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Executive (Agency) Administration

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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

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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.

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Introduction

President Trump has pursued significant control over the executive branch, but this in no way makes him exceptional.[1] As Elena Kagan famously argued before joining the Supreme Court, all modern Presidents have pursued a system of administrative control.[2] 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.[3]

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."[4] Indeed, she conceded, "the existence of independent agencies can pose a particularly stark challenge to the aspiration of Presidents to control

1. *See, e.g.*, Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43, 47-49 (2017) ("[E]arly actions by President Donald Trump signal that exertions of presidential authority over administrative agencies will continue—if not even be taken to new extremes."). *See generally* John Dickerson, *The Hardest Job in the World*, ATLANTIC (May 2018), https://perma.cc/L5WL-XUH2 (arguing that the executive branch may be overcentralized).

2. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (arguing that the President has primacy in "setting the direction and influencing the outcome of administrative process"). In addition, Kagan argued that President Clinton made "the regulatory activity of the executive branch agencies more and more an extension of the President's own policy and political agenda." *Id.* at 2248. And while "Reagan and Bush showed that presidential supervision could thwart regulators intent on regulating no matter what the cost, Clinton showed that presidential supervision could jolt into action bureaucrats suffering from bureaucratic inertia in the face of unmet needs and challenges." *Id.* at 2249.

   For additional literature on presidential power over administrative agencies, see, for example, Coglianese, *supra* note 1, at 47-49 (describing actions taken by President Obama as part of the "modern trend toward an 'administrative presidency'"); Geoffrey P. Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 GEO. WASH. L. REV. 401, 401 (1989) (noting that the Nixon Administration was "characterized by aggressive assertions of presidential power vis-a-vis Congress"); Kevin M. Stack, *Obama's Equivocal Defense of Agency Independence*, 26 CONST. COMMENT. 583, 584 (2010) (arguing that President Obama's and President Reagan's views of independent agencies were not so far apart after all); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 692-720 (2016) (illustrating how Presidents W. Bush and Obama exerted "significant control over the regulatory state").

3. Kagan, *supra* note 2, at 2246 ("The history of the American administrative state is the history of competition among different entities for control of its policies. All three branches of government—the President, Congress, and Judiciary—have participated in this competition; so too have the external constituencies and internal staff of the agencies.").

4. *Id.* at 2273-74.

administration."[5] This is because, as is well known, there are significant limitations to the President's power to direct or even influence independent agencies,[6] sometimes called the "fourth branch" of government.[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,[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.

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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.

6. *See infra* Part II.A.

7. *See, e.g.*, Ameron, Inc. v. U.S. Army Corps of Eng'rs, 787 F.2d 875, 886 (3d Cir.) ("[The] 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).

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.[9] However, this dynamic offers only a partial account of executive administration, in part because it is often driven by the President's agenda.[10]

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,[11] reveals this litigation has existed from 1945 through the present day. Nonetheless, few have examined it,[12] 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.[13] For example, the DOJ has appealed several decisions by the Federal Labor Relations Authority (FLRA) sanctioning executive agencies for committing unfair labor practices.[14]

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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.

12. Interagency litigation as a whole is common and "often arises in interesting contexts where a lot is at stake," but "the scholarship has largely ignored it." Joseph W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217, 1219 (2013). *See generally id.* (exploring whether intragovernmental litigation "satisf[ies] the traditional threshold standards of Article III, including standing and adverse parties"). Even scholars that study intragovernmental litigation have cited cases involving litigation between executive and independent agencies and litigating authority between the two types of agencies only sporadically. *See, e.g.*, Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 561 n.11 (2003); Michael Herz, United States v. United States*: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 895-96 (1991); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 291 & n.127 (2006); James R. Harvey III, Note, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1572 & n.10 (1996); Note, *supra* note 5, at 1596 n.4.

13. *See infra* Part I.B.1.

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.[15] 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.[16]

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.[17] Examples include DOJ litigation disputing the certification of airline mergers or price fixing in the railroad shipping industry.[18]

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.[19]

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,

15. *See infra* Part I.B.2.

16. *See* sources cited *infra* notes 99-100 (listing disputes between the Department of Labor and the OSHRC); *infra* text accompanying notes 102-03 (discussing a case in which the Department of Labor sought primary authority to interpret its own regulation in the face of a conflicting interpretation by the OSHRC).

17. *See infra* Part I.B.3.

18. *See* sources cited *infra* notes 117, 120 (listing cases involving an airline merger and price fixing in railroad shipping, respectively).

19. These statistics are based on analysis of this Article's original dataset of cases. *See infra* Tables A.1.1, A.1.2, and A.2.2. For further discussion, see also notes 81-83 below and accompanying text.

much of which has focused on mechanisms within the executive branch, rather than on Article III courts.[20]

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[21] (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."[22] 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.[23] In this way, litigation may help ameliorate independent agencies' issuance of subpar decisions due to their lack of accountability to the executive branch.[24]

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).

21. The internal separation of powers framework suggests that the benefits of the traditional separation of powers may be further accomplished by separation among entities within the executive branch. *See* Gillian E. Metzger, Essay, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 428-31 (2009); Bijal Shah, Response, *Toward an Intra-Agency Separation of Powers*, 92 N.Y.U. L. REV. ONLINE 101, 102 & n.4 (2017) (responding to Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016)).

22. *See* Kagan, *supra* note 2, at 2251-52.

23. *See infra* Part I.C.1.

24. *See generally* Cary Coglianese, *Improving Regulatory Analysis at Independent Agencies*, 67 AM. U. L. REV. 733 (2018) (suggesting ways to ameliorate the consequences of the lack of executive oversight of independent agency policymaking); Susan Bartlett Foote, Essay, *Independent Agencies Under Attack: A Skeptical View of the Importance of the Debate*, 1988 DUKE L.J. 223 (explaining one line of attack against independent agencies that involves lack of political accountability); Edwin Meese III, Attorney Gen., Address Before the Federal Bar Association (Sept. 13, 1985) (arguing that agencies and bureaucrats in general are not accountable because they answer to neither the President nor Congress).

with an executive agency's interpretation of a general statute.[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.[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.[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,[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.[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).[30]
b. Second, the DOJ has sought to reduce the insulation of independent agencies from the President.[31] For example, Presidents Reagan and H.W. Bush sought, unsuccessfully, to exercise at-will removal of independent agency commissioners,[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.[33]

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25. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1618 (2018). For further discussion of this theory of *Epic Systems*, see notes 187-92 below and accompanying text.

26. *See* Metzger, *supra* note 21, at 436.

27. *See supra* text accompanying note 6; *see also infra* Part II.A (exploring the limitations of presidential control over independent agencies).

28. Cases furthering presidential administration comprise less than 15% of the litigation in the dataset. *See infra* Table A.1.1.

29. *See infra* Part II.B.1.

30. These Presidents include Presidents Carter, Reagan, H.W. Bush, and Trump. *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).

31. *See infra* Part II.B.2.

32. Mackie v. Bush, 809 F. Supp. 144 (D.D.C.), *vacated as moot mem. sub nom.* Mackie v. Clinton, 10 F.3d 13 (D.C. Cir. 1993); Berry v. Reagan, No. 83-3182, 1983 WL 538, at *2, *6 (D.D.C. Nov. 14, 1983), *vacated as moot mem.*, 732 F.2d 949 (D.C. Cir. 1983). For additional discussion of these cases, see notes 301-05 below and accompanying text.

33. *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 77-78 (D.C. Cir. 2018) (en banc). For additional discussion of this case, see text accompanying notes 307-13 below.

The quick succession of uniquely aggressive cases brought by the Trump Administration to limit the function and autonomy of the fourth branch[34] 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.[35] 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.[36] 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,[37] and the DOJ's previous success in furthering the President's agenda through litigation has been mixed.[38] 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.[39] If so, this litigation could allow the President to become a more unitary executive in the near future, for better or for worse.[40]

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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.

37. *See infra* text accompanying notes 254-55 (discussing judicial losses for the Trump Administration). *But see infra* text accompanying notes 109-14 (discussing *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), a case in which position advanced by the Trump Administration won).

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*,

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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*[41]—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.[42] In addition, this approach to research incorporated a

65 UCLA L. REV. 78, 144-45 (2018) (cautioning against partisanship leading to increasingly authoritarian presidential norms), *and* Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 551 (2018) (suggesting one theoretical debate is that "'presidential administration' or 'presidentialism,' mean[s] roughly, muscular presidential direction and control of administrative policy").

41. 138 S. Ct. 1612 (2018).

42. More details on the search methodology can be found in the Appendix.

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[43]: 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).[44] 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."[45] 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 1,100 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. EDLES, 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 & EDLES, *supra*, at 171 (second alteration in original) (footnote omitted) (quoting United States v. Interstate Commerce Comm'n, 337 U.S. 426, 432 (1949)). *But*
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> 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 . . . .[46]

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.[47] 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.[48] 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

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see id. ("But the situation may change when one or both parties are independent agencies.").

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").

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.

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,[49] 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.[51] For instance, in *Hayburn's Case*, the Supreme Court took the Attorney General to task for attempting to litigate ex officio, without an actual client.[52] Furthermore, the DOJ has long acted of its own volition[53] and continues to do so,[54] including to "frequently conduct[] litigation in those cases that involve issues . . . common to all departments and agencies."[55]

Moreover, in addition to supporting the President's interests, the DOJ acts as counsel to the executive branch as a whole.[56] Accordingly, the DOJ is "far from monolithic" in its approach to representing agencies.[57] 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

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").

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 *United States v. United States*." Herz, *supra* note 12, at 896 & n.12 (emphasis omitted) (noting the "judiciary's receptiveness to intragovernmental lawsuits").

53. *See* Jerry L. Mashaw & Avi Perry, *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).

54. *See* Bruce A. Green & Rebecca Roiphe, *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.").

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").

56. That is, "[e]xcept as otherwise authorized by statute, the conduct of the federal government's litigation rests with the DOJ." *Id.* at 167 (citing 28 U.S.C. §§ 516-519 (1994)); *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, Essay, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, LAW & CONTEMP. PROBS., Winter 1998, at 205, 205 [hereinafter Devins & Herz, *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").

57. BREGER & EDLES, *supra* note 45, at 167; *see also* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 278 (1994).

agencies.[58] 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)[59] both exacerbates the distant relationship between the DOJ and independent agencies[60] 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.[61]

By acting as counsel on behalf of agencies, the DOJ is able to influence their substantive programs.[62] 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.[63] In

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.

Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1346 (2000).

63. *See* Devins, *supra* note 57, at 256; Robert L. Stern, Comment, *"Inconsistency" in Government Litigation*, 64 HARV. L. REV. 759, 759 (1951).

order to prioritize the interests of one agency,[64] 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[65] or for reasons—such as protecting the interests or legislative mandates of executive agencies over those of independent agencies[66]—that are unrelated to the White House's agenda.[67] 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 263, 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,[68] which would act as a bar to interagency litigation.[69] However, despite the OLC's traditional role in "settling disputes among departments and non-independent agencies of the executive branch,"[70] it does not have the authority or capacity to enforce its opinions against unwilling parties in courts.[71] Given that independent agencies are not even bound, as a matter of internal branch practice, to abide by the OLC's advice,[72] 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,[73] although this state of affairs may be in flux.[74]

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. Note, *supra* note 5, at 1595; *see also* Renan, *supra* note 50, at 847 ("Indeed, OLC's organizational origins are as an intra-executive dispute resolution office 'adjudicating' disagreements between the agencies."). As a general matter, the OLC is "the most significant centralized source of legal advice within the Executive Branch. Exercising authority delegated by the Attorney General, it provides legal advice to the President and other executive components. The questions OLC addresses are often among the most vexing in the Executive Branch." Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451 (2010) (footnotes omitted). These "vexing questions" include disputes between or among executive agencies. *See, e.g.*, *id.* at 1460-61, 1461 n.47.

71. Note, *supra* note 50, at 1052.

72. *See* Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 711 (2005).

73. *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).

74. *See* Bridget C.E. Dooling, Opinion, *How Independent Are Government Agencies? OMB's Move on "Major" Rules May Tell Us*, HILL (Apr. 13, 2019, 11:00 AM EDT), https://perma.cc/J7AC-SKRB. *See generally* Memorandum from Russell T. Vought, Acting Dir., White

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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

House Office of Mgmt. & Budget, to the Heads of Exec. Dep'ts & Agencies (Apr. 11, 2019) (increasing OIRA oversight of agencies, including potentially independent agencies), https://perma.cc/5FT5-XZL6.

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.[77] 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.[78] For the Nixon through Obama Administrations, these cases represent over 90% of litigation brought by the DOJ against independent agencies.[79] Litigation for purposes of executive administration was employed relatively often by the DOJ under Presidents Clinton, W. Bush, and Obama.[80]

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.[81] Courts have also tended to favor the DOJ when making determinations concerning the jurisdictional limits of independent agencies' authority.[82] 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.[83] 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,

84. United States v. United States, 417 F. Supp. 851 (D.D.C. 1976) (per curiam), *aff'd mem. sub nom.* Nat'l Classification Comm. v. United States, 430 U.S. 961 (1977).

85. *See* N.Y. Shipping Ass'n v. Fed. Mar. Comm'n, 495 F.2d 1215, 1218 (2d Cir. 1974).

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").

President Clinton: *See, e.g.*, NASA v. FLRA, 527 U.S. 229, 231-32 (1999); Nat'l Fed'n of Fed. Emps., Local 1309 v. Dep't of the Interior, 526 U.S. 86, 88-90 (1999) (noting that the DOJ argued on behalf of the National Federation of Federal Employees, which represented employees within a subagency of the Department of the Interior); INS v. FLRA, 144 F.3d 90, 91 (D.C. Cir. 1998); Gen. Servs. Admin. v. FLRA, 86 F.3d 1185, 1186 (D.C. Cir. 1996); U.S. Customs Serv. v. FLRA, 43 F.3d 682, 683-84 (D.C. Cir. 1994); Dep't of Veterans Affairs v. FLRA, 33 F.3d 1391, 1392 (D.C. Cir. 1994); U.S. Border Patrol v. FLRA, 12 F.3d 882, 883-84 (9th Cir. 1993); U.S. INS v. FLRA, 4 F.3d 268, 270 (4th Cir. 1993); INS v. FLRA, 995 F.2d 46, 46-47 (5th Cir. 1993); U.S. Border Patrol v. FLRA, 991 F.2d 285, 287 (5th Cir. 1993).

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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.[87] Around the same time, the D.C. Circuit also recognized the need for the judiciary to address interagency disputes.[88]

Finally, the Reagan Administration also brought claims asserting that adjudications of independent agencies were procedurally flawed,[89] which is unusual in this type of litigation. In these cases, the DOJ litigated ostensibly to improve independent agencies' decisionmaking processes.[90]

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.*, U.S. Dep't of the Air Force v. FLRA, 844 F.3d 957, 958 (D.C. Cir. 2016); U.S. Dep't of Homeland Sec. v. FLRA, 784 F.3d 821, 822 (D.C. Cir. 2015); Broad. Bd. of Governors v. FLRA, 752 F.3d 453, 453-54 (D.C. Cir. 2014); U.S. IRS Office of Chief Counsel v. FLRA, 739 F.3d 13, 14-15 (D.C. Cir. 2014); Fed. Bureau of Prisons v. FLRA, 737 F.3d 779, 781 (D.C. Cir. 2013); U.S. Dep't of the Treasury, Bureau of the Pub. Debt v. FLRA, 670 F.3d 1315, 1316 (D.C. Cir. 2012); U.S. Dep't of the Navy v. FLRA, 665 F.3d 1339, 1342 (D.C. Cir. 2012); U.S. Customs & Border Prot. v. FLRA, 647 F.3d 359, 361 (D.C. Cir. 2011); Fed. Bureau of Prisons v. FLRA, 654 F.3d 91, 92 (D.C. Cir. 2011); U.S. Dep't of the Air Force, 4th Fighter Wing v. FLRA, 648 F.3d 841, 842 (D.C. Cir. 2011); NLRB v. FLRA, 613 F.3d 275, 277 (D.C. Cir. 2010).

President Trump: *See, e.g.*, FLRA v. Mich. Army Nat'l Guard, 878 F.3d 171, 174 (6th Cir. 2017); Fed. Bureau of Prisons v. FLRA, 875 F.3d 667, 670 (D.C. Cir. 2017).

87. President Clinton: *See, e.g.*, Garvey v. Nat'l Transp. Safety Bd., 190 F.3d 571, 573 (D.C. Cir. 1999); Lachance v. Devall, 178 F.3d 1246, 1248 (Fed. Cir. 1999) (MSPB); Lachance v. White, 174 F.3d 1378, 1379 (Fed. Cir. 1999) (MSPB); Lachance v. Merit Sys. Prot. Bd., 147 F.3d 1367, 1369 (Fed. Cir. 1998); King v. Reid, 59 F.3d 1215, 1216-17 (Fed. Cir. 1995) (MSPB).

President W. Bush: *See, e.g.*, Springer v. Adkins, 525 F.3d 1363, 1364 (Fed. Cir. 2008) (MSPB); Collins v. Nat'l Transp. Safety Bd., 351 F.3d 1246, 1248 (D.C. Cir. 2003); James v. Santella, 328 F.3d 1374, 1375 (Fed. Cir. 2003) (MSPB); James v. Von Zemenszky, 284 F.3d 1310, 1312 (Fed. Cir. 2002) (MSPB).

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).

88. *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)).

89. *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).

90. *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.[91] 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.[92] 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.[93] 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.[94] 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.[95] 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.[96]

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.

92. Far E. Conference v. United States, 342 U.S. 570, 576 (1952).

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.*

94. United States *ex rel.* Chapman v. Fed. Power Comm'n, 345 U.S. 153, 153-55 (1953).

95. *See* St. Regis Paper Co. v. United States, 368 U.S. 208, 215-20 (1961).

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.[97] 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

97. Udall v. Fed. Power Comm'n, 387 U.S. 428, 433-35, 433 n.3 (1967); *see also* Herz, *supra* note 12, at 895.

98. Gordon v. N.Y. Stock Exch., 422 U.S. 659, 660-61, 685-86 (1975).

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).

101. *See* FLRA v. Aberdeen Proving Ground, Dep't of the Army, 485 U.S. 409, 410-11 (1988) (per curiam); Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 90-91 (1983); Ill. Nat'l Guard v. FLRA, 854 F.2d 1396, 1397 (D.C. Cir. 1988); Donovan v. A. Amorello & Sons, 761 F.2d 61, 62 (1st Cir. 1985) (noting the Secretary of Labor's challenge to an adjudication by the OSHRC).

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.").

authority.[104] 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.[105] 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.[106] (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.[107]) 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.[108]

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.[109] 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,"[110] 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.[111] In this instance, there was a

104. *See* Meredith v. Fed. Mine Safety & Health Review Comm'n, 177 F.3d 1042, 1044-45 (D.C. Cir. 1999).

105. By constraining the FLRA via litigation over other statutes, the executive branch was simultaneously limiting the FLRA's ability to interpret its own enabling statute—the Federal Service Labor-Management Relations Statute. *See, e.g.*, U.S. Dep't of Def. v. FLRA, 510 U.S. 487, 489-90 (1994); U.S. Customs & Border Prot. v. FLRA, 751 F.3d 665, 666-67 (D.C. Cir. 2014); IRS v. FLRA, 521 F.3d 1148, 1150-51 (9th Cir. 2008); U.S. Dep't of the Interior, Bureau of Reclamation v. FLRA, 279 F.3d 762, 763 (9th Cir. 2002); Soc. Sec. Admin. v. FLRA, 201 F.3d 465, 467 (D.C. Cir. 2000); Fed. Aviation Admin. v. FLRA, 145 F.3d 1425, 1426-27 (D.C. Cir. 1998); Dep't of the Air Force v. FLRA, 104 F.3d 1396, 1397 (D.C. Cir. 1997); U.S. Nuclear Regulatory Comm'n v. FLRA, 25 F.3d 229, 230-31 (4th Cir. 1994); *see also* Civil Service Reform Act of 1978, Pub. L. No. 95-454, tit. VII, 92 Stat. 1111, 1191-1218 (codified as amended in scattered sections of 5 U.S.C.).

106. *See* Meeker v. Merit Sys. Prot. Bd., 319 F.3d 1368, 1372-75 (Fed. Cir. 2003).

107. Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 767 (1984); *see also* Udall v. Fed. Power Comm'n, 387 U.S. 428 (1967). The Federal Power Commission was renamed to the Federal Energy Regulatory Commission in 1977. *Escondido Mut. Water Co.*, 466 U.S. at 767 n.1.

108. Sw. Power Admin. v. FERC, 763 F.3d 27, 28-29 (D.C. Cir. 2014).

109. Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1618-21 (2018).

110. *The Supreme Court, 2017 Term—Leading Cases: Federal Arbitration Act and National Labor Relations Act;* Epic Systems Corp. v. Lewis, 132 HARV. L. REV. 427, 427 (2018).

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

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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.[112]

Ultimately, the Supreme Court decided in favor of the executive branch's position. In doing so, it declared that no *Chevron* deference is due an independent agency when it is enforcing its own enabling statute if there is a conflicting interpretation of a second statute—even if the second statute is nonorganic and was implemented by an executive agency that has no special claim to its interpretation.[113] Arguably, this decision affirms scholars who have argued that there is—or at least should be—a generalized judicial reluctance to grant *Chevron* deference to independent agencies, relative to executive agencies, because of independent agencies' relative lack of political accountability as compared to executive agencies.[114] 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.[115] The DOJ pushed back against independent agencies' certification of

administration, the office reconsidered the issue and has reached the opposite conclusion.'" (quoting Brief for the United States as Amicus Curiae Supporting Petitioners in Nos. 16-285 and 16-300 and Supporting Respondents in No. 16-307 at 13, *Epic Sys. Corp.*, 138 S. Ct. 1612 (Nos. 16-285, 16-300 & 16-307), 2017 WL 2665007 [hereinafter *Epic Systems* United States Amicus Brief])).

112. 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].

113. *See Epic Sys. Corp.*, 138 S. Ct. at 1629.

114. *See infra* notes 125, 162 and accompanying text.

115. *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).

mergers under President Nixon.[116] Under President Ford, the DOJ brought suit to dispute an anticompetitive agreement that an independent agency allowed three airline companies to make among themselves.[117] And under President Carter, the DOJ pursued a governmental interest in reducing corporate monopolies in media and communication.[118] 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.[119] 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.[120]

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.[121] 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."[122] According to this view, the preservation of independent agencies is a key component to internal checks on presidential power.[123] Nonetheless, dynamics

116. *See, e.g.*, United States v. Marine Bancorporation, 418 U.S. 602, 605, 612-13 (1974); United States v. Interstate Commerce Comm'n, 396 U.S. 491, 495, 499-500, 502 (1970). As Michael Herz notes while commenting on *Marine Bancorporation*, the DOJ "challenged mergers and rate agreements that other federal agencies explicitly approved and defended in court." Herz, *supra* note 12, at 895 & n.6.

117. United States v. Civil Aeronautics Bd., 511 F.2d 1315, 1317 (D.C. Cir. 1975).

118. *See, e.g.*, United States v. FCC, 652 F.2d 72, 74-76 (D.C. Cir. 1980) (en banc); MCI Telecomms. Corp. v. FCC, 561 F.2d 365, 367, 372-73 (D.C. Cir. 1977).

119. *See* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 779, 784, 789 (1978).

120. *See, e.g.*, Ford Motor Co. v. Interstate Commerce Comm'n, 714 F.2d 1157, 1158-59 (D.C. Cir. 1983); United States v. FCC, 707 F.2d 610, 612 (D.C. Cir. 1983); United States v. Fed. Mar. Comm'n, 694 F.2d 793, 794 (D.C. Cir. 1982) (en banc) (per curiam).

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.

123. David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 57-58 (2018) (noting that leading features of the internal separation of powers "include the separation of adjudication from rulemaking or prosecutorial functions

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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

within administrative agencies, and the creation of 'independent' agencies that exercise a measure of policy discretion free of presidential control"); Metzger, *supra* note 21, at 429-30. Agency insulation can also go too far, as noted by commentators concerned that independent agencies are exempt from adequate executive oversight. Put another way, independent agencies may act without accountability because there is no intrabranch check on their decisionmaking processes and outcomes. *See* Metzger, *supra* note 21, at 433 ("[U]nilateral agency decisionmaking is also problematic from a separation of powers perspective, raising dangers of an unaccountable fourth branch and ineffective government."); *see also* Coglianese, *supra* note 24, at 746-49 (arguing for the improvement of executive oversight of independent agency policymaking); Meese, *supra* note 24, at 3-7 (arguing that agencies and bureaucrats are not accountable because they answer neither to the President nor to Congress).

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

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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."[131] 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.[132]

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.[133]

One such set of cases furthering oversight includes Reagan-era litigation casting a watchful eye on the integrity of administrative adjudications.[134] 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.[135] Although the D.C. Circuit found that the ex parte contacts in question did not corrupt the agency's final decision,[136] one judge nonetheless

131. *See* Sharkey, *supra* note 130, at 1614-15 (describing the discussion between Justices Scalia and Breyer in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009)).

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."[137] 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.[138]

More commonly, the DOJ has sought judicial review of independent agencies' actions on the basis of the "arbitrary and capricious" standard.[139] 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.[140] 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*.[141] That the application of this standard has favored the DOJ somewhat more frequently than the independent agency means that litigation has the

137. *Id.* at 600 (Robinson, J., concurring in part, and concurring in the judgment).

138. *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").

139. 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).

140. *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.").

141. *See infra* Table A.3.

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 agency[152] 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. S*ee, 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.

153. *See infra* Table A.3; *see also* Fed. Bureau of Prisons v. FLRA, 875 F.3d 667, 672, 676-77 (D.C. Cir. 2017); Cobert v. Miller, 800 F.3d 1340, 1347-51 (Fed. Cir. 2015); Huerta v. Ducote, 792 F.3d 144, 153, 156-57 (D.C. Cir. 2015); U.S. IRS Office of Chief Counsel v. FLRA, 739 F.3d 13, 17-21 (D.C. Cir. 2014); Bureau of Prisons v. FLRA, 737 F.3d 779, 784-88 (D.C. Cir. 2013); Dep't of the Air Force, 315th Airlift Wing v. FLRA, 294 F.3d 192, 198-202 (D.C. Cir. 2002); Garvey v. Nat'l Transp. Safety Bd., 190 F.3d 571, 576-77, 580-82 (D.C. Cir. 1999); Lachance v. White, 174 F.3d 1379, 1380-82 (Fed. Cir. 1999); Fed. Aviation Admin. v. FLRA, 145 F.3d 1425, 1426 (D.C. Cir. 1998); U.S. Nuclear Regulatory Comm'n v. FLRA, 25 F.3d 229, 232-36 (4th Cir. 1994); U.S. Border Patrol v. FLRA, 991 F.2d 285, 289-92 (5th Cir. 1993); U.S. Dep't of the Army, Red River Depot v. FLRA, 977 F.2d 1490, 1492-93 (D.C. Cir. 1992); Bureau of Indian Affairs v. FLRA, 887 F.2d 172, 176 (9th Cir. 1989).

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

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capricious standard but made final decisions based on their own statutory interpretation.[155]

Certainly, litigation is not an ideal vehicle for the "day to day oversight of the care and thoroughness of independent agency reasoning,"[156] and is perhaps, at best, a "blunt instrument" for effecting improvements.[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.[158] Nonetheless, the relative frequency with which the courts have reviewed narrowly focused independent agency adjudications[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 *Chevron* deference to independent agencies

Since *Chevron*, "[c]ourts have been left to resolve procedural and structural distinctions between independent agencies and executive branch agencies."[160] In addition, some commentators have argued that independent agencies merit

cases a year in the D.C. Circuit . . . ." Farber & O'Connell, *supra* note 20, at 1392. The DOJ represents the Postal Regulatory Commission in these cases, many of which apply the arbitrary and capricious standard. *See* USPS v. Postal Regulatory Comm'n, 886 F.3d 1253, 1254-55, 1260-61 (D.C. Cir. 2018); USPS v. Postal Regulatory Comm'n, 816 F.3d 883, 886-87, 886 n.3 (D.C. Cir. 2016); USPS v. Postal Regulatory Comm'n, 747 F.3d 906, 910, 913 (D.C. Cir. 2014). *But see* USPS v. Postal Regulatory Comm'n, 886 F.3d 1261, 1262, 1268-73 (D.C. Cir. 2018) (mentioning the arbitrary and capricious standard but deciding against the DOJ-represented Postal Regulatory Commission on the basis of statutory interpretation); USPS v. Postal Regulatory Comm'n, 640 F.3d 1263, 1266-68 (D.C. Cir. 2011) (deciding on the basis of a *Chevron* analysis).

155. *See, e.g.*, *USPS*, 886 F.3d at 1262, 1268-73; U.S. Customs & Border Prot. v. FLRA, 751 F.3d 665, 668 (D.C. Cir. 2014); NLRB v. FLRA, 613 F.3d 275, 279, 281-82 (D.C. Cir. 2010); Springer v. Adkins, 525 F.3d 1363, 1366, 1370 (Fed. Cir. 2008); Dep't of the Treasury—IRS v. FLRA, 521 F.3d 1148, 1152-54, 1157 (9th Cir. 2008).

156. Comments from Michael E. Herz, *supra* note 44, at 47.

157. Email from Cary Coglianese, Professor, Univ. of Pa. Law Sch., to author (Aug. 8, 2018, 2:46 PM) (on file with author).

158. Comments from Michael E. Herz, *supra* note 44, at 47 (suggesting that in this type of litigation, "there's always an important *legal* issue to be resolved" and that "the executive branch wants to win on that ground and doesn't want the court to get sidetracked" (emphasis added)).

159. *See supra* text accompanying note 86.

160. BREGER & EDLES, *supra* note 45, at 170.

less deference under *Chevron* than executive agencies.[161] Others points to skepticism by some courts toward independent agencies' ability to make reasonable policy choices because those agencies lack political accountability.[162]

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.[163] 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.[164] 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.[165] Before then, courts accorded some weight to independent agencies' interpretations under *Skidmore v. Swift & Co.*[166] and similar agency-specific principles valuing administrative discretion and

161. S*ee supra* 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, *supra* 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)).

163. *See Epic Sys. Corp.*, 138 S. Ct. at 1629.

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.

165. 467 U.S. 837 (1984).

166. *See* 323 U.S. 134 (1944).

expertise.[167] These principles included, for instance, a pre-*Chevron* doctrine under which some courts deferred to OSHRC interpretations of Department of Labor regulations.[168]

Furthermore, prior to *Chevron*, at least one court acknowledged an independent agency's "experience and expertise."[169] These cases are in keeping with the contention that "the Court was highly deferential to agency interpretations *before Chevron*."[170]

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."[171] 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))); *cf. 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

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based on the passage of legislation reducing the independent agency's authority to regulate the relevant issue.[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.[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.[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.[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.[176]

As is well known, *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.[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

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interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to deference.").

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").

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)), *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]").

174. *See* Comments from Michael E. Herz, *supra* note 44, at 58.

175. *See supra* note 173.

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."), *vacated as moot mem.*, 732 F.2d 949 (D.C. Cir. 1983).

177. *See generally* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

branch. Certainly, courts defer to independent agencies, particularly when statutory authority is clearly conferred to the agency.[178]

However, courts do not defer as a matter of course. In some cases, courts have invoked the deference doctrine for which *Chevron* stands, but ultimately decided against the independent agency based on the arbitrary and capricious standard.[179] In others, they were willing to defer to the agency, but ultimately determined that the independent agency's interpretation of statute was unreasonable.[180] In addition, similar to the concept of deference enshrined in *Auer*,[181] courts' previous predisposition toward OSHRC changed,[182] with both a court of appeals and the Supreme Court altering course after *Chevron* to decide that the independent agency is inherently *less* deserving of deference to its interpretation of a regulation than the executive agency if the executive agency issued the rule.[183] It is possible that "the explanation was not that executive agencies trump independent ones," but that "regulators (with delegated policymaking authority) trump adjudicators."[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.[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

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 *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].").

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").

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").

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).

182. For further discussion of the courts' pre-*Chevron* decisions related to the OSHRC, see *supra* text accompanying note 168.

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).

184. Comments from Michael E. Herz, *supra* note 44, at 55.

185. *See supra* text accompanying notes 173-75.

executive agencies.[186] 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.[187] The Principal Deputy Solicitor General argued broadly that the Arbitration Act should not yield to the NLRA,[188] and the Supreme Court agreed.[189]

Despite the statutory precept that particularized authority trumps general authority,[190] 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]

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186. *See supra* notes 93-96, 104-05 and accompanying text.

187. 138 S. Ct. 1612, 1619 (2018); *see also* Act of Feb. 12, 1925, ch. 213, § 3, 43 Stat. 883, 883 (codified as amended at 9 U.S.C. § 3 (2018)). This case was discussed briefly in Part I.B.2 above. *See supra* notes 109-14 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.

190. *Cf.* LARRY M. EIG, CONG. RESEARCH SERV., NO. 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 29 n.189 (2014), https://perma.cc/39NM-J9YV ("The Court's different resolution of a similar issue . . . illustrates that a subsequently enacted 'distinct regulatory scheme' does not always trump general authority.").

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 itself 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 expertise[196] than another agency's interpretation of a general statute impacting the same regulatory area.

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192. *Epic Sys. Corp.*, 138 S. Ct. at 1629 (majority opinion) (citation omitted) (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842, 844 (1984)).

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

194. *See Epic Sys. Corp.*, 138 S. Ct. at 1629.

195. Trevor Morrison suggests that, due to their more intimate relationship with Congress, agencies can "draw on sources of statutory meaning not readily accessible to courts." Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1240-41 (2006). "Agencies have a direct relationship with Congress that gives them insights into legislative purposes and meaning that are likely to be much more sure-footed than those available to courts in episodic litigation." Jerry L. Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 U. TORONTO L.J. 497, 508 (2005). *See generally* Peter L. Strauss, Essay, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321 (1990) (discussing the differences between agency and judicial use of legislative history).

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."[197] Indeed, independent agencies' "deep engagement with and knowledge of their organic statutes" render them well suited to interpreting these statutes.[198] While the doctrine of administrative deference acknowledges that agencies are often in a better position to anticipate legislative meaning than courts,[199] 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,[200] 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.[201]

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[202]—might be

197. *See* BREGER & EDLES, *supra* note 45, at 170.

198. Jonathan R. Siegel, *Guardians of the Background Principles*, 2009 MICH. ST. L. REV. 123, 124.

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

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203. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018) (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984)).

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.

205. *See* Duffy, *supra* note 125, at 203 n.456 (1998).

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.[208] 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.[209] In regard to *Bureau of Alcohol, Tobacco & Firearms v. FLRA*,[210] 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.[211] More

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.").

210. 464 U.S. 89 (1983).

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) ("[T]he '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)).

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.[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,[217] as well as to those who support greater judicial involvement in administrative statutory interpretation[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[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.[220] This tension between the constitutional powers of the President and statutory authority of agencies is particularly pronounced in regard to independent

216. *See supra* note 109-112 and accompanying text.

217. *See, e.g.*, CALABRESI & YOO, *supra* note 40, at 3-9; Kagan, *supra* note 2, at 2251-52.

218. *See supra* text accompanying note 213; *infra* note 349 and accompanying text.

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").

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.[221] 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.[222]

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.[223] She also has limited opportunity to remove independent agency heads with good cause,[224] and even to sue seeking changes to for-cause removal provisions.[225] On the other hand, the menu of formal options for control has long been limited by convention.[226]

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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.").

223. RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 101-02 (5th ed. 2009).

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*

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The President may also engage in informal consultation or oversight of her branch, for instance, by shaping the scope and substance of governmental litigation,[227] issuing broad mandates via directed memoranda[228] and executive orders,[229] creating presidential councils,[230] and guiding agencies' implementation of their statutory mandates.[231] Presidents have also attempted to direct agencies' actions through communications such as "letters, conversations, rose garden speeches, legislative proposals, and bill-signing statements."[232]

Design, 88 B.U. L. REV. 459, 488 (2008) ("Presidents cannot fire independent-agency heads on policy grounds and, as such, have been constrained in their efforts to direct independent-agency policy making."); Hickman, *supra* note 225, at 1476 (noting that even when courts found an agency's structure unconstitutional, "the courts left the actions of the challenged agency . . . largely or entirely untouched"); Paul R. Verkuil, Essay, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 275 ("The 'arm of Congress' view of independent agencies has successfully thwarted executive branch attempts significantly to reorganize them for over fifty years.").

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 Guignon*, 390 F.2d at 329-30 (describing how the Attorney General filed a brief opposing the FTC's position in the case).

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

229. *See, e.g.*, Exec. Order No. 13,771, 3 C.F.R. 284, 284 (2017), *reprinted in* 5 U.S.C. § 601 note at 121 (2018) (directing agencies to limit the issuance of regulations); *see also* Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 506 (2005) ("Executive orders demanding that agencies engage in regulatory cost-benefit analyses . . . 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, many not always be an effective form of executive control.

230. *See* Michael Herz, *Imposing 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.[233]

In addition, the President sometimes participates in the rulemaking process,[234] including through efforts to coordinate agencies,[235] or by enlisting a monitoring agency[236] or the Attorney General[237] to oversee regulatory activity on the President's behalf. However, these measures have generally been limited to executive agencies only.[238] Even in regard to executive agencies, a distinct lack of uniformity across agencies, opacity in administrative process,

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) ("[O]ne 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).

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) ("[O]ver 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*).

235. *See* Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L.J. AM. U. 461, 484 (1994).

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.").

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)).

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[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, intrabranch 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,[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.[241]

Furthermore, the DOJ could be doing the work of popular constitutionalism,[242] which is often synonymous with presidential constitutional

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").

240. *See, e.g.*, Adam B. Cox & Cristina M. Rodríguez, *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).

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.

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

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interpretation.[243] 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"[244]—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.[245] In addition, less than 15% of cases from the Nixon through

interpret the Constitution, or "legal constitutionalism"); *see* Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1618 (2005) (reviewing KRAMER, *supra*) ("[P]opular constitutionalism is the theory that the Constitution is nothing more and nothing less than the will of the people, interpreted by the people and backed by the threat of popular enforcement."). *See generally* Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959 (2004) (discussing the shift from the privileging of legal constitutionalism to an interest in preserving popular constitutionalism). Mark Tushnet refers to popular constitutionalism as "political law." Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991 (2006).

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.[246] Perhaps surprisingly, less than 5% of cases brought under Presidents Clinton, W. Bush, and Obama were of this type.[247] In contrast, these cases may become more common under the Trump Administration,[248] 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.[249]

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.[250]

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.

249. *See* Massimo Calabresi, *While Trump Is Tweeting, These 3 People Are Undoing American Government as We Know It*, TIME (Oct. 26, 2017), https://perma.cc/H9TP-D837; Meg Jacobs, *Trump Is Appointing People Who Hate the Agencies They Will Lead*, CNN (updated Dec. 12, 2016, 10:40 AM ET), https://perma.cc/3HWB-99UC. The nomination of agency heads that wish to weaken their own agencies has affected the Environmental Protection Agency as well as the Departments of Health and Human Services, Education, and Labor. *See* Coral Davenport, *Counseled by Industry, Not Staff, E.P.A. Chief Is Off to a Blazing Start*, N.Y. TIMES (July 1, 2017), https://perma.cc/U52V-Y5ZD; Sara Ganim & Linh Tran, *Trump's Choice for Education Secretary Raises Questions*, CNN: POL. (updated Dec. 2, 2016, 8:14 PM ET), https://perma.cc/P3N7-DYNW; Julia Horowitz, *Trump Taps Andrew Puzder, CEO of Hardee's and Carl's Jr., as Labor Secretary*, CNN: BUS. (Dec. 9, 2016, 6:44 AM ET), https://perma.cc/6A3V-LQ77; Tami Luhby, *Obamacare Critic Is Trump's Pick for Health Secretary*, CNN: BUS. (Nov. 29, 2016, 3:35 PM ET), https://perma.cc/89FP-KJG9.

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.

257. *See* Brief for the United States at 1-2, 9-10, 14-15, 17, Ry. Labor Execs.' Ass'n v. United States, 339 U.S. 142 (1950) (No. 337), 1950 WL 78519.

258. Brief for the United States at 9-11, Henderson v. United States, 339 U.S. 816 (1950) (No. 25), 1949 WL 50329.

Commission."[259] 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,[260] the DOJ originally joined the FCC in defending its order before the court of appeals. However, it switched positions when President Carter took office,[261] 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.[262]

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.[263] 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.[264] 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.[265] 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.

260. FCC v. Pacifica Found., 438 U.S. 726, 729 (1978).

261. *See* Petitioner's Reply Brief at 1-2, *Pacifica Found.*, 438 U.S. 726 (No. 77-528), 1978 WL 206843.

262. *Id.* at 2.

263. Brief for the United States as Amicus Curiae at 18-19, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (No. 78-233), 1978 WL 207300 [hereinafter *Pers. Adm'r of Mass.* United States Amicus Brief].

264. *See id.* at 34. The OPM, Department of Defense, Department of Labor, and EEOC also filed a brief in this case. Motion for Leave to File & Brief of the Office of Personnel Management et al. as Amici Curiae, *Pers. Adm'r of Mass.*, 442 U.S. 256 (No. 78-233), 1979 WL 199819 [hereinafter *Pers. Adm'r of Mass.* Amicus Brief of the OPM et al.].

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,[266] as well as one opposed to affirmative action and civil rights protections,[267] 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.[268] 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."[269] However, the Supreme Court did not always buy in to the DOJ's arguments.[270] This episode highlights that the Solicitor General may make litigation decisions in pursuit of both executive *and* presidential administration.

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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.

268. *See* Devins, *supra* note 57, at 296-301. Devins cites to several Reagan-era cases that involved Solicitor General-EEOC tensions, including *Connecticut v. Teal*, 457 U.S. 440 (1982); *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984) (en banc); *Local 28 of the Sheet Metal Workers' International Ass'n v. EEOC*, 478 U.S. 421 (1986); *City of Riverside v. Rivera*, 477 U.S. 561 (1986); and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

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[271] 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.[272] (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.[273])

The H.W. Bush Administration also asserted presidential power.[274] 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."[275] 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,[276] 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 ha[d] 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"[279]—particularly in regulatory areas disfavored by his political supporters.[280] For instance, the Trump Administration has rescinded or reversed Obama Administration policies that empowered the EEOC to implement stronger civil rights protections.[281] In addition, the Administration also opposed the EEOC's interpretation of the Civil Rights Act[282]—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.[283] Indeed, this Article's dataset suggests that the DOJ has taken this bold action rarely, and only at the behest of the Trump Administration.[284] In its amicus

277. Devins & Herz, *supra* note 12, at 579 (citing Metro Broad., Inc. v. FCC, 497 U.S. 547, 552 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)).

278. *Id.*

279. *See* Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 16 (2017); *see also* Lisa Rein & Juliet Eilperin, *White House Installs Political Aides at Cabinet Agencies to Be Trump's Eyes and Ears*, WASH. POST (Mar. 19, 2017, 5:15 PM PDT), https://perma.cc/79P9-BXJV ("Many of the advisers arrived from the White House . . . . One of the mandates at the top of their to-do list now . . . is making sure the agencies are identifying regulations the administration wants to roll back and vetting any new ones."); Jennifer Nou, *Taming the Shallow State*, YALE J. ON REG.: NOTICE & COMMENT (Feb. 28, 2017), https://perma.cc/L774-3FV9.

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).

282. Zarda v. Altitude Express, Inc., 883 F.3d 100, 107, 116 n.12 (2d Cir. 2018) (en banc), *argued*, No. 17-1623 (U.S. Oct. 8, 2019).

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.[285] Ultimately, the Second Circuit, sitting en banc, affirmed the EEOC's interpretation of the statute,[286] thus deepening a circuit split[287] and opening the door to resolution by the Supreme Court.[288] Since then, the DOJ has urged the EEOC to change its position that businesses cannot discriminate against LGBT workers;[289] as in several instances during the Reagan Administration, the DOJ will ultimately decide the government's litigation posture before the Supreme Court.[290]

In some ways, President Trump's actions harken back to President Reagan's efforts to reduce the effectiveness of the EEOC.[291] However, by convincing the EEOC to drop its involvement prior to litigation, the Reagan Administration kept the conflict within the executive branch.[292] 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,[293] 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.[294]

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285. Brief for the United States as Amicus Curiae at 6-22, *Zarda*, 883 F.3d 100 (No. 15-3775), 2017 WL 3277292.

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)).

288. The Court held oral argument for this case on October 8, 2019. *See* Transcript of Oral Argument, Bostock v. Clayton County, Nos. 17-1618 & 17-1623 (U.S. Oct. 8, 2019).

289. Ben Penn et al., *Justice Department Urges Civil Rights Agency to Flip LGBT Stance*, BLOOMBERG LAW (Aug. 13, 2019, 2:02 PM), https://perma.cc/U6NU-9BRS.

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*).

294. For a discussion of *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), see text accompanying notes 109-14 and Part I.C.2 above.

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]

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295. Wiener v. United States, 357 U.S. 349, 350, 356 (1958).

296. Swan v. Clinton, 100 F.3d 973, 975, 988 (D.C. Cir. 1996).

297. United States v. Wilson, 290 F.3d 347, 350 (D.C. Cir. 2002).

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 ha[d] grown huge, creating a natural battleground in which the President, Congress, bureaucrats, and interest groups vie[d] to control the political power of administrative agencies"); *id.* at 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

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Both Presidents Reagan[301] and H.W. Bush[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[303] and his arguably related contention that the Commission was not "independent."[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."[305]

Finally, on behalf of President Trump, the DOJ argued in *PHH Corp. v. Consumer Financial Protection Bureau*[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).[307] This case also involved a reversal of the government's position after a change in administration. Indeed, President Obama's DOJ supported for-

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that existed outside of the President's direct control" based on the "view that independent agencies were critical barriers to the President's agenda").

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), *vacated as moot mem.*, 732 F.2d 949 (D.C. Cir. 1983).

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), *vacated as moot mem. sub nom.* Mackie v. Clinton, 10 F.3d 13 (D.C. Cir. 1993).

303. *See* Robert Pear, *Reagan Ousts 3 from Civil Rights Panel*, N.Y. TIMES (Oct. 26, 1983), https://perma.cc/PA4A-Q7DS ("President Reagan today dismissed three members of the United States Commission on Civil Rights who have sharply criticized his policies toward blacks, women and Hispanic people over the last two years."); Robert Pear, *Surprise Clash: Reagan vs. Rights Chief*, N.Y. TIMES (Mar. 21, 1983), https://perma.cc/YLZ6-MVPV (discussing "[t]he latest dispute between the Reagan Administration and the United States Commission on Civil Rights").

304. Prominent unitary executive theorists Steven Calabresi and Christopher Yoo support this view. *See* CALABRESI & YOO, *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., *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 692 (2005).

305. Neal Devins, *Tempest in an Envelope: Reflections on the Bush White House's Failed Takeover of the U.S. Postal Service*, 41 UCLA L. REV. 1035, 1036 (1994) (citing *Mackie*, 809 F. Supp. 144).

306. 881 F.3d 75 (D.C. Cir. 2018) (en banc).

307. Brief for the United States as Amicus Curiae at 8-19, *PHH Corp.*, 881 F.3d 75 (D.C. Cir. 2018) (No. 15-1177), 2017 WL 1035617 [hereinafter *PHH Corp.* United States Amicus Brief].

cause removal protection for the Director of the CFPB.[308] Furthermore, the first D.C. Circuit panel ruled against the DOJ in a decision penned by then-Judge Kavanaugh.[309] In doing so, the panel determined that the provision limiting the President's authority to remove the Director was unconstitutional and should be severed.[310]

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.[311] 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,"[312] and that to rule otherwise would affirm a "wholesale attack on independent agencies . . . that, if accepted, would broadly transform modern government."[313]

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.[314] 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.").

309. PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1 (D.C. Cir. 2016), *rev'd on reh'g en banc*, 881 F.3d 75 (D.C. Cir. 2018).

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 "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.

314. *See* Brief for the Respondent at 7, Seila Law LLC v. Consumer Fin. Prot. Bureau, No. 19-7 (U.S. Sept. 17, 2019), 2019 WL 4528136 [hereinafter *Seila Law* Respondent Brief] (arguing

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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.[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.[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.[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.[318] For those that favor more centralized governance and subscribe to the canon of political accountability,[319] litigation may be a welcome addition to the limited arsenal of presidential administration. However, as other scholars have cautioned,[320] "presidential interventions and assertions of decisionmaking

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that, for various reasons, the single-headed agency structure with for-cause removal protection interferes with the President's constitutional powers).

315. While the Court did determine that double layers of for-cause removal protection may interfere with the President's executive power, *see* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010), this is the first time it has considered rendering unconstitutional a single layer of for-cause removal protection. *See PHH Corp.*, 839 F.3d at 16, 37-39.

316. *See* Transcript of Oral Argument, Seila Law LLC v. Consumer Fin. Prot. Bureau, No. 19-7 (U.S. Mar. 3, 2020), 2020 WL 1049355.

317. *Seila Law* Respondent Brief, *supra* note 314.

318. *See supra* Part II.A.

319. *See, e.g.*, sources cited *supra* notes 24, 125, 204 (listing scholars who subscribe to this view).

320. *See* sources cited *supra* note 207 (listing scholars who hold the view that presidential influence should not garner increased deference to agencies).

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]

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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).

323. Metzger, *supra* note 21, at 425-26.

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 II.A (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[330] or if it involves the Constitution[331] (potentially even to the detriment of the ensuing constitutional interpretation[332]). 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.[333] 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.[334] 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[335] or context-driven[336] 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

discretion than courts. Kevin M. Stack, *Agency Statutory Interpretation and Policymaking Form*, 2009 MICH. ST. L. REV. 225, 237-38.

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.[341] 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,[342] 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.[343] 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).[344]

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 forego politicization or centralization and opt for a form of administration they can less easily control if they believe that doing so will yield more effective performance").

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.

348. *See, e.g.*, Craig Green, *Deconstructing the Administrative State: Constitutional Debates over* Chevron *and Political Transformation in American Law* (Temple Univ. Beasley Sch. of Law, Research Paper No. 2018-35, 2018), https://perma.cc/9SY9-QJDY (detailing the political shift in the judiciary from judicial support for *Chevron* during the Reagan Administration to its more recent, "post-Scalian" attack on the doctrine).

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

350. *See supra* text accompanying notes 109-14 and Part I.C.2 (discussing *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), in which the NLRB's interpretation of its governing statute was rejected in favor of an interpretation by the DOJ).

351. *See supra* text accompanying notes 307-15 (discussing then-Judge Kavanaugh's opinion in *PHH Corp. v. Consumer Finance Protection Bureau*, 839 F.3d 1 (D.C. Cir. 2016), which was later reversed en banc, 881 F.3d 75 (D.C. Cir. 2018)); *see also supra* text accompanying notes 316-17 (discussing *Seila Law*, currently before the Supreme Court).

352. *Cf.* J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1593 (2018) (suggesting that "court capture calls into question the decision-making ability, the neutrality, and the legitimacy of courts").

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."[353] 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"[354] than the deference to presidential involvement that she advised;[355] 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,

353. Kagan, *supra* note 2, at 2385.

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.[356] 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:[357] 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).[358]

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.

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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.* Tenn. Valley Auth. v. Easement & Right of Way, 204 F. Supp. 837 (E.D. Tenn. 1962) (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

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

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

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

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

Administration	Total PA Cases	PA (a) Cases	PA (b) Cases
Roosevelt, Truman, Eisenhower, Kennedy, Johnson (Table B.1)	4	2	2
Nixon, Ford, Carter (Table B.2)	2	2	0
Reagan, H.W. Bush (Table B.3)	3	1	2
Clinton, W. Bush, Obama (Table B.4)	2	0	2
Trump (Table B.5)	3	1	2
Total	**14**	**6**	**8**

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

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

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

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

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

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

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

	Total A&C and *Chevron* Cases	**A&C Cases**	***Chevron* Cases**
Number of Cases	49	26	23
% of Dataset	42%	22%	20%
Number of Cases Won by DOJ	35	17	18
% DOJ Win Rate	71%	65%	78%

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).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Interstate Commerce Comm'n v. Inland Waterways Corp.[361] (U.S. 1943)	Roosevelt	Interstate Commerce Commission	Exec. Admin.	DOJ defending jurisdiction of Department of Agriculture to appeal rates fixed set by independent agency. **(c)**		Independent agency
United States v. Interstate Commerce Comm'n[362] (U.S. 1949)	Truman	Interstate Commerce Commission	Exec. Admin.	DOJ challenging independent agency order to deny government from recovering money. **(b)**	Arbitrary & capricious	DOJ
Ry. Labor Execs.' Ass'n v. United States[363] (U.S. 1950)	Truman	Interstate Commerce Commission	Pres. Admin.	DOJ challenging validity of independent agency interpretation of labor principles. **(a)**		DOJ

361. 319 U.S. 671 (1943).
362. 337 U.S. 426 (1949).
363. 339 U.S. 142 (1950).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Henderson v. United States[364] (U.S. 1950)	Truman	Interstate Commerce Commission	Pres. Admin.	DOJ challenging constitutionality of independent agency decision. **(a)**		DOJ
Far E. Conference v. United States[365] (U.S. 1952)	Truman	Federal Maritime Board	Exec. Admin.	DOJ challenging independent agency jurisdiction to adjudicate under Sherman Act because U.S. is not a "person." **(b)**		Independent agency
United States ex rel. Chapman v. Fed. Power Comm'n[366] (U.S. 1953)	Truman (argued under)	Federal Power Commission	Exec. Admin.	DOJ arguing that independent agency order infringes on jurisdiction of Department of Interior. **(b)**		Independent agency
Sec'y of Agric. v. United States[367] (U.S. 1954)	Eisenhower	Interstate Commerce Commission	Exec. Admin.	DOJ appealing order issued by independent agency against Department of Agriculture to ensure competition in shipping. **(c)**		DOJ
Fed. Mar. Bd. v. Isbrandtsen Co.[368] (U.S. 1958)	Eisenhower	Federal Maritime Board	Exec. Admin.	DOJ appealing order issued by independent agency against Department of Agriculture to ensure competition in shipping. **(c)**		DOJ

364. 339 U.S. 816 (1950).
365. 342 U.S. 570 (1952).
366. 345 U.S. 153 (1953).
367. 347 U.S. 645 (1954).
368. 356 U.S. 481 (1958).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Wiener v. United States[369] (U.S. 1958)	Eisenhower	War Claims Commission	Pres. Admin.	DOJ defending President's at-will removal of independent agency commissioner. **(b)**		Independent agency
St. Regis Paper Co. v. United States[370] (U.S. 1961)	Kennedy	Federal Trade Commission	Exec. Admin.	DOJ defending jurisdiction of Census Bureau from encroachment by independent agency and arguing to circumscribe independent agency's investigatory subpoena power. **(b)**		Independent agency
Udall v. Fed. Power Comm'n[371] (U.S. 1967)	Johnson	Federal Power Commission	Exec. Admin.	DOJ defending jurisdiction of Department of Interior from encroachment by independent agency. **(b)**		DOJ
FTC v. Guignon[372] (8th Cir. 1968)	Johnson	Federal Trade Commission	Pres. Admin.	DOJ challenging independent agency's authority to enforce its own subpoenas and appear in court to seek enforcement. **(b)**		DOJ

369. 357 U.S. 349 (1958).
370. 368 U.S. 208 (1961).
371. 387 U.S. 428 (1967).
372. 390 F.2d 323 (8th Cir. 1968).

Table B.2
Nixon Through Carter (1969-1981): Consistent Checks

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).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
United States v. Interstate Commerce Comm'n[373] (U.S. 1970)	Nixon	Interstate Commerce Commission	Exec. Admin.	DOJ challenging agency decision to approve a particular railway merger. **(c)**		Independent agency
Brennan v. OSHRC[374] (2d Cir. 1974)	Nixon	Occupational Safety and Health Review Commission	Exec. Admin.	DOJ defending jurisdiction of Department of Labor from encroachment by independent agency. **(b)**		DOJ
N.Y. Shipping Ass'n v. Fed. Mar. Comm'n[375] (2d Cir. 1974)	Nixon	National Labor Relations Board	Exec. Admin.	DOJ siding with independent agency Maritime Commission against independent agency NLRB (and against Department of Labor). **(a)**		DOJ, on behalf of Federal Maritime Commission

373. 396 U.S. 491 (1970).
374. 491 F.2d 1340 (2d Cir. 1974).
375. 495 F.2d 1215 (2d Cir. 1974).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Brennan v. S. Contractors Serv.[376] (5th Cir. 1974)	Nixon	Occupational Safety and Health Review Commission	Exec. Admin.	DOJ defending jurisdiction of Department of Labor from encroachment by independent agency. **(b)**	Pre-*Chevron* (declining to defer to OSHRC)	DOJ
United States v. Marine Bancorp.[377] (U.S. 1974)	Nixon	Office of the Comptroller of the Currency	Exec. Admin.	DOJ disputing corporate merger approved by independent agency within Department of Treasury. **(c)**		Independent agency
Brennan v. Gilles & Cotting, Inc.[378] (4th Cir. 1974)	Nixon (argued under)	Occupational Safety and Health Review Commission	Exec. Admin.	DOJ defending jurisdiction of Department of Labor from encroachment by independent agency. **(b)**		Independent agency
Brennan v. OSHRC[379] (10th Cir. 1975)	Ford	Occupational Safety and Health Review Commission	Exec. Admin.	DOJ defending jurisdiction of Department of Labor from encroachment by independent agency. **(b)**	Pre-*Chevron* (deferring to Department of Labor)	DOJ

376. 492 F.2d 498 (5th Cir. 1974).
377. 418 U.S. 602 (1974).
378. 504 F.2d 1255 (4th Cir. 1974).
379. 513 F.2d 553 (10th Cir. 1975).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Brennan v. OSHRC[380] (8th Cir. 1975)	Ford	Occupational Safety and Health Review Commission	Exec. Admin.	DOJ defending jurisdiction of Department of Labor from encroachment by independent agency. **(b)**	Pre-*Chevron* (deferring to OSHRC)	Independent agency
United States v. Civil Aeronautics Bd.[381] (D.C. Cir. 1975)	Ford	Civil Aeronautics Board	Exec. Admin.	DOJ challenging independent agency decision to allow airlines to enter into anticompetitive agreement. **(c)**		DOJ (in part) & independent agency (in part)
Gordon v. N.Y. Stock Exch., Inc.[382] (U.S. 1975)	Ford	Securities and Exchange Commission	Exec. Admin.	DOJ seeking limits to independent agency jurisdiction over fixed commission rates. **(b)**		Independent agency
United States v. United States[383] (D.D.C. 1976)	Ford	Interstate Commerce Commission	Exec. Admin.	DOJ defending resources of Department of Defense. **(a)**	Arbitrary & capricious	DOJ

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).

383. 417 F. Supp. 851 (D.D.C. 1976) (per curiam), *aff'd mem. sub nom.* Nat'l Classification Comm. v. United States, 430 U.S. 961 (1977).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
MCI Telecomms. Corp. v. FCC[384] (D.C. Cir. 1977)	Carter	FCC	Exec. Admin.	DOJ challenging agency certification of corporate monopoly. **(c)**	Pre-*Chevron* (declining to defer to FCC)	DOJ
FCC v. Nat'l Citizens Comm. for Broad.[385] (U.S. 1978)	Carter	FCC	Exec. Admin.	DOJ disputing individual rulemaking as encroaching on DOJ's own Antitrust Division. **(c)**	Arbitrary & capricious	Independent agency
FCC v. Pacifica Found.[386] (U.S. 1978)	Carter	FCC	Pres. Admin.	DOJ challenging independent agency regulation censuring broadcast as indecent at behest of new President. **(a)**		Independent agency
Usery v. Hermitage Concrete Pipe Co.[387] (6th Cir. 1978)	Carter	Occupational Safety and Health Review Commission	Exec. Admin.	DOJ representing independent agency OSHRC against Department of Labor to support OSHRC's decision not to penalize violation of OSHRC's enabling act. **(a)**	Pre-*Chevron* (noting when OSHRC is owed deference)	DOJ, on behalf of OSHRC (in part) & Department of Labor (in part)

384. 561 F.2d 365 (D.C. Cir. 1977).

385. 436 U.S. 775 (1978).

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).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Pers. Adm'r of Mass. v. Feeney[388] (U.S. 1979)	Carter	Equal Employment Opportunity Commission & Office of Personnel Management	Pres. Admin.	DOJ furthering constitutional argument in opposition to position taken by independent and executive agencies in amicus brief. **(a)**		DOJ (win for position argued by DOJ in amicus brief)
United States v. FCC[389] (D.C. Cir. 1980)	Carter	FCC	Exec. Admin.	DOJ disputing independent agency's grant of corporate merger. **(c)**		Independent agency

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).

Table B.3
Reagan and H.W. Bush (1981-1993): Political Battles

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).

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

390. 685 F.2d 547 (D.C. Cir. 1982).
391. 683 F.2d 45 (2d Cir. 1982).
392. 691 F.2d 1242 (8th Cir. 1982).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
United States v. Fed. Mar. Comm'n[393] (D.C. Cir. 1982)	Reagan	Federal Maritime Commission	Exec. Admin.	DOJ disputing independent agency approval of corporate rate fixing. **(c)**		DOJ
United States v. FCC[394] (D.C. Cir. 1983)	Reagan	FCC	Exec. Admin.	DOJ challenging independent agency approval to fix telephone rates. **(c)**		Independent agency
Ford Motor Co. v. Interstate Commerce Comm'n[395] (D.C. Cir. 1983)	Reagan	Interstate Commerce Commission	Exec. Admin.	DOJ disputing independent agency refusal to award reparations to rail carriers for overcharges by railroads. **(c)**	Arbitrary & capricious	DOJ
Berry v. Reagan[396] (D.D.C. 1983)	Reagan	Commission on Civil Rights	Pres. Admin.	DOJ arguing that President has power to remove independent regulatory commissioners at will. **(b)**		Independent agency
Bureau of Alcohol, Tobacco & Firearms v. FLRA[397] (U.S. 1983)	Reagan	Federal Labor Relations Authority	Exec. Admin.	DOJ arguing for limits to independent agency's power to regulate Bureau within executive agency. **(b)**	Pre-*Chevron* (declining to defer to FLRA)	DOJ

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).

396. No. 83-3182, 1983 WL 538 (D.D.C. Nov. 14, 1983), *vacated as moot mem.*, 732 F.2d 949 (D.C. Cir. 1983).

397. 464 U.S. 89 (1983).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Escondido Mutual Water Co. v. La Jolla Band of Mission Indians[398] (U.S. 1984)	Reagan	Federal Energy Regulatory Commission	Exec. Admin.	DOJ defending jurisdiction of Department of Interior from encroachment by independent agency. **(b)**		DOJ
Confederated Tribes & Bands of the Yakima Indian Nation v. FERC[399] (9th Cir. 1984)	Reagan	Federal Energy Regulatory Commission	Exec. Admin.	DOJ disputing adjudication by independent agency because of improper procedures and poor decisionmaking record lacking environmental impact statement. **(a)**	Pre-*Chevron* (declining to defer to FERC)	DOJ
Donovan v. A. Amorello & Sons[400] (1st Cir. 1985)	Reagan	Occupational Safety and Health Review Commission	Exec. Admin.	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)**		DOJ

398. 466 U.S. 765 (1984).
399. 746 F.2d 466 (9th Cir. 1984).
400. 761 F.2d 61 (1st Cir. 1985).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Dep't of the Treasury v. FLRA[401] (D.C. Cir. 1988)	Reagan	Federal Labor Relations Authority	Exec. Admin.	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)**	*Chevron* (deferring to FLRA)	Independent agency
FLRA v. Aberdeen Proving Ground, Dep't of the Army[402] (U.S. 1988)	Reagan	Federal Labor Relations Authority	Exec. Admin.	DOJ litigating against independent agency over labor practices. **(b)**		DOJ
Ill. Nat'l Guard v. FLRA[403] (D.C. Cir. 1988)	Reagan	Federal Labor Relations Authority	Exec. Admin.	DOJ seeking primary jurisdiction for National Guard and Department of Defense over interpretation of statutes not administered by independent agency. **(b)**	*Chevron* (declining to defer to FLRA)	DOJ

401. 837 F.2d 1163 (D.C. Cir. 1988).
402. 485 U.S. 409 (1988) (per curiam).
403. 854 F.2d 1396 (D.C. Cir. 1988).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
INS v. FLRA[404] (9th Cir. 1988)	Reagan	Federal Labor Relations Authority	Exec. Admin.	DOJ representing Immigration and Naturalization Service to dispute independent agency order. **(a)**	Arbitrary & capricious	DOJ
Bureau of Indian Affairs v. FLRA[405] (9th Cir. 1989)	H.W. Bush	Federal Labor Relations Authority	Exec. Admin.	DOJ representing Department of Interior to dispute independent agency order. **(a)**	Arbitrary & capricious	DOJ
IRS v. FLRA[406] (U.S. 1990)	H.W. Bush	Federal Labor Relations Authority	Exec. Admin.	DOJ representing IRS to dispute independent agency order. **(a)**	*Chevron* (deferring to FLRA but finding unreasonable application by FLRA)	DOJ
Fort Stewart Schs. v. FLRA[407] (U.S. 1990)	H.W. Bush	Federal Labor Relations Authority	Exec. Admin.	DOJ representing Army to dispute independent agency order. **(a)**	*Chevron* (deferring to FLRA)	Independent agency
Metro Broad., Inc. v. FCC[408] (U.S. 1990)	H.W. Bush	FCC	Pres. Admin.	DOJ asserting that independent agency decision is unconstitutional. **(a)**		Independent agency

404. 855 F.2d 1454 (9th Cir. 1988).
405. 887 F.2d 172 (9th Cir. 1989).
406. 494 U.S. 922 (1990).
407. 495 U.S. 641 (1990).
408. 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Martin v. OSHRC[409] (U.S. 1991)	H.W. Bush	Occupational Safety and Health Review Commission	Exec. Admin.	DOJ defending Department of Labor's authority to interpret its own regulation against encroachment by independent agency. **(b)**		DOJ
U.S. Dep't of Def. Dep't of Military Affairs v. FLRA[410] (D.C. Cir. 1992)	H.W. Bush	Federal Labor Relations Authority	Exec. Admin.	DOJ litigating on behalf of Department of Defense against independent agency's interpretation of the Freedom of Information Act. **(b)**		DOJ
U.S. Dep't of the Navy v. FLRA[411] (7th Cir. 1992)	H.W. Bush	Federal Labor Relations Authority	Exec. Admin.	DOJ litigating on behalf of Navy against independent agency's interpretation of the Freedom of Information Act. **(b)**		DOJ

409. 499 U.S. 144 (1991).
410. 964 F.2d 26 (D.C. Cir. 1992).
411. 975 F.2d 348 (7th Cir. 1992).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
U.S. Dep't of the Army, Red River Depot v. FLRA[412] (D.C. Cir. 1992)	H.W. Bush	Federal Labor Relations Authority	Exec. Admin.	DOJ representing Army to dispute independent agency order. **(a)**	Arbitrary & capricious	N/A (remanded to independent agency for clarification)
Mackie v. Bush[413] (D.D.C. 1993)	H.W. Bush	Postal Service Board	Pres. Admin.	DOJ arguing that President has power to remove independent regulatory commissioners at will. **(b)**		Independent agency

412. 977 F.2d 1490 (D.C. Cir. 1992).

413. 809 F. Supp. 144 (D.D.C.), *vacated as moot mem. sub nom.* Mackie v. Clinton, 10 F.3d 13 (D.C. Cir. 1993).

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).

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

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).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
U.S. Border Patrol v. FLRA[417] (9th Cir. 1993)	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ representing Immigration and Naturalization Service to dispute independent agency order. **(a)**	Arbitrary & capricious	Independent agency
U.S. Dep't of Def. v. FLRA[418] (U.S. 1994)	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ arguing on behalf of Department of Defense against independent agency's interpretation of Privacy Act. **(b)**	*Chevron* (declining to defer to FLRA)	DOJ
U.S. Dep't of the Interior, Bureau of Reclamation v. FLRA[419] (D.C. Cir. 1994)	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ representing Department of the Interior's interpretations against independent agency's interpretations of Prevailing Rate Systems Act and Civil Service Reform Act. (**b**)	*Chevron* (declining to defer to FLRA)	DOJ
U.S. Nuclear Regulatory Comm'n v. FLRA[420] (4th Cir. 1994)	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ representing Nuclear Regulatory Commission to argue that FLRA's order is not consistent with Inspector General Act. **(b)**		DOJ (on behalf of Nuclear Regulatory Commission)

417. 12 F.3d 882 (9th Cir. 1993).
418. 510 U.S. 487 (1994).
419. 23 F.3d 518 (D.C. Cir. 1994).
420. 25 F.3d 229 (4th Cir. 1994).

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

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).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Swan v. Clinton[426] (D.C. Cir. 1996)	Clinton	National Credit Union Administration	Pres. Admin.	DOJ defending President's at-will removal of independent agency commissioner. **(b)**		DOJ
Dep't of the Air Force v. FLRA[427] (D.C. Cir. 1997)	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ arguing on behalf of Air Force to dispute independent agency's interpretation of Federal Labor-Management Relations Statute and Privacy Act. **(b)**		Independent agency
INS v. FLRA[428] (D.C. Cir. 1998)	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ representing Immigration and Naturalization Service to dispute independent agency order. **(a)**	Arbitrary & capricious	Independent agency
Lachance v. Merit Sys. Prot. Bd.[429] (Fed. Cir. 1998)	Clinton	Merit Systems Protection Board	Exec. Admin.	DOJ representing Office of Personnel Management to seek reversal of independent agency order against U.S. Mint. **(a)**		DOJ (on behalf of OPM)

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).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Federal Aviation Admin. v. FLRA[430] (D.C. Cir. 1998)	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ representing Federal Aviation Administration against independent agency's interpretation of government-wide regulations. **(b)**	Arbitrary & capricious	DOJ
Nat'l Fed'n of Fed. Emps., Local 1309 v. Dep't of the Interior[431] (U.S. 1999)	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ arguing on behalf of Department of the Interior for limitations to the authority granted to independent agency by its enabling act. **(a)**	*Chevron* (deferring to FLRA)	Independent agency
Lachance v. White[432] (Fed. Cir. 1999)	Clinton	Merit Systems Protection Board	Exec. Admin.	DOJ representing Office of Personnel Management to seek reversal of independent agency order against Air Force. **(a)**	Arbitrary & capricious	DOJ (on behalf of OPM)
Lachance v. Devall[433] (Fed. Cir. 1999)	Clinton	Merit Systems Protection Board	Exec. Admin.	DOJ representing Office of Personnel Management to seek reversal of independent agency order against Navy. **(a)**		DOJ (on behalf of OPM)

430. 145 F.3d 1425 (D.C. Cir. 1998).
431. 526 U.S. 86 (1999).
432. 174 F.3d 1378 (Fed. Cir. 1999).
433. 178 F.3d 1246 (Fed. Cir. 1999).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Meredith v. Fed. Mine Safety & Health Review Comm'n[434] (D.C. Cir. 1999)	Clinton	Federal Mine Safety and Health Review Commission	Exec. Admin.	DOJ arguing on behalf of Mine Safety and Health Administration against independent agency interpretation of Mine Act (independent agency's enabling act). **(b)**		DOJ
NASA v. FLRA[435] (U.S. 1999)	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ representing NASA to dispute independent agency order. **(a)**		Independent agency (FLRA)
Garvey v. Nat'l Transp. Safety Bd.[436] (D.C. Cir. 1999)	Clinton	National Transportation Safety Board	Exec. Admin.	DOJ representing Federal Aviation Administration to dispute independent agency's dismissal of FAA's order. **(a)**	Arbitrary & capricious	DOJ
Luke Air Force Base v. FLRA[437] (9th Cir. 1999)	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ defending Air Force against independent agency charge that union should have been notified of Equal Employment Opportunity complaint. **(a)**	Arbitrary & capricious	DOJ

434. 177 F.3d 1042 (D.C. Cir. 1999).
435. 527 U.S. 229 (1999).
436. 190 F.3d 571 (D.C. Cir. 1999).
437. 208 F.3d 221 (9th Cir. 1999) (mem.).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Soc. Sec. Admin. v. FLRA[438] (D.C. Cir. 2000)	Clinton	Federal Labor Relations Authority	Exec. Admin.	DOJ arguing on behalf of Social Security Administration against FLRA's interpretation of Back Pay Act. **(b)**		DOJ (on behalf of SSA)
U.S. Dep't of Justice v. FLRA[439] (D.C. Cir. 2001)	W. Bush	Federal Labor Relations Authority	Exec. Admin.	DOJ representing its own Office of the Inspector General to dispute independent agency order. **(a)**		Independent agency
U.S. Dep't of the Interior, Bureau of Reclamation v. FLRA[440] (9th Cir. 2002)	W. Bush	Federal Labor Relations Authority	Exec. Admin.	DOJ arguing on behalf of Department of the Interior against independent agency's interpretation of Civil Service Reform Act. **(b)**		DOJ
James v. Von Zemenszky[441] (Fed. Cir. 2002)	W. Bush	Merit Systems Protection Board	Exec. Admin.	DOJ representing Office of Personnel Management to seek reversal of independent agency order against Department of Veterans Affairs. **(a)**		Independent agency (MSPB)

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).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
United States v. Wilson[442] (D.C. Cir. 2002)	W. Bush	Commission on Civil Rights	Pres. Admin.	DOJ defending President's appointee to independent agency and removal of holdover appointee from previous administration. **(b)**		DOJ
Dep't of the Air Force, 315th Airlift Wing v. FLRA[443] (D.C. Cir. 2002)	W. Bush	Federal Labor Relations Authority	Exec. Admin.	DOJ representing Air Force to dispute independent agency order. **(a)**	Arbitrary & capricious	DOJ
Dep't of the Air Force, 436th Airlift Wing v. FLRA[444] (D.C. Cir. 2003)	W. Bush	Federal Labor Relations Authority	Exec. Admin.	DOJ defending Air Force against independent agency charge that union should have been notified of Equal Employment Opportunity complaint. **(a)**	*Chevron* (deferring to FLRA)	Independent agency

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).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Meeker v. Merit Sys. Prot. Bd.[445] (Fed. Cir. 2003)	W. Bush	Merit Systems Protection Board	Exec. Admin.	DOJ arguing on behalf of Office of Personnel Management against independent agency's interpretation of Veterans Preference Act. **(b)**		DOJ (in part, on behalf of OPM) & independent agency MSPB (in part)
James v. Santella[446] (Fed. Cir. 2003)	W. Bush	Merit Systems Protection Board	Exec. Admin.	DOJ representing Office of Personnel Management to seek reversal of independent agency order. **(a)**	Arbitrary & capricious	Independent agency (MSPB)
Collins v. Nat'l Transp. Safety Bd.[447] (D.C. Cir. 2003)	W. Bush	National Transportation Safety Board	Exec. Admin.	DOJ representing Coast Guard to dispute independent agency order. **(a)**		DOJ
IRS v. FLRA[448] (9th Cir. 2008)	W. Bush	Federal Labor Relations Authority	Exec. Admin.	DOJ representing IRS to assert primacy of Portal-to-Portal Act over enabling act of independent agency. **(b)**		Independent agency

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).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Springer v. Adkins[449] (Fed. Cir. 2008)	W. Bush	Merit Systems Protection Board	Exec. Admin.	DOJ representing Office of Personnel Management to dispute independent agency order. **(a)**		Independent agency (MSPB)
NLRB v. FLRA[450] (D.C. Cir. 2010)	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ representing NLRB to dispute independent agency FLRA's order. **(a)**		DOJ (on behalf of NLRB)
USPS v. Postal Regulatory Comm'n[451] (D.C. Cir. 2011)	Obama	Postal Service	Exec. Admin.	DOJ arguing on behalf of Postal Regulatory Commission in favor of its regulation of U.S. Postal Service. **(a)**	*Chevron* (deferring to Commission in part and declining to defer in part)	DOJ on behalf of Postal Regulatory Commission (in part) & independent agency USPS (in part)
U.S. Dep't of the Air Force, 4th Fighter Wing v. FLRA[452] (D.C. Cir. 2011)	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ representing Air Force to dispute independent agency order. **(a)**	*Chevron* (deferring to Air Force)	DOJ
Fed. Bureau of Prisons v. FLRA[453] (D.C. Cir. 2011)	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ representing its own Bureau of Prisons to dispute independent agency order. **(a)**	Arbitrary & capricious	DOJ

449. 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	President	Independent Agency	Type	Subtype	Standard of Review	Winner
U.S. Customs & Border Prot. v. FLRA[454] (D.C. Cir. 2011)	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ representing Customs and Border Protection to dispute independent agency order. **(a)**	Arbitrary & capricious	Independent agency
U.S. Dep't of the Navy v. FLRA[455] (D.C. Cir. 2012)	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ representing Navy to dispute independent agency order. **(a)**		DOJ
U.S. Dep't of the Treasury, Bureau of the Public Debt v. FLRA[456] (D.C. Cir. 2012)	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ representing Department of the Treasury to dispute independent agency order. **(a)**		Independent agency (on jurisdictional grounds)
Kaplan v. Conyers[457] (Fed. Cir 2013)	Obama	Merit Systems Protection Board	Exec. Admin.	DOJ representing Office of Personnel Management to dispute independent agency MSPB's order involving Department of Defense. **(a)**		DOJ (on behalf of OPM)
Fed. Bureau of Prisons v. FLRA[458] (D.C. Cir. 2013)	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ representing its own Bureau of Prisons to dispute independent agency order. **(a)**	Arbitrary & capricious	DOJ (in part) & independent agency (in part)

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).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
U.S. IRS Office of Chief Counsel v. FLRA[459] (D.C. Cir. 2014)	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ representing Department of the Treasury to dispute independent agency order. **(a)**	Arbitrary & capricious	DOJ
USPS v. Postal Regulatory Comm'n[460] (D.C. Cir. 2014)	Obama	USPS	Exec. Admin.	DOJ arguing on behalf of Postal Regulatory Commission in favor of its regulation of U.S. Postal Service. **(a)**	Arbitrary & capricious	DOJ (on behalf of Postal Regulatory Commission)
U.S. Customs & Border Prot. v. FLRA[461] (D.C. Cir. 2014)	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ arguing on behalf of Department of Homeland Security against independent agency with respect to interpretation of independent agency's enabling act. **(b)**		DOJ
Broad. Bd. of Governors v. FLRA[462] (D.C. Cir. 2014)	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ representing independent agency Broadcasting Board of Governors to dispute independent agency FLRA's order. **(a)**		Independent agency (FLRA)

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).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Sw. Power Admin. v. FERC[463] (D.C. Cir. 2014)	Obama	Federal Energy Regulatory Commission	Exec. Admin.	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)**		DOJ
U.S. Dep't of Homeland Sec. v. FLRA[464] (D.C. Cir. 2015)	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ representing Customs and Border Protection to dispute independent agency order. **(a)**		Independent agency (on jurisdictional grounds)
Archuleta v. Hopper[465] (Fed. Cir. 2015)	Obama	Merit Systems Protection Board	Exec. Admin.	DOJ representing Office of Personnel Management to dispute independent agency order. **(a)**		Independent agency (MSPB)
Huerta v. Ducote[466] (D.C. Cir. 2015)	Obama	National Transportation Safety Board	Exec. Admin.	DOJ representing Federal Aviation Administration to dispute independent agency order. **(a)**	Arbitrary & capricious	DOJ

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).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Cobert v. Miller[467] (Fed. Cir. 2015)	Obama	Merit Systems Protection Board	Exec. Admin.	DOJ representing Office of Personnel Management to dispute independent agency MSPB's order. **(a)**		DOJ (on behalf of OPM)
USPS v. Postal Regulatory Comm'n[468] (D.C. Cir. 2016)	Obama	USPS	Exec. Admin.	DOJ arguing on behalf of Postal Regulatory Commission in favor of its regulation of the Postal Service. **(a)**	Arbitrary & capricious	DOJ (on behalf of Postal Regulatory Commission)
U.S. Dep't of the Air Force v. FLRA[469] (D.C. Cir. 2016)	Obama	Federal Labor Relations Authority	Exec. Admin.	DOJ representing Air Force to dispute independent agency order. **(a)**		DOJ

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).

Table B.5

Trump (2017 to mid-2018): Seeking Broad Constraints on the Fourth Branch

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).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Fed. Bureau of Prisons v. FLRA[470] (D.C. Cir. 2017)	Trump	Federal Labor Relations Authority	Exec. Admin.	DOJ representing its own Bureau of Prisons to dispute independent agency order. **(a)**	Arbitrary & capricious	DOJ
FLRA v. Mich. Army Nat'l Guard[471] (6th Cir. 2017)	Trump	Federal Labor Relations Authority	Exec. Admin.	DOJ representing National Guard to dispute independent agency FLRA's order and interpretation of its enabling statute. **(a)**		Independent agency
PHH Corp. v. Consumer Fin. Prot. Bureau[472] (D.C. Cir. 2018)	Trump	Consumer Financial Protection Bureau	Pres. Admin.	DOJ arguing that for-cause removal provision for independent agency's director is unconstitutional in amicus brief. **(b)**		Independent agency

470. 875 F.3d 667 (D.C. Cir. 2017).

471. 878 F.3d 171 (6th Cir. 2017).

472. 881 F.3d 75 (D.C. Cir. 2018) (en banc).

Case	President	Independent Agency	Type	Subtype	Standard of Review	Winner
Zarda v. Altitude Express, Inc.[473] (2d Cir. 2018)	Trump	Equal Employment Opportunity Commission	Pres. Admin.	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)**		Independent agency
USPS v. Postal Regulatory Comm'n[474] (D.C. Cir. 2018)	Trump	USPS	Exec. Admin.	DOJ arguing on behalf of Postal Regulatory Commission in favor of its regulation of U.S. Postal Service. **(a)**	Arbitrary & capricious	Independent agency (USPS)
USPS v. Postal Regulatory Comm'n[475] (D.C. Cir. 2018)	Trump	USPS	Exec. Admin.	DOJ arguing on behalf of Postal Regulatory Commission in favor of its regulation of U.S. Postal Service. **(a)**	Arbitrary & capricious	Independent agency (USPS)
Epic Sys. Corp. v. Lewis[476] (U.S. 2018)	Trump	National Labor Relations Board	Exec. Admin. AND Pres. Admin.	DOJ arguing that generally administrable Federal Arbitration Act should not yield to independent agency's enabling act in amicus brief. Exec. Admin. **(b)** & Pres. Admin. **(b)**	*Chevron* (declining to defer to NLRB)	DOJ (win for position argued by DOJ in amicus brief)

473. 883 F.3d 100 (2d Cir. 2018) (en banc), *argued*, No. 17-1623 (U.S. Oct. 8, 2019).

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

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

476. 138 S. Ct. 1612 (2018).