Essay

Independent Litigation Authority and Calls for the Views of the Solicitor General

Elliott Karr*

Introduction

The creation of independent agencies within the executive branch has produced a significant amount of scholarly debate about how the executive power should be distributed within the federal government.[1] Although the existence of these independent agencies is likely to continue, the debate over how much control the President, or his political appointees, should have over these independent agencies persists. One often overlooked area of executive control over independent agencies is the ability to litigate cases, particularly before the Supreme Court. Through the Office of the Solicitor General, the ability to

* J.D., 2009, The George Washington University Law School.

1 *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 664 (1994) ("The Framers and ratifiers consciously and deliberately chose to put one person in charge of executing *all* federal laws."); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1216 (1992) ("[A] coherent, consistent interpretation . . . facilitates the recapture of the Framers' vision of three competing, co-equal, and coordinate departments—no single one of which was given the *exclusive* role of maintaining the constitutional plan."); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1839 (1996) ("There may well be compelling reasons for the unitary executive . . . . History is not one of them."); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 196 (1994) ("The use of the veto to entrench presidential lawmaking . . . is an inversion of the veto's original purpose . . . . [W]e should accept a majority vote in both Houses of Congress as sufficient to block presidential lawmaking . . . .").

bring and defend cases at the Supreme Court is generally centralized in one office.[2] This centralization acts as a check on the ability of independent agencies to engage in policymaking at odds with the current administration by controlling the arguments the agencies can make and the cases they are able to bring at the Supreme Court.

In certain situations, however, Congress has provided these independent agencies with the ability to petition the Supreme Court. The ability to petition ensures the agency's views on particular areas of law are heard by the Court. This Essay examines the involvement of the Solicitor General when an agency attempts to petition the Court. In particular, this Essay argues that the Supreme Court encourages, through its rules and by "Calling for the Views of the Solicitor General,"[3] increased involvement on the part of the Solicitor General, and that this involvement effectively limits the authority of independent agencies.

To illustrate the separation of power concerns at play, this Essay considers in turn the actions of the executive, legislative, and judicial branches concerning the litigating authority of one such "independent" agency, the Federal Trade Commission ("FTC"). Part I of the Essay provides background information on the history of the independent agencies, as well as how government litigation is controlled. Part II discusses methods the executive branch has taken to attempt to increase the centralization of the control over agency litigation. Part III describes the situation that led Congress to grant independent litigating authority to the FTC. Part IV considers some of the responses by the Supreme Court toward independent litigating authority. Finally, Part V addresses the impact of the Court's responses on the agencies.

I. Independent Agencies, Unitary Executive, and Litigation Authority

Within the context of governmental agencies, the term "independent" can take on several different meanings. In general, an entity is independent if it is "[n]ot subject to the control or influence of another."[4] For federal agencies, independent usually refers to indepen-

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2 *See generally* 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, 1229 (1996) ("Perhaps the Solicitor General is most influential in deciding which of the numerous government cases to petition the Supreme Court for certiorari review.").

3 *See infra* Part IV.

4 BLACK'S LAW DICTIONARY 785 (8th ed. 2004).

dence from the President.[5] What it takes to be free from presidential control, however, is not as clearly delineated. Under the most common definition, an agency will be recognized as independent if the head of the agency cannot be removed at the will of the President. This type of independence was at issue in *Humphrey's Executor v. United States*.[6]

Prior to the Supreme Court's decision in *Humphrey's Executor*, the validity of the restrictions constituting the independent nature of the FTC, and of independent agencies in general, had not been resolved.[7] At issue was whether it was permissible for Congress to limit the power of the President to remove a commissioner of the FTC to situations of "inefficiency, neglect of duty, or malfeasance."[8] In his brief to the Court, the Solicitor General, on behalf of the President, argued that limiting the President's removal power was unconstitutional because it was an "unwarranted . . . interference with the executive power" and further contended that "[f]aithful execution of the laws may require more than freedom from inefficiency, neglect of duty, or malfeasance in office."[9] The Court disagreed, however, and held that the power of the President could be restricted, noting that "[t]he authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted."[10] This holding established that the heads of certain agencies could remain

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5 *See id.* at 68 (defining "independent agency" as "[a] federal agency . . . not under the direction of the executive").

6 Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) ("We think it plain under the Constitution that illimitable power of removal is not possessed by the President . . . . The authority of Congress . . . includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime.").

7 *See* Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L.J. AM. U. 461, 482 (1994). For the purposes of this Essay, an independent agency is considered one where the ability of the President to remove its officers at will is constrained by statute. *See* Alan B. Morrison, *How Independent Are Independent Regulatory Agencies?*, 1988 DUKE L.J. 252, 252 ("[A]n independent agency is one whose members may not be removed by the President except for cause . . . ."). *But see* Moreno, *supra*, at 468–72 (describing differences among definitions of "independent agency").

8 *Humphrey's Ex'r*, 295 U.S. at 620 ("Do the provisions of section 1 of the Federal Trade Commission Act, stating that 'any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office,' restrict or limit the power of the President . . . ? [I]s such a restriction or limitation valid under the Constitution of the United States?").

9 Brief for the United States at 22–23, *Humphrey's Ex'r*, 295 U.S. 602 (No. 667).

10 *Humphrey's Ex'r*, 295 U.S. at 629.

free from the presidential control that accompanies the power to remove at will.

Although the Court's decision assured the continuing viability of the independent agencies, it did not resolve many important issues about the degree to which the President can indirectly influence and control these agencies.[11] The degree of control is central to the debate over the "unitary executive" theory. The debate focuses on the extent of the President's executive power under Article II of the Constitution, in light of his duty to "take Care that the Laws be faithfully executed."[12]

The unitary executive theory states that all executive power is vested in the President, that Congress should be limited in its ability to control the executive branch, and that the Constitution creates a "hierarchical, unified executive department under the direct control of the President."[13] If the unified executive theory were fully adopted, it would result in all independent agencies being rendered unconstitutional.[14] This extreme reversal is unlikely to occur, as it is doubtful that the Court would overrule its decision in *Humphrey's Executor*.

Proponents of the unitary executive theory nevertheless believe the President should, at the very least, have a large degree of supervisory power over independent agencies, a conclusion not restrained by the decision in *Humphrey's Executor,* which only dealt with the removal of agency heads.[15] For example, Professors Peter Strauss and Cass Sunstein have argued that the President can and should issue Executive orders that would direct independent agencies to take certain actions.[16] The desire behind allowing the President some control or influence over even independent agencies so that he can effectuate his policy preferences is not shared by all. For example, Morton Rosenberg has argued that the unitary executive theory is both a "myth" and undesirable:

> The theory has no substantial basis in either our nation's administrative history or constitutional jurisprudence and subverts our delicately balanced scheme of separated but shared

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11 *See* Moreno, *supra* note 7, at 479.

12 U.S. CONST. art. II, § 3. For a concise description of the debate, see Moreno, *supra* note 7, at 479–81.

13 Calabresi & Rhodes, *supra* note 1, at 1165.

14 *Id*. at 1165–66.

15 *See Humphrey's Ex'r*, 295 U.S. at 619 (certifying the question with respect to "any commissioner").

16 Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 203 (1986).

> powers. It is Congress that was meant to be the dominant policymaking body in our constitutional scheme and its principal tool to ensure that its will would be carried out is its virtually plenary power to create the administrative bureaucracy and to shape the powers, duties, and tenure of the offices and officers of that infrastructure in a manner best suited to accomplish legislative ends.[17]

Regardless of objections to the unitary executive theory, most Presidents have attempted to influence independent agencies in one way or another.[18]

A. Control over Governmental Litigation

One method by which the President is able to influence the actions of the independent agencies is through the decision of whether or not to litigate particular cases. The power of prosecutorial discretion is one method by which a decisionmaker can affect the legal policies that an agency promulgates.[19] Congress has concentrated control over most government litigation in the Department of Justice ("DOJ"), under the Attorney General.[20] The reason that most litigation involving executive agencies is conducted by the DOJ is because of a desire to promote "a unity of decision, a unity of jurisprudence . . . in the executive law of the United States."[21] The DOJ litigation authority rule is merely a default rule established by Congress, and only applies "[e]xcept as otherwise authorized by law."[22] In fact, for a number of agencies, Congress decided to grant them independent litigation authority, or the power to litigate cases without relying on the DOJ.[23] If an independent agency is given this power, that agency will then be able to take legal positions contrary to the President's wishes before the courts.[24]

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17 Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 634 (1989).

18 *See* Moreno, *supra* note 7, at 481–88.

19 *Id*. at 502.

20 28 U.S.C. § 516 (2006) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

21 CONG. GLOBE, 41st Cong., 2d Sess. 3036 (1870) (quoting Rep. Jenckes).

22 28 U.S.C. § 516.

23 Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 277 (1993).

24 *See id*. ("[L]egislative grants of independent litigating authority result in a significant number of intragovernmental disputes . . . .").

Control over agency litigation before the Supreme Court, however, is far more centralized than before the lower courts. The vast majority of governmental litigation before the Supreme Court is conducted by the Solicitor General. When the United States has an interest before the Supreme Court, "[e]xcept when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court."[25] The Attorney General has delegated, by regulation, this authority to the Solicitor General.[26]

While there are a significant number of agencies that have independent litigation authority before the lower federal courts, virtually all government litigation—even litigation on behalf of independent agencies—at the Supreme Court is conducted by the Solicitor General.[27] Two independent agencies, the (now nonexistent) Interstate Commerce Commission and the FTC, have had independent litigation authority before the Supreme Court when the Solicitor General refuses to litigate on their behalf.[28] This results in a much greater unity of voice for the executive branch at the Supreme Court than in the lower courts, and enables the President, indirectly, to control the arguments that are put before the Court.

B. Types of Independence

The degree to which Congress allows independent litigating authority impacts the amount of presidential control over the agency and depends on the relative independence of both the independent agency and the Solicitor General. If the independent agency is considered completely independent from any executive influence, and the Solicitor General is viewed merely as a mouthpiece for the administration, then allowing the independent agency to represent itself is likely to lead to a significant decrease in the amount of presidential control.

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25 28 U.S.C. § 518(a); *see also id.* § 518(b) (giving the Attorney General the authority to direct the Solicitor General to "personally conduct and argue any case").

26 *See* 28 C.F.R. § 0.20 (2007) ("The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Solicitor General, in consultation with each agency or official concerned: (a) Conducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, briefs and arguments, and . . . settlement thereof.").

27 *See* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 255 (1994) ("With a few exceptions, the Solicitor General controls all aspects of independent agency litigation before the Supreme Court.").

28 *See id.* at 275 (noting Interstate Commerce Commission and FTC independent litigation authority, but also that National Labor Relations Board and Tennessee Valley Authority may have same authority).

On the other hand, if the independent agency is not as free from executive control, and the Solicitor General exercises a significant amount of discretion, then the issue becomes less about the amount of presidential control over the independent agency and more about where that control is located within the bureaucracy.

Consider the FTC. Because of the removal restrictions for the commissioners, the agency is traditionally considered independent. That does not completely answer the question of how independent the FTC is in reality. The fact that heads of an agency cannot be removed without cause by the President does not mean that they will never be influenced by the President. One way that the President can influence a particular agency is through the appointment process. For example, the FTC is headed by five commissioners, each of whom can only be removed for cause.[29] Of the five commissioners, at most three of them can be from the same political party.[30] Because one of the commissioner spots becomes open every other year,[31] a majority of the time a majority of the commissioners will likely at least be of the same political party as the sitting President, if not appointed by that President himself. As a result, there is a good chance that these commissioners will share similar policy goals with the President, especially those commissioners appointed by the President. However, the fact that the ability to remove the commissioners is restricted means each commissioner ultimately retains the ability to make policy determinations that run counter to the will of the President without fear of removal.

Although the Solicitor General is subject to removal at will by the President,[32] and therefore not independent in the traditional sense of the word, it is widely thought that the Solicitor General still has some measure of independence. Even though the Solicitor General is appointed by the President and is supervised by the Attorney General, the DOJ has noted that "the Solicitor General has enjoyed a marked degree of independence,"[33] and others have referred to the office as

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29 15 U.S.C. § 41 (2006).

30 *Id.*

31 *See id.*

32 *See* 28 U.S.C. § 505 (2006) (giving President appointment power for Solicitor General); Myers v. United States, 272 U.S. 52, 122 (1926) ("The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.").

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

"quasi-independent" in nature.[34] The Solicitor General's independence is beneficial because, "[t]o the extent the Solicitor General can be shielded from political and policy pressures—without being unaware of their existence—his ability to serve the Attorney General, and the President, as 'an officer learned in the law' is accordingly enhanced."[35] This independence is also important because, as a repeat player before the Court, the Solicitor General is able to build institutional capital with the Court.[36] If the Solicitor General were seen by the Court as simply representing the views of the President, as opposed to exercising independent legal judgment, his capital and authority with the Court would be diminished.[37]

Even though it is in the President's best interests to allow the Solicitor General to act independently in most circumstances in order to ensure having an effective litigator before the Supreme Court, it does not follow that the Solicitor General is completely free from presidential control, as "the appearance of independence is not independence."[38] As an initial matter, the President appoints the Solicitor General, and is likely to attempt to appoint someone whose political and legal views are as similar as possible to his own. More importantly, the Solicitor General is ultimately subject to presidential control because of the President's removal power. Unlike the heads of a traditionally independent agency, the Solicitor General cannot take actions that run contrary to the President without fear of being removed from office. In all but the most politically charged cases, however, there is a good chance that the President will not interfere with the actions of the Solicitor General because many cases do not seem important enough for the President to become directly involved.

While in the vast majority of Supreme Court cases the Solicitor General can expect a large degree of independence from the President, the location the Office of the Solicitor General within the DOJ, and the supervision of the Attorney General can also undermine his independence. Frequently, the Solicitor General must resolve competing claims made by different agencies of the government when deciding what position to take before the Supreme Court.[39] This process

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34 Devins, *supra* note 27, at 282–83 (using term and describing other instances of similar commentary).

35 Role of the Solicitor General, 1 Op. Off. Legal Counsel at 232–33.

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

37 *See id.*

38 Devins, *supra* note 27, at 287.

39 *See* Robert L. Stern, *The Solicitor General's Office and Administrative Agency Litiga-*

is generally not considered problematic because there is thought to be some benefit in having the interests of the government, in most instances, represented before the Supreme Court by a single voice. Also, the Solicitor General is usually capable of being a neutral arbiter of opposing agencies' views, either adopting the position of one of the agencies before the Court, or taking his own position somewhere between the views espoused by the agencies.[40] As long as the Solicitor General is able to maintain this impartiality, he can effectively represent the agencies as components of the Federal Government.

It is not clear, however, that the Solicitor General is able to satisfactorily fill the role of the impartial arbiter under all circumstances, given his position within the DOJ. "When one of the competing interests . . . is one enforced by the [DOJ] itself, it is somewhat more difficult for the Solicitor General to be completely neutral . . . ."[41] This may be simply a matter of similar jurisprudential and policy preferences of the Solicitor General and the Attorney General (given that they are both appointed by the President), as opposed to the Attorney General putting pressure on the Solicitor General to handle a case in a particular way. It also may merely be that, because the Office of the Solicitor General is located within the same building as other DOJ attorneys, the Solicitor General is influenced by proximity, both physically and institutionally. Whatever the reason, it is still troubling that the two agencies that are charged by Congress with enforcing particular statutes are not accorded equal deference by the Solicitor General in preparing positions before the Supreme Court.

With respect to the FTC in particular, the preference for DOJ views may be more significant. The FTC and the DOJ, through its Antitrust Division, both enforce the nation's antitrust laws. The FTC's position as a traditionally independent agency allows it to develop legal positions that are different from those of the DOJ. When the FTC endorses a position that differs from the views of the Antitrust Division, the Solicitor General may be more likely to value the views of the DOJ's antitrust lawyers more strongly, in terms of whether or not to take a case, or what arguments should be made. "It has been said that the administrative agencies fare badly when op-

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tion, 46 A.B.A. J. 154, 156–57 (1960) (noting disagreements between agencies, including between the Department of Agriculture and International Commerce Commission ("ICC"), the Office of Price Administration and the ICC, the Federal Reserve Board and the Department of the Treasury, and the Civil Aeronautics Board and the Post Office).

40 *See id.* at 157.

41 *Id*.

posed to the antitrust policies of the Department of Justice itself . . . . [T]his occurs most often when the agency . . . has authority to appear separately [before the Court] on its own behalf."[42]

Because the Solicitor General is ultimately subject to removal at will, the President is in a better position to control the positions the Solicitor General, as opposed to some independent agency, takes before the Supreme Court. Independent agencies have the power to make legal policy that runs counter to the will of the President, but allowing the Solicitor General to control litigation before the Supreme Court can help the President ensure independent agencies do not deviate from presidential priorities.[43] By deciding not to pursue cases where the agency would prefer a reversal, and vice versa, the Solicitor General is able to significantly impact the amount of legal policymaking that the independent agencies are able to undertake.

II. The Battle for Control

Congress and the President are frequently at odds over the question of centralized litigating authority. For the President, having government litigation concentrated in the DOJ provides a greater amount of control by the President over the policymaking done by agencies. Congress, however, has an incentive to promote decentralized litigating authority because it "enlarges department and agency responsibility, thereby providing oversight committees greater opportunities to influence agency business."[44] As a result, there has, in some cases, been a back and forth battle between the two branches over whether particular agencies should represent themselves before the federal courts.

Many administrations have made efforts to curb the amount of independent litigating authority agencies possess. In 1933, President Roosevelt issued an Executive order that first established DOJ control over government litigation, replacing the largely decentralized regime that preceded it.[45] Later, the Hoover Commission called for Congress to make the DOJ "the chief law office of the Government" by centralizing governmental litigation under it, but Congress responded by granting both independent and executive agencies the ability to try their own cases.[46] Later administrations attempted to

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42 *Id*.

43 *See* Devins, *supra* note 27, at 260.

44 *Id.* at 266.

45 *Id.* at 265 (citing Exec. Order 6166, § 5 (1933), *reprinted in* 5 U.S.C. § 901 (1998)).

46 *Id*. (quoting John F. Davis, Department of Justice Control of Agency Litigation 1-17

increase their control over government litigation by narrowly interpreting statutes authorizing independent litigation.[47] For example, during the first Bush administration, the DOJ advised the Postal Service that it could not represent itself in a dispute with the Postal Rate Commission, in light of statutory authorization that was ambiguous.[48] President Bush then directed the heads of the Postal Service to withdraw the case and sent letters threatening to remove them from office if they refused to cooperate.[49] Although the Postal Service was vindicated by an injunction blocking the removal and the D.C. Circuit's ruling that the Postal Service possessed independent litigating authority,[50] this episode demonstrates the importance to the executive of controlling the litigation conducted by an agency.

III. History of FTC Independent Litigation Authority

As noted earlier, in general, the DOJ, or more specifically the Office of the Solicitor General in the case of Supreme Court litigation, will control the litigation by agencies unless Congress provides otherwise. Congress has, however, provided a number of agencies with independent litigating authority. Generally, agencies are only authorized to represent themselves before the lower federal courts. However, some agencies, such as the FTC, have been granted the power to represent themselves before the Supreme Court. This Part looks at the circumstances surrounding Congress's decision to grant independent litigation authority to the FTC, in particular actions by the DOJ that made its representation of the FTC's interests untenable.

The FTC was granted independent litigation authority before the Supreme Court in 1975 under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act.[51] This authorization gave the FTC the right to represent itself before the Supreme Court only in cases where the Solicitor General decided not to petition for certiorari; if the Solicitor General wanted to take the case, he could do so.[52] Just two years earlier, the FTC had been granted the authority to re-

(Aug. 14, 1975) (unpublished report prepared for the Administrative Conference of the United States)).

47 *Id*. at 266–67.

48 *Id*. at 267.

49 *Id*.

50 *Id.*

51 Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 204, 88 Stat. 2183, 2199 (1975).

52 *See id*. (giving Attorney General the option to petition for certiorari); *supra* note 26.

present itself in the lower courts.[53] Previously, lower court litigation on behalf of the FTC was awkwardly divided between the DOJ and the FTC's own lawyers, with the DOJ handling injunctive actions and civil penalty suits, while the FTC was responsible for enforcement proceedings and judicial review.[54] This division of labor created problems when the FTC and DOJ disagreed on substantive areas of antitrust law and policymaking efforts and resulted in poor representation of the FTC's positions through filing delays, settlements that did not reflect the agency's policy goals, and even the refusal to file cases in the first place.[55] By granting the FTC independent litigation authority before the lower courts, Congress mitigated the representational problems and internal conflict that would have been inherent in having two separate agencies charged with regulating the same area of the law, while simultaneously requiring one of the agencies to represent the other in court.

In addition to the problems with the DOJ's representation of the FTC before the lower federal courts, Congress also recognized the Solicitor General's poor track record with respect to the FTC. Problems with the Solicitor General's representation of the FTC illuminate Congress's decision to grant the FTC independent litigation authority before the Supreme Court in 1975.[56] In 1968, the DOJ took a position against the FTC in *FTC v. Guignon*,[57] and, in an amicus brief, argued that the agency was not authorized to represent itself in subpoena enforcement proceedings.[58] This position likely reflected a "desire [by the DOJ] to maximize its litigating authority at the expense of the FTC."[59] More problematic was the Solicitor General's decision to shield a decision favorable to the DOJ from judicial review by not seeking certiorari, arguing that the issue was not "of sufficient general importance to warrant requesting the Supreme Court to review it."[60] In another case, *St. Regis Paper Co. v. United States*,[61] the FTC was effectively denied representation when the Solicitor General sided

53 *See* Pub. L. No. 93-153, § 408, 87 Stat. 576, 591–92 (1973).

54 Devins, *supra* note 27, at 270.

55 *Id*.

56 *See id*. at 270–71 (describing FTC-Solicitor General conflicts).

57 FTC v. Guignon, 390 F.2d 323 (8th Cir. 1968).

58 *Id.* at 329.

59 Devins, *supra* note 27, at 270.

60 *Id.* (quoting John F. Davis, Department of Justice Control of Agency Litigation 1-17 (Aug. 14, 1975) (unpublished report prepared for the Administrative Conference of the United States) (quoting a letter from Solicitor General Erwin Griswold to Paul R. Dixon, Chairman, Federal Trade Commission (Apr. 26, 1968))).

61 St. Regis Paper Co. v. United States, 368 U.S. 208 (1961).

with the position of the Census Bureau on an issue related to confidentiality claims of reports filed with the Census Bureau.[62] There, the Solicitor General decided not to "burden[ ] the Court with briefs from different agencies," but "attempt[ed] . . . to set forth the competing arguments as effectively and objectively as possible."[63] In the brief, however, the Solicitor General represented the FTC by arguing that the position the FTC proffered was not the proper one.[64] This 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. These events played a key role in motivating Congress to award the FTC independent authority, as Congress found that "the investigative and law enforcement responsibilities of the Federal Trade Commission have been restricted and hampered because of inadequate legal authority."[65]

Congress's intent in granting independent litigating authority to the FTC does not necessarily lead to the conclusion that the Solicitor General should never be involved in cases where the FTC is litigating. For example, in 1974, the House Committee on Interstate and Foreign Commerce maintained that the government's interest in putting forward its position with one voice outweighed the interest the FTC had in litigating its cases in the manner tailored to meet its particular enforcement goals.[66] In addition to concerns about the adequacy of the FTC's representation before the Supreme Court, a likely motivating factor behind Congress's decision to transfer this authority to the FTC from the Solicitor General was a combination of the desire to limit the power of the President and the DOJ following Watergate and the "Saturday Night Massacre,"[67] as well as the overwhelming popularity

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62 *See id.* at 217 ("[T]he government agencies are at loggerheads on the problem, the Department of Commerce, Census Bureau and the Bureau of the Budget believe the copies are not subject to legal process, while the Federal Trade Commission and the Antitrust Division of the Department of Justice, which filed this suit, contend to the contrary. The Solicitor General . . . has concluded 'on balance' that the copies are not subject to compulsive production.").

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

64 *Id.* at 26–28.

65 Pub. L. No. 93-153, § 408(a)(1), 87 Stat. 576, 591 (1973).

66 *See* Devins, *supra* note 27, at 271.

67 In 1975, the year the FTC was granted independent litigation authority, the Solicitor General was Robert Bork, who was involved in the dismissal of former Solicitor General Archibald Cox. *See generally* Ruth Marcus & Al Kamen, *Memories of the 'Saturday Night Massacre,'* WASH. POST, July 2, 1987, at A16.

of the FTC at the time during the "age of consumerism" of the 1970s.[68]

These political circumstances illustrate the types of issues that Congress can take into account when dividing the power to litigate cases before the Supreme Court among various federal agencies. Congress's ultimate transfer of the litigating authority to the FTC shows that Congress did not intend the Solicitor General to play as significant of a role in determining what cases should reach the Supreme Court, given that the cutting off of access to the Supreme Court, as occurred in *Guignon*, is in part what led Congress to adopt the 1975 law. Congress's decision guaranteed that the FTC's voice would be heard before the Supreme Court, regardless of whether it was at odds with views of the current administration.

IV. The Court Intercedes

It is common in discussion of the unitary executive theory to look at subsequent actions taken by the President and Congress designed to increase the power of one branch at the expense of the other. In the area of independent Supreme Court litigating authority, however, the Court itself has also played an important role. In general, the Court's actions have favored centralized control of government litigation within the Office of the Solicitor General. The motivation behind these acts is unlikely to be the Court taking sides in a conflict between the other two branches. Rather, the Court is probably motivated by self-interest, as it is well served by having the Solicitor General represent all government matters to it.

One of the more mundane methods by which the Supreme Court facilitates the participation of the Solicitor General in government litigation is the requirements for filing an amicus brief. Under Supreme Court Rule 37, in order to file an amicus brief before the Court, the party wishing to file the amicus brief must either obtain permission from both parties, or from the Court after filing a motion.[69] When the Solicitor General wants to file an amicus brief, however, he does not need to get leave from the Court.[70]

A much more important method by which the Court has begun to involve the Solicitor General in government litigation has been to "Call for the Views of the Solicitor General" ("CVSG") at the certiorari stage of litigation in order for the Solicitor General to advise the

68 Devins, *supra* note 27, at 272.

69 SUP. CT. R. 37.2(a), (b).

70 *Id.* at 37.4.

Court as to whether it should grant the petition for certiorari. While ordinarily the Solicitor General is expected to represent the interests of the government, when CVSG'ed, the Solicitor General acts, in the words of one former Solicitor General, as "an officer of that Court committed to providing his best judgment with respect to the matter at issue."[71] While the authority of the Solicitor General to litigate cases before the Supreme Court is clearly laid out in statutes and regulations, the CVSG process has no such legal basis.

Since the inception of the CVSG process, the Court has only issued a CVSG twice where one of the parties was a government agency: *FEC v. NRA Political Victory Fund*,[72] and *FTC v. Schering-Plough Corp.*[73] Part of the reason for such a small number of these cases is that there is no reason to CVSG a case where the Solicitor General is representing the agency, which is generally the case because of the widespread centralization of government litigation within the Office. Even if the agency possesses independent litigating authority before the Supreme Court, the agency is still likely to attempt to get the Solicitor General to sign off on the petition for certiorari because of his reputation with the Court, which eliminates any need for the Court to ask his opinion. As a result, the only situation where a CVSG will possibly occur is when the Solicitor General disagrees with the position taken by the agency. These two instances represent completely different issues of who should control Supreme Court litigation, but both cases demonstrate instances of the Court reaching out to the Solicitor General in order to protect the Office's power in front of the Court.

The first instance where the Court called for the views of the Solicitor General in a case with a federal agency as a party was in *NRA Political Victory Fund*.[74] Following an adverse ruling by the D.C. Court of Appeals, the Federal Election Commission ("FEC") filed a petition for writ of certiorari in its own name, without the authorization of the Solicitor General.[75] The Supreme Court requested the Solicitor General address the question of "[w]hether the [FEC] has

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71 Drew S. Days III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 KY. L.J. 485, 488 (1994–95).

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

73 FTC v. Schering-Plough Corp., 546 U.S. 974, 974–75 (2005), *cert. denied*, 548 U.S. 919 (2006).

74 *See NRA Political Victory Fund*, 513 U.S. at 90.

75 *See id.*

statutory authority to represent itself in this case in this Court."[76] The Solicitor General concluded that the FEC did not possess this authority.[77] Nevertheless, the Solicitor General urged the Court to allow the petition on the grounds that he had authorized the petition under 28 U.S.C. § 518(a).[78] The Court agreed with the Solicitor General that the FEC did not have independent litigation authority in this case,[79] but the Court also acknowledged the power of Congress to change the statutory regime and allow for the FEC to bring its own claims.[80] However, the Court did not find that the Solicitor General's authorization of the petition was valid because it occurred after the filing deadline had passed, and therefore the Court dismissed the petition.[81]

In this case, the statutory authorization allowed the FEC "to initiate . . . , defend . . . or appeal any civil action in the name of the [FEC]."[82] The Court, as well as the Solicitor General, did not think this provided sufficient authorization because it did not specifically authorize petitioning for writs of certiorari.[83] Thus, the Court effectively adopted a clear statement requirement in order for an agency to have independent litigating authority before the Supreme Court. This holding protected the place of the Solicitor General before the Court by minimizing the number of other agencies that would be considered to have authority to have their voices heard separately from Solicitor General representation.

The other instance of the Court calling for the views of the Solicitor General in a case where independent litigating authority was at issue, *Schering-Plough Corp.*, shows a different manner in which the Court helps to protect the Office of the Solicitor General. When the Court called for the views of the Solicitor General in *Schering-Plough*, it was asking whether the issue was appropriate for Supreme Court

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76 *Id.* (citing the Court's earlier order at *FEC v. NRA Political Victory Fund*, 510 U.S. 1190 (1994)).

77 *See* Brief for the United States as Amicus Curiae, *NRA Political Victory Fund*, 513 U.S. 88 (No. 93-1151), 1994 WL 16100276, at *4.

78 *See id.*; *see also* 28 U.S.C. § 518(a) (2006).

79 *NRA Political Victory Fund*, 513 U.S. at 90.

80 *Id.* at 96 ("Congress could obviously choose, if it sought to do so, to sacrifice the policy favoring concentration of litigating authority before this Court in the Solicitor General in favor of allowing the FEC to petition here on its own.").

81 *Id.* at 99.

82 2 U.S.C. § 437d(a)(6) (2006).

83 *See NRA Political Victory Fund*, 513 U.S. at 96 ("[G]iving the FEC independent *enforcement* powers . . . does not demonstrate that [Congress] intended to alter the Solicitor General's statutory prerogative to conduct and argue the Federal Government's litigation in the Supreme Court.").

review, not whether the FTC had the authority to file the petition in the first place, as it was clear that the Commission did have such authority.[84] *Schering-Plough* importantly marked the first time in the history of the CVSG process that the Court called upon the Solicitor General to second-guess the view of another agency in the executive department with independent litigation authority as to whether a particular case was cert-worthy. The Solicitor General acknowledged that the issue present in the case, involving the allegedly anticompetitive settlement of patent infringement claims, was a sufficiently important question of federal law to warrant the Court's attention.[85] The Solicitor General, however, recommended that the petition be denied because the case did not provide a good factual vehicle and because there was not a sufficient circuit split to warrant consideration.[86] These conclusions were at odds with the FTC's position that certiorari should have been granted in the case. Ultimately, the Supreme Court agreed with the Solicitor General and denied the petition.[87]

In *Schering-Plough*, the actions of the Court represented a new type of protection for the Solicitor General. Instead of limiting the number of agencies that can put forth their claims without the Solicitor General deciding whether to take their case, the Court emphasized that even when Congress has explicitly made the decision that a particular agency should be able to bring its views before the Court, the Court still wants to hear the views of the Solicitor General. While it had previously facilitated this process by allowing the Office of the Solicitor General to file amicus petitions without having to get permission from the Court, here the Court took a more active approach. The Court went out and asked the Solicitor General for his opinion as to whether the case should be heard, as opposed to relying on the

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84 Brief for the United States as Amicus Curiae at I, FTC v. Schering-Plough Corp., 548 U.S. 919 (2006) (No. 05-273), 2006 WL 1358441. The questions presented in this brief were:

> 1. Whether the antitrust laws prohibit a brand name drug patent holder and a prospective generic competitor from settling patent infringement litigation by agreeing that the generic manufacturer will not enter the market before a future date within the term of the patent and that the patent holder will make a substantial payment to the generic manufacturer.
>
> 2. Whether the court of appeals erred in concluding that "substantial evidence" did not support the Federal Trade Commission's factual finding that a payment from a patent holder to an allegedly infringing generic manufacturer was consideration for the generic manufacturer's delayed entry into the market rather than a separate royalty for a license concerning a different product.

Id.

85 *See id*. at 8–12.

86 *See id.* at 12–20.

87 *Schering-Plough*, 548 U.S. 919, 919 (2006).

opinion of the agency that brought the case. By actively seeking out the Solicitor General's opinions in these cases, the Court demonstrates a desire for the Solicitor General to retain control over as much of the litigation before the Supreme Court on behalf of the federal government as possible.

As mentioned above, it is unlikely that the reason the Court has taken these actions is a desire to see the interests of the executive branch promoted over those of the legislative. Nor is it likely that the reason the Court acts this way is a belief that under the Constitution this is the only proper way for government litigation to be controlled. Instead, it is likely a self-interested desire for Solicitor General involvement, combined with a perception that the Solicitor General is in the position best situated to manage government litigation and mediate intra-executive branch disputes.

The Supreme Court endorsed the advantages of having the Solicitor General involved in the certiorari process, both to itself and the government as a whole, in its decision in *NRA Political Victory Fund*:

> This Court, of course, is well served by such a practice, because the traditional specialization of [the Solicitor General] has led it to be keenly attuned to this Court's practice with respect to the granting or denying of petitions for certiorari. But the practice also serves the Government well; an individual Government agency necessarily has a more parochial view of the interest of the Government in litigation than does the Solicitor General's office, with its broader view of litigation in which the Government is involved throughout the state and federal court systems. Whether review of a decision adverse to the Government in a court of appeals should be sought depends on a number of factors which do not lend themselves to easy categorization. The government as a whole is apt to fare better if these decisions are concentrated in a single official.[88]

The ability of the Solicitor General to be "keenly attuned" to the certiorari process in part stems from the Solicitor General's place as a repeat player before the Court. If the number of cases where the Solicitor General is involved were diminished, not only would the Court lose out on his specialization in those cases, but if too many cases were outside his domain then his ability to remain keenly attuned would be hampered as well. In this respect, the Solicitor General functions as a gatekeeper, and acts to "guard the door to the Supreme Court, to

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

make sure that only the most important cases are appealed."[89] In fact, it is believed that the Solicitor General must have centralized control over the cases before the Supreme Court, as "[s]uch control insures that the government presents to the Supreme Court only those cases that meet the Court's own exacting standards for review."[90] When Congress was considering granting the Securities and Exchange Commission independent litigating authority before the Supreme Court, Chief Justice Burger further showed the preferences of the Court and voiced "the unanimous view of the Justices that it would be unwise to dilute the authority of the Solicitor General as to Supreme Court jurisdiction in cases arising within the Executive Branch and independent agencies."[91]

V. Effect on the Agencies

The back and forth battle between Congress and the President over the scope of independent litigating authority and the actions taken by the Supreme Court promoting the primacy of the Office of the Solicitor General show the importance of the issue of independent litigating authority, both with respect to separation of powers issues between the political branches, and with respect to the sound administration of the law within the judicial branch. These issues leave open the question, however, of how an agency with independent litigation authority can expect to fare under the current regime.

For an agency like the FTC, which possesses independent litigation authority, the Court's decision to CVSG their petition in *Schering-Plough* was likely very disappointing, given that the agency knew the Solicitor General had already declined to take their case, and would likely recommend that the Court deny certiorari—which the Court ultimately did. However, it will not always be the case that when the Solicitor General takes a position counter to the litigating agency, that agency loses its chance at certiorari. The fact that the Solicitor General recommended that the Court deny certiorari does not mean that the Court will necessarily do so, as the Solicitor Gen-

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89 Devins, *supra* note 27, at 317 (quoting John A. Jenkins, *The Solicitor General's Winning Ways*, 69 A.B.A. J. 734, 738 (1983) (quoting former Deputy Solicitor General Ken Geller)).

90 *Securities Exchange Act Amendments of 1973: Hearings on H.R. 5050 and H.R. 340 Before the Subcomm. on Commerce and Finance of the H. Comm. on Interstate and Foreign Commerce*, 93d Cong. 278 (1978) (statement of Erwin N. Griswold, Solicitor General of the United States).

91 Devins, *supra* note 27, at 313 (quoting Letter from Warren E. Burger, Chief Justice of the United States, to John E. Moss, Chairman, House Subcommittee on Commerce and Finance (Nov. 9, 1971)).

eral tends to guard the Court's docket more carefully than the Court itself. In addition, it is also not necessarily the case that the Court would have granted the petition for certiorari in the first place. If the Court was already planning on denying, then a negative recommendation from the Solicitor General would not be the reason that certiorari was denied.

While it may appear that the FTC lost out by not getting to argue *Schering-Plough* before the Supreme Court, it is important to note that the issue in that case, reverse patent payments, is not forever taken off of the board. When an agency without independent litigating authority is unable to convince the Solicitor General to take its case, "the agency will typically have the opportunity to relitigate the issue in another case. In such cases, Supreme Court adjudication is merely delayed, not foreclosed."[92] This situation is directly analogous to when the Solicitor General recommends that certiorari be denied in a case brought by an agency that does possess independent litigating authority, especially when the reasons the Solicitor General relied on for suggesting a denial of certiorari (problems with the vehicle and lack of a circuit split) are things that would be different in future cases.

Forcing an independent agency to wait for another case to petition for certiorari may also not go against the agency's best interests. Presumably, in petitioning the Supreme Court, the goal of the agency is not just to get the case heard, it is to win the case. If the agency is facing opposing views of the administration represented by the Solicitor General, then its chances before the Court may not be as good as if the Solicitor General were on its side. By relying on the views of the Solicitor General and denying certiorari, the Court may be looking to postpone resolution of the issue until the independent agency and the executive branch come to an agreement on how the case should be handled. This could either happen as the result of a change in the presidential administration, or when new heads of the agency are appointed, either of which would indicate democratic support for the position. If the event that brings the executive branch and the independent agency into agreement is the election of a new President, then the agency is likely to fare better before the Supreme Court when supported by the Solicitor General, and therefore the postponement of the resolution of the issue would actually be in the best interests of the agency with respect to its preferred policy outcome.

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92 *Id.* at 258.

It is still likely, however, that these actions of the Supreme Court decrease the amount of representation that these agencies with independent litigating authority receive. One reason that the Solicitor General may decide to bring a case to the Supreme Court on behalf of an agency with independent litigating authority—even a case that ordinarily the Solicitor General would prefer not to bring—would be a desire to control the arguments that are made before the Supreme Court. By agreeing to petition for certiorari on behalf of the agency, the Solicitor General, as opposed to the agency's general counsel, will himself represent the agency in front of the Court. In fact, this desire to control the litigation is what some officials at the FTC believe motivated the Solicitor General to support granting cert in *FTC v. Ticor Tile Insurance Co.*[93] While this possibility still exists, if the Solicitor General thinks that he can effectively participate both through the CVSG process and as an amicus, then the risk of the agency representing itself before the Court may not appear as great, and so fewer petitions may be supported.

Conclusion

The argument over the proper placement of agency control between the legislative and executive branches will likely not be settled anytime soon. Strong adherents to the unitary executive theory may think that any sort of independence for an agency goes against the principles of the Constitution. As this paper has demonstrated, however, centralized control over government litigation in most cases makes this argument somewhat of a theoretical discussion. When agencies are unable to press arguments in the federal courts that run counter to the will of the President, their ability to make policy will be limited. Even when Congress has allowed agencies the independent litigating authority to make their arguments before the Supreme Court, the Court itself has reinforced the ideal of centralization of government litigation. It has done this in a variety of ways, notably "Calling for the Views of the Solicitor General" in recent cases when the petitioning party has independent litigation authority. These actions by all three branches demonstrate the value each branch places on the litigation of government claims.

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93 FTC v. Ticor Title Ins. Co., 504 U.S. 621, 625 (1992) (noting grant of certiorari); *see* Devins, *supra* note 27, at 309 (describing FTC officials' belief that the Solicitor General advocated on the FTC's behalf to "exercise[ ] significant control in defining the case").