

When Agencies Sue Each Other

Author : Margaret Kwoka

Date : January 6, 2020

Bijal Shah, *Executive (Agency) Administration*, 72 **Stan. L. Rev.** __ (forthcoming), available at [SSRN](#).

Independent agencies are subject to a host of interesting academic debates, including debates that go to the heart of what makes an agency independent and which agencies qualify. Most of those debates focus, however, on the relationship between independent agencies and the President. Some of them explore the relationship between independent agencies and the public, the courts, or Congress. But the horizontal examination of the relationship between independent agencies and executive agencies has gone under-examined.

In a meticulous accounting, Professor [Bijal Shah](#) documents one fascinating aspect of that relationship in her forthcoming article, *Executive (Agency) Administration*. There, she focuses on litigation brought by the Justice Department (DOJ) on behalf of executive agencies *against* independent agencies. This litigation dynamic is unusual, but as she shows, not unheard of; her painstaking gathering of all such cases since 1900 yielded about 175 cases. What is more, these cases are incredibly illuminating. The vast majority fall into one of three categories. First, when an independent agency adjudicates a matter against an executing agency as a party—typically labor-related—these cases serve as the means for judicial review. Second, when independent agencies assert power that interferes with executive agencies' own authority, lawsuits serve to protect executive agencies' purview. And third, there is a smaller category of cases where DOJ has challenged independent agency decisions to approve certain antitrust matters.

Even just identifying this body of litigation and describing how it has evolved over time contributes meaningfully to our understanding of the relationship between executive and independent agencies. This sort of work—using original data to illuminate a previously unexamined aspect of administrative law—is gaining traction in the field, and with good reason.

Beyond these insights, however, Professor Shah goes much further and demonstrates how this litigation actually forms a powerful tool of executive control over independent agencies. While Shah explains that sometimes these decisions are made at the presidential level, and thus can be categorized as an attempt to exert presidential influence over independent agencies along the lines of now-Justice Kagan's "[presidential administration](#)," more often the decisions are made by career DOJ staff at the behest of executive agencies as their clients. These instances mark a very different kind of balance of power between executive and independent agencies.

And the executive agencies are very successful in this litigation, winning around two-thirds of the cases they bring. This flips traditional administrative challenges on their head; typically *defending* agencies [win about two-thirds of the time](#). Indeed, as Professor Shah explains, this phenomenon is one example of judicial review as an ex post check on independent agencies' decision-making, where ex ante political checks are not possible. Some of her data even suggest that the quality of independent agency decision-making may truly be improved by these checks—-independent agencies' least defensible decisions are overturned routinely in this context.

Though there are many other aspects of Professor Shah's work that are notable, including implications

for judicial standards of review of independent agency actions, I found the most salient her observations about implications for aggrandizement of presidential control over independent agencies. As she says, litigation on behalf of executive agencies against independent agencies can easily be harnessed for the political aims of the president. Although some past examples suggest court skepticism in cases where such goals are blatant, the changing nature of the presidency and the Supreme Court may, in her view, suggest more openness to that strategy in the future.

Her evidence is convincing, and in some ways quite troubling. In particular, Justice Gorsuch recently [rejected](#) the NLRB's interpretation of its own organic statute in favor of DOJ's views on the Federal Arbitration Act, a statute of general applicability where DOJ has no special expertise. And now-Justice Kavanaugh, then a D.C. Circuit judge, wrote a panel decision and a [dissent](#) in the en banc decision that later reversed it, taking the position that certain kinds of for-cause removal restrictions are unconstitutional, demonstrating some appetite for additional presidential control over independent agencies. If these trends hold, and if the current or future administration shows a willingness to engage the courts for political ends, we may see this phenomenon gain traction.

Professor Shah's ability to shed light on an under-appreciated aspect of administrative law is a refreshing addition to the literature that I am certain will be the beginning of much more consideration of the topic in the future. I personally believe that her troublesome predictions about the future of independent agencies' independence will prove both prescient and problematic for administrative law.

Cite as: Margaret Kwoka, *When Agencies Sue Each Other*, JOTWELL (January 6, 2020) (reviewing Bijal Shah, *Executive (Agency) Administration*, 72 **Stan. L. Rev.** __ (forthcoming), available at SSRN), <https://adlaw.jotwell.com/when-agencies-sue-each-other/>.