

THE BATTLE THAT NEVER WAS: CONGRESS, THE WHITE HOUSE, AND AGENCY LITIGATION AUTHORITY

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I

INTRODUCTION

Who should speak the government's voice in court? Specifically, are the interests of the United States better represented by generalist litigators in the Department of Justice ("DOJ") or agency lawyers with subject matter expertise? For DOJ and agency lawyers, this question is of monumental importance. For members of Congress and their staff, however, this question is almost always a nonstarter.

Witness, for example, our experience in conducting a study for the Administrative Conference of the United States ("ACUS") on DOJ control of government litigation.¹ Before the study was approved, C. Boyden Gray, President Bush's White House Counsel and a member of ACUS's board, insisted that the project be blessed by Clinton Justice Department officials. Once approved,² the project provoked dramatically different responses from agency and DOJ officials as well as congressional overseers. For agency lawyers, our project was a breath of fresh air—a chance to extol their underutilized litigation skills and vent frustration at DOJ. For some DOJ officials, our project was an invitation to disaster. Indeed, our inquiries about the distribution of litigation authority prompted one high-ranking DOJ official to lobby ACUS to kill the project. In the halls of Congress, however, staffers on the Senate Judiciary and House Energy and Commerce committees wondered why two law professors would invest so much energy in a project that held so little interest.

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1. The study was cut short by Congress' defunding of the Administrative Conference. Our research findings can be found in Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Government Litigation* (in progress). In *The Uneasy Case*, we consider the appropriate allocation of litigating authority on the merits from, we hope, a neutral position. In the present article, we ignore the merits and consider instead the interests at stake and the politics of the issue.

2. Clinton friend and then Associate Attorney General Webster Hubbell wrote a letter on our behalf. We hasten to say that rumors that this letter prompted Ken Starr, a DOJ official in the Reagan and Bush Administrations, to file criminal charges against Hubbell are simply untrue. Starr's investigation of the President and his friends is in fact part of a "vast right-wing conspiracy."

Differences between congressional and “administrative branch” attitudes were also underscored in our involvement in a bitter dispute over litigation authority that embroiled the Bush White House and the U.S. Postal Service.³ In particular, claiming statutory authority to represent itself in court, the Postal Service refused to bend to demands that it withdraw from a lawsuit that it filed against the Postal Rate Commission—demands made by the Justice Department, the White House counsel, and, ultimately, the President, who threatened to remove the Postal Service’s Board of Governors for insubordination. Throughout this struggle, Congress—notwithstanding several front-page *Washington Post* stories as well as Postal Service lobbying—expressed no opinion on Postal Service litigation authority. Rather, Congress left it to the courts to sort out the scope of the removal power and the appropriate division of litigation authority.⁴

In part, the explanation for this difference could not be more obvious. For the lawyers themselves, the allocation of authority is personal; it directly affects their power and the nature of their jobs. It is hardly a surprise that lawyers in DOJ and lawyers in the agencies both would prefer more rather than less responsibility. Members of Congress and their staffs lack this personal stake in the question of litigation authority.

Nevertheless, Congress’ seeming indifference to the division of litigation authority, at first glance, seems surprising. After all, courts figure prominently in governmental policymaking and, as such, the question of who speaks the government’s voice in court seems anything but immaterial. Congress is extraordinarily concerned about who the *judges* are; for the same, though slightly more dilute reasons, it ought to be concerned about who the *lawyers* are. Furthermore, since most departments and agencies are far more vulnerable to committee oversight than is DOJ, decentralizing litigation authority would appear to bolster congressional power.

Upon closer inspection, however, it may be that Congress’ choice to invest little energy in parceling out litigation authority is sensible. In our view, the distribution of litigation authority among executive branch agencies and departments is of marginal consequence to Congress. Through its lawmaking and oversight powers, Congress has more powerful and direct tools for defining the scope and content of legal policymaking. In contrast, centralizing litigation authority in DOJ does significantly bolster presidential control of the adminis-

3. Neal Devins worked as a consultant to the Postal Service. Michael Herz, through his scholarship and insights, assisted in this effort. For a recounting of this dispute, see 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 (1994).

4. In stark contrast, when President Bush, in the midst of this dispute, attempted to make a recess appointment to the Postal Service’s Board of Governors, the Service’s congressional overseers were up in arms, sending a blistering bipartisan letter of protest to the White House. Apparently, Congress saw Bush’s recess appointment as a threat to lawmaker prerogatives—the power to confirm presidential appointees. The litigation authority dispute did not raise such concerns. Instead, because the Postal Service wanted to raise postal rates, constituent interests—rather than pressure Congress to intervene—supported the White House.

trative state, and so is a more salient issue for the Executive Branch. Thus, when litigation authority is placed against the backdrop of the intensity of conflicting preferences within Congress and the Executive Branch, DOJ control of government litigation is hardly surprising.

II

THE ALLOCATION OF LITIGATION AUTHORITY

Historically, Congress well understood that a decentralized lawyering apparatus enhanced its authority *vis-à-vis* the President.⁵ For this very reason, in the early years of the Republic, Congress relied on highly decentralized legal arrangements. It did not create DOJ until 1870. Even with DOJ in place, for the next half-century, powerful solicitors in other departments undermined Attorney General control of government litigation by successfully lobbying their allies in Congress for independent litigation authority.⁶ Through powers granted the President by Congress only a few months earlier,⁷ however, Franklin Delano Roosevelt issued a June 1933 Executive Order that confined to DOJ “the responsibility of prosecuting and defending [c]ourt actions to which the United States is a party.”⁸

Consistent with the Roosevelt Executive Order, Congress has established DOJ as the primary litigator for the United States and its administrative agencies. The basic, though not inflexible, rule is that agencies may not employ outside counsel for litigation; they must refer all matters to DOJ.⁹ With regard to criminal prosecution, DOJ’s preeminence goes largely and appropriately unquestioned. On the civil side, however, it is a source of continuing controversy between DOJ and the agencies. DOJ is constantly on guard against the dilu-

5. See Lawrence Lessig, *Readings by Our Unitary Executive*, 15 CARDOZO L. REV. 175, 192-99 (1993).

6. In fact, on the eve of the New Deal, Attorney General John Sargent reported to Congress that only 115 of 900 federally employed attorneys were under his control, and at least nine separate government agencies or departments had independent litigation authority. See CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 75 (1992).

7. See Act of March 3, 1933, Pub. L. No. 72-428, § 16, 47 Stat. 1489, 1517-20. Responding to the economic crisis and the need for increased governmental efficiency, Congress granted the President broad reorganization authority, including the power to “[t]ransfer the whole or any part of any executive agency and/or the functions thereof to the jurisdiction and control of any other executive agency.” *Id.*, 47 Stat. at 1518 (creating a new § 403 of the legislative Appropriations Act of 1933).

8. Exec. Order No. 6166, § 5 (1933), *reprinted in* 5 U.S.C. § 901 (1994) (note). President Wilson had previously centralized all governmental legal authority within DOJ through Exec. Order No. 2877 (1918), but the change was largely ineffective and, in any event, temporary. See NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL’S OFFICE, 1789-1990*, at 63 (1992).

9. See 28 U.S.C. § 516 (1994) (“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to officers of [DOJ], under the direction of the Attorney General.”); *id.* § 519 (“Except as otherwise provided by law, the Attorney General shall supervise all [such] litigation . . .”); see also 5 U.S.C. § 3106 (1994) (“Except as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party . . . but shall refer the matter to the Department of Justice.”).

tion of what it deems its proper role as lawyer for the government,¹⁰ and the agencies have all chafed under the arrangement to a greater or lesser extent. In the words of one former head of DOJ's Civil Division, "[t]he warfare over litigation authority never ends. . . ."¹¹

This war is one that Congress largely observes from the sidelines. It has only occasionally taken an interest in the propriety of DOJ control of government litigation. For example, in the late 1970s, at a time when the Executive Branch was doing its own study of the allocation of legal resources and the issue seemed more up for grabs than it does today, several across-the-board proposals for independent litigating authority were introduced. However, the proposals never went anywhere, and they remain the exception to the general rule of extremely episodic and unfocused congressional interest in this question.

To be sure, Congress has carved out a variety of exceptions to DOJ control.¹² However, these exceptions have been anything but systematic. A slight pattern can be found: Congress grants litigating authority more often to independent agencies than to executive agencies, but it does not grant such authority to all such agencies, to all the litigation of any such agencies, or only to such agencies. Other than this tendency, it would be difficult to find any overarching principle on the merits that explains when Congress departs from the presumptive arrangement of DOJ control.

III

LITIGATION AUTHORITY MATTERS . . . *BUT NOT THAT MUCH*

Litigation authority, inextricably linked to the ebbs and flows of congressional and presidential power, is part and parcel of the ongoing dialogue between the branches over the control of the administrative state. The content of regulatory policy, moreover, is affected by the distribution of litigation authority. With so much apparently at stake, fierce battles between Congress and the White House over litigation authority should be commonplace. For the most part, however, Congress and the White House do not skirmish over this question. The simple explanation for this phenomenon is that, for Congress at least, litigation authority does not matter all that much.

10. See, e.g., Griffin Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 *FORDHAM L. REV.* 1049, 1050 (1978); *The Attorney General's Role as Chief Litigator for the United States*, 6 *Op. Off. Legal Counsel* 47 (1982).

11. Barbara Allen Babcock, *Defending the Government: Justice and the Civil Division*, 23 *JOHN MARSHALL L. REV.* 181, 186 (1990). Writing about conflict between DOJ and the agencies in 1978, one journalist observed that "[t]he historical struggle over legal control suggests that [President Jimmy] Carter has about as much prospect of satisfying the contending parties as he does of getting Menachem Begin and Anwar el-Sadat to agree on Mideast boundaries." Richard Cohen, *Government Lawyers Battle for Independence*, *NAT'L L.J.*, Aug. 12, 1978, at 1286.

12. See Neal Devins, *Unitariness and Independence: Solicitor General Control of Independent Agency Litigation*, 82 *CAL. L. REV.* 255, 263-74 (1994); Susan M. Olson, *Challenges to the Gatekeeper: The Debate over Federal Litigating Authority*, 68 *JUDICATURE* 71 (1984).

A. The Sometimes Importance of Litigation Authority

Court arguments affect outcomes, and who the lawyers are affects what arguments are made. Accordingly, it seems nearly certain that litigation authority is consequential. Consider, for example, *Local 28, Sheet Metal Workers' International Association v. EEOC*.¹³ Before a federal appeals court, Equal Employment Opportunity Commission ("EEOC") attorneys successfully defended the authority of federal courts to order affirmative action hiring in an employment discrimination lawsuit. Before the Supreme Court, however, the Solicitor General, not the pro-plaintiff EEOC, controlled the government's filings. Unlike the EEOC, the Solicitor General took into account the interests of DOJ's Civil Division, which defends employment discrimination challenges filed against executive agencies and departments, and, more importantly, the interests of the Reagan White House, which opposed affirmative action. The result: The Solicitor General unilaterally reversed the EEOC's position in a brief it filed on its behalf.¹⁴ For its part, the Supreme Court, referring to this flip flop, embraced the lower court arguments of EEOC attorneys, refusing to defer to the EEOC's newly minted position.¹⁵ 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.¹⁶

A less high-profile but equally telling example of the consequential nature of litigation authority is *Public Interest Research Group v. Hercules, Inc.*,¹⁷ a lawsuit between private parties which turned in part on the Environmental Protection Agency's ("EPA's") Clean Water Act regulations.¹⁸ Since EPA's regulations were at issue, the U.S. Court of Appeals for the Third Circuit wrote to the EPA General Counsel's Office, stating that "[t]he court believes that the views of the [EPA] would be helpful" and requesting that "you file a brief *amicus curiae*."¹⁹ What it received was a brief from DOJ, not signed by an agency lawyer, setting forth the views of the "United States."²⁰ On the merits, the brief took a middle ground, reflecting DOJ's efforts to reconcile the EPA's interest

13. 478 U.S. 421 (1986).

14. See Devins, *supra* note 12, at 296-301.

15. See 478 U.S. at 481-83; *cf.* Griggs v. Duke Power, 401 U.S. 424 (1971) (deferring to EEOC expertise).

16. With DOJ lawyers speaking the voice of the EEOC, there would be no opportunity for an intragovernmental conflict to be uncovered, especially since the EEOC lacks administrative "cease and desist" authority. Consequently, by controlling the case from its inception, DOJ arguments would be accorded whatever deference is owed the government.

17. 50 F.3d 1239 (3d Cir. 1995).

18. The particular issue concerned the scope and specificity required for the 60-day notice that must precede filing of a complaint in a citizen's enforcement action under the Act. EPA's regulations address the question of what constitutes an adequate 60-day notice. See 40 C.F.R. § 135.3(a) (1997).

19. Letter from P. Douglas Sisk, Clerk of the U.S. Court of Appeals for the Third Circuit, to Susan Lipow, Associate General Counsel, Environmental Protection Agency (June 13, 1994) (on file with author).

20. Brief for the United States as *Amicus Curiae* at 2 n.1, *Public Interest Group v. Hercules, Inc.*, 50 F.3d 1239 (3d Cir. 1995) (Nos. 93-5720, 93-5721).

in strong enforcement with the competing interests of other federal agencies, notably the Departments of Defense and Energy, that find themselves the subject of citizen suits under the Clean Water Act. No doubt, had EPA controlled this filing, it would have asserted a more expansive interpretation of the statute. Alternatively, if the issue presented to the court in *Hercules* had originated in a lawsuit filed against the Department of Energy, decentralizing litigation authority would have resulted in a narrower construction of the Act.

Cases like *Sheetmetal Workers* and *Hercules* make clear that government agencies and departments may have conflicting agendas. Mission agencies like EEOC and EPA, "dominated not by the employers and organizations being regulated but by representatives of the constituencies being served,"²¹ almost certainly will advance a pro-enforcement agenda. For this very reason, when Congress crafted clean air legislation in 1970, a fight erupted between pro-environmentalists in the Senate, who wanted EPA to represent itself in court, and pro-business interests in the House, who wanted EPA to rely on DOJ.²²

More is at stake here than which arguments are made once a case is in court; there is also the issue of whether the case will get to court at all. While defensive actions are not in the control of government attorneys, of course, enforcement actions are. If agencies must go to DOJ to bring a lawsuit, at least some of the time DOJ will say no, particularly since, to overgeneralize, DOJ lawyers care more about not losing in court and, therefore, are more cautious than agency lawyers, whose *raison d'être* is advancing agency priorities. In the area of intragovernmental enforcement, for example, claims by DOJ that inter-agency litigation is nonjusticiable have completely blocked EPA efforts to bring suit against federal polluters, including the Departments of Defense and Energy.²³ More telling, in the broader setting of enforcement against private entities, DOJ control over whether an EPA referral is pursued means, by definition, that fewer judicial actions will be brought than if EPA was acting on its own.

Litigation authority appears consequential for one other reason. Congress and its committees have more leverage over agencies and departments than over DOJ. In particular, a mutually reinforcing relationship exists among congressional committees (who authorize and oversee federal programs), constituent groups (who benefit from federal programs), and departments and agencies (whose power is enhanced by the expansion of federal programs). Accordingly,

21. Hugh Davis Graham, *The Politics of Clientele Capture: Civil Rights Policy and the Reagan Administration*, in REDEFINING EQUALITY 103, 113 (Neal Devins & Davison M. Douglas eds., 1998).

22. Debate over the 1977 amendments to the Clean Air Act likewise featured a fight over litigation authority, this time with pro-environmental interests in the House pushing for EPA self-representation. See Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 470-72 (1989).

23. See Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991).

agency general counsel see themselves as “vicar[s] of Congress”²⁴ not the White House. Beyond these symbiotic iron triangles, congressional committees are better positioned than DOJ to punish programmatic agencies. For example, when Congressman John Dingell (D-Mich.) informed EPA General Counsel Ray Ludwiszewski that unless EPA complied with committee demands for documents, “the escalation and the ratcheting up of the levels of unpleasantness will commence,” Ludwiszewski meekly and knowingly responded, “I’m painfully aware of that, sir. . . .”²⁵ In sharp contrast, while DOJ officials are subject to committee oversight, programmatic committees have less control over DOJ’s budget or decisionmaking.²⁶ For this reason, when legislative and presidential interests are in conflict, DOJ officials are more willing, and therefore more likely, to disappoint lawmakers than are agency officials.²⁷

Congress is well aware of these facts. After all, lawmakers “see the choice of administrative structures and processes as important in assuring that agencies produce policy outcomes that legislators deem satisfactory.”²⁸ The rise of the legislative veto, its continued persistence after being declared unconstitutional by the Supreme Court,²⁹ and the more recent creation of an across-the-board system of congressional review of agency rules³⁰ all underscore this conclusion. Congress’ efforts to limit presidential control of the administrative state through its creation of independent regulatory agencies likewise suggests that lawmakers see power sharing as a zero sum game; that is, the less power vested in the White House, the greater Congress’ voice in defining agency be-

24. *Clean Air Act Implementation (Part 1): Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 102d Cong. 254 (1991) (remarks of EPA General Counsel E. Donald Elliot).

25. *Id.* (Part 2) at 483 (1992).

26. The Judiciary Committees, of course, do have significant power over the DOJ. For the most part, however, the Judiciary Committees protect the DOJ from other committees. See *infra* notes 68-75 and accompanying text.

27. Along these lines, former head of Justice’s Environment Division Roger Clegg observed that DOJ is not afraid of Congress the way other agencies are, and asserted that DOJ never considered congressional reaction in deciding on a position. In contrast, he described EPA as having a “battered wife relationship” with John Dingell, head of the oversight committee of the House Energy and Commerce Committee. See Interview with Roger Clegg, Former Head of DOJ’s Environment Division, (Washington, D.C., Nov. 15, 1994) (notes on file with author). Furthermore, DOJ is willing to invoke executive privilege and thereby limit committee access to internal executive branch deliberations. Executive agencies and departments, however, are quite willing to turn over any and all requested information to Congress. For a first-hand account of conflicting DOJ and agency priorities, see ANNE M. BURFORD & JOHN GREENYA, *ARE YOU TOUGH ENOUGH: AN INSIDER’S VIEW OF WASHINGTON POLITICS* (1986).

That said, DOJ is only relatively freer, not absolutely immune, from the influence of congressional oversight, as illustrated by the battle over DOJ’s handling of environmental criminal enforcement. See *infra* notes 43-44 and accompanying text.

28. See McCubbins et al., *supra* note 22, at 432.

29. See generally Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273 (Autumn 1993).

30. Under the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847, which applies to all major rules issued by all agencies, rules cannot take effect for 60 days after they are issued, during which time Congress has the opportunity to pass a joint resolution of disapproval derailing the rule. See 5 U.S.C. §§ 801-08 (Supp II. 1996).

havior.³¹ Finally, the intricacies of its own internal procedures, rules, and seniority systems ensure that Members of Congress are keenly attuned to the substantive impacts that structural arrangements can have.

B. The Relative Unimportance of Litigation Authority

Given the foregoing, it is indisputable that the allocation of litigation authority matters, and that Congress knows, on some level, that it matters. However, the reality is that many things matter a good deal more.

First, while arguments made in court affect outcomes, they do so less than other things, notably, (to identify the obvious) statutory language and who the judge is. Since judges and statutes—not litigators and briefs—ultimately define federal legal policy, litigation authority seems far removed from Congress' principal concern, which is the substantive bottom line.

Second, whoever the lawyer is, in the grand scheme of things, her hands will be largely tied by the agency's prior substantive decisions. And those decisions are subject to centralized control within the Executive Branch, notably through review of proposed regulations and testimony by the Office of Management and Budget ("OMB"). Attorneys have limited discretion in defining the positions they advocate in court. For example, when EPA regulations are challenged by environmentalist or industry interests, government litigators control only the legal arguments made in defense of the agency's action. *Ex ante* decisionmaking, including choices as to the substance of the regulation and the procedures utilized in promulgating it, are not part and parcel of litigation authority. As such, in defensive actions, litigation authority has limited policymaking potential.³² On enforcement matters, litigation authority is more important. Yet, if an enforcement scheme focuses on administrative, not judicial, actions, the distribution of litigation authority may prove inconsequential.³³

Indeed, the decentralization of litigation authority, by itself, might not even neutralize White House control of executive agency *litigation*. Just as the President can centralize his regulatory agenda, the President is constitutionally empowered to coordinate the legal policymaking of executive branch departments and agencies. If agencies have the option of representing themselves or using DOJ, both formal and informal pressures will almost always compel the

31. Consider, for example, House Speaker Sam Rayburn's (D-Tex.) advice to President Kennedy's FCC Chair Newt Minow: "Just remember one thing, son. Your agency is an arm of Congress; you belong to us. Remember that and you'll be alright." ERWIN G. KRASNOW ET AL., *THE POLITICS OF BROADCAST REGULATION* 89 (3d ed. 1982).

32. DOJ has a greater tendency to rely on "technical" defenses such as sovereign immunity, lack of jurisdiction, statute of limitations, standing, mootness, and so on; agencies are somewhat more inclined to run litigation risks. Thus, DOJ is able to advance certain cross-cutting legal policies in a way that the agency would not. It has less of a free hand, however, with regard to substantive policy that is the subject of the litigation.

33. It may well be that both Congress and the White House view administrative cease-and-desist authority as more potent than court-centered enforcement schemes. Witness, for example, Nixon Administration efforts to confine EEOC authority to judicial enforcement and thereby "maximiz[e] the role of adversary proceedings in court so as to minimize the judgmental discretion of New Dealish regulatory agencies." HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA* 426-27 (1990).

latter.³⁴ Even if DOJ is wholly out of the picture, the President could nonetheless exert significant control over litigation. Like OMB review, court filings (including oral arguments) could be submitted to some clearinghouse, such as DOJ, for approval or modification. In performing this coordinating function, DOJ, like OMB, could solicit the views of affected agencies. Consequently, rather than allow the EPA and the Department of Energy to advance radically different interpretations of environmental statutes, decentralizing litigation authority might well result in court arguments no different than those advanced by DOJ today.

Even if the President lacked the energy or will to rein in agency attorneys in this way, the fact remains that other mechanisms for coordinating and controlling policymaking are more important tools of ultimate control and will greatly outweigh the loss of control from decentralized litigating authority. Thus, the most one might say is that decentralizing executive branch litigation authority would not operate as an absolute roadblock to presidential control; instead, it would only make control more costly and difficult. Its value to Congress is accordingly reduced.

Third, the significance to Congress of the allocation of litigating authority is further diluted by the fact that the other major lawyer's task, counseling, is almost entirely decentralized within the Executive Branch. Although DOJ is available for legal advice to the agencies,³⁵ and although, *if sought*, that advice is considered binding,³⁶ DOJ gives a legal opinion to agencies on a mere handful of the issues they confront.³⁷ For the most part, agencies turn to their in-house counsel for legal advice. Thus, lawyering is largely decentralized; it is just litigation that is not.³⁸

Fourth, just as the White House can combat decentralized litigation authority, Congress, too, has other mechanisms to further the goals that might be thwarted by centralizing litigation authority in DOJ. To begin with, Congress can make the locus of litigation authority less consequential. Citizen suit provisions, for example, allow "private attorneys general" to bring enforcement actions that the government is unwilling to file. More significantly, Congress

34. Many of the environmental statutes grant EPA authority to go to court on its own should DOJ refuse to represent it, and a 1977 Memorandum of Understanding between DOJ and EPA envisions EPA doing so. See Memorandum of Understanding Between [DOJ] and [EPA], Civil Litigation, § 9, 42 Fed. Reg. 48,942, 48,943 (1977). Nonetheless, EPA has virtually never exercised that power. In our interviews with lawyers in both agencies, those at DOJ considered it inconceivable that EPA ever would; those at EPA could imagine it but acknowledged that it did not happen and was unlikely.

35. See 28 U.S.C. § 512 (1994) (providing that department head "may require the opinion of the Attorney General on questions of law arising in the administration of his department").

36. See Nelson Lund, *Rational Choice in the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 489 (1993).

37. In 1991, for example, DOJ's Office of Legal Counsel gave 625 opinions to outside agencies. See John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 423 (1993).

38. On the question of decentralized counseling generally and the ways in which it works to Congress' advantage in particular, see Michael Herz, *The Attorney Particular: The Governmental Role of the Agency General Counsel*, in GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS 143, 164-69 (Cornell W. Clayton ed., 1995).

can displace much legal policymaking by favoring administrative over judicial enforcement. When an agency can assess, say, up to \$200,000 in penalties at a rate of \$25,000 per day, many cases that would have been referred to DOJ will be handled by the agency itself.

Consider EPA. It handles the huge majority of its enforcement administratively through actions ranging from a warning letter or a notice of violation, with a view to informal discussion and resolution, to agency-imposed penalties.³⁹ With the rarest of exceptions, administrative enforcement proceedings are handled by EPA attorneys. DOJ is simply not involved, unless, of course, the agency's final decision is challenged in court. Furthermore, the huge majority of administrative enforcement proceedings settle.⁴⁰ In these cases, there is no formal hearing and no possibility of judicial review—and thus no courtroom lawyering, ever.

Fifth, Congress, through legislation, has ultimate control over policymaking. Wherever litigating authority lies, Congress can and does limit policymakers' and litigators' discretion through highly prescriptive legislation. The Internal Revenue Code is a longstanding example of a detailed, and therefore constraining, legislative approach. More recently, in the environmental, health, and safety areas, Congress has frequently legislated with a breathtaking attention to detail.⁴¹ Much of this statutory minutia is a direct response to agency failings.⁴²

Sixth, and finally, Congress can rein in DOJ through a number of nonstatutory devices.⁴³ The saga of environmental criminal enforcement, for example, makes clear that even DOJ—despite its best efforts—cannot always resist the vise of congressional oversight. Unhappy with the Bush DOJ's decision to shift control of environmental criminal enforcement to Main Justice from the decen-

39. For fiscal year 1994, the respective numbers were the following: total administrative enforcement actions, 3600; administrative penalty actions, 1596; civil referrals to DOJ, 403; and criminal referrals to DOJ, 220. See ENVIRONMENTAL PROTECTION AGENCY, ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT at 4-2, 4-4, 4-8 (1995).

40. See, e.g., Samuel L. Silverman, *Federal Enforcement of Environmental Laws*, 75 MASS. L. REV. 95, 97 (1990) (reporting that “[w]ell over [90%] of Region I’s administrative penalty cases” settle). DOJ’s only involvement in EPA administrative settlements is under the Superfund law, which calls for DOJ approval of remedial action agreements and of cost-recovery settlements for over \$500,000. See 42 U.S.C. §§ 9622(d), (h)(1) (1994).

41. See Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 177-82 (1992); Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 824-40.

42. See generally Herz, *supra* note 41. As Representative Edward Markey (D-Mass.) wrote with regard to the 1986 Superfund amendments, because of Congress’ desire to limit agency “discretion,” Congress (or at least subcommittee chair Markey) “felt that we had to make [all pertinent policy] decisions for the agency.” Edward Markey, *Congress to Administrative Agencies: Creator, Overseer, and Partner*, 1990 DUKE L.J. 967, 969. Similarly, “[a]lmost every section of the [1984] RCRA amendments might be read as expressing a sense of frustration over the pace and scope of EPA action.” Walter Mugdan & Robert Adler, *The 1984 RCRA Amendments: Congress as a Regulatory Agency*, 10 COLUM. J. ENVTL. L. 215, 217 (1985).

43. Statutory amendment, of course, is subject to numerous internal and external hurdles, including presidential veto.

tralized U.S. Attorney's Offices, and believing that DOJ had been soft on environmental crime, EPA's House overseers conducted investigations, held hearings, and, in general, made life miserable for DOJ officials in charge of environmental crimes.⁴⁴ By the time President Clinton took office, the fight over environmental crimes was at full boil. With the new Administration unwilling to back away from the Bush DOJ's position, the fight continued and escalated. Finally, after the Senate Judiciary Committee (at the behest of EPA's overseers) held the nomination of Louis Schiffer, Clinton's choice to head DOJ's environment division, DOJ relented, allowing congressional staffers to question DOJ line attorneys and reversing the Bush DOJ's restructuring of environmental criminal enforcement. In the end, when up against Congress' oversight and confirmation powers, DOJ's tradition of insulation and resilience could not save DOJ priorities.

At the end of the day, then, the stakes with regard to the division of litigation authority just are not that high. Congress and the White House, in critical respects, can both overcome structural arrangements not to their liking; at the same time, there are substantial inherent limits on what can be accomplished by varying litigation authority. Accordingly, there is little reason for Congress and the White House to engage in battles royale over the division of litigation authority.

IV

THE *REALPOLITIK* OF LITIGATION AUTHORITY

The foregoing discussion suggests why Congress does not focus on the question of allocating litigation authority. It does not, however, explain why sometimes it does focus on this question. The foregoing discussion also presumes that Congress thinks systematically, makes decisions on the merits, and operates in a political vacuum. Of course, it does none of these things. A more realistic understanding of how Congress operates helps explain both why it ignores the question of litigation authority in general, and why it pays attention when it does.

A. The Predominance of Fire Alarm Oversight

Congress likes to reward constituent interests.⁴⁵ As public choice theory suggests, lawmakers often devise legislation at the behest of powerful interest groups. When there is a dominant interest group, legislation will often specify the devilish details of administration. Yet, since the details of administration

44. For a full account, see Theodora Galacatos, Note, *The United States Department of Justice Environmental Crimes Section: A Case Study of Inter- and Intra-branch Conflict over Congressional Oversight and the Exercise of Prosecutorial Discretion*, 64 *FORDHAM L. REV.* 587 (1995). For the deeply aggravated response of a DOJ supporter to what was, in his view, congressional harassment, see William T. Hassler, *Congressional Oversight of Federal Environmental Prosecutions: The Trashing of Environmental Crimes*, 24 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,074 (1994).

45. For a useful case study detailing the power of interest groups, see JOHN CHUBB, *INTEREST GROUPS AND THE BUREAUCRACY* (1983).

cannot always be anticipated (when there is a dominant group) and since interest groups often compete with each other (including industry and environmentalists, unions and business), legislation is often ambiguous. As such, oversight enables lawmakers to respond to ongoing constituency pressures. More than that, lawmakers may see a value in designing systems that create opportunities for them to reward preferred constituencies. That is, lawmakers may prefer systems that sometimes fail their constituents in order to “fix mistakes” and thereby cement their relationships with special interests.⁴⁶ In other words, lawmakers, by necessity and design, may well establish “a system of rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine administrative decisions (sometimes in prospect), charge executive agencies with violating congressional goals, and seek remedies from agencies, courts, and Congress itself.”⁴⁷ Under such a system, lawmakers respond to fire alarms sounded by constituent interests.

If congressional intervention is about putting out fires, allocating litigation authority is rarely a useful tool. First, for all the reasons set out above,⁴⁸ the payoff in terms of substantive governmental policy or action is small and uncertain, reflected in general tendencies rather than in identifiable, consistent results. Second, the payoff is too long-term to be of immediate use. By shifting litigation authority, Congress may prevent a problem from recurring, but it will not solve an existing problem. In short, allocating litigation authority, while somewhat relevant to the design of the federal enforcement apparatus, simply offers too small and too uncertain a payoff to meet the demands of constituent interests once a fire alarm is sounded.

Consider, for example, a few instances in which Congress might have but did not interfere with litigation authority, choosing instead alternate means to the same end. When the need to go to DOJ effectively prevented the EPA from suing federal entities for violations of the environmental laws (all of which apply to the federal government), Congress took two approaches. First, it conducted extensive oversight hearings into the question of the noncompliance of federal facilities.⁴⁹ Second, it acted legislatively by amending, in 1992, the Resource Conservation and Recovery Act (the basic law controlling the handling and disposal of hazardous waste)⁵⁰ to waive sovereign immunity for civil and administrative penalties under federal, state, and local law, and expressly to authorize the EPA to conduct administrative enforcement actions against federal facilities.⁵¹ The statute is silent on EPA lawsuits against federal facilities,

46. Thanks to John McGinnis for this “Machiavellian” insight.

47. Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

48. See *supra* Part III.B.

49. See, e.g., *Environmental Compliance by Federal Agencies: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong. (1987).

50. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6922u (1994)).

51. See Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (codified in relevant part at 42 U.S.C. § 6961 (1994)).

and so skirts the question of litigation authority, instead endorsing administrative enforcement and lawsuits against federal facilities by states and environmental interests.

Consider, too, the ways in which Congress expressed its displeasure with Reagan-era Federal Communications Commission (“FCC”) appointees. Following the FCC’s failure to defend diversity preferences for minority broadcasters, Congress castigated the Commission for hiding behind “legalistic gobbley gook” and demanded that the agency “send lawyers down to court who will defend [preferences]—not take dives.”⁵² More importantly, Congress approved an appropriation rider prohibiting the Commission from calling into question the legality of diversity preferences.⁵³

Congress also made use of appropriation riders to express disapproval of the Reagan DOJ’s claims, in *Bob Jones University v. United States*,⁵⁴ that racist private schools were entitled to tax breaks. Again, following its efforts to humiliate the government’s lawyers before an antagonistic oversight committee, Congress used its power of the purse. Unlike its treatment of the FCC, however, Congress did not prohibit the Administration from speaking its mind in court. Instead, Congress refused to reenact limitation riders restricting the enforcement of Carter-era nondiscrimination enforcement standards.⁵⁵

In each of these cases, Congress might have legislatively redistributed litigation authority. Its preference for oversight hearings, limitation riders, and the creation of causes of actions for constituency interests, rather than the permanent, legislative redistribution of federal litigation authority, reflect Congress’ preference for fire alarm oversight. What Congress might achieve by redistributing litigation authority can also be obtained through other means.

But what about those instances in which Congress has in fact statutorily reallocated litigation authority? These instances tend to be apparent exceptions that prove the rule. That is, they involve perceived failures, usually of enforcement, by a specific agency that are brought to Congress’ attention by specific, disappointed interest groups.

For example, in response to the perceived failure of DOJ to represent Federal Trade Commission (“FTC”) interests in court adequately, Congress granted the FTC independent litigating authority in the 1975 FTC Improvements Act.⁵⁶ The explanation for Congress’ action is that the question of enforcement, and therefore the locus of litigation authority itself, had become an acute problem. Specifically, on matters referred by the FTC to DOJ, significant delays in filing, unfavorable settlements, and the refusal to file cases had

52. *Minority Owned Broadcast Stations: Hearings on the H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong. 55, 54 (1986) (statement of Rep. Swift).

53. See Pub. L. No. 100-202, 101 Stat. 1329 (1987).

54. 461 U.S. 574 (1983).

55. See Neal Devins, *The Regulation of Government Agencies Through Appropriations Riders*, 1987 DUKE L.J. 456, 496-97.

56. See Devins, *supra* note 12, at 269-77.

become common practice. Furthermore, DOJ successfully fought off FTC attempts to enforce Commission subpoenas.⁵⁷

Congress' effort here is illustrative in one further way. In 1975, the spectre of Watergate limited President Ford's ability to demand DOJ control of government litigation. Indeed, the FTC bill was part of a larger Watergate-era attempt to limit the "imperial presidency." At roughly the same time, Congress limited White House authority in fiscal policymaking through the 1974 Budget Act, considered making DOJ an independent agency, and debated legislation to further insulate independent agencies from executive branch influence.⁵⁸

Battles over litigation authority are part of the larger tugs and pulls between the White House and Congress over the control of the administrative state. Indeed, Roosevelt's 1933 realignment of government litigation authority was folded into his legendary "One Hundred Days" reform package.⁵⁹ But when public opinion turned against Roosevelt (for fear that he was dangerously power hungry), Congress successfully resisted Roosevelt's opposition to the creation and maintenance of independent regulatory agencies, agencies that were insulated from White House control, in part because they controlled their own litigation.⁶⁰ Absent congressional efforts to rein in a White House run amok, however, Congress' penchant for fire alarm oversight will keep the litigation authority issue safely on the sidelines.⁶¹

B. Intensity of Preferences within Government

A final question remains. We have established why Congress only occasionally is interested in this question. What we have not explained is why centralization in DOJ, rather than agency representation, is the norm. Congress' lack of interest alone would not produce a uniform result, and it would not nec-

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

58. For relevant citations, see Devins, *supra* note 12, at 272 n.89.

59. See Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L.REV. 237 (1996).

60. See RICHARD POLENBERG, REORGANIZING ROOSEVELT'S GOVERNMENT 28-51 (1966).

61. We would mention one abortive congressional effort to rethink the allocation of litigation authority that on the surface does not fit within the fire-fighting model. In the late 1970s, the Senate Committee on Governmental Affairs produced a scholarly, six-volume study of federal regulation. See 1-6 STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., STUDY ON FEDERAL REGULATION (Comm. Print 1977-78). Among its many recommendations, the study proposed that independent regulatory commissions be authorized to sue and be sued, in their own name and represented by their own attorneys, in any civil actions apart from those in the Supreme Court. See 5 *id.* at xiii, 81. This proposal was backed by a serious and lengthy substantive discussion. See *id.* at 54-67.

In general terms, the proposal and the study are consistent with the general themes of this article. The study was animated by and repeatedly returns to a single central goal: enhancing congressional and minimizing presidential authority, particularly over the independent agencies. But the study is not firefighting. It displays an awareness of the importance of litigation authority to overall authority and of the link between structure and outcomes; it takes a systematic approach. Ultimately, however, this study is merely the apparent exception that proves the fire-fighting rule. The key point is that Congress did not write the study, and, of particular importance, it did not act on it. Some of the study's proposals received careful attention, but none passed. See Marshal J. Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 337, 342-43 (1986). As for the litigation authority proposal in particular, it did prompt John Glenn (D-Ohio) to introduce a bill, S. 4320 (1978), see 124 CONG. REC. 18723 (1978), but the proposal just sank beneath the waves.

essarily favor DOJ over the agencies. After all, the decentralization of litigation authority is also supported by mutually reinforcing triangular relations between agencies, interest groups, and congressional committees. The answer lies instead in the relative intensity of preferences among the governmental players. Put simply, centralized litigation is far more important to the White House than decentralized litigation is to Congress.

1. *The White House.* Let us return to the watershed presidential effort at centralization: Roosevelt's 1933 reorganization. Roosevelt's initiative typifies presidential efforts at centralization that have continued ever since. By centralizing litigation authority in a single department, Roosevelt sought to strengthen his hold on the burgeoning administrative state.⁶² In other words, he was paying close attention to structural arrangements. Obviously, he saw the distribution of litigation authority as consequential. And for good reason. In part, just as decentralized arrangements bolster congressional power, the President benefits from centralization. More significantly, as *Sheetmetal Workers* and *Hercules* suggest,⁶³ intramural disputes within the Executive Branch are commonplace. Departmental and executive agency heads, while named and subject to removal by a "unitary" president, are rarely appointed to help put into place a coordinated White House-driven vision of some public policy objective. These individuals have different visions of the social good, serve different constituencies, and are subject to different oversight committees. Unlike most agency and department heads, the Attorney General is usually a close confidante of the President, in many cases someone who was active in the President's political campaign and possesses deep personal loyalty to the President. Correspondingly, since the mission of DOJ attorneys is to represent the interests of the United States writ large, there is less chance that either narrow constituent interests or congressional committees will capture DOJ. Put another way, DOJ attorneys may well see the President as their client.

Furthermore, within the Executive Branch, DOJ's preference to control litigation far exceeds departmental and agency interests in decentralized arrangements. This goes beyond simply the endowment effect: the often observed phenomenon that people value something more highly when it is something they have but might lose than when it is something they lack but might gain. Specifically, without the power to go into court, DOJ would be enfeebled. Its status in government hinges on litigation authority. Agencies, in contrast, have less to gain from controlling litigation than DOJ has to lose. Rulemaking and administrative enforcement, powers that reside in agency heads, are far more potent policymaking tools than litigation authority. Moreover, when it comes to litigation, agencies have significant control over the reach and content of DOJ decisionmaking. For example, when DOJ defends agency rulemaking,

62. On this point, see Devins, *supra* note 59.

63. See *supra* Part III.A.

DOJ is largely bound by agency decisionmaking. Furthermore, agencies typically control whether to pursue an enforcement matter administratively or to turn it over to DOJ. Accordingly, when agencies are dissatisfied with DOJ representation, they can make use of existing administrative enforcement authority or, alternatively, ask Congress to expand administrative enforcement techniques.

The consequence of these internal dynamics is that the White House often takes a hard line position on congressional efforts to decentralize litigation authority.⁶⁴ The Reagan and Bush Administrations, for example, fought off congressional efforts to create new repositories of independent litigating authority. Reagan pocket vetoed the Whistleblower Protection Act of 1988 because it empowered a special counsel to obtain judicial review of Merit Systems Protection Board decisions.⁶⁵ The Bush Administration likewise resisted congressional efforts to allow EPA and Department of Housing and Urban Development attorneys to bring court actions against other parts of the federal government.⁶⁶

2. *Congress.* Given the intensity of presidential preferences, it is hardly surprising that Congress, whose own preference for decentralized litigating authority is, as we have seen, relatively dilute, yields. Consider, for example, congressional efforts to give EPA litigating authority as part of the 1984 amendments to the Resource Conservation and Recovery Act ("RCRA").⁶⁷ At this time, EPA had a new, vigorous, white-knight administrator in William Ruckelshaus, who was talking tough. DOJ, on the other hand, was irritating Congress substantially with assertions of executive privilege on environmental enforcement materials.⁶⁸ Moreover, thanks to massive press attention, including a series of *Doonesbury* cartoons about environmental non-enforcement, the question of who sues had itself become a fire.⁶⁹ Even in this setting, the proposal to give EPA litigating authority died quickly once White

64. For a larger discussion of this point, see generally Neal Devins, *Political Will and the Unitary Executive*, 15 CARDOZO L. REV. 273 (1993).

65. See Memorandum of Disapproval for the Whistle-Blower Protection Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1377 (Oct. 26, 1988).

66. See Memorandum from the American Law Division, The Library of Congress, Congressional Research Service, to Senate Committee on Banking, Housing, and Urban Affairs, Mar. 4, 1992 (discussing DOJ objections to establishing an Office of Federal Housing Enterprise Oversight).

67. As reported out of the House Energy and Commerce Committee, H.R. 2867, 98th Cong., § 11(d) (1983), the bill that ultimately became the Hazardous and Solid Waste Amendments of 1984 would have imposed a 30-day time limit for DOJ to act on an EPA RCRA referral; if DOJ did not notify EPA within 30 days of its plan to commence the action, or if it did not actually do so within 150 days, exclusive authority to litigate the matter would shift to EPA.

68. For a general account of relations between DOJ, EPA, and Congress during this period, see Joel A. Mintz, *Agencies, Congress and Regulatory Enforcement: A Review of EPA's Hazardous Waste Enforcement Effort, 1970-1987*, 18 ENVTL. L.J. 683, 734-50 (1988). The executive privilege dispute, of course, underlay *Morrison v. Olson*, 487 U.S. 654 (1988).

69. At an earlier stage of the process, Congressman John Dingell (D-Mich.), at the time chair of the House Energy Committee, had defended this provision by stating that DOJ "has a very sorry record on hazardous waste cases." *Extend EPA Rules to Small Waste-Makers-House Energy Unit*, PLATT'S OILGRAM NEWS, May 13, 1983, at 5.

House opposition surfaced,⁷⁰ again suggesting the weakness of congressional interest.

Just as the varying intensity of preferences within the Executive Branch is relevant here, so too are conflicting preferences within Congress. Thus far, we have spoken about Congress as a unified entity. However, its varying components often have conflicting interests and preferences. In this connection, the internal dynamics of Congress' committee structure to some extent reenforce DOJ control of agency litigation. The Judiciary Committee has a keen interest in DOJ control of litigation. If DOJ is without this control, Judiciary has less power since the agency it oversees has less power. In contrast, DOJ control of litigation has a *de minimis* impact on oversight committee supervision of agency decisionmaking or on the legislative policymaking accomplished through the substantive committees. Through legislation, hearings, and investigations, these committees can affect both the sweep and content of administrative enforcement and agency rulemaking. These committees, moreover, can place pressure on DOJ through hearings, investigations, and the like. Consequently, oversight committees are likely to accede to Judiciary's strong preference for DOJ control of government litigation.⁷¹

Consider two examples involving the House's Judiciary and Energy and Commerce Committees. Both disputes involved EPA and arose in the mid-1980s, a time when lackluster environmental enforcement made the question of litigating authority unusually salient. The first is Energy and Commerce's efforts to grant EPA litigating authority in RCRA cases. As noted above,⁷² Judiciary quashed this provision without breaking a sweat. The second concerns an instance in which Congress shifted authority from EPA to DOJ: the provisions governing administrative settlements in the 1986 Superfund amendments.⁷³ While Energy and Commerce supported limited DOJ involvement, Judiciary succeeded in requiring that DOJ approve cost-recovery settlements.⁷⁴ Citing

70. See H.R. REP. NO. 98-198, pt. 3, at 7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5636, 5642. Two factors were at work in the abandonment of this proposal. One was, as noted, the unified executive branch opposition. The other was that the provisions concerning litigation authority were reported out of the House Energy and Commerce Committee, and then struck by the House Judiciary Committee. See *id.*

71. Congress' committee structure, which encourages deference to subject matter specialists, also encourages Judiciary Committee oversight of litigation and, with it, DOJ centralization of litigation. See KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATIONS* (1991).

72. See *supra* notes 67-70 and accompanying text.

73. See Superfund Amendments and Authorization Act, Pub. L. No. 99-499, § 122, 100 Stat. 1678 (1986) (codified at 42 U.S.C. § 122 (1994)).

74. Specifically, EPA cannot enter into an administrative settlement calling for a private-party cleanup except via a consent decree, which by definition requires a lawsuit and DOJ participation. See 42 U.S.C. § 9622(d) (1994). It can settle a claim for cost-recovery without going to court but must obtain DOJ's approval for any settlement over \$500,000. See *id.* § 9622(h)(1). This provision was a direct response to the perception that EPA had consistently entered into "sweetheart deals" with responsible parties. See H.R. REP. NO. 99-253, pt. 1, at 59 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2841; Mintz, *supra* note 68, at 738. Thus, §122 is in fact an example of Congress shifting litigating authority, of a sort, as a way of putting out a fire; it is unusual only in that the shift is from the agency to DOJ.

the virtues of DOJ coordination and litigation expertise, it was successful in demanding that DOJ play a leadership role in both approving Superfund settlements and defending these settlements in court.⁷⁵

V

CONCLUSION

DOJ control of agency litigation seems here to stay. On the merits, whether this is a good or bad idea is uncertain. Regardless of the merits, however, preferences within and between the branches, informed by constituency-driven oversight, support DOJ control. The division of litigation authority is about power and, for better or worse, the question of who ought to speak the government's voice in court is controlled by DOJ and its supporters. Unless and until litigation authority is viewed as a significant attribute of federal policy-making, Congress, constituent interests, and agency heads will not resist the status quo. Thus, the question of whether the government's interests are well served by this arrangement may simply be irrelevant. If so, it would not be the first time that power and preference, not policy, determined outcomes in Washington, D.C.

75. See H.R. REP. NO. 99-253, pt. 3, at 33 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3056, 3038.