256 (1979); see supra notes 263-65 and accompanying text (explaining the DOJ’s argument in its amicus brief for a position opposing the one argued by the OPM, EEOC, and Departments of Labor and Defense).

^{389} 652 F.2d 72 (D.C. Cir. 1980) (en banc).
### Executive (Agency) Administration
72 STAN. L. REV. 641 (2020)

#### Table B.3

This Table categorizes cases into two types: executive administration and presidential administration. Executive administration cases fall into three subtypes: (a) appeal of decision binding an executive agency, (b) defense of executive agency jurisdiction, or (c) appeal of merger or price fixing. Presidential administration cases fall into two subtypes: (a) furthering the President’s agenda or (b) defending and augmenting the President’s removal power. This Table also indicates if a decision resulted from an application of the Administrative Procedure Act § 706(2)(A) arbitrary and capricious standard, or under a theory of deference (either before or after Chevron was issued).

<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prof’l Air Traffic Controllers Org. v. FLRA&lt;sup&gt;390&lt;/sup&gt; (D.C. Cir. 1982)</td>
<td>Reagan</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing intervenors Federal Aviation Administration to assert that FLRA adjudication was flawed when FLRA engaged in ex parte communication. (a)</td>
<td>Pre-Chevron (declining to defer to FLRA)</td>
<td>Independent agency</td>
</tr>
<tr>
<td>Div. of Military &amp; Naval Affairs v. FLRA&lt;sup&gt;391&lt;/sup&gt; (2d Cir. 1982)</td>
<td>Reagan</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing National Guard to dispute independent agency order. (a)</td>
<td>Pre-Chevron (declining to defer to FLRA)</td>
<td>DOJ</td>
</tr>
<tr>
<td>U.S. Dep’t of Agric. v. FLRA&lt;sup&gt;392&lt;/sup&gt; (8th Cir. 1982)</td>
<td>Reagan</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Department of Agriculture to dispute independent agency order. (a)</td>
<td>Pre-Chevron (declining to defer to FLRA)</td>
<td>DOJ</td>
</tr>
</tbody>
</table>

---

<sup>390</sup> 685 F.2d 547 (D.C. Cir. 1982).
<sup>391</sup> 683 F.2d 45 (2d Cir. 1982).
<sup>392</sup> 691 F.2d 1242 (8th Cir. 1982).
<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>(D.C. Cir. 1982)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>United States v. FCC</td>
<td>Reagan</td>
<td>FCC</td>
<td>Exec. Admin.</td>
<td>DOJ challenging independent agency approval to fix telephone rates. (c)</td>
<td></td>
<td>Independent</td>
</tr>
<tr>
<td>(D.C. Cir. 1983)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>agency</td>
</tr>
<tr>
<td>Ford Motor Co. v. Interstate Commerce Comm'n</td>
<td>Reagan</td>
<td>Interstate Commerce Commission</td>
<td>Exec. Admin.</td>
<td>DOJ disputing independent agency refusal to award reparations to rail carriers for overcharges by railroads. (c)</td>
<td>Arbitrary &amp; capricious</td>
<td>DOJ</td>
</tr>
<tr>
<td>(D.C. Cir. 1983)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Berry v. Reagan</td>
<td>Reagan</td>
<td>Commission on Civil Rights</td>
<td>Pres. Admin.</td>
<td>DOJ arguing that President has power to remove independent regulatory commissioners at will. (b)</td>
<td></td>
<td>Independent</td>
</tr>
<tr>
<td>(D.D.C. 1983)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>agency</td>
</tr>
<tr>
<td>Bureau of Alcohol, Tobacco &amp; Firearms v. FLRA</td>
<td>Reagan</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ arguing for limits to independent agency’s power to regulate Bureau within executive agency. (b)</td>
<td>Pre-Chevron (declining to defer to FLRA)</td>
<td>DOJ</td>
</tr>
<tr>
<td>(U.S. 1983)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

393. 694 F.2d 793 (D.C. Cir. 1982) (en banc) (per curiam).
394. 707 F.2d 610 (D.C. Cir. 1983).
395. 714 F.2d 1157 (D.C. Cir. 1983).
<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Escondido Mutual Water Co. v. La Jolla Band of Mission Indians&lt;sup&gt;398&lt;/sup&gt; (U.S. 1984)</td>
<td>Reagan</td>
<td>Federal Energy Regulatory Commission</td>
<td>Exec. Admin.</td>
<td>DOJ defending jurisdiction of Department of Interior from encroachment by independent agency. (b)</td>
<td>DOJ</td>
<td></td>
</tr>
<tr>
<td>Confederate Tribes &amp; Bands of the Yakima Indian Nation v. FERC&lt;sup&gt;399&lt;/sup&gt; (9th Cir. 1984)</td>
<td>Reagan</td>
<td>Federal Energy Regulatory Commission</td>
<td>Exec. Admin.</td>
<td>DOJ disputing adjudication by independent agency because of improper procedures and poor decisionmaking record lacking environmental impact statement. (a)</td>
<td>DOJ</td>
<td></td>
</tr>
<tr>
<td>Donovan v. A. Amorello &amp; Sons&lt;sup&gt;400&lt;/sup&gt; (1st Cir. 1985)</td>
<td>Reagan</td>
<td>Occupational Safety and Health Review Commission</td>
<td>Exec. Admin.</td>
<td>DOJ challenging independent agency’s interpretation of executive agency (Occupational Safety and Health Administration, under Department of Labor) regulation that was in opposition to executive agency’s interpretation. (b)</td>
<td>DOJ</td>
<td></td>
</tr>
</tbody>
</table>

---

399. 746 F.2d 466 (9th Cir. 1984).
400. 761 F.2d 61 (1st Cir. 1985).
### Executive (Agency) Administration

72 STAN. L. REV. 641 (2020)

<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dep’t of the Treasury v. FLRA</td>
<td>Reagan</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Department of the Treasury in dispute involving conflict between statute governing merit system and independent agency’s interpretation of labor negotiation contract. (a)</td>
<td>Chevron (deferring to FLRA)</td>
<td>Independent agency</td>
</tr>
<tr>
<td>FLRA v. Aberdeen Proving Ground, Dep’t of the Army</td>
<td>Reagan</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ litigating against independent agency over labor practices. (b)</td>
<td>DOJ</td>
<td></td>
</tr>
<tr>
<td>Ill. Nat’l Guard v. FLRA</td>
<td>Reagan</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ seeking primary jurisdiction for National Guard and Department of Defense over interpretation of statutes not administered by independent agency. (b)</td>
<td>Chevron (declining to defer to FLRA)</td>
<td>DOJ</td>
</tr>
</tbody>
</table>

---

401. 837 F.2d 1163 (D.C. Cir. 1988).
403. 854 F.2d 1396 (D.C. Cir. 1988).
<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>INS v. FLRA</em> 404 (9th Cir. 1988)</td>
<td>Reagan</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Immigration and Naturalization Service to dispute independent agency order. (a)</td>
<td>Arbitrary &amp; capricious</td>
<td>DOJ</td>
</tr>
<tr>
<td><em>Bureau of Indian Affairs v. FLRA</em> 405 (9th Cir. 1989)</td>
<td>H.W. Bush</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Department of Interior to dispute independent agency order. (a)</td>
<td>Arbitrary &amp; capricious</td>
<td>DOJ</td>
</tr>
<tr>
<td><em>IRS v. FLRA</em> 406 (U.S. 1990)</td>
<td>H.W. Bush</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing IRS to dispute independent agency order. (a)</td>
<td><em>Chevron</em> (deferring to FLRA but finding unreasonable application by FLRA)</td>
<td>DOJ</td>
</tr>
<tr>
<td><em>Metro Broad., Inc. v. FCC</em> 408 (U.S. 1990)</td>
<td>H.W. Bush</td>
<td>FCC</td>
<td>Pres. Admin.</td>
<td>DOJ asserting that independent agency decision is unconstitutional. (a)</td>
<td>Independent agency</td>
<td></td>
</tr>
</tbody>
</table>

404. 855 F.2d 1454 (9th Cir. 1988).
405. 887 F.2d 172 (9th Cir. 1989).
## Executive (Agency) Administration

72 STAN. L. REV. 641 (2020)

<table>
<thead>
<tr>
<th>Case Description</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Martin v. OSHRC</em>&lt;sup&gt;409&lt;/sup&gt; (U.S. 1991)</td>
<td>H.W. Bush</td>
<td>Occupational Safety and Health Review Commission</td>
<td>Exec. Admin.</td>
<td>DOJ defending Department of Labor’s authority to interpret its own regulation against encroachment by independent agency. <em>(b)</em></td>
<td>DOJ</td>
<td></td>
</tr>
<tr>
<td><em>U.S. Dep’t of Def. Dep’t of Military Affairs v. FLRA</em>&lt;sup&gt;410&lt;/sup&gt; (D.C. Cir. 1992)</td>
<td>H.W. Bush</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ litigating on behalf of Department of Defense against independent agency’s interpretation of the Freedom of Information Act. <em>(b)</em></td>
<td>DOJ</td>
<td></td>
</tr>
<tr>
<td><em>U.S. Dep’t of the Navy v. FLRA</em>&lt;sup&gt;411&lt;/sup&gt; (7th Cir. 1992)</td>
<td>H.W. Bush</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ litigating on behalf of Navy against independent agency’s interpretation of the Freedom of Information Act. <em>(b)</em></td>
<td>DOJ</td>
<td></td>
</tr>
</tbody>
</table>

---

411. 975 F.2d 348 (7th Cir. 1992).
<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mackie v. Bush[^413] (D.D.C. 1993)</td>
<td>H.W. Bush</td>
<td>Postal Service Board</td>
<td>Pres. Admin.</td>
<td>DOJ arguing that President has power to remove independent regulatory commissioners at will. (b)</td>
<td>Independent agency</td>
<td>Independent agency</td>
</tr>
</tbody>
</table>

Table B.4
Clinton Through Obama (1993-2017): Narrow Challenges to Agency Decisionmaking

This Table categorizes cases into two types: executive administration and presidential administration. Executive administration cases fall into three subtypes: (a) appeal of decision binding an executive agency, (b) defense of executive agency jurisdiction, or (c) appeal of merger or price fixing. Presidential administration cases fall into two subtypes: (a) furthering the President’s agenda or (b) defending and augmenting the President’s removal power. This Table also indicates if a decision resulted from an application of the Administrative Procedure Act § 706(2)(A) arbitrary and capricious standard, or under a theory of deference (either before or after *Chevron* was issued).

<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>U.S. Border Patrol v. FLRA</em>[^414^] (5th Cir. 1993)</td>
<td>Clinton</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Immigration and Naturalization Service to dispute independent agency order. (a)</td>
<td><em>Chevron</em> (declining to defer to FLRA’s unreasonable application of statute)</td>
<td>DOJ</td>
</tr>
<tr>
<td><em>INS v. FLRA</em>[^415^] (5th Cir. 1993)</td>
<td>Clinton</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Immigration and Naturalization Service to dispute independent agency order. (a)</td>
<td><em>Chevron</em> (declining to defer to FLRA’s unreasonable application of statute)</td>
<td>DOJ</td>
</tr>
<tr>
<td><em>U.S. INS v. FLRA</em>[^416^] (4th Cir. 1993)</td>
<td>Clinton</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Immigration and Naturalization Service to dispute independent agency order. (a)</td>
<td><em>Chevron</em> (deferring to FLRA in part)</td>
<td>DOJ (in part) &amp; independent agency (in part)</td>
</tr>
</tbody>
</table>

[^414^]: 991 F.2d 285 (5th Cir. 1993).
[^415^]: 995 F.2d 46 (5th Cir. 1993).
[^416^]: 4 F.3d 268 (4th Cir. 1993) (enforcing FLRA’s order in part and denying it in part).
<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. Border Patrol v. FLRA&lt;sup&gt;417&lt;/sup&gt; (9th Cir. 1993)</td>
<td>Clinton</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Immigration and Naturalization Service to dispute independent agency order. (a)</td>
<td>Arbitrary &amp; capricious</td>
<td>Independent agency</td>
</tr>
<tr>
<td>U.S. Dep’t of Def. v. FLRA&lt;sup&gt;418&lt;/sup&gt; (U.S. 1994)</td>
<td>Clinton</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ arguing on behalf of Department of Defense against independent agency’s interpretation of Privacy Act. (b)</td>
<td>Chevrion (declining to defer to FLRA)</td>
<td>DOJ</td>
</tr>
<tr>
<td>U.S. Dep’t of the Interior, Bureau of Reclamation v. FLRA&lt;sup&gt;419&lt;/sup&gt; (D.C. Cir. 1994)</td>
<td>Clinton</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Department of the Interior’s interpretations against independent agency’s interpretations of Prevailing Rate Systems Act and Civil Service Reform Act. (b)</td>
<td>Chevrion (declining to defer to FLRA)</td>
<td>DOJ</td>
</tr>
<tr>
<td>U.S. Nuclear Regulatory Comm’n v. FLRA&lt;sup&gt;420&lt;/sup&gt; (4th Cir. 1994)</td>
<td>Clinton</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Nuclear Regulatory Commission to argue that FLRA’s order is not consistent with Inspector General Act. (b)</td>
<td>DOJ (on behalf of Nuclear Regulatory Commission)</td>
<td>DOJ</td>
</tr>
</tbody>
</table>

417. 12 F.3d 882 (9th Cir. 1993).  
419. 23 F.3d 518 (D.C. Cir. 1994).  
420. 25 F.3d 229 (4th Cir. 1994).
### Executive (Agency) Administration

72 STAN. L. REV. 641 (2020)

<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dep’t of Veterans Affairs v. FLRA&lt;sup&gt;421&lt;/sup&gt; (D.C. Cir. 1994)</td>
<td>Clinton</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Department of Veterans Affairs to dispute independent agency order. (a)</td>
<td>Arbitrary &amp; capricious</td>
<td>Independent agency</td>
</tr>
<tr>
<td>U.S. Customs Serv. v. FLRA&lt;sup&gt;422&lt;/sup&gt; (D.C. Cir. 1994)</td>
<td>Clinton</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Customs Service to dispute independent agency order. (a)</td>
<td></td>
<td>DOJ</td>
</tr>
<tr>
<td>King v. Reid&lt;sup&gt;423&lt;/sup&gt; (Fed. Cir. 1995)</td>
<td>Clinton</td>
<td>Merit Systems Protection Board</td>
<td>Exec. Admin.</td>
<td>DOJ representing Office of Personnel Management to seek reversal of independent agency order against Navy. (a)</td>
<td></td>
<td>DOJ (on behalf of OPM)</td>
</tr>
<tr>
<td>U.S. Dept of the Treasury, Bureau of Engraving &amp; Printing v. FLRA&lt;sup&gt;424&lt;/sup&gt; (D.C. Cir. 1996)</td>
<td>Clinton</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Department of the Treasury to dispute independent agency application of Prevailing Rate Systems Act. (b)</td>
<td></td>
<td>Independent agency</td>
</tr>
<tr>
<td>Gen. Servs. Admin. v. FLRA&lt;sup&gt;425&lt;/sup&gt; (D.C. Cir. 1996)</td>
<td>Clinton</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing General Services Administration to dispute independent agency order. (a)</td>
<td></td>
<td>DOJ (on behalf of GSA)</td>
</tr>
</tbody>
</table>

---

421. 33 F.3d 1391 (D.C. Cir. 1994).
422. 43 F.3d 682 (D.C. Cir. 1994).
423. 59 F.3d 1215 (Fed. Cir. 1995).
424. 88 F.3d 1279 (D.C. Cir. 1996) (mem.).
425. 86 F.3d 1185 (D.C. Cir. 1996).
<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Swan v. Clinton</em> (D.C. Cir. 1996)</td>
<td>Clinton</td>
<td>National Credit Union Administration</td>
<td>Pres. Admin.</td>
<td>DOJ defending President’s at-will removal of independent agency commissioner. (b)</td>
<td>DOJ</td>
<td>DOJ</td>
</tr>
<tr>
<td><em>Dep’t of the Air Force v. FLRA</em> (D.C. Cir. 1997)</td>
<td>Clinton</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ arguing on behalf of Air Force to dispute independent agency’s interpretation of Federal Labor-Management Relations Statute and Privacy Act. (b)</td>
<td>Independent agency</td>
<td>Independent agency</td>
</tr>
<tr>
<td><em>INS v. FLRA</em> (D.C. Cir. 1998)</td>
<td>Clinton</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Immigration and Naturalization Service to dispute independent agency order. (a)</td>
<td>Arbitrary &amp; capricious</td>
<td>Independent agency</td>
</tr>
</tbody>
</table>

426. 100 F.3d 973 (D.C. Cir. 1996).
427. 104 F.3d 1396 (D.C. Cir. 1997).
428. 144 F.3d 90 (D.C. Cir. 1998).
429. 147 F.3d 1367 (Fed. Cir. 1998).
<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Aviation Admin. v. FLRA</td>
<td>Clinton</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Federal Aviation Administration against independent agency’s interpretation of government-wide regulations. (b)</td>
<td>Arbitrary &amp; capricious</td>
<td>DOJ</td>
</tr>
<tr>
<td>Nat'l Fed’n of Fed. Emps., Local 1309 v. Dep’t of the Interior</td>
<td>Clinton</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ arguing on behalf of Department of the Interior for limitations to the authority granted to independent agency by its enabling act. (a)</td>
<td>Chevron (deferring to FLRA)</td>
<td>Independent agency</td>
</tr>
<tr>
<td>Lachance v. White</td>
<td>Clinton</td>
<td>Merit Systems Protection Board</td>
<td>Exec. Admin.</td>
<td>DOJ representing Office of Personnel Management to seek reversal of independent agency order against Air Force. (a)</td>
<td>Arbitrary &amp; capricious</td>
<td>DOJ (on behalf of OPM)</td>
</tr>
<tr>
<td>Lachance v. Devall</td>
<td>Clinton</td>
<td>Merit Systems Protection Board</td>
<td>Exec. Admin.</td>
<td>DOJ representing Office of Personnel Management to seek reversal of independent agency order against Navy. (a)</td>
<td></td>
<td>DOJ (on behalf of OPM)</td>
</tr>
</tbody>
</table>

430. 145 F.3d 1425 (D.C. Cir. 1998).
432. 174 F.3d 1378 (Fed. Cir. 1999).
433. 178 F.3d 1246 (Fed. Cir. 1999).
<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>NASA v. FLRA</em>¹³⁵ (U.S. 1999)</td>
<td>Clinton</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing NASA to dispute independent agency order. (a)</td>
<td></td>
<td>Independent agency (FLRA)</td>
</tr>
<tr>
<td><em>Luke Air Force Base v. FLRA</em>¹³⁷ (9th Cir. 1999)</td>
<td>Clinton</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ defending Air Force against independent agency charge that union should have been notified of Equal Employment Opportunity complaint. (a)</td>
<td>Arbitrary &amp; capricious</td>
<td>DOJ</td>
</tr>
</tbody>
</table>

---

¹³⁴ 177 F.3d 1042 (D.C. Cir. 1999).
¹³⁶ 190 F.3d 571 (D.C. Cir. 1999).
¹³⁷ 208 F.3d 221 (9th Cir. 1999) (mem.).
<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Soc. Sec. Admin. v. FLRA&lt;sup&gt;438&lt;/sup&gt; (D.C. Cir. 2000)</td>
<td>Clinton</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ arguing on behalf of Social Security Administration against FLRA’s interpretation of Back Pay Act. (b)</td>
<td>DOJ (on behalf of SSA)</td>
<td></td>
</tr>
<tr>
<td>U.S. Dep’t of Justice v. FLRA&lt;sup&gt;439&lt;/sup&gt; (D.C. Cir. 2001)</td>
<td>W. Bush</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing its own Office of the Inspector General to dispute independent agency order. (a)</td>
<td></td>
<td>Independent agency</td>
</tr>
<tr>
<td>U.S. Dep’t of the Interior, Bureau of Reclamation v. FLRA&lt;sup&gt;440&lt;/sup&gt; (9th Cir. 2002)</td>
<td>W. Bush</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ arguing on behalf of Department of the Interior against independent agency’s interpretation of Civil Service Reform Act. (b)</td>
<td></td>
<td>DOJ</td>
</tr>
<tr>
<td>James v. Von Zmmeszky&lt;sup&gt;441&lt;/sup&gt; (Fed. Cir. 2002)</td>
<td>W. Bush</td>
<td>Merit Systems Protection Board</td>
<td>Exec. Admin.</td>
<td>DOJ representing Office of Personnel Management to seek reversal of independent agency order against Department of Veterans Affairs. (a)</td>
<td></td>
<td>Independent agency (MSPB)</td>
</tr>
</tbody>
</table>

438. 201 F.3d 465 (D.C. Cir. 2000).
439. 266 F.3d 1228 (D.C. Cir. 2001).
440. 279 F.3d 762 (9th Cir. 2002).
441. 284 F.3d 1310 (Fed. Cir. 2002).
<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States v. Wilson†</td>
<td>W. Bush</td>
<td>Commission on Civil Rights</td>
<td>Pres. Admin.</td>
<td>DOJ defending President’s appointee to independent agency and removal of holdover appointee from previous administration. (b)</td>
<td></td>
<td>DOJ</td>
</tr>
<tr>
<td>Dep’t of the Air Force, 315th Airlift Wing v. FLRA‡</td>
<td>W. Bush</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Air Force to dispute independent agency order. (a)</td>
<td>Arbitrary &amp; capricious</td>
<td>DOJ</td>
</tr>
<tr>
<td>Dep’t of the Air Force, 436th Airlift Wing v. FLRA§</td>
<td>W. Bush</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ defending Air Force against independent agency charge that union should have been notified of Equal Employment Opportunity complaint. (a)</td>
<td>Chevron (deferring to FLRA)</td>
<td>Independent agency</td>
</tr>
</tbody>
</table>

442. 290 F.3d 347 (D.C. Cir. 2002).
443. 294 F.3d 192 (D.C. Cir. 2002).
444. 316 F.3d 280 (D.C. Cir. 2003).
<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Collins v. Nat’l Transp. Safety Bd.447</td>
<td>W. Bush</td>
<td>National Transportation Safety Board</td>
<td>Exec. Admin.</td>
<td>DOJ representing Coast Guard to dispute independent agency order. (a)</td>
<td></td>
<td>DOJ</td>
</tr>
<tr>
<td>IRS v. FLRA448</td>
<td>W. Bush</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing IRS to assert primacy of Portal-to-Portal Act over enabling act of independent agency. (b)</td>
<td></td>
<td>Independent agency</td>
</tr>
</tbody>
</table>

445. 319 F.3d 1368 (Fed. Cir. 2003) (holding that the MSPB had jurisdiction over whether the OPM’s scoring formula for ALJ examinations was consistent with OPM’s regulations, but reversing the MSPB’s decision on the merits, and holding that the MSPB had no jurisdiction over whether the OPM’s formula was consistent with a statutory provision).
446. 328 F.3d 1374 (Fed. Cir. 2003).
447. 351 F.3d 1246 (D.C. Cir. 2003).
448. 521 F.3d 1148 (9th Cir. 2008).
### Executive (Agency) Administration

72 STAN. L. REV. 641 (2020)

<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>NLRB v. FLRA</em>[^450^] (D.C. Cir. 2010)</td>
<td>Obama</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing NLRB to dispute independent agency FLRA’s order. (a)</td>
<td>DOJ (on behalf of NLRB)</td>
<td></td>
</tr>
</tbody>
</table>

[^49^]: 525 F.3d 1363 (Fed. Cir. 2008).
[^450^]: 613 F.3d 275 (D.C. Cir. 2010).
[^451^]: 640 F.3d 1263 (D.C. Cir. 2011) (granting in part and denying in part the USPS’s petition for review of the Postal Regulatory Commission’s regulation of the USPS).
[^452^]: 648 F.3d 841 (D.C. Cir. 2011).
[^453^]: 654 F.3d 91 (D.C. Cir. 2011).
### Case

<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>U.S. Customs &amp; Border Prot. v. FLRA</em></td>
<td>Obama</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Customs and Border Protection to dispute independent agency order. (a)</td>
<td>Arbitrary &amp; capricious</td>
<td>Independent agency</td>
</tr>
<tr>
<td><em>U.S. Dep’t of the Navy v. FLRA</em></td>
<td>Obama</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Navy to dispute independent agency order. (a)</td>
<td>DOJ</td>
<td></td>
</tr>
<tr>
<td><em>U.S. Dep’t of the Treasury, Bureau of the Public Debt v. FLRA</em></td>
<td>Obama</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Department of the Treasury to dispute independent agency order. (a)</td>
<td>Independent agency (on jurisdictional grounds)</td>
<td></td>
</tr>
<tr>
<td><em>Kaplan v. Conyers</em></td>
<td>Obama</td>
<td>Merit Systems Protection Board</td>
<td>Exec. Admin.</td>
<td>DOJ representing Office of Personnel Management to dispute independent agency MSPB’s order involving Department of Defense. (a)</td>
<td>DOJ (on behalf of OPM)</td>
<td></td>
</tr>
</tbody>
</table>

---

454. 647 F.3d 359 (D.C. Cir. 2011).
455. 665 F.3d 1339 (D.C. Cir. 2012).
456. 670 F.3d 1315 (D.C. Cir. 2012).
457. 733 F.3d 1148 (Fed. Cir. 2013) (en banc).
458. 737 F.3d 779 (D.C. Cir. 2013) (finding that FLRA’s decision was reasonable with respect to one union proposal but was arbitrary and capricious with respect to another proposal).
<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>U.S. IRS Office of Chief Counsel v. FLRA</strong>&lt;sup&gt;459&lt;/sup&gt; (D.C. Cir. 2014)</td>
<td>Obama</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Department of the Treasury to dispute independent agency order.</td>
<td>Arbitrary &amp; capricious</td>
<td>DOJ</td>
</tr>
<tr>
<td><strong>USPS v. Postal Regulatory Comm’n</strong>&lt;sup&gt;460&lt;/sup&gt; (D.C. Cir. 2014)</td>
<td>Obama</td>
<td>USPS</td>
<td>Exec. Admin.</td>
<td>DOJ arguing on behalf of Postal Regulatory Commission in favor of its regulation of U.S. Postal Service.</td>
<td>Arbitrary &amp; capricious</td>
<td>DOJ (on behalf of Postal Regulatory Commission)</td>
</tr>
<tr>
<td><strong>U.S. Customs &amp; Border Prot. v. FLRA</strong>&lt;sup&gt;461&lt;/sup&gt; (D.C. Cir. 2014)</td>
<td>Obama</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ arguing on behalf of Department of Homeland Security against independent agency with respect to interpretation of independent agency’s enabling act.</td>
<td>DOJ</td>
<td></td>
</tr>
<tr>
<td><strong>Broad. Bd. of Governors v. FLRA</strong>&lt;sup&gt;462&lt;/sup&gt; (D.C. Cir. 2014)</td>
<td>Obama</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing independent agency Broadcasting Board of Governors to dispute independent agency FLRA’s order.</td>
<td>Independent agency (FLRA)</td>
<td></td>
</tr>
</tbody>
</table>

---

459. 739 F.3d 13 (D.C. Cir. 2014).
460. 747 F.3d 906 (D.C. Cir. 2014).
461. 751 F.3d 665 (D.C. Cir. 2014).
462. 752 F.3d 453 (D.C. Cir. 2014).
### Executive (Agency) Administration

*72 Stan. L. Rev. 641 (2020)*

<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Southwestern Power Admin. v. FERC</em>⁴⁶³</td>
<td>Obama</td>
<td>Federal Energy Regulatory Commission</td>
<td>Exec. Admin.</td>
<td>DOJ arguing on behalf of Department of Energy entity and Department of Interior that independent agency’s enabling act does not create waiver for U.S. sovereign immunity from monetary penalties. (b)</td>
<td>DOJ</td>
<td></td>
</tr>
<tr>
<td><em>(D.C. Cir. 2014)</em></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>U.S. Dep’t of Homeland Sec. v. FLRA</em>⁴⁶⁴</td>
<td>Obama</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Customs and Border Protection to dispute independent agency order. (a)</td>
<td>Independent</td>
<td>Independent</td>
</tr>
<tr>
<td><em>(D.C. Cir. 2015)</em></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>agency (on</td>
<td>grounds)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>jurisdictional</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>grounds)</td>
<td></td>
</tr>
<tr>
<td><em>(Fed. Cir. 2015)</em></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>agency (MSPB)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Huerta v. Ducote</em>⁴⁶⁶</td>
<td>Obama</td>
<td>National Transportation Safety Board</td>
<td>Exec. Admin.</td>
<td>DOJ representing Federal Aviation Administration to dispute independent agency order. (a)</td>
<td>Arbitrary &amp; capricious</td>
<td>DOJ</td>
</tr>
<tr>
<td><em>(D.C. Cir. 2015)</em></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

⁴⁶³. 763 F.3d 27 (D.C. Cir. 2014).
⁴⁶⁴. 784 F.3d 821 (D.C. Cir. 2015).
⁴⁶⁵. 786 F.3d 1340 (Fed. Cir. 2015).
⁴⁶⁶. 792 F.3d 144 (D.C. Cir. 2015).
<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cobert v. Miller⁴⁶⁷ (Fed. Cir. 2015)</td>
<td>Obama</td>
<td>Merit Systems Protection Board</td>
<td>Exec. Admin.</td>
<td>DOJ representing Office of Personnel Management to dispute independent agency MSPB’s order. (a)</td>
<td>DOJ (on behalf of OPM)</td>
<td></td>
</tr>
<tr>
<td>USPS v. Postal Regulatory Comm’n⁴⁶⁸ (D.C. Cir. 2016)</td>
<td>Obama</td>
<td>USPS</td>
<td>Exec. Admin.</td>
<td>DOJ arguing on behalf of Postal Regulatory Commission in favor of its regulation of the Postal Service. (a)</td>
<td>Arbitrary &amp; capricious</td>
<td>DOJ (on behalf of Postal Regulatory Commission)</td>
</tr>
<tr>
<td>U.S. Dep’t of the Air Force v. FLRA⁴⁶⁹ (D.C. Cir. 2016)</td>
<td>Obama</td>
<td>Federal Labor Relations Authority</td>
<td>Exec. Admin.</td>
<td>DOJ representing Air Force to dispute independent agency order. (a)</td>
<td>DOJ</td>
<td></td>
</tr>
</tbody>
</table>

⁴⁶⁷. 800 F.3d 1340 (Fed. Cir. 2015).
⁴⁶⁸. 816 F.3d 883 (D.C. Cir. 2016).
⁴⁶⁹. 844 F.3d 957 (D.C. Cir. 2016).
This Table categorizes cases into two types: executive administration and presidential administration. Executive administration cases fall into three subtypes: (a) appeal of decision binding an executive agency, (b) defense of executive agency jurisdiction, or (c) appeal of merger or price fixing. Presidential administration cases fall into two subtypes: (a) furthering the President’s agenda or (b) defending and augmenting the President’s removal power. This Table also indicates if a decision resulted from an application of the Administrative Procedure Act § 706(2)(A) arbitrary and capricious standard, or under a theory of deference (either before or after *Chevron* was issued).

<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>(D.C. Cir. 2017)</em></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>(6th Cir. 2017)</em></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>PHH Corp. v. Consumer Fin. Prot. Bureau</em>[^472^]</td>
<td>Trump</td>
<td>Consumer Financial Protection Bureau</td>
<td>Pres. Admin.</td>
<td>DOJ arguing that for-cause removal provision for independent agency’s director is unconstitutional in amicus brief. (b)</td>
<td></td>
<td>Independent agency</td>
</tr>
<tr>
<td><em>(D.C. Cir. 2018)</em></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

[^470^]: 875 F.3d 667 (D.C. Cir. 2017).
[^471^]: 878 F.3d 171 (6th Cir. 2017).
### Executive (Agency) Administration
72 STAN. L. REV. 641 (2020)

<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Independent Agency</th>
<th>Type</th>
<th>Subtype</th>
<th>Standard of Review</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Zarda v. Altitude Express, Inc.(^{473}) (2d Cir. 2018)</td>
<td>Trump</td>
<td>Equal Employment Opportunity Commission</td>
<td>Pres. Admin.</td>
<td>DOJ arguing that independent agency’s interpretation of Title VII of the Civil Rights Act is barred by agency and court precedent and by statute itself in amicus brief. (^{(a)})</td>
<td>Independent agency</td>
<td></td>
</tr>
</tbody>
</table>

---

474. 886 F.3d 1253 (D.C. Cir. 2018).
475. 886 F.3d 1261 (D.C. Cir. 2018).