Can EPA Sue Other Federal Agencies

Michael W. Steinberg
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INTRODUCTION

This Article addresses whether the Environmental Protection Agency (EPA), an agency in the executive branch, may sue another executive branch department in federal court. EPA has not yet attempted to bring such an action, partly because the last two administrations have claimed that EPA cannot constitutionally do so. This Article argues that, irrespective of the wisdom of such litigation, no constitutional barrier exists to EPA's using the courts to force federal agencies to comply with environmental laws. First, the Article explores whether a dispute between two departments of the executive branch presents a justiciable "case or controversy" as article III of the United States Constitution requires. It then examines whether the constitutional doctrine of separation of powers prohibits the federal judiciary from umpiring a dispute between departments of the executive branch.

EPA particularly might wish to resort to litigation to compel other federal entities to share in the cost of cleaning up hazardous waste sites. Hundreds of federal facilities are contaminated with such wastes, and federal agencies have generated, and continue to generate, substantial quantities of waste that are stored or disposed of at privately owned sites. The most likely settings in which EPA might want to sue another

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3. Stever, Perspectives on Problems of Federal Facility Liability for Environmental Contamination, 17 Env'l L. Rep. (Env'l L. Inst.) 10,114 n.2 (1987) (stating that "federal facilities are the source of significant amounts of hazardous waste" and defining "federal facilities" to
federal agency would involve a federal facility allegedly in violation of subtitle C of the Resource Conservation and Recovery Act (RCRA) or a federal agency that is a potentially responsible party under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund). Subtitle C of RCRA covers hazardous waste management and requires corrective action for contamination at active hazardous waste facilities. RCRA explicitly applies to federal facilities as well as to private sites. Under CERCLA, the United States falls within the definition of persons potentially liable for the cost of responding to releases of hazardous substances.

The Department of Defense (DOD), the Department of Energy (DOE), and the Department of the Interior (DOI) are the agencies most likely to be involved in hazardous waste disputes. EPA has not shied away from targeting at least DOD for remedial action with respect to hazardous waste sites. The sheer size and variety of defense-related activities, along with the specific byproducts of weapons production and storage, make DOD a large generator of hazardous waste. DOD is potentially responsible for thousands of active and inactive hazardous waste sites, including active installations, former installations, and offsite private facilities where DOD ships waste for treatment, storage, or dispo-

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9. Most of the sites on EPA's docket are owned by the Department of Defense (DOD), the Department of Energy (DOE), or the Department of the Interior (DOI). See First Docket Update, supra note 2; Original Docket, supra note 2. The DOD sites vary considerably in type. The DOE sites are primarily nuclear laboratories and test sites. DOI sites consist mainly of mines, mine tailings, and landfills on the federal public lands. See Second Docket Update, supra note 2; First Docket Update, supra note 2; Original Docket, supra note 2.
10. See GENERAL ACCOUNTING OFFICE, HAZARDOUS WASTE: EPA CLEANUP REQUIREMENTS—DOD VERSUS PRIVATE ENTITIES (1989) [hereinafter DOD VERSUS PRIVATE ENTITIES] (report to the Chairman, Environmental Restoration Panel, Subcommittee on Readiness, Committee on Armed Services, House of Representatives) (discussing a mechanism to insure that DOD is not held to a higher standard than industry when cleaning up hazardous waste sites).
11. The vast majority of the 1,268 sites currently on the EPA Federal Agency Hazardous Waste Compliance Docket are military-related sites. See Second Docket Update, supra note 2; First Docket Update, supra note 2; Original Docket, supra note 2.
sal. DOE controls nuclear weapons production and is thus directly responsible for a tremendous amount of radioactive waste. The public lands managed by DOI are dotted with landfill dumps and mines, which often produce hazardous materials or use them in operations.

Hazardous waste enforcement problems have already arisen at several federal sites. DOE's Rocky Flats nuclear weapons plant in Colorado has had continuous problems complying with hazardous waste storage requirements. RCRA violations at DOD's Rocky Mountain Arsenal have led to parallel suits between Colorado and the Army and between EPA and Shell Oil. Government employees responsible for storing hazardous wastes at DOD's Aberdeen Proving Grounds were convicted of criminal violations of RCRA in 1989.

EPA could become frustrated by the institutional limitations on its ability to sue violators when seeking compliance at a federal facility. As a result, the Agency may work behind the scenes with state officials, assisting the state's enforcement action or otherwise pressuring the federal facility. However, state agencies or private citizen groups attempting to force compliance through the so-called citizen suits authorized by RCRA may encounter a spirited and technical defense based on principles of sovereign immunity. The United States Department of Justice (DOJ) has frequently succeeded in persuading the courts that monetary civil penalties cannot be awarded against federal agencies.

13. See Second Docket Update, supra note 2; First Docket Update, supra note 2; Original Docket, supra note 2.
16. United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Colo. 1985). The court refused to grant Shell's request that the Army be joined as a defendant, reasoning, "It is the Army that continues to plan, in consultation with [EPA], a comprehensive solution.... If the Army were joined as a defendant, the Army would in actuality, as well as in name, be suing itself." Id. at 1082.
An additional complication arises when both RCRA and CERCLA apply at a given facility. The state agency may seek to use its EPA-authorized RCRA program to spur the cleanup effort, while EPA and the sister federal agency that runs the site may view CERCLA as preeminent. As a result, the enforcement effort may be splintered between the state and EPA. This occurred in the Rocky Mountain Arsenal litigation where the district court ruled that the Superfund program did not preempt Colorado's ability to sue to enforce RCRA. If EPA had the ability to sue DOD to enforce RCRA directly against the Army, some of the coordination problems in the Rocky Mountain Arsenal case could have been avoided.

Both the Reagan and Bush administrations, however, have taken the position that federal courts cannot decide such intrabranch disputes. This policy has prevented EPA from using litigation to bolster its efforts to enforce the hazardous waste laws against federal agencies. Some colorable legal, and some important policy, considerations support the administrations' position.

One such legal argument is that a dispute between two agencies or departments of the executive branch did not amount to a "case or controversy" within the article III jurisdiction of the federal courts. A related constitutional claim, and one to much the same effect, argues that judicial resolution of an intrabranch dispute would violate the separation of powers doctrine. Finally, from a policy perspective, one may well ask whether litigation is a particularly efficient way to improve the environmental compliance record of DOD, DOE, or any other federal agency.

In order to assess these claims, one first needs to separate the constitutional issues from the policy arguments. As discussed below, the United States Supreme Court is likely to find that an intrabranch dispute between EPA and a sister agency can be resolved by the federal judiciary without running afoul of either article III or the separation of powers principle. As a matter of constitutional law then, EPA can sue other federal agencies. Whether such litigation is desirable should be resolved as a policy matter within the executive branch.

sovereign immunity); Ohio v. United States Dep't of Energy, 689 F. Supp. 760 (S.D. Ohio 1988) (U.S. waived sovereign immunity to civil claims under RCRA); see also RCRA § 3008(a), 42 U.S.C. § 6928(a) (1982 & Supp. V 1987) (all civil penalties must be paid to United States Treasury). EPA's ability to extract civil penalties from federal agencies would presumably be limited to the extent of the express waivers in the statutes.

20. See generally DOD VERSUS PRIVATE ENTITIES, supra note 10 (discussing and rejecting potential problems with overlaps between CERCLA and RCRA as applied to sites where both RCRA and CERCLA could be invoked to enforce cleanup).


22. See infra text accompanying notes 45-70.

23. See infra note 45 and accompanying text.
INTRAEXECUTIVE COMPLIANCE LITIGATION

By demonstrating the constitutionality of suits by EPA against other federal agencies, this Article seeks to refocus the debate on the desirability of such suits. Part I provides a brief review of the principal policy arguments for and against giving EPA judicial leverage in intrabranch disputes. While the discussion does not attempt to resolve the policy arguments, they are presented here to put the constitutional analysis in context. Part II considers the cases and controversies requirement of article III and the theory of the unitary executive. Part III considers the separation of powers doctrine. This Article concludes that no constitutional barrier exists to prevent EPA from suing its sister agencies to force compliance with environmental laws.

I

POLICY CONSIDERATIONS

The case for allowing EPA to sue other federal agencies is based on several interrelated themes. First, the modern environmental statutes reflect a general aspiration that federal facilities should not only comply fully with all substantive requirements, but also should serve as "examples" for the private sector. Unfortunately, federal facilities as a whole have an environmental compliance record no better than their counterparts in private industry. Furthermore, federal agencies appear to have little incentive to improve their record. Many federal facility compliance problems are currently resolved, or not resolved, through "jawboning" among political appointees, rather than through more adversarial administrative or judicial enforcement actions brought by EPA. Finally, Congress frequently calls EPA officials to task over well-publicized violations at DOD and DOE facilities, thus suggesting that EPA


26. See, e.g., DOE Regulation of Mixed Waste: Hearings Before the Subcomm. on Energy
is somehow ultimately responsible for insuring compliance at DOD- and DOE-managed facilities. Given the perceived failure of voluntary compliance, and mounting congressional pressure on EPA to achieve results, it is easy to understand why EPA enforcement personnel would seek to use the full range of enforcement tools, unhindered by any distinctions between public and private polluters.27

On the other hand, several considerations weigh against letting EPA sue other federal agencies. To begin with, it can be argued that federal agencies are qualitatively different from private companies. Because they do not generate profits and do not answer to investors, federal agencies obtain either marginal or no economic benefits from delaying or avoiding compliance expenditures.28 According to this theory traditional economic incentives for noncompliance should be minimal and the need for litigation should be correspondingly reduced.

Although superficially appealing, this argument seems to have at least one basic flaw. In an age when agency personnel are forced to achieve their missions with smaller budgets, every dollar spent on environmental compliance is a dollar not spent on the affirmative mission, much less any private agenda or pet project. Similarly, complying with environmental regulations burdens an agency's time and reduces its discretion over the management of its enterprise. In this way the noncompliance incentives for DOD, DOE, or any other agency may not be materially different from those that influence private sector behavior.

A second policy consideration follows from the Anti-Deficiency Act,29 which prohibits federal agency managers from spending funds not appropriated by Congress, no matter how important the objective at stake.30 If an agency's budget submissions for the current fiscal year did not anticipate a particular environmental compliance problem and related expenditures, the agency managers currently have no authority to dedicate funds to that problem. This fact of life complicates any attempt to use litigation to redirect an agency's budgetary priorities.


28. But see Colorado v. United States Dep't of the Army, 707 F. Supp. 1562, 1570 (D. Colo. 1989) ("[T]He Army's obvious financial interest is to spend as little money and effort as possible on the cleanup."); see also Clean Air Act (CAA) § 120, 42 U.S.C. § 7420 (1982) (unique penalty provision aimed at recouping the economic benefit realized by delaying compliance expenditures, from which federally managed waste sites are not excepted).


30. Id. § 1341(a)(1)(B).
Similarly, a court order assessing civil penalties, which is typically an important goal of EPA's civil enforcement litigation, is likely to be pointless if not unavailable against a federal agency. Even if sovereign immunity has been waived so as to allow such awards, a point that is currently unclear, the statutes require that all civil penalties collected must be paid into the United States Treasury, not into EPA's account. Thus, a "successful" suit by EPA against, for example, DOD would result in funds previously appropriated for specific DOD activities being returned to the Treasury. This problem, however, could be remedied easily by legislation stipulating that such penalties be turned over to the Superfund or to EPA for use in bringing the facility at issue into compliance.

Finally, federal agencies are already subject to "citizen suits" for injunctive relief. These cases can and have been brought by state and local governments, environmental groups, and private citizens. Successful, or even partially successful, plaintiffs are entitled to recover their attorneys' fees. In the face of these enforcement mechanisms, one may question whether adding EPA to the roster of potential plaintiffs would significantly improve the federal facility compliance record.

In short, substantial policy considerations can be advanced on either side of the debate over whether EPA should be able to sue other federal agencies. But these issues are unlikely to receive the analysis they deserve until the specter of a constitutional impediment to such litigation has been laid to rest. The remainder of this Article analyzes the potential constitutional barriers to such suits in an effort to demonstrate that, wise or unwise, such suits are constitutionally permissible.


32. Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 695 (4th Cir. 1989); Stever, supra note 3, at 10,118 n.63.


34. See, e.g., Massachusetts v. United States Veterans Admin., 541 F.2d 119, 121 n.1 (1st Cir. 1976) (Commonwealth of Massachusetts authorized to bring suit as a "citizen" under the Clean Water Act); Blue Legs v. EPA, 668 F. Supp. 1329 (D.D.C. 1987) (holding that there was a cause of action under RCRA for failure of the Bureau of Indian Affairs and the Indian Health Service to implement solid waste disposal guidelines required by RCRA); New York v. United States, 620 F. Supp. 374 (D.C.N.Y. 1985) (United States did not dispute that it was amenable to suit by the state of New York under CERCLA).

II
POWER AND LIMITS OF THE JUDICIARY: CASES, CONTROVERSIES, AND THE UNITARY EXECUTIVE

A. Cases and Controversies

Two types of constitutional limits might block an EPA suit against another federal agency. The United States Constitution limits the kinds of cases that federal courts can hear and also implicitly circumscribes the role of the judiciary within the governmental separation of powers. Article III of the Constitution vests the "judicial Power" in the Supreme Court and any lower courts created by Congress and grants the courts authority to adjudicate "cases or controversies." In *Flast v. Cohen*, the United States Supreme Court recognized two inherent limits on this express power. First, the case or controversy clause "define[s] the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." Second, the "judicial Power" vested by article III defines the role assigned to the judicial branch in the tripartite allocation of power of the federal government.

Article III's requirement of a real case or controversy requires that parties be adverse in fact. Federal courts cannot hear cases that are collusive or that simply require advisory opinions. When one executive branch department or agency sues another, however, the United States is actually suing itself. This raises the question of whether the intrabranch dispute is genuinely adverse.

In general, a proceeding in which a party sues itself is not a justiciable case or controversy. In *South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, for example, the Supreme Court refused to adjudicate the case because one party controlled both sides of the litigation. The issue is not so simple, however, when applied to suits between instrumentalities of the federal government, even if they belong to the same branch. The mere fact that two agencies exist within the same governmental branch does not necessarily create a collusive, or even a collegial, environment.

Even if two government entities are clearly adverse in a given dispute, federal courts must also remember their place in the constitutional balance of power. In *Flast*, the Supreme Court recognized that federal

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38. *Id.* at 95.
39. *Id.*
41. 145 U.S. 300 (1892).
42. *Id.* at 301.
43. See *infra* notes 167-69 and accompanying text.
courts should not intrude into areas committed to the other branches of the federal government. The recent administrations' interpretation of the unitary executive theory adopts this logic and rules out the possibility of intraexecutive suits to enforce environmental laws.

B. The Unitary Executive

The Department of Justice (DOJ) has consistently taken the position that judicial resolution of an intrabranch dispute is not appropriate because such disputes do not satisfy the article III case or controversy requirement. Accordingly, it has regularly refused to file suit on EPA’s behalf to enforce environmental laws against other federal agencies. DOJ’s view is based on its theory of the “unitary executive,” as well as on constitutional separation of powers concerns.

Article II vests the executive power in the President and mandates that the President shall “take Care that the Laws be faithfully executed.” The Reagan and Bush administrations have maintained that the President’s powers include general administrative control and supervision of subordinate executive branch officials to ensure coordinated execution of the laws. According to this theory, the supervisory authority requires the President to resolve any disputes between executive departments.

In a 1987 congressional hearing concerning federal facility compliance with environmental laws, F. Henry Habicht II, then Assistant Attorney General for the Land and Natural Resources Division, expanded on this argument. In a prepared statement, Habicht argued that “the

45. See Letter from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, United States Department of Justice, to Representative John D. Dingell (Oct. 11, 1983) [hereinafter McConnell Letter] (stating that “there is a serious question whether such disputes would, in any event satisfy article III’s justiciability requirements”); Environmental Compliance by Federal Agencies: Hearings before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce. 101st Cong., 1st Sess. 110, 117 (1989) (statement of Donald A. Carr, Acting Assistant Attorney General, Land and Natural Resources Division) [hereinafter Carr]; see also Environmental Compliance by Federal Agencies: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce. 100th Cong., 1st Sess. 182, 206 (1987) (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division) [hereinafter Habicht] (’’[DOJ] has consistently taken the position that under our constitutional scheme, disputes of a legal nature between two or more executive branch agencies whose heads serve at the pleasure of the President are properly resolved by the President or by someone with authority delegated from the President.’’).
46. See Stever, supra note 3, at 10, 114.
47. See McConnell Letter, supra note 45.
48. U.S. Const. art. II, § 3.
49. See McConnell Letter, supra note 45; Carr, supra note 45, at 117; see also Habicht, supra note 45, at 208.
50. McConnell Letter, supra note 45; Carr, supra note 45, at 117; see also Habicht, supra note 45, at 207.
Constitution requires a process that protects the President's ability to take care that all laws are faithfully executed, and hence, to manage the Executive Branch. Therefore, Habicht asserted, the President is obligated to exercise control over those executing the laws. In this supervisory role, the President should ensure that the laws are executed in a unitary or uniform manner.

The administrations' interpretation of article II rests in part on the Supreme Court's holding in *Myers v. United States*. The Court held in *Myers* that the President, pursuant to the authority vested in him by article II, could not be forced to obtain Senate approval in order to remove an executive officer. The Court reasoned that the Constitution's excepting clause does not allow Congress to “draw to itself... the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers.” *Myers* further held:

The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.

Relying on *Myers*, Habicht testified, “Simply put, the executive power under our Constitution is based on this principle of the unitary executive.”

The argument for the unitary executive also derives from the concept of “original intent” espoused by former Attorney General Edwin

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52. *Id.* at 207.
53. *Id.* at 208. More recent statements made by Habicht suggest that his thinking on this issue has changed somewhat. During the Senate confirmation hearing on his nomination to be Deputy Administrator of EPA, the number two position in the Agency, Habicht was questioned closely on EPA's enforcement role relative to other federal agencies. Asked if he could “imagine a case where EPA might take another Federal agency to Federal court,” Habicht replied, “I can't say I find the situation inconceivable.” *Nomination of F. Henry Habicht II: Hearings before the Senate Comm. on Environment and Public Works*, 101st Cong., 1st Sess. 9 (1989). Habicht was swiftly confirmed. 135 CONG. REC. S5753-54 (daily ed. May 18, 1989).
54. 272 U.S. 52 (1926).
55. *Id.* at 119-25 (Senate's role of advice and consent relating to appointments did not apply to removals).
56. U.S. CONST. art. II, § 2 (“but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments”).
58. *Id.* at 135 (emphasis added).
Meese argued that the operations of the federal government should not vary from the original vision of the Framers of the Constitution. Under this view, the Framers intended a federal system that included a unitary executive, not a system that referred intrabranch squabbles to the courts.61

In 1787, the Constitutional Convention rejected suggestions for multiple executives or a triumvirate council of advisors to share the executive power.62 Instead, the framers clearly indicated that the executive power should rest with one executive office—that of the President.63

In Marbury v. Madison,64 Chief Justice Marshall also acknowledged the President as the sole voice within the executive branch.65 With respect to his discretionary powers, the President could be held accountable only “in his political character, and to his own conscience.”66 The

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60. See Meese, 19 U.C. DAVIS L. REV. 22 (1985) (one of three addresses published under the title Construing the Constitution). In discussing “jurisprudence of original intention” and the role of federal courts under that theory, Meese asserted that the Framers were attempting to create a tripartite national government and that the “genius of the constitutional blueprint is found in its creation and respect for spheres of authority and the limits it places on governmental power. Id. at 28-29.


63. Id.; see also The Federalist No. 70, at 354 (A. Hamilton) (G. Wills ed. 1982). The Federalist No. 70, entitled “Unity of the Executive Desirable,” addresses the benefits of a unitary executive. Differences of opinion or dissension in the executive department “serve to embarrass and weaken the execution of the plan or measure.” Id. at 358. Such disunity “constantly counteract[s] those qualities in the executive, which are the most necessary ingredients in its composition, vigour and expedition.” Id. Hamilton argued that “‘the executive power is more easily confined in the one’: That it is far more safe there should be a single object for the jealousy and watchfulness of the people; and in a word that all multiplication of the executive is rather dangerous than friendly to liberty.” Id. at 360-61 (citing De Lome).

64. 5 U.S. (1 Cranch) 137 (1803).

65. Id. at 165-66.

66. Id. at 166. But see Humphrey’s Ex’r v. United States, 295 U.S. 602, 628 (1935) (holding that independent agencies are not “an arm or eye of the executive,” but have “duties [which] are performed without executive leave”).

Independent agencies maintain a peculiar place in our tripartite federal government. Their quasi-legislative, quasi-executive roles place them outside the exclusive control of the President. The Court has held that officers of independent agencies, unlike those of purely executive agencies, can only be removed for good cause. See id. at 626 (holding that the President could only remove members of the Federal Trade Commission for one of the causes enumerated in the Federal Trade Commission Act; Wiener v. United States, 357 U.S. 349 (1958) (President’s ability to remove members of the War Claims Commission implicitly limited to good cause). In those cases, the Court reasoned that the officers were not core executive officers because they also performed “quasi-legislative” and “quasi-judicial” functions. Wiener, 357 U.S. at 352-56; Humphrey’s Ex’r, 295 U.S. at 629.

Recently, in Morrison v. Olson, 108 S. Ct. 2597 (1988), the Court stepped back from the core executive and quasi-legislative/judicial distinction in reviewing removal of an independent
President’s judgment was likewise conclusive regarding the acts of executive branch officers acting within this discretionary sphere.\textsuperscript{67}

According to Habicht’s 1987 testimony, one of the Framers’ main objectives in placing the executive power in one person was to ensure accountability for the federal government’s actions.\textsuperscript{68} Habicht testified that because the President is accountable for the government’s actions, he should be able to manage and coordinate the officers within his branch.\textsuperscript{69} The President alone should resolve any dispute among those officers: “In our view, if the intentions of the Framers are to be fulfilled, the President must have an unfettered opportunity to take action in the event of disagreements or disputes within the Executive Branch. The President has the responsibility of making certain that the Branch speaks with one voice.”\textsuperscript{70}

In recent years, the executive branch has attempted to ensure that it will “speak with one voice” by providing dispute resolution mechanisms for intraexecutive arguments.\textsuperscript{71} Executive Order 12,088\textsuperscript{72} requires that

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\textsuperscript{67} Marbury, 5 U.S. (1 Cranch) at 166.

\textsuperscript{68} Habicht, supra note 45, at 179.

\textsuperscript{69} Id. at 209; see also Pierce, The Role of Constitutional and Political Theory in Administrative Law, 64 Tex. L. Rev. 469, 507-08 (1985) (indicating that the President should make policy decisions because he is as accountable as Congress and more so than the judiciary).

\textsuperscript{70} Habicht, supra note 45, at 209. Note, however, that the unitary executive theory cannot stand for the proposition that the President, in his power to execute the laws, can choose not to execute laws he has sworn to uphold. See Kendall v. United States, 37 U.S. (12 Pet.) 524, 613 (1838) (“[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution and entirely inadmissible”); see also National Treasury Employees Union v. Nixon, 492 F.2d 587, 604 (D.C. Cir. 1974) (President cannot refuse to execute duly enacted laws). In his testimony, Habicht noted that the Administration’s view of the unitary executive intends only that where the President has conflicting obligations when executing the laws, he should have the discretion to resolve the issue. See Habicht, supra note 45, at 210 (indicating that the dispute should not be brought to court without first presenting it to the executive branch for resolution).

\textsuperscript{71} Executive orders are Presidential “directives” to executive branch officials and typically set forth internal operating or administrative procedures. See Noyes, Executive Orders, Presidential Intent, and Private Rights of Action, 59 Tex. L. Rev. 837, 839 (1981). The President cannot issue an Executive order addressing an issue not delegated to him by the Constitution or a statute. Nonetheless, Executive orders serve as useful tools for the President in running the executive branch because they do not require the approval of Congress. See id. n.10 (citing Fleishman & Aufses, Law and Orders: The Problem of Presidential Legislation, 40 Law & Contemp. Probs. 1, 33-34 (1976)).

the Administrator of EPA "make every effort to resolve conflicts regarding [violation of environmental statutes] between Executive agencies. . . . If the Administrator cannot resolve a conflict the Administrator shall request the Director of the Office of Management and Budget [OMB] to resolve the conflict." 73 The Director of OMB is then required to consider unresolved conflicts and to seek EPA's "technological judgment and determination" regarding the applicable statutes. 74

The procedures in Executive Order 12,088 are "in addition to, not in lieu of, other procedures . . . for the enforcement of applicable pollution control standards." 75 Thus, Executive Order 12,088 creates no absolute federal facility immunity regarding environmental statutes. The Order simply requires that EPA first present conflicts to OMB so that they can be resolved within the executive branch whenever possible. 76

A second Executive order also provides guidance on how to resolve intrabranch legal disputes. 77 Pursuant to Executive Order 12,146, "whenever two or more Executive agencies are unable to resolve a legal dispute between them . . . each agency is encouraged to submit the dispute to the Attorney General." 78 If the heads of the disputing agencies serve at the pleasure of the President, however, the Order states that the "agencies shall submit the dispute to the Attorney General prior to proceeding in any court." 79 This Order implicitly contemplates that the dispute ultimately may be presented to a court. 80

Under Executive Order 12,146, EPA could apply to the Attorney General only in legal disputes such as jurisdictional issues. 81 The Attorney General does not issue orders, but instead delivers written opinions

73. Id. § 1-602.
74. Id. § 1-603.
75. Id. § 1-604.
76. Id. § 1-602.
77. Exec. Order No. 12,146, 3 C.F.R. 409 (1980), reprinted in 28 U.S.C. § 509 (1982 & Supp. V 1987) [hereinafter Exec. Order No. 12,146]. The difference between Exec. Order No. 12,088 and Exec. Order No. 12,146 is that Exec. Order No. 12,088 was issued specifically to address federal facility compliance with environmental statutes, while Exec. Order. No. 12,146 was issued generally to coordinate the federal government's legal resources.
78. Id. § 1-401.
79. Id. § 1-402 (emphasis added).
81. Exec. Order No. 12,146, supra note 77, §§ 1-401, 1-402. EPA and the Army Corps of Engineers used this procedure in 1979 to resolve which agency had the lead in interpreting section 404 of the Clean Water Act. 43 Op. Att'y Gen. 15 (1979). An opinion from Attorney General Civiletti said EPA had the lead. Id.
on the legal issues, not the facts, of submitted disputes. Because environmental compliance issues frequently depend on disputed facts, the purely legal review that Executive Order 12,146 provides would not be of much use to EPA in dealing with enforcement problems. Nothing contained in the Executive Order would stop EPA from going to court if the Agency received no answer from the Attorney General, or perhaps even if it did not like the answer it got.

The administration maintains that Executive Order 12,146 provides a viable mechanism to resolve intraexecutive disputes without resorting to litigation. In *Tennessee Valley Authority v. United States*, DOE argued that the separation of powers doctrine precluded the Claims Court from hearing intrabranch litigation, given the existence of the administrative dispute resolution mechanism of Executive Order 12,146. The court endorsed a policy of abstention where an administrative dispute resolution scheme exists, but did not find that such a scheme stripped the courts of jurisdiction. Although the action was a justiciable contract claim, the presence in the case of executive branch policy questions counseled judicial restraint. The court declared, "[I]f the matter can be resolved as a matter of Administration policy . . . it is altogether appropriate to dejudicialize the dispute and allow the Executive an opportunity to act." The court ordered the Tennessee Valley Authority (TVA) to submit the dispute to the Attorney General for resolution.

In a footnote, however, the court rejected DOE's argument that the Order necessarily made the dispute nonjusticiable:

[W]here the question is not which agency position will be put before the court, but the rights and liabilities of one agency in respect of the other, the issue becomes one of justiciability. The Attorney General's resolution will stand unless a dissatisfied agency can persuade the court that the dispute is justiciable [and that] Executive Order 12,146 cannot displace the precedent that requires justiciability determination to be resolved by examining the real parties in interest and the nature of the controversy.

Thus, if TVA was not satisfied with the Attorney General's resolution, it could bring the dispute back to the court and the court would review the case de novo. While this holding indicates that the Executive should be

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84. *Id.* at 697-99.
85. *Id.* at 701 n.9.
86. *Id.* at 700.
87. *Id.* at 700-01.
88. *Id.* at 703.
89. *Id.* at 701 n.9.
90. *Id.* at 703.
permitted to resolve intraexecutive disputes, in practice it may only serve to delay judicial intervention in intrabranch disputes.\textsuperscript{91}

The court's reluctance to involve itself in the internal dispute until the President had the chance to resolve it is not much different from what the administration actually requests. In his 1987 testimony, Habicht asserted that "[e]xecutive agencies may not sue one another, nor may one agency be ordered by another to comply with an administrative order without prior opportunity to contest the order within the Executive Branch."\textsuperscript{92} Therefore, the Claims Court's analysis is similar to the administration's view of the unitary executive theory.

\section*{C. The Unitary Executive Theory and the Courts}

Despite the opinion of recent administrations, the courts have not readily accepted the use of the unitary executive theory to stave off judicial intervention into intrabranch disputes.\textsuperscript{93} In a series of cases beginning with \textit{United States v. Interstate Commerce Commission},\textsuperscript{94} the United States, using its executive authority to prosecute, brought suit against independent agencies. The federal courts acted to resolve these disputes despite the presence of the government on both sides of each case. Most of the cases involved the executive branch and an independent agency, as opposed to two wholly executive or "dependent" agencies.\textsuperscript{95} The rationale of those cases, however, would dictate the same result if, for example, EPA sued DOD to force compliance with environmental statutes.\textsuperscript{96}

\begin{itemize}
\item \textsuperscript{91} The court described the Attorney General's function as an "opportunity to head off litigation" rather than as a final and exclusive arbiter of intrabranch disputes. \textit{Id.} at 702.
\item \textsuperscript{92} Habicht, \textit{supra} note 45, at 210 (emphasis in original).
\item \textsuperscript{93} See, e.g., \textit{United States v. Nixon (Nixon I)}, 418 U.S. 683 (1974). Commentators have also criticized the unitary executive theory. See, e.g., Rosenberg, \textit{Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive}, 57 \textit{GEO. WASH. L. REV.} 627, 634 (1989) ("[T]he unitary executive is and has always been a myth concocted by the Reagan Administration to provide a semblance of legal respectability for an aggressive administrative strategy designed to accomplish what its failed legislative agenda could not."). \textit{But see} Pierce, \textit{supra} note 69, at 505-08 (arguing that the President should be the one to deal with intrabranch disputes because he is politically accountable, confined by boundaries set by Congress, and shares the political preferences of those who elect him).
\item \textsuperscript{94} 337 U.S. 426 (1949).
\item \textsuperscript{95} \textit{Nixon I} did involve executive branch parties on both sides. Some argue that \textit{Nixon I} does not reach beyond its unique facts and that the issue in that case was whether Nixon's personal claim to documents could prevail over the government's claim to them. See, e.g., P. Bobbitt, \textit{Constitutional Fate, Theory of the Constitution} 213-19 (1982) ("The real holding is that a President . . . may not manipulate the instrumentalities of law enforcement both to prevent the law's enforcement and to acquit himself.").
\item \textsuperscript{96} It is not absolutely clear that EPA now possesses statutory authority even to issue an administrative order against a federal facility. On July 19, 1989, the United States House of Representatives passed H.R. 1056, the Federal Facilities Compliance Act of 1989, 101st Cong., 1st Sess., 135 \textit{CONG. REC.} H3932 (July 19, 1989). The bill would have amended RCRA to allow EPA to issue administrative orders and collect fines from federal agencies for violation of the law at federal facilities. H.R. REP. No. 141, 101st Cong., 1st Sess. 2 (1989).\
\end{itemize}
I. United States v. Interstate Commerce Commission

In several proceedings in which the United States appeared to be suing itself, federal courts have found justiciable cases or controversies. The courts looked beyond the names of the parties to determine whether the issues presented were of the sort that courts traditionally address. In the leading Supreme Court case on this subject, *United States v. Interstate Commerce Commission*, the United States provided wharfage services at certain ports for railroad companies transporting goods to the ports. When the United States sought reimbursement for these services, the railroads refused to pay. The United States then asked the Interstate Commerce Commission (ICC) to order the railroads to compensate the United States for the services. ICC rejected the United States' request, and the United States sought judicial review of the agency's order dismissing the claim.

Although the Supreme Court noted that the Attorney General appeared on the briefs of both sides, it found this anomaly to be superficial. Because other shippers could invoke the protection of ICC, the Court reasoned that the United States, as a shipper, should have access to the same regulatory protection. Consequently, the Court determined that the real parties in interest in the case were the United States.

The Act "clarifie[d]" that "person" under RCRA includes federal agencies. The Act also made explicit the congressional intent that environmental statutes are to be enforced against federal facilities in the same manner as against private facilities. In its report, the House Committee on Energy and Commerce criticized the theory that the President, under his duty to "take care" that the laws of the United States are faithfully executed, could frustrate the intent of Congress by not executing laws against certain violators. The report also indicates that the Act would allow the Administrator of EPA to use the dispute resolution process of Exec. Order No. 12,088. The federal facility could still negotiate a remediation program with EPA. However, under the Act, when "it becomes apparent to the Administrator that the negotiations are unlikely to be successful, the [House] intends that the Administrator expeditiously finalize an administrative order." Such an order would use enforcement procedures similar to procedures followed against a private violator. Similar legislation has been introduced in, but not yet passed by, the Senate. See S. 1140, 101st Cong., 1st Sess., 135 CONG. REC. S6330 (June 7, 1989).


97. 337 U.S. 426 (1949).
98. "Wharfage" entails moving shipped goods from railroad cars to shipping piers and from piers to railroad cars. See id. at 428. Railroads normally performed these services, and wharfage charges were incorporated into freight charges. The United States government performed its own wharfage at certain ports it took over during World War II. The railroads carrying government freight to those ports continued to charge rates incorporating payment for wharfage. The government sued for reimbursement of this alleged overcharge for services not rendered. Id.
99. Id.
100. Id. at 429.
101. Id. at 431-32.
102. Id. at 430.
as shipper and the railroads that used its wharfage services. As the real parties in interest were separate entities, the Court was not concerned about the United States suing itself.

The Court's analysis, however, went beyond a determination of the real parties in interest. The Court stated that a federal court must look behind the names of the parties on the briefs and focus on the issue raised to determine if a controversy is justiciable. When the Court looked behind the names in ICC, it found two issues presented. The first concerned the railroads' liability to reimburse the United States for wharfage services rendered. The second question was whether ICC's dismissal order was arbitrary and capricious. In this latter dispute over administrative process, government instrumentalities appeared to be the real parties in interest on both sides.

The Court recognized both issues as traditionally justiciable. Accordingly, the Court held that although the United States was suing ICC, the "principle that a person cannot create a justiciable controversy against himself" did not apply. The ICC Court emphasized the nature of the issue to be litigated rather than focusing on the nominal iden-

103. Id.
104. Id. at 430-31.
105. Id. at 430.
106. Id.
107. Id. at 431.
108. Id.
109. Id. In a number of other cases between federal agencies, the Court has not significantly addressed the justiciability issue. See, e.g., United States ex rel. Chapman v. Federal Power Comm'n, 345 U.S. 153, 156 (1953) (Federal Power Commission and the Secretary of the Interior regarding hydroelectric generating station license); Interstate Commerce Comm'n v. Jersey City, 322 U.S. 503, 524 (1944) (Federal Price Administrator and the Interstate Commerce Commission over railroad fare increase); Secretary of Agriculture v. United States, 347 U.S. 645, 647 n.1 (1954) (in dispute between Interstate Commerce Commission and the Secretary of Agriculture over railroad charges for unloading produce, Court did not question justiciability, noting that Congress authorized the Secretary of Agriculture to resort to original and appellate judicial remedies in cases affecting the transportation of certain farm products).

While the Court in ICC acknowledged the United States as a market participant asserting rights against another market participant, later cases applying ICC have not used this analysis. In United States ex rel. Tennessee Valley Auth. v. Easement and Right of Way Over Certain Land in Bedford County, Tenn., 204 F. Supp. 837 (E.D. Tenn. 1962), for example, the district court dismissed TVA's attempt to obtain an easement over land held by the Federal Home Authority as an interagency dispute not subject to adjudication. Id. at 839. The court distinguished ICC on the grounds that ICC did not involve one government agency suing another, but was really the government, as shipper, suing the railroads. Id. at 840.

A later opinion, Dean v. Herrington, 668 F. Supp. 646, 651 (E.D. Tenn 1987), questioned the earlier opinion's distinguishing of ICC. See also United States v. Federal Communications Comm'n, 707 F.2d 610, 612 n.2 (D.C. Cir. 1983), where in a brief footnote the court cited ICC and indicated that the United States was representing the consumer interests of DOD, the General Services Administration, and other federal executive agencies in challenging a Federal Communications Commission (FCC) rate order. The court apparently cited ICC for the proposition that the United States can bring suit against a federal agency when it represents the consumer interests of other agencies.
tity of the parties. Under that analysis, a dispute between two purely executive agencies would be no less justiciable than a case pitting a purely executive agency against an independent agency. As long as the issue was traditionally justiciable, a suit between two executive agencies could satisfy the case or controversy requirements of article III.110

Lower courts have regularly applied ICC to proceedings where the federal government was the real party in interest on both sides of the litigation. For example, DOJ has repeatedly sued the Federal Maritime Commission (FMC) over FMC pooling agreements that were allegedly in violation of federal antitrust laws.111 The D.C. Circuit found the cases justiciable.112

The Supreme Court has also umpired at least one major dispute between members of the legislative branch. In Powell v. McCormack,113 Adam Clayton Powell sued to retain his seat in the House of Representatives. The House, citing alleged violations of its ethics and funding rules, had passed a resolution denying Powell his seat.114 Powell’s suit challenged the House’s action, charging a violation of the article I mandate that the House shall be composed of members chosen by the states.115 The House responded that article I, section 5 provided the House of Representatives with authority to expel or exclude its own members.116 Therefore, the House claimed, the federal courts lacked jurisdiction to hear the dispute.117

110. The D.C. Circuit apparently perceived no problem with subject matter jurisdiction in at least two challenges brought by the Department of Agriculture against EPA pesticide restrictions. See Butz v. Train, No. 76-1181, 9 Env’t Rep. Cases (BNA) 1575 (D.C. Cir. 1977) (consolidated and reported with EDF v. EPA, 548 F.2d 998 (D.C. Cir. 1977)); Butz v. Train, No. 75-1092, 7 Env’t Rep. Cases (BNA) 1689 (D.C. Cir. 1975) (consolidated and reported with EDF v. EPA, 510 F.2d 1292 (D.C. Cir. 1975)). Earl Butz was Secretary of Agriculture and Russell Train was EPA Administrator at the time of the litigation. Although the D.C. Circuit did not rule expressly on its jurisdiction, subject matter jurisdiction is always a matter for the consideration of a court perceiving a defect, even if the parties do not raise the issue. See, e.g., Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908). The court’s silence on the issue probably indicates that the threshold issue of article III jurisdiction did not appear to pose a significant barrier to the litigation.


112. United States v. Federal Maritime Comm’n, 694 F.2d at 808 (citing ICC); United States v. Federal Maritime Comm’n, 655 F.2d at 252 (citing Nixon I).


114. Id. at 490.

115. Id. at 493; U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of members chosen every second year by the people of the several states.").

116. Powell, 395 U.S. at 507; U.S. CONST. art. I, § 5 ("Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.").

117. Powell, 395 U.S. at 514.
The Supreme Court adjudicated the case, determining that it was required to analyze whether the House's actions were consistent with the Constitution.\textsuperscript{118} Such a determination "fell] within the traditional role accorded courts . . . and d[id] not involve a lack of respect due [a] coordinate [branch] of government."\textsuperscript{119}

The interpretation of an environmental statute is equally within the normal prerogatives of a court. A court refereeing a dispute between executive agencies over statutory interpretation would appear no more disrespectful to the executive branch than the Powell Court was to Congress.\textsuperscript{120}

2. United States v. Nixon: Justiciable Issue and Adverse Setting

The Watergate scandal resulted in a series of confrontations between the President and Congress that eventually required the Supreme Court to reconsider the justiciability of intrabranch suits.\textsuperscript{121} Responding to considerable political pressure, President Nixon named a special prosecutor to investigate alleged illegal activities by high ranking executive branch officials.\textsuperscript{122} During his investigation and a resulting criminal proceeding, the special prosecutor subpoenaed certain tapes and papers Nixon had maintained. Nixon resisted the subpoena on two grounds. First, Nixon asserted that executive privilege gave the President an absolute right to keep his records secret.\textsuperscript{123} Second, in an argument that touches more directly on the concerns of this Article, Nixon claimed that the Court lacked jurisdiction to interfere in an intrabranch dispute between the special prosecutor and the President.\textsuperscript{124}

In rejecting both jurisdictional arguments, the Court noted that the "mere assertion of a claim of an 'intrabranch dispute,' without more, has

\textsuperscript{118. Id.}
\textsuperscript{119. Id. at 548.}
\textsuperscript{120. Powell nominally involved a suit by an individual congressman against the Speaker of the House, and the issue of real parties in interest did not enter into the Court's constitutional analysis. A similar representative construct could be used in the context of a suit between EPA and DOD. See Butz v. Train, No. 76-1181, 9 Env't Rep. Cases (BNA) 1575 (D.C. Cir. 1977) (consolidated and reported with EDF v. EPA, 548 F.2d 998 (D.C. Cir. 1977)); Butz v. Train, No. 75-1092, 7 Env't Rep. Cases (BNA) 1689 (D.C. Cir. 1975) (consolidated and reported with EDF v. EPA, 510 F.2d 1292 (D.C. Cir. 1975)) (although in reality a suit between EPA and the Department of Agriculture, the court consistently referred to the suits as being between the Administrator of EPA and the Secretary of Agriculture).
\textsuperscript{121. United States v. Nixon (Nixon I), 418 U.S. 683 (1974).}
\textsuperscript{122. The first prosecutor, Archibald Cox, was more aggressive than Nixon desired. Nixon's removal of Cox resulted in the infamous Saturday Night Massacre in October of 1973. A second prosecutor, Leon Jaworski, was installed, and he too faced an uncooperative President. See generally J. Lukas, Night-Mare: The Underside of the Nixon Years (1976).
\textsuperscript{123. See Nixon I, 418 U.S. at 703-13.
\textsuperscript{124. Id. at 697. Notice that Nixon's argument is similar to the Reagan/Bush unitary executive theory.
never operated to defeat federal jurisdiction." Following the reasoning of ICC, the Court stated that it had to look beyond the names that symbolize the parties to determine the existence of a justiciable case or controversy. Therefore, the Court first inquired into the nature of the issue raised in the proceeding. The central issue was the discoverability of specified evidence deemed relevant in a pending criminal case. "Whatever the correct answer on the merits," such a discovery dispute was a traditionally justiciable issue.

The Court acknowledged that the executive branch had exclusive authority to decide whether to prosecute a case, but it was not persuaded that prosecutorial discretion was a primary issue in Nixon I. The Court instead focused on whether the President's decision to withhold evidence in a criminal trial was final. Even though the case involved two officers of the executive branch, that relationship was not "a barrier to justiciability." The status of the contested issue as a traditional case or controversy, not the status of the parties, determined whether the case was justiciable.

The Nixon I Court added a second step to the article III case or controversy analysis. In Nixon I, unlike ICC, the real parties in interest on both sides of the litigation were officers of the same branch of the federal government. Further, the special prosecutor was the subordinate of the President; thus, the Court asked whether Nixon I presented the kind of "adversary proceeding" required by article III.

125. Id. at 693.
126. Id.
127. Id. at 694.
128. Id. at 697.
129. Id.
130. Id. at 693.
131. See id. at 693-97. This case did not erode the President's exclusive discretion to prosecute a criminal case. Rather, it addressed the President's discretion to determine whether evidence is to be used in a criminal proceeding once the President has delegated the decision to prosecute to a special prosecutor. Id. Accordingly, Nixon I did not determine whether the courts could adjudicate a dispute over the Executive's exercise of prosecutorial discretion in the context of an executive branch agency suit against another executive branch agency. Nixon I merely held that the President's resolutions delegating certain prosecutorial authority to the special prosecutor were binding upon the President so long as they remained in force. Id. at 696. He could not ignore them, only change them. See also Heckler v. Chaney, 470 U.S. 821, 831 (1985) (an executive agency's use of its absolute discretion in deciding not to prosecute or enforce is unsuitable for judicial review).
133. Id.
134. Id.
135. In Nixon I, the President retained some power to remove the special prosecutor, but the prosecutor's mission as defined in executive branch regulations nevertheless provided sufficient adverseness. Id. at 696-97.
To determine adverseness, the Court analyzed the "setting" of the case. The special prosecutor claimed to need the subpoenaed material in a criminal proceeding, while the President steadfastly asserted a privilege against disclosure. This situation assured the "concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." Therefore, even though the President theoretically controlled both sides of the litigation, the "setting" assured that the case was a genuine adversary proceeding.

Taken together, *ICC* and *Nixon I* stand for a two-pronged case or controversy analysis. First, when a federal court is faced with an intrabranch dispute, it must determine whether the issue raised is traditionally justiciable. Second, the court must decide if the setting of the dispute demonstrates true adversity between the parties. If the case satisfies both conditions, the court should umpire the dispute. Thus, the fact that a case involves an intrabranch dispute does not deprive a federal court of jurisdiction under article III. Similarly, the requirement of sufficient adversity between the parties does not necessarily defeat jurisdiction over intrabranch disputes. Purely executive agencies, though answerable to the President, in fact have widely varying missions and political constituencies. In environmental compliance cases between EPA and DOD or DOE, for example, the tension relating to enforcement is often apparent. Therefore, as long as the President does not interfere with the prosecution of the case, the parties would be sufficiently adverse to come within the case or controversy requirement.

In theory, real adversity is perhaps more likely between an executive department or agency, on the one hand, and an independent regulatory agency, on the other. This theory hinges on the fact that the latter is not answerable legally or politically to the executive branch. The theoretical point is rebutted, however, by the high degree of tension and animosity that naturally occurs when EPA seeks to enforce compliance with environmental statutes against a recalcitrant government agency polluter. The fact that resistance comes from another executive branch agency such as DOE or DOD does not reduce this tension automatically.

136. *Id.* at 697.
137. *Id.* (citing Baker v. Carr, 369 U.S. 186, 204 (1962)).
138. See *Enforcement Power*, supra note 25, at A-15 ("'the nation's chief environmental watchdog is forced to sit by as basic environmental statutes and regulations are routinely ignored at federally owned facilities'") (quoting *NATIONAL ASSOCIATION OF GOVERNORS & NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, FROM CRISIS TO COMMITMENT: ENVIRONMENTAL CLEANUP AND COMPLIANCE AT FEDERAL FACILITIES* (1990)).
3. Intrabranche Litigation After ICC and Nixon I

Since Nixon I, lower federal courts have applied the two step analysis in several cases between federal agencies. These courts have been willing to adjudicate antitrust actions and basic contract disputes that involved federal agencies on both sides of the litigation. In United States v. Federal Maritime Commission (FMC I), DOJ challenged a pooling agreement that FMC approved for certain shipping lines. DOJ complained that the agreement violated antitrust laws. The shipping companies intervened, asserting that DOJ could not challenge FMC’s order. The intervenors argued that no article III case or controversy existed because “the United States [was] suing itself.” The D.C. Circuit held that Nixon I established the standard for justiciability of all interagency disputes. The court concluded that DOJ could sue FMC because the proceeding “raise[d] issues that the courts traditionally re-

olve and the setting assure[d] . . . concrete adverseness.”

Judge Markey, concurring only in the result, argued that the proceeding was not a true case or controversy, but a policy dispute between DOJ and FMC in which each agency purported to act “on behalf of all citizens.” Each asked for court approval of its view concerning the antitrust implications of the pooling agreement. Markey distinguished ICC on the grounds that the dispute in that case was actually between the United States, representing a proprietary interest, and certain railroad companies; the presence of the United States on both sides of that case was only a superficial anomaly. In FMC I, Markey argued, the United States was actually suing itself because the case turned on whether DOJ’s or FMC’s view of antitrust policy should prevail. Article III did not permit the courts to interfere in a “mere policy dispute between agencies of the Executive Branch.” Finally, Markey distinguished Nixon I as “a special case” because the special prosecutor had

139. 655 F.2d 247 (D.C. Cir. 1980) (affirming FMC order).
140. Id. at 252.
141. Id. at 249.
142. Id.
143. Id. at 252.
144. Id.
145. Id.
146. Id. at 254 (Markey, C.J. (C.C.P.A.), concurring in the result). Chief Judge Markey concurring because he would have agreed with the majority on the merits if DOJ both had standing and had presented a true case or controversy. Id. at 254-58.
147. Id. at 258.
148. Id.
149. Id.
150. Id.
151. Id.
been given specific authority to use judicial process to enforce subpoenas.\textsuperscript{152}

In a later case, \textit{United States v. FMC (FMC II)},\textsuperscript{153} DOJ challenged another FMC pooling agreement as an antitrust violation. The D.C. Circuit, sitting en banc, rejected private intervenors' claims that the case did not present an article III case or controversy.\textsuperscript{154} Relying on \textit{ICC}, the court held that "the structure of the government of the United States permits cases and controversies to arise between separate agencies."\textsuperscript{155} Even assuming that DOJ and FMC were the real parties in interest, the court held that \textit{Nixon I} required that DOJ be allowed to sue.\textsuperscript{156} As long as the case presented issues traditionally resolved by the courts in a setting of concrete adverseness, the courts could hear a dispute between officials of the same branch of government.\textsuperscript{157}

The \textit{FMC II} court apparently found that the agencies' statutory "public interest" obligations raised a "traditionally justiciable" issue.\textsuperscript{158} The "concrete adverseness" prong of the \textit{Nixon I} standard was satisfied because both parties were traditional advocates of differing views of the public interest.\textsuperscript{159}

In a more recent intrabranch case, the defending agency, rather than a nongovernmental intervenor, challenged justiciability. In \textit{Dean v. Herrington},\textsuperscript{160} TVA filed suit against DOE over an electricity supply contract dispute.\textsuperscript{161} In holding that the case was justiciable under article III, the district court "found guidance" in \textit{ICC, Nixon I, and FMC II}.\textsuperscript{162} The court recognized that the case was a traditionally justiciable breach of contract dispute.\textsuperscript{163} The court cited TVA's unique independence as assurance that the parties would be adverse.\textsuperscript{164}

\textsuperscript{152} Id. at 257 n.10.
\textsuperscript{153} 694 F.2d 793 (D.C. Cir. 1982) (en banc).
\textsuperscript{154} Id. at 809-10.
\textsuperscript{155} Id. at 809.
\textsuperscript{156} Id. at 810.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} 668 F. Supp. 646 (E.D. Tenn. 1987).
\textsuperscript{161} Id. at 648.
\textsuperscript{162} Id. at 650-52.
\textsuperscript{163} Id. at 652.
\textsuperscript{164} Id. TVA is different from many other "independent agencies" in that it has a corporate form, is exempt from the Administrative Procedure Act, and sets its own rates. Id. at 652 n.1. The district court also addressed whether adjudicating the interagency dispute would upset the constitutional separation of powers. Id. at 652. The \textit{Dean} court, however, found that it lacked subject matter jurisdiction over TVA's claim and transferred the case to the United States Claims Court. Id. at 655-56. In \textit{Tennessee Valley Auth. v. United States}, 13 Cl. Ct. 692 (1987), the Claims Court agreed that, following \textit{Nixon I}, the nature of the controversy, rather than the parties, determines whether the case is justiciable. Id. at 697. Accordingly, the Claims Court acknowledged the standards established by \textit{ICC} and \textit{Nixon I} and looked beyond the names of the parties to determine whether the case was justiciable pursuant to article III.
Using the setting of the dispute to determine if the parties are sufficiently adverse imposes a weaker requirement than that of adverse real parties in interest. The criterion is also extremely subjective. The court must consider whether the parties’ relationship is adverse enough to “sharpen[] the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” Absent any indication of collusion, this part of the standard appears relatively easy to satisfy.

**D. EPA v. DOD: The ICC/Nixon I Analysis of Justiciability**

Were EPA to sue DOD, the court would first look at whether the issue is one that the courts traditionally handle. Whether a party must comply with environmental laws and what constitutes compliance appear to be traditionally justiciable issues. *FMC II* indicates that a conflict between agencies over public interest objectives is a traditionally justiciable issue. Given this precedent, EPA would likely argue that its position is one of protecting the public interest in a safe environment. On the other hand, DOD would probably argue that it was protecting the public interest in national defense.

Not only is the issue one that is traditionally justiciable, but the proceeding appears to provide the court with a sufficiently “adverse setting” as well. While no litmus test exists for adverseness, certain themes recur in the case law. For example, apart from the basic requirement that the case involve at least two parties, those parties must advocate genuinely conflicting views. This is to insure that the court will have a “full presentation of facts and arguments.”

Adverseness has been found wanting where no genuine dispute exists over the issues in the case, or where one of the litigants is also the real

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*Id.* at 697-99. Justiciability turned on an examination of real parties in interest and the nature of the controversy. *Id.* at 701 n.9. DOE attempted to distinguish *ICC, FMC I, FMC II,* and *Nixon I* on the grounds that the heads of both agencies in *TVA* served at the pleasure of the President. *Id.* at 698-99. The court rejected this argument because the President had also chosen the agency heads in the earlier cases, although his removal power was restricted. *Id.*


167. 13 Wright, Miller & Cooper, Federal Practice & Procedure § 3530 (2d ed. 1984). See also Baker v. Carr, 369 U.S. 186 (1962). The concern with adverseness is tied to the rule that federal courts cannot issue advisory opinions. In *Lord v. Veazie,* 49 U.S. (8 How.) 251 (1850), the Court dismissed a case for lack of adversity and noted that “any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended.” *Id.* at 255.
party in interest on the other side of the case. In a case styled \textit{EPA v. DOD}, so long as each agency advocated its own position, free of undue influence from other quarters, the case would satisfy the "adverse setting" requirement.

III
SEPARATION OF POWERS CONSIDERATIONS

Even if a proceeding between EPA and DOD satisfies the article III case or controversy requirement, as interpreted in \textit{ICC} and \textit{Nixon I}, the proceeding would still have to clear the hurdle posed by the separation of powers doctrine in order to be constitutionally permissible. This doctrine restrains one branch from aggrandizing its power at the expense of another branch. No branch may assume a function that is more properly entrusted to another branch, and one branch may not improperly

168. See, e.g., Cleveland v. Chamberlain, 66 U.S. (1 Black) 419, 426 (1862) (dismissing case because a "sole party" was advocating both sides of the case); \textit{Veazie}, 49 U.S. (8 How.) at 254-56 (1850) (dismissing case because it became evident that the interests of the plaintiff and the defendant were "one and the same").

169. The fact that DOJ might normally represent both sides of the dispute does not create an insuperable barrier. \textit{ICC} accepted DOJ representation on both sides. United States v. Interstate Commerce Comm'n, 337 U.S. 426, 431-32 (1949). The judge in the Rocky Mountain Arsenal litigation, however, found that DOJ faced inherent conflicts in representing both the Army (a polluter) in one case and EPA in a companion case. Colorado v. United States Dep't of the Army, 707 F. Supp. 1064, 1082 (D. Colo. 1989). But, if Congress puts DOJ on both sides of a case through a statutory scheme, that alone overcomes any problem regarding conflicts of interest. Nevada v. United States, 463 U.S. 110, 128, \textit{reh'g denied}, 464 U.S. 875 (1983) ("[I]t is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well.").

If concerns about dual representation remain, one side could use its own solicitor or general counsel to litigate the case, provided it has statutory authority to do so. The Department of Agriculture followed this course when it challenged EPA pesticide restrictions, to the apparent satisfaction of the D.C. Circuit. See Butz v. Train, No. 76-1181, 9 Envt' Rep. Cases (BNA) 1575 (D.C. Cir. 1977) (consolidated and reported with \textit{EDF v. EPA}, 548 F.2d 998 (D.C. Cir. 1977)); \textit{see also} Butz v. Train, No. 75-1092, 7 Envt' Rep. Cases (BNA) 1689 (D.C. Cir. 1975) (consolidated and reported with \textit{EDF v. EPA}, 510 F.2d 1292, 1296 n.3 (D.C. Cir. 1975)). Finally, Congress could authorize the polluter agency to retain private counsel.

170. [T]he powers properly belonging to one of the departments, ought not to be directly and completely administered by either of the other departments. . . . [N]either of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers. . . . [P]ower is of an encroaching nature, and . . . it ought to be effectually restrained from passing the limits assigned to it.

\textit{The Federalist} No. 48, at 250 (J. Madison) (G. Wills ed. 1982).

171. In a number of cases, the Supreme Court has ruled that a branch may not exercise powers outside its constitutional grant. For example, in United States v. Ferreira, 54 U.S. (13 How.) 40 (1852), the Court held that administrative or executive duties of a nonjudicial nature may not be imposed on article III courts. In Bowsher v. Synar, 478 U.S. 714, 721-27 (1986), the Court invalidated part of the Gramm-Rudman-Hollings deficit reduction bill because it improperly granted an executive function to the Comptroller General, a congressional officer.

Mistretta v. United States, 109 S. Ct. 647 (1989), however, upheld congressional delegation of rulemaking authority to an agency within the judicial branch, rather than to one within
interfere with another's performance of its constitutionally assigned function.\textsuperscript{172} The doctrine is a concern in the \textit{EPA v. DOD} setting because the judicial, rather than the executive branch, would resolve a dispute between two executive agencies.

Separating the powers of the three branches of the federal government was a central goal of the Framers of the Constitution. The principle of separation of powers was one of the few issues not heavily debated, and the three-part governmental structure was largely adopted as introduced.\textsuperscript{173} In \textit{The Federalist Papers}, Madison made clear the Framers' view that a tripartite form of government was essential to protect liberty: "The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny."\textsuperscript{174}

Still, the branches are not hermetically sealed from one another. Intertwined with the doctrine of separation of powers is the notion of a system of checks and balances among coequal branches. This system ensures that no branch improperly exerts its power beyond constitutional limits or at the expense of another coequal branch.\textsuperscript{175} Accordingly, the Constitution provides for "overlapping" as well as distinct functions.\textsuperscript{176} For example, while all legislative powers are granted to Congress, the President can veto legislation.\textsuperscript{177} Although the President is the Commander in Chief of the nation's armed forces, only Congress can declare war.\textsuperscript{178} Similarly, the President is authorized to appoint officers of the United States, subject to the advice and consent of the Senate.\textsuperscript{179} Moreover, the President does not have exclusive authority to appoint "inferior" officers; Congress can grant that power to heads of the various departments or to the courts.\textsuperscript{180}

the executive branch. \textit{Id.} at 675. Although rulemaking is primarily an executive function, it has never been confined exclusively to the executive branch. \textit{Id.} at 662 n.14. Therefore, the delegation of power in this case was not unconstitutional because it did not interfere with the proper functioning of either the executive or the judicial branch. \textit{Id.} at 664.

174. \textit{THE FEDERALIST} \textbf{No. 47} (J. Madison) (G. Wills ed. 1982). Madison cites the "oracle" Montesquieu as his source for the "invaluable precept" of separation of powers. Montesquieu's \textit{The Spirit of the Laws} is liberally quoted and eagerly accepted. \textit{Id.} at 244-46; \textit{see also} Bowsher v. Synar, 478 U.S. 714, 722 (1986) ("[E]ven a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a government that would protect liberty.").
175. The Framers were aware that the branches sometimes must act to check and restrain each other. They "regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." \textit{Buckley v. Valeo}, 424 U.S. 1, 122 (1976).
178. \textit{Id.} § 8, cl. 11; art. III, § 2, cl. 1.
179. \textit{Id.} art. II, § 2, cl. 2.
180. \textit{Id.}
A. Separation of Powers and Interbranch Interference

The Supreme Court’s current separation of powers analysis accepts some overlap between the branches. The Court now asks whether the challenged actions of one branch unduly or improperly interfere with another branch’s constitutionally assigned functions. The Court takes a practical approach, seeking to maintain the constitutional separation of powers without precluding a coordinated and efficient federal government. As Justice Jackson noted in Youngstown Sheet & Tube Co. v. Sawyer, "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

The Court’s fullest articulation of this “flexible” approach to separation of powers questions came in Nixon v. Administrator of General Services (Nixon II). Nixon II rejected the view that separation of powers requires three “airtight departments of government.” The proper separation of powers inquiry focuses instead on the extent to which an interfering branch prevented another from “accomplishing its constitutionally assigned functions.” Where it found the potential for such disruption, the Court would “determine whether that interference was justified by an overriding need to promote objectives within the constitutional authority” of the interfering branch.

Therefore, when faced with a separation of powers question, a federal court should first determine whether one branch is interfering with another branch’s constitutionally assigned functions. If the court finds no interference, the inquiry ends. If the court finds interference or disruption, however, it must balance the interfering branch’s “overriding need to promote” its constitutional objectives against the impact of the interference.

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182. See id. at 660-61.
183. Id. 659.
185. Id. at 635 (Jackson, J., concurring); see also Hampton & Co. v. United States, 276 U.S. 394 (1928). Hampton acknowledged that branches could “invoke the action of the two other branches” as long as the action invoked did not assume “the constitutional field of action” of the other branch. Id. at 406. “In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination.” Id.
187. Id. at 443.
188. Id.
189. Id.
190. Id. Recently, the D.C. Circuit has developed a doctrine of equitable discretion when faced with a separation of powers issue. Under this doctrine, when the court is asked to involve itself in an intrabranch dispute and the members of that branch have other options for relief within that branch, the court will exercise judicial restraint and dismiss the case. In
The Supreme Court has applied the *Nixon II* separation of powers analysis in several very recent opinions. In *Morrison v. Olson*, the Court upheld the Ethics in Government Act of 1978. The Act required that, under certain circumstances, a panel of judges appoint an independent prosecutor to investigate possible violations of federal criminal laws by high-ranking government officials. Before the panel could appoint a prosecutor, however, the Attorney General had to certify that there was sufficient evidence of wrongdoing to warrant an independent investigation. Since federal law enforcement is traditionally thought to be exclusively an executive branch function, opponents argued that the special prosecutor acted as an executive officer and thus should be appointed by the executive branch.

The Court disagreed. First, the Court held that the special prosecutor was an inferior officer whose appointment was not necessarily an executive function. Second, the special judicial panel could only appoint the independent prosecutor upon the specific request of the Attorney General. Accordingly, the decision to conduct the investigation and to prosecute remained with the executive branch. The Act also left with the Executive the power to remove the independent prosecutor upon a showing of "good cause." The Act thus did not interfere with the President's constitutionally assigned power to decide whether and

Humphrey v. Baker, 848 F.2d 211 (D.C. Cir.), *cert. denied*, 109 S. Ct. 491 (1988), the D.C. Circuit applied equitable discretion. The dispute, an attack on the constitutionality of the Federal Salary Act of 1976 by a Senator and five members of the House, was seen as one within the domain of the legislative branch, and an "in house" remedy was available. Accordingly, "[u]nder the doctrine of equitable discretion, the availability of an internally available remedy to Members of Congress means that it would be an abuse of discretion for the judiciary to entertain the action." *Id.* at 214.

The court has applied equitable discretion to several disputes within the legislative branch, but has not yet applied it to any intraexecutive disputes. *See Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873, 877-82 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

193. *Id.* § 593(b)(1). *See In re Olson*, 818 F.2d 34, 39 (D.C. Cir. 1987) (describing the historical basis for the belief that such independent prosecutors were needed).
196. *Id.* at 2608-11.
197. *Id.* at 2608-09.
198. *Id.* at 2621.
199. In his dissent, Justice Scalia argued that the Act's provision for the Attorney General to apply for a prosecutor at his discretion was farcical. *Id.* at 2624 (Scalia, J., dissenting). He asserted that the political consequences of failing to appoint a prosecutor in the face of allegations of criminal activity by an executive official practically force the Attorney General to request an independent prosecutor. *Id.* Justice Scalia also argued that the statute gave the Attorney General little choice but to request a prosecutor because the statute is "acrid with the smell of threatened impeachment." *Id.* at 2625.
200. *Id.* at 2619.
when to investigate and enforce the laws. The inquiry ended here because the Act did not interfere with the Executive's constitutional duties. No assessment of the overriding need for the interference was required because there was no interference.

More recently, in *Mistretta v. United States*, the Court addressed a separation of powers challenge to the United States Sentencing Commission. Congress created the Commission within the judicial branch and granted it the authority to promulgate sentencing guidelines. The Commission was not composed entirely of judges, but "at least three of the members [were] to be Federal judges." 

However, the Court concluded that the promulgation of guidelines by the Commission did not violate the separation of powers. The Court first determined that the commission scheme did not allow the judiciary to encroach on an area that was more appropriately performed by the legislative branch. Furthermore, promulgating guidelines was not an exclusively executive function; the promulgation of sentencing standards "has been and should remain 'primarily a judicial function.'" Accordingly, under the *Nixon II* analysis, the Sentencing Commission did not preclude or interfere with another branch's execution of its constitutionally assigned functions.

204. *Id.* at 675.
205. *Id.* at 654-58, 660-67.
207. In *In re President's Comm'n on Organized Crime (Scarfo)*, 783 F.2d 370 (3d Cir. 1986), the court applied the *Nixon II* analysis to the question of whether the inclusion of a retired Supreme Court Justice and an active circuit judge on the President's Commission on Organized Crime violated the Constitution's separation of powers. The court asked "whether judicial membership on a commission prevents [the Commission] from carrying out its executive duties, and whether participation by the judges will disrupt the operation of the courts." *Id.* at 380. The court held that the presence of a judge on the Commission does not prevent it from performing its function: "That a member of the Commission is a judge does not inhibit the use of [the Executive functions]." *Id.* at 380-81. As for whether the presence of the judge on the Commission interfered with the operation of the courts, the court found that the judge was not serving as a representative or member of any court and was not purporting to act on behalf of any court. *Id.* A judge sitting on the Commission could recuse herself from any later cases that raised a question of bias without impairing the court's ability to perform its constitutionally assigned functions. *Id.*

Much of the court's analysis was based upon the historical participation of judges and Justices on nonjudicial panels. The court determined that the fact that the activity was nonjudicial did not mean that it violated separation of powers:

We assume, without deciding, that under some circumstances judges may violate the principle of separation of power by voluntarily undertaking nonjudicial activity which intrudes substantially in the domain of another branch or so weakens their ability to function as Article III judges that the courts are substantially hindered in
Second, the Court examined whether the Commission threatened the "institutional integrity" of the judicial branch. 208 The challengers argued that the Commission posed such a threat by involving judges in rulemaking, by giving the President removal power over the judges' commission posts, and by mixing nonjudges with judges on the Commission. 209 The court held that developing sentencing guidelines would not impair the integrity of the judicial branch any more than developing rules of procedure. 210 Judges would serve on the Commission as individuals; this would not threaten the integrity of their judicial office. 211 Finally, the President's removal power would not extend to the judges' role as judges and thus would not undermine the safeguards of article III. 212 Since no significant interbranch interference was found, the Court was not obliged to consider whether overriding justifications existed for the interference.

B. Separation of Powers and Justifiable Interference

Courts have not invalidated all exercises by one branch of power normally reserved to another branch. Minimal interference by one branch in another's functions may not rise to the level of disrupting the other branch or stripping it of fundamental powers. 213

the proper performance of their duties. In this analysis, however, care must be taken not to confuse ethical consideration and accepted notions of propriety in judicial conduct with constitutional imperatives. Id. at 379.

The movant in In re President's Comm'n on Organized Crime (Scaduto), 763 F.2d 1191 (11th Cir. 1985), an earlier case, had objected to a subpoena issued by the President's Commission on Crime, also alleging that the inclusion of federal judges on the Commission violated the separation of powers doctrine. Id. at 1193. The court in Scaduto, however, applied a functional standard to the case, asking, "does the imposition of powers traditionally associated with one branch of government on officials of another branch interfere with their ability to perform their constitutionally-required duties in the branch of which they are a part?" Id. at 1196-97. The opinion noted that "[i]mpartiality is one of the central, constitutionally-ordained, requirements of the federal judicial office" in concluding that the presence of article III judges on the Commission was unconstitutional. Id. at 1197. The court reasoned that the judges had to adopt a "pro-government perspective," which clashed with their obligation to remain neutral. Id. The court also stated that even if the judge could remain neutral, the litigants might not be able to sustain faith in his or her impartiality. Id.

Rejecting the Scaduto analysis, the Scarfo court stated that the real issue to be discussed was the voluntary acceptance of authority by the judges. It noted that the Scarfo court objected to the "confering" of powers on a judge and reasoned that the attention should be focused on the judge's conduct and not on the conduct of "those who tendered, but did not impose, the powers." Scarfo, 783 F.2d at 378.

209. Id. at 653, 660-61.
210. Id. at 662, 664-65.
211. Id. at 671.
212. Id. at 674-75.
213. See, e.g., Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856-57 (1986) (CFTC's state law counterclaims and CFTC's assumption of jurisdiction over common law counterclaims was a de minimis intrusion on the judiciary branch and did not violate separation of powers); Lear Siegler, Inc., Energy Prod. Div. v. Lehman, 842 F.2d 1102, 1112 (9th
In Lear Siegler, Inc., Energy Products Division v. Lehman,\textsuperscript{214} the Navy challenged the constitutionality of subtitle D of the Competition in Contracting Act of 1984.\textsuperscript{215} The Act authorized the General Accounting Office and the Comptroller General to stay contested bid awards by federal agencies.\textsuperscript{216} When President Reagan signed the Act, he commented that the stay provision improperly assigned an article II executive duty, government procurement, to congressional officers.\textsuperscript{217} OMB directed federal agencies to disregard the stay provisions of the Act.\textsuperscript{218} Lear Siegler filed a bid protest with the Navy, but, contrary to the terms of the Act, the Navy refused to stay the award.\textsuperscript{219}

When Lear Siegler sued, the Navy argued that the Act's stay provision violated the separation of powers doctrine by intruding into the functions of the executive branch.\textsuperscript{220} The Ninth Circuit rejected the claim, finding that the intrusion was minimal and that the congressional goal of ensuring competitive bidding for federal contracts outweighed the minimal intrusion.\textsuperscript{221}

Of course, the function of the executive branch is not limited to the actual execution of laws. Its functions encompass internal fact gathering, analysis, and policy consultation before the laws are carried out.\textsuperscript{222} The Executive also legitimately conducts internal monitoring to achieve consistency of agency actions.\textsuperscript{223}

A potential incursion into the deliberative aspect of the executive branch's function was addressed in Washington Legal Foundation v. Department of Justice (WLF).\textsuperscript{224} In WLF, the district court considered whether the Federal Advisory Committee Act (FACA)\textsuperscript{225} applied to the American Bar Association (ABA) Committee that advises the President on potential judicial nominees. FACA requires advisory committees to hold open meetings and to provide the public with access to their

\textsuperscript{214} 842 F.2d 1102 (9th Cir. 1988).
\textsuperscript{216} Id. § 3553(c)(1), (d)(1).
\textsuperscript{217} Lear Siegler, 842 F.2d at 1105.
\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id. at 1111-12. See also supra note 207 for discussion of In re President's Comm'n on Organized Crime (Scarfo), 783 F.2d 370 (3d Cir. 1986) (judicial membership on executive branch commission does not prevent commission from carrying out its executive duties).
\textsuperscript{222} See, e.g., Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981).
\textsuperscript{223} Id.
records.\textsuperscript{226} FACA also requires committee membership to be “fairly balanced” in terms of political perspective.\textsuperscript{227}

The \textit{WLF} court found that the ABA Committee met the statutory definition of an advisory committee under FACA.\textsuperscript{228} The court then questioned whether the application of FACA to the ABA Committee violated separation of powers.\textsuperscript{229} Article II provides that the President “shall nominate, and by and with Advice and Consent of the Senate, shall appoint” judges to federal courts.\textsuperscript{230} The \textit{WLF} court found that the Constitution delineated a specific division of power between the executive and legislative branches: the President nominates judges and the Senate provides its advice, and perhaps its consent.\textsuperscript{231} The application of FACA would require the ABA Committee to make public its counseling of the Attorney General. Such an application of FACA to the ABA Committee “would potentially inhibit the President’s freedom to investigate, to be informed, to evaluate and to consult during the nomination process.”\textsuperscript{232} The court stressed the “importance of confidentiality of communications and deliberations in the exercise of executive functions.”\textsuperscript{233} The court therefore found that the application of FACA to the ABA Committee posed a “potential for significant disruption.”\textsuperscript{234}

Having found an intrusion, the court then applied the \textit{Nixon II} balancing test to determine whether the intrusion violated separation of powers. The court concluded that there was no overriding congressional interest in FACA’s interference in the Executive’s nomination function.\textsuperscript{235} The court held that any congressional interest in judicial nominations was addressed in the Senate’s advice and consent function.\textsuperscript{236} Consequently, “any need for applying FACA to the ABA committee [was] outweighed by the President’s interest in preserving confidentiality and freedom of consultation in selecting judicial nominees.”\textsuperscript{237}

In \textit{Public Citizen v. Department of Justice},\textsuperscript{238} the Supreme Court affirmed the district court’s judgment in \textit{WLF}, but construed FACA narrowly to avoid addressing the separation of powers issue. The Court noted that applying FACA to the ABA Committee “would present for-

\begin{itemize}
\item \textsuperscript{226} \textit{Id.} §§ 8-10.
\item \textsuperscript{227} \textit{Id.} § 5(b)(2), (c).
\item \textsuperscript{228} Washington Legal Found. v. Department of Justice, 691 F. Supp. 483, 491 (D.D.C. 1988).
\item \textsuperscript{229} \textit{Id.}
\item \textsuperscript{230} U.S. CONST. art. II, § 2, cl. 2.
\item \textsuperscript{231} \textit{WLF}, 691 F. Supp. at 491-92.
\item \textsuperscript{232} \textit{Id.} at 493.
\item \textsuperscript{233} \textit{Id.} at 494 (citing United States v. Nixon (\textit{Nixon I}), 418 U.S. 683 (1974)).
\item \textsuperscript{234} \textit{Id.} at 495.
\item \textsuperscript{235} \textit{Id.} at 495-96.
\item \textsuperscript{236} \textit{Id.} at 495.
\item \textsuperscript{237} \textit{Id.} at 496.
\item \textsuperscript{238} 109 S. Ct. 2558 (1989).
\end{itemize}
In deciding that FACA did not cover the ABA Committee, the Court acknowledged the influence of its traditional reluctance to decide important constitutional questions unnecessarily. 240

WLF and Public Citizen suggest that constitutional protections extend to the President’s ability to obtain confidential advice and to reach executive decisions without interference from other branches. It is unclear whether this shield reaches beyond functions that the Constitution explicitly commits to the President and for which it provides explicit checks. Within those areas, however, any interference with the President’s decisionmaking may violate the Constitution’s separation of powers unless the intruding branch can demonstrate an overriding interest.

C. EPA v. DOD: Nixon II Applied

A hypothetical suit by EPA against DOD under federal hazardous waste laws would trigger the two part separation of powers inquiry set out in Nixon II. The threshold question would be whether judicial resolution of that intrabranch dispute would significantly interfere in the Executive’s performance of its constitutionally assigned functions. Significant interference could only be justified if it advanced an overriding constitutional concern.

Intrabranch litigation of this type should not interfere to any great extent with the delegated article II functions of either agency. EPA, by suing DOD, would be pursuing the constitutional executive duty to take care that the laws are faithfully executed. 241 Judicial resolution of the dispute would threaten no direct interference with that core function of the executive branch. Judicial resolution could, however, interfere more seriously with the ability of DOD, or some other defendant agency, to execute its specific mission. The outcome of the inquiry into this latter form of interference would be necessarily fact bound. 242 DOD’s defense mission is certainly a critical function of the executive branch. The typical court order requiring cleanup of hazardous waste, however, would seem unlikely to produce unconstitutional interference with DOD’s mission. 243

239. Id. at 2572.
240. Id. Three justices found that FACA covered the ABA committee, but would have invalidated the application of the statute as an encroachment on the President’s exclusive nominating power under section 2 of article 3. Id. at 2573-84 (Kennedy, J., concurring in the judgment).
242. For example, a judicial order to drill a monitoring well in close proximity to an Air Force bomber runway might present such interference by impairing the defense function of the runway. See infra note 246. One would hope a federal court would have sufficient common sense and creativity to find an alternative compliance mechanism.
243. Furthermore, the environmental statutes contain provisions allowing the President to
Thus, the principal separation of powers issue in *EPA v. DOD* would be whether judicial resolution of the case would interfere with the President's deliberative function, which includes the executive duty to coordinate the execution of the laws. If EPA won its case, the court would presumably issue an order requiring compliance with hazardous waste cleanup standards. A court order might impinge on the polluting agency's resources and prerogatives more than a settlement negotiated within the executive branch. A settlement might consider policies unrelated to the environmental laws at issue, while a court's resolution would be more closely tied to the specific provisions of the applicable statutes. Although a court might defer to EPA's interpretation of the standards, its statutory interpretation would be controlling over the agency that manages the waste site.

These effects seem unlikely to rise to the level of impermissible interference with constitutionally assigned executive functions. First, the President would retain prosecutorial discretion, a prerequisite to any EPA action against DOD. EPA could not bring suit without at least the tacit consent of the President. The President could always order dismissal or intrabranch resolution of an environmental dispute. By allowing EPA to sue, the President would simply be expressing a preference in favor of a judicial arbiter for intrabranch disputes about statutory interpretation in certain circumstances.

Second, a court decree resulting from an EPA lawsuit would seem no more intrusive or burdensome on the functioning of the polluting agency than if the complaining party were a state or an individual. As exempt virtually any facility from any requirement, as long as she provides an explanation of what she is doing. See, e.g., RCRA § 6001, 42 U.S.C. § 6961 (1982); CERCLA § 120(j), 42 U.S.C. § 9620(j) (Supp. V 1987).

244. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 859-66 (1984) (stating that policy arguments concerning environmental protection should be addressed to legislators or administrators, and that, in the absence of clear legislative intent to the contrary, EPA's interpretation of a statute is entitled to deference).

245. The prosecutor's decision has "long been regarded as the special province of the Executive Branch" because it is that branch's constitutional mandate to "take care that the laws be faithfully executed." *Heckler v. Cheney*, 470 U.S. 821, 832-35 (1988) (decision not to prosecute unsuitable for judicial review under the Administrative Procedures Act because it was largely a discretionary decision best left to agency expertise).

But see *Rather, Executive Privilege, Self Incrimination, and the Separation of Powers Illusion*, 22 UCLA L. REV. 92, 102 (1974). Rather argues that the Constitution does not assign prosecutorial functions to the President. He claims that Congress distributes that function among the several executive officers via legislation. *Id.* Accordingly, no true intrabranch dispute arises when one executive branch officer sues another.

246. Environmental compliance can threaten significant interference with the central mission of another federal agency. A good example is a pre-CERCLA case involving an Air Force base in Michigan that served Strategic Air Command (SAC) bombers. Under a 1979 consent decree with the Michigan Department of Natural Resources (MDNR), the Air Force agreed to a major groundwater monitoring and remediation program for spilled fuels and solvents. One plume of groundwater contamination passed under the Alert Apron—the staging
noted earlier, such suits are explicitly allowed by some statutes,247 and the individuals free to bring suit under these statutes are under no obligation to seek to resolve problems by means other than litigation.

If EPA sued DOD, however, both parties would be within the federal government and within the same branch, and thus presumably subject to some intrabranch dispute resolution procedures. In fact, Executive Order 12,088 could be viewed as a mandatory remedy that EPA must use before resorting to litigation.248 Such dispute resolution procedures would provide both an initial reality check for the agencies and a forum for political consideration of the sister agency’s mission. Thus, most litigation in this context would probably be a last resort, resulting from EPA’s perception that the other agency would act only if compelled.

Finally, statutory interpretation is a classic function of the judiciary. Courts routinely enforce EPA’s regulations and orders in environmental litigation. Courts regularly adjudicate disputes involving statutory restrictions on the executive branch and order agencies to comply with statutory mandates.249 Those orders sometimes conflict with an executive branch interpretation of the laws it is executing. The courts, however, cannot simply interfere in the activities of the Executive at will; instead, courts gain this power only to the extent that an agency’s execution of a statute conflicts with the judicially determined meaning of a statute passed by the legislative branch. A court may exercise its traditional function of judicial review whenever an executive interpretation of a statute is challenged in court. The court’s role is no less judicial when the challenge comes from within the executive branch.

Although judicial resolution of a dispute between EPA and DOD could potentially present more than a de minimis intrusion on the executive branch,250 the policy objectives of Congress and the constitutional

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247. See supra notes 33-34 and accompanying text.
248. See supra text accompanying notes 71-76.
249. See e.g., Morrison v. Olson, 108 S. Ct. 2597 (1988) (holding that the fact that the Ethics in Government Act restricted the Attorney General’s right to remove independent counsel did not violate the separation of powers doctrine).
250. Note, however, that several statutes already allow for the federal government to sue other executive agencies. See, e.g., Civil Service Reform Act of 1978 § 701, 5 U.S.C. §§ 7103, 7104(f)(2), 7118, 7123(b) (1982) (Federal Labor Relations Authority may sue executive agen-
role of the courts could override the intrusion into the Executive's constitutional function. Resolving disputes is the essence of the constitutional judicial power.

Congress' constitutional function includes enacting legislation for the benefit and welfare of the nation. An *EPA v. DOD* lawsuit would almost by definition serve a congressional goal. Since the early 1970's, Congress has enacted a series of statutes designed to protect and clean up the environment. Congress delegated enforcement authority to EPA. The restrictions and conditions that Congress placed on these grants of power are designed to insure that EPA carries out congressional mandates in the manner Congress desires. EPA is thus a hybrid agency, part of the executive branch but compelled to carry out the congressional will through specific powers delegated by Congress. Shutting the courts out of all intrabranch disputes involving environmental violations would thus frustrate Congress' statutory purpose. At least with respect to EPA suits against other executive agencies, a prohibition against intraexecutive suits would allow the executive branch to prevent or impede EPA's fulfillment of the functions Congress delegated to it. As such, it would represent a *de facto* statement that the President was not only free not to enforce the law, but also equally free to interpret the law. Such a prohibition would allow the unitary executive to become the omnipotent executive.

**CONCLUSION**

Despite some powerful policy arguments to the contrary, federal courts have generally been willing to adjudicate disputes between instrumentalities of the executive branch. Under article III, the courts have required that the disputed issue be within the traditional purview of the courts and that the setting of the dispute guarantee that the contending parties have genuinely adverse interests. As a plaintiff suing under environmental statues, EPA is sufficiently independent of and adverse to its sister agencies, and environmental enforcement actions are clearly within the traditional scope of the judicial branch. It would be surprising, there-
fore, if a complaint filed by EPA against another executive branch agency failed to survive a challenge based on article III jurisdiction.

However clear the article III case or controversy issue is under the case law, the separation of powers question is more complex. Part of the problem is that EPA is a hybrid agency with both executive and legislative authority. That is, EPA must carry out powers delegated to it by Congress, while at the same time existing as part of the executive branch of the government. Where the goals of the legislative and the executive branches conflict, EPA is perhaps inevitably caught in the crossfire. This situation itself justifies resolution of such conflicts in statutory interpretation and application by the judicial branch on a case-by-case basis in accordance with article III. Afterall, the traditional role of our judiciary is precisely to "say what the law is." 254
