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The Manacled Octopus: The Unitary Executive and EPA Enforcement Involving Federal Agencies

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THE MANACLED OCTOPUS: THE UNITARY EXECUTIVE AND EPA ENFORCEMENT INVOLVING FEDERAL AGENCIES

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I. INTRODUCTION

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) affords the United States, particularly the Environmental Protection Agency (EPA), a powerful enforcement tool for obtaining timely private-party cleanups of Superfund sites and recovering costs expended in governmental cleanups.[2] However, CERCLA enforcement becomes much more complex when federal agencies are considered potentially responsible parties (PRPs) at Superfund sites, owing to the Executive Branch's longstanding adherence to the "Unitary Executive" principle.[3] Under that principle, inter-agency disputes, including enforcement of CERCLA by EPA against potentially liable federal agencies, are considered matters for resolution within the Executive Branch and generally are not submitted to the federal courts.

Although CERCLA clearly designates federal and state agencies as potentially liable "persons,"[4] the Executive Branch has con-

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2. *See* Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601-9675 (2000) (establishing procedures for recouping Superfund remediation costs).

3. *See, e.g.*, Cass R. Sunstein, *The Council on Competitiveness: Executive Oversight of Agency Rule Making: The Myth of the Unitary Executive*, 7 ADMIN. L.J. AM. U. 299, 300 n.4 (1993) (discussing Executive's adherence to Unitary Executive theory); *see also* Myers v. United States, 272 U.S. 52, 135 (1926) (recognizing implicitly Executive's adherence to Unitary Executive principle and that President has authority to review other executive officials' actions). The "Unitary Executive" principle is essentially that all components of the Executive Branch are "unified" meaning they all constitute one entity. *See* Nelson D. Cary, *A Primer on Federal Facility Compliance With Environmental Laws: Where Do We Go From Here?*, 50 WASH. & LEE L. REV. 801, 828-32 (1993) (describing Unitary Executive theory). The President is ultimately accountable for all the actions of the Executive Branch because the President is the head of the Executive Branch. *Id.* According to the Unitary Executive principle, under the Case or Controversy Clause in Article III of the United States Constitution, executive agencies cannot sue each other because they are in effect the same party. *Id.*

4. *See* CERCLA § 101(21), 42 U.S.C. § 9601(21) (2000) (defining "person" as used in CERCLA).

sistently taken the position that EPA cannot independently enforce CERCLA in the federal courts against federal agency PRPs (federal PRPs), because to do so would violate the United States Constitution.[5] Notwithstanding this policy, EPA frequently finds itself (sometimes along with other federal agencies which have delegated enforcement authority under CERCLA)[6] a plaintiff in CERCLA enforcement actions involving federal PRP defendants.[7] In such cases, the United States Department of Justice (DOJ) represents all federal agencies involved.[8] Thus DOJ, as the litigation arm of the federal Executive, frequently represents both EPA and federal PRP defendants in the same CERCLA litigation.[9] Yet, it is not at all clear that the Unitary Executive principle precludes adjudications between EPA and federal PRPs as a matter of law, and therefore requires representation of both sides by DOJ before the federal courts.[10]

Reliance on the Unitary Executive by the United States can be attributed to policies of past administrations, going at least as far back as the Reagan Administration.[11] However, some writers have

5. *See Environmental Compliance by Federal Agencies: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong. 668, 675 (1987) (memorandum from John Harmon, Ass't Att'y Gen., Office of Legal Counsel, to Michael J. Egan, Assoc. Att'y Gen.) (allowing EPA to sue another agency would violate established principle that "no man can create a justiciable controversy against himself").

6. *See* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987) (designating federal natural resource trustees). Most frequently such agencies are the federal Natural Resources Trustees, the National Oceanographic and Atmospheric Administration and the Department of the Interior, but they sometimes include agencies with delegated enforcement authority, such as Department of Defense (DOD) and the Department of Energy (DOE). *See id.*; *see also* Exec. Order No. 13,016, 61 Fed. Reg. 45,871 (Aug. 30, 1996) (amending Exec. Order No. 12,580 to delegate CERCLA § 106 order and § 122 settlement authority with respect to federal facilities to a number of federal agencies, including DOE and DOD).

7. Federal agencies alleged to be liable under CERCLA § 107 are usually brought into litigation following the filing of a government complaint through third-party counter-claims against the unitary United States.

8. For a further discussion about federal agencies involved, see *supra* note 6 (explaining DOJ's representative role in cases with multiple PRPs).

9. *See* CERCLA § 106(a), 42 U.S.C. § 9606(a) (2000) (stating that Attorney General will "secure such relief as may be necessary to abate such danger or threat" caused by hazardous substances' release).

10. *See* Cary, *supra* note 3 at 827-30 (explaining Unitary Executive principal); *See generally* Steven G. Calabresi and Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992) (expanding on Unitary Executive theory); Michael Herz, *United States v. United States: When Can The Federal Government Sue Itself?* 32 WM. & MARY L. REV. 893 (1991) (discussing Unitary Executive theory generally).

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

questioned whether the Constitution precludes EPA from taking judicial enforcement action against federal PRPs, or requires that DOJ act as the arbitrator of potentially justiciable inter-agency CERCLA disputes.[12] In this view, adherence to the Unitary Executive would appear to be strictly a matter of policy, and the question posed becomes: what interests does this policy serve? The obvious answer is that it is designed to strengthen the executive by preserving its policy-making prerogative, rather than weakening the executive by submitting intra-Branch disputes for resolution by the judiciary.

Such a rationale, while persuasive in the context of policy development, is less persuasive when applied to enforcement of environmental laws by one agency against another. It is often assumed that a "unitary" executive, hierarchical and centralized, is strongest.[13] However, in the enforcement context, this Article proposes a paradigm of the modern executive as a complex organism whose various departments and agencies function as multiple appendages: an octopus, if you will. The strength of such an executive depends not upon rigid central control, but upon the untrammeled, vigorous and independent operation of its agency "arms." In the CERCLA enforcement context, restricting the free use of enforcement discretion (as well as defense capability) of executive agencies by exercising centralized control of the type usually associated with policy development, in effect, manacles the octopus, rendering the executive weaker and less effective.

Congress has the power to grant independent representation in CERCLA cases involving federal PRPs to plaintiff federal agencies, including EPA.[14] This might alleviate some of the difficulties that arise when DOJ represents EPA as plaintiff and federal PRP agencies as defendants in the same Superfund action.[15] It might also help to ensure balanced representation of *all* federal agencies'

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principle's origins). Rosenberg states, "[T]he theory of the 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." *Id.*

12. *See id.*; *see also* Sunstein, *supra* note 3, at 301 (discussing adherence to Unitary Executive theory).

13. *See* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 37-38 (1995) (justifying "Unitary Executive" principle as means to strengthen Executive).

14. See *infra* notes 153-59 and accompanying text for a discussion of possible alternatives to strict adherence to the Unitary Executive.

15. See *infra* notes 106-51 and accompanying text for a discussion on how appearance of conflict of interest presented by Unitary Executive principle could be mitigated by independent representation in enforcement of CERCLA.

interests in Superfund litigation involving federal PRPs[16] and ensure consistency in EPA's dealings with all PRPs in Superfund matters.[17] Although Superfund has been amended a number of times, Congress has not elected to make this change and is unlikely to do so.[18]

There is a simpler solution which could be implemented within the Executive Branch and is arguably consistent with the Unitary Executive principle. This would be to establish staff-level "firewalls" that would separate opposing government counsel in such cases.[19] Such firewalls could be instituted as a matter of general policy or on a case-by-case basis. They would prevent the exchange of information at the governmental staff level and allow governmental counsel to advocate freely on behalf of their respective client agencies in negotiations and in court, and would not disturb the function of DOJ management as policy-maker or executive mediator of inter-agency disputes arising in the course of litigation.[20]

This Article first briefly outlines CERCLA's statutory scheme and then discusses some of the specific problems that can arise in the litigation context in connection with the Unitary Executive Principle.[21] Section II provides an overview of CERCLA.[22] Section III undertakes an analysis of the case law concerning the constitutionality of inter-agency litigation.[23] Section IV reviews the American Bar Association's position on conflicts of interest as applied to government counsel in the context of representation of federal

16. See *infra* notes 48-53 and accompanying text for a discussion of imbalance in representation of federal interests in CERCLA settlements that can be rectified.

17. See *infra* notes 42-47 and accompanying text for a discussion of the inconsistency in EPA's dealings with all PRPs that can be remedied.

18. CERCLA has been amended several times since originally enacted in 1980. It was subsequently amended by the Superfund Amendments and Reauthorization Act in 1986. *See* Pub. L. No. 99-499, 100 Stat. 1613 (1986). CERCLA was next amended in 1992 by the Community Environmental Response Facilitation Act. *See* Pub. L. No. 102-426, 106 Stat. 2174 (1992). Then, in 1996, CERCLA was amended by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act. *See* Pub. L. No. 104-208, 110 Stat. 3009-462 (1996). Finally, in 2002, changes to CERCLA were made by the Small Business Liability Relief and Brownfields Revitalization Act. *See* Pub. L. No. 107-118, 115 Stat. 2356 (2002).

19. See *infra* notes 159-60 and accompanying text for a discussion of the second proposed solution.

20. See *infra* notes 107-63 and accompanying text for a more complete discussion of firewalls and the ethics of dual representation.

21. See *infra* notes 27-67 and accompanying text for a discussion of CERCLA's statutory scheme and some problems with enforcement.

22. *See id.* (outlining CERCLA generally).

23. See *infra* notes 68-105 and accompanying text (discussing potential constitutional problems with inter-agency representation).

plaintiff agencies and federal PRPs in Superfund cases.[24] Finally, Section V explores the question of independent EPA representation in CERCLA cases involving federal PRPs[25] and proposes an Executive Branch solution: implementation of staff-level firewalls.[26]

II. THE UNITARY EXECUTIVE IN THE CERCLA CONTEXT

A. CERCLA's Statutory Scheme

Federal agencies are frequently linked to privately-owned Superfund sites as generators or former owner/operators within the meaning of section 107(a) of CERCLA.[27] Section 107(a) generally imposes liability for response costs upon "any person" falling within the four broad classes set forth therein, including generators, transporters and owners/operators.[28] Section 101(21) of CERCLA currently includes the United States Government in the definition of "person."[29] Because the United States takes the position that the Unitary Executive principle precludes adjudication of disputes between federal agencies, federal agencies are not named as defendants in cost-recovery complaints brought by DOJ under section 107 of CERCLA.[30] However, EPA may issue information requests and notices of potential liability to federal agencies and attempt to require them to participate in Superfund response actions. Federal PRPs may play a significant role as generators of hazardous substances sent to a site or may be liable as former

24. See *infra* notes 106-51 and accompanying text (squaring ABA rules with dual representation).

25. See *infra* notes 152-58 and accompanying text (discussing independent counsel's role in inter-agency representation).

26. See *infra* notes 159-60 and accompanying text (hypothesizing about implementing staff-level firewalls).

27. *See* CERCLA §§ 107(a)(1)-(4), 42 U.S.C. §§ 9607(a)(1)-(4) (2000) (setting forth categories of liable parties under CERCLA). Subsections 107(a)(1) and (2) impose liability on "owners" and "operators" of facilities from which there has been a release of hazardous substances. This is commonly referred to as "owner/operator" liability. *Id.* Subsections 107(a)(3) and (4) impose liability upon generators and transporters of hazardous substances. This is commonly referred to as "generator" or "transporter" liability. *See id.*

28. *See id.* (detailing classes liable for costs consistent with national emergency plan).

29. *See* CERCLA § 101(21), 42 U.S.C. § 9601(21) (defining "person" as used in CERCLA).

30. *See* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987) (stating "Sec. 6. Litigation. . . any representation pursuant to or under this Order in any [CERCLA] judicial proceedings shall be by or through the Attorney General."); *see also* Lieutenant Colonel Charles L. Green, *A Guide to Monetary Sanctions for Environmental Violations by Federal Facilities*, 17 PACE ENVTL. L. REV. 45, 57 (1999) (stating DOJ "has long maintained that EPA lacks judicial enforcement authority over federal agencies and may not bring suit against them").

owner/operators of a site. For that reason, private PRPs often bring pressure on EPA to recognize and notify federal PRPs about their potential liability.[31] EPA also has the authority to name federal PRPs in unilateral orders, but only with the prior approval of DOJ.[32]

Even where EPA has not noticed a federal agency as a PRP, if potentially liable, the federal agency will likely become involved, not as a formal party to the litigation, but (if the case settles), as a "settling federal agency" entitled to the same protections afforded settling private parties.[33] Finally, private parties frequently assert counterclaims against federal PRPs for contribution when those private parties are named as defendants in EPA-initiated CERCLA actions.[34] Private PRPs may even initiate direct suits against federal PRPs under section 107 if they have incurred "response costs."[35]

B. CERCLA Enforcement Involving Federal PRPs

EPA frequently becomes involved in litigation with federal PRPs in numerous areas of CERCLA enforcement. Because CER-

31. *See* CERCLA § 104(e), 42 U.S.C. § 9604(e) (2000) (authorizing EPA to issue information requests and notices of potential liability); *see also* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987) (delegating CERCLA § 104(e) information-gathering authority to EPA); *see also* Memorandum from Susan Bromm, Dir., to Office of Regional Counsel, Superfund Division, Region VI, *OSRE-EPA, Transmittal of Guidance on Issuing CERCLA Section 104(e)(2) Information Requests to Federal Agencies at Privately-owned Superfund Sites* (June 14, 2004), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/104e-fed-prp.pdf (discussing Superfund cases involving federal PRPs).

32. *See* CERCLA § 106(a), 42 U.S.C. § 1906(a) (2000) (explaining EPA authority in certain CERCLA actions); *see also* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987) (explaining Superfund implementation).

33. CERCLA settlements often involve both EPA and federal PRP defendants as "settling federal agencies." *See, e.g.*, Consent Decree, Rollins Envtl. Serv. (NJ) Inc. v. United States; United States v. AlliedSignal, Inc., 1996 EPA Consent LEXIS 148 (Oct. 8, 1996) [hereinafter Rollins/AlliedSignal EPA Consent]; *see also* Joint EPA/DOJ Memorandum, *Revisions to the 1995 National Model Remedial Design/Remedial Action (RD/RA) Consent Decree to Resolve Federal Potentially Responsible Party (PRP) Liability* (Dec. 28, 1998), *available at* http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/rev-1995mod-rd-ra-cd-fprp.pdf.

34. *See* CERCLA § 113, 42 U.S.C. § 1913(f) (2000) (authorizing private-party suits for contribution to recover costs incurred in site cleanup).

35. *See* Cooper Indus., Inc. v. Aviall Serv., Inc., 125 S. Ct. 577, 582 (2004) (leaving open question whether private parties can maintain contribution action under CERCLA § 107(a)). The Court has held that a purchaser of contaminated property could not maintain a contribution action under CERCLA § 113(f)(1) against the seller following the purchaser's voluntary cleanup of a contaminated site, because such an action could only be sought "during or following" a CERCLA action. *See id.* However, the question of whether or not a private party could maintain a suit for contribution under CERCLA § 107(a) was not directly addressed by the Court. *See id.*

CLA and an Executive Order require EPA to include DOJ in any action brought against federal PRPs under CERCLA,[36] EPA lacks the same direct enforcement capability against federal PRPs that EPA has with regard to private PRPs.[37] Such direct action is often highly effective in forcing PRPs to participate in settlement negotiations in a timely and meaningful fashion. Under section 4(e) of Executive Order 12,580 issued in 1987, the President delegated the authority to EPA to issue administrative orders to federal agencies pursuant to CERCLA section 106, but also required that EPA obtain the concurrence of DOJ before exercising such authority.[38] Because this concurrence is unlikely to be given, it is rarely sought.[39] Thus, the delegation,[40] which might have strengthened EPA's hand against federal PRP agencies, has been ineffective in ensuring vigorous direct enforcement by EPA against federal PRPs.[41]

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36. *Compare* CERCLA §§ 101(21), 106(a), 107(a), 120(a)(1), 42 U.S.C. §§ 9601(21), 9606(a), 9607(a), 9620(a)(1) (2000), *with* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987). The United States may be a liable "person" under CERCLA § 101(21), and therefore federal agencies are potentially subject to an EPA enforcement under §§ 106(a) and 107(a). CERCLA § 101(21), 42 U.S.C. § 9601(21). In addition, CERCLA § 120, applicable to federal facilities, provides that all branches of the federal government "shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under [CERCLA § 107]." CERCLA § 120(a)(1), 42 U.S.C. § 9620(a)(1). However, owing to the requirements contained in Executive Order 12,580 that EPA be represented by DOJ in judicial enforcement proceedings under CERCLA § 107 and obtain the concurrence of DOJ for issuance of administrative orders to federal agencies under CERCLA § 106, independent action by EPA against federal PRPs is extremely rare. CERCLA §§ 106(a), 107(a), 42 U.S.C. §§ 9606(a), 9607(a) (2004); *see also* Exec. Order No. 12,580, 52 Fed. Reg. 2923, §§ 4(e) and 6(a) (Jan. 23, 1987).

37. As previously noted, EPA must obtain the approval of DOJ for the issuance of a unilateral order to a federal PRP. *See* CERCLA § 106(a), 42 U.S.C. § 9606(a) (2000); Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987).

38. See *supra* note 33 (noting instances where EPA and other federal agencies acted as "settling federal agencies" in same action).

39. The reasons for this may be several: first, as noted above, DOJ regards the Anti-Deficiency Act as precluding federal PRPs from undertaking cleanups under EPA's orders; second, federal PRPS generally prefer to obtain contribution protection through a judicial consent decree, rather than undertake work under an administrative order; third, a unilateral order would subject a federal PRP to statutory penalties for noncompliance—an exposure federal PRPs would prefer to avoid.

40. See *supra* note 33 (noting instances where EPA and other federal PRPs acted as opposing parties).

41. A principle component of EPA's enforcement strategy includes using unilateral orders against PRPs who will not consent to perform response actions. The Executive Order could easily be amended to allow EPA the direct use of CERCLA § 106 orders against federal PRPs without the requirement of DOJ concurrence.

Not only are federal PRPs insulated from direct administrative or judical enforcement action by EPA but in formal settlement agreements, federal PRPs receive more favorable terms than private PRPs as a matter of policy.[42] For example, federal PRPs may obtain the benefits of contribution protection in settlements without bearing the same burdens of responsibility for Superfund cleanups as private PRPs.[43] Settlements with federal PRPs typically contain no penalties for late payment, as well as no cleanup obligations.[44] Federal PRPs have sometimes maintained that they cannot reimburse EPA for investigative oversight costs pursuant to section 104(a) of CERCLA, because such payments would constitute an unauthorized augmentation of EPA's appropriations.[45] However, EPA attorneys may point out that, rather than augmenting a federal agency's budget, payment of EPA's oversight costs by a federal PRP satisfies a legal liability under sections 104(a)(1) and 107(a) of CERCLA.[46] The foregoing demonstrates that, although CERCLA makes no distinction as to liability between private parties and governmental entities, in practice, federal PRPs can settle on more favorable terms than private PRPs.[47]

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42. *See* Joint EPA/DOJ Memorandum, *supra* note 33 (explaining EPA enforcement authority in CERCLA actions). For example, EPA and DOJ model language applicable to federal PRPs in RD/RA settlements exempts federal PRPs from work requirements and only requires payment by federal PRPs of costs as soon as reasonably practicable, with mediation by DOJ in the event of nonpayment within 120 days. *Id.* Settling private PRPs are subject to work requirements (including schedules), dates certain for payment of costs and stipulated penalties for consent decree violations (including late payment) under EPA's model RD/RA consent decree. *See* EPA *Model CERCLA RD/RA Consent Decree* (May 2001), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/mod-rdra-cd.pdf (last visited Apr. 10, 2005).

43. *See* CERCLA § 113(f), 42 U.S.C. § 1913(f) (2000) (discussing statutory allowance for cost recovery in private party suits). Federal PRPs generally take the position that the Anti-Deficiency Act, which prohibits government employees from entering into obligations in advance of Congressional appropriations, prevents federal PRPs from performing work under CERCLA consent decrees. 31 U.S.C. § 1341 (a)(1) (1994). *See also* U.S. CONST. art. I, § 9, cl. 7. However, note that federal PRPs as "settling federal agencies" have agreed to partially fund response work performed by private PRPs. *See, e.g.*, Rollins/AlliedSignal EPA Consent, *supra* note 33 (approving consent decree).

44. *See* Joint EPA/DOJ Memorandum, *supra* note 33 (explaining that federal PRP settlements do not involve payment of penalties or cleanup obligations).

45. *See* 31 U.S.C. § 1341 (a)(1) (2000) (describing government officers' and employees' limited ability to "make or authorize" expenditures and obligations).

46. *See* CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (2000) (requiring payment of oversight costs in settlements under CERCLA § 122 for conducting Remedial Investigation or Feasibility Study); *see also* CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (2000) (imposing liability on certain parties for all costs incurred, including oversight costs, by government, in cleaning up superfund site).

47. *See* CERCLA § 120(a)(1), 42 U.S.C. § 9620(a)(1).

The potential for favorable treatment of federal PRPs in settlements can undermine settlement negotiations with private PRPs, who expect that all PRPs will be treated equitably by the United States and will pay their fair share of settlements.[48] There is, therefore, some basis in governmental policy for private PRPs to complain that a governmental policy favorable to federal PRPs impedes their efforts to hold other PRPs accountable in the Superfund process. This can lead to the reluctance of private PRPs to settle for past costs or undertake cleanups at sites with federal PRPs, owing to a perception that the federal PRPs receive more favorable treatment than private PRPs, even if that is not the case.

In order to assure the private regulated community that federal PRPs are receiving the same treatment as private PRPs, in addition to paying an appropriate share of response costs (with premiums, if appropriate), federal PRPs can and should be subject to the same disincentives for delaying settlement or avoiding payment under settlement agreements as private PRPs. Those disincentives could include the threat of prompt administrative or judicial action if settlement is not forthcoming, and once settlement is achieved, payment should follow by a certain date with stipulated penalties for noncompliance.[49] Without such disincentives, federal PRPs may not participate in settlement negotiations in a timely and meaningful fashion.[50]

CERCLA § 120(a)(1) provides:

> Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act.

Id.

48. *See, e.g.*, Memorandum from Barry Breen, EPA (June 17, 1999) *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/negenfst-mem.pdf (discussing settlements' effects favorable to federal PRPs); OSWER Directive No. 9835.0; *see also Interim CERCLA Settlement Policy, Attachment XII,* (Dec. 5, 1984) *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cerc-settlmnt-mem.pdf (discussing outcome when federal PRPs are favorably treated).

49. *See* Joint EPA/DOJ Memorandum, *supra* note 33. As previously noted, EPA is required to obtain DOJ approval before issuing administrative orders to federal PRPs, effectively insulating them from direct administrative action. *See* Exec. Order No. 12,580, 52 Fed. Reg. 2923, § 4(e) (Jan. 23, 1987). EPA and DOJ model consent decree language applicable to federal PRPs does not contain stipulated penalties. *See id.*

50. Federal PRPs may be seen by private PRPs as having the same incentives for delaying settlement as they do: by delaying payment, they gain an advantage through the time value of money. But, in addition, private PRPs know that government policy gives federal PRPs a greater ability to drag their feet than private PRPs have. See *supra* note 48.

Representation by DOJ of both EPA and a federal PRP in litigation forces DOJ attorneys to attempt to put forward a single unified position on behalf of the government.[51] For example, a single DOJ attorney may attend a deposition and question the witness on both EPA's claims and a federal PRP's defenses.[52] DOJ has acknowledged that because it represents parties on both sides, the possibility of taking inconsistent legal positions exists, but rather than allow disputes between agencies to be aired in the courts, DOJ attempts to minimize this conflict by allowing its attorneys to "trade legal briefs and solicit each other's comments to give the government one voice."[53]

C. The Recent *Aviall* Supreme Court Decision

The position taken by the Solicitor General before the Supreme Court in *Cooper Industries, Inc. v. Aviall Services, Inc.*[54] is instructive, and provides a clear example of how the Unitary Executive principle finds its expression in DOJ having to choose between the interests of a client agency, such as EPA, and the opposing interests of other client federal agencies, in this case federal PRPs.[55] It should be recognized, however, that *Aviall* does not directly present the difficulties of dual representation by DOJ of an enforcing agency and a defending agency which find themselves adverse parties to the same litigation. Instead, *Aviall* presented the government with a policy-making decision, arguably a situation appropriate for intra-Executive resolution. Nevertheless, the Hobson's choice dictated by the Unitary Executive principle was a stark one, and the results far-reaching. For that reason, *Aviall* deserves close examination.

Respondent Aviall sought contribution under section 113(f)(1) of CERCLA, against Petitioner, Cooper, for certain expenses Aviall incurred in cleaning up property it purchased from

51. *See* 23 Env't Rep.(BNA) 3328 (Apr. 30, 1993) (discussing EPA and DOJ efforts to "cope" with CERCLA liability).

52. *See id.* at 3229 (noting DOJ's ability to represent multiple parties on government's behalf).

53. *Id.* at 3228-29 (summarizing J. Steven Rogers' comments to D.C. Bar Association). J. Steven Rogers is Assistant Chief of the Environmental Defense Section of DOJ's Environment and Natural Resources Division. *Id.* He spoke before a D.C. Bar Association session on April 22, 1993. *Id.*

54. *See Aviall Serv., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677 (5th Cir. 2002) (en banc), *rev'd and remanded*, 125 S. Ct. 577 (2004).

55. *See generally* Brief for the United States as Amicus Curiae, *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 125 S. Ct. 577 (2004) (No. 02-1192) (demonstrating Unitary Executive principle).

Cooper.[56] The district court dismissed Aviall's contribution claim, holding that Aviall could not maintain a section 113(f)(1) contribution action because the plain language of the statute required such an action to be brought "during or following" an enforcement action under CERCLA.[57] The United States Court of Appeals for the Fifth Circuit reversed, and Cooper sought *certiorari*.[58] The Supreme Court reversed and remanded, upholding the district court's interpretation of Section 113(f)(1) in favor of Cooper.[59]

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56. *Aviall*, 125 S. Ct. at 586 (outlining Aviall's claim against Cooper). Although Aviall also asserted a claim under CERCLA § 107(a), the Supreme Court declined to address Aviall's claim that it may recover costs under § 107(a)(4)(B) in the absence of briefing and decisions by the courts below, or to decide whether Aviall has an implied right to contribution under § 107. *See id.*

57. *See* Brief for the United States as Amicus Curiae, *supra* note 55, at 8 (rejecting Aviall's CERCLA contribution claim).

58. *See Aviall*, 125 S. Ct. at 582-83 (reversing previous decision en banc by divided vote).

59. *See id.* at 583-84 (deciding that CERCLA § 113(f)(1) did not authorize Aviall's suit). Note that the effects of *Aviall* are already being felt in later CERCLA cases. *See, e.g.*, AMW Materials Testing, Inc. v. Town of Babylon, 348 F. Supp. 2d 4 (E.D.N.Y. 2004) (holding that pursuant to *Aviall*, plaintiffs could not maintain CERCLA § 113 contribution claim because they had incurred cleanup costs voluntarily); Elementis Chems., Inc. v. T H Agric. and Nutrition, L.L.C., No. 03 Civ. 5150(LBS), 2005 WL 236488 (S.D.N.Y. Jan. 31, 2005) (holding that plaintiff had no CERCLA § 107 claim to recover voluntary cleanup costs). After *Aviall* was decided by the Supreme Court, plaintiff acknowledged in supplemental post-*Aviall* brief that it had no § 113(f) claim because it had not been subject to §§ 106 or 107 action). In another case, a U.S. District Court found that respondent to EPA administrative consent order did not have CERCLA § 113 claim for contribution because EPA'S consent order was not a settlement under CERCLA § 122. *See* Pharmacia Corp. v. Clayton Chem. Acquisition LLC, No. 02-CV-0428 MJR, 2005 WL 615755 (S.D. Ill. 2005). Subsequently the court granted leave to amend complaint to add a CERCLA § 107 claim. *Id.* Elsewhere, however, a U.S. District Court granted the government's motion for summary judgment filed before *Aviall* was decided and dismissed the plaintiffs' CERCLA § 113(f) claim. *See* E.I. Du Pont De Nemours & Co. v. United States, 297 F. Supp. 2d 740, 745 (D. N.J. 2004). This case is currently on appeal to the Third Circuit. The plaintiffs are seeking reconsideration of Court of Appeals' previous rejection of § 107 suits for contribution. *See generally* Appellant's Opening Brief, *E.I. Du Pont De Nemours & Co. v. United States*, 297 F. Supp. 2d 740 (D. N.J. 2004) (No. 04-2496) (Feb. 7, 2005). *See also* Adobe Lumber v. Taecker, No. CV S02-186 GEB GGH (E.D. Ca. May 24, 2005) (citing *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997); *Western Props. Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 685 (9th Cir. 2004) (holding private party may bring contribution action under § 107 of CERCLA because Supreme Court did not rule on issue therefore Ninth Circuit precedent governs). The District Court noted that § 113 did not replace the § 107 implicit right to contribution recognized by many courts; instead, the sections operate together for contribution claims. *Id. But see* Syms v. Olin Corp., 408 F.3d 95 (2d Cir. 2005) (acknowledging dilemma created by *Aviall* decision for parties seeking contribution for voluntary cleanup costs if there is no mechanism for recovery until after proceedings are brought against PRPs; remanding issue on plaintiff's eligibility to sue under § 107(a) of CERCLA).

What makes this case unique is the interest taken in it by a number of governmental and private entities, all of whom filed *amicus curiae* briefs for the Respondent, Aviall, with the notable exception of the United States government.[60] The predominate public policy argument in these briefs was that private-sector cleanups would be discouraged and delayed if the right of contribution under CERCLA were restricted, frustrating both the interests of CERCLA in cleaning up toxic waste sites and longstanding EPA policy favoring private-party cleanups.[61] One industry *amicus* brief maintained that this would be the result if the right of contribution were extinguished at sites where investigations and cleanups are performed either voluntarily or under an EPA unilateral order:

> The right of contribution is the sole mechanism that allows the member companies of amici curiae to collect from other liable parties their equitable shares of the cleanup costs (note omitted). These member companies frequently perform cleanups—either voluntarily or at the request of government agencies—at sites where they are responsible for only a small share of the contamination. They agree to perform these cleanups, despite their relatively small shares of liability, in reliance upon the right of contribution, which allows them to compel other liable parties to pay an equitable share of the cleanup costs. If that right is restricted, these member companies will have little reason to step forward and perform cleanups while other companies that contaminated the same sites escape liability.[62]

The state amici similarly stressed the importance of contribution actions in achieving the expeditious cleanup of Superfund sites:

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60. *See generally* Brief for Lockheed Martin Corp. as Amicus Curiae, *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 125 S. Ct. 577 (2004) (No. 02-1192); Brief for Superfund Settlements Project et al. as Amici Curiae, *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 125 S. Ct. 577 (2004) (No. 02-1192); Brief for the State of New York et al. as Amici Curiae, 125 S. Ct. 577 (2004) (No. 02-1192); Brief for Atlantic Richfield Co. et al. as Amici Curiae, 125 S. Ct. 577 (2004) (No. 02-1192). In all, twenty-three states, the Commonwealth of Puerto Rico, eight industry umbrella and trade organizations and a number of interested corporations filed four separate amicus curiae briefs in support of Aviall's position.

61. *See id.* (arguing against weakening CERCLA contribution rights on policy grounds).

62. *See* Brief for Superfund Settlements Project et al. as Amici Curiae, *supra* note 60, at 2-3 (emphasizing contribution rights' importance in Superfund settlements).

> CERCLA provides a considerable incentive for PRPs to enter into administrative or judicially approved settlements with the States (or the United States). A party that resolves its liability by way of such settlement benefits from the ability to seek contribution from other PRPs under [section] 113(f)(3)(B). . . . As a practical matter, these incentives are critical to the smooth functioning of the administrative process and the cleanup of many sites without the burdens and expenses of litigation.[63]

The Solicitor General, in lone opposition to the *amicus curiae* briefs of industry and the states, filed an *amicus* brief in support of the Petitioner, Cooper.[64] The Solicitor General sought reversal, arguing that the plain language of section 113(f)(2) of CERCLA makes clear that a party may seek contribution under CERCLA only "during or following" a civil action under section 106 or section 107(a).[65] The Court adopted this interpretation.

Why, one may ask, would DOJ elect to file an *amicus* brief advocating a position potentially detrimental to EPA's policy interests, unless its motivation was primarily the protection of federal PRPs facing contribution claims?[66] It seems apparent that DOJ, charged under the Unitary Executive principle with balancing the compet-

63. *See* Brief for the states of Arizona, California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Massachusetts, Michigan, Missouri, Montana, Nevada, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Washington, Wisconsin, and Wyoming, and the Commonwealth of Puerto Rico as Amici Curiae, at 2-3, *Cooper Indus., Inc., v. Aviall Serv., Inc.*, 125 S. Ct. 577 (2004) (No. 02-1192) (supporting Respondent).

64. *See* Brief for the United States as Amicus Curiae, *supra* note 55, at 1 (supporting Petitioner).

65. *See id.* at 16-17. Although the Solicitor General maintained that the "plain language" of § 113(f)(1), 42 U.S.C. § 9613(f)(1), compelled a restrictive reading of the right of contribution, it was necessary both to completely ignore the "savings" clause of 113(f)(1), 42 U.S.C. § 9613(f)(1) (noting "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution *in the absence of a civil action* under § 106 or § 107"), and the permissive language of that subsection (stating "[a]ny person *may* seek contribution . . . during or following any civil action under § 106 or § 107(a)") in order to reach that conclusion. (Emphases added).

66. *See id.* Note that the Solicitor General also argued that § 107(a), 42 U.S.C. § 9607(a), did *not* provide an independent right of contribution and that a § 113(f)(1), 42 U.S.C. § 9613(f)(1), action was not available to a respondent to a § 106, 42 U.S.C. § 9606, unilateral administrative order. The Solicitor General has thus already taken a position on the two issues unresolved by *Aviall*, both of which are likely to come before the Court again: (1) whether a party can bring a contribution action under § 107; and (2) whether a complying respondent to a § 106 unilateral administrative order can seek contribution under § 113(f)(1), 42 U.S.C. § 9613(f)(1). Brief for the United States as Amicus Curiae, *supra* note 55, at 9 and 11.

ing policy interests of its client agencies, had determined to resolve the conflict in favor of federal agency defense rather than EPA enforcement, with results which may, on balance, prove favorable to the federal purse but not necessarily to environmental protection. Yet it would seem that this conundrum, forcing the executive to choose one public policy concern over another, is less constitutionally compelled than driven by a need to keep policy-making decisions within the executive and out of the courts. In the *Aviall* context, the argument for such executive control is more compelling. In the context of CERCLA litigation involving federal PRPs, it is arguably less so.

It is the thesis of this Article that in the CERCLA enforcement context, where federal PRPs are involved, a truly strong executive would search for a Solomonic solution - one which would allow its agencies limited freedom to advance their own competing interests in the public forum of the courts. In *Aviall*, EPA's voice was necessarily silent.[67] EPA's vital interests in CERCLA enforcement, as well

67. Note that before the Court, Mr. Minear did advance an EPA policy interest: keeping remedy decisions in EPA's hands and out of the courts. Requiring settlements as a prerequisite for contribution actions benefits the EPA, Mr. Minear implied, because:

> [b]y reaching a settlement with the Federal Government on — on the — the details of the cleanup, it relieves a Federal court of having to make that determination in a contribution action. As it stands right now in a case such as this [a private party action for costs incurred in voluntary cleanup], the Federal court is going to be forced to make the determination of whether or not there is compliance with the NCP. And that's a highly technical issue and it's an issue that ought to be addressed in the first instance by the Federal or State officials who are experts in these matters. As it stands right now, if there is no extinguishment of the underlying liability, the court is going to have to — the Federal courts are going to have to resolve these issues without the guidance of those people who are most knowledgeable on that very issue.

Transcript of Oral Argument of Jeffery P. Minear, in support of the United States, *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 125 S. Ct. 577 (2004) (No. 02-1192) *available at* 2004 U.S. TRANS LEXIS 51. This argument, however, only applies to contribution actions brought after settlements under § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B) (2000). It ignores the possibility of remedy review or review of issues relating to consistency with the National Contingency Plan (NCP) in a judicial enforcement action which Mr. Minear argued was *required* to trigger a contribution action under § 113(f)(1), 42 U.S.C. § 9613(f)(1). Also, it overlooks the statutory requirement for record review of remedy decisions, under which EPA's choice of remedy is afforded judicial deference. *See* CERCLA § 113(j)(2), 42 U.S.C. § 9613(j)(2), providing "in any judicial action under this Act, the Court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law." CERCLA § 113(j)(2), 42 U.S.C. § 9613(j)(2). Finally, it overlooks the opportunity the United States would have of intervening on behalf of EPA in any private CERCLA contribution litigation as an interested party under FED. R. CIV. P. 24(a). *See generally* United States v. Union Elec. Co., 64 F.3d 1152 (8th Cir. 1995); United States v.

as the public's interest in obtaining expeditious cleanup of Superfund sites, were advanced by industry and the states' attorneys general, but not by the Solicitor General. While this sacrifice may have been unavoidable in the policy-making context, in the more limited and fact-specific context of EPA enforcement litigation involving federal PRPs it is possible that such a Hobson's choice can be avoided.

III. CONSTITUTIONALITY OF INTERAGENCY DISPUTES

The Unitary Executive principle holds that disputes between parties in the same branch of the government are not justiciable because they do not satisfy the "case or controversy" requirement of Article III of the Constitution.[68] A related argument is that Article II, the Separation of Powers Clause, precludes suits between executive agencies because the President, and not individual administrative agencies, has the constitutionally assigned power to see that the laws are faithfully executed.[69] However, Articles II and III do not explicitly prohibit intra-executive litigation, and this interpretation of the Unitary Executive principle may be a mechanical one that elevates form over substance.[70] It appears doubtful that there are strict Constitutional barriers to such litigation.[71]

To meet the Article III requirement for a real case or controversy, there must be adverse parties and a dispute before the court that is of a type that has traditionally been decided by the courts.[72] It is an established principle that one may not sue oneself, because in such a case there would not be adverse parties.[73] However, courts will look beyond the names of the parties to determine

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Acton Corp., 131 F.R.D. 431 (D. N.J. 1990) (noting non-settling PRP's interest in contribution sufficient to sustain intervention under both CERCLA and Federal Rules of Civil Procedure).

68. *See* U.S. CONST. Art. III, § 2, cl. 1 (extending judicial power to cases and controversies).

69. *See* U.S. CONST. Art. II, § 3 (mandating President shall "take care" to ensure that laws are "faithfully executed").

70. *See generally* Sunstein, *supra* note 3 (addressing presidential oversight in administrative process).

71. *See* Michael W. Steinberg, *Can EPA Sue Other Federal Agencies?*, 17 ECOLOGY L.Q. 317, 324-53 (1990) (arguing no constitutional barrier prohibits EPA from suing federal agencies in court to enforce environmental law). *See also* Herz, *supra* note 10, at 896-99 (outlining arguments concerning justiciable intra-governmental suits).

72. *See* U.S. CONST. Art. III, § 2, cl. 1 (setting forth "case or controversy" requirement).

73. *See* Herz, *supra* note 10, at 894 (pointing to both precedent and constitutional language supporting adverse party principle).

whether a case or controversy exists.[74] Historically, courts have permitted the United States to be on both sides of a lawsuit because the courts have emphasized the nature of the issue to be litigated, rather than the nominal identity of the parties.[75] In *United States v. Interstate Commerce Commission* (*Interstate Commerce Commission*)[76], the Supreme Court held that one must focus on the issues raised to determine if a controversy is justiciable.[77]

It may be argued, however, that while suits between independent agencies, such as the Interstate Commerce Commission (ICC), and executive agencies may be cognizable by the courts, EPA is an agency within the Executive Branch and is therefore not entitled to litigate against other agencies. Disputes *between* agencies within the Executive Branch, in this view, are not justiciable because there can be no controversy within the Executive Branch, which is headed by one person.[78]

Another argument in favor of the Unitary Executive principle is that the separation of powers clause in Article II, which vests executive authority in one person, would be undermined if the courts provided a forum for disputes between executive agencies.[79] This interpretation of the Unitary Executive assumes that the President resolves all disputes in the Executive Branch.[80] However, agency

74. *See* United States v. Nixon, 418 U.S. 683, 693-94 (1974) (deciding courts must look beyond caption to determine disputes' justiciability); United States v. Interstate Commerce Comm'n, 337 U.S. 426, 430 (1949) (illustrating same principle). *See generally* Murdock v. City of Memphis, 87 U.S. 590 (1874) (discussing federal courts' powers); Tenn. Valley Auth. v. United States, 13 Cl. Ct. 692, 697 (Cl. Ct. 1987) (concluding that dispute between two executive agencies was justiciable); Dean v. Herrington, 668 F. Supp. 646, 651 (E.D. Tenn. 1987) (finding suit between two executive agencies justiciable).

75. *See Interstate Commerce Comm'n*, 337 U.S. at 430 (emphasizing need to look beyond parties' names when determining jusiticiability).

76. 337 U.S. 426 (1949).

77. *See id.* (citing holding of case). *But see* Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 128 (1995) (discussing how government's different roles in litigation may affect justiciability). For example, the Court noted "the status of the Government as a statutory beneficiary or market participant must be sharply distinguished from the status of the Government as regulator or administrator." *Id.* at 128-29.

78. *See, e.g.*, Mackie v. Bush, 809 F. Supp. 144, 146-47 (D.D.C. 1993) (discussing intra-executive justiciability). DOJ has also at times taken the position that not even independent agencies, such as the Postal Service, can litigate against other federal agencies. *See id.*

79. *See* U.S. CONST. Art. II, § 1 (vesting executive power in President). *See also* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 38 (Jan. 1994) (discussing President's duties as outlined in Constitution).

80. *See* Lessig and Sunstein, *supra* note 79, at 38 (discussing relationship between Article II's Voting Clause and Opinions Clause).

heads often have their own decision-making authority, which is constitutionally vested by Congress or delegated by the President.[81] Within the Executive Branch, there are several examples of non-presidential control.[82] For example, the President lacks the authority to remove independent counsel and civil service employees.[83]

The broad purpose of the Unitary Executive principle is to ensure the "unity and coordination in executive administration [that is] essential to effective action."[84] However, the federal courts are not uniform in finding that the judiciary is constitutionally barred from reviewing intra-executive lawsuits.[85] In *United States v. Nixon*,[86] the Supreme Court noted that "mere assertion of a claim of an 'intra branch dispute,' without more, has never operated to defeat federal jurisdiction."[87] As with *Interstate Commerce Commission*, the *Nixon* Court ruled that the status of the contested issue as a traditional case or controversy, not the status of the parties, determined whether the case was justiciable.[88] In so ruling, the Court eliminated Article II's separation of powers clause from its inquiry.[89] Instead, it focused solely upon whether the case presented an Article III case or controversy, susceptible to judicial resolution.[90] To determine adverseness, the Court looked to the facts or "setting" of the case and concluded that the conflicting positions taken by the

81. *See id.* at 37 (comparing Presidential and Congressional appointment powers).

82. *See, e.g.*, Morrison v. Olsen, 487 U.S. 654, 656 (1988) (holding restriction of Attorney General's power to remove Independent Counsel to instances of "good cause" not violation of separation of powers). *See also generally* Nathan v. Smith, 737 F.2d 1069 (D.C. Cir. 1984) (holding that Independent Counsel may only be removed for good cause shown by Attorney General).

83. *See generally Smith*, 737 F.2d 1069 (noting that good cause threshold to remove Independent Counsel ensured Independent Counsel's independence).

84. *See Myers v. United States*, 272 U.S. 52, 135 (1926) (offering dicta that implicitly recognized President's adherence to Unitary Executive principle). The Court also implied that the President has authority to review the actions of other executive agency officials. *Id.*

85. *See id.* at 108 (discussing whether Article I grants President independent power to remove executive agency officials).

86. 418 U.S. 683, 697 (1974). *See also Morrison*, 487 U.S. at 696 (upholding independent counsel provisions in Ethics in Government Act).

87. *Nixon*, 418 U.S. at 693. In interagency litigation involving EPA, the D.C. Circuit determined that it had subject matter jurisdiction in two challenges brought by the Department of Agriculture to EPA pesticide restrictions. *See, e.g.*, Envt'l Def. Fund, Inc. v. Envt'l Prot. Agency, 548 F.2d 998 (D.C. Cir. 1976); Envt'l Def. Fund, Inc. v. Envt'l Prot. Agency, 510 F.2d 1292 (D.C. Cir. 1975).

88. *See Nixon*, 418 U.S. at 697 (noting suits are not rendered nonjusticiable simply because both parties are Executive Agency officials).

89. *See id.* (stating all federal criminal prosecutions fall under Article III).

90. *See id.* at 698 (discussing whether Article III case or controversy requirement was satisfied).

Special Prosecutor and the President presented that "concrete adverseness which sharpens the presentation of issues upon which the Court . . . largely depends for illumination of difficult constitutional questions."[91]

In accordance with the test established by *Interstate Commerce Commission* and *Nixon*, CERCLA cases involving recalcitrant federal PRPs present: (1) traditionally justiciable disputes; (2) in a setting which assures "concrete adverseness" of the parties.[92] EPA, as the agency charged with enforcing environmental laws, routinely has an adversarial relationship with its regulated community, which includes federal agencies within the Executive Branch. EPA's interests in protecting public health and the environment are adverse to any federal agency that has allegedly contaminated the environment and from whom EPA seeks penalties, injunctive relief or restitution.

Unlike other types of controversies between agencies that may involve questions concerning overlapping jurisdiction or policy, disputes between EPA and federal PRPs are fundamentally adversarial. The federal PRP at a private-party site does not behave in any way as a regulator or as an agency co-equal to EPA with potentially shared decision-making or policy authority; it is merely one PRP among many. The financial stakes in CERCLA litigation are high, so PRPs faced with such liability exposure engage in extensive third-party practice in an effort to lower that exposure. In addition, factual issues requiring resolution in a CERCLA case are much more complex than those presented in other environmental regulatory contexts. CERCLA cases, for example, may involve hundreds of parties, each presenting unique problems of proof as well as unique defenses.

Since *Nixon* was decided, federal courts have followed the two-prong test in determining whether inter-agency disputes are justiciable. In *United States v. Federal Maritime Commission*,[93] the United States Court of Appeals for the District of Columbia Circuit held that a suit brought by the Antitrust Division of DOJ to challenge the Commission's approval of certain pooling agreements between shippers was justiciable.[94] In finding that the Article III "case or controversy" prerequisite to jurisdiction was met, the court stated:

91. *See id.* at 697 (noting Article III case or controversy requirement was not satisfied if parties not adverse).

92. *See id.* (discussing general requirements for justiciability).

93. 694 F.2d 793 (D.C. Cir. 1982).

94. *See id.* at 799-801 (describing Court's justiciability analysis and applying *Interstate Commerce Commission/Nixon* test).

> [T]he structure of the government of the United States permits cases and controversies to arise between separate agencies . . . .This dispute over the validity of a Commission order raises issues that courts traditionally resolve and the setting assures the concrete adverseness on which sharpened presentation of the issues is thought to depend. The parties' controversy is justiciable.[95]

The Executive Branch itself has been inconsistent in application of the Unitary Executive principle.[96] For example, in *Shoreham-Wading River Central School District v. U.S. Nuclear Regulatory Commission*,[97] DOJ filed a brief against the United States government.[98] In that case, petitioners sought a stay of an order of the Nuclear Regulatory Commission (NRC), until the NRC complied with the National Environmental Policy Act and filed an Environmental Impact Statement (EIS).[99] In its brief, DOJ acknowledged that while it would usually join in the NRC's response to the petitioners' challenge, in this instance, because the Department of Energy and Council on Environmental Quality would also argue for the need to file an EIS, it would join with the petitioners and urge the stay of the NRC order.[100]

A fundamental tenet of the Unitary Executive principle is that it ensures uniform execution of the laws, which is clearly the duty of the Chief Executive.[101] However, as noted above, specific agencies are, in most instances, the actual executors of the laws.[102] There would continue to be unitary execution of environmental laws if there were litigation between EPA, as a regulatory agency, and a federal agency subject to EPA regulation. EPA would retain its authority as the sole agency executing environmental laws, subject to

95. *See id.* at 809-10. *See also United States v. Fed. Mar. Comm'n*, 655 F.2d 247, 252 (D.C. Cir. 1980) (noting that suit raised issues traditionally resolved by courts and that "setting" ensures "adverseness").

96. *See generally* Shoreham-Wading River Cent. Sch. Dist. v. United States Nuclear Regulatory Comm'n, 971 F.2d 766 (D.C. Cir. 1992) (dismissing case involving two executive agencies).

97. 501 U.S. 1267 (1991).

98. *See* Shoreham-Wading River Cent. Sch. Dist. v. United States Nuclear Regulatory Comm'n, No. 90-1241, 1991 WL 64881 (D.C. Cir. 1991) (noting attorneys' appearances and briefs filed).

99. *See generally id.* (discussing plaintiffs' desired outcome).

100. *See id.* (noting DOJ supported NRC order).

101. *See* U.S. CONST. Art. II, § 3 (providing "take care" clause).

102. *See* Lessig and Sunstein, *supra* note 79, at 39-41 (commenting on agency decision-making authority granted by Congress or President).

judicial review, while a federal PRP would retain its authority to defend against any such enforcement action.

The federal courts have not always deferred to the United States government's interpretation of the Unitary Executive principle.[103] For example, the United States District Court for the District of Columbia granted a preliminary injunction that prevented the President from removing members of the Board of Governors of the Postal Service so that the United States Court of Appeals for the District of Columbia Circuit could decide an action brought by the Board (over the express wishes of the Attorney General *and* a Presidential directive) against the Postal Rate Commission concerning a rate-making dispute.[104] In a similar sense, it could be argued that the Unitary Executive principle imposes no legal barriers to judicial enforcement of CERCLA by EPA against federal PRPs.[105]

IV. THE ETHICS OF DUAL REPRESENTATION

As the foregoing discussion demonstrates, it is not at all clear that the Constitution precludes federal agencies as distinct entities from airing their differences in court or taking administrative action against other agencies, where authorized by statute. Congress has mandated that CERCLA is to be applied equally to the federal government when it behaves as a regulated entity.[106] Yet, such equal treatment is called into question when both EPA and the regulated federal agencies are represented by common counsel.

Although there are arguments to the contrary, the potential of a conflict of interest exists in CERCLA cases when DOJ is forced to represent EPA in an enforcement capacity and another federal agency in a defensive capacity. The American Bar Association (ABA) has promulgated the Model Rules of Professional Con-

103. *See generally Mackie v. Bush*, 809 F. Supp. 144 (D.D.C. 1993) (deciding suit between Justice Department and United States Postal Service).

104. *See id.* (noting justiciability problems in suit between two entities within United States Postal Service). In an effort to prevent the Board from going forward with its lawsuit against the Commission, DOJ, in an October 27, 1992 letter to the Chairman of the Board, asserted that the Postal Service had no independent litigation authority. The District Court noted that although the question of its jurisdiction to hear the injunction action was not entirely clear under existing precedent, it deferred to the D.C. Circuit, and determined that the underlying controversy should be heard. *See id.* at 146.

105. *See, e.g.*, Sunstein, *supra* note 3, at 303 (discussing federal government's prosecution powers).

106. *See, e.g.*, 42 U.S.C. §§ 9601(21), 9606(b), 9607(a), 9609, 9620(a)(1) (2000) (applying CERCLA requirements to federal PRPs).

duct[107] and the Model Code of Professional Responsibility,[108] which include canons of ethics, ethical considerations and disciplinary rules. Model Rule 1.7 addresses loyalty to a client and is the principle provision governing conflicts of interest.[109] In its comments to Model Rule 1.7, the ABA states:

> [L]oyalty to a client prohibits undertaking representation directly adverse to that client *without that client's consent.* . . . Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. . . . Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. . . . Consideration should be given to *whether the client wishes to accommodate the other interests involved.*[110]

Model Rule 1.7 applies to both actual and potential conflicts of interest.[111] Although the mere potential for conflict does not absolutely preclude representation, if an actual conflict exists, the lawyer must analyze "whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pur-

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107. MODEL RULES OF PROF'L CONDUCT (1983).

108. MODEL CODE OF PROF'L RESPONSIBILITY (1982).

109. MODEL RULES OF PROF'L CONDUCT R. 1.7 (1983). In its entirety, Rule 1.7 states:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation.
>
> When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Id.

110. *See id.* R. 1.7 cmt. (1983) (emphasis added) (discussing loyalty to client).

111. *See id.* (distinguishing between conflict types).

sued on behalf of the client."[112] When describing conflicts in litigation, the ABA also states:

> An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.[113]

Virtually identical conflict rules govern law firms and lawyers employed in the legal department of a corporation or other organization, so that even if different attorneys in the same organization separately represent clients with adverse interests, the conflict may still be imputed to all attorneys in the organization. Model Rule 1.10[114] is intended to prevent law firms from undertaking representation of multiple clients with adverse interests, thus creating an impermissible conflict of interest.[115] The ABA has commented that Rule 1.10 is premised on the fact that "a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client. . . [therefore] each lawyer is vicariously bound by the obligations of loyalty owed by each lawyer with whom the lawyer is associated."[116] Thus, the Rule may be interpreted to disqualify DOJ from representing the interests of both EPA and a federal PRP in the same CERCLA enforcement action, even if separate DOJ attorneys are assigned to each agency, because no DOJ attorney should represent EPA if any other DOJ attorney is representing a client agency whose interests are adverse to EPA's.[117]

However, Model Rule 1.7 would permit an attorney to represent multiple parties *if the interests of each can adequately be represented, and if each consents* to the representation after full disclosure. Thus, there are two prongs to be satisfied: first, each client's interests must be adequately represented, and second, each must consent to the representation. As to the latter, under existing

112. *See id.* (describing critical questions lawyers should ask themselves when faced with potential conflict).

113. *Id.* (explaining how conflicts can be found in litigation context).

114. MODEL RULES OF PROF'L CONDUCT R. 1.10 (1983). Model Rule 1.10 provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2." *Id.*

115. *See id.* (dealing with multiple clients being represented by same firm).

116. *See id.* R. 1.10 cmt. (explaining basis for Rule 1.10 and principle of imputed disqualification).

117. *See id.* (noting possibility of disqualification if one firm represents both parties, even if protective measures are taken such as assigning separate attorneys).

governmental policy, one may argue that both EPA and federal PRP agencies have consented to such representation.[118] However, as to the first prong, even if EPA consented, the proposition that an attorney or a potentially conflicted organization can represent both a plaintiff and a defendant in the *same* matter, even under circumstances of full disclosure and consent, has received some criticism.[119]

There are a number of cases at the state level where courts have found conflicts of interest when a state Attorney General represents state entities with adverse interests.[120] In *Motor Club of Iowa v. Department of Transportation*,[121] the state Attorney General sought to override the interests of the State Department of Transportation and pursue a lawsuit on behalf of the State of Iowa.[122] The court observed that:

> An attorney general should not seek to perform his duty to represent a department of state government where the goals of the department conflict with what the attorney general believes is the state interest. State officers and state departments of government deserve adequate legal representation. No representation can be adequate unless it is without conflicts on the part of counsel . . . . To accord the attorney general the power he claims would leave

118. *See* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987) (designating natural resource trustees).

119. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 5-15, n.19 (1982) (citing *Jedwabny v. Philadelphia Transp. Co.*, 135 A.2d 252, 254 (1957), *cert. denied*, 355 U.S. 966 (1958)) (dealing with interests of multiple clients). "[M]anifestly, there are instances where the conflicts of interest are so critically adverse as not to admit of one attorney's representing both sides . . . . No one could conscionably contend that the same attorney may represent both the plaintiff and defendant in an adversary action." *Id.*

120. *See, e.g.*, City of York v. Pa. Pub. Util. Comm'n, 295 A.2d 825, 831 (Pa. 1972) (denying Attorney General's request that Pennsylvania intervene as appellant against defendant, state agency); *see also* Teleco, Inc. v. Corp. Comm'n of Okla., 649 P.2d 772, 773 (Okla. 1982) (denying attorney permission to intervene in opposition to state agency but suggesting such intervention might be allowed where public interest was unrepresented and agency could be represented by independent counsel); *see also* Amerland v. Hagan, 175 N.W. 372, 374 (N.D. 1919) (denying Attorney General's motion to strike state agency's answer filed without consulting Attorney General); *see also* Waigand v. City of Nampa, 133 P.2d 738, 741 (Idaho 1943) (finding authority for government entity to retain independent counsel); *see also* Ariz. State Land Dep't v. McFate, 348 P.2d 912, 918 (Ariz. 1960) (refusing to permit attorney general to challenge agency action).

121. *See* 251 N.W.2d 510, 511 (Iowa 1977) (holding Attorney General does not have authority to continue prosecution of appeal against wishes of client and Department).

122. *See id.* at 511-13 (noting reason for state Attorney General's claim).

Villanova Environmental Law Journal, Vol. 16, Iss. 2 [2005], Art. 1

> all branches and agencies of government deprived of access to the court except by his grace and with his consent. In a most fundamental sense such departments and agencies would thereby exist and ultimately function only through him.[123]

In addition, an attempt by the National Association of Attorneys General to exempt government lawyers from the Model Rules governing conflicts of interest was flatly rejected by the ABA.[124] The ABA has noted that a lawyer representing a government agency is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests in Rule 1.7.[125] Nevertheless, in the comments to Model Rule 1.7, the ABA notes that there may be circumstances in which a lawyer may act as advocate against a client:

> For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.[126]

The Preamble to the ABA Model Rules discusses the unique position of government lawyers, such as attorneys general, who may have settlement authority that private lawyers do not automatically have absent client's permission.[127] The ABA notes that "lawyers

123. *See id.* at 515-16 (explaining why Attorney General cannot always provide adequate counsel to government agencies).

124. *See* William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients are in Conflict?*, 29 How. L.J. 539, 543 n.15 (1986) (noting unsuccessful attempt by National Association of Attorneys General to exempt government attorneys from conflict of interest rules).

125. *See* MODEL RULES OF PROF'L CONDUCT R. 1.11 (1983) (specifying that government attorneys are subject to Rule 1.7).

126. *See id.* R. 1.7, cmt. (noting joint representation is permitted under certain circumstances).

127. *See id.* preamble (noting special circumstances affecting representation by government attorneys).

under the supervision of these officers may be *authorized* to represent several governmental agencies in intra-governmental legal controversies in circumstances where a private lawyer could not represent multiple private clients . . . . These Rules do not abrogate such authority."[128]

Federal courts, in *dicta*, have indicated that in certain circumstances conflicts of interest do exist and may prevent DOJ from adequately representing its federal clients.[129] For example, in *State of Colorado v. U.S. Department of the Army*,[130] Colorado sued the Department of the Army (represented by DOJ/Defense), seeking an injunction to halt alleged violations of Colorado's Resource Conservation and Recovery Act (RCRA)-based environmental laws in connection with cleanup of the Rocky Mountain Arsenal, a facility owned by the Army.[131] DOJ/Enforcement, at the same time, represented EPA in a consolidated CERCLA action involving private PRPs, Colorado and the Army (which was again represented by DOJ/Defense).[132] In denying the Army's motion to dismiss the State's RCRA complaint, the District Court of Colorado held that the United States' pending CERCLA suit did not preclude the

128. *See id.* (permitting government lawyers to represent multiple agencies, where private lawyer could not represent multiple clients). The fact that ABA has affirmatively stated that rules of conflict apply to government lawyers, but has also stated that the Model Rules do not prevent duly authorized government attorneys from representing multiple agencies, suggests that the ABA may not have fully resolved the conflict of interest issue as far as government lawyers are concerned. Note that Statute, 28 U.S.C. § 516, provides that "conduct of all litigation in which the United States, an agency, or officer thereof is a party . . . is reserved by statute exclusively to the Department of Justice." *See also* 28 U.S.C. § 519 (2000). Further, both 28 U.S.C. §§ 516 and 519 are prefaced by the phrase: "[e]xcept as otherwise authorized by law." 28 U.S.C. §§ 516, 519. Thus, an express reservation of litigation authority to EPA by statutory amendment, as is the case in parts of the Clean Air Act, 42 U.S.C. § 7605, the Federal Water Pollution Control Act, 33 U.S.C. § 1366, and the Safe Drinking Water Act, 42 U.S.C. § 300j-9, would authorize independent agency representation. However, it has been observed that if Congress puts DOJ on both sides of a dispute through a statutory scheme, the government must abide by Congress' mandate. *See* Nev. v. United States, 463 U.S. 110, 128 (1983) (finding government must perform obligations to represent Indian tribes and other interests as well).

129. *See, e.g.*, Colorado v. United States Dep't of the Army, 707 F. Supp. 1562, 1570 (D. Colo. 1989) (mentioning DOJ attorneys repeatedly denied conflict of interest existed). *See also* United States v. Shell Oil Co., 605 F. Supp. 1064, 1083 (D. Colo. 1985) (holding that no inter-agency dispute existed in this case).

130. *See generally* 707 F. Supp 1562 (D.Colo. 1989), *rev'd and remanded, Colorado v. United States Dep't of the Army*, 990 F.2d 1565 (10th Cir. 1993) (bringing action against US Army to comply with certain state ground water rules).

131. *See id.* at 1563 (summarizing procedural history).

132. *See id.* at 1564 (describing case consolidation of two CERCLA cases involving cleanup of same site).

State's RCRA-based enforcement suit against the Army.[133] The court observed, however, that DOJ's conflicting interests impeded both the conduct of the litigation as well as cleanup efforts.[134] In addition, the court stated that agreements reached between entities with conflicting interests represented by DOJ may be suspect:

> Since it is the E.P.A.'s job to achieve a cleanup as quickly and thoroughly as possible, and since the Army's obvious financial interest is to spend as little money and effort as possible on the cleanup, I cannot imagine how one attorney can vigorously and wholeheartedly advocate both positions. For this reason, among others, I have been reluctant to approve the proposed 'consent decree,' which is fundamentally an agreement between the two polluters, the Army and Shell, to restrict future uses of Arsenal land and thereby limit cleanup standards, thus lowering costs for both defendants.[135]

In resolving a discovery dispute related to the *Love Canal* litigation, *United States v. Hooker Chemicals & Plastics Corp.*, the District Court for the Western District of New York commented upon a possible conflict where DOJ was charged with representing both EPA and the Department of the Army.[136] In granting defendant Occidental Chemical Corporation's motion to compel discovery against the Army concerning the Army's disposal of hazardous substances, the District Court questioned DOJ's ability to represent both EPA and the Army simultaneously.[137] The District Court stated that "the steps taken by the Department of Justice . . . reflect what appears to have been an almost naive approach to the possible conflicts be-

133. *See id.* at 1569-70 (finding CERCLA actually preserves state enforcement).

134. *See id.* at 1570 (concluding conflict of interest caused lack of vigorous advocacy, which was contrary to public interest). It should be noted that in *Shell Oil*, the District Court denied defendant Shell's motion to join Army as a defendant, after applying the *Nixon* and *ICC* two-step test and finding that no justiciable "case or controversy" under Article III existed. *See Shell Oil*, 605 F. Supp. at 1083.

135. *Dep't. of Army*, 707 F. Supp. at 1570 (commenting on potential conflict presented when DOJ represents both parties). The District Court criticized EPA for being unable to objectively monitor or enforce against federal polluters, stating that where both EPA and a federal PRP are represented in a CERCLA action by the "same Justice Department lawyers . . . there is no vigorous independent advocate for the public interest." *Id.*

136. *See* United States v. Hooker Chems. & Plastics Corp, 136 F.R.D. 559, 566-67 (W.D.N.Y. 1991) (noting possible conflicts of interest).

137. *See id.* (discussing conflict of interest at issue).

tween its litigation interests and responsibilities and those of the Army."[138]

On the other hand, there are cases in which courts have found dual representation by DOJ is not an actual conflict of interest.[139] In *Aetna Casualty & Surety Co. v. United States*,[140] the United States appealed an order disqualifying DOJ and the United States Attorney from representing four individual co-defendants under Disciplinary Rules 5-105(A) and 5-105(B) of the Code of Professional Responsibility adopted by the North Carolina State Bar.[141] The case arose from an Eastern Airlines crash, where the individual defendants were air traffic controllers on duty at the time of the crash.[142] Plaintiff insurance companies paid $25 million in settlements arising from the crash, and filed suit against the United States and the traffic controllers to recover those costs.[143]

The Court of Appeals for the Fourth Circuit ruled that in disqualifying DOJ, the District Court erred, and reversed.[144] It stated the "mere existence of multiple defendants" does not inevitably create a conflict of interest.[145] The court emphasized that there was *no dispute* among representatives of DOJ or the controllers "either with respect to their duties and responsibilities or the details of the plane crash."[146] The circuit court was also influenced by the insurance company's apparent motivation to "fragmentize the defense" rather than "any sensitivity" on their part "to the ethical considerations involved," and the court was influenced as well by the undisputed fact that there was "little or no possibility that the four controllers [would] incur any personal liability" because they acted

138. *See id.* at 567 (setting forth District Court's rationale). *See also* United States v. City of Glen Cove, Wah Chang Smelting & Refining Co. of Am., Inc., 221 F.R.D. 370 (E.D.N.Y. 2004). In *City of Glen Cove*, the intervener's rights were compromised because federal PRPs and EPA were represented by common DOJ counsel. *Id.* "[T]his Court . . . finds that [Intervener's] contribution interest is adequate to sustain intervention in this case. This result is particularly appropriate under the instant set of facts, where as here, the federal government was on both sides of the negotiation table and essentially reached a settlement agreement with itself." *Id.* at 373.

139. *See* Aetna Cas. & Sur. Co. v. United States, 570 F.2d 1197 (4th Cir. 1978), *cert. denied*, 439 U.S. 821 (1978). (noting cases where such conflicts did not exist).

140. *Id.*

141. *See id.* at 1199 (stating grounds for United State's appeal).

142. *See id.* (noting case originated from airline crash).

143. *See id.* (detailing insurance companies' attempt to recover payments made as result of airline crash).

144. *See Aetna*, 570 F.2d at 1200-01 (discussing District Court error and reversal of District Court decision).

145. *See id.* at 1201 (noting rationale for reversing lower court decision).

146. *See id.* (noting factors used in deciding outcome of case).

in the course and scope of their employment, and a judgment against the United States would bar entry of a judgment against them.[147] Canon Five was designed to protect *only* the interests of the clients affected by a conflict, and therefore, the circuit court stated that the impact on plaintiffs was "irrelevant."[148] Yet, the *Aetna* case suggests that if the interests of the United States and the controllers had been adverse, then the Fourth Circuit might have found a conflict of interest.[149]

Several bar association ethical committees have opined, citing Disciplinary Rule 5-105 of the ABA Model Code of Professional Responsibility, that, where the relationship between a governing body and one of its agencies has become antagonistic, counsel fully independent of the government should be retained to represent that agency.[150] Prior United States Attorneys General have endorsed the notion that, as a matter of general policy, the Justice Department should permit agencies with which it disagrees to present their positions in court.[151]

Equal treatment of private and federal PRPs may be questioned when both EPA and federal PRPs are represented by DOJ. Although the law is not clear, an argument may be made that the potential of a conflict of interest exists in such cases. The ABA Model Rules appear to sanction such representation where client agencies can be said to receive adequate representation and have "consented" to dual representation. Whether these conditions have been satisfied in any given case may be highly fact-specific. The ABA has, however, also taken note of the unique position of government lawyers, who may be *authorized* by law to represent several governmental agencies in intra-governmental litigation.

147. *See id.* (noting factors that influenced Fourth Circuit's decision).

148. *See id.* at 1200-01 n.7 (pointing out that purpose of Canon Five was to protect clients affected by conflicts of interests, not other parties).

149. *See Aetna*, 570 F.2d at 1200 (noting that Fourth Circuit found "nothing in the record to support the conclusion . . . that 'an actual conflict exists.'").

150. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1282 (1973) (stating no attorney in corporate counsel's office may represent both sides in suit brought by city against its police force); *see also* N.Y. State Bar Ass'n Comm'n on Prof'l Ethics, Op. 447 (1976) (reinforcing conflict of representing both sides of suit).

151. *See* Josephson & Pearce, *supra* note 124 at 549-50 (discussing Attorney General's view that DOJ should permit agencies to set forth their opposing opinions).

V. Towards a Stronger Executive: Several Proposals

A. Independent Litigation Authority

Although Congress could grant separate and independent authority enabling EPA to represent itself in CERCLA enforcement actions involving federal PRPs, it has not done so despite a series of CERCLA amendments over the years.[152] However, Congress has granted independent litigation authority to other federal entities.[153] For example, Congress justified the creation of the Consumer Products Safety Commission as an agency within the Food and Drug Administration (FDA),[154] giving this agency independent litigation authority, as follows:

> It is important that the litigation of the Agency, which is critical to enforcement of the laws it administers, be directed and controlled by the Administrator. No one else has the responsibility for enforcement of those laws, and no one else should be in the position to frustrate their enforcement. . . . Similarly, the decision as to what legal arguments are to be made and how to make them most effectively for orderly development of the law through trial and appellate litigation is best handled by the Administrator who is responsible solely for enforcing the food, drug and product safety laws.[155]

Congress has also granted independent litigation authority to the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), the Securities and Ex-

152. See *supra* note 18. Consistent with such a grant, the Agency might request rescission of the portion of Executive Order 12,580 which requires DOJ to approve the issuance of a § 106 Order. *See* Exec. Order 12,580, 52 Fed. Reg. 2923, § 4(e) (Jan. 23, 1987). Also note that independent representation authority is distinct from the more limited "overfile authority" now available (but seldom if ever used) under some environmental statutes. An example of "overfile" authority is that granted to EPA under § 7605 of the Clean Air Act, which requires the Administrator to request the Attorney General to appear and represent the Administrator. *See* 42 U.S.C. § 7605 (2000). That section further provides that unless "the Attorney General notifies the Administrator that he will appear in such action, within a reasonable time, attorneys appointed by the Administrator shall appear and represent him." *See* 42 U.S.C. § 7605(a).

153. *See generally* 15 U.S.C. § 2061 (2000) (providing independent litigation authority to Consumer Products Safety Commission).

154. *See id.* (setting forth creation of Consumer Products Safety Commission within FDA).

155. Consumer Product Safety Act of 1972, S. Rep No. 92-835, at 4853 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 4573.

change Commission (SEC), the Department of Transportation (DOT) and the Interstate Commerce Commission (ICC).[156]

It is widely recognized that EPA's willingness to enforce CERCLA's joint and several liability provisions serves as a principal settlement incentive for private PRPs.[157] EPA has been successful at sites involving only private PRPs by pursuing an enforcement strategy that serves to deter PRPs from "lying in the weeds."[158] Although a Congressional grant of independent litigation authority might strengthen this policy, as a practical matter such a step is unlikely to happen. However, intra-executive measures could be pursued consistent with existing policy, which can be implemented with minimum disruption to current practices and procedures.

B. Staff-level Firewalls

A more modest proposal, arguably consistent with the Unitary Executive principle because it preserves the function of DOJ management as executive mediator of inter-agency disputes, is the establishment of staff-level "firewalls" between opposing government counsel in CERCLA litigation involving federal PRPs.[159] Such a proposal could be instituted either as a matter of general government policy, to be applied in all CERCLA enforcement cases involving federal PRPs, or on a case-by-case basis depending on the degree of the federal PRP agency's involvement and the degree of adverseness between the positions of the enforcing and defending agencies. Such firewalls would allow agency and DOJ counsel the freedom to advocate independently in negotiations and in court,

156. *See* 29 U.S.C. § 154(a) (2000) (granting litigation authority to NLRB); 42 U.S.C. § 2000e-5(b)(2) (2000) (granting authority to EEOC); 15 U.S.C. §§ 77(t), 78(u) (2000) (granting authority to SEC); 49 U.S.C. § 1810(b) (2005) (granting authority to DOT); 28 U.S.C. § 2323 (2000) (granting authority to ICC). However, note that such independent authority does not necessarily equate to inter-agency litigation authority.

157. *See, e.g.*, O'Neil v. Picillo, 883 F.2d 176, 177-78, (1st Cir. 1989) (holding that joint and several liability was imposed on non-settling defendants, but 35 other PRPs settled).

158. *See, e.g.*, Breen, *supra* note 48 (noting EPA success in pursuing enforcement strategy with respect to PRPs); *see also Interim CERCLA Settlement Policy*, *supra* note 48 (noting general strategy to ensure timely cleanups).

159. The term derives from the language of computer security. While severing computer links between two sides of a law firm representing adverse clients is one aspect of "fire" walls, a true "firewall" would prohibit *all* communication and information-sharing relating to the lawsuit at issue, except those which are a matter of public record in the litigation between attorneys in the same firm representing adverse interests. A CERCLA firewall at the staff level, of the type proposed herein, would therefore be somewhat less restrictive than a true firewall as those terms are generally understood by the private legal community.

but would allow DOJ management to resolve certain issues internally without public airing. A staff-level firewall would address a number of issues identified above.

Staff-level firewalls would allow all government counsel to conduct discovery, motion practice and other litigation independently (and hopefully more effectively) on behalf of their respective federal clients. This would ensure that DOJ trial attorneys have their respective clients' best interests at heart in every aspect of litigation, without having to balance the competing interests of other agencies at every step. In litigation and settlement negotiations, for example, one DOJ attorney would be able to concentrate exclusively on EPA's affirmative case, without also having to protect the interests of any involved federal PRPs at the same time. Such firewalls would also provide procedures for shielding from disclosure potential intra-governmental disputes which do not require adjudication or which would not contribute meaningfully to settlement negotiations with the private PRPs if disclosed.

As noted above, this proposal could be instituted at the governmental staff level as a matter of policy or on a case-by-case basis.[160] Its essential feature would be to create an effective barrier at the staff level between opposing governmental interests in a particular case. It would require firewalls between enforcement and defense staff, as well as agency staff counsel involved in the same CERCLA litigation.

A staff-level firewall of this type would prohibit communication and information exchange between enforcement and defense government counsel regarding the subject matter of a given suit, except with respect to open settlement negotiations, court conferences, court appearances or other communications and discovery that are accessible to all private counsel. This would prohibit opposing governmental staff attorneys from sharing attorney work-product, protected attorney-client communications, confidential settlement negotiations and other information which would not be available to a private party in litigation with the Government.

Under such a policy, in the event that disputes arise between federal agencies represented by DOJ staff, which cannot be resolved openly or which are not appropriate for public airing, such disputes could be taken to the appropriate managerial level for resolution.

160. See *supra* note 159 and accompanying text (discussing aspects of proposal pertaining to staff-level firewalls and potential implementation of proposal); *supra* notes 25-26 and accompanying text (noting that establishing staff-level firewalls is simpler solution).

The same would be true for ultimate DOJ approval of initial pleadings, settlements in principle or final settlement documents, for which the DOJ decision-maker would have access to all information available to those at the staff level. Nevertheless, the DOJ decision-maker would make every attempt not to reveal the confidential information obtained from one side at the staff level to the other side.

Other than with regard to matters appropriate for managerial resolution, enforcement and defense government counsel would be free to take independent positions in litigation and settlement negotiations without having to coordinate their strategies. Governmental counsel representing either the defense or enforcement side would also be able to enter into settlement confidentiality agreements independently, provided such agreements did not prevent the exchange of information otherwise discoverable.

VI. CONCLUSION

Enforcement of CERCLA by or on behalf of EPA is complicated when federal agencies are PRPs at privately-owned Superfund sites, owing to the Executive Branch's adherence to the Unitary Executive principle, which requires DOJ to represent both EPA and federal PRP defendants in the same litigation. Yet, as I have attempted to show, it is not clear that the Constitution prohibits adjudications between EPA and federal PRPs, nor requires the dual representation of enforcing and defending agencies by DOJ before the federal courts. In fact, under CERCLA, one may argue that Congress has explicitly sanctioned such inter-agency litigation.[161]

Rather, reliance on the Unitary Executive can be attributed to policies of past administrations intended to strengthen the federal Executive through centralized policy-making control.[162] In such a scheme, all intra-executive disputes, extending to the enforcement of environmental laws by one agency against another, are to be resolved within the Executive Branch and are not subject to judicial scrutiny.

Such a centralized management structure, however, may be ill-suited to the modern executive, comprised as it is of multiple departments and agencies commanding vast resources, performing varied and disparate functions, each of which acts in its sphere as a self-sufficient mini-government. It is not at all unrealistic to pre-

161. *See* 42 U.S.C. §§ 9601(21), 9620(a)(1) (authorizing inter-agency litigation).

162. *See* Rosenberg, *supra* note 11, at 628-30 (noting policies leading to reliance on Unitary Executive principles).

sume that such ponderous organizations, each independently funded through Congressional appropriations, each with a distinct mission, may sue and be sued as separate, independent legal entities. Indeed, some executive departments and other federal regulatory entities already have such authority.[163] As I have attempted to demonstrate, in CERCLA cases involving federal PRPs, independent agency representation could result in greater and more timely federal PRP compliance as well as a more cooperative private PRP community.

Would this weaken the Executive? Quite the contrary. I have proposed the paradigm of the octopus to describe the phenomenon of the modern executive. It is not fragmentary: it has a head, but apart from matters of national policy, its strength lies in the free and muscular exercise of its independent limbs, not upon rigid central control. In the CERCLA enforcement context, censorial control over inter-agency litigation cripples the modern executive: it manacles the octopus. I would suggest that a truly strong executive, in the absence of overriding national policy concerns, is one whose agencies and departments are allowed to pursue their various missions with independence and vigor in the enforcement context.

Independent representation is unlikely to be accomplished by act of Congress. However, there does exist a solution consistent with the Unitary Executive principle which can be implemented with a minimum of change to existing practices: staff-level "firewalls" separating opposing government counsel in CERCLA cases with federal PRPs. Such firewalls would allow DOJ management to continue to function as policy-maker and executive mediator of inter-agency disputes, while freeing government staff or trial counsel from the potential for conflict of interest when representing federal agency clients with adverse interests in the same litigation. This change would strengthen, not weaken, the Executive.

163. See *supra* note 155. Congress has granted independent litigation authority to, *e.g.*, the Consumer Products Safety Commission of the Food and Drug Administration, 15 U.S.C. § 2061; the National Labor Relations Board, 29 U.S.C. § 154(a); the Equal Employment Opportunity Commission, 42 U.S.C. § 2000e-4(b)(2); the Securities and Exchange Commission, 15 U.S.C. §§ 77(t) and 78(u); the Department of Transportation, 49 U.S.C. § 1810(b); and the Interstate Commerce Commission, 28 U.S.C. § 2323.