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COMMENTS

RAINES, RAINES GO AWAY: HOW PRESIDENTIAL SIGNING STATEMENTS AND SENATE BILL 3731 SHOULD LEAD TO A NEW DOCTRINE OF LEGISLATIVE STANDING

Jason A. Derr

Since taking office, President George W. Bush has exercised his executive power to disregard over 750 laws. In April 2006, Boston Globe re-

+ J.D. Candidate, May 2008, The Catholic University of America, Columbus School of Law, B.A., King’s College, Wilkes-Barre, PA. First and foremost, the author wishes to thank the staff of the Catholic University Law Review for their expert editing of this Comment. The author owes an incredible debt of gratitude to Professor Heather Elliott for her invaluable guidance and expert legal analysis throughout the writing process, Professor Richard J. Peltz for his assistance in the initial stages of working with presidential signing statements, and his Note and Comment Editor, Kinari Patel, for her expert critiques and continual encouragement. Finally, the author wishes to express his heartfelt gratitude for the love and support of his mother, Brenda, father, Warren, and sister, Alicia.

1. Charlie Savage, Bush Challenges Hundreds of Laws, BOSTON SUNDAY GLOBE, Apr. 30, 2006, at A1; see also AMERICAN BAR ASSOCIATION TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, RECOMMENDATION & REPORT 2 (2006), available at http://www.abanet.org/op/signing statements/aba_final_signing_statements_recommendation-report_7-24-06.pdf [hereinafter ABA TASK FORCE REPORT]. It is important to note that presidential signing statements are not a new mechanism of executive action. See PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT 203-13 (2002) (outlining various uses of presidential signing statements by providing specific examples from the Reagan, George H.W. Bush, and Clinton administrations); ABA TASK FORCE REPORT, supra, at 7-14 (discussing the use of presidential signing statements from the Monroe administration through the current Bush administration). The first presidential signing statement to contradict the will of Congress was issued by President James Monroe. ABA TASK FORCE REPORT, supra, at 7. After signing a bill into law that directed the president as to how military officers should be selected, President Monroe issued a statement claiming it to be the constitutional role of the president, not Congress, to select military officials. Id. Since Monroe, a host of presidents have used signing statements in various contexts to counteract the will of Congress, including John Tyler, Ulysses S. Grant, Theodore Roosevelt, Woodrow Wilson, Franklin D. Roosevelt, Harry Truman, Dwight Eisenhower, John F. Kennedy, Lyndon B. Johnson, Richard Nixon, Gerald Ford, Jimmy Carter, Ronald Reagan, George H.W. Bush, and Bill Clinton. Id. at 7-14.

Despite the fact that signing statements have been used frequently by presidents throughout the 20th century, it was the Reagan administration that spawned a turning
porter Charlie Savage wrote that President Bush has "ignore[d]" laws regarding "military rules and regulations, affirmative-action provisions, requirements that Congress be told about immigration services problems, 'whistle-blower' protections for nuclear regulatory officials, and safeguards against political interference in federally funded research." Even the American Bar Association (ABA) recognizes the existence of "a major national controversy."

point in the use of signing statements from frequently ceremonial to systematically weapon-like. See COOPER, supra, at 201 (describing the Reagan administration's use of signing statements as "a systematic and effective weapon to trump congressional action and to influence not only the implementation of law but also its legal interpretation"). Indeed, it was Reagan's Attorney General, Edwin Meese III, that signed a 1986 agreement with West Publishing to have presidential signing statements printed as part of a statute's legislative history in the U.S. Code Congressional and Administrative News. Id. at 201-03. Meese's stated goal was to "improve statutory interpretation by making clear the president's understanding of legislation at the time he signs a bill." Id. at 203. Overall, Ronald Reagan raised seventy-one challenges to federal statutes by the use of signing statements. ABA TASK FORCE REPORT, supra, at 11. More recently, Presidents George H.W. Bush and Bill Clinton far surpassed Reagan's total, with Bush issuing 232 challenges and Clinton issuing 105. Id. at 11-13.

2. Savage, supra note 1. Recently, President Bush issued presidential signing statements in two additional areas of law: the United States' policy on torture, Elisabeth Bumiller, For President, Final Say on a Bill Sometimes Comes After the Signing, N.Y. TIMES, Jan. 16, 2006, at A11, and the operation of the Federal Emergency Management Agency (FEMA); Spencer S. Hsu, Bush Balks at Criteria for FEMA Director, WASH. POST, Oct. 7, 2006, at A2. In regard to the United States' torture policy, President Bush wrote a signing statement declaring that the president possesses the authority to disregard Congress' recent ban on cruel, inhumane, or degrading treatment of American prisoners under the guise of the president's constitutional authority as commander in chief. Bumiller, supra. The so-called torture ban was initially opposed by President Bush; but later, the president met with Senator John McCain (R-AZ), the sponsor of the legislation, in the Oval Office in order "to make clear to the world that this government does not torture." Id. Interestingly, President Bush's signing statement was released at 8:00 p.m. on Friday, December 30, via e-mail with the subject line simply stating, "Statement by the President." Id. The New York Times reported that the timing of the statement's release placed it within a "dead time" before the New Year's weekend, leaving almost no one to notice its existence. Id.

Regarding the operation of FEMA, the president used a presidential signing statement to reserve the ability to ignore a post-Hurricane Katrina requirement enacted by Congress that requires the director of FEMA to be experienced in handling disasters. Hsu, supra. Congress created such elevated standards after it was made apparent that Michael Brown, the former director of FEMA during Hurricane Katrina, who was a lawyer and Arabian horse judge, lacked experience in managing disaster relief. Id. After Congress passed the increased standards for the position, President Bush issued a signing statement reserving the right to ignore such changes. Id.

3. See ABA TASK FORCE REPORT, supra note 1, at 2 (stating that when the first reports of President Bush's use of signing statements were reported in the national media, "a major national controversy" emerged); Robert Pear, Legal Group Says Bush Undermines Law by Ignoring Select Parts of Bills, N.Y. TIMES, July 24, 2006, at A12 (quoting Michael S. Greco, president of the ABA, referring to presidential signing statements as a "threat to the Constitution and to the rule of law"). Recent reporting that has uncovered
The executive mechanism that President Bush uses to disregard these various federal laws is the presidential signing statement.4 Presidential signing statements are:

[Announcements made by the president, usually prepared by the Justice Department, that go beyond merely lauding passage of a statute to identify provisions of the legislation with which the president has concerns. They also provide the president’s interpretation of the language of the law, announce constitutional limits on the implementation of some of its provisions, or indicate directions to executive branch officials as to how to administer the new law in an acceptable manner.5

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4. Savage, supra note 3 ("A signing statement is issued by the president as he signs a bill into law. It describes his interpretation of the bill, and it sometimes declares that one or more of the laws created by the bill are unconstitutional and thus need not be enforced or obeyed as written."). Charlie Savage of The Boston Globe recounts the process Bush has used as of April 2006:

[President Bush] has signed every bill that reached his desk, often inviting the legislation's sponsors to signing ceremonies at which he lavishes praise upon their work. Then, after the media and the lawmakers have left the White House, Bush quietly files “signing statements” .... The statements are recorded in the federal register. Savage, supra note 1.

5. COOPER, supra note 1, at 201. Professor Cooper supplies a helpful breakdown of the “how” and “why” of presidential signing statements. Id. at 203-20. In terms of how presidential signing statements are implemented, Cooper has recognized the following methods: (1) “[s]igning [s]tatement[s] as a [t]ype of [f]iscal [l]ine [i]tem [v]eto,” whereby the president states his desire to spend (or not spend) money on a particular area that Congress has spoken on, id. at 203; (2) “[s]ubstantive [l]ine [i]tem [v]eto [s]tatement[s],” where the president specifically rejects provisions of actual statutes even when signing the bill into law, id. at 204; (3) “[f]ixing [o]uter [b]oundaries to [s]tates,” a method that allows the president to interpret a law within certain, often constitutional, boundaries, id. at 206; (4) “[a]dd[ing] the [p]resident’s [o]pinion to the [l]egislative [h]istory,” where the president attempts to lay out his view of the enacted law in order to influence subsequent interpretation, id. at 210; (5) “[a]void[ing] [p]ractical [p]roblems [s]uch as [e]nd of [s]ession [v]etoes or [v]etoes of [l]arge, [c]omplex [s]tate[s],” a method that is used instead of a fatal presidential veto, id. at 211; and (6) “[s]tructuring [i]mplementation of a [s]tate,” where the president makes an end run around a presidential veto by giving specific instructions to the executive branch in accord with the president’s interpretation of the law. Id. at 212.

In categorizing why presidential signing statements are used, Cooper lists: (1) “[t]o [p]rovide [r]ecognition for [p]olitical [a]llies and [s]upporters,” id. at 213; (2) “[m]aking
Quite naturally, members of Congress object to the president's use of signing statements, particularly when the president states his intent to ignore a duly enacted law. After President Clinton used a signing statement in October 1999 to indicate that his administration would not implement the 2000 Defense Authorization Act as passed by Congress, Senator Robert Byrd (D-WV) reprimanded a Clinton administration official before the Senate Armed Services Committee by remarking, "[y]ou've shown a contempt of Congress that borders on a supreme arrogance of this institution. Let me tell you there are still people up here who work hard. There are still people up here who believe in the Constitution of the United States."

Most recently, Senator Arlen Specter (R-PA), speaking on the effect of presidential signing statements, stated that "congressional legislation doesn't amount to anything if the president can say, "My constitutional authority supersedes the statute." And I think we've got to lay down the gauntlet and challenge him on it." On July 26, 2006, Senator Specter challenged the abuse of presidential signing statements by introducing Senate Bill 3731. Senator Specter's

6. See <i>Pear</i>, supra note 3 (quoting Senator Arlen Specter (R-PA) as saying Bush's use of signing statements gives the impression the president believes he can "cherry-pick the provisions he likes and exclude the ones he doesn't like," and Senator Patrick J. Leahy (D-VT) as saying that Bush's signing statements have become "a diabolical device to rewrite laws enacted by Congress"); see also <i>Cooper</i>, supra note 1, at 230 (stating, "[f]or their part, legislators are asking why it should be the case that a president can issue a signing statement that to all intents and purposes directs an agency not to implement a statute as it was enacted by the Congress").

7. <i>Cooper</i>, supra note 1, at 200.

8. Id. at 199.


bill seeks to accomplish two goals: (1) to prevent any state or federal court from using presidential signing statements "as a source of authority" in judicial decisions, and (2) to grant standing to the Congress as an institution (through the Office of Senate Legal Counsel or the Office of legislation "telling the courts that in interpreting law, they cannot rely on presidential 'signing statements,'" and also quoting Senator Specter as saying that such legislation was to make certain that presidential signing statements "are not used in an unconstitutional manner"). Senator Specter's Senate Bill 3731 is consistent with recommendations made by the ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine because the legislation, in part, seeks to provide judicial review of presidential signing statements. See ABA TASK FORCE REPORT, supra note 1, at 25-26 (recommending that legislation be drafted to ensure that presidential signing statements are subject to judicial review); S. 3731, § 5. The ABA report states that this legislation would grant to "Congress as an institution or its agents" standing to challenge the president's use of a signing statement that disregards laws enacted by Congress. ABA TASK FORCE Report, supra note 1, at 25.

The ABA recommendation is based on a single rationale: presidential signing statements harm the constitutional doctrine of separation of powers. Id. at 20. The ABA concludes in its report that the separation of powers doctrine requires that the president refrain from using signing statements as a means "to disregard or decline to enforce a law or to interpret it in a manner inconsistent with the will of Congress." Id. The ABA's arguments are grounded in both the framers' intent and decisions of the United States Supreme Court. Id. at 20-21. The ABA provides, "[o]ne of the most fundamental innovations of the American Constitution was to separate the executive from the legislative power." Id. at 20. In addition, the ABA quotes James Madison for the proposition that the framers believed the separation of powers was "essential to the preservation of liberty." Id. (quoting THE FEDERALIST No. 51 (James Madison)). The framers' view on the separation of powers doctrine, according to the ABA, is embodied in Article II, section 3 of the United States Constitution stating "the President 'shall take Care that the Laws be faithfully executed."' Id. (quoting U.S. CONST. art. II, § 3). The ABA argues that this section of the Constitution evidences an intent "to vest lawmaking power in the Congress and enforcement power in the President." Id.

Discussing Supreme Court case law, the ABA cites to Youngstown Sheet & Tube Co. v. Sawyer, which states, "[i]n the framework of our Constitution, the president's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952), quoted in ABA TASK FORCE REPORT, supra note 1, at 20. Moreover, the ABA finds that signing statements violate the holding of INS v. Chadha, where the Court held that the Constitution embodies "the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." INS v. Chadha, 462 U.S. 919, 951 (1983), quoted in ABA TASK FORCE REPORT, supra note 1, at 20-21. The ABA concludes that "[t]he Constitution thus limits the President's role in the lawmaking process to the recommendation of laws he thinks wise and the vetoing of laws he thinks unwise." ABA TASK FORCE REPORT, supra note 1, at 20.

The ABA argues that although their view of the separation of powers may seem restrictive of the lawmaking role of the president, their stance is fully supported by Supreme Court case law. Id. at 20-21. The ABA notes that although the Court has stated that "[t]he choices ... made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable," the Supreme Court recognizes that "those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." Chadha, 462 U.S. at 959, quoted in ABA TASK FORCE REPORT, supra note 1, at 20.
General Counsel for the United States House of Representatives) to obtain a declaratory judgment as to the legality of any presidential signing statement.  

Another provision of Senate Bill 3731 is an attempt by Senator Specter to navigate the unsettled doctrine of legislative standing. Standing is generally used to determine whether a particular person is entitled to adjudication by a court on a particular matter. Professor Erwin Chemerinsky describes standing generally as "one of the most confused areas of the law." The doctrine of legislative standing specifically refers to the standing of members of a legislature to file suit claiming an injury to their legislative power. Legislative lawsuits of this nature are also often referred to as lawsuits alleging injuries to the legislator's official capacity.

The United States Supreme Court has only addressed the issue of legislative standing twice. In 1939, the Court in Coleman v. Miller granted

11. S. 3731, §§ 4-5.
12. Id. § 5 ("Any court of the United States ... may declare the legality of any presidential signing statement ... "); 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, 218 (2001) (discussing that there has been "little discussion by courts of the specific concept of legislator standing"); Carlin Meyer, Imbalance of Powers: Can Congressional Lawsuits Serve As Counterweight?, 54 U. PITT. L. REV. 63, 70-71 (1992) (recognizing, as of 1992, that the "[c]urrent doctrine [of legislative standing] needs refinement").
13. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 60 (3d ed. 2006). Professor Chemerinsky notes that "[t]he Supreme Court has declared that '[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Id. (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)) (second alteration in original).
14. Id. Professor Chemerinsky has identified various reasons why the doctrine of standing is so complex. First, the factors used to analyze standing have changed "greatly" during the last 25 years. Id. Second, the Supreme Court has left standing without a consistent method of application. Id. Third, legal commentators argue that the Supreme Court has manipulated the doctrine based on the Court's desire to review particular fact patterns. Id. at 60-61.
15. See, e.g., Note, Standing in the Way of Separation of Powers: The Consequences of Raines v. Byrd, 112 HARV. L. REV. 1741, 1741 n.3 (1999). The author uses the phrase "legislative standing" to refer only to those lawsuits where legislators sue for institutional injury to their official capacity. Legislators may also sue in their personal capacity; however, this separate strand of legislative lawsuits involves settled law that does not raise any "'unusual concerns'" worth discussing in the context of institutional injury suits by legislators. Id. (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-20, at 150 (2d ed. 1988)). The primary case for a legislator's right to sue for personal injuries is Powell v. McCormack, where a member of Congress, Adam Clayton Powell, Jr., filed suit for being unconstitutionally removed from his seat in Congress after his wife allegedly received illegal payments from his office. Powell v. McCormack, 395 U.S. 486, 489-90, 493 (1969).
standing to twenty members of the Kansas State Legislature whose votes were "virtually held for naught" by a constitutionally questionable action by the Kansas Lieutenant Governor. Then, in 1997, the Court held in Raines v. Byrd that members of the United States Congress lacked standing to sue for an institutional loss of voting power arising out of the passage of the Line Item Veto Act because the members named in the complaint did not have a sufficient personal stake in the dispute.

Lower court interpretations of Raines have set the standard for legislative standing very high, making it difficult for any legislator to meet it. These interpretations have created a new body of law on legislative standing, generated primarily by the United States Court of Appeals for the District of Columbia Circuit. This body of law leaves unanswered questions and significant problems.

This Comment argues that (1) Senate Bill 3731, if enacted, will ultimately fail under the Supreme Court's holding in Raines v. Byrd and its progeny, and (2) the failure of Senate Bill 3731 highlights how critical it is for the Supreme Court to generate a new and more generous doctrine of legislative standing to protect the doctrine of separation of powers. First, this Comment traces the Supreme Court's development of the doctrine of legislative standing and examines the most recent cases on the subject from the United States Court of Appeals for the District of Columbia Circuit. Next, this Comment analyzes Senate Bill 3731 in light of the current legislative standing doctrine and concludes that the legislation will ultimately fail as a check on the power of the executive branch. Finally, this Comment argues that constraints on legislative standing must be relaxed in order to protect the constitutional spheres of power for the executive and legislative branches. Legislative standing can be revived without inviting endless lawsuits from disaffected legislators by limiting the doctrine to three baseline requirements: (1) Congress must pass legis-

20. See Campell v. Clinton, 203 F.3d 19, 32 (D.C. Cir. 2000) (Randolph, J., concurring) ("[T]he majority's decision is tantamount to a decision abolishing legislative standing."); TOM CAMPBELL, Another Method of Solving Interbranch Disputes: Legislators Going to Court to Sue the Executive Branch, in SEPARATION OF POWERS IN PRACTICE 193, 193, 210 n.1 (2004).
22. See Arend & Lotrionte, supra note 12, at 262-72 (examining how the D.C. Circuit has dealt with Raines since 1997).
23. Id. at 273-74 (stating that the current state of legislative standing jurisprudence has "serious problems" and is plagued by the unanswered questions of Raines); Note, supra note 15, at 1744 (stating that the doctrine of legislative standing is "by no means clear").
lation that is subsequently nullified, (2) Congress must sue as an entity, and (3) the D.C. Circuit's case law on legislative standing must be rejected in favor of the Supreme Court's approach in *Raines v. Byrd*.

I. THE DOCTRINE OF STANDING IN FEDERAL COURTS

According to a leading treatise, "[s]tanding is the determination of whether a specific person is the proper party to bring a matter to the court for adjudication." The doctrine of standing in federal court arises out of the "case-or-controversy" requirement of Article III of the Constitution. Thus, the standing requirement is a constitutional restriction that can never be diminished by statute.

In *Lujan v. Defenders of Wildlife*, the United States Supreme Court outlined the three requirements for standing in federal court. The Court held:

First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... the result [of] the independent action of some third party not before the court." Third it must be "likely," as opposed to merely "speculative," that the injury will be "re-dressed by a favorable decision."

24. CHEMERINSKY, supra note 13, at 60. Through the intent to limit the number of lawsuits that come before the federal courts, the doctrine of standing serves four major purposes. First, standing maintains the separation of powers. *Id.* at 61. By limiting adjudication to parties entitled to have their cases heard, standing reduces the likelihood that the court will hear lawsuits concerning disputes between the executive and the legislative branches. *Id.* Second, standing promotes judicial efficiency. *Id.* The number of cases that the court must hear is reduced because the doctrine of standing does not permit ideological lawsuits, opting instead for actual injury and a personal stake in the dispute. See *id.* at 61. Third, standing advances judicial decision making. *Id.* at 62. Since standing only allows those parties with a personal stake in the dispute to come before the court, each side of the dispute will more strongly advocate their position. *Id.* This adversarial positioning narrows the issues for the court and focuses the court in difficult decisions. *Id.* Fourth, the requirement of standing promotes general principles of fairness by ensuring that third parties do not advocate for the rights of others. *Id.* The Supreme Court held that "the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." Singleton v. Wulff, 428 U.S. 106, 113-14 (1976), quoted in CHEMERINSKY, supra note 13, at 62.


26. CHEMERINSKY, supra note 13, at 63.


28. *Id.* (citations omitted) (alterations in original); see also Blank, supra note 17, at 612 (further discussing the effect of *Lujan* on standing jurisprudence).
These three standing requirements are "the 'irreducible minimum' required by the Constitution." Therefore, if a case fails to meet these requirements, it will be dismissed and federal courts will refuse to hear the case on the merits.

A final, but critical, feature of standing is its relationship with the separation of powers doctrine. Standing seeks to preserve the separation of powers doctrine by restricting judicial intervention. However, accom-
plishing such preservation is a delicate balance. If standing were to become too restrictive, the judiciary would lose its ability to maintain the system of checks and balances that it provides. Therefore, a court's application of the standing doctrine must be handled with care.

II. THE DOCTRINE OF LEGISLATIVE STANDING IN THE UNITED STATES SUPREME COURT

The federal courts have developed a specialized doctrine of "legislative standing." Unlike the volumes of case law on standing in general, the doctrine of legislative standing has rarely been discussed. Legislative standing is at issue when members of a legislature file suit claiming an injury to their "official capacities as legislators."

A. Coleman v. Miller: The Supreme Court's First Legislative Standing Case

Before 1939, the United States Supreme Court never addressed the issue of legislative standing. In that year, the Court decided Coleman v.
Miller. There, Kansas legislators challenged the right of the lieutenant governor to cast the deciding vote in the Kansas Senate ratifying a proposed amendment to the United States Constitution. In January 1937, a resolution was introduced in the Kansas State Senate to adopt the amendment; out of forty senators, the vote for ratification was a perfect tie—twenty senators in favor, twenty senators opposed. To break the stalemate, the lieutenant governor cast the forty-first vote in favor of ratification. Subsequently, the resolution was adopted by a majority vote in the Kansas House of Representatives.

Twenty-one members of the Kansas Senate, including all twenty senators who voted against ratification, filed a mandamus petition directly to the Kansas Supreme Court to force the secretary of the senate to deny passage of the resolution. The legislators argued that the lieutenant governor lacked the power to cast the deciding vote in the Senate. The Kansas Supreme Court held that the lieutenant governor did possess the authority to cast the tie-breaking vote and that the resolution itself was valid. The legislative plaintiffs petitioned for certiorari and the Supreme Court granted the writ.

Writing for the Court, Chief Justice Hughes considered the issue of standing and held that the twenty Kansas senators, whose votes against ratification were “overridden and virtually held for naught,” possessed “a plain, direct and adequate interest in maintaining the effectiveness of their votes.” In addition, the Court concluded that because the twenty losing senator’s votes “would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, [it was] sufficient to give the Court jurisdiction.”

The Court sought to place Coleman within prior precedent, looking to Hawke v. Smith and Leser v. Garnett as controlling authorities. The Court decided that because both Hawke and Leser permitted standing for

40. 307 U.S. 433 (1939).
41. Id. at 435-36.
42. Id.
43. Id. at 436.
44. Id.
45. Id. In addition to the twenty senators that voted against ratification, three members of the Kansas House of Representatives joined the lawsuit. Id.
46. Id.
47. Id. at 437.
48. See id.
49. Id.
50. Id. at 446.
51. 253 U.S. 221 (1920).
52. 258 U.S. 130 (1922).
individual citizens seeking to have their voting power recognized, certain twenty senators have a more “impressive” interest in maintaining their voting power.

The Coleman decision leaves a few questions unanswered. First, Coleman is unclear about whether the holding that senators have standing to sue state officials applies to the United States Congress. In fact, no precedent discussed in the decision relates specifically to legislators, much less federal legislators. Finding that Coleman, a case involving state legislators, could justify congressional standing ignores federal separation of powers concerns inevitably implicated in a lawsuit by either body of the United States Congress against the executive branch. Secondly, assuming that Coleman would apply as a binding precedent for standing for federal legislators, it is unclear whether “the entire disenfranchised group” must bring suit in order to achieve standing. Coleman offers nothing to help determine what would happen if any of the twenty losing state legislators had not come before the Court.

B. After More Than a Half-Century, the Court Addresses Legislative Standing in Raines v. Byrd

Almost sixty years later, in Raines v. Byrd, the Supreme Court granted certiorari on the second legislative standing dispute in its history; only this time the legislative body involved was the United States Congress.

Raines v. Byrd involved the enactment of the Line Item Veto Act of 1996. The Act gave the president authority to veto specific portions of legislation relating to spending and tax benefits, rather than exercising a

54. See id. at 441. In Hawke, the Court permitted standing for an Ohio voter who sought to challenge the actions of the Ohio secretary of state. Hawke, 253 U.S. at 224, 231. In Leser, the Court held standing was appropriate for voters in the state of Maryland to bring suit to have various women’s names removed from a list of “qualified voters.” Leser, 258 U.S. at 135-36.

55. Coleman, 307 U.S. at 441 (emphasis added). The Court also based its holding on various cases recognizing standing for public officials and administrative employees, both federal and state, due to their duty to enforce statutory law; however, these rationales are outside the scope of legislative standing. Id. at 441-46.

56. Arend & Lotrionte, supra note 12, at 220.

57. Id.

58. See id.

59. Id. at 221.

60. See id.

61. Raines v. Byrd, 521 U.S. 811, 813 (1997); see also Note, supra note 15, at 1741 (“Raines was the Court’s first pronouncement on congressional standing in nearly sixty years.”).


veto on the entire piece of legislation.\textsuperscript{64} Under the procedure of the Act, any effort by the president to exercise his cancellation power could be overridden by a disapproval bill passed by a two-thirds majority in both Houses of Congress.\textsuperscript{65} The Act also provided: "Any Member of Congress or any individual adversely affected by [the Act] may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution."\textsuperscript{66}

The day after the Act became effective, six members of Congress who voted against it brought suit in the United States District Court for the District of Columbia.\textsuperscript{67} They alleged that the Act violated the Constitution by expanding the power of the president and violating the constitutional requirements of bicameralism and presentment.\textsuperscript{68} The members claimed that the Act harmed them "directly and concretely . . . in their official capacities" as members of Congress by altering the legal effectiveness of their voting power, taking away their constitutional option to repeal legislation, and changing the constitutional balance of power between the executive branch and the legislative branch.\textsuperscript{69}

The defendants asked the district court to dismiss the case on the grounds that the congressional plaintiffs lacked standing to sue.\textsuperscript{70} The district court denied the defendant's motion, holding that the members of Congress did have standing and that the Line Item Veto Act was uncon-
Because the Act contained an expedited appeal provision, the defendants appealed directly to the United States Supreme Court. The Supreme Court held that the congressional plaintiffs lacked standing to sue. In doing so, the Court laid out the broad principles of Article III standing, discussed the prior legislative standing case of Coleman v. Miller, and examined two particular caveats present in the case.

Discussing the general principles of standing, the Court focused on the personal injury requirement as the key to any standing analysis. The Court reiterated that plaintiffs must have a "personal stake" in the alleged dispute" and the injury must be "particularized as to him." The Court stressed that strict compliance with the requirements of standing has always been required. The Court also emphasized that in disputes "our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.

Next, the Court discussed the case of Coleman v. Miller, the only decision in which it had previously addressed legislative standing. After briefly discussing the facts of Coleman, the Court distilled the entire case into one, succinct sentence; it stated:

71. Id. In addition to ruling on the issue of standing and the unconstitutionality of the Line Item Veto Act, the district court also entertained the defendants' argument under the doctrine of ripeness. Id. The defendants' argued that because the president had yet to exercise his authority under the Line Item Veto Act, the case was not ripe for review. See id. The district court disagreed, holding that the case was, in fact, ripe for review. Id. 72. 2 U.S.C. § 692(b)-(c) (2000); Raines, 521 U.S. at 817-18. 73. Raines, 521 U.S. at 830. 74. See id. at 818-830; see also Arend & Lotrionte, supra note 12, at 259-60 (explaining the Court's justification for its denial of standing). 75. Raines, 521 at 818 (citing Allen v. Wright, 468 U.S. 737, 751 (1984)). Specifically, the Court provided: "To meet the standing requirements of Article III, '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."' Id. (quoting Allen, 468 U.S. at 751). 76. Id. at 819 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). 77. Id. 78. Id. at 819-20. 79. Id. at 821-26. The Court first discussed Powell v. McCormack; however, that case did not involve legislative standing. Id. at 820-21; Powell v. McCormack, 395 U.S. 486 (1969). In Powell, a member of Congress was singled out and removed from his seat due to strong evidence of illegal payments made to the Congressman's wife. Powell, 395 U.S. at 490, 493. The Court granted standing in the case. See id. at 512-14; Raines, 521 U.S. at 820-21. The Court in Raines found Powell inapplicable because the Raines plaintiffs were not "singled out for especially unfavorable treatment," but instead, were claiming an institutional injury of damage to the entire Congress. Raines, 521 U.S. at 821. Moreover, the Court added that the Raines plaintiffs were claiming a violation of their political power, rather than a private harm, which, as the Court stated, "would make the injury more concrete." Id.
It is obvious, then, that our holding in Coleman stands (at most) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified. 80

Applying this interpretation of Coleman, the Court held that vote nullification had not occurred in Raines, and, therefore, the case was not governed by Coleman. 81 The Court stated that there was no nullification because the congressional plaintiffs in Raines were not claiming that a law passed by a sufficient vote was later nullified by illegal action; instead, the plaintiffs had simply lost a vote. 82 Moreover, the Court dismissed the plaintiff's argument that their votes were prospectively nullified. 83 Nothing prevents Congress, the Court said, from passing and rejecting appropriations bills, creating exemptions from the Line Item Veto Act, or repealing the Line Item Veto Act itself. 84

Even though the Court found that Coleman was not controlling, it went on to address the suggestion that Coleman permits standing where "senators [have] 'a plain, direct and adequate interest in maintaining the effectiveness of their votes'." 85 The plaintiffs argued that the Line Item Veto Act changes the meaning and effectiveness of Congress' vote for all cancelled projects. 86 However, the Court concluded that Coleman did not control. 87 The Court refused to accept the plaintiffs' argument and stated that such logic "pulls Coleman too far from its moorings" because the plaintiffs' use of the word "effectiveness" was not comparable to the factual context of Coleman. 88

In its conclusion, the Court noted two important facts. First, the Court "attach[ed] some importance" to the fact that neither the House of Representatives nor the Senate authorized the congressional plaintiffs to

80. Raines, 521 U.S. at 823 (citation omitted). In a critical footnote, the Court added that because the complete nullification feature of Coleman was enough to distinguish the case from Raines, the Court would refrain from discussing any other ways in which the two cases differed. Id. at 824 & n.8. Thus, as commentators have noted, the Court refused to hold whether Coleman, as a state legislature case, would extend to authorize standing to a lawsuit brought by federal legislators. Arend & Lotrionte, supra note 12, at 257.
82. Id. at 824.
83. Id.
84. Id.
85. Id. at 825 (quoting Coleman v. Miller, 307 U.S. 433, 438 (1939)).
86. Id.
87. Id. at 826.
88. Id. at 825-26. The Court held that "[t]here is a vast difference between the level of vote nullification at issue in Coleman and the abstract dilution of institutional legislative power that is alleged here. To uphold standing here would require a drastic extension of Coleman." Id. at 826.
sue. Second, the Court's decision left the Act vulnerable to constitutional challenge by someone who suffers a judicially cognizable injury.  

III. THE D.C. CIRCUIT ATTEMPTS TO MAKE SENSE OF THE AFTERMATH OF RAINES

Since the Supreme Court's decision in Raines, it has not returned to the issue of legislative standing. However, two important cases have since been heard in the D.C. Circuit, which often hears appeals arising from federal civil lawsuits. These subsequent D.C. Circuit interpretations of legislative standing are the best evidence of how the holding in Raines will be interpreted.

A. Chenoweth v. Clinton and Its Similarities with Raines

In Chenoweth v. Clinton, the D.C. Circuit addressed President Clinton's creation of the American Heritage Rivers Initiative (AHRI). The AHRI allowed local communities to call upon agencies of the federal government "to preserve certain historically significant rivers and riverside communities." In June 1997, following the president's announcement of the initiative in his State of the Union address, Representatives Chenoweth, Schaffer, and Pombo unsuccessfully introduced legislation to terminate any further progress on the AHRI. Subsequently, President Clinton established the AHRI by Executive Order 13,061 in September 1997.
Representatives Chenoweth, Schaffer, and Pombo filed suit against the president claiming that he had no statutory authority to issue Executive Order 13,061. Specifically, the representatives claimed the president's action "deprived [the plaintiffs] of their constitutionally guaranteed responsibility of open debate and vote on issues and legislation involving interstate commerce, federal lands, the expenditure of federal monies, and implementation of the [National Environmental Policy Act]."

The district court granted the president's motion to dismiss on the grounds that the representatives' claimed right to vote on the AHRI was "too abstract and not sufficiently specific" to meet the requirements of Article III standing. The representatives appealed to the D.C. Circuit. The D.C. Circuit affirmed the ruling of the district court, holding that the members' claim of a dilution of their voting authority was "indistinguishable from the claim to standing the Supreme Court rejected in Raines."

A recent example of the broad effect of executive orders is President George W. Bush's use of executive orders to jumpstart a faith-based service initiative, which was created by two executive orders that sought to increase federal government cooperation with faith-based organizations. See generally Exec. Order No. 13,198, 3 C.F.R. 750-52 (2002); Exec. Order No. 13,199, 3 C.F.R. 752-54 (2002).

Professor Phillip J. Cooper has noted that executive orders have many more uses, including: (1) the issuance of binding pronouncements to the executive branch; (2) the making of policy in areas of generally accepted presidential concern; (3) the initiation of regulation; (4) the delegation of authority "to address behavior of those outside the executive branch," through orders to government officials; (5) the reorganizing of agencies; (6) the "management of federal personnel;" (7) control of the military; (8) the implementation of foreign policy; and (9) "[t]o [s]et aside, [m]anage, [a]llocate or to [d]ispose of physical assets or real property." COOPER, supra note 1, at 21-37.

96. Chenoweth, 181 F.3d at 113.
97. Id.
100. Id. at 117.

However, while the court in Moore permitted standing, it ultimately dismissed the plaintiff's case under the doctrine of equitable discretion. Id. at 958-59; see also Chenoweth, 181 F.3d at 114-15. The D.C. Circuit's equitable discretion doctrine is a blending of the doctrines of standing and separation of powers created in Riegle v. Federal Open Market Committee, in which the court concluded, "where a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or
Ultimately, the D.C. Circuit concluded that Raines overruled the Court’s prior legislative standing precedent by implication. The court held that if Raines denied standing where Congress was deprived of its constitutional role as a legislature, then the plaintiffs in Chenoweth must likewise be denied standing for a claim of a mere “right[ ] to participate and vote on legislation in a manner defined by the Constitution.”

amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator’s action.” 656 F.2d 873, 881 (1981); see also Dessem, supra note 36, at 9-13. The Riegle court’s adoption of the equitable discretion doctrine stems from an influential article written by D.C. Circuit Judge McGowan. Meyer, supra note 12, at 84-85. Judge McGowan’s formulation of the doctrine is that the courts should not place any special burden on congressional plaintiffs, but instead, courts should grant standing where the elements are met and use their equitable discretion to refuse relief when it appears the political process has not fully been able to deal with the issue. Id. at 85. Therefore, the doctrine of equitable discretion is a mechanism for blending the separation of powers into a legislative standing analysis. See id. (stating that Judge McGowan’s article urged the courts to use discretion “as a tool to address . . . separation of powers concerns”).

Chenoweth, 181 F.3d at 115; see also Arend & Lotrionte, supra note 12, at 263 (stating that Chenoweth recognizes that after Raines the holdings of Kennedy and Moore are “no longer valid”).

Chenoweth, 181 F.3d at 115 (quoting Moore, 733 F.2d at 951) (alteration in original). In the final section of Chenoweth, despite the court’s unwillingness to apply Kennedy and Moore to the claim of a loss of voting power, the court discussed in dicta the extent to which particular aspects of Kennedy and Moore may still be good law. Chenoweth, 181 F.3d at 116-17.

First, the court examined the effect that Raines may have on the equitable discretion doctrine in Moore. Id. at 116. On this point, the court states that Moore and Kennedy may remain good law because Moore’s equitable discretion doctrine and the application of Raines yield the same result in Chenoweth. Id. Applying Moore’s equitable discretion doctrine, the court noted that Chenoweth would be dismissed because “the parties’ dispute is . . . fully susceptible to political resolution.” Id. The court wrote that Raines’ analysis creates the same result in the present case because, as mentioned previously, Raines does not permit standing where a member of Congress is “divest[ed] of [a] constitutional role.” Id. at 115.

The court interpreted the interrelationship of these doctrines to mean that it is possible that the D.C. Circuit, instead of overruling Moore entirely, merely merged the analysis of equitable discretion, which stems from a separation of powers concern, with the Raines formulation of standing. Id. at 116. However, the court notes that since the Supreme Court held there was no standing in Raines, it did not need “to consider the applicability (or the validity) of the doctrine of equitable discretion.” Id. at 115.

Second, the court considers the possibility that Kennedy retains precedential value in light of Raines. Id. at 116-17. The court concluded that Kennedy may be considered a narrow rule in the spirit of Coleman v. Miller. Id. at 116. Raines interprets Coleman’s holding to create a “complete nullification” standard. Id. (quoting Raines v. Byrd, 521 U.S. 811, 823 (1997)). Based upon this reading of Coleman in Raines, the court finds that Kennedy may still be viable. Id. at 116-17. The court states that because it was the president’s pocket veto that stopped the bill from becoming law in Kennedy, and not a failure by certain members to get legislative support, the majority that voted for the bill may be able to argue their votes were completely nullified by the president’s action. Id.
B. Campbell v. Clinton: Defining “Completely Nullified”

Only one year after Chenoweth, Campbell v. Clinton provided the D.C. Circuit with another opportunity to address legislative standing.104 There, President Clinton's direction of United States military involvement in the NATO campaign in Yugoslavia was questioned.105 On March 24, 1999, President Clinton initiated air attacks on Yugoslav targets.106 Two days later, the president submitted a report to Congress, pursuant to the War Powers Resolution (WPR) that contained details about the deployment of the U.S. Armed Forces.107 Under the applicable portions of the WPR, as the court described them, the president must submit a report within forty-eight hours in any instance where the U.S. Armed Forces are involved in hostilities or even circumstances where hostilities may be imminent.108 In addition, the president is required to terminate all use of the U.S. Armed Forces within sixty days of filing such a report, unless Congress has either declared war or granted specific authorization to the president.109

The plaintiffs, thirty-one congressmen united in opposition to the United States presence in Yugoslavia, sought a declaratory judgment prior to the end of the conflict, finding that the president's use of force violated the War Powers Clause of the Constitution and the WPR.110 The primary contention of the congressional plaintiffs was that, although the president did file a proper report pursuant to the WPR, he “nonetheless

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105. Id. at 19; see also Ronald J. Sievert, Campbell v. Clinton and the Continuing Effort to Reassert Congress' Predominant Constitutional Authority to Commence, or Prevent, War, 105 DICK. L. REV. 157, 170-71 (2001).
107. Campbell, 203 F.3d at 20. The March 26, 1999 report made by President Clinton stated that he had taken action “pursuant to [his] constitutional authority to conduct foreign relations and as Commander-in-Chief and Chief Executive.” Campbell v. Clinton, 52 F. Supp. 2d 34, 38 (D. D.C. 1999), aff'd, 203 F.3d 19 (2000). The House of Representatives mounted a strong opposition to President Clinton’s decision to get involved in the conflict. Sievert, supra note 105, at 170. In particular, on April 28, 1999, the House: (1) rejected a joint resolution to declare war between the United States and Yugoslavia by a vote of 427-2; (2) rejected a concurrent resolution to allow President Clinton to reposition U.S. forces for action against the government of Yugoslavia by a vote of 290-139; and (3) defeated a concurrent resolution to allow President Clinton to conduct air and missile strikes against Yugoslavia by a vote of 213-213. Id. at 170; Gawley, supra note 106, at 580-81.
108. Campbell, 203 F.3d at 20.
109. Id.; Sievert, supra note 105, at 170-71.
110. Campbell, 203 F.3d at 20.
failed to end U.S. involvement in the hostilities after 60 days.\textsuperscript{111} The district court dismissed the case on the president’s motion for lack of standing; the plaintiffs appealed to the D.C. Circuit.\textsuperscript{112}

The D.C. Circuit only addressed the issue of standing.\textsuperscript{113} The main concern of the Campbell court was what it called a “soft spot” in the case law of congressional challenges to actions of the president, and that this was what the plaintiffs in Campbell sought to “penetrate.”\textsuperscript{114} The court was referring to the failure of the Raines’ decision to define the phrase “completely nullified.”\textsuperscript{115} The court noted the Raines decision’s emphasis on the fact that Coleman did not apply there because under the Coleman facts the Kansas legislator’s votes were “completely nullified.”\textsuperscript{116}

Recognizing that the Supreme Court had not clearly defined “completely nullified,” the D.C. Circuit supplied its own definition: “It would seem the [Raines] Court used nullify to mean treating a vote that did not pass as if it had, or vice versa.”\textsuperscript{117} The court determined that Coleman is a nullification case because state officials adopted a failed amendment ratification as if it had actually passed.\textsuperscript{118} The Campbell plaintiffs’ votes did not meet this test.\textsuperscript{119} The president was not giving effect to a defeated declaration of war or specific statutory authorization, but was acting pursuant to his powers as commander-in-chief and under the WPR.\textsuperscript{120} Thus, no legislative act had been nullified.\textsuperscript{121} The court further explained that

\begin{itemize}
  \item[\textsuperscript{111}] Id. The official ending date of the conflict in Yugoslavia was June 21, 1999, when the secretary of defense redeployed U.S. aircraft out of Yugoslavia. Sievert, supra note 105, at 173.
  \item[\textsuperscript{112}] Campbell, 203 F.3d at 20.
  \item[\textsuperscript{113}] See id.; see also Sievert, supra note 105, at 173 (stating the court did not rely on doctrines such as mootness, choosing instead to “issue a twenty one page opinion in which it affirmed the lower court based on lack of legislative standing pursuant to Raines v. Byrd”).
  \item[\textsuperscript{114}] Campbell, 203 F.3d at 21.
  \item[\textsuperscript{115}] See id. at 22.
  \item[\textsuperscript{116}] Id.
  \item[\textsuperscript{117}] Id.; see also Arend & Lotrionte, supra note 12, at 267-68.
  \item[\textsuperscript{118}] Campbell, 203 F.3d at 22.
  \item[\textsuperscript{119}] Id.
  \item[\textsuperscript{120}] Id. The court noted specifically that nullification could not be shown because members failed to actually pass a resolution requiring the president to withdraw from Yugoslavia. Id. at 23.
  \item[\textsuperscript{121}] See id. at 22-23. In its analysis in Campbell, the D.C. Circuit laid out what it called the key to understanding the Raines reading of Coleman, stating:

  We think the key to understanding the Court’s treatment of Coleman and its use of the word nullification is its implicit recognition that a ratification vote on a constitutional amendment is an unusual situation. It is not at all clear whether once the amendment was “deemed ratified,” the Kansas Senate could have done anything to reverse that position. We think that must be what the Supreme Court implied when it said the Raines plaintiffs could not allege that the “[Line Item Veto Act] would nullify their votes in the future,” and that, after all, a majority of senators and congressmen
\end{itemize}
Raines does not justify standing every time the executive undertakes an action Congress voted down or every time the president exceeds his statutory authority.\textsuperscript{122}

In applying the above test for nullification to the Campbell facts, the court took a strict approach. It held that there was no vote nullification in Campbell because there were various political remedies available to the plaintiffs.\textsuperscript{123} Specifically, Congress could have: (1) “passed a law forbidding the use of U.S. forces” in the Yugoslav campaign, (2) “cut off funds for the American role in the conflict,” or (3) impeached the president for violating the authority of Congress.\textsuperscript{124} Thus, the court concluded that the “soft spot” created by the Coleman decision was inapplicable to the plaintiffs and affirmed the district court’s dismissal for lack of standing.\textsuperscript{125}

IV. SENATE BILL 3731 AND ITS INEVITABLE FAILURE TO GRANT STANDING TO THE UNITED STATES CONGRESS

Senator Arlen Specter’s (R-PA) proposed legislation, Senate Bill 3731, directly implicates the doctrine of legislative standing by authorizing Congress to sue to challenge the president’s use of signing statements in federal court.\textsuperscript{126} Under the current doctrine of legislative standing, Senate Bill 3731 is a nonstarter.

A. The Structure and Goals of Senate Bill 3731

Senate Bill 3731 has one main goal: to prevent all state and federal courts from using presidential signing statements as a source of authority in legal analysis.\textsuperscript{127} The legislation contains two different mechanisms to achieve this result. First, under section 4, titled “Judicial Use of Presidential Signing Statements,” the legislation strictly prohibits any state or federal court from relying on or even considering a presidential signing statement “as a source of authority” in judicial decisions.\textsuperscript{128} Second, un-
der section 5, titled, “Congressional Standing to Obtain Declaratory Judgment,” the bill grants Congress the authority to obtain a declaratory judgment on the constitutionality of a presidential signing statement.\(^{129}\) It is section 5 that must withstand a justiciability analysis in order to have any effect on the future legality of presidential signing statements.\(^{130}\)

Under section 5, no single member of Congress is empowered to bring an action against the president for the use of a signing statement.\(^{131}\) The legislation specifically permits suit only by the Senate or the House of Representatives as a body (through the Office of Senate Legal Counsel or the Office of the General Counsel for the United States House of Representatives).\(^{132}\) Once a proper pleading is filed, section 5 grants any federal court the power to rule on the legality of any presidential signing statement.\(^{133}\)

**B. The Current Doctrine of Legislative Standing is Far Too Strict to Permit Standing for Congress**

The current approaches to the doctrine of legislative standing are so strict that a congressional challenge to a signing statement will likely fail...
Despite Senator Specter's efforts to make such suits easier, Section 5 also raises a ripeness issue. See Chemerinsky, supra note 13, at 103-05 (defining ripeness). Although the doctrine of ripeness is outside the scope of this paper, a brief discussion of its application to section 5 is illustrative. As opposed to standing, which seeks to determine who is the proper injured party to bring a lawsuit, the doctrine of ripeness considers when such a lawsuit may occur. Id. at 103-04. The primary function of ripeness is to make sure that issues do not come before the federal courts which are premature or speculative. See id. at 104.

The case of Abbott Laboratories v. Gardner provides the two considerations of the Supreme Court's ripeness analysis: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967), quoted in Chemerinsky, supra note 13, at 104. Under the first consideration, the court determines whether the question presented is a purely legal issue not requiring a detailed body of facts to reach a decision. See Chemerinsky, supra note 13, at 111. In general, the more the judiciary would benefit from a particular factual context, the more likely the court will hold the case is not ripe for review, opting to dismiss the case in favor of further factual development. Socialist Labor Party v. Gilligan, 406 U.S. 583, 587 (1972) (holding that a challenge to a state election law was not ripe for review because the record before the court was "extraordinarily skimpy"), discussed in Chemerinsky, supra note 13, at 104.

Under the second consideration, the greater the substantial hardship to the plaintiff from a denial of judicial review, the more likely a federal court will hear the case. Chemerinsky, supra note 13, at 105. In addition, the more speculative the injury, the less likely the Court will declare the case ripe for review. See generally Texas v. United States, 523 U.S. 296 (1998) (holding that the question of whether the Voting Rights Act of 1965 should be applicable to a magistrate who was not yet appointed at the time of the lawsuit was merely speculative and not ripe for review), cited in Chemerinsky, supra note 13, at 105.

Section 5 of Senate Bill 3731 will likely fail under the justiciability doctrine of ripeness. As the legislation provides, Congress, upon a proper pleading by the appropriate counsel's office, may bring an action to have a federal court rule on the legality of "any presidential signing statement." S. 3731, § 5. By the plain text of the bill, Congress is authorized to file an action questioning the mere issuance of a signing statement even before that statement can have any real world effect. See id.

Signing statements are the executive branch's interpretation of the law, representing the future intentions of the president to interpret the law in accordance with his view of the role of the executive—not actual actions. See Cooper, supra note 1, at 201. Consider the 2006 signing statement by President Bush to the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act as an example of how signing statements provide the future intent of the president, but do not constitute actual action at the moment of the signing. See Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, § 1003, 119 Stat. 2680, 2739 (2005) [hereinafter Emergency Supplemental Appropriations Act Signing Statement].

Title X, section 1003 of the Act relates to the interrogation of detainees of the Department of Defense, and explicitly provides that "[n]o 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." Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, § 1003, 119 Stat. 2680, 2739 (2005). In his signing statement to the overall Act, the president stated he
lar, Congress is all-but-certain to be denied standing under: (1) the Supreme Court's "complete nullification" reading of *Coleman* in *Raines*, and (2) the D.C. Circuit's approach to "complete nullification" in *Campbell*. The D.C. Circuit's approach, although not binding on the Supreme Court, remains significant due to the court's reputation as the "mini Supreme Court" and because the court hears a high concentration of federal civil cases.

would construe Title X "in a manner consistent with the constitutional authority of the President to supervise the . . . executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power." Emergency Supplemental Appropriations Act Signing Statement, *supra*, at 1919. This signing statement clearly relates to the future intentions of the president, and constitutes no concrete action unless acted upon.

Considering how presidential signing statements are used, the plain language of section 5 of Senate Bill 3731 appears to fail both ripeness requirements and, therefore, any lawsuit brought pursuant to its power will likely be dismissed. See S. 3731, § 5; see also Chemerinsky, *supra* note 13, at 112-13 (discussing both factors under a ripeness analysis).

Because more speculative injuries make it less likely that the Court will hear the case, see Chemerinsky, *supra* note 13, at 105, a lawsuit by the Congress for the mere act of issuing a signing statement is likely to be dismissed because the alleged injury is such a speculative one, a point made clear by analogy to *Texas v. United States*, 523 U.S. 296 (1998). There, the Supreme Court was asked to review whether the Voting Rights Act of 1965 should be applicable to magistrate appointments to monitor the performance standards of school districts. *Id.* at 299. However, because no magistrate was appointed at the time of the litigation, the Court dismissed the case as unripe based on the fact that the Court was forced to speculate as to whether a magistrate would ever be appointed. *Id.* at 300. A challenge to a presidential signing statement under Senate Bill 3731 will similarly fail because a presidential signing statement, which is only a future intention to act, will require speculation by the Court as to whether any harm will ever occur. See generally S. 3731, § 5 (providing that Congress is permitted standing to sue for the president's use of a presidential signing statement by itself, not the harm that results from actions upon the statement).

A Senate Bill 3731, section 5 challenge will also fail to meet the second, and final, ripeness factor, requiring a necessary body of facts to be fully developed. See Chemerinsky, *supra* note 13, at 111-12; see also Gilligan, 406 U.S. at 587. Senate Bill 3731, section 5, in allowing a signing statement to be challenged as soon as it is written, permits Congress to sue long before any factual background can be developed, especially if the president never acts on the signing statement at all. See S. 3731, § 5 (granting Congress standing to sue upon the issuance of a presidential signing statement and before it is actually acted upon, thereby precluding development of a sufficient body of facts to as to how the signing statement may be used before suit is filed). Without the opportunity for a factual context to develop, an action under Senate Bill 3731, section 5 will be dismissed under the ripeness doctrine. See, e.g., Gilligan, 406 U.S. at 587.


In *Raines*, the Supreme Court gave only brief attention to *Coleman*; however, the Court's holding is clear. The plaintiffs in *Raines* argued, as was found in *Coleman*, that legislators have "a plain, direct and adequate interest in maintaining the effectiveness of their votes." However, the Court held that the Line Item Veto Act's alleged dilution of voting power did not rise to the level of changing the effectiveness of Congress' vote. The Court refused to allow the mere possibility of a change in voting power to provide a basis for standing, and held that such logic "pulls *Coleman* too far from its moorings."

Applying *Raines* holding to an action against a presidential signing statement will yield the same result. Just as the Line Item Veto Act allowed vote dilution, so does a presidential signing statement. Thus, a congressional plaintiff seeking to challenge a signing statement will run headlong into *Raines* holding that any argument that a mere allowance of vote dilution constitutes sufficient harm for standing extends *Coleman* too far.

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*Loyal Opposition*, 66 GEO. WASH. L. REV. 739, 740 n.5 (1998) (stating that the D.C. Circuit is "one of the leading circuits in the nation"); McLeese, *supra* note 91, at 1066 (stating that the D.C. Circuit has "a more important caseload than other circuit courts" because it hears a large number of federal civil cases).


141. *Id.* at 825.

142. *See* id. at 816 (providing arguments by members of Congress as to why the Line Item Veto Act leads to a dilution of voting power).

143. *See* Christopher S. Kelley, A Comparative Look at the Constitutional Signing Statement: The Case of Bush and Clinton, Presented at the 61st Annual Meeting of the Midwest Political Science Association (Apr. 3-6, 2003) (stating that "the presidential signing statement often acts as an 'iron-clad item veto' because it allows the president to excise items from a bill without any chance for the Congress to overrule the decision" (footnotes omitted)).

144. *Raines*, 521 U.S. at 825-26. President Bush's 2002 signing statement to the 21st Century Department of Justice Appropriations Authorization Act provides a concrete example of how Congressmembers' votes would be diminished by executive action pursuant to a signing statement. See Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act, 38 WEEKLY COMP. PRES. DOC. 1971 (Nov. 2, 2002) [hereinafter Justice Appropriations Act Signing Statement]. The Act provides that the attorney general must submit reports to Congress after any time that he takes certain actions such as implementing policies that prevent the enforcement of federal laws or seeking to contest the constitutionality of a federal law. 28 U.S.C. § 530D(a)(1) (Supp. III 2004). President Bush reinterpreted the language of this provision in his signing statement and made clear his future intent to view the law according to his executive role. Justice Appropriations Act Signing Statement, *supra*, at 1971. The president wrote that the sections of the law which "purport to require" the executive branch to give reports to Congress for executive actions will be construed "in a manner consistent with the constitutional authorities of the President to supervise the . . . executive branch." *Id.*
The D.C. Circuit's strict application of the complete nullification exception in *Campbell* precludes legislative standing for legislators to challenge a signing statement.145 *Campbell*'s stringent reading of *Raines* rejected standing for the congressional plaintiffs because it saw three different political remedies available: (1) Congress can pass a law in the future to remedy the harm; (2) Congress can use the appropriations process to cut funding and stop the harm from occurring; and (3) Congress can impeach the president for violating the authority of Congress.146

Congressional plaintiffs seeking to challenge signing statements stand no chance of arguing that their votes are completely nullified as defined by *Campbell* because the political remedies available to the *Campbell* plaintiffs are also available to congressional plaintiffs challenging the validity of a signing statement. First, congressional plaintiffs challenging signing statements can attempt to pass a law to prevent the harm of signing statements.147 Indeed, section 4 of Senate Bill 3731 uses legislation as a remedy by preventing all state and federal courts from using signing statements as a source of authority.148 Second, congressional plaintiffs can resort to the appropriations process to remedy the damage of a signing statement.149 For example, in the case of the president issuing a signing statement claiming executive authority to treat military detainees in accordance with his constitutional role as commander in chief,150 Congress could cut the funding of the Department of Defense to inhibit the operation of interrogation programs. Third, Congress certainly has the extreme option of impeaching the president if Congress believes a signing statement exceeds executive authority.151

V. A NEW PROPOSAL FOR LEGISLATIVE STANDING

As Senate Bill 3731's all-but-certain failure makes clear, both *Raines*’ refusal to grant legislative standing because the injury was too abstract and *Campbell*'s application of the extremely narrow complete nullification exception represent the major approaches that have strangled legislative standing within its last breath.152 Thus, the question arises: If legis-

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146. See id. at 23.
149. See U.S. CONST. art. I, § 9, cl. 7.
150. See Emergency Supplemental Appropriations Act Signing Statement, supra note 134 (presenting the exact example used, where President Bush issued a signing statement claiming he would treat detainees in accordance with his authority as commander in chief).
152. See *Raines* v. *Byrd*, 521 U.S. 811, 830 (1997); *Campbell* v. Clinton, 203 F.3d 19, 22-23 (D.C. Cir. 2000); see also *CAMPBELL*, supra note 20, at 193 (discussing the near nonexistent status of the modern doctrine of legislative standing).
Essentially, the extremely limited legislative standing doctrine generates only two solutions: (1) the political process can create a remedy, or (2) a private lawsuit may arise that is concrete enough to place the interbranch dispute before a federal court. These two remedies are theoretically and practically problematic as solutions to dealing with true disputes between Congress and the Executive. Therefore, the trajectory of the modern legislative standing doctrine must be altered and a workable doctrine must be created.

A. Problems with the Political and Private Lawsuit Solutions

Multiple problems exist with forcing the political process, instead of the courts, to deal with a legal dispute between Congress and the president. To begin, appropriations actions are not always an effective option for Congress to deal with a constitutional violation by the president. In fact, they often raise constitutional problems on their own. One example of this problem arises from Campbell's facts. There, the Court of Appeals for the District of Columbia Circuit held, in part, that the congressional plaintiffs did not have standing to challenge the president's initiation of the war in Kosovo because Congress could have resorted to the appropriations process for a remedy. However, as a plaintiff in the litigation, Tom Campbell argues that this result is an illusory solution because of the president's veto power. Although it is possible for Congress to use the appropriations process to cut funding for the war, the president always has the power to veto such a measure. Therefore, the right of the majority of Congress under the Constitution to reject a decla-

153. See, e.g., Clinton v. City of New York, 524 U.S. 417, 421, 448-49 (1998). The Court's decision in Clinton demonstrates that a private lawsuit alleging a concrete injury, in this case one brought by the City of New York for the loss of federal funding, is a method that may lead to Court hearing the case on the merits, despite the fact that a prior legislative lawsuit failed. Id. at 421.

154. See CAMPBELL, supra note 20, at 193-97 (discussing the desirability of allowing legislative standing in light of the myriad difficulties with both the alternative political solutions and the private lawsuit solution).

155. See id. at 194-95.

156. See id. at 195-96 (outlining the various problems with the appropriations process as an effective alternative to legislative standing, particularly in the context of Department of Defense appropriations).

157. See id. (presenting the facts of Goldwater v. Carter, 444 U.S. 996 (1979), as an example of how a political remedy can lead to an odd, unconstitutional result).


159. Id. at 22-23.

160. CAMPBELL, supra note 20, at 196.

161. U.S. CONST. art. I, § 7, cl. 1-2; see also CAMPBELL, supra note 20, at 196.
ration of war can only be exercised if Congress can override the president's veto by a two-thirds majority.\textsuperscript{162}

Moreover, judicial abdication in favor of political process places no limit on the level of interbranch friction that may result.\textsuperscript{163} \textit{Campbell} endorses the most serious of federal interbranch conflict by holding that where impeachment of the president is possible, there is no complete nullification and legislative standing will not exist.\textsuperscript{164} It appears contradictory that standing, a doctrine often invoked to protect the separation of powers,\textsuperscript{165} can be simultaneously used to endorse one of the most extreme federal battles that can occur between the legislative and executive branches.\textsuperscript{166}

\textsuperscript{162} See U.S. CONST. art. 1, §§ 7, 2, 8, cl. 11; see also \textit{Campbell}, supra note 20, at 196. Summarizing the overall problem at issue under the \textit{Campbell} facts, Tom Campbell notes, "[t]here was nothing that the majority of only one house could do legislatively to vindicate its right." \textit{Campbell}, supra note 20, at 196 (emphasis added). On the issue of signing statements, the \textit{Campbell} problem of the supermajority remedy is even more pronounced. For example, assume Congress passes a law requiring certain defense spending. The president has the option of signing the bill into law but issuing a signing statement ignoring the act of Congress under the guise of his Article II powers as commander in chief. \textit{See supra} note 144 (discussing an example where President Bush used a signing statement claiming his power as head of the executive branch to ignore requirements that the attorney general report periodically before Congress); \textit{see also} Justice Appropriations Signing Statement, \textit{supra} note 144, at 1971 (providing an example of a signing statement where the president claims his executive authority as commander in chief as a method of interpreting a bill passed by Congress). As a remedy to this rebuke, Congress can pass another law compelling the president to follow its prior defense spending legislation. Now, if the president were to veto the second bill, Congress, in order to override the veto, would have to act by a super-majority just to get the president to follow the first piece of legislation that he originally signed into law.

\textsuperscript{163} See \textit{Campbell}, supra note 20, at 194 (stating that when the court does not allow legislative standing, there is "no guarantee the battle will be confined to the context of the good faith dispute").

\textsuperscript{164} See \textit{Campbell}, 203 F.3d at 22-23; see also \textit{Campbell}, supra note 20, at 194.


\textsuperscript{166} See Richard W. Stevenson & John M. Broder, \textit{Focus on Impeachment Casts a Shadow on the Goals of Both Parties}, N.Y. TIMES, Jan. 11, 1999, at A12 (discussing the difficulty Congress had in moving forward with any substantive public policy issues during the Clinton impeachment proceedings because Washington was "all impeachment all the time"). The impeachment of President Clinton displayed one of the most significant problems with resorting to impeachment—the loss of focus on substantive policy. \textit{See id.} In the midst of the debate over Clinton's future as president, national defense, tax policy, social security, Medicare, and political fund-raising were all major issues that needed the attention of policy makers. \textit{Id.} Although the trial of President Clinton was conducted during a period of the year when Congress often accomplishes very little, former Senator Judd Gregg (R-NH) stated "[t]his trial has obviously knocked everything off the agenda for a period of time." \textit{Id.} In addition, the impeachment proceedings spawned a lack of trust between the parties that raised questions of whether the president and the Congress would be able to compromise on these issues at all. \textit{Id.}
The modern doctrine of legislative standing permits one other remedy: private action by a nonlegislative plaintiff. Such private remedies, although at times effective, fail to address various issues that arise from disputes between Congress and the president. First, private suits will


168. See Campbell, supra note 20, at 193-94 ("[T]here are . . . cases where private individuals with particularized harm cannot be counted on to bring suit in time or at all, or with the proper kind of claim . . . "). Some critics would disagree with this analysis. Supporters of private action over legislative standing invoke the intent of the framers and early Supreme Court case law such as that of Marbury v. Madison. See, e.g., Moore v. U.S. House of Representatives, 733 F.2d 946, 956-65 (D.C. Cir. 1984) (Scalia, J., concurring) ("Unless [the powers conferred upon officers of the political branches] have been denied in such fashion as to produce a governmental result that harms some entity or individual who brings the matter before us, we have no constitutional power to interfere."); Arend & Lotrionte, supra note 12, at 278-81. The two main arguments in favor of private action are: (1) the framers intended the judiciary to determine only private rights in order to prevent the intervention of an unelected judiciary into the affairs of political branches, Arend & Lotrionte, supra note 12, at 279; Meyer, supra note 12, at 66-67; and (2) the precise language used by Chief Justice Marshall in Marbury states that the province of the Court is to decide the rights of individuals. Moore, 733 F.2d 959 (Scalia, J., concurring) (citing Marbury v. Madison, 5 U.S. 137 (1803)).

Both of these arguments are unsustainable upon consideration of the full picture of the debate they invoke. The framers' intent argument is substantially weakened by considering the framers' view on war. Campbell, supra note 20, at 210 (quoting Letter from Abraham Lincoln to William H. Herndon (Feb. 15, 1848) in 2 Complete Works of Abraham Lincoln 2, 3 (J.G. Nicolay & J. Hay eds., 1905) ("[T]he framers] resolved to so frame the Constitution that no one man should hold the power of bringing [the oppression of war] upon us."). Forcing legislative causes of action to be brought by private individuals would permit the president to begin and end an illegal war before any private plaintiff has a chance to reach the judiciary. Id. at 211 n.3. A president's unilateral decision to go to war was overtly rejected by the framers. See id. at 210; accord U.S. Const. art. I, § 8, cl. 11. Cf. Meyer, supra note 12, at 73 (stating that the rise of executive power in general was "feared by the Framers"). Thus, the argument that the potential for unilateral war is preferable to allowing the legislature to sue for genuine injuries to its authority seems nonsensical. Sievert, supra note 105, at 160 (quoting James Wilson as stating that it was his "expectation that the [separation of powers] system would guard against the possibility of hostilities being initiated by one man" and also stating that Alexander Hamilton, despite his beliefs in a strong executive, would often voice his belief that the president, "unlike the King of England, could not on his own command the country to enter a state of war.").

Second, the argument that Marbury v. Madison mandates that the Court's constitutional province is to decide the rights of private individuals is weakened by the basic facts of Marbury itself. Marbury was hardly a case of individual rights. See generally Marbury, 5 U.S. 137; see also Campbell, supra note 20, at 207-08. Instead, Marbury's facts required Chief Justice Marshall to analyze President Jefferson's ability as the Executive to reject Article I judicial appointments made by the previous Adams administration. Campbell, supra note 20, at 208. Overall, the case required Marshall to consider how the statutory appointment of D.C. judges would operate as between both the executive and legislative branches. Id. In contrast to those critics that invoke Marbury for the proposition that the Court should only deal with individual rights, Marbury can be seen as relatively similar to an interbranch dispute of the kind found in legislative standing cases. Id.
not address the damage to Congress as a body, which is the real problem at issue in a suit concerning a power dispute between the legislature and the executive. 169 Private parties will be suing based upon the harm that is particular to them and not, for example, the constitutional loss of power to the Congress. 170 Moreover, if Congress cannot advocate against its own injury, but must rely on a private third-party to make the case, this violates the general purpose of standing—to make sure that a proper, actually injured party is present before the court. 171

Second, private lawsuits may arise too late to be effective. 172 Presidential exercise of war powers provides a clear example of where private lawsuits are ineffective. For example, in the case of an illegal war that violates the War Powers Act and continues beyond sixty days without congressional approval, it is possible that the war will end before any private plaintiff, such as a soldier, can bring a lawsuit. 173

Finally, private lawsuits have the potential to harm the process of lawmaking between the branches. Waiting for a private suit can lead to a gap of knowledge between the branches as to whether the executive and legislative branches' actions are constitutional. 174 This problem is apparent in the gap between Raines, where the Court denied standing to challenge the Line Item Veto Act, 175 and Clinton v. City of New York, where a private suit was brought and the Court struck down the Line Item Veto Act as violative of the Constitution. 176 During this time period, President Clinton used the Line Item Veto approximately eighty times, assuming the law was constitutional. 177 This whole period of wasted government effort could have been avoided if only the Court had granted standing in Raines. 178

169. See CAMPBELL, supra note 20, at 208-09.
170. See id. at 211 n.2.
171. CHERMERINSKY, supra note 13, at 61-62.
172. CAMPBELL, supra note 20, at 193-94. See generally CHERMERINSKY, supra note 13, at 103.
173. CAMPBELL, supra note 20, at 211 n.3. Campbell v. Clinton presents a perfect of example of how a war can end before a lawsuit reaches the federal court. Campbell v. Clinton, 203 F.3d 19, 33 (D.C. Cir. 2000) (Randolph, J., concurring). In Campbell, members of Congress filed suit to prevent an alleged unconstitutional use of the United States Armed Forces in Yugoslavia. Id. at 19-20 (majority opinion). The congressional plaintiffs' lawsuit was filed on May 19, 1999, and by June 21, 1999, roughly four months before the case was even argued before the D.C. Circuit, hostilities ended. Id. at 33 (Randolph, J., concurring).
177. Weiner, supra note 21, at 230.
178. Id. at 230-31.
B. The Baseline Requirements of a New Doctrine of Legislative Standing

The standard for legislative standing seems to have been set so high that no such standing could ever be found. But the problem of signing statements demonstrates that a more practical approach must be taken. Three major changes to the current doctrine will lead to a much more workable doctrine that protects both the constitutional power of Congress and the doctrine of separation of powers: (1) Congress must pass legislation that is subsequently nullified; (2) Congress must choose to sue as a body; and (3) in terms of analysis, the “completely nullified” test must be returned to its original formulation by the Supreme Court.

1. Congress Must Pass Legislation that is Nullified

Raines and Chenoweth make clear that when Congress has not taken action, yet members sue for a dilution of voting power, the Court will refuse to grant standing. For example, in Chenoweth, the three congressional plaintiffs attempted to pass a bill to prevent the president from creating the American Heritage Rivers Initiative, but the bill never came to a vote. After the president authorized the initiative through an executive order, legislators claimed a loss of voting. The Court held standing was inappropriate in part because to grant standing for such an injury would, by implication, allow Congress to sue in every instance where a president acted without a specific congressional grant of executive power, or exceeded a grant of such power.

In order to eliminate the concerns in Raines and Chenoweth, the first requirement of legislative standing must be that Congress actually act. In other words, Congress must pass a law, and the president must then act to nullify such clear direction before the courts will recognize an injury sufficient to confer standing. Requiring definite action by Con-

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179. See, e.g., Raines, 521 U.S. at 830 (dismissed for lack of standing); Campbell v. Clinton, 203 F.3d 19, 24 (D.C. Cir. 2000) (same); Chenoweth v. Clinton, 181 F.3d 112, 117 (D.C. Cir. 1999) (same).
181. Raines, 521 U.S. at 830; Chenoweth, 181 F.3d at 117.
182. Chenoweth, 181 F.3d at 113.
183. Id.
184. See Chenoweth, 181 F.3d at 113, 115-17; see also CAMPBELL, supra note 20, at 197-200 (“By requiring some congressional action as a predicate to bring a lawsuit of this kind, courts would prevent overuse of the judicial remedy.”).
185. CAMPBELL, supra note 20, at 197-200; see also Meyer, supra note 12, at 120.
186. See Sievert, supra note 105, at 172 (suggesting Campbell may have been decided differently if the president, rather than overstepping his authority under the War Powers Resolution, had actually violated a clear exercise of authority from the Congress).
gress would put a stop to Chenoweth’s concern that legislative standing may lead to an overuse of the federal court system. In addition, an actual action requirement addresses the concern that courts will become judicial referees for the other two federal branches. By allowing only those cases where Congress has taken definite action, the courts will hear only a limited number of cases where the president has violated an express act of Congress.

2. Congress Must Choose to Sue as a Body

The Raines decision stated that Congress’ lack of authorization for the lawsuit against the Line Item Veto Act was of “some importance” in its refusal to grant standing. The Raines rationale appears to have two unstated bases: (1) if only a minority of the members of Congress could seek judicial remedies, they would possess greater power in the courts than they possess in the political process; and (2) if only a minority of members of Congress could seek judicial remedies, the courts would often be thrust into the role of judicial referee.

To solve the concerns of Raines, a second prong of legislative standing must mandate that a majority of both houses of Congress must authorize...
any lawsuit brought on behalf of the institution. Both underlying concerns in *Raines* would be solved by this proposal. If a majority of Congress votes in favor of filing a lawsuit, then the problem of improperly granting too much power to a minority of Congress is eliminated. Moreover, where Congress must act as a majority, the judiciary is far less likely to get caught in a situation requiring a court to hear every case in which the president exceeds congressional authority because the majority requirement will make it more difficult for Congress to seek review by the court.

3. Campbell's "Completely Nullified" Approach Must be Rejected in Favor of the Original Formulation by the Supreme Court

The D. C. Circuit's approach in *Campbell*, requiring complete nullification, makes legislative standing a doctrine in name only. By reading *Raines* use of "completely nullified" to mean that all political remedies, even impeachment, must be exhausted prior to a grant of standing, the *Campbell* approach renders legislative standing wholly inaccessible, and guarantees that only problematic political remedies are available; therefore, it must be rejected.

Rather than adopting a *Campbell* approach, the Supreme Court should reassert the *Raines* interpretation of *Coleman*. As stated in *Raines*, the test should simply state, "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect)." Using this *Raines-Coleman* test removes the political difficulties of the *Campbell* approach. First, the *Raines-Coleman* test creates a more realistic remedy to checking the president's power than the appropriations process because Congress can use the direct effect of a court decision to stop executive action rather than the ineffective remedy that appropria-

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193. See id. at 200-03 (proposing the rule that if a member of Congress can get a vote onto either house's floor, then "he or she must").
194. See id. at 198-99.
195. Cf. id. at 197-98 (stating congressional action alone will reduce the "overuse of the judicial remedy" without even going as far as if a majority of Congress were required to comply as well).
196. See id. at 193, 210 n.1.
198. See CAMPBELL, supra note 20, at 196-97; see also supra notes 155-166 and accompanying text.
199. CAMPBELL, supra note 20, at 203.
200. Raines v. Byrd, 521 U.S. 811, 823 (1997); see also Campbell, 203 F.3d at 29 (Randolph, J., concurring) (stating that the *Raines* reading of *Coleman* is the "heart" of the *Raines* decision and that the proper legislative standing analysis should simply be based on whether the plaintiffs had the votes "sufficient to defeat . . . a specific legislative act," instead of a narrow definition of "completely nullified" based on future political remedies).
tions offers—enacting a bill that the president is free to veto. Second, this interpretation will allow congressional harms to be addressed in federal courts before the *Campbell* alternative of impeachment is undertaken.

Adopting the *Raines-Coleman* approach will also address the problematic outcome in *Campbell* that led to the awkward political remedy of requiring a supermajority of one house to vindicate the rights of a majority. By focusing only on whether the votes were sufficient to defeat the overriding action of the president, a *Raines* reading of *Coleman* would have allowed those members of Congress who did sufficiently vote against the Kosovo conflict to have their appropriate rights protected in court. However, under the D.C. Circuit's strict complete nullification approach, these congressional plaintiffs would have to use the political process and would most likely end up having to garner a supermajority to override a presidential veto. Adopting the original *Coleman* interpretation prevents what is essentially an amendment to the lawmaking process of the Constitution by the political branches.

Finally, a *Raines-Coleman* test will remedy the problems that private lawsuits create. By allowing Congress to gain access to the courts legislative standing will be drawn into the broader principle of standing—that the appropriate party is to be before the court. In addition, congressional suits will prevent the decisional gap presented by the *Raines* and *Clinton* Line Item Veto Act cases by eliminating the need for the executive and legislative branches to guess whether their political actions are legally sound.

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201. *See Campbell*, supra note 20, at 195 (discussing the ineffectiveness of the appropriations process as a check on the behavior of the president).

202. *Id.* at 194 (discussing the extreme political remedy of impeachment and how it is apparently endorsed by the court in *Campbell*).

203. *Id.* at 196 (examining the constitutional implications of the ineffective political remedy of appropriations proposed in *Campbell*); see also supra notes 157-161 and accompanying text.

204. *See Campbell*, supra note 20, at 202-03 (discussing the fact that the *Raines* reading of *Coleman* should have been employed in *Campbell*, which would have led to a different result).

205. *See id.* at 196.


207. *See generally supra* notes 167-178 and accompanying text.

208. *Chemerinsky*, supra note 13, at 60.

209. *See Weiner*, supra note 21, at 230-31 (discussing how the time lag between *Raines* and *Clinton v. New York* harmed the separation of powers by allowing the president and Congress to act as if the law were constitutional, only to find that such energy was wasted when the law was declared unconstitutional in a private, non-legislative lawsuit); see also supra notes 174-178 and accompanying text.
VI. CONCLUSION

Although Senate Bill 3731 is likely to be a failed attempt at checking the president’s use of presidential signing statements, its provisions provide the opportunity for a reconsideration of the doctrine of legislative standing. Current approaches, such as that taken by the Court of Appeals for the District of Columbia Circuit in *Campbell*, leave Congress shut out of federal court if it seeks a remedy for institutional harm. The political process and private lawsuits offered as alternatives are hardly effective remedies. The best solution in light of the controversy over presidential signing statements is to adopt a new doctrine of legislative standing that will protect the separation of powers concerns of the judiciary, as well as balance the functioning of constitutional authority respectively granted to the legislative and the executive branches.