STANDING UP TO THE COMMANDER-IN-CHIEF: PROBLEMS WITH WHO CAN CHALLENGE THE PRESIDENT'S AUTHORITY OVER INTERROGATION METHODS

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INTRODUCTION

In April 2004, the U.S. Army announced the removal from duty of seventeen soldiers in Iraq after charges of mistreating Iraqi

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prisoners in Abu Ghraib.[1] The Army's investigation led to six of them being court-martialed.[2] However, less than a month later, one of the soldiers facing court-martial, Sergeant Chip Frederick spoke to CBS News 60 Minutes II.[3] During this interview, the public saw some of the pictures that led to the Army investigation for the first time.[4] These included a photo of one Iraqi prisoner "stand[ing] on a box with his head covered [with] wires attached to his hands" while being told that he would be electrocuted if he fell off the box.[5] Other photos portrayed naked prisoners piled up in a pyramid, prisoners in sexually suggestive and humiliating positions, and one held on a leash.[6] The pictures shocked the public.[7] The Bush administration quickly condemned the low-ranking soldiers seen in the pictures and described the abuse as an isolated case of "disgraceful conduct by a few American troops who dishonored our country and disregarded our values."[8]

However, this was not an isolated incident, and reports of acts of torture and cruel treatment by the U.S. Army's 82nd Airborne Division soon came to light.[9] Human Rights Watch documented reports of the United States supporting extraordinary rendition—transferring detainees to other countries for detention and enhanced interrogation—and reports of the Guantanamo Bay Naval Base detention center subjecting detainees to torture.[10] Worse, the administration had been writing legal justifications for this conduct

[1] Rebecca Leung, *Abuse at Abu Ghraib*, CBS NEWS 60 MINUTES (May 5, 2004), https://www.cbsnews.com/news/abuse-at-abu-ghraib/.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] Rebecca Leung, *Abuse of Iraqi POWs by GIs Probed*, CBS NEWS 60 MINUTES (Apr. 27, 2004), https://www.cbsnews.com/news/abuse-of-iraqi-pows-by-gis-probed/.
[6] Alette Smeulers & Sander van Niekerk, *Abu Ghraib and the War on Terror–a Case Against Donald Rumsfeld?*, SPRINGER SCIENCE + BUSINESS MEDIA B.V.327, 327-28 (Nov. 18, 2008) DOI 10.1007/s10611-008-9160-2.
[7] *Id.* at 343.
[8] *Id.* at 328 (quoting the speech given by Bush on May 25th, 2004, http://www.commondreams.org/headlines04/0525-01.htm).
[9] Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1149 (2006).
[10] *Id.*

for years prior to the publication of these photographs.[11] A significant example of this is the 2002 Bybee memo, which claimed, among other reasons, that the President could choose how to interrogate detainees pursuant to his authority to wage a military campaign as Commander-in-Chief, even if it contradicted a federal statute criminalizing torture.[12]

Later known as part of the "torture memos," the Bybee memo sparked controversy about the Commander-in-Chief powers for years following its publication.[13] The controversy centered on whether the President and Congress shared power over interrogation methods.[14] The Bybee memo was so controversial that it was withdrawn two years later in the Levin Memorandum, which disagreed with the "severe" pain limitations the Bybee memo interpreted 18 U.S.C. §§ 2340-2340(A) to include and eliminated any analysis of the President's Commander-in-Chief power because "consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that U.S. Personnel not engage in torture."[15] Further, in 2006, Congress added the McCain amendment to the National Defense Authorization Act, seeking to limit the President's authority over interrogation methods by banning cruel and inhuman treatment of people in U.S. custody.[16] However, the question of whether the President has these torture powers by nature of the Commander-in-Chief powers has never been answered by a court. No President has attempted to violate the McCain Amendment using Bybee's logic that Congress cannot limit the President's constitutional powers.

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[11] *Id.*

[12] Jay S. Bybee, *Memorandum for Alberto R. Gonzales Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, U.S. DEP'T OF JUST. OFF. OF LEGAL COUNSEL (Aug. 1, 2002).

[13] Ariane de Vogue, *DOJ Releases Controversial 'Torture Memos': Memos Detail Use of Insects, Confinement Boxes and Waterboards under Bush*, ABC NEWS (April 15, 2009), https://abcnews.go.com/Politics/LawPolitics/story?id=7343497&page=1.

[14] *Id.*

[15] Daniel Levin, *Memorandum for James B. Comey Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C.* §§ 2340-2340A at 2, U.S. DEP'T OF JUST. OFF. OF LEGAL COUNSEL (Dec. 30, 2004).

[16] The Detainee Treatment Act of 2005, Pub. L. No. 109-148, Title X, § 1003 (2006).

Even if a president did violate the McCain Amendment or another federal statute while conducting military campaigns, an important question must be answered before a court could decide the constitutional issue: who has standing to challenge the President's authority? This Comment will unpack the history of the standing doctrine to answer that question.

Part A will discuss how the United States responded to the intelligence gap after the attacks on September 11, 2001, the infamous Bybee memo that justified enhanced interrogation, and the McCain Amendment, which sought to end enhanced interrogation. Part B will unpack the standing doctrine, focusing on three groups to better understand the relevant actors: the concerned citizen, the congress member, and the detainee. Part C will then identify and subsequently address the challenges that each of the three groups would face if they were to challenge the President's authority. Ultimately, this Comment concludes that the answer to the question is that none of the three groups examined have standing. This problematically leaves us without the ability to examine the outer bounds of the President's authority in situations where the balance between security and accountability are in tension with each other.

I. BACKGROUND

A. Responding to the Intelligence Gap Post-9/11 and the Bybee Memo

The response to the terrorist attacks on September 11, 2001, began with a period of unity due to a sense of nationalism and a demand for action. Citizens were facing a new moral panic as they prioritized reestablishing feelings of safety and security. The Bush administration responded by promising to do everything in its power to prevent future attacks.[17] The United States' failure to prevent the attacks proved that there were intelligence gaps that the country's intelligence apparatus was unable to fill.[18] To meet the Bush administration's promise, the U.S. Intelligence Community had to fix

[17] *See* Smeulers & Niekerk, *supra* note 6, at 329.
[18] *Id.*

these vulnerabilities and take action against a group with strong commitments.[19] The religious commitments made the enemy soldiers highly motivated and willing to risk his life in combat or sacrifice it in a suicide attack.[20]

The entirely different nature of the war on terror led to more extreme measures to obtain "actionable intelligence" or knowledge about the terrorist organization and its plans.[21] The measures included holding detainees at Guantanamo Bay or sending detainees to secret detention centers in third-party countries.[22] As one government official said, "[w]e don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them."[23] However, even at the sites within the United States, authorities engaged in what they called "enhanced interrogation" methods, including sleep deprivation, positioning detainees into highly uncomfortable positions over extended periods, exposure to extreme cold and heat, deafening music and noises, sexual humiliation, shoving detainees against a wall, and waterboarding.[24] While more recent studies suggest that these methods are not tools that yield reliable intelligence, both the country's and the Bush administration's fear of another attack seemed to legitimize the need to use the methods.[25] As Donald Rumsfeld explained in a Department of Defense Briefing on January 11, 2002, "[t]he faster we can interrogate these

[19] *Id.*
[20] *Id.*
[21] *Id.* at 330.
[22] Jakub Zahora, *Between Sovereignty and Biopolitics: The Case of Enhanced Interrogation Techniques*, 22(2) INST. OF INT'L RELS., PERSPS. 87, 90 (2014).
[23] Reed Brody et al., *Getting Away with Torture? Command Responsibility for the U.S. Abuse of Detainees*, HUMAN RIGHTS WATCH VOL. 17, NO. 1(G) 1, 17 (Apr. 2005).
[24] Zahora, *supra* note 22, at 90.
[25] *Id.* at 91. "On a somewhat intuitive level, one can think of several reasons behind this ineffectiveness which are backed up by extant scholarship: a tortured person has every reason to say anything to alleviate the pain and thus, in many cases, gives misleading information (Richter Montpetit, 2014: 45); verifying the claims of the tortured through other means is often extremely difficult (Hajjar, 2009: 330); in cases of strong-willed individuals, interrogators are simply not able to get any information at all (Soufan, 2009); and harsh physical stress can mentally disable a victim, who is then genuinely unable to provide interrogators with any meaningful answers (Rejali, 2007: 466-468)." *Id.*

people and identify them and get what they have in them out of them, in as graceful a way as possible, we have a better chance of saving some people's lives."[26]

On August 1, 2002, the U.S. Department of Justice ("DOJ"), Office of Legal Counsel ("OLC") responded to a request from Counsel to the President regarding the standards of conduct for interrogations under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by 18 U.S.C. §§ 2340-2340(A).[27] 18 U.S.C. §§ 2340-2340(A) establishes the federal prohibition against U.S. nationals from committing or attempting to commit torture outside of the United States, defining "torture" as "an act . . . intended to inflict severe physical or mental pain or suffering . . . upon another person within custody or physical control."[28]

In the 2002 OLC Bybee memo, Assistant Attorney General Jay Bybee argued that the legal definition of torture was extremely narrow, so narrow that 18 U.S.C. § 2340A applied only to acts that are "of an extreme nature."[29] The physical pain must be "be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death," and the mental pain must "result in significant psychological harm of significant duration" such as months or years to amount to the level of torture.[30] After explaining his interpretation of the definition of torture based on the text of the statute and legislative history, Bybee argued that interpreting the definition of torture in a way that would make the President's chosen interrogation methods a violation of 18 U.S.C. §§ 2340-2340(A) would make the statute unconstitutional.[31] In finding that a broader reading of the statute would encroach on the President's Constitutional power to conduct military campaigns, Bybee wrote:

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[26] Smeulers & Niekerk, *supra* note 6, at 330.
[27] Bybee, *supra* note 12.
[28] 18 U.S.C. §§ 2340-2340A (2000).
[29] Bybee, *supra* note 12, at 1.
[30] *Id.*
[31] *Id.* at 31.

> As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy. The demands of the Commander-in-Chief power are especially pronounced in the middle of a war in which the nation has already suffered a direct attack. In such cases, the information gained from interrogations may prevent future attacks by foreign enemies. Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional.[32]

Bybee's legal arguments for supporting this proposition were to either (1) employ the canon of statutory interpretation to avoid constitutional problems by reading the definition to be incredibly narrow so as not to apply to the United States Government's use of enhanced interrogation; or (2) if Congress did intend to limit the President's discretion on the use of interrogation methods, that the DOJ could not enforce the statute against federal officials acting pursuant to the President's authority to wage a military campaign.[33]

The distinction between the two arguments lies in whether Congress intended to limit the President's discretion. The first argument offers that if the statute is ambiguous on Congress' intentions, it can remain constitutional by being read narrowly to avoid infringing the President's Constitutional rights.[34] The second argument is that if the statute clearly establishes that the purpose is to restrict the President's discretion in interrogation methods, its enforcement against federal officials would be unconstitutional.[35] While Bybee walks through each of these arguments separately, the critical piece that unites both arguments is the premise that the President has complete authority over the conduct of war and that Congress cannot write legislation that infringes that authority.[36]

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[32] *Id.*
[33] *Id.* at 33-39.
[34] *Id.*
[35] Bybee, *supra* note 12, at 33-39.
[36] *Id.*

In summarizing the DOJ's understanding of the Commander-in-Chief powers, Bybee stated that "[t]he President's constitutional power to protect the security of the United States and the lives and safety of its people must be understood in light of the Founders' intention to create a federal government cloathed with all the powers requisite to the complete execution of its trust."[37] Bybee argued that the security of the nation is among the objectives committed to that trust, citing Alexander Hamilton's view that the circumstances affecting the safety of the public cannot be defined and as such "it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defense and protection of the community, in any matter essential to its efficacy."[38] Bybee found that "the text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of grave and unforeseen emergencies" such as combating violent and deadly terrorist attacks during the War on Terror.[39] He relied on both the Vesting Clause and the Commander-in-Chief Clause of the Constitution[40] as expressly giving the President the authority to deploy military force in defense of the United States, but then more controversially included within that authority the power over all conduct of warfare and defense of the nation unless expressly assigned to another branch.[41]

> Article II, Section 1 clarifies this by stating that the 'executive Power shall be vested in a President of the United States of America.' That sweeping grant vests in the President an unenumerated 'executive power' and contrasts with the specific enumeration of the powers—those 'herein'—granted to

[37] *Id.* at 36 (quoting Federalist No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed. 1961)).
[38] *Id.* (quoting Federalist No. 23, at 147-48 (Alexander Hamilton) (Jacob E. Cooke ed. 1961)).
[39] *Id.* at 37.
[40] *Id.* Bybee misattributed both clauses to Article I of the Constitution instead of Article II, writing, "The decision to deploy military force in the defense of United States interests is expressly placed under Presidential authority by the Vesting Clause, U.S. Const. Art. I, § 1, cl. 1, and by the Commander-in-Chief Clause, *id.* at § 2, cl. I."
[41] Bybee, *supra* note 12, at 37.

> Congress in Article I. The practical consideration confirms the implications of constitutional text and structure. National security decisions require the unity in purpose and energy in action that characterizes the Presidency rather than Congress.[42]

Bybee provided cases that support this view.[43] In *Johnson v. Eisentrager*, the Supreme Court recognized that the Commander-in-Chief power, paired with the President's obligation to protect the nation, implies ancillary powers necessary to their successful exercise.[44] "[T]he first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, the grant of war power includes all that is necessary and proper for carrying those powers into execution."[45] Bybee also cited the *Prize Cases*, where the Court held that political questions on the appropriate use of force were a question "to be decided by him."[46]

Finally, having found interrogating members of the enemy to be "one of the core functions of the Commander in Chief," Bybee concluded that "any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."[47] As such, 18 U.S.C. §§ 2340-2340(A) either needs to be read narrowly to avoid infringing the President's authority to conduct interrogations, or it is unconstitutional because Congress cannot write statutes that violate

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[42] *Id.*
[43] *Id.* (citing Johnson v. Eisentrager, 339 U.S. 763, 765-66, 790 (1950)).
[44] *Id.*
[45] *Id.* at 38 (quoting *Eisentrager*, 339 U.S. at 763).
[46] *Id.* (citing Prize Cases, 67 U.S. 635 (1863)).
[47] Bybee, *supra* note 12, at 39. The Bybee Memo also includes sections comparing the reading of the statute to international laws on torture and argues: "Even if an interrogation method, however, might arguably cross the line drawn in Section 2340, and application of the statute was not held to be an unconstitutional infringement of the President's Commander-in-Chief authority, we believe that under the current circumstances certain justification defenses might be available that would potentially eliminate criminal liability." *Id.* However, because this comment is limited in scope to who has standing to challenge this understanding of Commander-in-Chief powers, these sections will not be discussed further.

the President's power as Commander-in-Chief to wage a military campaign.

B. The McCain Amendment

In late 2005, after the public had become aware of the acts that had taken place inside U.S. detention camps, and with the unified call for safety "at all costs" waning four years after the September 11, 2001, attacks, Senator John McCain introduced an amendment to the House-passed defense appropriations bill and an identically worded amendment to National Defense Authorization Act for FY2006 prohibiting "the use of cruel, inhuman, or degrading treatment against any individual in the custody or physical control of the United States."[48] Although President Bush threatened to veto the entire military budget if the amendment remained,[49] the McCain Amendment was ultimately included in a rider of the passed bill and signed into law on January 6, 2006.[50]

The first section of the McCain Amendment requires that no one in the custody or control of the Department of Defense ("DOD") or detained in a DOD facility "shall be subject to any interrogation treatment or technique that is not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation."[51] The enhanced interrogation methods that the DOD approved in 2002 are not included in the U.S. Army Field Manual. Because of that, Congress was constructively limiting the President's discretion in what interrogation techniques could be employed.[52] The second section of the McCain Amendment prohibits detainees that are in the custody or control of the U.S. government, regardless of geographical location, nationality, or controlling agency, from being subjected to

[48] S.Amdt. 1977; S.Amdt. 2425.
[49] *See* Koh, *supra* note 9, at 1154.
[50] The Detainee Treatment Act of 2005 § 1003.
[51] The Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, Pub. L. No. 109-148, Title X, § 1003 (2006); The Detainee Treatment Act of 2005 § 1003.
[52] MICHAEL JOHN GARCIA, CONG. RSCH. SERV., RL33655, INTERROGATION OF DETAINEES: OVERVIEW OF THE MCCAIN AMENDMENT, n.1 (Dec. 11, 2007).

"cruel, inhuman, or degrading treatment or punishment."[53] On September 6, 2006, the Army released an updated version of the Field Manual reflecting the requirements of the McCain Amendment and expressly prohibited eight enhanced interrogation techniques from being used in intelligence interrogations.[54] The McCain Amendment also stipulates that the provision cannot "be superseded, except by provision of law enacted after the date of the enactment of this act which specifically repeals, modifies, or supersedes the provisions of this section."[55]

By targeting the actions of the DOD and specifically passing into law restrictions on the types of interrogation methods that can be used, the legislation sought to eliminate any ambiguity in Congress's intentions and any possibility of using the constitutional avoidance canon. This may mean that if a President violated the McCain Amendment and 18 U.S.C. §§ 2340-2340(A) by using enhanced interrogation methods, the only justification left would be the Commander-in-Chief power argued for in the Bybee Memo. However, President Bush's signing statement attached to the National Defense Authorization Act for FY2006 qualified his responsibility to follow the Act "in a manner consistent with the constitutional authority of the President . . . to supervise the unitary executive branch."[56]

With the signing statement adding ambiguity to the issue of "whose power is it anyway," but with no apparent violations of 18 U.S.C. §§ 2340-2340(A) or the McCain Amendment, the debate has continued outside of the courts. Many scholars view the President's constitutional authority as shared power, with checks and balances

[53] *Id.* at 3.

[54] *Id.* at 6. The eight techniques banned in the 2006 Army Manuel are: forcing the detainee to be naked, perform sexual acts, or pose sexually; placing hoods or sacks over the head of a detainee or using duct tape over the eyes; applying beatings, electrical shock, burns, or other forms of physical pain; waterboarding; using military working dogs; inducing hypothermia or heat injury; conducting mock executions; and depriving the detainee of necessary food, water, or medical care. *Id.* at 6-7.

[55] *Id.* at 3.

[56] President's Statement on Signing National Defense Authorization Act for Fiscal Year 2006, 42 WCPD 23 (Jan. 16, 2006).

between the three branches even over national security issues, instead of the absolute executive power.[57] Following the logic in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, a President that uses interrogation methods that are explicitly banned in a statute may be acting in his lowest ebb of authority because it is not in conjunction with Congress.[58] Other legal scholars argue that it depends upon whether interrogation methods are part of the "preclusive core" of the President's war powers or if they are part of the "more 'peripheral' Commander-in-Chief powers that are subject to statutory and treaty based regulations."[59] The Bybee Memo contends that the President's "tactical command authority" is a "core, indefeasible power" with which congressional authority must give way.[60] What Bybee does not mention in the memo is that the Framers embraced checks and balances, "a belief that was itself rooted in their practical experience with the dangers of unconstrained executive authority, particularly in war."[61]

Further, some argue that the Bybee memo misconstrues the case law used in support of the Commander-in-Chief argument, noting that the holding in *Johnson v. Eisentrager* is about courts not having jurisdiction to review cases of enemy combatants held abroad, and the *Prize Cases* "at best stand for the proposition that the President can order a blockade in times of war even if Congress has not declared or even recognized a state of war."[62]

With many legal arguments on both sides, it is unclear whether the Commander-in-Chief arguments from the Bybee Memo would hold if a President violated the McCain Amendment or 18 U.S.C. §§ 2340-2340(A). Additionally, it is unclear whether Congress

[57] *See* Koh, *supra* note 9, at 1155 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)).
[58] *Id.* (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)).
[59] David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb, Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 721 (2008).
[60] *Id.*
[61] *Id.* at 803.
[62] Arthur H. Garrison, *The Office of Legal Counsel "Torture Memos": A Content Analysis of What the OLC Got Right and What They Got Wrong*, 49 No. 5 CRIM. L. BULL. Art. 3 (2013).

can write laws limiting the President's ability to defend the nation as he sees fit. However, suppose a President violates the McCain Amendment. In that case, a court could not answer this constitutional problem without first addressing who has standing to effectively challenge his actions—a bar that is not easily reached.

C. Standing

Justice Douglas once remarked that standing has become "the most amazing, complex, intricate web of minutiae imaginable."[63] The plain language of Article III, Section 2 of the U.S. Constitution holds that "the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made," and "Controversies" between different parties.[64] However, by not defining the terms, the language gives little guidance as to the standards that limit judicial review.[65] In *Lujan v. Defenders of Wildlife*, the Court found that given the lack of definition, "the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts."[66] This common understanding is based largely on a structural argument originating in *Marbury v. Madison* and derives standing, mootness, ripeness, and political question requirements from Article III.[67]

Under the current doctrine, the "irreducible minimum of standing contains three elements."[68] First, the plaintiff must have suffered an "injury in fact" in which there was an invasion of a legally protected interest.[69] The injury cannot be conjectural or hypothetical but must be concrete, particularized, and imminent.[70] Second, the injury must be causally connected to the conduct of the defendant and

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[63] Laveta Casdorph, *The Constitution and Reconstruction of the Standing Doctrine*, 30 ST. MARY'S L.J. 471, 473 (1999).
[64] U.S. Const. art. III, § 2.
[65] Casdorph, *supra* note 63, at 480.
[66] Lujan v. Defs. of Wildlife, 504 U.S. 555, 559-60 (1992).
[67] *See* Casdorph, *supra* note 63, at 480–81.
[68] *Lujan*, 504 U.S. at 560.
[69] *Id.*
[70] *Id*; *see also* Warth v. Seldin, 422 U.S. 490, 508 (1975); Sierra Club v. Morton, 405 U.S. 727, 740-41 n.16 (1972).

"not . . . the result of the independent action of some third party not before the court."[71] Third, it must be likely and not speculative, that a favorable decision by the court will redress the injury.[72] Justice Scalia described standing as "an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: What's it to you?"[73] Without these three requirements, a person does not have a personal interest in the matter, and there is no case or controversy for a court to hear.[74] The logic behind requiring a personal stake in the outcome of the case is to ensure that "the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[75]

The Court has denied claims challenging exclusionary zoning provisions by advocates for low-income housing,[76] denied claims of reduction in the level of care by nursing home residents and Medicaid recipients,[77] and denied claims of litigants challenging the systemic use of chokeholds by police in Los Angeles.[78] Each of these claims were denied because none of the plaintiffs could show that the harm would happen to them in the future with certainty. Thus, the Court found that none of them had standing.[79] Justice Thurgood Marshall dissented to this understanding of standing in *City of L.A. v. Lyons*, pointing out the impossibly high burden it creates "[s]ince no one can show that he will be choked in the future, no one-not even a person

[71] *Lujan*, 504 U.S. at 560 (internal quotes omitted).
[72] *Id.* at 561.
[73] Antonin Scalia, J., *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK UNIV. L. REV. 881, 882 (1983).
[74] *See id.*
[75] Mark S. Brodin, *Screening Out Unwanted Calls: The Hypocrisy of Standing "Doctrine*," 15 NEV. L.J., 1181, 1201 (2015) (quoting Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982)).
[76] *See Warth*, 422 U.S. at 493.
[77] *See* Blum v. Yaretsky, 457 U.S. 993, 1001 (1982).
[78] *See* City of L.A. v. Lyons, 461 U.S. 97, 101 (1983).
[79] *See* Brodin, *supra* note 75, at 1190-91.

who, like Lyons, has almost been choked to death-has standing to challenge the continuation of the policy."[80]

However, the Court has entertained cases from plaintiffs with claims of "reverse discrimination" even though they were unable to connect their specific rejections from schools to the school's use of an affirmative action program.[81] Most notably, in 2003, Justice Rehnquist found that a plaintiff had standing to challenge the University of Michigan's admission program despite never having applied to transfer to the University of Michigan.[82] Instead of requiring the plaintiffs to show that they would receive the benefit if race were not considered, the Supreme Court has repeatedly held that the relevant injury in such cases is "the inability to compete on an equal footing."[83] With inconsistencies like these, the prudential requirement of requiring a personal stake has in recent years transformed into "a wildly swinging door that conveniently closes on cases the Court would prefer not to hear."[84] With disagreements between the justices on what standard to apply, the only constant is that standing "is one of degree, of course, and is not discernable by any precise test."[85]

In order for anyone to have standing to challenge the President's use of enhanced interrogation, they must show that they meet these requirements—however imprecise they may be. There are three different groups of people who can try to meet this requirement: groups of concerned citizens, Congress, and detainees. However, each faces its own unique challenges.

[80] *Id.* at 1190 (quoting *Lyons*, 461 U.S. at 113 (Marshall, J., dissenting)).
[81] *Id*. (Abigail Fisher had standing even though she graduated eighty-second in her high school class of 674 and scored a mediocre 1180 out of 1600 (below the 80th percentile) on the SAT); *see also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 269, 270, 276–77, 281 n.14 (1978) (finding Alan Bakke had standing even though he interviewed poorly at Davis and was unsuccessful applying to eleven other programs).
[82] Gratz v. Bollinger, 539 U.S. 244, 262 (2003).
[83] Texas v. Lesage, 528 U.S. 18, 21 (1999).
[84] Brodin, *supra* note 76, at 1201.
[85] Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 297 (1979).

1. Citizen Standing

Justice Antonin Scalia, then a judge on the U.S. Court of Appeals for the District of Columbia, wrote that a "concrete injury – an injury apart from the mere breach of a social contract – is the indispensable prerequisite of standing."[86] Justice Scalia argued that the plaintiff must be able to separate himself from the rest of society to show that he is entitled to special protection.[87] Beyond being part of a minority group, the minority status must be "relevant to the particular governmental transgression that he seeks to correct."[88] This fits the case or controversy paradigm requiring adverse parties, each with a personal stake in the litigation, and one alleging a legal harm caused by the other.[89] Courts have the power to and are well suited to resolve these disputes.[90] However, they are not authorized and not well suited to resolve issues of general interest to the public.[91]

Minority status issues of standing are especially significant when groups of concerned citizens seek relief before a court. To protect courts from becoming "debating societies," standing is often rejected if a citizen's or group of citizens' legal issue is one that affects the public as a whole.[92] To have standing, citizens must have a claim beyond that the Constitution has been broadly violated against society.[93]

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, a group of citizens, Americans United, brought suit against a local private college after it received property from the government at no cost due to a 100 percent public benefit allowance, claiming the conveyance was a violation of the Establishment Clause of the First Amendment.[94] The Court found that

[86] Scalia, J., *supra* note 73, at 895.
[87] *Id.*
[88] *Id.*
[89] Casdorph, *supra* note 63, at 473.
[90] *Id.*
[91] *Id.*
[92] *Valley Forge Christian Coll.*, 454 U.S. at 472.
[93] *Id.*
[94] *Id.* at 468.

Americans United did not have a claim beyond that the Constitution had been violated.[95] The Court had repeatedly "rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law."[96] Unable to identify any personal injury suffered by Americans United as a result of the constitutional violation, "other than the psychological consequence presumably produced by observation of conduct with which one disagrees," the Court found no injury sufficient to confer standing under Article III.[97] Chief Justice Rehnquist stressed that even though Americans United was obviously committed to the constitutional principle of separation of church and state, "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy."[98] The majority concluded by citing *Schlesinger v. Reservists Committee to Stop the War*, finding that the assumption that no one has standing to sue is not a reason to find standing.[99]

If a citizen can show a relevant minority status that a court will recognize, they still must connect their legally recognized harm to the defendant.[100] One way is for a plaintiff to show an imminent threat of future harm or that a present harm incurred in consequence of such a threat.[101] For example, a plaintiff who contests the constitutionality of a criminal statute does not need to expose himself to actual arrest or prosecution to challenge the statute he claims "deters the exercise of his constitutional rights."[102] His intention to engage in conduct that has an arguably constitutional interest, but by statute opens himself up to the credible threat of prosecution, is enough to grant standing.[103] However, if the plaintiff does not "claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that

[95] *Id.* at 488-90.
[96] *Id.* at 764 (quoting Fairchild v. Hughes, 258 U.S. 126, 129 (1992)).
[97] *Id.* at 765.
[98] *Valley Forge Christian Coll.*, 454 U.S. at 486.
[99] *Id.* at 489 (quoting Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974)).
[100] *Lujan*, 504, U.S. at 560.
[101] *Id.* at 564.
[102] *Babbitt*, 442 U.S. at 98 (quoting Steffel v. Thompson, 415 U.S. 452 (1974)).
[103] *Id.*

a prosecution is remotely possible," they do not meet the minimum requirement needed to be heard by the Court.[104]

In 2013, a group of writers, journalists, and activists claimed to have this type of standing in a suit against President Obama and the Secretary of Defense and challenged a provision of the National Defense Authorization Act that affirmed the President's authority to detain covered persons.[105] Each plaintiff was engaged in reporting on or being a spokesperson for organizations related to WikiLeaks and feared detention under §1021 of the Act.[106] The Court held that neither the U.S. citizen plaintiffs nor the non-citizen plaintiffs could meet the burden for standing.[107] After analyzing the meaning of the relevant provision, the Court concluded that because the statute did not grant authority to detain U.S. citizens, the statute could not "itself be challenged as unconstitutional by citizens on the grounds advanced by plaintiffs because as to them it neither adds nor subtracts from whatever authority would have existed in its absence."[108]

Finding that the non-citizens did not have standing was not as simple because the statute "does have real meaning regarding the authority to detain individuals who are not citizens."[109] However, the non-citizen plaintiffs still did not have standing because (1) the law was not aimed "directly at them" or individuals specifically like them; (2) neither non-citizen plaintiff presented any evidence that the government intended to place them in military custody; and (3) there was no evidence that individuals had ever been subjected to military detention.[110]

The court stressed in *Hedges* that nothing in the decision was relying on deference to the political branches merely because the case involved national security and foreign affairs.[111] The Supreme Court

[104] *Id.* at 298-99.
[105] Hedges v. Obama, 724 F.3d 170, 173-174 (2013).
[106] *Id.* at 194-95.
[107] *Id.* at 204-05.
[108] *Id.* at 193.
[109] *Id.* at 194.
[110] *Id.* at 202.
[111] *Hedges*, 724 F.3d at 204.

has heard many landmark cases in recent years involving due process concerns for detainees.[112] But without meeting the "'irreducible constitutional minimum' of Article III standing," federal courts cannot feign to play a meaningful role in assessing the problems;[113] especially when the problem is to "decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."[114] This begs the question: if the dispute is between the two branches, when does Congress have standing to challenge the Executive in court?

2. Congressional Standing

One of the issues for congressional standing is the same issue citizens face: courts find that they do not have a sufficient "personal stake" in the dispute.[115] "The law of Art. III standing is built on a single basic idea—the idea of separation of powers," and as such, courts must resist the urge to settle disputes between branches "for the sake of convenience and efficiency."[116] Instead, courts must discern whether "the claimed injury is personal, particularized, concrete, and otherwise judicially cognizable."[117] As elected representatives, meeting the "personal" prong can be difficult because the harm does not usually involve things they are personally entitled to but rather privileges they were granted in their official capacity.[118]

The Supreme Court has granted certiorari to directly discuss the matter of congressional standing in only two cases, accepting it in

[112] *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality decision) (granting an American citizen's habeas corpus petition to challenge his status as an enemy combatant); *see also* Boumediene v. Bush, 553 U.S. 723 (2008) (granting aliens detained as enemy combatants the privilege of habeas corpus to challenge the legality of their detentions).
[113] *Hedges*, 724 F.3d at 204 (citing *Lujan*, 504 U.S. at 560).
[114] *Id.* (citing Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013)).
[115] Raines v. Byrd, 521 U.S. 811, 830 (1997) (Holding that individual members of Congress did not have sufficient "personal stake" in a dispute challenging the constitutionality of the Line-Item Veto Act, and did not allege a sufficiently concrete injury, to establish Article III standing.).
[116] *Id.* at 820 (internal quotations omitted).
[117] *Id.*
[118] *Id.* at 821.

the first and greatly restraining it in the latter.[119] In *Raines v. Byrd*, the Court laid out three ways in which the plaintiffs were distinguishable from the former grant of standing.[120] First, their injury was suffered by all other members of Congress.[121] Second, the injury was attached only temporarily to the plaintiff, and if the plaintiff lost his seat in Congress, the claim would move to another party.[122] Justice Rehnquist wrote:

> If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the member's seat, a seat which the member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power.[123]

Third, and finally, even if the legislators had suffered a loss in power, that power really belonged to the legislators' constituents—making it a general grievance of the public and not a personal stake.[124]

With no clarifying case law coming from the Supreme Court, the *Raines* opinion leaves a confusing test for whether Congressional standing is possible.[125] To begin, while issues that affect the general public are not grounds for standing, such as taxpayer standing, there is no rule requiring plaintiffs to have a unique injury separate from all similarly situated persons in a class.[126] Yet, the Court suggests that a member of Congress who shares an injury with other members of Congress would be less likely to have standing than the member who was injured alone.[127] The Court then contradicts itself by "attach[ing] some importance to the fact that appellees have not been authorized

[119] *See* Powell v. McCormack, 395 U.S. 486 (1969) (finding that a member of Congress's constitutional challenge to his exclusion from the House of Representatives presented Article III standing because of his loss of salary); *Raines*, 521 U.S. at 811.
[120] *Raines*, 521 U.S. at 821.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 354 (2015).
[126] *Id.*
[127] *Id.*

to represent their respective House of Congress in this action, and indeed both Houses actively oppose their suit."[128] This suggests that plaintiffs would be more likely to have standing if the injury was so obviously shared by all members of a House of Congress that they allowed themselves to be formally represented in court.[129]

The second issue is that the *Raines* Court suggests that standing requirements should be more rigid in disputes of interbranch conflicts.[130] Without distinctly stating that special weight was given to the nature of the conflict, the Court cited the old adage from *Valley Forge* that the standing inquiry is "especially rigorous" when deciding disputes where one branch claims an action of another branch was unconstitutional.[131] Its strict interpretation of congressional standing invokes the political question doctrine without ever mentioning it explicitly but instead claims that the federal court is not the forum for redress because members still have adequate remedies within their own political processes.[132]

Because the Supreme Court has not spoken on the issue often, most of the case law regarding congressional standing comes from the lower courts.[133] However, they do not come close to resolving the issues presented in *Raines*. In the early 1970s, the D.C. Circuit suggested that members of Congress only had standing when the determination of the issue would "bear upon" the member's duties as a legislator.[134] Only a year later, the Fourth Circuit held that members

[128] *Raines*, 521 U.S. at 829.
[129] Nash, *supra* note 125.
[130] *Id.* at 355.
[131] *Raines*, 521 U.S. at 819-20 (citing *Valley Forge Christian Coll.*, 454 U.S. at 473-74).
[132] *Id.* at 829.
[133] *E.g.*, Hansen v. Nat'l Comm'n on Observance of Int'l Women's Year, 628 F.2d 533 (9th Cir. 1980) (Holding that members of Congress lacked standing when a claimed interest was an interest shared with all other citizens.); McKinney v. U.S. Dept. of Treasury, 799 F.2d 1554, 1547, 1558 (Fed. Cir. 1986) (holding that members of Congress do not have standing to assert the legal rights or interests of their constituents in their representative capacities).
[134] Nash, *supra* note 125, at 358 (citing Mitchell v. Laird, 498 F.2d 611, 624 (D.C. Cir. 1973) (holding that if the defendant's actions went beyond the authority conferred upon them by the Constitution, the determination of the issue would bear

of Congress lacked standing to sue for declaration of illegality of executive action because, "Once a bill has become law, . . . their interest is indistinguishable from that of any other citizen. They cannot claim dilution of their legislative voting power because the legislation they favored became law."[135] Similar to what the Supreme Court would later say in *Raines*, the Fourth Circuit suggested that the members still had a course of redress within their political processes because they could clarify the meaning of their earlier legislation through new resolutions.[136] In 1981, the field was further muddied when the D.C. Circuit created the "abstention doctrine," deciding that separation-of-powers issues "were best addressed independently" of congressional standing; so that, even if a legislator had standing, if the plaintiff could still "obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute" the court should exercise equitable discretion and dismiss the case.[137] The abstention doctrine could not even unify the D.C. Circuit, however, with Judges Scalia and Bork, both on the D.C. Circuit at the time, criticizing the openness to congressional standing at all and reliance on equitable discretion.[138]

Post-*Raines*, the D.C. Circuit again amended its approach.[139] In 1999, the court dismissed an action where members of Congress challenged the President's ability to set up a program by Executive Order without an authorizing statute, holding that post-*Raines*, the plaintiffs did not have standing but also noting that parts of the abstention doctrine "may remain good law."[140] A year later, the D.C. Circuit rejected a case where plaintiffs, members of the House, "by

upon the duties of the plaintiff, there were sufficient considerations to give standing).

[135] Harrington v. Schlesinger, 528 F.2d 455, 459 (1975).

[136] *Id.*

[137] Reigle v. Fed. Open Mkt. Comm., 656 F.2d 873, 877 (D.C. Cir. 1981).

[138] Nash, *supra* note 125, at 359-60 (citing Moore v. U.S. House of Reps., 733 F.2d 946, 957, 962 (D.C. Cir. 1984) (Scalia, J., concurring) ("[A] purely intragovernmental dispute . . . has no place in the law courts."); *see also* Barnes v. Kline, 759 F.2d 21, 41, 61 (D.C. Cir. 1984) (Bork, J., dissenting) ("We ought to renounce outright the whole notions of congressional standing."), *vacated on other grounds sub nom. Burke v. Barnes*, 479 U.S. 361 (1987)).

[139] Nash, *supra* note 125, at 360.

[140] Chenoweth v. Clinton, 181 F.3d 112, 112-13, 116 (D.C. Cir. 1999).

specifically defeating the War Powers Resolution authorization by a tie vote and by defeating a declaration of war" alleged their legislative duties had been nullified by the Executive conducting airstrikes in the former Yugoslavia.[141] Once again, the deciding factor was that the plaintiffs still had recourse to political relief by passing a law that forbid the use of U.S. forces in Yugoslavia, cut funding, or impeach "should a President act in disregard of Congress' authority on these matters."[142]

While standing and political question doctrines are distinct hurdles, it is not clear which controls congressional standing in issues concerning separation of powers.[143] Ultimately, even if standing exists for a congressperson plaintiff, the precedent set by both the Supreme Court and the D.C. Circuit has left little avenue for justiciability by employing equitable discretion so often.[144]

3. Detainee Standing

The most obvious avenue for challenging an executive action that violates 18 U.S.C. § 2340(A) or the McCain Amendment—the answer to Justice Scalia's "what's it to you?" question—would be for the plaintiff to be the detainee who suffered the injury of torture while in detention of the U.S. government. This standing is also not guaranteed, detainees have always faced an uphill due process battle.[145]

The law surrounding due process of detainees was originally believed to be settled after World War II when the Supreme Court held that German nationals in the custody of the U.S. military, convicted of engaging in military activity against the U.S. by military commissions, had no right to a writ of habeas corpus to challenge the legality of their detention.[146] But it was not until 2008 that many of the gaps in the case

[141] Campbell v. Clinton, 203 F.3d 19, 22, 23 (D.C. Cir. 2000).
[142] *Id.* at 23.
[143] Nash, *supra* note 125, at 363.
[144] *Id.*
[145] *E.g.*, *Boumediene*, 553 U.S. at 723; Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 543 U.S. 507 (2004); Al Hela v. Trump, 972 F.3d 120 (D.C. Cir. 2020).
[146] *Eisentrager*, 339 U.S. at 765-66, 790 (1950).

law were filled.[147] After the attacks on September 11, 2001, the view of the U.S. government was that Al Qaeda detainees were "unlawful enemy combatants" not covered under the Geneva Convention.[148] Without the protection of the Geneva Convention, the Bush administration claimed the right to detain the unlawful enemy combatants without trial indefinitely because they do not qualify as prisoners of war.[149]

It was not until 2004 when the media began to cover the treatment of unlawful enemy combatants and human rights groups began pushing for courts to evaluate the ability of detainees to challenge their status and detention, that the Supreme Court responded to the unlawful combatant detainees.[150] Aliens detained at the U.S. Naval Base in Guantanamo Bay brought actions through relatives acting as their next friends, challenging the legality and conditions of their confinement, but were met immediately with jurisdictional problems.[151] The Supreme Court held in *Rasul* that, despite the precedent of *Johnson* and the petitioners' lack of U.S. citizenship, the federal habeas statute, 28 U.S.C. § 2241, did apply to the detainees.[152] Justice Steven distinguished the case from *Johnson* by noting that the petitioners were

> [N]ot nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in a territory over which the United States exercises exclusive jurisdiction and control.[153]

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[147] *Boumediene*, 553 U.S. at 723 (holding that detainees were entitled to a habeas corpus hearing and could not be required first to exhaust review procedures).
[148] Memorandum from President George W. Bush to Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020207-2.pdf.
[149] *Id.*
[150] *Rasul*, 542 U.S. at 466.
[151] *Id.* at 470-71.
[152] *Id.* at 485.
[153] *Id.* at 476.

With the finding that federal jurisdiction was not dependent upon U.S. citizenship, the Court opened the doors for detainees "to invoke the federal courts" and challenge the legality of their detention.[154]

Decided the same day as *Rasul*, the Supreme Court's second Guantanamo Bay detainee case concerned a U.S. citizen being held as an unlawful enemy combatant appealing the dismissal of his habeas corpus petition.[155] In a plurality decision, the Court held that due process requires that all U.S. citizens be given meaningful opportunity to contest the factual basis of his detention.[156] This meaningful opportunity must include receiving "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[157] However, beyond these requirements, the proceedings could be modified to "alleviate" the burden of the executive during "ongoing military conflict," suggesting allowing hearsay to be admissible and a presumption in favor of the government.[158]

After the 2004 decisions, the government established procedures for Combatant Status Review Tribunals ("CSRTs").[159] Structured under the law of war, the administrative process provided

[154] *Id.* at 481.
[155] *Hamdi*, 542 U.S. at 507.
[156] *Id.* at 532. Justice O'Conner, recognizing the balance between freedom and the ability of the government to achieve important goals, like security, stressed the need to reaffirm "the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails." *Id.* at 531. But more interestingly, she added that in holding for Hamdi, the Court "necessarily reject[ed] the Government's assertion that separation of powers principles mandate[s] a heavily circumscribed role for the courts in such circumstances." *Id*. at 535. Instead, the role of the judiciary becomes more important because, without the ability to review the individual cases and not just the legality of the broader detention scheme, power will condense to a single branch of government which cannot be meaningfully reviewed. *Id.* at 546.
[157] *Id.* at 533.
[158] *Id.* at 533-34.
[159] *See* Department of Defense (DOD) Fact Sheet, *Combatant Status Review Tribunals*, (Sept. 26, 2006), https://web.archive.org/web/20191121223914/https://archive.defense.gov/news/Oct2006/d20061017CSRT.pdf.

an opportunity for U.S. citizen-enemy combatants to contest their status before three commissioned officers with the help of counsel who could receive an unclassified summary of evidence in advance of the hearing and the ability to introduce their own evidence at the hearing.[160]

In 2005, Congress passed the National Defense Authorization Act that included the McCain Amendment. The final appropriations bill also included an amendment by Senators Graham, Levin, and Kyl that sought to strip federal courts of jurisdiction to hear cases brought by alien enemy combatants.[161] Section 1005(e)(1) declares that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba . . . ."[162] Despite this language, the Supreme Court granted certiorari to an alien combatant to decide the issue of jurisdiction only a few months later.[163] Hamdan, a Yemeni citizen, was detained at Guantanamo Bay without charge for two years before being charged with a conspiracy offense triable by a military commission.[164] Hamdan filed a motion for writs of habeas corpus and mandamus to challenge the Executive's means of prosecuting the charge, citing that neither congressional act nor common law supports trial by commission for the crime of conspiracy and that the procedures used by the commission violated "the most basic tenants of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him."[165]

Senators Graham and Kyl submitted an amicus brief, which argued the enacted Detainee Treatment Act ("DTA") rescinded the statutory grant of jurisdiction to the federal courts to entertain petitions for writs of habeas corpus or other actions filed by alien

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[160] *Id.* Within eight months, the Department of Defense conducted 558 CRSTs at Guantanamo Bay; however, only 38 detainees were determined to no longer meet the definition of enemy combatants. *Id.*

[161] The Detainee Treatment Act of 2005 § 1003.

[162] *Id.* §1005(e)(1).

[163] *Hamdan*, 548 U.S. at 557.

[164] *Id.* at 566.

[165] *Id.* at 567.

detainees held in U.S. custody and established new mechanisms for judicial review by granting "exclusive jurisdiction" to the CRSTs.[166] Their brief relied on the language of the statute and language Senator Graham submitted into the congressional record after the legislation had been enacted but worded in a manner to imply it was a part of the debate. [167] Ultimately, the Supreme Court found that: "exclusive jurisdiction" was given not to the CRSTs but rather to the D.C. Circuit based on the statutory construction of the DTA and the weak legislative history;[168] the military commission was not expressly authorized by any congressional act;[169] and that the military commission's procedure violated the Uniform Code of Military Justice.[170]

After the Court's decision, the Bush administration proposed the Military Commissions Act of 2006 ("MCA"), which was enacted to fill the holes the Supreme Court had drawn attention to.[171] It officially authorized the trial of detainees by military commission and detailed rules governing the procedures.[172] Congress also used the MCA to, once again, revoke the U.S. court's jurisdiction to hear habeas corpus petitions by all alien detainees in U.S. custody, this time including lawful combatants, regardless of where they were in custody.[173] The provision applied to "all cases, without exception, pending on or after the date of [enactment] which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001."[174]

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[166] Brief of Senators Graham and Kyl as Amicus Curiae in Support of Respondents at 2-3, Hamdan v. Rumsfeld, No. 05-184 (U.S. Feb. 2006).
[167] Emily Bazelon, *Invisible Men: Did Lindsey Graham and Jon Kyl mislead the Supreme Court?*, Slate, Jurisprudence, (Mar. 27, 2006), https://slate.com/news-and-politics/2006/03/invisible-men.html.
[168] *Hamdan*, 548 U.S. at 571-84.
[169] *Id.* at 588-94.
[170] *Id.* at 612-35.
[171] The Military Commissions Act of 2006 ("MCA"), Pub. L. 109-366.
[172] *Id.*
[173] MCA, Pub. L. 109-366 § 7; *see also* Jennifer K. Elsea, *The Military Commissions Act of 2006 (MCA): Background and Proposed Amendments*, CRS Report R40752, (Aug. 11, 2009), https://fas.org/sgp/crs/natsec/R40752.pdf.
[174] MCA, Pub. L. 109-366 § 7.

In 2008, Boumediene, a citizen of Bosnia and Herzegovina detained in Guantanamo Bay as an enemy combatant, successfully brought a writ of habeas corpus case in federal court that challenged the constitutionality of the MCA.[175] Turning to the Suspension Clause of the U.S. Constitution, the Court held that the MCA had not explicitly suspended the writ of habeas and found that the clause had full effect at Guantanamo.[176] It further found that the MCA's limitations on the detainees' ability to present evidence and limitations on the Court of Appeal's ability to review to be an unconstitutional suspension of the writ of habeas corpus. [177] After almost a decade of back and forth between the legislature and judiciary, it looked as if a final holding had emerged—the detainees must have access to due process by an Article III court at some level. While officials may be "charged with daily operational responsibility for our security," our "freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers" cannot be ignored or placed to the side.[178]

While it would be comforting and simple to leave detainee due process case law on that note, the law is ever-changing. On August 28, 2020, the D.C. Circuit, for the first time, denied a habeas corpus petition to a detainee at Guantanamo Bay and upheld his indefinite detention.[179] Abdulsalam Ali Abdulrahman Al Hela appealed the district court denial of the writ after a full hearing, claiming that he was entitled to relief for violations of both "substantive" and "procedural" due process.[180] He noted that *Boumediene* considered both the Due Process and Suspension Clauses when discussing the scope of habeas review.[181] However, the D.C. Circuit interpreted *Boumediene* more narrowly, claiming that the Supreme Court "never suggested the Due Process Clause applies to Guantanamo detainees" and "in absence of direction from the Supreme Court," they declined

[175] *Boumediene*, 553 U.S. at 732, 793.
[176] *Id.* at 771.
[177] *Id.* at 787-93.
[178] *Id*. at 797.
[179] *Al Hela*, 972 F.3d at 151.
[180] *Id.* at 127.
[181] *Id.* at 149-50.

"to reverse binding precedent and extend new constitutional protections to alien detainees at Guantanamo Bay."[182]

Formally denying the right to due process is a major setback for the remaining detainees in U.S. custody abroad, many of whom were subjected to the enhanced interrogation techniques program. [183] Even though the remaining detainees are considered the "worst of the worst by the U.S. government," denying due process can still risk undermining our judicial system, separation of power, and "the moral high ground" the nation yearns to maintain in its counterterrorism efforts.[184] Without due process, the chances of a detainee being granted standing are limited to none.

II. ANALYSIS

While no President has tried to violate 18 U.S.C. §§ 2340-2340(A) or the McCain Amendment in the DTA, it does not exclude the possibility of it ever happening.[185] The fear felt immediately after the September 11, 2001, attacks by both the general public and the U.S. government was blinding, leaving some legal discussions and considerations of due process by the wayside as the country fought to protect itself from what could come next.[186] While we can continue to prepare and keep a watchful eye for what may threaten the United States next, there is no way to prevent another attack—and the fear that comes with it—with any infallible degree of certainty.

Should the United States ever be put into a similar situation, the Executive may respond with the same force as the Bush

[182] *Id*. at 150.
[183] Maddie Jurden, *Reclaiming the Moral High Ground?*, GEO. SEC. STUDS. REV., (Oct. 16, 2020), https://georgetownsecuritystudiesreview.org/2020/10/16/reclaiming-the-moral-high-ground/.
[184] *Id*.
[185] In a 2006 interview, President Bush backed off from his signing statement to the DTA and acknowledged limits to his constitutional powers, saying, "I don't think a president can . . . order torture, for example . . . Yes, there are clear line . . . ." Interview by Bob Schieffer, CBS News, with President George W. Bush, in Washington, D.C. (Jan. 27, 2006), https://www.cbsnews.com/news/transcript-exclusive-bush-interview/.
[186] *See* Smeulers & Niekerk, *supra* note 6, at 329.

administration, allowing questionable legal arguments to justify enhanced interrogation techniques on detainees the administration does not even view as lawful combatants.[187] While the question everyone will want to know is whether Bybee's Commander-in-Chief argument, which exempts the president from congressional control over interrogation techniques, is right, the question that must be asked first is "who has standing?" It is very possible that the answer to the first mandatory question is "no one." The three main options for who could challenge the President's authority—the concerned citizen, Congress, or detainees—each face incredibly high burdens to meet the standing requirement.

A. The Concerned Citizen Cannot Come to Court

The current standing doctrine requires only three things: an injury-in-fact, a causal connection to the defendant, and the opportunity for redress.[188] The issue for the concerned citizen is that it cannot meet the first. The case or controversy paradigm of the Constitution requires adverse parties with a real stake in the litigation, where one party is alleging that the other caused a legal harm to them.[189] Similar to the concerned citizens in *Valley Forge Christian College* who brought a suit claiming a conveyance of land was a violation of the Establishment Clause of the First Amendment, the concerned citizen who steps in for the detainee is unable to identify any personal injury suffered to them "other than the psychological consequence presumably produced by observation of conduct with which one disagrees."[190] The details released about the enhanced interrogation methods shocked the public and undoubtedly felt the need to advocate on behalf of human rights for all people.[191] However, given that "standing is not measured by the intensity of the litigant's

[187] White House Memorandum, *Humane Treatment of al Qaeda and Taliban Detainees* (Feb. 7, 2002), https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020207-2.pdf.
[188] *Lujan*, 504 U.S. at 560-61.
[189] Casdorph, *supra* note 63, at 483.
[190] *Valley Forge Christian Coll.*, 454 U.S. at 485.
[191] Rebecca Leung, *Abuse of Iraqi POWs By GIs Probed: 60 Minutes II Has Exclusive Report on Alleged Mistreatment*, CBS NEWS 60 MINUTES, (Apr. 27, 2004), https://www.cbsnews.com/news/abuse-of-iraqi-pows-by-gis-probed/.

interest or the fervor of his advocacy," it will not matter how shocking or important the issue is to the public.[192] Because it affects the general public the same, none of us who have not experienced the injury-in-fact have standing. Further, the standing doctrine does not allow for third-party plaintiffs.[193] Without a personal injury, the outcome of the legal questions could find themselves being resolved not in a concrete factual context but in "the rarified atmosphere of a debating society."[194]

The only time citizens can claim an injury-in-fact before they are harmed is if they can prove a relevant minority status that personalizes the injury, distinct from the general public.[195] But when it comes to being harmed by the torture of detainees, one of the only real minority statuses available would be to claim a fear of being detained and tortured.[196] This would be nearly impossible because it would require: (1) convincing a court that the AUMF or DTA and the Executive's instructions were aimed "directly at you" or individuals like you; (2) presenting evidence that the government intends to place you in military custody and possibly use enhanced interrogation methods; and (3) present evidence that individuals in similar situations had been subjected to military detention.[197] The plaintiffs in *Hedges* worked in a field that reported information stolen in the Wikileaks scandal and feared being detained because there were arrests of people who shared the confidential information, and the court still did not grant them standing.[198] In this case, it would require convincing a court that your line of work is so similar to that of a terrorist that you get accused of being a terrorist frequently and are at risk of being detained. With this as the only viable route to achieve standing, it is very unlikely that a concerned citizen could challenge

[192] *Valley Forge Christian Coll.*, 454 U.S. at 486.
[193] *Lujan*, 504 U.S. at 559-60.
[194] Brodin, *supra* note 75, at 1201.
[195] *Lujan*, 504 U.S. at 560.
[196] *Hedges,* 724 F.3d at 173-74 (discussing the fear of being prosecuted as a minority status).
[197] *Id.* at 202.
[198] *Id.* at 194-95.

the President if he violated 18 U.S.C. § 2340(A) or the McCain Amendment.

B. The Court Does Not Want to Hear Congress's Complaints

The member of Congress faces a similar challenge with a slight twist—she is both a member of the general public and a part of one of the three branches of government. Therefore, she must find an injury-in-fact through one of them. Unfortunately, the judiciary has made it clear that it would rather not listen to complaints from members of Congress by imposing not one but two doctrines with a presumption against standing. The most recent Supreme Court case addressing the issue, which makes up for half of the Supreme Court case law on this issue, runs in circles around the plaintiffs, spreading red tape.[199] *Raines* claims that issues shared by all members of Congress do not provide for standing because then it is a political issue with opportunities for political redress.[200] However, it also places significance in the fact that the plaintiffs had not been authorized to represent their Houses of Congress, suggesting that when all members of Congress share in the injury, they do have standing.[201] This contradiction perfectly encapsulates the battle the lower courts have been experiencing since the 1970s, which is deciding what their reason is for not wanting to hear from Congress.

Does Congress not have standing, or is it a political question the Court is not situated to answer? In *Raines*, the Supreme Court did not decide any better than the lower courts have and created the contradiction instead. If a case involves only a few members of Congress and the House will not let them represent it, then the members *obviously* do not have standing—they could not even convince their own House that there was an injury-in-fact. But if all members of Congress recognize the injury, they still *obviously* do not have standing because either it is a harm that affects the general public

[199] *Raines*, 521 U.S. at 821.
[200] *Id.*
[201] *Id.* at 829.

equally or it is a part of their job, and you do not have a personal right to it.

The great part about both options, whether the House agrees or disagrees, is that the answer for both cases could also be that it is a political question, which Article III courts are not equipped to answer. If the respective House is not united in claiming an injury, it must be a problem of votes and better answered through political processes. If the House agrees it is an injury, then the case involves a political question between the legislature and the executive that the judiciary should not answer.

For only a brief moment in time did the court consider congressional standing truly viable in disputes between Congress and the Executive, with another circuit contradicting the "bear upon" doctrine within a year.[202] What we are then left with is no legal doctrine that will allow Congress to challenge the President's actions, even when it seems clear that the Executive's actions use unconstitutional means to shift the balance of power between the branches.[203]

There is little reason to believe that things would be different if Congress tried to challenge the President's authority in this case. The courts repeatedly deny standing, advising the members of Congress to return to the capitol and pass new clarifying legislation, even when the issue is not the clarity of the statute but the President's use of signing statements or Executive Orders choosing to interpret the statute as "respecting his very broad Constitutional powers" and not applying to him.

C. The Detainees Lack Due Process

On the surface, a detainee that was tortured easily meets the three prongs laid out in *Lujan*: (1) the detainee has suffered an "injury in fact" by being subjected to physical or mental torture that is not conjectural or hypothetical but concrete, particularized, and imminent; (2) the injury is causally connected to the conduct of the defendant—those who detain and torture him and those giving orders

[202] *Harrington*, 528 F.2d at 459.
[203] *Campbell*, 203 F.3d at 23.

for detainment and torture; and (3) it is likely, rather than speculative, that a favorable decision would redress the injury through an injunction or damages for pain and suffering.[204] However, when you take a closer look, even the detainee faces insurmountable challenges to achieve standing to challenge the President. The main challenge being that if the Court does not want to hear about how a terrorist was thrown against a wall, it will not.[205]

In *Johnson*, *Rasul*, *Hamdi*, *Hamdan*, and *Boumediene*, the due process questions the Supreme Court addressed were all related to the detainee's ability to defend himself.[206] While some of the courts did address larger detention and trial schemes, the unifying factor in each was the court discerning what rights the detainee had when defending against his status as an enemy combatant in detention or defending against criminal charges brought against him.[207] It took fifty-eight years from the original post-World War II case for the Supreme Court to definitively say that all detainees, regardless of citizenship or location, had a right to a prompt habeas corpus hearing.[208] It took three years of constant battle, including new legislation by Congress challenging the President, new executive actions challenging court precedent, and the judiciary tearing both the legislation and actions by the executive apart before detainees were afforded a system in which all detainees were entitled to a basic due process concept that the United States prides itself: the ability to be heard. Heard in a manner that was meaningful and allowed for notice of the factual basis for the status or charges, the assistance of counsel, and an opportunity to present evidence before a neutral decisionmaker.[209] The most likely reason for why this was such a struggle was the fear and anger the United States still feels following the attacks of September 11, 2001,—the lingering fear that the next attack could come at any moment and

[204] *Lujan*, 504 U.S. at 559-60.
[205] *Lyons*, 461 U.S. at 102-03.
[206] *Eisentrager*, 339 U.S. at 765-66, 790 (1950); *Rasul*, 542 U.S. at 470; *Hamdi*, 543 U.S. at 509; *Hamdan*, 548 U.S. at 567; *Boumediene*, 553 U.S. at 732; *Al Hela*, 972 F.3d at 127.
[207] *Id.*
[208] *Boumediene*, 553 U.S. at 798.
[209] *Hamdi*, 543 U.S. at 533.

one of the detainees might have information that could save American lives.

Before the photos were released from Abu Ghraib, the image in every American's mind of suspected terrorists was of a hardened extremist who had committed crimes against humanity and was capable of taking so many more lives. There was little sympathy for anyone who might be connected to Al Qaeda. The release of the photos and information on enhanced interrogation opened the door in the minds of the nation to the possibility that maybe one of them might be innocent and enduring the most extreme humiliation and treatment possible by the country who was supposed to have the moral high ground. Even still, allowing any of the detainees to defend themselves against charges could mean allowing a real terrorist a route to freedom, and the threat of that still outweighed any remorse felt looking at the photos from Abu Ghraib.

Twenty years after the attacks, this internal battle within the United States is not resolved.[210] With thirty-eight detainees remaining at Guantanamo, there is still pressure to make sure that enemy combatants and law of war prisoners are never given too much of a day in court, lest they slip through the cracks and are released back into the world to cause harm.[211] With this legal precedent and perception in mind, it is clear that enemy combatant detainees would not be the ones granted standing to challenge the constitutionality of the actions of a U.S. president. It might be tempting to consider the detainee who won his writ of habeas, successfully defended against his status as an enemy combatant, and was released from detention as a possible candidate. They were injured-in-fact and were not actually terrorists. However, I suspect that the "wildly swinging doors" of the U.S. standing doctrine would close on him as well.[212] Even if the wrongly accused detainee could get past the public perception that he

[210] *Al Hela*, 972 F.3d at 151.
[211] Carol Rosenberg, *Court Rules Guantanamo Detainees Are Not Entitled to Due Process: The decision in the Case of a Yemeni Held at the Military Prison in Cuba since 2004 Found that an Indefinite Detainee's Only Constitutional Right is to Challenge His Detention*, N.Y. TIMES, (Sept. 2, 2020), https://www.nytimes.com/2020/09/02/us/politics/guantanamo-detainees-due-process.html?auth=login-google1tap&login=google1tap.
[212] Brodin, *supra* note 75, at 1201.

must have done something to be detained in the first place, it is likely that he would still lack standing to challenge the constitutionality of the President's actions because he could not show that the harm would happen to him again in the future with certainty, just like Lyon who was almost choked to death by the police in Los Angeles.[213]

CONCLUSION

With even the tortured detainees most likely unable to achieve standing to challenge Bybee's Commander-in-Chief argument, it is very possible that the answer to the question "who has standing?" is "no one." The current U.S. standing doctrine is too narrow to effectively address this issue, and this could leave the scope of the President's authority unchecked regardless of what the legal community or nation believes the answer to Bybee's argument is. Without a plaintiff able to assert a legally protected interest and a personal connection to the legal claim that the President's actions in violating 18 U.S.C. §§ 2340-2340(A) or the McCain Amendment, the claim would be quickly dismissed.

This is not to say that the President's authority would be completely unchecked after concerns are publicly reported. Public opinion and political pressure have proven to be strong forces before and will likely still be a strong force in the future to steer the administration back to the moral high ground towards a more balanced separation of power. This moral authority and balance of power are important because it is what marks the United States as an example for others and grounds our success. Ted Sorensen, a speechwriter and political advisor to John F. Kennedy, gave a commencement speech right after the Abu Ghraib scandal became public that best explains this. He said:

> Last week, a family friend of an accused American guard in Iraq recited the atrocities inflicted by our enemies on Americans and asked: "Must we be held to a different standard?" My answer is YES. Not only because others expect it. WE must hold ourselves to a different standard. Not only because God demands it, but because it serves our security. Our greatest strength has long

[213] *Lyons*, 461 U.S. at 95.

> been not merely our military might but our moral authority. Our surest protection against assault from abroad has been not all our guards, gates, and guns or even our two oceans, but our essential goodness as a people. Our richest asset has been not our material wealth but our values.[214]

When fear motivates a country, and the use of enhanced interrogation techniques is hidden from the public, it can take a long time for public opinion and political forces to gain momentum. At the end of the day, the United States needs a system that does not rely on an ability to challenge executive action because the assumption that no one has standing has never motivated a U.S. court to find it.[215]

[214] Theodore Sorensen, Commencement Address at the New School University (May 21, 2004).
[215] *Valley Forge Christian Coll.*, 454 U.S. at 489 (quoting *Schlesinger,* 418 U.S. at 227).