

Summer 2013

## Interagency Litigation and Article III

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# INTERAGENCY LITIGATION AND ARTICLE III

*Joseph W. Mead\**

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## I. INTRODUCTION

People generally have better things to do than sue themselves. The same is true for corporations, organizations, and—one would think—governments. In fact, however, litigation between federal agencies is surprisingly common, and often arises in interesting contexts where a lot is at stake.<sup>1</sup> But as the D.C. Circuit put it: “[t]he justiciability of such interagency disputes . . . is a complex and sometimes controversial question that frequently must be addressed by the courts.”<sup>2</sup>

Like all litigation, intragovernmental litigation must satisfy the traditional threshold standards of Article III, including standing and adverse parties. Yet the federal government is no ordinary party, and the application of these general principles to a sovereign is no easy matter. By looking at 200 years of cases, and keeping in mind the Supreme Court’s pronouncements in similar contexts, I propose that a judicially cognizable “case” may not be premised on dueling notions of the public good. Courts have generally been reluctant to hear disputes when both the plaintiff and defendant agency appear asserting the sovereign interests of the United States; such disputes are adverse in fiction but not in fact.

While the Judicial and Executive Branches have wrestled with the difficulty of interagency litigation,<sup>3</sup> the scholarship has largely ignored it. In fact, only a handful of articles so much as mention interagency litigation,<sup>4</sup> and the most recent article on the subject

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<sup>1</sup> *E.g.*, *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>2</sup> *Mail Order Ass’n of Am. v. USPS*, 986 F.2d 509, 527 n.9 (D.C. Cir. 1993).

<sup>3</sup> *E.g.*, *Admin. Assessment of Civil Penalties Against Fed. Agencies Under the Clean Air Act*, 21 Op. O.L.C. 109 (1997); *Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Emp’t Practices*, 6 Op. O.L.C. 121 (1992); *Constitutionality of Nuclear Regulatory Comm’n’s Imposition of Civil Penalties on the Air Force*, 13 Op. O.L.C. 131, 138–39 (1989); *Proposed Tax Assessment Against the USPS*, 1 Op. O.L.C. 79, 80–82 (1977).

<sup>4</sup> Lee A. Albert & Larry G. Simon, *Enforcing Subpoenas Against the President: The Question of Mr. Jaworski’s Authority*, 74 COLUM. L. REV. 545, 552–58 (1974); Louis L. Jaffe, *Standing To Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 297–301 (1961); William K. Kelley, *The Constitutional Dilemma of Litigation Under the Independent Counsel System*, 83 MINN. L. REV. 1197, 1213–15 (1999); Michael W. Steinberg, *Can EPA Sue Other Federal Agencies?*, 17 ECOLOGY L.Q. 317 (1990); Note, *Judicial Resolution of*

has been superseded by two decades of decisions.<sup>5</sup> Unlike prior scholarship, this Article looks at both historical practice and modern Article III case law and finds meaningful jurisdictional limits on interagency litigation.

Although this Article focuses on the Executive Branch, this is not the only arm of the government that seeks judicial intervention when it cannot make up its mind.<sup>6</sup> Recently, the Supreme Court heard a case brought by the State of Virginia against the State of Virginia.<sup>7</sup> Governors have opposed actions brought by their attorneys general.<sup>8</sup> And sometimes one branch of the federal government sues another or even takes up lawyers against itself.<sup>9</sup>

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*Administrative Disputes Between Federal Agencies*, 62 HARV. L. REV. 1050 (1949); Note, *Judicial Resolution of Inter-Agency Legal Disputes*, 89 YALE L.J. 1595 (1980) [hereinafter Note, *Inter-Agency Legal Disputes*] ("Interagency Legal Disputes").

<sup>5</sup> Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991).

<sup>6</sup> For the purposes of this Article, any distinction between agencies in the "Executive Branch" and in the "headless fourth branch" is immaterial. I use "Executive Branch" to mean those parts of the U.S. government that are neither judicial nor legislative. The application of my argument to other entities is left for another time.

<sup>7</sup> Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632 (2011). Litigation between municipalities and states is also common. *E.g.*, *City of Cleveland v. Ohio*, 508 F.3d 827, 834 (6th Cir. 2007); *Illinois v. City of Chicago*, 137 F.3d 474, 476 (7th Cir. 1998). Sometimes, even smaller governmental units find themselves on both offense and defense in the same case, as recently happened to the City of Detroit. See Editorial, *A City Legally Divided Against Itself*, DET. NEWS, July 9, 2012, at A11.

<sup>8</sup> Compare Amicus Brief on Behalf of the Governors of Washington, Colorado, Michigan, and Pennsylvania in Support of Defendants' Motion for Summary Judgment, *Florida v. U.S. Dep't of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT (Nov. 19, 2010), 2010 WL 4876892, with Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, *Florida*, No. 3:10-cv-91-RV/EMT (Nov. 23, 2010), 2010 WL 4876894 (memo by attorneys general of those states taking opposing position).

<sup>9</sup> Stanley M. Brand, *Battle Among the Branches: The Two Hundred Year War*, 65 N.C. L. REV. 901, 904 (1987) ("The issue of which branch is entitled to the mantle of the United States is more than a matter of trivial nomenclature: it reveals deep-seated and fundamental views about the proper role of each branch."); Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033, 1064–65 (2007) (describing competing briefs filed by the Senate Chief Counsel for Employment and the Senate itself regarding litigation over the Congressional Accountability Act of 1995); Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1551 (2012).

In Part II, I explain that the federal judiciary's limited jurisdiction over "cases" and "controversies" generally precludes a suit without adverse parties. This requirement of adverseness is riddled with exceptions and complications and is far more complicated than the literature to date has acknowledged.<sup>10</sup> Indeed, in its recent decision regarding the Defense of Marriage Act, the Supreme Court confronted what type of adverseness must be shown before a federal court may proceed.<sup>11</sup>

In Part III, I survey the interesting history of interagency litigation. Litigation within the government had early roots, from the Attorney General's unsuccessful 1793 mandamus petition against the Secretary of War to early lawsuits by the Postmaster General against deputy postmasters who pocketed more than their fair share of postage revenue. But only over the past several decades has interagency litigation become more common, arising in colorful contexts such as President Nixon's refusal to obey a subpoena, a government-chartered corporation that boldly tried to exercise eminent domain over an agency's land, and an agency that was accused of stealing another's vending machines. Several rationales have been offered to square these cases with the general rule that no party can sue itself, but none fully satisfy. Instead, I argue that these cases can be explained by recognizing the divide between when an agency alleges a proprietary injury (which has been allowed) and when both agencies assert a sovereign interest (which has generally not been permitted).

In Part IV, I explain why litigation between two agencies asserting sovereign interests is not justiciable. Before a plaintiff can sue, there must be an identifiable "injury in fact"—a mere statutory right to sue or an interest in seeing the law obeyed is not enough. But the United States is different: it has standing based on its interest in seeing its laws obeyed, its vision of the public interest vindicated, and its power to regulate unrestrained. These sovereign interests, I argue, justify standing when the United

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<sup>10</sup> For a notable exception, see generally Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-Or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545 (2006).

<sup>11</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2684–89 (2012).

States appears adverse to a party other than the government, but the United States cannot assert a sovereign interest against itself. Such a suit amounts to little more than a squabble between bureaucrats over a regulatory agenda, which is not the proper domain for the judiciary. By studying when interagency litigation is permitted and when it is not, we can better understand the nature of the judicial power, as well as what it means for the "United States" to appear in court.

## II. CASES, CONTROVERSIES, AND ADVERSENESS

The Constitution permits the federal courts to exercise jurisdiction over certain enumerated "cases" and "controversies."<sup>12</sup> These amorphous words begot a slew of overlapping doctrines, such as standing, the rule against advisory opinions, and the requirement of adverse parties, all of which "have grown up to elaborate [Article III's] requirement [and] are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society.'"<sup>13</sup>

### A. THE RULES AND THE EXCEPTIONS

The most (in)famous limitation on the federal courts' jurisdiction is standing. The now-familiar three-prong test of the current standing doctrine requires a plaintiff to establish "injury in fact," causation, and redressability in particular ways.<sup>14</sup> Only one plaintiff in a suit needs to establish standing,<sup>15</sup> but some plaintiff must have standing for every cause of action asserted in an action.<sup>16</sup> Under current law, a legal injury is not enough: there must also be an injury "in fact," although Congress may have some ability to define the range of cognizable injuries.

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<sup>12</sup> See U.S. CONST. art. III.

<sup>13</sup> *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

<sup>14</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>15</sup> *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

<sup>16</sup> *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983).

The Supreme Court has identified several benefits of limiting courts to a defined set of contested, fact-intensive controversies. A plaintiff with an injury supplies specific facts (even if hotly disputed) on which the court can apply the law.<sup>17</sup> Dueling advocates ensure that the issues before the court are fully explored, and an injured plaintiff is believed to be better motivated to advance all relevant arguments than an uninterested one. The Supreme Court has also described standing as a way of limiting judicial interference with the prerogatives of the elected branches.<sup>18</sup> By restricting courts to “judicial” functions, the courts do what they do best, and the elected branches are left to carry out their democratically assigned roles over the remainder. But the Court is quick to note that simply fulfilling the purposes of standing is not enough to provide jurisdiction where it would otherwise be lacking.<sup>19</sup>

Although standing receives the lion’s share of scholarly and judicial attention, it is but one way to articulate the case-or-controversy requirement.<sup>20</sup> Another side of the same coin is that there must be adverse parties, which includes a rule against suing oneself.<sup>21</sup> This can be described as an inherent part of the case-or-controversy requirement,<sup>22</sup> and it can be traced to the early-

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<sup>17</sup> See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (“It tends to assure 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.”).

<sup>18</sup> See *id.* at 473 (“The exercise of the judicial power also affects relationships between the coequal arms of the National Government. The effect is, of course, most vivid when a federal court declares unconstitutional an act of the Legislative or Executive Branch.”).

<sup>19</sup> See *id.* at 475 (“But neither the counsels of prudence nor the policies implicit in the ‘case or controversy’ requirement should be mistaken for the rigorous Art. III requirements themselves.”); *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 225 (1974) (finding no jurisdiction even though “the adverse parties sharply conflicted in their interests and views and were supported by able briefs and arguments”).

<sup>20</sup> See *Flast v. Cohen*, 392 U.S. 83, 100 (1968) (“[T]he standing requirement is closely related to, although more general than, the rule that federal courts will not entertain friendly suits, or those which are feigned or collusive in nature.” (internal citations omitted)).

<sup>21</sup> *E.g.*, Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 3, 13 (2011).

<sup>22</sup> See, *e.g.*, *Muskraat v. United States*, 219 U.S. 346, 361 (1911) (“[J]udicial power . . . is the right to determine actual controversies arising between adverse litigants, duly



English common law.<sup>23</sup> Like standing, adverseness is thought to sharpen the presentation of legal issues by having dueling advocates cast the maximum amount of light on the subject.<sup>24</sup> And the fact that the parties are adverse to one another suggests that judicial intervention is needed to resolve a dispute peacefully.<sup>25</sup>

The requirement of adverseness is closely linked to the concern with collusive suits.<sup>26</sup> Some lawyers with questionable ethics feign suits in order to obtain a favorable ruling to the detriment of a third party.<sup>27</sup> But the judiciary's concern with collusion extends beyond cases brought with ill motive.

The Court has found unfit for adjudication any cause that "is not in any real sense adversary," that "does not assume the 'honest

instituted in courts of proper jurisdiction."); Hall, *supra* note 9, at 1551 ("A one-sided 'case' or 'controversy' is an oxymoron."); Redish & Kastanek, *supra* note 10, at 567-69 & nn.80-95 (discussing *Muskra*'s role in developing the case-or-controversy requirement). Some, however, describe "case" as having a much different meaning in the eighteenth century—a meaning that does not require any sort of dispute. *E.g.*, Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 449 (1994).

<sup>23</sup> Redish & Kastanek, *supra* note 10, at 565 n.73.

<sup>24</sup> See *Baker v. Carr*, 369 U.S. 186, 204 (1962) ("[C]oncrete adverseness . . . sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."). The necessity of adverseness brings to mind the Supreme Court's description of cross-examination as the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 JOHN HENRY WIGMORE, EVIDENCE § 1367 (3d ed. 1940)) (internal quotation marks omitted).

<sup>25</sup> *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892) ("Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals.").

<sup>26</sup> See *Poe v. Ullman*, 367 U.S. 497, 505 (1961) (plurality opinion); *United States v. Johnson*, 319 U.S. 302, 305 (1943) (per curiam); see also *Flast v. Cohen*, 392 U.S. 83, 100 (1968) ("[T]he standing requirement is closely related to, although more general than, the rule that federal courts will not entertain friendly suits or those which are feigned or collusive in nature." (citation omitted)); *Muskra*, 219 U.S. at 361 ("[J]udicial power . . . is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.").

<sup>27</sup> *Lord v. Veazie*, 49 U.S. 251, 254 (1850) (two brothers as litigants to foreclose claim of third-party creditor). But see *Pennington v. Cox*, 6 U.S. (2 Cranch) 33, 33 (1804) (deciding a "feigned issue").

and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court.”<sup>28</sup>

The rule against self-suing also helps to ensure that the judiciary's power is limited. Without such a rule, Article III's limited grant of authority to “cases” and “controversies” would be an empty formalism. Any person could invoke the court to obtain an opinion. Applying this general principle, courts have long held that a litigant cannot sue itself to create a case.<sup>29</sup>

The adverseness requirement is not without exceptions and complexities.<sup>30</sup> Article III judges can resolve uncontested bankruptcy petitions,<sup>31</sup> admiralty suits,<sup>32</sup> and naturalization applications,<sup>33</sup> even though each might involve but a single party.<sup>34</sup> To what extent these exceptions can be squared with the general rule of adverseness is beyond the scope of this Article.<sup>35</sup>

<sup>28</sup> *Poe*, 367 U.S. at 505 (quoting *Johnson*, 319 U.S. at 305).

<sup>29</sup> *Lord*, 49 U.S. at 254; see *Gilbert v. Wash. Beneficial Endowment Ass'n*, 10 App. D.C. 316, 358 (D.C. Cir. 1897) (describing “the case of Dr. Jekyll suing Mr. Hyde. Such a security as that is utterly delusive and impossible . . .”).

<sup>30</sup> See generally Redish & Kastanek, *supra* note 10.

<sup>31</sup> *Cont'l Ill. Nat'l Bank & Trust Co. of Chi. v. Chi., Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 668–74 (1935); William L. Norton, Jr. & Richard Lieb, *Ending the Bankruptcy Jurisdiction Dilemma—An Article III Bankruptcy Court Approach*, 67 JUDICATURE 346, 352 (1984) (“[N]o genuine question exists today as to whether bankruptcy jurisdiction may be vested in an Article III bankruptcy court.”).

<sup>32</sup> Eric B. Schnurer, Note, “*More Than an Intuition, Less Than a Theory*”: Toward a Coherent Doctrine of Standing, 86 COLUM. L. REV. 564, 574 n.61 (1986).

<sup>33</sup> *Tutun v. United States*, 270 U.S. 568, 577 (1926); Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 594 n.107.

<sup>34</sup> In addition, judges sit on the Sentencing Commission, *Mistretta v. United States*, 488 U.S. 361, 390 (1989), promulgate rules of procedure, 28 U.S.C. §§ 2071–2075 (2012); *Mistretta*, 488 U.S. at 389, and supervise grand juries and review applications for wiretap and search warrants, *Mistretta*, 488 U.S. at 389 n.16. These examples, however, arguably relate to some actual controversy with adverse parties. See Redish & Kastanek, *supra* note 10, at 587 n.157 (noting that functions such as issuing a warrant are incidental to an underlying adversarial proceeding).

<sup>35</sup> Although these issues warrant further study, I note that adverseness today appears to depend more on the nature of the interests at stake, and not the adverseness of arguments before the court. That adverseness depends on interests instead of arguments is clear enough when a federal court exercises jurisdiction to enter a default judgment against a party who has forfeited any right to offer argument on his defense. See FED. R. CIV. P. 55.

Significantly, however, each exception involves a plaintiff who has an injury in fact (to use standing language) and seeks adjudication of legal rights.

At a high level of generality, I expect most would agree that the constitutional and policy bases for some justiciability rules are valid. But the devil is in the details, and it seems we are in hell. The standing doctrine has been criticized with a consensus and harshness without equal among other doctrines.<sup>36</sup> Over the past two decades, the Supreme Court has become increasingly formalistic in its approach to justiciability,<sup>37</sup> and the disconnect between stated purpose and doctrine has been, at times, downright absurd. The current approach is both wildly over- and under-inclusive in terms of promoting its billed purposes.<sup>38</sup> For example, per *Lujan*, purchasing a plane ticket gets you into court, or even an injury of a single dollar, but spending much more than that on attorney's fees does not.<sup>39</sup> But this is not the forum to rehash all of the arguments that have been made ably elsewhere. Instead, in this Article, I try to determine and follow justiciability doctrine as faithfully as possible.

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The focus on adverseness was reaffirmed by the Supreme Court's recent reasoning that the United States' was injured (for Article III purposes) by a judgment against it, even though the United States' attorneys affirmatively sought that judgment. See *United States v. Windsor*, 133 S. Ct. 2675, 2685–69 (2013). The conclusion also follows from the Supreme Court's repeated rejection of cases with adverse arguments but no adverse interests. See, e.g., *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013).

<sup>36</sup> See, e.g., Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 466–67 (2008); Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 594 (2010) (“[S]tanding remains one of the most contested areas of federal law, with criticisms of the doctrine nearing the number of commentators.”).

<sup>37</sup> See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 226–27 (1992) (describing requirement that plaintiff purchase a plane ticket as “unnecessarily formalistic”). Indeed, this reflects a general trend in separation-of-powers jurisprudence toward simple rules and away from considering the purpose of the division of power. See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594, 2619–20 (2011); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995).

<sup>38</sup> See generally Elliott, *supra* note 36.

<sup>39</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 579 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (“[I]t may seem trivial to require that Mes. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return . . .”).

## B. THE UNITED STATES AND ITS COURTS

The usual rules on justiciability apply even to the United States, at least in theory. In practice, however, the federal government has standing in every situation (except, as discussed below, when it tries to overturn its own decisions) because it can assert sovereign interests in addition to the usual set of common law injuries that everyone else asserts.

It is a basic principle of standing that litigants' interests in seeing that the law is obeyed or in vindicating their view of the public interest is insufficient to establish a right to sue.<sup>40</sup> Unless, that is, the litigant is the United States: Unlike you or I, the United States need only assert some sovereign interest—that its laws have been violated or an injury to the “public interest”—is at stake to appear in federal court.<sup>41</sup> When it asserts such an injury, the United States is exercising its sovereign prerogative to defend its sovereign interests, which include the interest in governing and vindicating its vision of the public interest, including “the power to create and enforce a legal code, both civil and criminal.”<sup>42</sup>

Of course, the government also has proprietary interests in its property and contracts, just as any private corporation would.<sup>43</sup> “As a proprietor, it is likely to have the same interests as other similarly situated proprietors. And like other such proprietors it

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<sup>40</sup> See, e.g., *FEC v. Akins*, 524 U.S. 11, 24 (1998) (“The abstract nature of the harm—for example, injury to the interest in seeing that the law is obeyed—deprives the case of the concrete specificity that characterized those controversies which were ‘the traditional concern of the courts at Westminster.’” (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting))).

<sup>41</sup> Raoul Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts*, 50 YALE L.J. 65 *passim* (1940); Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 792 (2009); Catherine T. Struve, *Sovereign Litigants: Native American Nations in Court*, 55 VILL. L. REV. 929, 931–32 (2010); cf. *United States v. Larkin, Hoffman, Daly & Lindgren, LTD.*, 841 F. Supp. 899, 906–07 (D. Minn. 1993).

<sup>42</sup> *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). States and Indian tribes also may rely, to a lesser extent, on their sovereign interests in federal court. See generally Nicholas A. Fromherz & Joseph W. Mead, *Equal Standing with States: Tribal Sovereignty and Standing After Massachusetts v. EPA*, 29 STAN. ENVTL. L.J. 130 (2010).

<sup>43</sup> E.g., *Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1850).

may at times need to pursue those interests in court.”<sup>44</sup> Thus, the United States can be harmed in the same manner as a private corporation, and it also enjoys standing to vindicate injuries to its common law interests.

The right of the United States to assert what might otherwise be a generalized grievance is plain enough in the context of a criminal prosecution. Thus, the basis for the prosecution’s standing may be nothing more than “the sovereign, seeking to vindicate the general public interest in compliance with the law.”<sup>45</sup> Yet “all concede” that such cases are within the jurisdiction of the federal courts.<sup>46</sup>

And the Supreme Court has repeatedly sanctioned the United States’ reliance on its sovereign powers to bring civil actions as well.<sup>47</sup> In *In Re Debs*, the Court held that an inherent aspect of sovereignty is the right to invoke the nation’s courts to enforce its sovereign prerogatives.<sup>48</sup> Thirty years later, the Supreme Court

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<sup>44</sup> *Snapp & Son*, 458 U.S. at 601–02. Generally speaking, the divide between sovereign and proprietary interests in the context of interagency litigation overlaps with the divide between an agency’s interest as a regulator (a sovereign interest) and the injury an agency experiences from being regulated by another (a proprietary interest). Cf. Kelley, *supra* note 4, at 1213 (distinguishing between official- and personal-capacity suits).

<sup>45</sup> Edward Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2248 (1999) (internal quotation mark omitted). Certainly some prosecutions involve more tangible harm than others to United States’ interests, such as when money has been stolen from the public fisc or at least harm to a citizen under its protection, as when it brings a case for murder. See *id.* at 2246–51. But plainly not all prosecutions fall into one of these two forms. The Court, and in particular Justice Scalia, has also cited the rule against “generalized grievance” as reserving to the political branches certain classes of disputes which are more appropriately resolved nonjudicially.

<sup>46</sup> *Id.* at 2251; see also *ICC v. Brimson*, 154 U.S. 447, 485–86 (1894) (discussing a hypothetical statute making failure to testify in front of the ICC a violation of federal law and concluding that a prosecution under that statute “would be a case or controversy within the meaning of the Constitution”).

<sup>47</sup> See, e.g., *The Amistad*, 40 U.S. (15 Pet.) 518, 547–48 (1841) (allowing United States to intervene as party and appeal adverse judgment based on foreign relations concerns); Grove, *supra* note 41, at 792–95 (arguing that the basis of the Executive Branch’s authority to sue is the Take Care Clause); Recent Development, *United States Has Nonstatutory Standing To Sue To Enforce Policies of a Federal Statute*, 64 COLUM. L. REV. 951, 951 (1964) (discussing United States’ standing to sue to enforce its “interest in proper implementation of the policies of the Civil Relief Act”).

<sup>48</sup> 158 U.S. 564, 582 (1895). The Court wrote:

once more held that the United States needs no statutory authorization to bring a suit.<sup>49</sup> The Court noted the unique status of the United States, writing:

This is not a controversy between equals. The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction. It has a standing in this suit not only to remove obstruction to interstate and foreign commerce, the main ground, which we will deal with last, but also to carry out treaty obligations to a foreign power . . . . [A]nd no statute is necessary to authorize the suit.<sup>50</sup>

Later decisions have recognized the United States' power to sue to vindicate an interest related to any regulatory program, the public interest more generally, or to articulate its views on the constitutionality of a federal law.<sup>51</sup>

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The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. . . . But passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only instrument by which rights of the public can be enforced and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated either at the instance of the authorities, or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with nor does it destroy the right of appeal in an orderly way to the courts for a judicial determination, and an exercise of their powers by writ of injunction and otherwise to accomplish the same result.

*Id.*; see also *United States v. Texas*, 143 U.S. 621, 643 (1892) ("The present suit falls in each class, for it is, plainly, one arising under the Constitution, laws and treaties of the United States, and, also, one in which the United States is a party. It is, therefore, one to which, by the express words of the Constitution, the judicial power of the United States extends.").

<sup>49</sup> *Sanitary Dist. of Chi. v. United States*, 266 U.S. 405, 426 (1925).

<sup>50</sup> *Id.* at 425–26.

<sup>51</sup> See, e.g., *FTC v. Dean Foods Co.*, 384 U.S. 597, 606 (1966) (finding FTC had standing to seek injunctive relief despite the absence of explicit statutory authorization); *United States v. Raines*, 362 U.S. 17, 27 (1960) ("It is urged that it is beyond the power of Congress to authorize the United States to bring this action in support of private constitutional

Thus, the United States can obtain jurisdiction where a private litigant—even one with congressional authorization—cannot. As Justice Story wrote, in a slightly different context:

It scarcely seems possible to raise a reasonable doubt as to the propriety of giving to the national courts jurisdiction of cases in which the United States are a party. It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts.<sup>52</sup>

The interest of providing a fair tribunal to protect private rights supplies more than sufficient grounds to justify the judiciary's attention, as the alternative is for the executive to use force against the individual directly. Indeed, it is one of the great features of our system that the United States must often obtain permission from an independent and impartial judiciary to inflict an injury against an individual.

To say that the "United States" has standing glosses over an important restriction on who speaks for the United States. The Supreme Court has repeatedly explained that only the Executive

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rights. But there is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights, and we think it perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief."); *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 458–59 (1940) (holding that agency had standing to intervene to further "the public interests which the Commission was designated to represent"); see also *Raines v. Byrd*, 521 U.S. 811, 831 n.2 (1997) ("[A]n injury to official authority may support standing for a government itself or its duly authorized agents." (citations omitted)); Larry W. Yackle, *A Worthy Champion for Fourteenth Amendment Rights: The United States in Parens Patriae*, 92 NW. U. L. REV. 111, 115 (1997) (noting United States' standing to sue to protect the Fourteenth Amendment rights of litigants whether or not they could do so); Note, *Protecting the Public Interest: Nonstatutory Suits by the United States*, 89 YALE L.J. 118, 118 (1979) ("In a series of cases decided during the last century, the Supreme Court recognized the standing of the United States, with or without statutory authority, to sue to protect the public interest."). Some have argued, however, that the early Supreme Court was uneasy with (or even hostile to) nonstatutory suits by the Executive. Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 434 (1995).

<sup>52</sup> 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1674 (Melville M. Bigelow ed., 5th ed. William S. Hein & Co., Inc. 1994) (1833).

Branch—not Congress, and not private parties—may assert the sovereign interests of the United States,<sup>53</sup> and it has done so both in terms of the Take Care Clause<sup>54</sup> as well as standing.<sup>55</sup>

But what happens when the United States sues itself?

### III. WHAT'S BEEN DONE—LITIGATION BETWEEN THE UNITED STATES AND THE UNITED STATES

#### A. THE FIRST 100 YEARS

Although litigation between two departments of the United States government probably would have been unfathomable at the nation's founding,<sup>56</sup> the issue came up in somewhat surprising ways (and surprisingly early in the nation's history). One of the judiciary's earliest confrontations with justiciability—*Hayburn's Case*—at one point lacked a private litigant.<sup>57</sup> The Invalid Pensions Act authorized payments to veterans who became disabled during the Revolutionary War. Controversially, the law required federal judges to process applications for benefits and make recommendations to the Secretary of War.<sup>58</sup> Although the Supreme Court never issued an opinion as a body on the issue, all six Justices viewed the law's use of the judiciary to be unconstitutional,<sup>59</sup> and the Justices' letters set an important precedent still relied on to this day.<sup>60</sup>

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<sup>53</sup> See Grove, *supra* note 41, at 794. There are limited exceptions when the judiciary can appoint a prosecutor to vindicate some judicial interest. See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987) (holding that “courts possess inherent authority to initiate contempt proceedings for disobedience to their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt”); cf. *Morrison v. Olson*, 487 U.S. 654 (1988).

<sup>54</sup> U.S. CONST. art. II, § 3; *Buckley v. Valeo*, 424 U.S. 1, 138 (1976); Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 344, 353–54 (2001); Grove, *supra* note 41, at 805 n.103.

<sup>55</sup> *E.g.*, *Byrd*, 521 U.S. at 816–17; *Newdow v. U.S. Congress*, 313 F.3d 495, 497 (9th Cir. 2002); Hall, *supra* note 9, at 1576–77.

<sup>56</sup> Bloch, *supra* note 33, at 627–28 & n.214.

<sup>57</sup> 2 U.S. (2 Dall.) 409, 410 n.† (1792).

<sup>58</sup> *Id.*

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

<sup>60</sup> See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995). The lesson usually drawn from this decision is that the judicial power includes the ability to decide a



Of relevance here are the procedural machinations behind this important case. Disabled veteran William Hayburn petitioned for pension benefits under the Act, but he resided in a circuit where the judges refused to process such applications.<sup>61</sup> He then solicited the assistance of the Attorney General, who filed a writ of mandamus in the Supreme Court against the lower court judge who had refused to process Hayburn's application.<sup>62</sup> The Justices disagreed over whether the Attorney General had a "right, under such circumstances, and in a case of this kind, to proceed *ex officio*,"<sup>63</sup> and as a result the Court refused to hear his suit.<sup>64</sup> The Attorney General then agreed to represent Hayburn as his private lawyer and re-filed the petition on behalf of Hayburn. The Supreme Court raised no objection to Hayburn's application but declined to issue a ruling until that case became moot.<sup>65</sup>

The Attorney General's defense of the constitutionality of the Invalid Pensions Act continued the following year. Congress expressly authorized the Attorney General to sue,<sup>66</sup> so he again brought an *ex officio* writ of mandamus directed against the Secretary of War.<sup>67</sup> This action was brought pursuant to an agreement between the Attorney General and the Secretary of War, and neither the Secretary of War (nor any other litigant) opposed the motion.<sup>68</sup> Despite the explicit statutory authorization, some Justices still questioned the Attorney General's power to

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case, and courts are not in the business of issuing advisory opinions. *Id.* This formulation, although seemingly straightforward, hides considerable complexity not relevant to this Article. To take one example: through the pardon power, the President can nullify criminal convictions, yet no one doubts that criminal prosecutions are within the judicial power of the United States. *See DeSilva v. DiLeonardi*, 125 F.3d 1110, 1113 (7th Cir. 1997) ("The Constitution itself allows the President to block enforcement of a criminal judgment by issuing a pardon.").

<sup>61</sup> Bloch, *supra* note 33, at 597–98.

<sup>62</sup> *Id.* at 598.

<sup>63</sup> *Hayburn's Case*, 2 U.S. at 409.

<sup>64</sup> *See Filarsky v. Delia*, 132 S. Ct. 1657, 1663 (2012); Bloch, *supra* note 33, at 607.

<sup>65</sup> Bloch, *supra* note 33, at 599 n.122.

<sup>66</sup> *Id.* at 610 & n.163 (citing Act of Feb. 28, 1793, ch. 17, § 3, 1 Stat. 324, 325 (entitled "An Act to Regulate the Claims to Invalid Pensions")).

<sup>67</sup> *Id.* at 610 & n.164.

<sup>68</sup> *See id.*

proceed, and the Attorney General abandoned his effort.<sup>69</sup> Thus, even express congressional authorization was not enough for the Supreme Court to hear the suit.<sup>70</sup>

In her thorough exploration of this issue, Professor Bloch argues that the Court was troubled by a lack of an explicit presidential directive to bring the suit,<sup>71</sup> a concern that certainly would not bother courts today. But it is also possible that the Justices were troubled by the lack of a justiciable controversy when the Attorney General and the Secretary of War were the only parties.<sup>72</sup> Relatedly, the Justices might have questioned the Attorney General's standing to bring this suit.<sup>73</sup> In any event, the Court avoided setting an early precedent permitting intragovernment litigation, although it also managed to avoid saying anything clear on the subject.

Although dodging the issue in *Hayburn's Case*, the Court was asked the following year to provide "advice" to President Washington on twenty-nine foreign policy questions.<sup>74</sup> The President's cabinet disagreed over the proper answer to many of these questions, and the Executive Branch looked to the Supreme Court for guidance.<sup>75</sup> The Justices famously declined to opine on the questions, citing "[t]he lines of separation drawn by the

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<sup>69</sup> *Id.* at 610.

<sup>70</sup> *See id.* at 599. A decade later, the Supreme Court famously concluded that it lacked jurisdiction to issue a writ of mandamus against an executive official. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). But as Professor Bloch explains, the Supreme Court saw no trouble with its jurisdiction over such cases during the first decade, and it is "highly unlikely" that this troubled the Court in 1793. Bloch, *supra* note 33, at 613 n.175; *see also* *United States v. Lawrence*, 3 U.S. (3 Dall.) 42, 53 (1795) (mandamus brought against circuit judge that refused to issue warrant).

<sup>71</sup> Bloch, *supra* note 33, at 613–14.

<sup>72</sup> *Id.* at 611 ("In today's parlance, the justices might have questioned first, whether there exists a justiciable controversy when the Attorney General sues the Secretary of War pursuant to an agreement reached under orders from Congress . . ."); *see also* Yackle, *supra* note 51, at 115 n.12 (noting that some have suggested that *Hayburn's Case* "reflects constitutional complications arising from the government 'litigating with itself'").

<sup>73</sup> Bloch, *supra* note 33, at 599.

<sup>74</sup> *See* Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 144–58 (discussing the request and the motivations of the Justices in declining to provide advice).

<sup>75</sup> William R. Casto, *The Early Supreme Court Justices' Most Significant Opinion*, 29 OHIO N.U. L. REV. 173, 181 (2002).

Constitution between the three departments of the government.”<sup>76</sup> Instead, Chief Justice John Jay wrote on behalf of the Court, the President was left to seek advice from the heads of departments.<sup>77</sup> Like *Hayburn’s Case*, this exchange is cited as precedent against issuing advisory opinions, which in this context means resolving legal issues before a case requires judicial attention.<sup>78</sup> But, like *Hayburn’s Case*, it could also suggest that the early Court was unwilling to provide a judicial forum for disagreements within the government.

The early judiciary also had to wrestle with the mandamus action. Most mandamus actions, like *Marbury v. Madison*, involving a private citizen’s request for mandamus relief against an Executive Branch official for a nondiscretionary duty.<sup>79</sup> Mandamus actions were often captioned as being brought on behalf of the “United States” (on the relation of the petitioner) against one of its officers in an official capacity.<sup>80</sup> But this was mere pleading, nothing more: generally, the litigation was in fact brought by a private citizen who had to show a personal injury to establish a claim for relief.<sup>81</sup> “The real parties to the[se] dispute[s] were, therefore, the relators and the United States.”<sup>82</sup>

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<sup>76</sup> RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 79 (6th ed. 2009) (reprinting August 8, 1793 letter from Chief Justice Jay to President Washington).

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

<sup>78</sup> *E.g.*, *United States v. Sharpe*, 470 U.S. 675, 726 n.17 (1985) (Stevens, J., dissenting); FALLON, *supra* note 76, at 79–80.

<sup>79</sup> 5 U.S. (1 Cranch.) 137 (1803); see also Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 *CARDOZO L. REV.* 2241, 2247 (2011) (collecting cases).

<sup>80</sup> See, *e.g.*, *United States ex rel. Greathouse v. Dern*, 289 U.S. 352 (1933); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838).

<sup>81</sup> *Kendall*, 37 U.S. at 612. There is contrary authority in early cases that appears to suggest that anyone can enforce a public right, even without a personal interest in the proceeding. See Craig A. Stern, *Another Sign from Hein: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing To Sue?*, 12 *LEWIS & CLARK L. REV.* 1169, 1189–91 (2008) (collecting authority).

<sup>82</sup> *Kendall*, 37 U.S. at 611. On occasion, the Attorney General would seek mandamus as a way of appealing the action of a lower court judge. In 1795, for instance, the Attorney General brought a petition for a writ of mandamus on behalf of the United States against a district court judge who refused to issue the Executive Branch a requested warrant. *United States v. Lawrence*, 3 U.S. (3 Dall.) 42, 42 (1795). The Supreme Court unanimously

Although mandamus petitions are not as common today, they share some similarities to the *qui tam* action, which also dates back to English common law<sup>83</sup> and the early years of the republic.<sup>84</sup> *Qui tam* actions—short for a Latin phrase meaning “who as well for the king as for himself sues in this matter”<sup>85</sup>—supply a bounty to a successful relator who recovers money belonging to the government. These actions are often brought against private entities but cannot be brought against the government.<sup>86</sup> Like mandamus petitions, the *qui tam* plaintiff-relator formally sues on behalf of the United States, in part because any recovery is split with the government. But unlike the mandamus petition, the *qui tam* plaintiff-relator need not establish any personal injury beyond the promised bounty. Thus, the plaintiff-relator’s standing is entirely derivative of the United States’ as a partial assignee of the government’s proprietary interest.<sup>87</sup> (Later commentary would argue that the Supreme Court’s decision approving of *qui tam* actions confirms that sovereign interests cannot be assigned to a private party.<sup>88</sup>) Yet the presence of an interested private party establishes a

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concluded that it had no power to grant the writ because the judge “was acting in a judicial capacity.” *Id.* at 53. This decision appears to be based on an interpretation of the scope of the common law mandamus action rather than a constitutional or jurisdictional holding. See Susan Low Bloch & Maeva Marcus, *John Marshall’s Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301, 327 n.102 (“The Court appears never to have questioned its jurisdiction.”). But the Attorney General never sought mandamus against another executive branch officer.

<sup>83</sup> *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 776–77 (2000); see generally J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 565–608 (2000) (discussing the original intent of *qui tam* suits as well as their eventual legislative abolition).

<sup>84</sup> *Stevens*, 529 U.S. at 776–77.

<sup>85</sup> The Latin phrase is *qui tam pro domino rege quam pro se ipso in hac parte sequitur*. BLACK’S LAW DICTIONARY 1368 (9th ed. 2009).

<sup>86</sup> Compare, e.g., *United States ex rel. Holmes v. Consumer Ins. Grp.*, 318 F.3d 1199 (10th Cir. 2003) (en banc), with *Juliano v. Fed. Asset Disposition Ass’n*, 736 F. Supp. 348, 352 (D.D.C. 1990) (rejecting *qui tam* action against the United States agency because “plaintiff and defendant are one”).

<sup>87</sup> The interest that the private relator can assert, however, is only the government’s proprietary interest (such as a loss of funds) rather than a sovereign interest. *Stevens*, 529 U.S. at 771–73; Grove, *supra* note 41, at 805 n.103.

<sup>88</sup> Gilles, *supra* note 54, at 344, 353–54; Grove, *supra* note 41, at 805 n.103.

controversy, despite the formal designation of the United States on both sides of the case.<sup>89</sup>

Efforts to steal from the government are not new, and the early United States occasionally had to collect debts through litigation. Sometimes, this meant the government had to sue its own contractors. Consider the early Post Office, a government corporation headed by the Postmaster General, who appointed regional "deputy postmasters" to manage the financial and logistical aspects of carrying the mail.<sup>90</sup> Every three months, these deputies were required to account for their revenue and expenditures and pay into the public treasury the net profit.<sup>91</sup> But the deputies could not always be trusted to timely pay their due, so Congress authorized the Postmaster General "to cause a suit to be commenced" against a recalcitrant deputy.<sup>92</sup> The Supreme Court found that this law, as amended, fell within the ambit of the circuit courts' federal question jurisdiction.<sup>93</sup>

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<sup>89</sup> *Stevens*, 529 U.S. at 776–77; Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 381–87 (1989). Further, although *qui tam* and mandamus actions may be brought against an employee or officer of the United States, they are never brought against the United States itself or an agency. The common premise of both actions is that the official has acted in violation of a statutory duty. In a sense, then, the action is against the official in a private capacity because the official has been charged with acting beyond the office's power. Cf. *Ex Parte Young*, 209 U.S. 123, 159 (1908) ("The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity."). Of course, as a formal matter, mandamus actions are usually brought against the official in an official capacity and automatically substitute a successor official as a defendant if the original official resigns. See FED. R. APP. P. 43(c)(2).

<sup>90</sup> 1 Stat. 232, 234 (1794); see generally Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671 (2007).

<sup>91</sup> 1 Stat. at 234.

<sup>92</sup> *Id.* at 238.

<sup>93</sup> *Post Master Gen. of the U.S. v. Early*, 25 U.S. (12 Wheat.) 136, 147–49 (1827). Curiously, the Court distinguished between a suit brought by the "United States" and a suit brought by the Postmaster General (even in his official capacity), suggesting that the latter suit could not take advantage of the jurisdiction of courts to hear cases to which the United States was a party. *Id.*; see also *Osborn v. Bank of United States*, 22 U.S. 738, 825–26 (1824) ("The Postmaster General, for example, cannot sue under that part of the [C]onstitution which gives jurisdiction to the federal Courts, in consequence of the character of the party."); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1680 (1st ed. 1833) (same).

Several decades later, the Supreme Court was again confronted with the Executive Branch on both sides of a dispute.<sup>94</sup> During the Civil War, a Union gunship seized a vessel owned by an Alabaman that attempted to run a Union blockade.<sup>95</sup> The United States claimed title to the vessel as a spoil of war, and the district court condemned it in favor of the captors.<sup>96</sup> However, in the meantime, the owner of the vessel convinced the Secretary of Treasury that the owner was loyal to the United States and was attempting to flee to nonrebel territory.<sup>97</sup> As a result, the Secretary issued an order of remission, and the owner of the vessel tried to rely on this order to preserve his claim to title.<sup>98</sup>

The Assistant Attorney General argued on behalf of the United States that the prior owner's title to the vessel was forfeited, and that the remission from the Treasury did not salvage the claimant's title.<sup>99</sup> The Solicitor of the Treasury (who then had what was effectively independent litigating authority<sup>100</sup>) appeared and sought to argue the effect of the order of remission.<sup>101</sup> The Court held that when "the United States is a party" and is represented by the Attorney General, "no counsel can be heard in opposition on behalf of any other of the departments of the government."<sup>102</sup> The Court did not explain whether its reluctance

<sup>94</sup> *The Gray Jacket II*, 72 U.S. (5 Wall.) 370 (1866).

<sup>95</sup> *The Gray Jacket I*, 72 U.S. (5 Wall.) 342, 365–66 (1866); see also Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1916–17 (2010).

<sup>96</sup> *Gray Jacket I*, 72 U.S. at 351.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 352. Also arguing on behalf of this position was counsel for the captors. *Id.*

<sup>100</sup> As part of the Judiciary Act of 1789, the Attorney General was given responsibility for litigating "all suits in the Supreme Court in which the United States shall be concerned." 1 Stat. 73, 92–93 (1789). But between 1820 and 1870, the Solicitor of the Treasury had rival authority. 4 Stat. 414 (1830); see also Sewall Key, *The Legal Work of the Federal Government*, 25 VA. L. REV. 165, 177–81 (1938) (describing the establishment of the Solicitor of the Treasury).

<sup>101</sup> *Gray Jacket II*, 72 U.S. at 371.

<sup>102</sup> *Id.* at 371; see also *The Confiscation Cases*, 74 U.S. 454, 458 (1868) ("[N]o counsel will be heard for the United States in opposition to the views of the Attorney-General, not even when employed in behalf of another of the executive departments of the government."). However, the Court allowed the Solicitor to argue because Treasury's counsel (and all other parties) assumed that he would be permitted to argue. *Gray Jacket II*, 72 U.S. at 371.

to permit another department to appear was based on prudential, statutory, or constitutional considerations.<sup>103</sup> Regardless, with or without Treasury's participation, there was plainly a controversy between the vessel's owner, the captors, and the United States.

In sum, the early history is not conclusive, but it is consistent with a general skepticism towards judicial intervention when there are no private interests at stake. However, since *Gray Jacket*, differences of opinion within the federal government have at times been presented to courts in proceedings involving at least some private litigants.<sup>104</sup> Consistent with the rule that one plaintiff needs to establish standing for a case to proceed,<sup>105</sup> the government's difference of opinion does not defeat a controversy that already existed, nor does it create a controversy where one did not exist before.<sup>106</sup>

But what about when the entire case consists solely of the United States?

#### B. *UNITED STATES V. UNITED STATES* IN THE SUPREME COURT

Over the past sixty years, courts have dealt directly with lawsuits where the only controversy is between two agencies. The Supreme Court has twice expressly permitted such litigation to

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<sup>103</sup> Robert E. Johnston, Note, *1001 Attorneys General: Executive-Employee Qui Tam Suits and the Constitution*, 62 GEO. WASH. L. REV. 609, 624 (1994).

<sup>104</sup> See, e.g., *Udall v. Fed. Power Comm'n.*, 387 U.S. 428, 433 (1967) (Secretary of Interior intervened in challenge to Federal Power Commission's order); *Sec'y of Agric. v. United States*, 350 U.S. 162 (1956) (Secretary of Agriculture and United States intervened in suit to challenge ICC's order regarding railroad liability for broken eggs); *United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980); *In re Pfeiffer*, 254 F. 511 (S.D.N.Y. 1918) (Learned Hand, J.) (noting that Department of Labor objected to argument made by Department of Justice); *Alabama v. United States*, 56 F. Supp. 478, 484 (W.D. Ky. 1944) ("The United States of America filed an answer pointing out that the proceedings presented a situation where one Government agency was opposing another Government agency, and in view of the fact that both Government agencies would have an opportunity to present their respective positions by their own counsel it would take a neutral position without prejudice to its later support of one or the other agency in any appeal that might be taken from the decree of the Court."), *rev'd*, 325 U. S. 535 (1945).

<sup>105</sup> E.g., *Horne v. Flores*, 557 U.S. 433, 445 (2009).

<sup>106</sup> Herz, *supra* note 5, at 981 ("Arguably, as long as litigation is already taking place between a private party and the government, other governmental parties should be able to join or file companion suits.").

proceed, but only with a number of caveats that have been overlooked at times by lower courts.

The earliest case arose against the backdrop of World War II.<sup>107</sup> To meet the demands of war, the U.S. government shipped a large amount of goods to a port over the railways. With stereotypical generosity, the railways charged the government the full regulated rate, even though the government—not railroad staff—serviced the shipment.<sup>108</sup> When the government argued before the Interstate Commerce Commission, which regulated the railways, that the rate should have been abated because it did all the work, it lost.<sup>109</sup> The government thereafter challenged the Commission's decision in district court.<sup>110</sup> Although the Civil Division of the Department of Justice both formally brought the suit challenging the ICC decision and defended against that challenge,<sup>111</sup> in reality the defense was supplied by lawyers from the ICC and from the railroads, which intervened to defend of the order.<sup>112</sup>

In the district court, a three-judge panel dismissed the complaint on the grounds that no party may sue itself, but the Supreme Court reversed.<sup>113</sup> The Court "look[ed] behind the names that symbolize[d] the parties to determine whether a justiciable case or controversy [was] presented."<sup>114</sup> The case was really not between the government and itself, the Court concluded, but "to settle who is legally entitled to sums of money, the Government or the railroads."<sup>115</sup> Such an action is "of a type which [is] traditionally justiciable," and the Court concluded that the

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<sup>107</sup> *United States v. ICC*, 337 U.S. 426 (1949); see also Kelley, *supra* note 4, at 1213 (noting that "[t]he most prominent and extended judicial discussion of this question came in *United States v. ICC*").

<sup>108</sup> See *United States v. ICC*, 78 F. Supp. 580, 581 (D.D.C. 1948), *rev'd*, 337 U.S. 426 (1949).

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

<sup>110</sup> *Id.*

<sup>111</sup> See *id.* at 582–83 (noting that both the petition and answer were "signed by the same Assistant Attorney General").

<sup>112</sup> 337 U.S. at 432. The presence of railroads as a party dispels any doubt that there was a justiciable controversy: that is, one between the United States and the railroads.

<sup>113</sup> *Id.* at 429, 444.

<sup>114</sup> *Id.* at 430.

<sup>115</sup> *Id.*



government had a judicial recourse to fight the railroads' alleged illegal overcharging.<sup>116</sup>

Although *United States v. ICC* is generally cited for the proposition that the United States can sue itself, the case is better understood as an exception to the general prohibition on such suits. In fact, the Court expressly confirmed the "general principle" that "no person may sue himself," including the United States, because courts "do not engage in the academic pastime of rendering judgments in favor of persons against themselves."<sup>117</sup> One commentator summarized the *ICC* decision: "The government may well be unable to sue itself, then, but that is not what it was doing in this case."<sup>118</sup>

The Supreme Court again had to grapple with interagency litigation a few years later in *United States ex rel. Chapman v. Federal Power Commission*, when the Secretary of the Interior and a private trade association challenged a ruling of the Federal Power Commission.<sup>119</sup> The Secretary asserted standing based on his "statutory duty to act as sole marketing agent of power developed at public hydroelectric projects."<sup>120</sup> The Supreme Court found that it had jurisdiction, but it could not identify a reason why. Instead, the Supreme Court simply wrote:

We hold that petitioners have standing. Differences of view, however, preclude a single opinion of the Court as to both petitioners. It would not [add] further clarification of this complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations, to set out the divergent grounds in support of standing in these cases.<sup>121</sup>

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<sup>116</sup> *Id.* at 430-31.

<sup>117</sup> *Id.* at 430.

<sup>118</sup> Herz, *supra* note 5, at 941.

<sup>119</sup> 345 U.S. 153 (1953).

<sup>120</sup> *Id.* at 155.

<sup>121</sup> *Id.* at 156.

Although *Chapman* does not directly provide insight on the limits of federal jurisdiction, the Court's difficulty on this issue emphasizes the controversial and difficult nature of the question.

A few decades later, President Nixon's legal troubles gave rise to a decision<sup>122</sup> proving the old adage that bad facts make bad law. A special prosecutor was appointed and delegated power by the Attorney General, who promised not to interfere with the prosecutor's work.<sup>123</sup> The prosecutor subpoenaed President Nixon for certain documents, which he resisted on the grounds of privilege.<sup>124</sup> When the prosecutor filed suit, the President argued, among other things, that there was no justiciable lawsuit because both sides were part of the Executive Branch.<sup>125</sup> Noting the nature of the legal question (assessing a privilege), the proceeding (criminal prosecution), the formal independence of the prosecutor from the President, and the "steadfast" opposition of the parties, the Court concluded that there was a justiciable controversy under the "unique facts" of the case.<sup>126</sup> As will be seen, lower courts have read this case outside of its unique context in allowing interagency litigation. The case also serves as legal support for litigation arising under the Independent Counsel Act, which authorizes an independent lawyer, appointed by a court, to exercise the investigatory and prosecutorial duties of the United States, subject to limited removal by the Attorney General.<sup>127</sup>

In 1991, the Supreme Court was once more presented with an interagency dispute, this time between the Secretary of Labor and the Occupational Safety and Health Review Commission.<sup>128</sup> The Secretary petitioned for review of the Commission's decision to

<sup>122</sup> See *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>123</sup> *Id.* at 694–95, 696.

<sup>124</sup> *Id.* at 696–97.

<sup>125</sup> *Id.* at 692.

<sup>126</sup> *Id.* at 697.

<sup>127</sup> See, e.g., John Q. Barrett, *All or Nothing, or Maybe Cooperation: Attorney General Power, Conduct, and Judgment in Relation to the Work of an Independent Counsel*, 49 MERCER L. REV. 519, 522 (1998) (discussing Ken Starr's use of *Nixon* during his turn as Independent Counsel investigating President Clinton's alleged wrongdoing); see generally Kelley, *supra* note 4, at 1201–10 (reviewing intrabranch litigation involving Independent Counsels from 1974 to 1993).

<sup>128</sup> *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1996).

disallow the Secretary's efforts to enforce a citation against a private company.<sup>129</sup> That company intervened,<sup>130</sup> and the Commission, although nominally a party, did not participate in the circuit court and appeared only as an amicus before the Supreme Court.<sup>131</sup> Although the Court did not comment on jurisdiction, the presence of a private party is critical.<sup>132</sup> In this somewhat unusual procedural posture, the adjudicating agency is analogous to a district court and thus has no interest in defending its judgment on appeal, despite being named as a respondent.<sup>133</sup>

### C. *UNITED STATES V. UNITED STATES* IN THE LOWER COURTS

Litigation in the lower courts involving solely federal government parties follows a few patterns but includes inconsistent and unreasoned outlying decisions. In many cases, the trouble with intragovernment litigation is not raised. Although courts do have a duty to assess their own jurisdiction, "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."<sup>134</sup> Yet despite these caveats, the lower courts have tended to assert jurisdiction over interagency disputes, either explicitly or silently.

One type of suit deals with the distribution of money or property between agencies. Federal Circuit precedent holds that no controversy exists when money is to be moved from one

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<sup>129</sup> *Id.* at 150.

<sup>130</sup> *See id.* at 146 (noting that the respondent's case was argued by a lawyer representing the private company, CF&I Steel Corp.).

<sup>131</sup> Brief for the Petitioner at 7 n.6, *Martin*, 499 U.S. 144 (No. 89-1541), 1990 WL 508097, at \*7 n.6 ("The Commission was a nominal respondent in the court of appeals (pursuant to Fed.R.App.P. 15(a)), but did not participate in those proceedings, in accordance with its statutory role as a purely adjudicatory agency.").

<sup>132</sup> However, other courts have silently asserted jurisdiction over such petitions, even in the absence of an interested private party. *E.g.*, *Reich v. Occupational Safety & Health Review Comm'n*, 998 F.2d 134, 137 (3d Cir. 1993); *Sec'y of Labor v. Occupational Safety & Health Review Comm'n*, 980 F.2d 1273 (9th Cir. 1992) (unopposed petition for review).

<sup>133</sup> *Hinson v. NTSB*, 57 F.3d 1144, 1147 n.1 (D.C. Cir. 1995) (stating that adjudicator has no cognizable interest as a party).

<sup>134</sup> *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448–49 (2011) (collecting cases).

government pot to another. For example, the Federal Deposit Insurance Corporation (FDIC) sometimes sues the United States as successor to the interests of a failed financial institution.<sup>135</sup> But when any judgment will only accrue to the FDIC's coffers,<sup>136</sup> no justiciable controversy exists,<sup>137</sup> because "none of the money paid by the government in satisfaction of such a judgment would leave the government."<sup>138</sup>

Other courts have agreed that disputes within the federal government over money or property are not justiciable.<sup>139</sup> For example, the Tennessee Valley Authority, a government-chartered corporation, attempted to condemn land owned by the Farmers' Home Administration to obtain an easement for a new power line.<sup>140</sup> The court rejected the lawsuit because there was no "identity separate or distinct" from that of the United States;

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<sup>135</sup> *E.g.*, *Landmark Land Co. v. FDIC*, 256 F.3d 1365, 1379 (Fed. Cir. 2001).

<sup>136</sup> For example, when the FDIC takes over and liquidates a failing financial institution, the FDIC becomes a high-priority creditor entitled to be reimbursed by the institution before others. See 12 U.S.C. § 1821(d)(11) (2006).

<sup>137</sup> *Landmark Land Co.*, 256 F.3d at 1380; see also *FDIC v. United States*, 342 F.3d 1313, 1317–18 (Fed. Cir. 2003) (rejecting the FDIC's attempt to distinguish *Landmark Land Co.*); *Glass v. United States*, 258 F.3d 1349, 1355 (Fed. Cir. 2001) (finding no justiciability for the same reason as *Landmark Land Co.*, which was issued concurrently).

<sup>138</sup> *Landmark Land Co.*, 256 F.3d at 1380. Other courts have disagreed, finding that they could hear the Tennessee Valley Authority's suit for money against the government because there was sufficient tension between the Authority and an Executive Branch agency. See *TVA v. United States*, 51 Fed. Cl. 284, 287 (2001) ("We are satisfied, if we needed any other proof than the vigorous conduct of the litigation heretofore, that opposing interests are before us with respect to the type of controversy that this court is equipped to address."); see also *TVA v. United States*, 13 Cl. Ct. 692, 699 (1987) ("The dispute between TVA and DOE is not illusory").

<sup>139</sup> *E.g.*, *Juliano v. Federal Asset Disposition Ass'n*, 736 F. Supp. 348, 352–53 (D.D.C. 1990), *aff'd*, 959 F.2d 1101 (D.C. Cir. 1992) (table); see also *Sweeney v. FDIC*, 116 F.3d 942 (D.C. Cir. 1997) (table) (following *Juliano* in *qui tam* action); *Emps. Welfare Comm. v. Daws*, 599 F.2d 1375, 1377–78 (5th Cir. 1979) (suit for declaratory and injunctive relief as well as damages against local postmaster by USPS arm for conversion of property); *Def. Supplies Corp. v. U.S. Lines Co.*, 148 F.2d 311, 312–13 (2d Cir. 1945) (suit brought by wholly owned government corporation against the United States based on dispute over liability for damaged wool); *United States v. Easement & Right of Way*, 204 F. Supp. 837, 839 (E.D. Tenn. 1962) (government corporation attempted to exercise eminent domain against another agency); cf. *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1084 (D. Colo. 1985) (refusing to join Army as a defendant in United States' suit to require private party to clean up site).

<sup>140</sup> *Easement & Right of Way*, 204 F. Supp. at 838.

therefore, "there could not be any issue between the TVA and the FHA, both being the United States, which this Court could litigate or adjudicate. Any differences between these agencies would at most be interagency disputes which are not subject to settlement by adjudication."<sup>141</sup>

Courts have also avoided other disputes over government property. Consider an example from the Fifth Circuit. For twenty-five years, the Employees Welfare Committee (an instrumentality of the U.S. Post Office) operated vending machines and other facilities for the benefit of Miami Post Office employees.<sup>142</sup> But in 1973, for reasons now lost to history, the postmaster abruptly dissolved the committee, destroyed the vending machines, and installed new ones.<sup>143</sup> The committee sued the post office for damages and injunctive relief, but the Fifth Circuit concluded that the plaintiff "as an arm of an agency of the United States government cannot bring suit against the government."<sup>144</sup> Twenty years prior, the Second Circuit reached a similar conclusion in a contract action brought by a wholly owned government corporation against the United States seeking compensation for wool that was damaged during its cross-ocean journey.<sup>145</sup> In contrast, however, at least one court has held that contract actions brought by one agency against another are justiciable.<sup>146</sup>

The most common type of interagency suit involves one agency as an employer and the other as an enforcer of federal labor laws. For example, the Federal Labor Relations Authority (FLRA) regulates the labor practices of federal agencies<sup>147</sup> and frequently finds itself pitted against other federal agencies.<sup>148</sup> The FLRA is

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<sup>141</sup> *Id.* at 839.

<sup>142</sup> *Daws*, 599 F.2d at 1376-77.

<sup>143</sup> *Id.* at 1377.

<sup>144</sup> *Id.* at 1378.

<sup>145</sup> *Def. Supplies Corp. v. U.S. Lines Co.*, 148 F.2d 311, 312-13 (2d Cir. 1945).

<sup>146</sup> *Dean v. Herrington*, 668 F. Supp. 646, 652 (E.D. Tenn. 1987).

<sup>147</sup> 5 U.S.C. §§ 7104-7105 (2006). The FLRA is free from the statutory obligation to submit to Department of Justice representation. *Id.* § 7105(h).

<sup>148</sup> *E.g.*, *IRS v. FLRA*, 494 U.S. 922 (1990); *EEOC v. FLRA*, 476 U.S. 19 (1986); *Dep't of the Air Force v. FLRA*, 680 F.3d 826 (D.C. Cir. 2012); *PTO v. FLRA*, 672 F.3d 1095 (D.C. Cir. 2012); *Dep't of the Treasury v. FLRA*, 670 F.3d 1315 (D.C. Cir. 2012); *Dep't of the Navy*

an unusual creature, having been created solely to regulate the federal government. Federal agencies have been expressly authorized to seek judicial review of adverse FLRA orders.<sup>149</sup> The courts have not been asked to directly confront the justiciability of the FLRA's disputes with other agencies but have nonetheless silently asserted jurisdiction over many.<sup>150</sup>

Like the FLRA, the Merit Systems Protection Board (MSPB) oversees the personnel practices of federal agencies. And yet the MSPB lacks authority to commence an enforcement suit against a recalcitrant agency.<sup>151</sup> This was no accident: following the advice of the Department of Justice,<sup>152</sup> President Reagan vetoed legislation that would have permitted the MSPB's Office of Special Counsel to litigate against the government, in part because "permitting the executive branch to litigate against itself conflicts with constitutional limitations on the exercise of the judicial power of the United States to actual cases or controversies between parties with concretely adverse interests."<sup>153</sup>

And yet the MSPB can litigate against at least one other agency. The Office of Personnel Management (OPM) can, and occasionally does, seek judicial review if an order of the Board will substantially impact civil service rules.<sup>154</sup> In *Horner v. MSPB*, the Federal Circuit rejected an argument that the court lacked jurisdiction over OPM's appeal when the claims of the underlying

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v. FLRA, 665 F.3d 1339 (D.C. Cir. 2012); *Dep't of Homeland Sec. v. FLRA*, 647 F.3d 359 (D.C. Cir. 2011); *NLRB v. FLRA*, 2 F.3d 1190 (D.C. Cir. 1993); *see also* 5 U.S.C. § 7123 (2006). Often, a relevant union intervenes as an interested party. *E.g.*, *Dep't of the Treasury*, 670 F.3d at 1315.

<sup>149</sup> *E.g.*, 5 U.S.C. §§ 7104–7105.

<sup>150</sup> *Cf.* *SEC v. FLRA*, 568 F.3d 990, 997–98 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (collecting cases).

<sup>151</sup> *See* 5 U.S.C. § 1214 (2006).

<sup>152</sup> *Auth. of the Special Counsel of the MSPB To Litigate & Submit Legislation to Cong.*, 8 Op. O.L.C. 30, 33–34 (1984).

<sup>153</sup> Herz, *supra* note 5, at 897 n.16.

<sup>154</sup> 5 U.S.C. § 7703(d) (2006); *see James v. Von Zemenszky*, 284 F.3d 1310, 1314 (Fed. Cir. 2002); *King v. Alston*, 75 F.3d 657, 660 (Fed. Cir. 1996); *Newman v. Lynch*, 897 F.2d 1144, 1145–46 (Fed. Cir. 1990). In many of these cases, the employee was named as an additional respondent. No other agency has this statutory authority. *See* 5 U.S.C. §§ 1204, 1214, 7703(a)(1) (2006); *Dep't of Health & Human Serv. v. Bercier*, 261 F. App'x 284, 284 (Fed. Cir. 2008).

employee were no longer contested.<sup>155</sup> The court found that it had jurisdiction because OPM had a statutory right to appeal and had standing because the Board's determination "is of vital interest to OPM, which has administrative responsibility for personnel practices and policies throughout most parts of government."<sup>156</sup> In other words, the court concluded it had jurisdiction to resolve the intrabranch dispute because (1) there was statutory authorization for it and (2) one agency has an "interest" in how another agency with final say on the issues interprets the law.<sup>157</sup>

Other times, one agency's regulation of another is incidental to a general regulatory mission. Where there is regulation, there is an urge to litigate, either to enforce the penalty or to challenge it. For instance, the Environmental Protection Agency (EPA) asserted the authority to impose penalties on other agencies for violations of the Clean Air Act.<sup>158</sup> The Department of Justice concluded that the EPA had the authority to issue penalties, but any dispute over the fines could not be brought into litigation consistent with Article III.<sup>159</sup> It based this on the DOJ's longstanding view that courts lack jurisdiction over lawsuits when Executive Branch agencies are the only real parties in interest.<sup>160</sup>

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<sup>155</sup> 815 F.2d 668, 670-72 (Fed. Cir. 1987).

<sup>156</sup> *Id.* at 671.

<sup>157</sup> *See id.* It appears that Congress sought to provide the court with this power. *See* S. Rep. No. 95-969, at 53 (1978) ("[T]he section establishes . . . a means for OPM to appeal Board decisions to court where the Board and the Director have substantial disagreements about the proper interpretation or direction of the government's personnel laws."). A similar conclusion was reached in *EEOC v. USPS*, 860 F.2d 372, 375 (10th Cir. 1988).

<sup>158</sup> *See* Admin. Assessment of Civil Penalties Against Fed. Agencies Under the Clean Air Act, 21 Op. O.L.C. 109 *passim* (1997).

<sup>159</sup> *See id.*

<sup>160</sup> *See id.*; *see also* Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Emp't Practices, 6 Op. O.L.C. 121, 129 (1992) ("Given that there is ultimately but a single interest of the executive branch—that determined by the President—litigation between two executive agencies would not appear to involve the requisite adversity of interests to constitute a 'Case[]' or 'Controvers[y]' within the meaning of Article III." (alterations in original)); Constitutionality of Nuclear Regulatory Comm'n's Imposition of Civil Penalties on the Air Force, 13 Op. O.L.C. 131, 138-39 (1989); Proposed Tax Assessment Against the USPS, 1 Op. O.L.C. 79, 80-82 (1977).

A panel of the Eleventh Circuit disagreed, however, when the Tennessee Valley Authority took the EPA to court.<sup>161</sup> The panel formulated a two-part test, loosely based on *Nixon*: (1) “whether the issue is traditionally justiciable” and (2) “whether the setting of the dispute demonstrates true adversity between the parties.”<sup>162</sup> Applying this test, the court concluded that review of agency decisions is a common function of courts, and TVA’s independence established the requisite adversity.<sup>163</sup> Although the opinion was later withdrawn, the DOJ unsuccessfully petitioned the Supreme Court to review the conclusion that this dispute was justiciable.<sup>164</sup>

But the DOJ does not always oppose interagency litigation.<sup>165</sup> For example, the D.C. Circuit allowed the DOJ to challenge a Federal Maritime Commission order exempting certain shippers from antitrust laws.<sup>166</sup> The DOJ disagreed with the Commission’s exemption and challenged the decision based on its status as the nation’s enforcer of the antitrust laws.<sup>167</sup> In sum, the parties disagreed about antitrust enforcement policies—nothing more.<sup>168</sup> The D.C. Circuit relied on *Nixon* to reject an argument that it lacked jurisdiction, finding that the DOJ’s role as the “traditional advocate of antitrust policies in agency litigation” was enough to give it standing, and “courts traditionally resolve” challenges to final agency decisions.<sup>169</sup> In other cases, the D.C. Circuit has

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<sup>161</sup> *TVA v. EPA*, 278 F.3d 1184, 1197 (11th Cir. 2002), *withdrawn*, 336 F.3d 1236 (11th Cir. 2003). The EPA, acting through the DOJ, also opposed TVA’s litigation on the ground that it violated an executive order and the DOJ’s exclusive statutory authority to represent the government.

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

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

<sup>164</sup> Petition for a Writ of Certiorari at 19–23, No. 03-1662, *EPA v. TVA*, 2004 WL 304351, at \*19–23 (Feb. 13, 2004). The Supreme Court denied the petition. 541 U.S. 1030, 1030 (2004). In another case involving TVA, a court found that it lacked jurisdiction over TVA’s effort to bring an eminent domain proceeding against a federal agency. *United States ex rel. TVA v. Easement & Right of Way*, 204 F. Supp. 837, 839 (E.D. Tenn. 1962).

<sup>165</sup> See, e.g., *United States v. Civil Aeronautics Bd.*, 511 F.2d 1315 (D.C. Cir. 1975) (hearing case without addressing jurisdiction).

<sup>166</sup> See *United States v. FMC*, 694 F.2d 793, 794–95 (D.C. Cir. 1982) (en banc) (per curiam) (reprinting panel opinion).

<sup>167</sup> *Id.* at 810.

<sup>168</sup> See *id.*

<sup>169</sup> *Id.*



heard challenges brought by the DOJ on behalf of the "United States" (and other interested agencies) against decisions of the Interstate Commerce Commission<sup>170</sup> and the Civil Aeronautics Board.<sup>171</sup>

The line of cases suggesting that a policy dispute suffices to grant the executive a ticket into court was largely called into doubt by a 1995 Supreme Court decision.<sup>172</sup> The Court rejected the argument that the director of an agency with a disagreement about a Benefits Review Board Board's decision was a "person aggrieved" within the meaning of a statute authorizing judicial review of such decisions.<sup>173</sup> Although formally a statutory-interpretation decision, the Court made several observations with constitutional undertones. Importantly, the Court distinguished *United States v. ICC*, describing the United States' role in that case as a market participant, perhaps even in "a nongovernmental capacity," which "must be sharply distinguished from the status of the Government as regulator or administrator."<sup>174</sup> The Court noted that interagency litigation to enforce a "policy interest" would invoke the latter status—the government's interest as regulator or administrator. The Court concluded, "To acknowledge the general adequacy of such an interest would put the federal courts into the regular business of deciding intrabranch and intraagency policy disputes—a role that would be most inappropriate."<sup>175</sup> Since 1995, the D.C. Circuit has adopted a narrower construction of judicial-review statutes<sup>176</sup> and of agency standing to challenge the actions of another agency.<sup>177</sup>

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<sup>170</sup> *United States v. ICC*, 417 F. Supp. 851 (D.D.C. 1976), *aff'd sub nom.* Nat'l Classification Comm. v. United States, 430 U.S. 961 (1977).

<sup>171</sup> *United States v. Civil Aeronautics Bd.*, 511 F.2d 1315, 1317–18 (D.C. Cir. 1975) (hearing, without addressing jurisdiction, challenge brought by Departments of Justice and Transportation to the Board's approval of anticompetitive agreements among airlines as contrary to the "public interest").

<sup>172</sup> *OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122 (1995).

<sup>173</sup> *See id.* at 125–30.

<sup>174</sup> *Id.* at 128 & n.3.

<sup>175</sup> *Id.* at 128–29.

<sup>176</sup> *E.g.*, *Nat'l Ass'n of Sec. Dealers, Inc. v. SEC*, 431 F.3d 803, 810 (D.C. Cir. 2005).

<sup>177</sup> *E.g.*, *In re Sealed Case*, 146 F.3d 1031, 1032 (D.C. Cir. 1998) (Silberman, J., concurring in the denial of rehearing in banc).

The final type of intrabranch litigation arguably occurs when a federal employee or officer sues the government based on a matter arising out of the performance of the officer's duties. Courts routinely hear such disputes when the officer appears in a personal capacity, such as when the officer alleges discrimination that causes some adverse employment action.<sup>178</sup> In 1924, for instance, a disbursing officer's salary was reduced by a deduction ordered by the Comptroller General. The officer, understandably unhappy at his reduced salary, brought a mandamus petition to require the disbursing officer—*himself*—to pay him his full salary. Although the court described the case as a "comic opera," noted the "apparent absurdities," and made the obligatory reference to Dr. Jekyll and Mr. Hyde, it ultimately rejected the government's motion to dismiss and granted the requested mandamus.<sup>179</sup>

In contrast, however, the courts are far less willing to entertain a suit when the only injury alleged is to one's official capacity. For example, an employee of the Department of State sued his employer on the theory that the appointment of a senator to be Secretary of State violated the Constitution, and that he was suffering an injury by being required to follow orders that derived from unconstitutionally appointed leadership. The court had little difficulty dismissing the employee's claim as nonjusticiable.<sup>180</sup>

#### D. WHAT DOES IT ALL MEAN?

Courts and commentators have proposed several theories for squaring these cases with the general proposition that no entity can sue itself. But each offered rationale has limitations that prevent it from satisfying.

1. *Presence of a Real Party in Interest.* One possibility is that behind the caption in each case is a private party as the real party

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<sup>178</sup> See Kelley, *supra* note 4, at 1213 (explaining significance of officer appearing in personal versus official capacity).

<sup>179</sup> Wyly v. McCarl, 2 F.2d 897 (D. Mass. 1924), *aff'd*, 5 F.2d 964, 965 (1st Cir. 1925) (emphasizing that the Comptroller General was also a named respondent).

<sup>180</sup> Rodearmel v. Clinton, 666 F. Supp. 2d 123, 131 (D.D.C. 2009), *appeal dismissed for lack of jurisdiction*, 130 S. Ct. 3384 (2010).

in interest.<sup>181</sup> The Court's decision in *United States v. ICC*, emphasized the presence of private railroads, "the real parties in interest."<sup>182</sup> But the facts and holdings of many cases do not fit neatly (if at all) within this paradigm.<sup>183</sup> Although some commentators have described *United States v. Nixon* as a suit against "President Nixon in his private capacity,"<sup>184</sup> this does not seem to have been the way the Supreme Court viewed the case. Moreover, this explanation loses much of its force when one considers that the dispute in that case was the propriety of President Nixon's invocation of the Executive Privilege—a constitutionally grounded privilege that attaches only to the Executive Branch.<sup>185</sup>

The real-party-in-interest rationale also succumbs to a more fundamental problem. Why should the interests of an absent private party be litigated by nonadverse parties? Indeed, that some absent party's interests are being adjudicated is an argument against justiciability.<sup>186</sup> Instead, judicial resolution should wait until the outside party can participate, lest that party be prejudiced by an adverse precedent obtained through litigation missing an outside perspective.

2. *Presence of an Independent Agency.* Another popular explanation is that litigation is permissible only when one of the parties is an "independent agency" that does not answer directly to the President.<sup>187</sup> The usual definition of "independent agency" is

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<sup>181</sup> See *Constitutionality of Nuclear Regulatory Comm'n's Imposition of Civil Penalties on the Air Force*, 13 Op. O.L.C. 131, 139–41 (1989); Herz, *supra* note 5, at 940–46.

<sup>182</sup> *United States v. ICC*, 337 U.S. 427, 432 (1949).

<sup>183</sup> See Herz, *supra* note 5, at 941–44.

<sup>184</sup> 13 Op. O.L.C. at 141; Herz, *supra* note 5, at 971 n.300.

<sup>185</sup> See Herz, *supra* note 5, at 971 n.300. Herz nevertheless observes that the President "was a member of the regulated community, subject to the ordinary evidence-gathering regime of the criminal law," and was involved in that capacity rather than as the elected head of a branch of government. *Id.*

<sup>186</sup> See *id.* at 945 (arguing that this approach is "perverse" and "[i]f the United States actually has a dispute with a private party, then perhaps the Constitution requires it to litigate against that party rather than against itself").

<sup>187</sup> *SEC v. FLRA*, 568 F.3d 990, 997–98 (D.C. Cir. 2009) (Kavanaugh, J., concurring); 13B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3531.11 n.6 (3d ed. 2008); Kelley, *supra* note 4, at 1213–14; cf. Note, *Inter-Agency Legal Disputes*, *supra* note 4,

one with a head that is insulated by statute from removal by the President, usually absent some showing of good cause.<sup>188</sup> These agencies are then thought to be more independent of the rest of the Executive Branch, because they can pursue their regulatory agenda with a measure of freedom.

Litigation involving independent agencies is, at least formally, more adverse than litigation solely between components directly answerable to the President. The leadership of the independent agency has the formal ability to go “rogue” and resist the general policies of the President without risking immediate removal. But, despite this formal independence, political and administrative pressures keep independent agencies in check.<sup>189</sup> Moreover, even pure Executive Branch agencies have some practical measure of independence that rivals the formal independence of independent agencies.<sup>190</sup> The practical difference between executive and independent agencies may be more illusionary than real.

A bigger problem is that the mere presence of an independent agency has not been held to be a necessary or sufficient requirement in any of the cases. It is true that independent agencies are, as a practical matter, more likely to be involved in interagency litigation, and many (although not all<sup>191</sup>) of the cases where agencies have been adverse involved an independent agency. But it would be a mistake to treat a practical prerequisite as a constitutionally sufficient condition to suit.

Even if independent agencies have a degree of formal autonomy, justiciability problems remain. As discussed further below, one fundamental flaw with interagency disputes over

at 1595–96 (arguing that even agencies under the direct control of the President should be permitted to litigate against each other).

<sup>188</sup> See *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3153 (2010); Herz, *supra* note 5, at 952.

<sup>189</sup> Herz, *supra* note 5, at 952–53.

<sup>190</sup> *Id.* at 952–54 (arguing that the difference between independent agencies and executive branch agencies “looks bigger than it is”). Empirical research also indicates that agency structure depends on factors such as the President’s popularity, the strength of the congressional majority, and whether the President and Congress are of the same party. See DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* 58–69 (2003).

<sup>191</sup> *E.g.*, *TVA v. EPA*, 278 F.3d 1184, 1197 (11th Cir. 2002), *withdrawn*, 336 F.3d 1236 (11th Cir. 2003).

regulatory policy is that both agencies rely on the same interest—that of the United States. This reasoning applies equally to independent agencies. Even if they are adverse in the sense that their disagreements cannot be resolved administratively, they are still just competing voices of the same government.

3. *The Nixon Test*. Several courts interpret *United States v. Nixon* as setting forth a two-part test: (1) “whether the issue is traditionally justiciable” and (2) “whether the setting of the dispute demonstrates true adversity between the parties.”<sup>192</sup> The most jurisdiction-friendly decisions apply this test and find jurisdiction even in regulatory or policy squabbles between agencies.<sup>193</sup> But this test is based on a misreading of *Nixon* and cannot be squared with basic principles of justiciability.

To begin, the Supreme Court never actually articulated this “test.” The Court never, for instance, described any aspect of the test as necessary or sufficient to justify federal court jurisdiction. Rather, the Court pointed to several features that were enough under the facts of the case to create a justiciable controversy. But many of these (such as the fact that the case was ancillary to “a federal criminal prosecution,” which clearly involves a private litigant adverse to the government) failed to make it into the test’s formulation.<sup>194</sup>

Moreover, the test relies on a functionalist approach to justiciability that has been severely eroded at best—or, more likely, outright rejected—by subsequent Supreme Court case law.<sup>195</sup> *Lujan* and its progeny do not ask whether the totality of

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<sup>192</sup> *TVA v. EPA*, 278 F.3d at 1197; see also Steinberg, *supra* note 4, at 337.

<sup>193</sup> *E.g.*, *TVA v. EPA*, 278 F.3d at 1197.

<sup>194</sup> See *Nixon*, 418 U.S. at 697.

<sup>195</sup> See *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 611 (2007) (plurality opinion) (“By framing the standing question solely in terms of whether the dispute would be presented in an adversary context and in a form traditionally viewed as capable of judicial resolution, *Flast* failed to recognize that this doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-à-vis the other branches, concrete adverseness or not.” (quoting *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996))); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (“The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has

the circumstances support jurisdiction. Rather, they insist that litigants show a particular type of injury that the courts can remedy in a particular way.

The difficulty with the functional approach to *Nixon* is underscored by the illusory nature of the test in practice. Even though the *Nixon* Court justified jurisdiction by emphasizing the “uniqueness of the setting” and the “unique facts of this case,” the test gleaned from that case would virtually always support jurisdiction. For the first part of the test, courts ask whether a particular controversy is justiciable by considering the nature of legal questions raised. But this “misses the point.”<sup>196</sup> Framed this way, courts will inevitably conclude that the traditional role of courts is to decide questions of law.<sup>197</sup> The judiciary is undoubtedly the final arbiter of constitutional meaning, but this does not give it a license to consider constitutional questions absent a live case. The more relevant inquiry considers the manner in which the question is presented and asks whether the nature of the proceeding and the parties involved is “of the sort traditionally . . . resolved by, the judicial process.”<sup>198</sup>

The second prong of the test—whether the setting demonstrates sufficient adverseness—is also illusory in practice. By definition, if the court is asked to resolve a question, some adverseness exists, even if it is feigned. But this is hardly enough to justify standing under modern law.<sup>199</sup> Nor should courts simply take the word of the parties that they are at odds. Given the way in which the *Nixon* test can be and has been manipulated to support unwarranted exercises of judicial power, if ever there were an

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couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process.”).

<sup>196</sup> Herz, *supra* note 5, at 969.

<sup>197</sup> See *United States v. FMC*, 694 F.2d 793, 810 (1982) (en banc) (per curium) (“This dispute . . . raises issues that courts traditionally resolve and the setting assures . . . concrete adverseness.” (reprinting original panel opinion)).

<sup>198</sup> *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998)) (internal quotation marks omitted).

<sup>199</sup> See generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

example to justify the Court's recent turn towards rigid rules of justiciability, the manipulable and meaningless *Nixon* test is it.

4. *Herz's Test.* The final possible rule comes from Professor Herz, who criticizes each of these justifications for intrabranch litigation.<sup>200</sup> Rejecting each, he believes that any effort to articulate an Article III limit on agency litigation is doomed.<sup>201</sup> In Herz's view, it is "absurdly formalistic" to describe the United States as "one person as a litigant" in light of the varied interests of the government.<sup>202</sup> Instead, Herz argues, "if an intragovernmental dispute has actually reached the courts, that very fact indicates that there is concrete adversity sufficient to satisfy article III."<sup>203</sup> Herz does express reservations motivated by concerns over presidential (rather than judicial) power if certain types of policy disputes spill over into courts. Although I agree that Article II may be relevant to the inquiry, I take up Herz's implicit challenge to defend the role of Article III in such matters, with the benefit of an additional two decades of case law and scholarship.<sup>204</sup>

5. *A Different View.* Each approach to interagency litigation offered so far—a real party in interest, the presence of an independent agency, the *Nixon* test, and the Herz approach—is unsatisfying. Instead, I propose that the justiciability of interagency litigation depends on whether the interests asserted by the competing parties are sovereign or proprietary.<sup>205</sup> Although disputes between agencies asserting proprietary injuries are

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<sup>200</sup> Herz, *supra* note 5, at 941–55, 969–70.

<sup>201</sup> See *id.* at 971, 990.

<sup>202</sup> *Id.* at 906; cf. Albert & Simon, *supra* note 4, at 549 (arguing that, because the Court has approved of independent agencies, "it is implausible to view article II as a general bar against adjudication of legal disputes" within the Executive Branch).

<sup>203</sup> Herz, *supra* note 5, at 898.

<sup>204</sup> See also Kelley, *supra* note 4, at 1213.

<sup>205</sup> 13B WRIGHT ET AL., *supra* note 187, § 3531.11 ("For some purposes, it is convenient to approach the standing of the United States by distinguishing sovereign, proprietary, quasi-sovereign, and private interests."); *Flast v. Cohen*, 392 U.S. 83, 119 n.5 (1968) (Harlan, J., dissenting) (marking "the distinction between the personal and proprietary interests of the traditional plaintiff, and the representative and public interests of the plaintiff in a public action. I am aware that we are confronted here by a spectrum of interests of varying intensities, but the distinction is sufficiently accurate, and convenient, to warrant its use at least for purposes of discussion.").

justiciable, there is no controversy when both sides rely on a sovereign interest.

The distinction between sovereign and proprietary harms is used in several analogous settings,<sup>206</sup> including the interpretation of judicial-review statutes,<sup>207</sup> the early Supreme Court's approach to state standing,<sup>208</sup> and generally follows the modern approach to foreign-state sovereign immunity.<sup>209</sup> And, as explained in the following sections, the difference between an agency's interest as regulator and as the regulated is relevant to standing. If both sides assert an interest as a sovereign—an interest in enforcing the law or regulating third parties—then both sides are asserting the same interest, and there is no controversy.<sup>210</sup> However, if at least one agency appears in a proprietary or commercial capacity—as a market participant or a regulated entity—then there can be a justiciable dispute.<sup>211</sup>

Permitting interagency disputes when one side acts in a nonregulatory capacity is consistent with the vast majority of the cases, including the Supreme Court decisions. For example, the Postmaster General asserted a proprietary injury against a nonpaying deputy who was effectively stealing money from the

<sup>206</sup> See, e.g., *Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass.*, 507 U.S. 218, 227 (1993) (distinguishing, for purposes of National Labor Relations Act preemption, between “government as regulator and government as proprietor”).

<sup>207</sup> See, e.g., *Nat'l Ass'n of Sec. Dealers, Inc. v. SEC*, 431 F.3d 803, 810–12 (D.C. Cir. 2005).

<sup>208</sup> See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 559–60 (1851) (distinguishing between proprietary, sovereign, and quasi-sovereign interests for purposes of state standing); *Wolhandler & Collins*, *supra* note 210, at 413–18 (same); Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051, 2056–56 (2011) (same).

<sup>209</sup> See Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.) (enumerating exceptions to foreign sovereign immunity, including exceptions for commercial activities, certain torts, and takings of property in violation of international law).

<sup>210</sup> *Wolhandler & Collins*, *supra* note 51, at 410. One might also point out that the government can assert quasi-sovereign interests, basically representing the interests of its citizenry. For purposes of this Article, I treat these as purely sovereign interests.

<sup>211</sup> Cf. *Cotton v. United States*, 52 U.S. 229, 231 (1850) (“But the powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic.”).



United States.<sup>212</sup> In *United States v. ICC*, the Army appeared as a purchaser of a service that was unhappy with the rate the railroads charged with the approval of another agency.<sup>213</sup> The agencies that challenge a mandate of the FLRA or the MSPB suffer a plainly proprietary injury in their capacities as employers.<sup>214</sup> Because the regulated agency is in a similar situation to any private regulated company, it can easily meet the traditional elements of standing based on its proprietary interest.

In contrast, the Supreme Court correctly rejected both the Attorney General's suit against the Secretary of War in *Hayburn's Case*<sup>215</sup> and the Secretary of Labor's challenge to the decision of the Benefits Review Board in *Newport News*.<sup>216</sup> Although the Court's reasons for rejecting the Attorney General's suit in *Hayburn's Case* are unknown, the Court's most recent pronouncement in *Newport News* expressly rejected the prospect of an agency asserting a policy interest against another agency. In fact, the *Newport News* Court articulated the very distinction between sovereign and proprietary interests used here: the distinction between the government's proprietary injuries, which "must be sharply distinguished from the status of the Government as regulator or administrator."<sup>217</sup>

This divide between sovereign and proprietary interests is also supported by analogy to the Supreme Court's decisions on whether a *state* can sue itself in federal court.<sup>218</sup> In 2011, the Supreme Court permitted one state agency to sue other state officials who refused to provide records to the agency as part of the agency's investigation on behalf of individuals with disabilities in the state.<sup>219</sup> The Court did not mention Article III but instead held

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<sup>212</sup> See *supra* notes 90–93 and accompanying text.

<sup>213</sup> See *supra* notes 107–16 and accompanying text.

<sup>214</sup> See *supra* notes 147–53 and accompanying text.

<sup>215</sup> See *supra* notes 57–65 and accompanying text.

<sup>216</sup> *OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122 (1995).

<sup>217</sup> *Id.* at 128 & n.3.

<sup>218</sup> See generally 13B WRIGHT ET AL., *supra* note 187, § 3531.11.1.

<sup>219</sup> *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1637–38 (2011); see also *Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Serv. Admin.*, 603 F.3d 365, 370–74 (7th Cir. 2010) (en banc).

that Congress could validly abrogate sovereign immunity even for an intrastate contest.<sup>220</sup> In earlier decisions, the Court routinely rejected constitutional challenges by state subdivisions when they asserted “public”—distinguished from “private”—rights against their own state.<sup>221</sup> Although these decisions could be viewed as interpretations of the relevant constitutional provisions, some lower courts have suggested these decisions may imply a limit on standing for a state to sue itself.<sup>222</sup>

Admittedly, some lower court decisions do not track the distinction between sovereign and proprietary interests perfectly.<sup>223</sup> Most problematic are the D.C. Circuit’s decisions that allowed the DOJ to sue the Federal Maritime Commission and others over policy disagreements.<sup>224</sup> These decisions were wrongly decided and have been severely undercut by subsequent developments, including the Supreme Court’s decision in *Newport News* and the restriction of standing in general. In fact, they have not been followed even in the D.C. Circuit.<sup>225</sup>

Some have criticized the distinction between the government’s sovereign and proprietary capacities as incoherent.<sup>226</sup> But it has

<sup>220</sup> *Stewart*, 131 S. Ct. at 1638.

<sup>221</sup> See *Rogers v. Brockette*, 588 F.2d 1057, 1069–70 (5th Cir. 1979) (collecting cases).

<sup>222</sup> See *Virginia v. Reinhard*, 568 F.3d 110, 122–23 (4th Cir. 2009), *rev’d sub nom.* *Vt. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632 (2011); *City of South Lake Tahoe v. Cal. Tahoe Reg’l Planning Agency*, 625 F.2d 231, 232–34 (9th Cir. 1980); see also *Illinois v. City of Chicago*, 137 F.3d 474, 476–77 (7th Cir. 1998).

<sup>223</sup> There is also a series of cases where interagency disputes over property—the quintessential proprietary injury—were rejected by courts as improper interagency litigation. See *supra* note 139. Although at first blush, these cases would seem to be inconsistent with the divide proposed here, as explained below, they can be explained by the doctrine of sovereign immunity, rather than from Article III’s case or controversy requirements. If Congress were to authorize agencies to sue each other over allocation of money, this would not necessarily implicate Article III limits, but it could raise serious concerns under the Appropriations Clause and the political accountability implicit in the purpose of the Clause. See generally Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343 (1988).

<sup>224</sup> This decision is even criticized by Herz. Herz, *supra* note 5, at 970–71.

<sup>225</sup> *Nat’l Ass’n of Sec. Dealers, Inc. v. SEC*, 431 F.3d 803, 810 (D.C. Cir. 2005).

<sup>226</sup> Grove, *supra* note 41, at 805 n.103 (“I do not claim that this distinction between ‘sovereign’ and ‘proprietary’ interests is necessarily coherent.”); Herz, *supra* note 5, at 962 (“The concrete line drawing difficulties that plague its application are a symptom of this conceptual difficulty.”).

proven workable when used in parallel contexts. Indeed, its intuitive appeal explains why it continues to resurface despite its critics. Even if there are some difficult calls at the margins, it is unlikely that the distinction will cause any greater trouble for courts than the standing doctrine more generally or interagency litigation in particular.

#### IV. THE NEED FOR A NONSOVEREIGN INTEREST TO SATISFY ARTICLE III

Although the courts have largely rejected litigation between agencies raising sovereign interests and allowed agencies to fight over proprietary injuries, the rationales (if any) actually offered by the deciding courts have not been clear. In fact, prohibiting courts from hearing agency disputes over sovereign functions is well supported by general principles of standing and Article III. When an agency is regulated in its commercial dealings, it suffers harm in its corporate capacity and can properly assert this interest against another agency. But the sovereign is the United States, and while agencies may be designated to act on behalf of the United States, sovereign interests belong to the United States and cannot appear on both sides of a dispute.

To illustrate the justiciability problems of certain types of interagency litigation, consider a stylized version of *United States (through the DOJ) versus Federal Maritime Commission (FMC)*.<sup>227</sup> Both agencies play a role in antitrust laws: the DOJ through enforcement and the FMC through granting exceptions to certain classes of carriers when the public interest warrants it. The parties, however, dispute whether shippers should be given a license to engage in anticompetitive behavior that otherwise would violate the antitrust laws. The FMC, which happens to be an independent agency with independent litigating authority, passes a regulation granting a broad exemption to every shipper. The DOJ disagrees with the FMC's assessment of what the public interest requires and, further, believes it has identified procedural

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<sup>227</sup> See *United States v. FMC*, 694 F.2d 793 (D.C. Cir. 1982) (en banc) (per curium).

defects in the FMC's regulation, so it takes advantage of a statutory provision explicitly permitting the DOJ to challenge any order of the FMC in court.

The lack of any private party is fatal to this suit. Because the DOJ and the FMC both are asserting the sovereign interests of the United States, they lack standing to sue each other. Moreover, the identified dangers of a nonadverse suit, including a failure of advocacy and a lack of facts, are alive and well in the context of such intragovernment litigation, which further counsels against jurisdiction over these matters.

Here, I draw a distinction between the interests of the United States and the interests of a particular agency. I argue that sovereign interests belong to the United States alone. In contrast, agencies are simply legal personalities and can experience the same proprietary injuries as any other ongoing concern. When an agency faces injury—some proprietary harm—there can be a justiciable controversy. But when both plaintiff and defendant rely on sovereign interests, they both appear as representatives of the United States. And a single-party case is no case at all. Alternatively, if expressed as a matter of standing, the United States lacks any cognizable interest in reversing itself.

#### A. THE MANY INTERESTS OF THE SINGULAR UNITED STATES

1. *The Difference Between the Interests of the "United States" and the Interests of an Agency or of an Officeholder.* The distinction between sovereign and proprietary injuries does not usually matter much when the federal government is the plaintiff. Challenges to the government's standing in suits against private parties are generally rare and ill-fated. But as I argued above, the distinction between sovereign and proprietary injuries does have meaning in interagency litigation. An agency can suffer a proprietary injury and seek relief for this injury even against another agency. However, only the United States experiences a sovereign injury, and the United States cannot assert a sovereign

injury against itself.<sup>228</sup> Thus, there is a meaningful difference for purposes of interagency litigation between the proprietary interests of an agency and the sovereign interests of the United States.<sup>229</sup> One must look behind the designation of the parties on the pleadings to determine whether the agency is actually asserting an injury to itself (a proprietary injury) or to the United States (a sovereign injury).

There is but one federal sovereign—the United States. Its interests include ensuring the proper interpretation and application of its laws as well as the protection of its citizens, but this list is hardly exhaustive.<sup>230</sup> The United States cannot speak but through its agents—its many officers and institutions—who declare and defend its sovereign interests. Thus, when Congress vests an agency with the power to implement the United States' interests, it can also designate an agency or officer to represent its interests in court.<sup>231</sup> When an agency sues to enforce its view of the public interest or defend a regulation it promulgated, it is relying on nothing less than the sovereign power of the United States: the United States' interest as regulator.<sup>232</sup> It is, of course, true that the articulation of the sovereign's interest depends on who is speaking; thus, the DOJ and the FMC, may disagree over the view of the United States in any particular matter. This

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<sup>228</sup> See Gilles, *supra* note 54, at 344, 353–54 (arguing that, by analogy to private law litigation, sovereign “injuries are ‘personal’ to the government” and “claims seeking to vindicate the government’s non-proprietary, sovereign interests are not assignable” but may be enforced through agents).

<sup>229</sup> Courts have at times drawn a distinction between the interests of the United States and that of an agency, but it usually tracks designation rather than the nature of the injury asserted. See, e.g., *In re Sealed Case*, 146 F.3d 1031, 1031–32 (D.C. Cir. 1998) (Silberman, J., concurring in denial of rehearing in banc); *United States v. Alky Enters., Inc.*, 969 F.2d 1309, 1315 (1st Cir. 1992); *Marshall v. Gibson’s Prods., Inc.*, 584 F.2d 668, 676 (5th Cir. 1978); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51, 56 (D.D.C. 1973).

<sup>230</sup> See Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1144 (2010) (noting that “public interest” could be defined in a number of ways).

<sup>231</sup> See *ICC v. Oregon–Washington R.R. & Navigation Co.*, 288 U.S. 14, 27 (1933).

<sup>232</sup> See Gilles, *supra* note 54, at 353–54.

disagreement, however, does not alter the fact that they are both, at their core, asserting the position of the United States.<sup>233</sup>

Other times an agency relies on some harm to itself as a quasi-corporate entity. This often occurs when it is regulated by another agency. These injuries are directly analogous to those suffered by wholly nongovernmental entities. For example, an agency's hiring practices may be rejected by another agency, or its ownership of certain property may be scrutinized.<sup>234</sup> These regulations pertain to the agency's structure, and they implicate interests with ready analogues to the common law interests of private corporations. True, such regulations may have an indirect and incidental effect on the agency's furtherance of its sovereign mission (by, for example, imposing an administrative burden). But these rules primarily injure the agency in the same manner as they would injure a private corporation. Even in the 1800s, the Supreme Court carefully distinguished between actions by an agency asserting a common law injury and those asserting "the powers of the United States as a sovereign" to enforce its laws.<sup>235</sup>

The same analysis applies with equal force to defendant standing. Although usually we do not think of defendants as having standing, Professor Hall convincingly demonstrates that this is because it is virtually always satisfied and thus "[h]ides in [p]lain [s]ight."<sup>236</sup> Standing's redressability requirement ensures that defendants are also interested parties.<sup>237</sup> Similarly, the requirement of concrete adverseness contemplates that defendants

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<sup>233</sup> *Id.*

<sup>234</sup> See 5 U.S.C. §§ 7105(a)(2)(G), 7116, 7118 (2006) (granting the FLRA the authority to resolve issues relating to an agency's unfair labor practices, which includes an examination of its hiring practices); 40 U.S.C. § 521 (2006) (giving the General Services Administration the authority to determine what to do with "excess" property, including to transfer it to other federal agencies).

<sup>235</sup> *E.g.*, *Cotton v. United States*, 52 U.S. 229, 231 (1850); *accord* *Post Master Gen. of U.S. v. Early*, 25 U.S. (12 Wheat.) 136, 145–46 (1827).

<sup>236</sup> See Hall, *supra* note 9, at 1552.

<sup>237</sup> See *id.* at 1551–52 ("Any defendant against whom relief is sought will always have standing to defend, because the exposure to risk of injury from an adverse judgment is a sufficient personal stake to satisfy Article III.").

have different interests at stake in the litigation than plaintiffs.<sup>238</sup> Recognizing this, determining whether the interest that the interagency-litigation defendant asserts is sovereign or proprietary is simple: When it is defending a regulation or order that it issued, it is sovereign; if not, it is proprietary.

Because agencies may assert an injury as an agency or as a delegatee of the United States' interests, we must follow the Supreme Court's instruction to "look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented."<sup>239</sup> This can be done by looking at the nature of the injury asserted. When an agency appears as a market participant adverse to a regulator, it asserts a common law injury no different from any private corporation's—paying out money or retaining an employee it would rather discharge.<sup>240</sup> But when it asserts an injury as a regulator—a policy interest or an interest in a particular interpretation of law—it asserts a sovereign interest divorced from any particular common law harm to the agency itself. This injury would not suffice for a private corporation, and the only plausible basis for the agency's standing is that it appears in the shoes of the United States.<sup>241</sup>

2. *The Government Has No Sovereign Interest in Reversing Itself.* Courts rarely find that agencies lack standing to assert sovereign interests. But they will do so when an agency challenges the regulatory decision of another agency based on a mere policy interest rather than a direct harm.<sup>242</sup> For instance, the Supreme Court concluded that the Director of the Office of Workers' Compensation Programs could not challenge in court a decision of the Benefits Review Board, rejecting the Director's

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<sup>238</sup> See *id.* at 1551 ("Article III ensures that the federal courts resolve only legal questions that 'emerge[] precisely framed and necessary for decision from a class of adversary argument . . . embracing *conflicting and demanding* interests.'" (alterations in original) (quoting *Flast v. Cohen*, 392 U.S. 83, 96–97 (1968))).

<sup>239</sup> *United States v. ICC*, 337 U.S. 426, 430 (1949); cf. *In re Sealed Case*, 146 F.3d 1031, 1031–32 (D.C. Cir. 1998) (Silberman, J., concurring in the denial of rehearing in banc).

<sup>240</sup> See, e.g., *Cotton*, 52 U.S. at 231.

<sup>241</sup> See Gilles, *supra* note 228, at 353–54.

<sup>242</sup> See *S&E Contractors, Inc. v. United States*, 406 U.S. 1, 12 (1972) (finding that the Department of Justice lacks standing "to overturn decisions of coordinate offices of the Executive Department"); cf. *Raines v. Byrd*, 521 U.S. 811, 829–30 (1997).

argument that she was attempting to vindicate the public interest *and* the programmatic interests of her agency.<sup>243</sup> The Court (through Justice Scalia) “sharply distinguished” between “the status of the Government as a statutory beneficiary or market participant” and “the status of the Government as regulator or administrator,” the latter lacking the authority to challenge other agencies in Court.<sup>244</sup> Although formally concerned with the construction of the statute authorizing appeals,<sup>245</sup> the Court relied on this distinction in explaining its reluctance to permitting an agency to rely on a policy interest to challenge another’s decision in court.<sup>246</sup> The reasoning behind this distinction tracks closely the argument that I make here.

Plainly, a policy interest is enough to establish an agency’s Article III standing to sue a private party. That this standing evaporates when the defendant is another agency suggests a denial of the challenging agency’s right to assert the United States’ sovereign interests.<sup>247</sup> This is because the United States has no sovereign interest in proceeding against itself, like it does against another,<sup>248</sup> to ensure its vision of the public interest or interpretation of the law is realized. It has no interest in reversing *itself*. Consequently, no agency—as one of many duly empowered agents articulating and advocating for the United States’

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<sup>243</sup> *OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 130 (1995).

<sup>244</sup> *Id.* at 128.

<sup>245</sup> *See id.* at 125. *But see* *Illinois v. Chicago*, 137 F.3d 474, 476 (7th Cir. 1998) (relying on *Newport News* for broader constitutional lesson).

<sup>246</sup> *Newport News*, 514 U.S. at 128–29. It is true that the *Newport News* Court said some broader things that might question whether agencies generally have standing to enforce the public interest. *See id.* at 132 (“Agencies do not automatically have standing to sue for actions that frustrate the purposes of their statutes.”). But it would be remarkable if so unknown an opinion silently called into doubt the settled holdings of 150 years of jurisprudence. Moreover, such unnecessarily broad language can be explained by considering its context—a statute that the Court interpreted to deny the agency a right to sue under those circumstances—suggesting Congress has some ability to limit by statute the Executive Branch’s litigating options when it comes to the public interest. *Id.* at 131–33.

<sup>247</sup> *See S&E Contractors*, 406 U.S. at 13.

<sup>248</sup> However, I concede that the United States can proceed against an agency that is asserting a proprietary interest, because the defendant agency is not the United States. The United States has no interest in reversing *itself*, but that is not to deny the United States’ valid interest in enforcing federal law against its agencies.



sovereign interests—can have an interest in adjudicating a claim that amounts to simply rejecting another duly empowered agent's view of those same interests. An agency, like private litigants, can no longer obtain Article III standing based on an undifferentiated interest in seeing the law enforced in a particular way when the agency sues the United States (or one of its officers or institutions); it must instead point to whatever common law harm that the agency experiences.

Not only does it make sense that the United States lacks an interest in reversing itself, but when both parties in a dispute rely on the same interest, there cannot be a case or controversy. An agency that wants to impose its interpretation of law so that it can regulate as it sees fit relies on its piece of the sovereign interest. And the same interest is implicated when an agency appears in court as a defendant to defend its policy decisions.<sup>249</sup> Neither the plaintiff nor defendant agency in such a case has a constitutionally cognizable injury, so to satisfy standing's injury requirement, each must rely on an injury to the sovereign interest of the "United States"—namely, with its vision of the law or public interest. Intuitively, when both plaintiff and defendant rely on this same sovereign interest to establish an injury, there is no justiciable controversy.<sup>250</sup> As the Supreme Court has said, there is but "one 'United States' that may appear before" the courts.<sup>251</sup>

3. *Response to Objections.* This distinction between the interests of an agency and the United States may be fairly criticized. One might argue that I have drawn a formalist line between the interests of the United States and the agencies, thereby overlooking the legitimate interests that agencies have in implementing their vision of the public interest over the objections

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<sup>249</sup> See *supra* notes 236–38.

<sup>250</sup> Cf. Herz, *supra* note 5, at 971 ("In the article III context, however, the regulating/regulated distinction rests as much on intuition as argument, a feeling that two agencies truly are part of the same person when both are acting in their regulatory capacities.").

<sup>251</sup> *United States v. Providence Journal Co.*, 485 U.S. 693, 701 (finding "startling" the suggestion that "there is more than one 'United States' that may appear before this Court, and that the United States is something other than the sovereign composed of the three branches" (internal quotation marks omitted)).

of another agency. But my distinction is not simply a formalist linguistic trick; instead, it reveals a deeper point. By considering why agencies might disagree, we can see why their competing claims to the mantle of the United States cannot establish their standing.

First, agencies might disagree due to differences in personnel. In this type of dispute, a court is effectively asked to decide a war waged between bureaucrats. If government officials, by virtue of their office, could obtain standing, then the courts would provide a forum to resolve competing visions of the law among members of the bureaucracy (who already have broad power to set policy) but not among members of the electorate.<sup>252</sup> The Supreme Court has rejected the standing of federal officials when baldly premised on an official interest.<sup>253</sup> It serves little purpose to disallow the standing of individual officials but to allow them to accomplish the same goal when directing a federal agency.

Another potential reason for agency disagreement is the scope of their mandate. Some agencies have extremely narrow interests. For example, the Small Business Administration (which has no regulatory authority) must myopically consider only the interests of certain businesses.<sup>254</sup> Generally, however, agency mandates are not so narrow but require an agency to assess the “public interest” and “reasonableness.”<sup>255</sup> Yet even mandates to consider general interests are likely to be skewed over time by institutional biases.<sup>256</sup> An agency’s enforcement mission may cloud its ability to

<sup>252</sup> John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1232 (1993).

<sup>253</sup> See *Raines v. Byrd*, 521 U.S. 811, 821, 829–30 (1997); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997); accord *Rodearmel v. Clinton*, 666 F. Supp. 2d 123, 129 (D.D.C. 2009).

<sup>254</sup> Leah Chan Grinvald, *Resolving the IP Disconnect for Small Businesses*, 95 MARQ. L. REV. 1491, 1502 n.52 (2012) (“The U.S. Small Business Administration (SBA) was created in 1953 as an independent agency of the federal government to aid, counsel, assist and protect the interests of small business concerns . . .” (quoting *Mission Statement*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/mission-statement-0> (last visited June 8, 2012))).

<sup>255</sup> See, e.g., Mendelson, *supra* note 230, at 1135–36 (citing examples).

<sup>256</sup> Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 22–23 (2010); Eric Biber, *Too Many Things To Do: How To Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 7 (2009).

pass a regulation that fairly considers the interests of regulated parties,<sup>257</sup> or (more likely) an agency's power to promote development will co-opt its mission to regulate for safety.<sup>258</sup> Or perhaps one agency has greater contact with a particular industry and thus is more susceptible to be "captured" by the industry's focused lobbying.<sup>259</sup> Still further, even without a good reason, an agency might simply evolve divergent ideological cultures over time.<sup>260</sup> Congress, arguably aware of these biases when it legislates, may select the agency to which it provides regulatory power with these biases in mind.<sup>261</sup> Therefore, agencies may represent divergent interests based on congressional intent, either explicit (through a narrow statutory mandate) or implicit (through the delegation of power to an agency with a policy bias). As Professor Jaffe wrote, the United States

may, in the carnival of the public interest, appear in many guises in which if one looks he may see—without too much effort—twitching behind the august lineaments of the ICC, the Department of Agriculture, and the Secretary of the Interior, the eager grimaces of railroad, farmer, and rural electrifier.<sup>262</sup>

Although these representational interests may indicate that agencies are truly antagonistic to one another, this does not establish that the agency has an injury to itself that is distinct from that of the sovereign. The mere fact of divergent institutional interests within an organization is not sufficient to permit a suit. A corporation's general counsel and head of

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<sup>257</sup> See Biber, *supra* note 256, at 32.

<sup>258</sup> Barkow, *supra* note 256, at 50–51.

<sup>259</sup> See generally *id.*

<sup>260</sup> Cf. *id.* at 49.

<sup>261</sup> Cf. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (praising *Chevron* because "Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known").

<sup>262</sup> Jaffe, *supra* note 4, at 300.

marketing may often clash as each focuses on different interests, but they still may not sue each other to work those differences out.

Further, to the extent that an agency purports to sue for private interests in a pseudo-representational capacity, it is better for those interests to be represented directly by those whose interests are at stake.<sup>263</sup> However interested an agency may be in promoting only a particular slice of the public welfare (whether based on statutory mandate, capture, or culture), it may fail to accurately identify the interests it is meant to protect.<sup>264</sup> And, in any event, not even a sovereign can assert the broad interests of the citizenry against the United States.<sup>265</sup>

A final objection to my distinction between agency and sovereign interests could be that agencies have an interest in preserving their regulatory power independent of the sovereign interests of the United States.<sup>266</sup> Thus, an alternative way of looking at interagency litigation is that the agencies are simply asking the courts to decide which agency has the power to determine the regulatory issue. Both want to act in some shared

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<sup>263</sup> See Herz, *supra* note 5, at 945 (arguing that representational standing is “perverse” and “If the United States actually has a dispute with a private party, then perhaps the Constitution requires it to litigate against that party rather than against itself”).

<sup>264</sup> Of course, the people affected may lack standing to bring their own suit. Thus, one might argue that some agency must defend the interests of those who lack standing to bring suit themselves. But this objection cannot be squared with the logic behind the Court’s numerous careful curtailments of standing. The Court’s efforts to evade deciding certain disputes—say, generalized grievances against some governmental action—would all be for naught if those disputes for which no person has standing could be championed by an agency representing their preferences. For example, the Court has repeatedly indicated that a party cannot obtain an injunction against a federal official absent a showing of an injury in fact, and that Congress cannot change this. The Court has even noted approvingly that some disputes will, by their nature, virtually never have someone with an injury in fact. But, under the logic of the objection, the Court’s insistence on this constitutional limit on congressional power and federal jurisdiction is more form than substance, as Congress could simply charge an agency with representing those policy preferences that no person has an injury in fact to present.

<sup>265</sup> See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982) (“A State does not have standing as *parens patriae* to bring an action against the Federal Government.” (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923))).

<sup>266</sup> See Note, *Inter-Agency Legal Disputes*, *supra* note 4, at 1610 (“The interest of an executive-branch agency that sues another federal authority in a jurisdictional dispute stems from the asserted congressional commitment of regulatory power to the plaintiff agency.”).

regulatory space, but in inconsistent ways. In other contexts, courts have not hesitated to determine who can speak for the United States, such as in court.<sup>267</sup> By analogy, the argument runs, feuding agencies are really just trying to figure out which has the final word on behalf of the United States.

One problem is that this view does not accurately describe the nature of the cases. When the Department of Justice challenged the Federal Maritime Commission's approval of shipping agreements, it did so based on its belief that the FMC misapplied the law. The DOJ recognized that the FMC had jurisdiction over the agreements but argued that it got the law wrong.<sup>268</sup> This is not simply a question of turf—which agency has been statutorily designated to resolve the matter for the United States—but an actual request for the courts to pick a side by reviewing the case's merits.

The more fundamental problem with this approach, however, is that it assumes that agencies have an interest in regulatory power for its own sake, and not simply as representatives of the United States. I think the latter view is the better one. Agency power to regulate is entirely derivative of being an arm of the sovereign. And even on matters delegated to an agency to regulate, the agency acts not in its own right but as the agent of the United States.<sup>269</sup> And agents of the same principal cannot sue each other on the principal's behalf.

#### B. THE LACK OF "CONCRETE ADVERSENESS"

Some have argued that "if an intragovernmental dispute has actually reached the courts, that very fact indicates concrete

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<sup>267</sup> *E.g.*, *United States v. Providence Journal Co.*, 485 U.S. 693, 694–95 (1988) (determining whether DOJ had to file petition for certiorari on behalf of judicially appointed contempt prosecutor).

<sup>268</sup> *See United States v. FMC*, 694 F.2d 793, 802 (D.C. Cir. 1982) (en banc) (per curiam) (reprinting panel opinion).

<sup>269</sup> Gilles, *supra* note 228, at 354 (arguing that the government cannot assign sovereign interests, which can only be carried out by agents); *see also* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 248–53 (1987).

adversity sufficient to satisfy article III.”<sup>270</sup> Of course, an analysis that simply considered the functions of standing would be difficult to square with thirty years of Supreme Court precedent demanding far more of litigants.<sup>271</sup> However, a lawsuit with only governmental parties offends not just some abstract formality but also fails to guarantee that any function of standing is met. Intragovernmental litigation raises the prospect of collusion and invites courts to decide matters without the benefit of an appropriately presented factual record. It can also lead to judicial involvement before some nongovernmental interest is directly at stake.

1. *Failure of Advocacy.* There is little assurance that components of the same government will adequately advocate opposing interests simply because they march into court against one another. In fact, government collusion in litigation was present as early as the Attorney General’s 1793 mandamus petition against the Secretary of War, which was brought pursuant to an agreement between the parties.<sup>272</sup> A more recent effort—offered by Professor Herz in defense of interagency litigation—illustrates the danger of collusion between government parties. He suggests that courts will eventually decide many intragovernmental disputes anyway because a private litigant will eventually sue.<sup>273</sup> For this reason, Herz argues, it improves the President’s regulatory authority to have the first case litigated solely between federal parties, “particularly if the agencies settle the case, thereby protecting themselves against future litigation by entry of a consent decree.”<sup>274</sup> As an example, he cites an EPA memorandum complaining that the DOJ would not permit the EPA and the Army to file a consent decree in court that was intended to act as a “shield” against future litigation involving

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<sup>270</sup> Herz, *supra* note 5, at 898.

<sup>271</sup> *E.g.*, Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208, 225 (1974) (rejecting standing despite “depth of [plaintiff’s] commitment” and “the fact that the adverse parties sharply conflicted in their interests and views and were supported by able briefs and arguments”); Elliott, *supra* note 36, at 467–68.

<sup>272</sup> Bloch, *supra* note 33, at 610 & n.164.

<sup>273</sup> Herz, *supra* note 5, at 936.

<sup>274</sup> *Id.* at 936–37.

private parties.<sup>275</sup> But such a lawsuit would be the quintessential collusive suit: an attempt to obtain the imprimatur of a court on a suit between two parties controlled by a single person (the President) to the detriment of absent parties with an interest.<sup>276</sup>

This example is somewhat extreme, but even without improper collusion, meaningful adverseness cannot be assumed when government disagreements spill into court unless one party has suffered a proprietary harm. To begin, it is difficult to determine whether any particular dispute was sufficiently genuine or improperly collusive. To do so would require a standard by which the measure the motivation of the agencies, the vigor of counsels' arguments, etc.; such a standard would inevitably be inconsistently applied and would impose an unwarranted intrusion into the judgment of the civil servants involved.<sup>277</sup> Perhaps these difficulties explain why the Supreme Court has declined to hear even well-meaning disputes that were, nevertheless, not truly adverse.<sup>278</sup>

The lack of a private party can lead to important legal issues being overlooked or not pressed with the vigor of a plaintiff facing a serious injury. Agencies, for example, have little incentive to

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<sup>275</sup> The memorandum explains, the Department of Army was anxious to have some type of "shield" from any State, local or citizen action once they reach a compliance agreement with EPA which may extend beyond statutory deadlines. . . . [O]ur earlier strategy of filing such agreements in court to provide the desired 'shield' has been precluded by DOJ.

*Review of Hazardous Waste Disposal Practices at Federal Facilities: Hearing Before House Subcomm. of the Comm. on Gov't Operations*, 98th Cong. 260 (1983) (statement of Marvin B. Durning, Assistant Administrator for Enforcement, EPA).

<sup>276</sup> Herz, *supra* note 5, at 936–37 & nn.169–70. Herz acknowledges that such a lawsuit would "raise[ ] significant article III concerns." *Id.* at 937 n.169.

<sup>277</sup> See generally Neal Devins & Saikrishna B. Prakash, *Reverse Advisory Opinions*, 80 U. CHI. L. REV. 859 (2013) (criticizing judicial demands that parties to a case make certain arguments). Such intrusion is particularly unwarranted given the difficult judgment calls that good advocates must make about which arguments to press—decisions that become even more difficult for government attorneys who must also consider the long-term reputation of the United States in court and broader notions of justice. Catherine H. Gibson, *Representing the United States Abroad: Proper Conduct of U.S. Government Attorneys in International Tribunals*, 45 GEO. J. INT'L L. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2230816](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230816).

<sup>278</sup> *E.g.*, *Poe v. Ullman*, 367 U.S. 497, 505 (1961).

make constitutional arguments that would limit their own options in the future. Of course, it is true that this can also happen when a private party challenges an agency's policy: an environmental group might challenge a particular environmental regulation for being too lax but is unlikely to argue that the regulator's charter is unconstitutional. Even if an agency is genuinely and entirely committed to representing its particular slice of the public interest, to the exclusion of even its own interest (which is unlikely), it may miscalculate exactly what that interest is. The presence of a private party supplies an outside perspective that is necessarily absent in interagency litigation.

2. *Lack of Facts.* The Court has identified the need for a specific factual context as a justification for its standing rules. Without an outside party with an interest in the dispute, there may be a shortage of facts, at least when the challenging agency is not a regulated party itself.<sup>279</sup> In cases involving a regulated agency, the factual context will often be clear, and the presence or absence of an outside party matters little to the record developed before the court. But consider what happens when one agency challenges another's decision, despite not falling within the regulated class. The disagreement between the dueling agencies likely concerns the factual impact of the regulation. But without private parties to supply a specific factual context, the agencies are left to debate abstract points of law and policy in a vacuum. An outside party crystallizes the legal issue for the court with facts rather than hypotheticals, generalizations, or estimates. Judicial resolution thus requires only an application of law to fact, a task for which judges are well suited.

It is worth pausing a moment to ask whether the "factual context" rationale justifies a standing requirement in all cases.<sup>280</sup> Challenges to government actions, even constitutional challenges, are often based on factual findings made by the agency or by

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<sup>279</sup> See generally David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808 (2004) (recognizing but criticizing the rule).

<sup>280</sup> See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 62 (3d ed. 2006).



Congress.<sup>281</sup> For example, consider a facial constitutional challenge to a federal statute based on an argument that it exceeds Congress's Article I power. The plaintiffs in such a proceeding are unlikely to supply relevant facts for the court to consider on the merits, but they still must establish how the law affects them to prove standing.<sup>282</sup> Or consider a challenge to an agency regulation, which is generally reviewed on an administrative record filed by the agency, with deference to the agency's factual determinations. How, then, could the factual concreteness supplied by a party's factual injury aid resolution of disputes that are limited to a factual record not of the parties' making?<sup>283</sup>

This is a fair question, and it merits closer scrutiny than this Article can provide.<sup>284</sup> One answer would be simply to observe that it has never troubled the Supreme Court, which has insisted on standing in record-review cases with equal vigor as in other cases.<sup>285</sup> Or perhaps the rule is needed because it is too difficult to determine at the outset if concrete facts will aid the court, so a bright-line rule is used as a prophylactic.

A more satisfying answer is that a party with a factual stake in the controversy is able to make use of the record to supply a factual context. For example, a party with a factual injury who is challenging an agency record is better positioned to understand and highlight relevant portions of the record to supply a factual

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<sup>281</sup> See Driesen, *supra* note 279, at 840 ("In three very important classes of cases—administrative law cases, facial constitutional challenges based on individual rights, and structural constitutional litigation—explicit linkages between injuries and merits adjudication seldom arise. The requirement of injury-in-fact in such cases usually does nothing to make litigation more concrete.").

<sup>282</sup> See Robert Alleman & Jason Mazzone, *The Case for Returning Politicians to the Supreme Court*, 61 HASTINGS L.J. 1353, 1378–79 (2010) (quoting from Chief Justice Roberts's confirmation hearing about deference to congressional factfinding); cf. FED. R. EVID. 201 (discussing legislative facts).

<sup>283</sup> Perhaps this dilemma is one reason why the Court has grown increasingly hostile to facial constitutional challenges because they rely on speculation. See generally Catherine Gage O'Grady, *The Role of Speculation in Facial Challenges*, 53 ARIZ. L. REV. 867 (2011).

<sup>284</sup> See generally Driesen, *supra* note 279.

<sup>285</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 516–18 (2007).

context for the court's inquiry.<sup>286</sup> It is also able to recognize any deficiencies in the record and thus, under certain circumstances, augment the record.<sup>287</sup> Even seemingly "pure" questions of law rarely are: the factual context, and the judges' own perception of facts, lurks just beneath the surface.<sup>288</sup> A motivated plaintiff who has been directly injured by a law understands how the law actually operates and knows when to challenge congressional or administrative descriptions of the law.

3. *The Absence of a Need for Judicial Resolution.* "The province of the court is, solely, to decide on the rights of individuals," Chief Justice Marshall famously declared in *Marbury v. Madison*.<sup>289</sup> When allocating power between the branches, the Framers gave the legislature the power to "prescrib[e] the rules by which the duties and rights of every citizen are to be regulated"<sup>290</sup> but forbade it the power "to impose a substantial deprivation on one person" through the prohibition on bills of attainder and the reservation of judicial power to the courts.<sup>291</sup> The judiciary, at least partially insulated from majoritarian whims through the tenure of its judges, was entrusted with the most vital task of adjudicating the "rights of individuals."<sup>292</sup> One hopes that the political branches exercise their power wisely, but it was the elaborate and impartial processes of the independent judiciary that was viewed as better serving an individual in any particular case. Indeed, recent Supreme Court decisions demonstrate that it greatly prizes judicial resolution of private interests by actually

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<sup>286</sup> See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1308 (1976) ("If the party structure is sufficiently representative of the interests at stake, a considerable range of relevant information will be forthcoming. And, because of the limited scope of the proceeding, the information required can be effectively focused and specified. . . . Moreover, the information that is produced will not be filtered through the rigid structures and preconceptions of bureaucracies.").

<sup>287</sup> E.g., *Wilson v. Comm'r*, 705 F.3d 980, 991 (9th Cir. 2013).

<sup>288</sup> *United States v. Morrison*, 529 U.S. 598, 614 (2000).

<sup>289</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>290</sup> *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 222 (1995) (quoting THE FEDERALIST NO. 78, at 523, 525 (Alexander Hamilton) (Jacob E. Cooke ed. 1961)).

<sup>291</sup> *Id.* at 242 (Breyer, J., concurring) (quoting *INS v. Chadha*, 462 U.S. 919, 962 (1983)).

<sup>292</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

mandating the availability of an Article III tribunal for many of these injuries.<sup>293</sup>

The judiciary's resources and political capital are limited.<sup>294</sup> So perhaps we can understand limiting judicial intervention to cases involving actual or imminent private injury is an attempt to conserve the judiciary's most valuable function. As Professor Jaffe wrote,

Neither the executive nor the legislature is as dependable as the judiciary in making such determinations [of private rights] and, if necessary, we should exclude other functions which might impair the judiciary's performance of this role. Indeed, if we had to choose just one function for the judiciary we should choose the administration of justice in this sense.<sup>295</sup>

From the Justices' 1793 refusal to advise the President on questions of law absent any private interest directly at stake<sup>296</sup> to

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<sup>293</sup> *E.g.*, *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

<sup>294</sup> As it is, the judiciary is overworked and may be unable to give sufficient effort to even cases with serious private interests at stake. Even with limited jurisdiction, judges complain of being overworked and look to timesavers to cope. Courts rely heavily upon newly minted law school graduates to fulfill the court's duties. Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 20 (2007). Circuit courts further minimize their workload by writing unpublished opinions and unthinkingly following prior decisions under super-strict rules of precedent. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 796–98 (2012). Courts are also quick to find waiver of arguments and to dismiss plausible cases for technicalities. Each feature reflects a judiciary straining to fulfill its constitutionally assigned mission of adjudicating assigned cases and controversies. Moreover, the federal judiciary cannot be expanded indefinitely: its excellence depends in part on the rigorous and demanding selection process of its judges. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 30, 99 (1985). Whether any of these features justifies the Court's restriction on jurisdiction is beyond the scope of this Article. See Elliott, *supra* note 36, at 499 ("If the only goal is to reduce the cases the courts hear, then standing doctrine might be effective. But a doctrine should not randomly choose who can or cannot sue."); CHEMERINSKY, *supra* note 280, at 61–62 (arguing that high cost of litigation prevents courts from being overwhelmed with litigation from ideological plaintiffs).

<sup>295</sup> Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1034–35 (1968).

<sup>296</sup> The Court later adopted a rule against hearing nonadverse suits that ensures the asserted interests placed before the Court are genuine, because judicial review "is

today's rules on standing, the Court can be thought of as asking whether sufficient private stakes exist to warrant judicial involvement.<sup>297</sup> In this vein, the Court recently advised courts to devote their resources "to those disputes in which the parties have a concrete stake."<sup>298</sup> While some might say that courts provide the wrong answer—by ignoring diffuse ecological harms<sup>299</sup> or the injury that one suffers when the government establishes another's religion<sup>300</sup>—but perhaps this is the right question.<sup>301</sup>

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legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals." *Chi. & Grand Truck Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892). Even the exceptions recognized to the requirement of adversity (i.e., bankruptcy, naturalization, search warrants) all involve a clearly defined private interest at stake, further underscoring the Court's concern that it reserve judgment until it is needed.

<sup>297</sup> *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 191 (2000).

<sup>298</sup> *Id.*; see also *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) ("[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (arguing that while the power of judicial review "is a formidable means of vindicating individual rights, when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of the federal courts in performing that role"); cf. *Woolhandler & Collins*, *supra* note 51, at 445–46 (arguing for limited standing of states for similar reasons). The Court has usually advanced other rationales to explain standing, generally framed as protecting the other branches from anti-democratic interference from unelected judges. These protestations about preserving political power ring somewhat hollow when both Congress and the Executive want judicial intervention but are denied it by the Court. *Elliott*, *supra* note 36, at 496 ("For the Court to use standing to defeat that congressional purpose would be to exceed the bounds of the judicial power."). The Court might instead emphasize that standing benefits both judges and litigants by conserving the judiciary's resources for when it is needed to protect individual rights.

<sup>299</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

<sup>300</sup> *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

<sup>301</sup> It is true that the Court has never held that some private interest is all that is required to establish standing. Its approval of *qui tam* actions even though the plaintiff simply asserts an interest derivative of the government illustrates this point. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000). The plaintiff's share of the award suffices to support jurisdiction. The *qui tam* example underscores that Congress can articulate which private rights are actionable—as long as there are private interests in the case. Further, the Court has held that states have interests worth protecting, even though they are also sovereign. But, at least at one point, states actually were limited to proprietary injuries—in other words, they *were* treated like individuals. *Woolhandler & Collins*, *supra* note 51, at 399–407. Moreover, separate sovereigns (like Indian tribes and foreign governments) have a constitutionally imposed distinctness that distinguishes their disputes from an agency's.

Litigation involving only the sovereign's inability to make up its mind lacks the private injuries that courts were designed to protect through adjudication. In fact, agencies have an influence that nongovernmental parties can only dream of.<sup>302</sup> Most agencies can appeal directly to the President, who can pick a winner among competing agencies. Even agencies with some measure of insulation from the President have a strategic interest in cooperating with other agencies, making judicial intervention superfluous. Every agency is at least partially reliant on others, particularly those with shared regulatory space. If an agency unilaterally asserts and prevails on a single position, the other agency can push back on other positions.<sup>303</sup> Moreover, agencies have a direct connection to the President, who can control budget requests and the appointment of agency heads, even for those agencies with a measure of independence.<sup>304</sup> In sum, disagreeing agencies may rely on many alternatives short of litigation to accomplish their goals.

One could argue that litigation supplies strong proof that the dispute cannot be resolved internally, making judicial resolution needed.<sup>305</sup> But this need not be true: agencies might in certain circumstances view litigation as a more predictable, less costly, and less politically risky vehicle to challenge another's decision. It may also be less intrusive for an agency to obtain a court order against another agency than endure the friction of tense negotiation over a policy. Similarly, agencies might desire a judicial resolution to their impasse to avoid making a difficult political decision. "Elected officials in the United States encourage or tacitly support judicial policymaking both as a means of avoiding political responsibility for making tough decisions and as a means of pursuing controversial policy goals that they cannot

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<sup>302</sup> See generally J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217 (2005) (describing effectiveness of agencies lobbying independent agencies to change its behavior).

<sup>303</sup> See Barkow, *supra* note 256, at 43–44.

<sup>304</sup> See *id.*

<sup>305</sup> See Herz, *supra* note 5, at 904.

publicly advance through open legislative and electoral politics.”<sup>306</sup> But even if we indulge the assumption that interagency litigation could resolve a deadlock within the government, this still would not justify judicial intervention; the competing interests at stake are still only the differing views of government officials about how the Executive Branch should implement the law.

Delaying judicial intervention until a nonsovereign interest is at stake ensures that courts will spend their efforts where they are most needed. Interagency litigation could involve questions that would never be presented to the courts by a nongovernmental party. Perhaps no one outside the government would have standing or, even with standing, the incentive to bring the litigation. But even if the litigation will be brought eventually, it is better that the interested party control the litigation, rather than trusting the agency to advocate successfully for its interests. For example, the Supreme Court found it had no jurisdiction to review Congress’s challenge to the line-item veto but held the veto unconstitutional the following Term when a challenge was brought by parties outside of the U.S. Government.<sup>307</sup> “All that was changed was the perceived nature of the Court’s role—it was acting as protector of various private and public entities against the waywardness of the Act, not sitting as direct arbiter of congressional and presidential powers. That difference was a powerful reason to deny congressional standing” but hear the case when brought by injured outside parties.<sup>308</sup>

4. *Questions of Law Versus Questions of Policy.* A final argument in defense of interagency litigation might be that, so long as courts are confined to questions of law, there is no real danger of inappropriate judicial involvement in Executive Branch policy.<sup>309</sup> The argument would note that, even in interagency

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<sup>306</sup> Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 37 (1993).

<sup>307</sup> Compare *Raines v. Byrd*, 521 U.S. 811, 813–30 (1997), with *Clinton v. City of New York*, 524 U.S. 417, 420–36 (1998).

<sup>308</sup> 13B *WRIGHT ET AL.*, *supra* note 187, § 3531.11.2.

<sup>309</sup> Herz, *supra* note 5, at 936 (“To say that interagency litigation requires courts to resolve disputes over regulatory policy is also misleading. Such a judicial role would be unseemly at best. Although the policy disagreement—for example, should this

litigation, courts will be asked to resolve questions of law, not some general question of policy. Although this is true enough in the abstract, this characterization loses its significance in the application to particular disputes. At the level of agency disagreement, the questions of law are extremely difficult and rely more on questions of assigning deference rather than the usual tools of judicial construction. They are also likely to be extremely controversial politically. These are exactly the arenas where a robust empirical literature suggests that judges will act on their policy preferences rather than in a judicial capacity.<sup>310</sup> In addition, the more detached that questions of law become from any particular facts (or the interests of any particular nongovernmental party), the more that they look like questions of policy better resolved administratively than judicially.

#### V. CONCLUSION

In sum, there is but one United States, and bureaucratic disagreements cannot create a case where one does not otherwise exist. The United States lacks a sovereign interest in reversing itself, and there is no adverseness when two components of the United States assert the same interest in court. Only when a common law interest is at stake—either by a plaintiff, a defendant, or both—may federal courts adjudicate a dispute.

This conclusion, compelled not only by the specific cases that have addressed interagency litigation but also by the general concepts of Article III standing, has ramifications well beyond the next lawsuit between federal agencies. A limit on interagency litigation underscores Congress's inability to shift power from the

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hydroelectric project go ahead?—may be what got the case into court in the first place, it is not the issue that the court will resolve. Rather, the court will decide legal issues, fulfilling a judicial rather than an executive function, exactly as it does in litigation between the government and a private party.”)

<sup>310</sup> Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 813 (2008); Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 220–24 (1999); Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 DUKE L.J. 2193, 2228 (2009).

Executive to the Judiciary<sup>311</sup> and prevents the Executive from running to the courts to get out of making a difficult decision or avoid political responsibility.<sup>312</sup> By using interagency litigation as a case study in Article III, we gain unique insight into the contours of the requirements of adverseness and standing. And this Article provides new way of looking at standing: not simply as a limitation to frustrate plaintiffs but as a way of defining the relationship between plaintiff and defendant. Finally, by studying interagency litigation, we gain a clearer understanding of what it means for the United States to appear in its courts.

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<sup>311</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992); Elliott, *supra* note 36, at 463 (“[S]tanding acts as a bulwark against congressional overreaching, preventing Congress from conscripting the courts in its battles with the executive branch.”).

<sup>312</sup> *Cf. NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (opinion of Roberts, C.J.) (“Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. ‘[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.’” (quoting *New York v. United States*, 505 U.S. 144, 169 (1995))).