



10-2007

# Litigating Presidential Signing Statements

Michele E. Gilman

*University of Baltimore School of Law*, [mgilman@ubalt.edu](mailto:mgilman@ubalt.edu)

Follow this and additional works at: [http://scholarworks.law.ubalt.edu/all\\_fac](http://scholarworks.law.ubalt.edu/all_fac)



Part of the [President/Executive Department Commons](#)

---

## Recommended Citation

Litigating Presidential Signing Statements, 16 Wm. & Mary Bill Rts. J. 131 (2007) (symposium)

This Article is brought to you for free and open access by the Faculty Scholarship at ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact [snolan@ubalt.edu](mailto:snolan@ubalt.edu).

## LITIGATING PRESIDENTIAL SIGNING STATEMENTS

Michele Estrin Gilman\*

Presidential signing statements have been variously portrayed as much ado about nothing,<sup>1</sup> a cause for concern,<sup>2</sup> and a constitutional crisis.<sup>3</sup> Clearly in the latter category, the American Bar Association (ABA) Task Force on Presidential Signing Statements and the Separation of Powers Doctrine called presidential signing statements “contrary to the rule of law and our constitutional system of separation of powers.”<sup>4</sup> The ABA Task Force concluded that the President must veto legislation he believes is constitutionally objectionable, rather than use presidential signing statements to refuse to enforce statutes that he signs into law.<sup>5</sup> In this view, such refusals effectuate unconstitutional line-item vetoes.<sup>6</sup> Accordingly, the ABA Task Force urged Congress to enact legislation that would subject presidential signing statements to judicial review in order to halt this presidential practice altogether.<sup>7</sup>

Senator Arlen Specter took up the ABA Task Force’s suggestion and introduced the Presidential Signing Statements Acts of 2006 and 2007,<sup>8</sup> which would give either the Senate or the House of Representatives standing to seek a declaratory judgment about the legality of a presidential signing statement. It is easy to see why some members of Congress want the judicial branch to referee this tug-of-war between

---

\* Associate Professor and Director, Civil Advocacy Clinic, University of Baltimore School of Law. J.D., University of Michigan Law School, 1993; B.A., Duke University, 1990. I would like to thank Professors Arnold Rochvarg and Kim Brown for their comments on this Article, as well as the symposium participants. Stephen Mutschall provided valuable research assistance.

<sup>1</sup> Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 310 (2006) (“The attack on the institution of signing statements is puzzling.”).

<sup>2</sup> Postings of David Barron et al., to Georgetown Law Faculty Blog, [http://gulcfac.typepad.com/georgetown\\_university\\_law/2006/07/thanks\\_to\\_the\\_p.html](http://gulcfac.typepad.com/georgetown_university_law/2006/07/thanks_to_the_p.html) (July 31, 2006) (“Briefly summarized, we think nonenforcement on any seriously contested question of constitutional law should be the rare exception, a rule of thumb that coincides with Executive practice prior to this Administration.”).

<sup>3</sup> AM. BAR ASS’N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE (2006), available at [http://www.abanet.org/op/signing-statements/aba\\_final\\_signing\\_statements\\_recommendation-report\\_7-24-06.pdf](http://www.abanet.org/op/signing-statements/aba_final_signing_statements_recommendation-report_7-24-06.pdf).

<sup>4</sup> *Id.* at 5.

<sup>5</sup> *Id.* at 22.

<sup>6</sup> *Id.* at 23.

<sup>7</sup> *Id.* at 25.

<sup>8</sup> S. 1747, 110th Cong. (2007); S. 3731, 109th Cong. (2006).

the executive and legislative branches. By pushing the issue to the judiciary, Congress does not have to expend political capital in repeated showdowns with the President over the scope of executive power. Moreover, once a clear-cut case involving executive inaction gets into federal court, the courts generally will order executive officials to act in accordance with the law.<sup>9</sup> This Article explores whether Congress can litigate presidential signing statements, concluding that they are not justiciable even if Congress enacts a law granting itself standing. Furthermore, if the President follows through on his signing statements and declines to enforce the laws as written, those acts of presidential nonenforcement will face significant justiciability barriers. As a result, Congress must use political tools to force the President's hand if the President is refusing to enforce laws that he has signed.

Part I of the Article discusses the ripeness and standing barriers Congress would face in seeking judicial review of presidential signing statements. Given these barriers, Part II explores ways in which Congress can piggyback on hypothetical litigation brought by private parties to challenge presidential signing statements, such as intervention and amicus briefs. While these are viable methods to give Congress a voice in this interbranch dispute, Part III discusses why such private lawsuits are unlikely to succeed because of various hurdles to justiciability, including standing.

To illustrate these obstacles, Part III discusses six actual instances in which the executive branch did not enforce statutes that President Bush had previously objected to in signing statements. These acts of executive nonenforcement were uncovered by the Government Accountability Office (GAO) when it examined all of the presidential signing statements that accompanied appropriations legislation in 2006.<sup>10</sup> Part III also addresses threatened instances of nonenforcement contained in some of President Bush's more high-profile signing statements, such as his objections to statutes that require the head of the Federal Emergency and Management Agency (FEMA) to be qualified, ban torture against foreign detainees, and set forth how the United States should execute foreign policy in Sudan. This Part concludes that plaintiffs would likely not be able to challenge actual or threatened acts of nonenforcement because standing and other justiciability doctrines would pose insurmountable barriers. In short, Congress will have to exercise its political powers if it wishes to confront the President over his signing statements.

---

<sup>9</sup> See generally Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253 (2003). Cheh explains that courts generally avoid ruling on executive discretionary decisions but will order action where congressional intent is clear and the institutional costs to the judiciary are low. See *id.* at 270–72.

<sup>10</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, PRESIDENTIAL SIGNING STATEMENTS ACCOMPANYING THE FISCAL YEAR 2006 APPROPRIATIONS ACTS 9–10 (2007) [hereinafter GAO REPORT], available at <http://www.gao.gov/decisions/appro/308603.pdf>.

## I. BARRIERS TO JUDICIAL REVIEW

In over 149 signing statements, President Bush has threatened executive non-enforcement of at least 800 statutory provisions that he deems inconsistent with the Constitution.<sup>11</sup> His objections fall into four main categories. He objects to statutes that he asserts (1) limit the President's power to supervise the unitary executive; (2) impinge on the Commander-in-Chief powers; (3) violate the Presentment and Bicameralism Clauses; and (4) violate the Due Process Clause of the Fifth Amendment.<sup>12</sup> Commentators are mixed on the underlying merits of the President's claims,<sup>13</sup> although most conclude that he has issued presidential signing statements too rashly and too often.<sup>14</sup> Despite a general sense of outrage over the President's use of signing statements, there has been scant attention given to the question of whether the issue will come to a head in the courts. As this Part explains, congresspersons will face serious ripeness and standing barriers if they hope to have the judiciary rule on the merits of signing statements.

## A. Ripeness

On their own, presidential signing statements do not have any tangible effect other than putting us on notice that the President has constitutional concerns about certain statutes. While we are officially on notice, we cannot be sure about much else. For instance, many signing statements claim that the President will enforce the statute at issue consistent with the Constitution, but they do not set forth the President's specific views about constitutional interpretation.<sup>15</sup> Similarly, other signing statements claim that certain statutory provisions interfere with the President's power to

---

<sup>11</sup> See AM. BAR ASS'N, *supra* note 3, at 14.

<sup>12</sup> See Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515, 522 (2005) (providing a full list of George W. Bush's constitutional objections).

<sup>13</sup> See, e.g., T.J. HALSTEAD, CONG. RESEARCH SERV., REPORT FOR CONGRESS: PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 14–20 (2007) (concluding that President George W. Bush's signing statements in the areas of foreign policy, executive privilege, and reporting requirements express an overly broad conception of presidential power, but that his objections to legislative vetoes are supported by Supreme Court precedent).

<sup>14</sup> See, e.g., Cooper, *supra* note 12, at 530–31 (stating the Bush administration has employed signing statements “so dramatically that it might surprise even Alexander Hamilton”).

<sup>15</sup> See, e.g., Statement on Signing the Department of Defense Appropriations Act, 2005, 40 WEEKLY COMP. PRES. DOC. 1453 (Aug. 5, 2004) (“The executive branch shall construe these provisions relating to planning and making of budget recommendations in a manner consistent with the President's constitutional authority to require the opinions of the heads of departments and to recommend for congressional consideration such measures as the President shall judge necessary and expedient.”).

supervise a “unitary executive;”<sup>16</sup> however, they do not articulate a theory of the unitary executive or reveal whether the President will ignore the statutory command.<sup>17</sup> Thus, the presidential signing statements do not cause any immediate injury other than collective uncertainty over presidential intentions.

As a result, the signing statements are not ripe. Although the ABA Task Force and Senator Specter are focused on granting Congress standing,<sup>18</sup> the foremost barrier to hauling the President into court over a signing statement is ripeness. Whereas standing determines *who* may bring a lawsuit, ripeness governs *when* lawsuits can properly be heard.<sup>19</sup> The ripeness doctrine ensures that courts hear actual disputes rather than speculative ones. In *Abbott Laboratories v. Gardner*,<sup>20</sup> the Court stated that the ripeness doctrine is designed “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements” and to limit judicial interference “until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.”<sup>21</sup> A claim is ripe if the issues are fit for review and there is hardship to the parties from withholding review.<sup>22</sup> A challenge to presidential signing statements seems to falter on both prongs.

An issue is considered fit for review when it is legal and final. The ABA Task Force argues that the use of presidential signing statements poses a purely legal issue: whether the President must veto legislation that he believes is unconstitutional.<sup>23</sup> However, even if an issue is legal, it is not fit for review if it is better served by factual development in a specific context.<sup>24</sup> When the President issues a signing statement, we do not know whether and how he will ultimately execute the statute underlying the statement. We only know that he has some concerns that Congress may be interfering with presidential prerogatives.

---

<sup>16</sup> See, e.g., Statement on Signing the National Defense Authorization Act for Fiscal Year 2004, 39 WEEKLY COMP. PRES. DOC. 1683 (Nov. 24, 2003) (“The executive branch shall construe the restrictions on deployment and use of the Armed Forces in sections 541(a) and 1023 as advisory in nature, so that the provisions are consistent with the President’s constitutional authority as Commander in Chief and to supervise the unitary executive branch.”).

<sup>17</sup> The “unitary executive” theory is associated with “the president’s power to remove subordinate policy-making officials at will, the president’s power to direct the manner in which subordinate officials exercise discretionary executive power, and the president’s power to veto or nullify such officials’ exercises of discretionary power.” Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 607 (2005).

<sup>18</sup> See *supra* notes 3–8 and accompanying text.

<sup>19</sup> Standing and ripeness are closely related doctrines. See 13A CHARLES ALLEN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.12 (2d ed. 2007) (“Ripeness . . . easily could be seen as the time dimension[] of standing.”).

<sup>20</sup> 387 U.S. 136 (1967).

<sup>21</sup> *Id.* at 148–49.

<sup>22</sup> *Id.* at 149.

<sup>23</sup> AM. BAR ASS’N, *supra* note 3, at 21–23.

<sup>24</sup> See *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 734 (1988).

Of over 800 presidential signing statements issued by President Bush, no one has identified more than six that have not been enforced as written.<sup>25</sup> The GAO uncovered these acts of non-enforcement but could not conclude whether or not the President's views are affecting how agencies are carrying out the law.<sup>26</sup> Nor do we know whether a similar pattern of non-enforcement is occurring in the absence of signing statements. The GAO examined presidential signing statements that accompanied appropriations acts in the fiscal year 2006.<sup>27</sup> In eleven signing statements, the President objected to 160 different statutory provisions.<sup>28</sup> The GAO selected nineteen of those provisions to see whether the agencies charged with executing the statutes carried them out.<sup>29</sup> The GAO found that ten were executed as written, six were not, and three were not triggered because they were conditioned on external events that did not occur.<sup>30</sup> These findings confirm that a signing statement is not synonymous with final agency action. Thus, courts would likely be inclined to wait to see how the executive branch chooses to implement a statute before ruling on the validity of a signing statement. The President is using signing statements to protect his prerogatives as part of an overarching strategy of expanding executive power;<sup>31</sup> however, he does not necessarily object to all of the substantive statutory goals or plan to deviate from them.

Moreover, there are many steps between the President's issuance of a signing statement and a specific agency's act of non-enforcement.<sup>32</sup> The President does not carry out statutes; the federal bureaucracy does. A signing statement is not final; an agency decision not to enforce is.<sup>33</sup> In *Toilet Goods Ass'n v. Gardner*, decided the

---

<sup>25</sup> GAO REPORT, *supra* note 10, at 9.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1, 11.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See generally Michael P. Allen, *George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change*, 72 BROOK. L. REV. 871, 871 (2007) ("It is no secret that the administration of President George W. Bush has consistently asserted a breathtakingly broad view of the scope of executive authority under Article II of the United States Constitution."); Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 312 (2006) ("Recent expansive assertions of implied executive authority by the present administration against the backdrop of national security considerations have also added a particularly combustible fuel to the controversy.").

<sup>32</sup> In *Ohio Forestry Ass'n v. Sierra Club*, the Court rejected as unripe a challenge to a federal land and resource management plan adopted by the United States Forest Service because the alleged harm was not imminent. 523 U.S. 726 (1988). "As we have pointed out, before the Forest Service can permit logging, it must focus upon a particular site, propose a specific harvesting method, prepare an environmental review, permit the public an opportunity to be heard, and (if challenged) justify the proposal in court." *Id.* at 734.

<sup>33</sup> In its report, the GAO was unable to conclude whether the presidential signing statement impacted the agencies who failed to enforce the six statutes identified as not carried out

same day as *Abbott Laboratories*, the Court held that a challenge to an FDA regulation authorizing the agency to suspend certifications to manufacturers that denied the agency free access to their factories was not ripe.<sup>34</sup> The Court stated, “At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the [FDA] Commissioner will give to justify his order.”<sup>35</sup> Likewise, as we have seen, the President may or may not follow through on the threats contained in his signing statements.

Moreover, the executive branch may decline to enforce statutes with or without a signing statement. Most statutes give the executive branch considerable room in which to exercise its discretion. Congress does not legislate with specificity for a variety of reasons. Some are legitimate, such as unforeseen circumstances, the complexity of modern society, and the need for technical and scientific expertise in policymaking, while some are less so, such as a lack of political will or failure to draft with precision.<sup>36</sup> Thus, Congress leaves it to the executive branch to fill in statutory gaps. Many of these gaps are filled when agencies conduct notice and comment rulemaking or adjudicate specific enforcement actions.<sup>37</sup> Throughout this process, the President can influence how agencies carry out statutes in a variety of ways, ranging from creating an annual budget to appointing sympathetic agency heads to conducting regulatory review of proposed regulations.<sup>38</sup> Given the inherent ambiguity in most laws, different administrations often execute the same statute quite differently.<sup>39</sup> The variation in administration priorities and tactics occurs irrespective of whether there is a signing statement announcing such intent. In sum, it is how the executive implements a statute that is potentially injurious, not the signing statement itself.

Further, signing statements do not cause hardship to Congress that warrants pre-enforcement review. Hardship arises when parties are forced to comply with an illegal

---

as written. GAO REPORT, *supra* note 10, at 9. This further suggests the difficulty of tying a specific presidential signing statement to an agency’s final action.

<sup>34</sup> *Toilet Goods Ass’n v. Gardner*, 387 U.S. 158 (1967).

<sup>35</sup> *Id.* at 163.

<sup>36</sup> See RICHARD J. PIERCE ET AL., *ADMINISTRATIVE LAW AND PROCESS* 43–44 (4th ed. 2004).

<sup>37</sup> *Administrative Procedure Act*, 5 U.S.C. §§ 551, 553–54 (2000).

<sup>38</sup> See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 587–91 (1984).

<sup>39</sup> For example, the Reagan administration implemented a regulation forbidding family planning clinics that receive federal funds from counseling patients about abortion. See *Separation of Abortion-Related Services from Family Planning Programs*, 52 Fed. Reg. 33, 214–15 (Sept. 1, 1987). The Supreme Court upheld this “gag rule” against attack during the Bush administration. *Rust v. Sullivan*, 500 U.S. 173, 177–79 (1991). President Clinton reversed the “gag rule.” See *The Title X “Gag Rule”*, 58 Fed. Reg. 7455 (Jan. 22, 1993). Subsequently, President Bush reinstated part of it. Press Release, White House, Memorandum: Restoration of the Mexico City Policy (Jan. 22, 2001), available at <http://www.whitehouse.gov/news/releases/20010123-5.html>.

law or risk prosecution with substantial consequences.<sup>40</sup> For instance, in *Abbott Laboratories*, drug companies were forced to choose between complying with a costly FDA labeling requirement that they believed was illegal or risk criminal and civil penalties for distributing misbranded drugs.<sup>41</sup> In such circumstances, the Supreme Court has stated that pre-enforcement review is appropriate.<sup>42</sup> By contrast, no one is forced to do anything or refrain from any action when a President issues a signing statement. To be sure, Congress or private parties may be agitated as they await final executive action, but this is not hardship. When the President issues a signing statement announcing that part of a statute unconstitutionally infringes on presidential powers, no one in Congress is forced to choose between forgoing lawful activity or facing civil and criminal penalties. As for private parties, the Supreme Court has held that, generally, non-enforcement of a statute presents less of a risk of injury than enforcement.<sup>43</sup>

In many cases, President Bush has enforced statutes about which he expressed misgivings in signing statements. In other situations, the executive branch appears to have followed through on the President's threats of non-enforcement. When there is an actual agency decision not to enforce, the ripeness barrier falls away. At that point, the timing is right. Yet, a litigant must show not only that the time is right for judicial review, but also that he or she has suffered an injury for standing purposes. Although it is impossible to assess the risks posed by non-enforcement of 800 different statutory provisions, it is significant that no one has yet emerged from the woodwork claiming individual harm. The injuries identified by the ABA and other commentators go to the structural balance of our system of separation of powers. This view of presidential power may be significant, even dangerous, but signing statements have yet proven to impact anyone individually. As the next Part explains, members of Congress might be angry over a signing statement, but the Supreme Court has held that congressional displeasure is not an injury.

### *B. Legislator Standing*

Under Article III of the Constitution, courts can only adjudicate cases and controversies.<sup>44</sup> Standing is one element of the case and controversy requirement. To establish standing, the "plaintiff must allege personal injury fairly traceable to the

---

<sup>40</sup> *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967).

<sup>41</sup> *Id.* at 152–54.

<sup>42</sup> *Id.*

<sup>43</sup> See *Cheh*, *supra* note 9, at 279–85 (explaining that under *Heckler v. Chaney*, 470 U.S. 821 (1985), executive refusals to enforce the law are presumptively unreviewable). *Cheh* critiques the *Chaney* presumption, stating that "the distinction between action and nonaction, with action alone raising concern about the rights of individuals, completely ignores the public rights created by statutory regimes." *Id.* at 281.

<sup>44</sup> See U.S. CONST. art. III.



defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."<sup>45</sup> The requirement of injury-in-fact is the insurmountable hurdle for most legislator lawsuits; cases in this area do not even get to the traceability and redressability standing requirements.<sup>46</sup> To demonstrate an injury, the plaintiff must allege that he has a personal and particularized stake in the dispute and that he has "suffered . . . an invasion of a legally protected interest."<sup>47</sup>

In *Raines v. Byrd*,<sup>48</sup> the Supreme Court set forth a narrow conception of legislator standing that overturned a line of D.C. Circuit cases that typically granted legislators standing, while denying them review on the merits through court-created "equitable discretion" doctrines.<sup>49</sup> In *Raines*, the Court held that individual legislators lacked standing to challenge the Line Item Veto Act, which gave the President the authority to cancel spending and tax benefit measures after he signed them into law, subject to congressional overruling.<sup>50</sup> The Court began its opinion by noting that respect for separation of powers principles requires a rigorous standing inquiry when the case involves political branch disputes.<sup>51</sup> In so doing, the Court glossed over a provision of the Act that expressly gave the federal courts jurisdiction to rule on the Act's constitutionality even before the President flexed his veto power.<sup>52</sup> Instead, the Court reasoned that the claimed injury to the plaintiffs, six current and former congresspersons, was solely institutional and thus "wholly abstract and widely dispersed."<sup>53</sup> The Court contrasted the alleged injury in *Raines* to the two types of cases in which legislators do have standing.<sup>54</sup>

---

<sup>45</sup> *Allen v. Wright*, 468 U.S. 737, 738 (1984).

<sup>46</sup> As noted earlier, standing and ripeness doctrines are related. If critical events have not yet occurred, there can be said to be no redressable injury and likewise, the claim is not ripe. See 13A WRIGHT ET AL., *supra* note 19, at § 3531.12.

<sup>47</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>48</sup> 521 U.S. 811 (1997).

<sup>49</sup> For an extended discussion of D.C. Circuit approaches to legislator standing prior to *Raines*, see Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL'Y 209, 222–41 (2001), and Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve as Counterweight?* 54 U. PITT. L. REV. 63, 73–103 (1992).

<sup>50</sup> *Raines*, 521 U.S. at 830.

<sup>51</sup> *Id.* at 819–20. Neal Devins and Michael A. Fitts argue that "the Court's characterization of congressional standing as an invitation to interbranch Armageddon is, at the very least, unnecessary." Neal Devins & Michael A. Fitts, *The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court's Attempt to Control Constitutional Confrontations*, 86 GEO. L.J. 351, 354 (1997). The authors contend that the Court was wise to avoid rendering an opinion before the effects of the Line Item Veto Act were known, but that the Court should do more to urge Congress to pass judgment on the constitutionality of its enactments. *Id.* at 360–61.

<sup>52</sup> *Raines*, 521 U.S. at 820 n.3.

<sup>53</sup> *Id.* at 829.

<sup>54</sup> *Id.* at 821.

First, legislators have standing where they suffer an individual injury.<sup>55</sup> Thus, in *Powell v. McCormack*, a congressman had standing to challenge his exclusion from the House of Representatives and his consequent loss of salary.<sup>56</sup> Whereas the *Powell* plaintiff suffered a personal injury, the legislators in *Raines* suffered a claimed injury which “runs . . . with the Member’s seat” and not as a “prerogative of personal power.”<sup>57</sup> Indeed, every member of Congress in *Raines* suffered the same alleged loss of political power as a result of the Line Item Veto Act.

Second, legislators can suffer a legally cognizable institutional injury, but only when their votes are nullified. *Coleman v. Miller*<sup>58</sup> established this proposition in 1939. There, twenty Kansas state senators alleged that the Lieutenant Governor cast an unlawful tie-breaking vote in the state senate in favor of a federal constitutional amendment, thereby approving the amendment against their votes.<sup>59</sup> The Court held that the losing senators had a “plain, direct and adequate interest in maintaining the effectiveness of their votes.”<sup>60</sup> As the *Raines* Court explained, *Coleman* stands for the proposition that legislators are institutionally injured only if their votes are completely nullified, that is, if their “votes would have been sufficient to defeat (or enact) a specific legislative Act” but “that legislative action goes into effect (or does not go into effect).”<sup>61</sup> The *Raines* legislators did not have their votes nullified, because their votes were given full effect. “They simply lost that vote.”<sup>62</sup> Moreover, the legislators had remedies for their discontent—they could repeal the Act or exempt certain appropriations bills from the Act’s reach.<sup>63</sup> The Line Item Veto Act also remained open to challenge by someone suffering a true injury-in-fact, which is exactly what eventually happened when the Act was stricken down as unconstitutional in *Clinton v. City of New York*.<sup>64</sup>

---

<sup>55</sup> *Id.*

<sup>56</sup> 395 U.S. 486 (1969).

<sup>57</sup> *Raines*, 521 U.S. at 821.

<sup>58</sup> 307 U.S. 433 (1939).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 438.

<sup>61</sup> *Raines*, 521 U.S. at 823.

<sup>62</sup> *Id.* at 824.

<sup>63</sup> *Id.*

<sup>64</sup> *Clinton v. New York* consolidated two cases: The plaintiffs in the first case [were] the City of New York, two hospital associations, one hospital, and two unions representing health care employees. The plaintiffs in the second [case were] a farmers’ cooperative consisting of about thirty potato growers in Idaho and an individual farmer who was a member and officer of the cooperative. 524 U.S. 417, 425 (1998). They all faced adverse financial consequences as a result of the President exercising the Line Item Veto by canceling section 4722(c) of the Balanced Budget Act of 1997, which waived the Federal Government’s statutory right to recoupment of as much as \$2.6 billion in taxes that the State of New York had levied against Medicaid providers, and section 968 of the Taxpayer Relief Act of 1997, which permitted the owners of certain food refiners and processors to defer recognition of capital gains if they sold their stock to eligible farmers’ cooperatives. *Id.* at 432–37.

*Raines* was a very narrow decision.<sup>65</sup> Since *Raines*, the D.C. Circuit has shed further light on what constitutes “nullification.”<sup>66</sup> In *Chenoweth v. Clinton*,<sup>67</sup> members of Congress sued the President, challenging his issuance of an executive order that provided federal support for local efforts to preserve historically significant rivers.<sup>68</sup> The plaintiffs claimed that the Executive Order bypassed the legislative process and thereby “diminished their power as Members of the Congress.”<sup>69</sup> The court held that the plaintiffs lacked standing because their claimed injury—the dilution of their authority as legislators—was the same as that rejected in *Raines*.<sup>70</sup> The court stated that the dispute was “fully susceptible to political resolution,” because Congress could overturn the effect of the Executive Order by passing a law to the contrary.<sup>71</sup> The court left the door open for legislator standing where the President’s action prevents a bill from becoming law.<sup>72</sup>

The court seemingly shut that door in *Campbell v. Clinton*.<sup>73</sup> There, several congressmen sued President Clinton, seeking a declaratory judgment that the President violated the War Powers Resolution and the War Powers Clause of the Constitution when he directed the United States forces’ participation in a NATO campaign in Yugoslavia.<sup>74</sup> Again, the D.C. Circuit held that the legislators lacked standing.<sup>75</sup> The court reasoned that in *Coleman* nullification involved a defeated constitutional ratification that was treated as approved.<sup>76</sup> By contrast, in *Campbell*, the President was not “acting pursuant to the defeated declaration of war or a statutory authorization,” but rather pursuant to his constitutional foreign affairs powers and as Commander in Chief.<sup>77</sup> Thus, nothing that Congress did was nullified.<sup>78</sup> According to the court, *Coleman* and *Raines* do not support the proposition that a legislator has standing “whenever the government does something Congress voted against . . . [or] anytime

---

<sup>65</sup> See Arend & Lotrionte, *supra* note 50, at 260, 273; Devins & Fitts, *supra* note 52, at 374–75.

<sup>66</sup> Arend & Lotrionte, *supra* note 50, at 273.

<sup>67</sup> 181 F.3d 112 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 113.

<sup>70</sup> *Id.* at 117.

<sup>71</sup> *Id.* at 116.

<sup>72</sup> *Id.* at 116–17. The court distinguished *Kennedy v. Sampson*, in which it had granted legislator standing to challenge presidential use of the pocket veto on the grounds that a pocket veto “could plausibly” be described as a nullification. *Id.* at 116–17 (citing *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974)).

<sup>73</sup> 203 F.3d 19 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 815 (2000).

<sup>74</sup> *Id.* at 20.

<sup>75</sup> *Id.* at 20, 24.

<sup>76</sup> *Id.* at 22.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

a President allegedly acts in excess of statutory authority.”<sup>79</sup> Instead, the Supreme Court recognized in *Coleman* “that a ratification vote on a constitutional amendment is an unusual situation.”<sup>80</sup> Once the amendment in *Coleman* was deemed ratified, the senators were powerless to rescind it.<sup>81</sup> Conversely, in *Campbell*, the plaintiffs could have stopped the United States’ involvement in Yugoslavia by passing a law forbidding the use of American forces or cutting off funds for the military.<sup>82</sup> Yet, as the court noted, congressional efforts on both of those fronts fizzled.<sup>83</sup> In addition, the court stated that Congress can impeach a President who acts in blatant disregard of Congress’s authority.<sup>84</sup> In short, the D.C. Circuit has sent a loud message that legislators should be required to turn to politics instead of the courts when they are unhappy with the President.<sup>85</sup>

Does a presidential signing statement constitute a nullification? Under existing precedent, the answer is clearly no. The ABA Task Force defines the injury to Congress as “the usurpation of the lawmaking powers of Congress by virtue of the provisions of the signing statement, and the denial of the opportunity to override a veto.”<sup>86</sup> Here, the argument goes, congresspersons cast their votes, there is no veto, the law is on the books, and yet no one will benefit from the law. In *Coleman* terms, the legislators’ votes were sufficient to enact a law, but that legislative action does not go into effect. Yet, unlike in *Coleman*, the law is still on the books, and the President may decide to enforce it. The signing statements themselves do not cause injury—what may be objectionable is the action (or lack of action) the President ultimately decides to take in carrying out a statute.<sup>87</sup> Indeed, President Bush has enforced many statutes despite issuing signing statements that threaten otherwise.<sup>88</sup> Moreover, future Presidents may enforce any law once it is on the books.

Further, members of Congress retain a variety of political alternatives to achieve statutory objectives. Congress’s formal powers include the threat of impeachment and the power of the purse.<sup>89</sup> Since the other branches of government depend on

---

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 23.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 24. In his concurrence, Judge Randolph asserted that the majority’s emphasis on alternative political remedies “is tantamount to a decision abolishing legislative standing.” *Id.* at 32 (Randolph, J., concurring). The majority responded that political self-help was integral to the *Raines* decision. *Id.* at 24 (majority opinion).

<sup>86</sup> AM. BAR ASS’N, *supra* note 3, at 26.

<sup>87</sup> See Bradley & Posner, *supra* note 1, at 310 (stating that many commentators are missing the point that “the real concern is not with the institution of signing statements but with the Bush administration’s underlying views of executive power”).

<sup>88</sup> See GAO REPORT, *supra* note 10, at 1.

<sup>89</sup> See Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61,

Congress for their funding, Congress's budgetary power "is among Congress's most potent weapons in its effort to control the execution of the laws."<sup>90</sup> Congress's methods of informal supervision over executive agencies include "cajoling, adverse publicity, audits, investigations, committee hearings, factfinding missions, informal contacts with agency members and staff, and pressure on the President to appoint persons chosen by members of Congress to agency positions."<sup>91</sup> These informal controls operate against a background threat that noncompliant federal agencies may find their budgets cut or their programs eliminated.<sup>92</sup> For these same reasons, even if the President follows up on his threats and refuses to enforce a statute, there is no nullification under current precedent. In the event of statutory non-enforcement, congresspersons not only retain political remedies, but private parties may also be able to bring suit if they can allege injury-in-fact.

Still, *Raines* does not address whether Congress as a body has a greater claim to standing than individual legislators. *Raines* dealt with individual legislators as plaintiffs, rather than houses of Congress, and suggested that distinction could be significant.<sup>93</sup> In so doing, the Court cited two cases stating that the houses of Congress have aggregate institutional interests separate from their members.<sup>94</sup> Yet if nullification is truly the test for standing, it seems the result would be the same regardless of whether the plaintiff is an individual legislator or a house of Congress.<sup>95</sup> By emphasizing the extreme alternative of impeachment, the Supreme Court and the D.C. Circuit have suggested that nullification rarely occurs.

---

69–70 (2006).

<sup>90</sup> *Id.* at 84.

<sup>91</sup> *Id.* at 70.

<sup>92</sup> *Id.* at 121–22. Nevertheless, Congress may still need the courts to play an important role in reigning in executive excess, because Congress cannot always "police nonenforcement alone." Cheh, *supra* note 9, at 286–87. The standing cases ignore this reality.

<sup>93</sup> "We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit." *Raines v. Byrd*, 521 U.S. 811, 829 (1997). The Senate and the House Bipartisan Legal Advisory Group (consisting of the Speaker, the Majority Leader, the Minority Leader, and the two Whips) filed a joint amicus curiae brief arguing for reversal of the district court opinion striking down the Line Item Veto Act as unconstitutional. *Id.* at 818 n.2. The houses of Congress did not weigh in on the standing issue. *Id.*

<sup>94</sup> *Id.* at 829 n.10 ("Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take." (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 (1986)); "The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole." (quoting *United States v. Ballin*, 144 U.S. 1, 7 (1892))).

<sup>95</sup> See *infra* notes 136–45 and accompanying text discussing *Newdow v. U.S. Cong.*, 313 F.3d 495 (9th Cir. 2002).

The arguments in favor of congressional standing are that judicial abdication leads to executive aggrandizement of power and allows the political branches to amend the Constitution without following Article V requirements.<sup>96</sup> The argument against congressional standing is that the federal courts should hear cases involving private injuries and refrain from umpiring disputes between the political branches of the government because those branches have powers that private parties do not.<sup>97</sup> Moreover, in this view, judicial power is expanded when the courts freely allow standing, which in turn gives too much power to an undemocratic branch and undermines judicial legitimacy.<sup>98</sup> In the pro-standing view, separation of powers requires court involvement, while in the anti-standing view, separation of powers requires court abstention. Thus, the Supreme Court's resolution of this issue would likely hinge on its view of separation of powers, *i.e.*, whether separation of powers is best preserved when the Court adjusts for imbalance or when the Court allows imbalances to work themselves out over time.

Clearly, the best odds for Congress to challenge executive action on the merits are situations in which individual interests are impacted. Yet if private parties are injured, the Court would expect them to file suit as plaintiffs, in which case the role of Congress would be secondary, perhaps as an intervenor or amicus. Accordingly, the next Part addresses Congress's ability to participate in ongoing litigation over executive non-enforcement.

## II. INTERVENTION AND AMICUS

Both the Supreme Court and the D.C. Circuit have rejected expansive notions of legislator standing, preferring instead to consider alleged executive branch violations of law in the context of lawsuits brought by private parties. These private lawsuits could provide members of Congress with the means for making their views about the merits of a case known to the court. By piggybacking on a private lawsuit as either intervenors or amici curiae, congresspersons could align themselves with private parties challenging presidential acts of non-enforcement. An intervenor joins an ongoing lawsuit and has the same rights as the original parties, such as the right to argue before the court.<sup>99</sup> By contrast, an amicus provides the court with information and typically does not have other participatory rights. As this Part explains, congresspersons are freely allowed to participate as amicus, while intervention rights are less of a guarantee.

---

<sup>96</sup> See Meyer, *supra* note 50, at 67–72.

<sup>97</sup> See Arend & Lotrionte, *supra* note 50, at 273–79.

<sup>98</sup> See Moore v. U.S. House of Representatives, 733 F.2d 946, 958–59 (D.C. Cir. 1984) (Scalia, J., concurring), *cert. denied*, 469 U.S. 1106 (1985); see also Vander Jagt v. O'Neill, 699 F.2d 1166, 1180 (D.C. Cir. 1983) (Bork, J., concurring), *cert. denied*, 464 U.S. 823 (1983).

<sup>99</sup> 7C WRIGHT ET AL., *supra* note 19, at §§ 1901, 1920.

### A. Congressional Intervention

Intervention is a procedural tool that allows a non-party whose interests are impacted by litigation to join an ongoing lawsuit.<sup>100</sup> Once admitted, an intervenor has all the rights and obligations as the original parties to the litigation and is likewise bound by the judgment in the case.<sup>101</sup> Intervention is automatically allowed if a federal statute confers an unconditional right to intervene.<sup>102</sup> The most important federal statute granting such a right is 28 U.S.C. § 2403(a), which permits the United States to intervene in any federal court litigation challenging the constitutionality of an act of Congress that affects the public interest if neither the United States nor any officer, agency, or employee thereof, is a party.<sup>103</sup> The court and the parties must notify the Attorney General about the lawsuit and allow the United States to present evidence and argument about the constitutional issue.<sup>104</sup>

This statute, however, is of limited use to the houses of Congress or their members if they disagree with the executive branch about the constitutionality of a law, because the statute envisions that the executive branch will defend the challenged law. The official role of the Attorney General and the Department of Justice is to represent the United States in litigation and to coordinate litigation across the many agencies that make up the executive branch.<sup>105</sup> In general, once the Attorney General decides whether or not to join the litigation, the language of 28 U.S.C. § 2403(a) does not allow additional components of the United States government to join the case, such as federal agencies or members of Congress.

Congress has filled this gap by granting the Senate the right to intervene (or appear as *amicus curiae*) in litigation “in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue,” as long as “standing to intervene exists under section 2 of article III of the Constitution of the United States.”<sup>106</sup> By statute, Congress created the Office of Senate Legal Counsel, which is headed by a Senate Legal Counsel (SLC) who is appointed by the President pro tempore of the Senate based on recommendations from the Senate majority and minority leaders.<sup>107</sup> The SLC can seek intervention only upon a resolution passed

---

<sup>100</sup> *Id.* § 1901.

<sup>101</sup> *Id.* § 1920.

<sup>102</sup> FED. R. CIV. P. 24(a). This is called intervention of right. There is also permissive intervention at the discretion of the court under Federal Rule of Civil Procedure 24(b).

<sup>103</sup> 28 U.S.C. § 2403(a) (2000).

<sup>104</sup> *Id.*

<sup>105</sup> *See* 28 U.S.C. § 516 (2000) (“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.”).

<sup>106</sup> 2 U.S.C. § 288e(a) (2000).

<sup>107</sup> *Id.* § 288(a).

by the Senate.<sup>108</sup> The Attorney General must notify the SLC when the executive branch will not enforce, apply, or administer a federal law on the ground that it is unconstitutional, or decides not to defend a law against constitutional attack.<sup>109</sup> As an intervenor, the SLC is expected to “defend vigorously” when there is a challenge to Congress’s power to make laws or to the constitutionality of laws.<sup>110</sup> The statutory requirement that the Senate satisfy Article III standing requirements in order to intervene could be a significant constraint in light of *Raines* and its progeny in the D.C. Circuit.

Nevertheless, although the Supreme Court has been reluctant to find legislator standing, it has been liberal in allowing legislators to intervene where houses of Congress or members of Congress are defending a statute against constitutional attack.<sup>111</sup> For instance, both houses of Congress intervened in *INS v. Chadha* to defend the constitutionality of a portion of the Immigration and Naturalization Act that allowed a one-house veto over an executive decision to allow a particular deportable alien to remain in the United States.<sup>112</sup> The executive branch sided with the plaintiff in attacking the provision as an unconstitutional legislative veto, and the Court agreed.<sup>113</sup> In approving of congressional intervention in the case, the Court stated, “We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.”<sup>114</sup> The Court did not cite any statute or rule in support of this proposition, instead cited two older cases in which the Senate appeared only as *amicus curiae*.<sup>115</sup>

Yet the Court’s impetus to hear Congress’s voice in the dispute over the legality of the legislative veto seems correct, despite the lack of express authority for the

---

<sup>108</sup> *Id.* § 288b(c). The SLC also has many other legal duties, such as enforcing subpoenas, defending the Senate against suits brought by members of Congress or congressional employees, and providing litigation support for congressional investigations. *Id.* §§ 288(a)–288(n). For a full description of the litigation duties undertaken by the Senate and House counsels, see Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, LAW & CONTEMP. PROBS., Spring 1988, at 47.

<sup>109</sup> 2 U.S.C. § 288k(b) (Supp. III 2003); 28 U.S.C. § 530D (Supp. II 2002).

<sup>110</sup> 2 U.S.C. § 288(h) (2000).

<sup>111</sup> One author contends that it is unconstitutional for Congress to litigate in defense of a statute because it violates the separation of powers for Congress to delegate the power to execute the law to itself. James W. Cobb, Note, *By “Complicated and Indirect” Means: Congressional Defense of Statutes and the Separation of Powers*, 73 GEO. WASH. L. REV. 205 (2004).

<sup>112</sup> 462 U.S. 919 (1983). Both houses of Congress intervened before the Ninth Circuit Court of Appeals. *Id.* at 930 n.5.

<sup>113</sup> *Id.* at 959.

<sup>114</sup> *Id.* at 940.

<sup>115</sup> *Id.* (citing *Cheng Fan Kwok v. INS*, 392 U.S. 206, 210 n.9 (1968); *United States v. Lovett*, 328 U.S. 303 (1946)).



proposition. The participation of Congress in an interbranch dispute over a separation of powers issue ensures that the issue will be adequately aired and briefed, especially if there is no other entity defending the merits of the statute, as occurred in *Chadha*.<sup>116</sup> Further, in *Chadha*, denying congressional intervention would have resulted in the case being dismissed and Mr. Chadha being deported—even though he was correct on the merits—because there would not have been an adversary party defending the statute.<sup>117</sup> Without congressional intervention, there are circumstances, such as those in *Chadha*, in which the President could essentially veto a law simply by failing to defend it.

Of course, this is the same claim made by opponents of presidential signing statements, who believe they are illegal after-the-fact vetoes. Yet the Supreme Court has indicated that the availability of other political remedies would defeat congressional standing to challenge a presidential signing statement. If “Congress’s legislative, impeachment and oversight powers”<sup>118</sup> are sufficient to defeat standing, why were they not sufficient to defeat intervention in *Chadha*? To begin with, both houses of Congress intervened in *Chadha*,<sup>119</sup> as opposed to individual legislators.<sup>120</sup> This allowed Congress to speak with a single, authoritative voice, a factor that was missing in *Raines*.

More importantly, in *Chadha*, there was a private plaintiff who clearly suffered an injury, namely, the threat of deportation.<sup>121</sup> In turn, this assured that the dispute had the necessary level of concreteness and factual development for judicial review.<sup>122</sup> Thus, Congress was joining an already existing lawsuit, rather than using the courts for its own purposes. This suggests that Congress should be permitted to piggyback on a suit brought by a proper plaintiff. However, in *Chadha*, the plaintiffs and the executive were aligned against Congress. In the case of a challenge to a signing statement and any subsequent act of nonenforcement, the plaintiff is likely to be aligned with Congress seeking enforcement of a statute, rather than with the executive branch seeking to strike down a statute. Thus, the specific procedural posture that existed in *Chadha*—and was central to the Court’s intervention ruling—would not apply.<sup>123</sup>

---

<sup>116</sup> In *Chadha*, the INS agreed with Chadha that the statute was unconstitutional; however, it was obliged to carry out the order of deportation until a court declared the statute unconstitutional. *Chadha*, 462 U.S. at 930.

<sup>117</sup> *Id.* at 939–40.

<sup>118</sup> See Beermann, *supra* note 90, at 113.

<sup>119</sup> *Chadha*, 462 U.S. at 930 n.5.

<sup>120</sup> *Raines v. Byrd*, 521 U.S. 811, 829 (1997); cf. *Karcher v. May*, 484 U.S. 72, 84–85 (1987) (White, J., concurring) (“It bears pointing out, however, that we have now acknowledged that the New Jersey Legislature and its authorized representative have the authority to defend the constitutionality of a statute attacked in federal court. . . . [W]e again leave for another day the issue whether individual legislators have standing to intervene and defend legislation for which they voted.”).

<sup>121</sup> See *Chadha*, 462 U.S. at 919.

<sup>122</sup> *Id.* at 936.

<sup>123</sup> There may be a justification for more freely allowing defendant-intervenors than

Still, other Supreme Court cases indicate that as long as proper plaintiffs are before the Court, legislators can intervene on either side of the case. The standing of private plaintiffs explains legislator intervention in *Bowsher v. Synar*.<sup>124</sup> There, a group of legislators who voted against the Gramm-Rudman-Hollings Act of 1985 sued to challenge the Act's constitutionality.<sup>125</sup> The Act gave the Comptroller General, a legislative officer, the ability to make binding budgetary decisions to effectuate deficit reduction, and it gave Congress the authority to remove the Comptroller General.<sup>126</sup> The plaintiffs successfully charged that the Act resulted in an unlawful aggrandizement of executive power to the legislature.<sup>127</sup> The Court stated that it did not have to determine whether the legislators had standing to bring the suit, because their co-plaintiffs were a group of federal employee unions facing salary freezes under the Act, and therefore, they clearly had Article III standing.<sup>128</sup> The Attorney General defended the statute along with several other intervenors, including the United States Senate, the Speaker, the Bipartisan Leadership Group of the House of Representatives, and individual members of Congress.<sup>129</sup> The Court did not address, and the issue apparently was not raised, why these intervenors were allowed into the case; however, these defendant-intervenors were riding the coattails of the Attorney General, who has the authority to defend statutes against constitutional attack.

Similarly, in *Buckley v. Valeo*, a slate of congresspersons intervened on both sides of the case, which involved a First Amendment challenge to campaign finance laws.<sup>130</sup> There, the plaintiffs included a U.S. Senator running for re-election, as well as various political candidates, political parties, and public interest groups.<sup>131</sup> The defendants included the Federal Election Commission (FEC) (the agency charged with enforcing the law), the Attorney General, the Comptroller General, and the Secretary of the U.S. Senate and the clerk of the House of Representatives in their official capacities and as ex officio members of FEC.<sup>132</sup> The Court did not assess the standing of each of these parties. Instead, it concluded that "at least some of the appellants ha[d] a sufficient 'personal stake'" to present an Article III controversy.<sup>133</sup> The Court cited

---

plaintiff-intervenors because standing requirements apply only to plaintiffs. *See infra* notes 147–57 and accompanying text (discussing whether intervenors must meet Article III standing requirements).

<sup>124</sup> 478 U.S. 714 (1986).

<sup>125</sup> *Id.* at 719.

<sup>126</sup> *Id.* at 717–20.

<sup>127</sup> *Id.* at 722 ("The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.").

<sup>128</sup> *Id.* at 721.

<sup>129</sup> *Synar v. United States*, 626 F. Supp. 1374, 1378–79 (D.D.C. 1986) (describing the procedural posture of the case below and listing intervenors).

<sup>130</sup> 424 U.S. 1 (1976).

<sup>131</sup> *Id.* at 7–8.

<sup>132</sup> *Id.* at 8.

<sup>133</sup> *Id.* at 12.

*Coleman* in support of the proposition that “[p]arty litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights.”<sup>134</sup> In *Buckley*, the intervening legislators were directly impacted by the campaign finance laws as individuals, making it more akin to *Powell* than *Raines*—or any lawsuits that would challenge a signing statement.

Despite the Court’s relatively permissive attitude towards intervention, at least one circuit court has expressed concerns about unlimited congressional piggybacking. In *Newdow v. United States Congress*,<sup>135</sup> the Ninth Circuit held that the Senate could not intervene to defend a school district policy and state law that required public school students to recite the Pledge of Allegiance, which contains the words “one nation under God.”<sup>136</sup> The court stated that although the Attorney General had standing to defend the Pledge of Allegiance, the Senate lacked separate standing to defend its statutes and that standing was a prerequisite for intervention.<sup>137</sup> The court did, however, allow the Senate to participate as amicus if it wished.<sup>138</sup>

The Ninth Circuit’s justifications for its restricted view of intervention appear inapposite to signing statement challenges. The court stated that permitting the Senate to defend all statutes as a “roving commission” might be constitutionally suspect as trenching on executive branch prerogatives.<sup>139</sup> While the court was correct that normally the Attorney General represents the interests of the United States, this is impossible when the executive and legislative branches disagree over the scope of their respective powers. As the court recognized, *Chadha* and *Bowsher* allowed intervention in cases that directly “implicated the authority of Congress within our scheme of government, and the scope and reach of its ability to allocate power among the three branches.”<sup>140</sup> By contrast, *Newdow* involved a constitutional question implicating individual rights, and thus, the need for independent Senate involvement was arguably less.<sup>141</sup>

The court also reasoned that granting the Senate the right to intervene in every lawsuit challenging a statute would force plaintiffs to have to fight not only the United States, but also the Senate, the House of Representatives, and perhaps even

---

<sup>134</sup> *Id.* at 117.

<sup>135</sup> 313 F.3d 495, 499 (9th Cir. 2002).

<sup>136</sup> The father of an elementary student attacked the school district policy and the Pledge as violating the First Amendment, and the Ninth Circuit agreed. 292 F.3d 597 (9th Cir. 2002), *cert. denied*, 540 U.S. 962 (2003). The Ninth Circuit decision was later reversed in *Elk Grove School District v. Newdow*, when the Court held that the father lacked standing because he lacked legal custody of his daughter. 542 U.S. 1 (2004).

<sup>137</sup> *Newdow*, 313 F.3d at 497. The Pledge of Allegiance is set forth in 4 U.S.C. § 4 (2000).

<sup>138</sup> *Newdow*, 313 F.3d at 496.

<sup>139</sup> *Id.* at 497–98.

<sup>140</sup> *Id.* at 498.

<sup>141</sup> *Id.*

the President.<sup>142</sup> In *Newdow*, there was no reason to think that the Attorney General would fail to represent the interests of Congress because they were similarly aligned. This would not be the case in a presidential signing statement challenge.<sup>143</sup> Finally, the court explained that the Senate had suffered “no harm beyond frustration of a general desire to see the law enforced as written.”<sup>144</sup> Here, the court was correct. The statute allowing Senate intervention requires that the Senate have standing,<sup>145</sup> and this is a nearly impossible standard to meet under *Raines*. If the Senate wants to have broader intervention rights, it should amend 2 U.S.C. § 288e to remove the standing requirement.

However, it is important to note that the circuit courts are split, and the Supreme Court has not decided, whether an intervening plaintiff has to establish standing independently of the initiating plaintiff.<sup>146</sup> *Bowsher* suggests that separate standing is not required for intervenors, at least for Congress and members of Congress, but that case did not expressly address the issue and was decided before *Raines*, when the Court established a narrower view of legislator standing. On the one hand, some courts hold that because intervenors have all the rights and responsibilities of other parties, they should meet the same constitutional standards.<sup>147</sup> On the other hand, other courts hold that Article III does not require everyone in a case to have standing as long as a case is properly initiated and the court is therefore not issuing an advisory opinion on an abstract matter.<sup>148</sup>

---

<sup>142</sup> *Id.* at 500 & n.5.

<sup>143</sup> The *Newdow* court distinguished the Senate’s role in *Raines* by stating that in that case the Senate was content to appear as amicus. *Id.* at 499 n.3. However, individual legislators were allowed to intervene in *Bowsher v. Sunar*, a point not addressed in *Newdow*. 478 U.S. 714, 721 (1986).

<sup>144</sup> *Newdow*, 313 F.3d at 498.

<sup>145</sup> 2 U.S.C. § 288e(a) (2000).

<sup>146</sup> See *Diamond v. Charles*, 476 U.S. 54, 68–69 (1986) (“We need not decide today whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III.”). The *Diamond* Court indicated that the defendant-intervenor could have piggybacked on an appeal by a defendant with Article III standing, even though the intervenor himself did not have standing to appeal. However, for the defendant-intervenor to appeal on his own, he would need standing. *Id.* at 68.

For a summary of how each circuit has ruled on the issue, see Joan Steinman, *Irregulars: The Appellate Rights of Persons Who Are Not Full-Fledged Parties*, 39 GA. L. REV. 411, 427 (2005). See also Amy M. Gardner, Comment, *An Attempt to Intervene in the Confusion: Standing Requirements for Rule 24 Intervenor*, 69 U. CHI. L. REV. 681, 693–97 (2002); Juliet Johnson Karastelev, Note, *On the Outside Seeking in: Must Intervenor Demonstrate Standing to Join a Lawsuit?*, 52 DUKE L.J. 455, 464–68 (2002).

<sup>147</sup> See, e.g., *Planned Parenthood v. Ehlmann*, 137 F.3d 573, 577–78 (8th Cir. 1998), cert. denied, 528 U.S. 1006 (1999); see also discussion *infra* note 155 and accompanying text.

<sup>148</sup> See, e.g., *Ruiz v. Estelle*, 161 F.3d 814, 832 (5th Cir. 1998), cert. denied, 526 U.S. 1158 (1999); see also discussion *infra* notes 150–54 and accompanying text.

Interestingly, two of the leading cases in the circuit split involve legislators as intervenors. In *Ruiz v. Estelle*, Texas state legislators moved to intervene in ongoing litigation over state prison conditions.<sup>149</sup> A statute gave legislators the right to intervene regardless of standing, and the Fifth Circuit held that the statute was constitutional.<sup>150</sup> The court held that Federal Rule of Civil Procedure 24 presumes that there is a justiciable case or controversy before the court.<sup>151</sup> Thus, the court has proper jurisdiction over the matter before the intervenor becomes involved.<sup>152</sup> “Once a valid Article III case-or-controversy is present, the court’s jurisdiction vests. The presence of additional parties, although they alone could independently not satisfy Article III’s requirements, does not of itself destroy jurisdiction already established.”<sup>153</sup>

By contrast, in *Planned Parenthood v. Ehlmann*, the Eighth Circuit denied state legislators the right to intervene to defend a statute excluding Planned Parenthood from obtaining state funds.<sup>154</sup> The court applied the Eighth Circuit rule that intervenors must have standing to intervene and then reasoned that the legislators lacked standing because their votes were not nullified.<sup>155</sup> For its part, the D.C. Circuit, which is most likely to hear challenges to signing statements and/or executive nonenforcement, appears to require standing for intervenors, although the relevant cases deal with permissive intervention rather than intervention as of right.<sup>156</sup> Thus, intervention is not a certain path for Congress to join litigation over presidential signing statements.

The Supreme Court has been exacting with its standing requirements for legislators, while being more relaxed on intervention issues. This differential treatment is justifiable. The separation of powers concerns that underlie *Raines* are not implicated when legislators seek to intervene in a pre-existing lawsuit. In such cases, there is less risk that the judiciary will lose its legitimacy by throwing itself into the political fray, less risk that the dispute will be abstract, and less risk that the judiciary will end up involved in “amorphous general supervision of the operations of government.”<sup>157</sup>

---

<sup>149</sup> *Ruiz*, 161 F.3d at 816.

<sup>150</sup> *Id.* at 828–33.

<sup>151</sup> *Id.* at 832.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> 137 F.3d 573 (8th Cir. 1998). The court relied on a prior case, *Mausolf v. Babbitt*, which held: “In our view, an Article III case or controversy, once joined by intervenors who lack standing, is—put bluntly—no longer an Article III case or controversy. An Article III case or controversy is one where all parties have standing, and a would-be intervenor, because he seeks to participate as a party, must have standing as well.” 85 F.3d 1295, 1300 (8th Cir. 1996).

<sup>155</sup> *Ehlmann*, 137 F.2d at 577.

<sup>156</sup> See *Jones v. Prince George’s County, Md.*, 348 F.3d 1014, 1017 (D.C. Cir. 2003); *Rio Grande Pipeline Co. v. Fed. Energy Regulatory Comm’n*, 178 F.3d 533, 537 (D.C. Cir. 1999); *City of Cleveland v. Nuclear Regulatory Comm’n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994).

<sup>157</sup> *Raines v. Byrd*, 521 U.S. 811, 829 (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring)).

*B. Amicus*

The uncertainty over the scope of legislator intervention leaves the amicus option as the only surefire way for Congress to insert its voice into litigation over presidential signing statements. Indeed, after *Raines*, when the Supreme Court considered the constitutionality of the Line Item Veto Act in *Clinton v. City of New York*, the Senate appeared as amicus to support the United States in favor of the Act, as did individual congresspersons, while other individual congresspersons submitted amicus briefs arguing against the Act.<sup>158</sup>

Amici are permitted at all levels of federal court litigation, from the district courts to the circuit courts to the Supreme Court.<sup>159</sup> The role of the amicus is as “‘friend of the court’—someone who is not a party to the litigation but who believes that the court’s decision may affect its interests.”<sup>160</sup> Even when a party has able legal counsel, an amicus may provide important assistance to the court by providing background information or particular expertise.<sup>161</sup> In addition, amicus can “argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. . . . [or] explain the impact a potential holding might have on an industry or other group.”<sup>162</sup>

The government generally has greater rights to participate as amicus than private parties.<sup>163</sup> For instance, under Federal Rule of Appellate Procedure 29, the United States or its officer or agency may file an amicus curiae brief without the consent of the parties or leave of court.<sup>164</sup> By contrast, non-governmental entities need either of these forms of permission to obtain amicus status.<sup>165</sup> Unlike an intervenor, an amicus does not gain the same rights as the parties.<sup>166</sup> For instance, at the appellate level, an amicus needs the court’s permission to participate in oral argument or to file a reply brief.<sup>167</sup> Moreover, amicus cannot introduce new issues into the case or seek further review by the Supreme Court.<sup>168</sup> Nevertheless, at the district court level, some judges have permitted governmental amicus to introduce evidence and examine witnesses,

---

<sup>158</sup> *Clinton v. City of New York*, 524 U.S. 417, 420 (1998).

<sup>159</sup> See Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1256 (1992).

<sup>160</sup> WILLIAM H. REHNQUIST, *THE SUPREME COURT* 184 (rev. ed. 2002).

<sup>161</sup> Luther T. Munford, *When Does the Curiae Need an Amicus?*, 1 J. APP. PRAC. & PROCESS 279, 281 (1999).

<sup>162</sup> *Id.*

<sup>163</sup> See Lowman, *supra* note 160, at 1261.

<sup>164</sup> FED. R. APP. P. 29.

<sup>165</sup> *Id.* (“Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.”).

<sup>166</sup> 16A WRIGHT ET AL., *supra* note 19, at § 3975.1 (“The amicus curiae, in short, does not become a party to the appeal. It has no rights other than the conditional right to file ‘a brief’ in accordance with Rule 29.”).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* § 3975.1 n.3.

conduct discovery, seek injunctions, or petition for appeal.<sup>169</sup> This enhanced level of governmental amicus participation usually arises in cases involving structural constitutional questions.<sup>170</sup>

Although most judges freely grant amicus status, Judge Posner has been active in campaigning against amicus briefs, stating that they are typically duplicative of one side's briefs, drive up litigation costs, and insert interest group politics into the appellate process.<sup>171</sup> Accordingly, he would limit amicus briefs to situations in which

a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.<sup>172</sup>

His reasoning extends to legislators; he denied amicus status to the Speaker of the Illinois House of Representatives and the President of the Illinois Senate in a case involving the constitutionality of the Illinois Public Utilities Act, arguing that an appeal should "not resemble a congressional hearing."<sup>173</sup> Although Judge Posner's views have spurred a lively debate, his opinion is the minority view.<sup>174</sup>

---

<sup>169</sup> See Lowman, *supra* note 160, at nn. 116–20. There is no specific rule allowing for amicus participation at the district court level, but it is widely recognized that district courts have broad discretion to appoint amicus. See, e.g., *United States v. Ahmed*, 788 F. Supp. 196, 198 n.1 (S.D.N.Y. 1992), *aff'd*, 980 F.2d 161 (2d Cir. 1992); *United States v. Gotti*, 755 F. Supp. 1157, 1158–59 (E.D.N.Y. 1991); *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990); *Pa. Envtl. Def. Found. v. Bellefonte Borough*, 718 F. Supp. 431, 434 (M.D. Pa. 1989) (citing *Hoptowitz v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982)); *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985), *aff'd*, 782 F.2d 1033 (3d Cir. 1986), *cert. denied*, 476 U.S. 1141 (1986). Nevertheless, it has been suggested that amicus are less appropriate at the trial court level than the appellate level because issues of fact predominate. *Yip*, 606 F. Supp. at 1568; *accord News & Sun-Sentinel Co. v. Cox*, 700 F. Supp. 30, 32 (S.D. Fla. 1988); *Donovan v. Gillmor*, 535 F. Supp. 154, 159 (N.D. Ohio 1982), *appeal dismissed*, 708 F.2d 723 (6th Cir. 1982); *Leigh v. Engle*, 535 F. Supp. 418, 422 (N.D. Ill. 1982).

<sup>170</sup> See Lowman, *supra* note 160, at 1264–65.

<sup>171</sup> See *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (stating that amicus briefs should be "friend of the court, not friend of a party"); *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

<sup>172</sup> *Ryan*, 125 F.3d at 1063.

<sup>173</sup> *Voices for Choices*, 339 F.3d at 545.

<sup>174</sup> See 16A WRIGHT ET AL., *supra* note 19, at § 3975; Andrew Frey, *Amici Curiae: Friends of the Court or Nuisances?*, 33 LITIG. 5, 5 (2006). Justice Samuel Alito published an opinion when he was on the Court of Appeals contesting Judge Posner's claims, stating:

[A] restrictive practice regarding motions for leave to file seems to be an unpromising strategy for lightening a court's work load. For one

Thus, despite standing and intervention hurdles, amicus remains a viable option for Congress to insert its voice into lawsuits challenging the constitutionality of statutes. Moreover, legislators may gain even more participatory rights than other amici. Thus, concerns over legislative standing may be overwrought. However, the amicus option hinges on there being a proper party to bring a case in the first place, as well as a justiciable claim that can proceed to the merits. Accordingly, the next Part considers whether President Bush's signing statements are likely to be involved in a case that is heard on the merits.

### III. PRESIDENTIAL NON-ENFORCEMENT

Presidential signing statements are not justiciable because they are not ripe. However, executive decisions to refuse to enforce a statute in line with a signing statement may be justiciable if a proper plaintiff can be found. Congress cannot bring suit on its own and may not even be able to intervene in a suit brought by a plaintiff with standing. At a minimum, however, Congress can play a role in litigation over presidential non-enforcement as an amicus. Still, there needs to be a proper plaintiff. This Part looks at the actual instances of non-enforcement identified by the GAO to see whether they could engender litigation. In addition, this Part looks at three high-profile presidential signing statements that threaten non-enforcement to see whether a private plaintiff could sue over actual non-enforcement and have the case proceed to the merits. For both the actual and threatened acts of non-enforcement, the justiciability barriers are significant.

#### *A. Actual Acts of Executive Non-enforcement*

The GAO identified six statutory provisions in 2006 appropriations legislation that the executive branch failed to carry out.<sup>175</sup> The executive branch refused to enforce laws that required the following actions: (1) congressional approval before the Pension Benefit Guaranty Corporation (PBGC) incurred certain administrative expenses; (2) congressional approval before the Department of Agriculture transferred enumerated funds; (3) submission of a FEMA proposal and expenditure plan for housing; (4) anticipated budget expenditures from the Department of Defense (DOD)

---

thing, the time required for skeptical scrutiny of proposed amicus briefs may equal, if not exceed, the time that would have been needed to study the briefs at the merits stage if leave had been granted. In addition, because private amicus briefs are not submitted in the vast majority of court of appeals cases, and because poor quality briefs are usually easy to spot, unhelpful amicus briefs surely do not claim more than a very small part of a court's time.

*Neonatology Assocs. v. Comm'r*, 293 F.3d 128, 133 (3d Cir. 2002).

<sup>175</sup> GAO REPORT, *supra* note 10, at 10.



for fiscal year 2007 spending in Iraq; (5) DOD responses within twenty-one days to questions posed by the Chairman of the Subcommittee on Military Quality of Life and Veterans Affairs, House Committee on Appropriations; and (6) relocation of border checkpoints by Customs and Border Patrol every seven days in the Tucson sector.<sup>176</sup>

We already know that legislators probably lack standing to compel the judiciary to adjudicate this tug-of-war between the executive and legislative branches.<sup>177</sup> It is also hard to identify an obvious private plaintiff that would have standing to challenge these particular executive acts of non-enforcement. The statutory provisions identified by the GAO do not appear to impact discrete, individual interests.<sup>178</sup> Nor do they require action or inaction on the part of any private party. Rather, they deal with congressional oversight of the internal operations of government agencies and/or prescribe how agencies should achieve statutory objectives.

Certainly, there may be people who are outraged by the executive branch's failure to carry out clear statutory commands. For instance, someone concerned about illegal immigration may be fuming that the Tucson area border checkpoints were not relocated every seven days in order to better screen entry of aliens into the United States. Or, a resident of a coastal area concerned about possible hurricane damage in the future may be furious that FEMA is refusing to "submit [for approval] a proposal and expenditure plan for housing" to Congress.<sup>179</sup> However, the Supreme Court has held that standing is not established "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens."<sup>180</sup> Although widespread injuries can be justiciable, each individual injury must be concrete,<sup>181</sup> and frustration over an executive who fails to carry out congressional wishes about agency operations is not a concrete injury.

This is why taxpayers generally do not have standing. For instance, in *United States v. Richardson*, a taxpayer claimed that statutes protecting the secrecy of the CIA budget violated the constitutional requirement for a regular statement and account of public funds.<sup>182</sup> The Court held that he lacked standing because "he has not alleged that, as a taxpayer, he is in danger of suffering any particular concrete injury as a result of the operation of this statute."<sup>183</sup> Instead, the plaintiff had only "generalized

---

<sup>176</sup> *Id.*

<sup>177</sup> *See supra* Part I.B.

<sup>178</sup> GAO REPORT, *supra* note 10, at 10.

<sup>179</sup> *Id.* In addition to possible standing problems related to a speculative, future injury, this hypothetical plaintiff would be hard-pressed to demonstrate that a properly enforced pilot housing program would redress the future injury or that the lack of the pilot housing program would cause a future injury.

<sup>180</sup> *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

<sup>181</sup> *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998).

<sup>182</sup> 418 U.S. 166 (1974).

<sup>183</sup> *Id.* at 177.

grievances about the conduct of government.”<sup>184</sup> The Court acknowledged the possibility that “if respondent is not permitted to litigate this issue, no one can do so,” but it concluded that “the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.”<sup>185</sup>

The Court has recognized taxpayer standing only where the plaintiff challenges government expenditures as violating the Establishment Clause of the First Amendment.<sup>186</sup> However, even this narrow exception to the bar against taxpayer standing has been significantly restricted. Recently, in *Hein v. Freedom from Religion Foundation*, the Court refused to find taxpayer standing in claims against the executive branch, even when the plaintiffs alleged an Establishment Clause violation.<sup>187</sup> In *Hein*, a public interest organization claimed that conferences held pursuant to President Bush’s Faith-Based and Community Initiatives program violated the Establishment Clause because, among other things, President Bush and other high-ranking governmental officials gave speeches that used “religious imagery” and praised the efficacy of faith-based programs in delivering social services.<sup>188</sup> The Court rejected the plaintiffs’ assertion that they had taxpayer standing, stating, “In light of the size of the federal budget, it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm.”<sup>189</sup> To the contrary, the Court stated, “if every federal taxpayer could sue to challenge any

---

<sup>184</sup> *Id.* at 173 (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)).

<sup>185</sup> *Id.* at 179; *see also* *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (holding that plaintiffs did not have standing to enjoin members of Congress from serving in the military reserves). The Supreme Court has held that the ban on generalized grievances is a constitutional requirement and not simply a prudential limitation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (2002). This means that even where Congress statutorily grants standing to all citizens, such a statute may violate Article III. *Id.* at 572–73; *cf.* *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 24 (1998) (stating that there is no per se ban on generalized grievances). Regardless, the statutes identified by the GAO as not being enforced do not contain citizen suit provisions.

<sup>186</sup> *Flast*, 392 U.S. at 83 (upholding taxpayer’s standing to challenge federal subsidies to parochial schools as violating the Establishment Clause). In *Akins*, the Court held that a statutory right to information which is then denied, can give rise to standing even though harm is widespread. *Akins*, 524 U.S. at 11. In such a case, unlike *Richardson*, “there is a statute which . . . does seek to protect individuals . . . from the kind of harm they say they have suffered, *i.e.*, failing to receive particular information about campaign-related activities.” *Id.* at 22. By contrast, the statutes the GAO identified as not executed do not contain underlying rights flowing to citizens.

<sup>187</sup> 127 S. Ct. 2553 (2007).

<sup>188</sup> *Id.* at 2559. The President’s Faith-Based and Community Initiatives program seeks to expand funding to faith-based organizations to deliver social services and was created by executive order. For a detailed discussion of the program, see Michele Estrin Gilman, *If at First You Don’t Succeed, Sign an Executive Order: President Bush and the Expansion of Charitable Choice*, 15 WM. & MARY BILL RTS. J. 1103, 1110–22 (2007).

<sup>189</sup> *Id.* at 2559.

Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus.”<sup>190</sup>

The Court distinguished *Flast* on the grounds that the plaintiffs in *Hein* were not challenging congressional action, but rather executive action.<sup>191</sup> Although the distinction seems to lack constitutional significance,<sup>192</sup> the Court declined to extend *Flast* to discretionary executive branch expenditures. The Court was concerned that a contrary rule “would enlist the federal courts to superintend, at the behest of any federal taxpayer, the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials.”<sup>193</sup> This would turn the courts into “virtually continuing monitors of the wisdom and soundness of Executive action,” a result at odds with core separation of powers principles.<sup>194</sup>

To be sure, the acts of non-enforcement identified by the GAO are different from the executive acts at issue in *Hein*. In *Hein*, the executive branch was exercising its discretion in spending general appropriations funds.<sup>195</sup> By contrast, the non-enforcement decisions identified by the GAO are in direct violation of unambiguous statutory commands. For this reason, the separation of powers concerns are somewhat attenuated, because the judiciary would not be second-guessing executive branch discretionary decisions. Yet the Court may be wary of trying to determine whether an act of non-enforcement is deliberate or simply an oversight or mistake. In any event, private plaintiffs challenging those acts of non-enforcement would be hard-pressed to allege concrete, individualized harm. It seems they would be suing as taxpayers, and thus, their claims would not be cognizable.<sup>196</sup> Moreover, even if a private party could allege a concrete injury, the litigation would be about the agency’s nonenforcement. The litigation would not be about the propriety of signing statements. Given the steps between issuance of a presidential signing statement and an agency decision not to enforce,<sup>197</sup> it would be very tough for a plaintiff to show that any injury was caused by a presidential signing statement or redressable by an injunction banning presidential signing statements.

---

<sup>190</sup> *Hein*, 127 S. Ct. at 2559.

<sup>191</sup> *Id.*

<sup>192</sup> *See id.* at 2579–80 (Scalia, J., concurring); *id.* at 2584 (Souter, J., dissenting).

<sup>193</sup> *Id.* at 2570 (majority opinion).

<sup>194</sup> *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 760 (1984)).

<sup>195</sup> *See id.*

<sup>196</sup> Even if someone could identify an individualized harm caused executive be nonenforcement that was traceable to the signing statement and redressable by a court ruling, the plaintiff would have to establish that he is within the zone of interests protected by the statute. *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). That is, the plaintiff would have to establish that he is within the group the statute was designed to protect. The statutes identified by the GAO were not enacted to benefit or regulate specific groups; they are designed to improve the internal workings of government. Thus, the zone of interests test would be difficult to satisfy.

<sup>197</sup> *See supra* text accompanying notes 31–32.

### *B. Threatened Acts of Non-enforcement*

The acts of non-enforcement identified by the GAO are troubling to many members of Congress and commentators, particularly DOD's refusal to provide a budget for the ongoing war in Iraq.<sup>198</sup> However, most of the statutory provisions identified by the GAO deal with the inner workings of government and do not impact individual rights. Moreover, some agencies complied with the provisions shortly after the required deadlines, or complied with them in part, thus alleviating part of the impact of the agencies' failure to execute exactly as written.<sup>199</sup> Other presidential signing statements not within the GAO's study have triggered intense scrutiny, interest, and protest—as this very symposium reveals. Thus, this Section examines three of the President's more controversial signing statements to see whether private plaintiffs would have standing to challenge them and thereby provide Congress with a means for having the courts address legislative concerns. These three signing statements involve the President's objections to a statute requiring that the administrator of FEMA have relevant experience, the McCain Amendment's ban on torture of detainees, and a statute directing the President to take certain foreign policy steps with regard to Sudan.

#### 1. Appointments

##### The Statute:

Administrator. (1) In general. The [Federal Emergency Management] Administrator shall be appointed by the President, by and with the advice and consent of the Senate. (2) Qualifications. The Administrator shall be appointed from among individuals who have—(A) a demonstrated ability in and knowledge of emergency management and homeland security; and (B) not less than 5 years of executive leadership and management experience in the public or private sector.<sup>200</sup>

##### The Signing Statement:

Section 503(c)(2) vests in the President authority to appoint the Administrator, by and with the advice and consent of the Senate, but purports to limit the qualifications of the pool of persons

---

<sup>198</sup> See, e.g., Charlie Savage, *U.S. Agencies Disobey 6 Laws that President Challenged*, BOSTON GLOBE, June 19, 2007, at A1 (discussing reactions to the GAO Report); Jonathan Weisman, 'Signing Statements' Study Finds Administration Has Ignored Laws, WASH. POST, June 19, 2007, at A4 (same).

<sup>199</sup> See GAO REPORT, *supra* note 10, at 10.

<sup>200</sup> Homeland Security Act of 2007, 6 U.S.C.A. § 313(c) (West Supp. 2007).

from whom the President may select the appointee in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the office. The executive branch shall construe section 503(c)(2) in a manner consistent with the Appointments Clause of the Constitution.<sup>201</sup>

This statute was enacted in the wake of Hurricane Katrina, after the head of FEMA, Michael Brown, was widely criticized for incompetence and ridiculed for his lack of experience.<sup>202</sup> Congress sought to ensure that future FEMA administrators possessed relevant backgrounds. President Bush objected to the limitation on his powers under the Appointments Clause, which grants the President the authority to appoint officers of the United States with the advice and consent of the Senate.<sup>203</sup>

It is difficult to conjure any scenario under which this signing statement, or executive action taken in line with it, would be justiciable. To begin with, Congress is not injured because the Senate retains its advice and consent role. If the President appoints an individual who does meet the congressionally mandated requirements, the Senate can avoid its past mistakes and refuse to confirm that nominee. If the Senate goes ahead and confirms a FEMA administrator who does not fulfill the statutory requirements, a private party could possibly challenge the authority of the FEMA administrator by contending that he was not appointed in compliance with the statute. However, that would not be an Appointments Clause challenge. Perhaps the private party would be a citizen or local government official in a disaster area who was concerned about recovery efforts. In such a situation, the private party would want the statute to be enforced—he or she would not want to have the statute stricken as an unconstitutional Appointments Clause violation. In other words, the lawsuit would not be challenging the President or his signing statement.

Conversely, a litigant unhappy with the FEMA administrator might challenge his authority by claiming that the qualification requirement impinges on the President's prerogatives. Yet the D.C. Circuit has consistently rebuffed Appointments Clause challenges to agency composition on standing grounds, requiring plaintiffs to show not only that they are directly regulated parties, but also that the alleged harm is directly traceable to the agency's decisions and that the appointments restriction actually impacted the President's choice.<sup>204</sup> Although this caselaw is interesting, it is probably

---

<sup>201</sup> Statement on Signing the Department of Homeland Security Appropriations Act, 2007, 42 WEEKLY COMP. PRES. DOC. 1742, 1742–43 (Oct. 4, 2006).

<sup>202</sup> See Peter Baker, *FEMA Director Replaced as Head of Relief Effort*, WASH. POST, Sept. 10, 2005, at A1.

<sup>203</sup> U.S. CONST. art. II, § 2. As a substantive matter, the congressional limitation on the President's appointment power is probably constitutional. See *Myers v. United States*, 272 U.S. 52, 129 (1926) (stating that Congress may impose "reasonable and relevant qualifications and rules of eligibility of appointees").

<sup>204</sup> See, e.g., *Fed. Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993) (rejecting a challenge to the composition of the Federal Election Commission in which

beside the point. After the Michael Brown debacle, the President appointed R. David Paulison, the then-acting FEMA administrator and a career firefighter with thirty-five years of experience in emergency management.<sup>205</sup> There is no indication that the statute made a bit of difference to the President's choice; for political reasons he clearly had to appoint a qualified individual after Katrina. As with many of the signing statements, this one is more bluster than bite. The President is using signing statements as one of many tools to reinforce his overarching theories about the nature of executive power,<sup>206</sup> but he does not necessarily object to the substantive goal of the statutes at issue, or even intend to follow through on his objections. This further demonstrates why signing statements are not ripe. In many cases, such as this one, the President implements the statute as Congress clearly intended.

## 2. War Powers/Anti-Torture

### Statute:

(a) In General.—No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.<sup>207</sup>

### Signing Statement:

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.<sup>208</sup>

---

plaintiff alleged that the requirement that no more than three members belong to the same political party is unconstitutional); *Comm. for Monetary Reform v. Bd. of Governors of Fed. Reserve Sys.*, 766 F.2d 538 (D.C. Cir. 1985) (rejecting a challenge to the composition of the Federal Reserve System).

<sup>205</sup> See Eric Lipton, *Nominations Made for Top Post at FEMA and Three Other Slots*, N.Y. TIMES, Apr. 7, 2006, at A20.

<sup>206</sup> Throughout his presidency, George W. Bush has invoked a broad view of executive power, of which signing statements are just one tool. See generally Allen, *supra* note 31.

<sup>207</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003(a), 119 Stat. 2680, 2739 (codified as amended at 42 U.S.C.A. § 2000dd (West Supp. 2007)).

<sup>208</sup> Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006,

This signing statement is probably the most controversial of them all. Following revelations about detainee abuse by the American military at Abu Ghraib prison during the Iraq War, Congress passed this provision, known as the McCain Amendment, to prohibit torture.<sup>209</sup> The President responded by objecting to the torture ban's limitations on his powers to supervise the unitary executive branch and as Commander in Chief.<sup>210</sup> Clearly, there are individuals who would be physically and mentally injured if the military defies the McCain Amendment and engages in torture. However, this does not mean that these alleged torture victims would be able to use American courts to recover for their injuries and, in so doing, challenge the administration's policies and views of executive power.

The law in this area is complicated and in flux, but recent cases demonstrate the barriers to torture claims by foreign nationals. The first problem is that there is no statute, including the McCain Amendment, expressly creating a private right of action for damages caused by torture that is inflicted by United States employees.<sup>211</sup> The second problem is that rights secured by the Constitution do not apply to foreign citizens.<sup>212</sup> Furthermore, even if a plaintiff can overcome these barriers, he must still contend with sovereign and official immunity doctrines that bar torture claims against the United States and its employees.<sup>213</sup>

These obstacles are illustrated by the case *In re Iraq and Afghanistan Detainees Litigation*.<sup>214</sup> There, nine foreign plaintiffs claimed that they were innocent civilians

---

41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Dec. 30, 2005).

<sup>209</sup> See *supra* note 207 and accompanying text.

<sup>210</sup> See *supra* note 208 and accompanying text. The story does not end with the signing statement. To the contrary, all three branches of government have been engaged in defining the permissible boundaries of the President's war powers with regard to detainees. See David Cole, *The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11*, 59 STAN. L. REV. 1735, 1750–51 (2007); Michael Greenberger, *You Ain't Seen Nothin' Yet: The Inevitable Post-Hamdan Conflict Between the Supreme Court and the Political Branches*, 66 MD. L. REV. 805, 811–15 (2007); Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 99–110 (2007) (discussing developments preceding and following enactment of McCain Amendment).

<sup>211</sup> See Cole, *supra* note 210, at 1749 (“[T]he McCain Amendment . . . included no mechanism for enforcement of violations, and expressly barred prisoners in the war on terror from filing habeas corpus petitions to challenge such abuse.”); Mayerfeld, *supra* note 210, at 116 (“[M]any of the legal measures needed to prevent torture are already present in international law. The United States, however, has blocked the incorporation of several of these measures into its domestic legal system.”); Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 719–20 (2006) (“[T]he availability of civil remedies for U.S. torture under current law is razor-thin. . . . Current law must change in order for the United States to keep its promise not to torture people.”).

<sup>212</sup> See Seamon, *supra* note 211, at 776.

<sup>213</sup> *Id.* at 722–23.

<sup>214</sup> 479 F. Supp. 2d 85 (D.D.C. 2007).

who were tortured and abused while detained by the United States military at various locations in Iraq and Afghanistan before they were released without being charged with any crimes.<sup>215</sup> They sued the former Secretary of Defense, Donald Rumsfeld, as well as several high-ranking military officials alleging violations of the Fifth and Eighth Amendments to the Constitution and international law.<sup>216</sup> The court held that rights guaranteed under the United States Constitution do not extend to foreign citizens detained by the military in foreign countries, and further, that special factors counseled hesitation in recognizing such constitutional claims under the *Bivens* doctrine.<sup>217</sup> Given the constitutional commitment of military and foreign affairs to the political branches, the court deemed it best to leave it to Congress to determine “whether a damages remedy should be available under the circumstances presented here.”<sup>218</sup> In a footnote, the court noted that Congress had twice legislated about detainee treatment but did not create a private cause of action in either instance.<sup>219</sup> Further, the court stated that even if a *Bivens* action could be recognized, “government officials are afforded qualified immunity, which shields them from ‘liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”<sup>220</sup> The court determined that at the time of the alleged abuse, there was no clear constitutional violation.<sup>221</sup> The court also held that the defendants were entitled to absolute immunity under the Westfall Act, which affords federal employees absolute immunity from tort liability for negligent or wrongful acts or omissions while acting within the scope of their employment.<sup>222</sup> Since the court held that defendants were acting within the scope of their employment, the lawsuit was converted to one against the United States under the Federal Tort Claims Act (FTCA).<sup>223</sup>

The court did not reach the claims against the United States under the FTCA, which is a waiver of the United States’ sovereign immunity for torts committed by employees of the United States.<sup>224</sup> However, the FTCA contains numerous exceptions that would likely bar a lawsuit by a foreign national against the United States for torture, including exceptions for claims arising out of combatant activities of the military, claims arising in foreign countries, and intentional torts.<sup>225</sup> In short, the

---

<sup>215</sup> *Id.* at 88.

<sup>216</sup> *Id.* at 90–91.

<sup>217</sup> *Id.* at 95.

<sup>218</sup> *Id.* at 107.

<sup>219</sup> *Id.* at 107 n.23.

<sup>220</sup> *Id.* at 108 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

<sup>221</sup> *Id.* at 109.

<sup>222</sup> 28 U.S.C. § 2679(b)(1) (2000).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* §§ 1346(b), 1402(b), 2401(b), 2671–2680.

<sup>225</sup> See Seamon, *supra* note 211, at 732–53 (discussing the FTCA exceptions in the context of torture claims). The Alien Tort Claims Act also fails to provide a clear avenue for relief



resounding message that comes from courts and scholars who have examined the issue is that Congress could create a remedy for torture committed by the United States, but that it needs to do so expressly.<sup>226</sup> Thus far, it has not. In turn, this makes it nearly impossible for Congress to use the courts as a forum for articulating congressional views about torture. Of course, Congress has the power to provide private remedies for torture if it chooses to give teeth to its prohibitions.

The issue of detainee torture could arise in other litigation contexts, such as a criminal trial of a soldier charged with torture or, conversely, a soldier refusing to carry out orders. As the prior discussion suggests, however, the law banning and defining torture is complex and involves a mix of many domestic and foreign statutes, treaties, covenants, conventions, and international customary law.<sup>227</sup> The President's signing statement is but one piece of a much larger mosaic that involves all three branches of government in a dialogue about the conduct of war. As torture claims arise in litigation, the courts consider whether the alleged facts violate specific, actionable laws. While a lawsuit might raise the issue of the scope of the President's Commander-in-Chief powers, it would not raise the issue of whether the President should have vetoed the McCain Amendment if he disagreed with it. In short, the President's conception of executive power, as expressed in the signing statement, might someday be litigated, but the propriety of the signing statement as a vehicle for expressing those views likely would not.<sup>228</sup>

### 3. Foreign Policy/Sudan Peace Act

#### Statute:

(A) The President shall make a determination and certify in writing to the appropriate congressional committees within 6 months after the date of enactment of this Act [Oct. 21, 2002], and each 6 months thereafter, that the Government of Sudan and the Sudan People's Liberation Movement are negotiating in good faith and that negotiations should continue. (B) If . . . the President determines . . . that the Government of Sudan has not engaged in good

---

due to sovereign immunity and the exclusivity provisions of the FTCA. *See id.* at 761–73; *cf.* Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1162–63 (2006) (arguing that the Alien Tort Claims Act is available for torture claims).

<sup>226</sup> *See supra* note 210.

<sup>227</sup> *See* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1688 (2005) (describing the various sources of the prohibition of torture).

<sup>228</sup> The signing statement could perhaps be utilized as a form of legislative history. *See generally* William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 701 (1991).

faith negotiations . . . then the President, after consultation with the Congress, shall implement the [following] measures . . . . (A) shall, through the Secretary of the Treasury, instruct the United States executive directors to each international financial institution to continue to vote against and actively oppose any extension by the respective institution of any loan, credit, or guarantee to the Government of Sudan; (B) should consider downgrading or suspending diplomatic relations between the United States and the Government of Sudan; (C) shall take all necessary and appropriate steps, including through multilateral efforts, to deny the Government of Sudan access to oil revenues to ensure that the Government of Sudan neither directly nor indirectly utilizes any oil revenues to purchase or acquire military equipment or to finance any military activities; and (D) shall seek a United Nations Security Council Resolution to impose an arms embargo on the Government of Sudan.<sup>229</sup>

**Signing Statement:**

Section 6(b) of the Act purports to direct or burden the conduct of negotiations by the executive branch with foreign governments, international financial institutions, and the United Nations Security Council and purports to establish U.S. foreign policy objectives. The executive branch shall construe these provisions as advisory because such provisions, if construed as mandatory, would impermissibly interfere with the President's exercise of his constitutional authorities to conduct the Nation's foreign affairs, participate in international negotiations, and supervise the unitary executive branch.<sup>230</sup>

This is one of several statutes directing the President to take certain steps in conducting the foreign policy of the United States to which the President has objected in a signing statement.<sup>231</sup> The Sudan Peace Act deals with the devastating and intractable

---

<sup>229</sup> Sudan Peace Act, Pub. L. No. 107-245, § 6(b)(1)–(2), 116 Stat. 1504, 1507–08 (codified at 50 U.S.C. § 1701 (Supp. II 2002)).

<sup>230</sup> Statement on Signing the Sudan Peace Act, 38 WEEKLY COMP. PRES. DOC. 1819 (Oct. 21, 2002).

<sup>231</sup> See also Statement on Signing the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, 40 WEEKLY COMP. PRES. DOC. 2673 (Oct. 28, 2004); Statement on Signing the Vision 100-Century of Aviation Reauthorization Act, 39 WEEKLY COMP. PRES. DOC. 1795 (Dec. 12, 2003); Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 38 WEEKLY COMP. PRES. DOC. 1658 (Sept. 30, 2002); Statement on Signing

genocide and civil war in Sudan.<sup>232</sup> In addition to the enforcement mechanisms set forth above, the Act declares that the government of Sudan is engaged in genocide, seeks “to facilitate a comprehensive solution to the war in Sudan,” and allocates \$300 million over a three-year period “for assistance” in areas of Sudan outside of government control.<sup>233</sup> The President does not object to the statutory goals, however, according to his signing statement, he does not believe that Congress can tell him how to carry out foreign policy.<sup>234</sup>

The Supreme Court has never definitively demarcated the respective powers of Congress and the President in foreign affairs. As Jide Nzelibe summarizes:

On one side of the debate, pro-President scholars stress the importance of strength and flexibility in an executive that is not fettered in his foreign-policy goals by parochial legislators. On the other side of the debate, pro-Congress scholars argue that a legislative check on the President’s foreign-policy actions encourages democratic accountability and effective scrutiny.<sup>235</sup>

Further, scholars dispute whether this question—the respective foreign policy powers of the President and Congress—is even judicially reviewable.<sup>236</sup>

---

the Export-Import Bank Reauthorization Act of 2002, 38 WEEKLY COMP. PRES. DOC. 1014 (June 14, 2002); Statement on Signing the Enhanced Border Security and Visa Entry Reform Act of 2002, 38 WEEKLY COMP. PRES. DOC. 822 (May 14, 2002).

<sup>232</sup> For more information on the conflict in Sudan and the impact of the Sudan Peace Act on the conflict, see TED DAGNE, CONG. RESEARCH SERV., REPORT FOR CONGRESS: THE SUDAN PEACE PROCESS (2003), available at [http://ecosonline.org/back/pdf\\_reports/2003/sudanreport2003.pdf](http://ecosonline.org/back/pdf_reports/2003/sudanreport2003.pdf).

<sup>233</sup> Sudan Peace Act, Pub. L. No. 107-245, §§ 2(10), 4, 6(b)(2). 116 Stat. 1504, 1508 (codified at 50 U.S.C. § 1701 (Supp. II 2002)).

<sup>234</sup> For a discussion of whether Congress has the authority to direct the President to take coercive diplomatic actions against a foreign government, see generally J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007) (arguing that Congress has the authority to take such actions under the Law of Nations Clause of the Constitution).

<sup>235</sup> Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 996 (2006). As to the merits of the President’s assertion, compare Van Alstine, *supra* note 31, at 314 (arguing that the “Constitution does not vest in the president a general, independent lawmaking power in foreign affairs”), with Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 355–56 (2001) (“Outside its specific foreign affairs powers such as declaring war or regulating commerce, and laws necessary and proper to such powers, Congress may legislate only to carry into execution the President’s foreign affairs powers.”).

<sup>236</sup> See Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980 (1993) (reviewing THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992)).

The Supreme Court is unlikely to resolve the debate anytime soon. Even assuming there was a party who would have standing based on the President's refusal to carry out the Sudan Peace Act,<sup>237</sup> the Court historically has dodged similar tug-of-wars between the branches over foreign policy. Relying on the political question doctrine, the Supreme Court has left certain areas of constitutional interpretation to the politically accountable branches. In *Baker v. Carr*, the Court stated that a political question arises when there is

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>238</sup>

The boundaries of the political question doctrine are infamously hazy, and the criteria for its application are confusing.<sup>239</sup>

Nevertheless, the doctrine is regularly used to deny judicial review to cases raising foreign policy issues. The Court has held that the following are nonjusticiable political questions: the determination of when war begins or ends, the recognition of foreign governments, the determination of who represents a foreign state, the ratification and interpretation of treaties, and the use of the President's War Powers.<sup>240</sup>

---

<sup>237</sup> Standing is extremely unlikely given the difficulties there would be in linking presidential non-enforcement to the alleged injuries under the traceability and redressability prongs of the standing doctrine.

<sup>238</sup> 369 U.S. 186, 217 (1962).

<sup>239</sup> On the continued vitality of the political question doctrine, see the collected essays in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 160 (Nada Mourtaba-Sabbah & Bruce E. Cain eds., 2007).

<sup>240</sup> See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* § 2.8 (3d ed. 2006). It is not clear the extent to which *Hamdan* signals an end to judicial constraint in the area of foreign affairs and war powers. See also Nancy Kassop, *A Political Question By Any Other Name: Government Strategy in the Enemy Combatant Cases of Hamdi and Padilla*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES*, *supra* note 239, at 127, 160 ("At bottom, [the *Hamdi* decision] made crystal clear that, in matters of individual rights during wartime, the president's policies were not immune from judicial review."); cf. Robert J. Pushaw, Jr., *The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 *NOTRE DAME L. REV.* 1005, 1064 (2007) ("*Hamdan* presents the exceedingly rare situation in which the Court distorted its jurisdictional precedent to reach

For instance, in *Goldwater v. Carter*,<sup>241</sup> Senator Barry Goldwater challenged President Carter's unilateral rescission of a treaty with Taiwan, contending that treaty rescission required the approval of two-thirds of the Senate.<sup>242</sup> The plurality held that the case posed a political question because there were no constitutional standards governing treaty rescission, and the dispute was between "coequal branches of our Government, each of which has resources available to protect and assert its interests."<sup>243</sup> Likewise, the Court may conclude that if Congress is upset with how the President is handling foreign policy with Sudan, it has several measures at its disposal to express its disapproval, the most potent being the power of the purse. In any event, the evidence suggests that the President has been complying with the reporting requirements of the Sudan Peace Act, and further that the sanction requirements in the Act have not been triggered.<sup>244</sup> Accordingly, unlike the signing statement that accompanied the McCain Amendment, this signing statement appears designed to protect the President's prerogatives rather than to disagree with Congress over substantive goals and methods. The courts may someday choose to resolve the competing conceptions of power over foreign policy, but it will likely be in a case in which the President overtly flaunts congressional commands.

#### CONCLUSION

Although some members of Congress are upset about President Bush's aggressive use of presidential signing statements, it is unlikely congresspersons could use the courts to challenge this presidential practice. Legislators usually lack standing to challenge executive branch decisions, and courts apply a variety of justiciability doctrines to limit review of cases involving disputes between the executive and legislative branches. When signing statements play a role in litigation, it is only as a possible source of legislative history, and even this use is controversial. Still, members of Congress may find value in proposing legislation to give them standing to challenge signing statements or in filing lawsuits that ultimately get dismissed. Such actions

---

a controversial legal issue."); Jana Singer, *Hamdan as an Assertion of Judicial Power*, 66 MD. L. REV. 759, 763-64 (2007) ("The fact that the Court did not follow the cautious approach that it has taken in previous foreign affairs disputes indicates that the Court not only wanted to recalibrate the balance between Congress and the Executive, but also that the Court wanted to establish *itself* as an important player in future national security disputes—at least where those disputes involve claims of individual liberty.").

<sup>241</sup> 444 U.S. 996 (1979).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 1004.

<sup>244</sup> See DAGNE, *supra* note 232, at 18-19; see also, e.g., Presidential Determination on the Sudan Peace Act, 40 WEEKLY COMP. PRES. DOC. 665 (Apr. 21, 2004) (certifying that the government of Sudan and the Sudan People's Liberation Movement have been negotiating in good faith).

send a message to the President that Congress is monitoring executive attempts at aggrandizement and is willing to push back. However, if Congress wants to do more than score points in the court of public opinion, it probably needs to flex its political muscles to overcome executive non-enforcement.

The presidential practice of using signing statements is likely not justiciable. However, simply because an injury is lacking for standing purposes does not mean there is no harm. Standing doctrine is of no help when all citizens are harmed equally. President Bush's signing statements are one of many tools he has used to articulate a rigid view of a unitary executive. In this view, the President has spheres of authority into which no other branch can intrude. Not surprisingly, in lieu of cooperation and collaboration, President Bush has often bypassed Congress in establishing foreign policy, national security, or domestic objectives. By sheer repetition, the President's view of the unitary executive theory may become so entrenched that the rule of law dissipates in favor of unchecked executive power. To be sure, the signing statements add some transparency to the President's thought processes and allow Congress and the public to monitor the executive branch. Suffice to say, we have been warned.