

## **ABSTRACT**

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*The Consequences of DOJ Control of Litigation on Agencies' Programs*

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Abstract by Michele Richman

This piece discusses the consequences of DOJ control of litigation on agencies' programs. The DOJ has a monopoly over government litigation because the government must speak with one voice and consistency can only be achieved by a centralized litigation authority. This article examines what effect if any DOJ control has on the way agencies carry out their substantive programs and the effectiveness with which they do so. The authors consider whether the effect of such an arrangement might reduce the scope and effectiveness of agency enforcement, lead to avoidable courtroom losses, and might encourage DOJ to adopt an aggressive stance to its client agencies, directly influencing or interfering with agencies' substantive decisions. This Article reviews instances in which Congress has considered shifting control of litigation from the DOJ to agencies because of serious doubts as to the DOJ's effectiveness in representing the agency. This case by case study demonstrates that political pressures often persuade Congress to give agencies independent litigating authority in direct response to a perceived failure of the DOJ. The authors look at the DOJ's adequacy of representation, legal grounds presented, refusal to bring cases, and skewing enforcement decisions. They conclude that the DOJ's control of litigation is not inconsequential but its effects are hard to quantify and are generally influenced by other factors. The Article proposes that a fundamental restructuring is unwarranted but that there may be room for greater agency lawyer involvement in defending regulations, and DOJ must operate as a lawyer for a client, not as a client's board of directors.