

THE YALE LAW JOURNAL

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Civil Servant Suits

ABSTRACT. A civil servant suit is a lawsuit brought by a government employee to declare unlawful a statute, regulation, or command that he or she is charged with enforcing. The theory of such suits is that the civil servant is uniquely situated to challenge such a command: unlike members of the public, who have no particularized interest in whether the command is legal, civil servants must choose between following the law and keeping their jobs. This Note is the first to introduce, describe, and assess the practice of civil servant suits.

The key question is whether such suits should be permitted, and this Note explores both doctrinal and normative answers to that question. As a doctrinal matter, I argue that it is impossible to determine whether civil servant suits should proceed—whether civil servants have Article III standing—without a more robust account of the rights and duties of civil servants. Should civil servants be able to resist commands they believe to be unlawful? As a normative matter, I suggest that the matter is more complex than it might seem. Civil servant suits might promote executive compliance with the law and facilitate dissent from within the executive branch. But unresolved questions regarding the structure of civil servant suits and the nature of civil servant resistance may make them less effective than they might initially appear.

AUTHOR. Yale Law School, J.D. 2014. I am deeply grateful to Cristina Rodríguez for her constant support in supervising this Note; to Bridget Fahey, Judge William Fletcher, Heather Gerken, Jon Michaels, Nicholas Parrillo, and participants in the Yale Law School Separation of Powers seminar for insightful comments and conversations regarding previous drafts; and to Charlie Dameron and the editors of the *Yale Law Journal* for thorough and thoughtful editing.



NOTE CONTENTS

INTRODUCTION	760
I. STANDING AND THE SEPARATION OF POWERS	763
A. A Brief History of Standing	763
B. Citizen Suits and the Separation of Powers	768
C. Civil Servant Suits	772
II. CIVIL SERVANT STANDING	777
A. Constitutional Standing	778
1. Injury in Fact	778
2. Causation	782
B. “Generalized Grievances”	783
III. THE RIGHT TO RESIST	785
IV. CIVIL SERVANTS AND THE SEPARATION OF POWERS	791
A. The Rule of Law	791
B. “Garden-Variety Employment Disputes”	795
C. The Political Alternatives	799
CONCLUSION	802

INTRODUCTION

Debates raged in the 1980s and 1990s over whether the federal courts could hear *citizen suits*: lawsuits brought by members of the public to challenge the legality of official action.¹ Citizen suits, argued their proponents, were needed in order to ensure that the executive branch complied with congressional or constitutional commands; without the checks imposed by these private attorneys general, the executive could under-enforce statutory or constitutional rights for ideological reasons. But in a series of controversial decisions, the Supreme Court largely turned this effort back. Citizen suits, explained the Court, present only “generalized grievances about the conduct of government,”² not the kinds of “Cases” and “Controversies” that the federal courts are permitted to hear. The resulting doctrine – then and now – precludes many disputes about the legality of official action from being heard by the federal courts.

But there is one set of plaintiffs who can disrupt this state of affairs, or so this Note will suggest: the civil servants who are charged with *enforcing* the statute, regulation, or command subject to challenge. Consider the following examples:

- A state passes a new statute restricting the rights of gun owners. A group of elected sheriffs sues on the ground that the sheriffs “cannot enforce a statute that violates the fundamental constitutional rights” of their constituents.³
- The Chair of the U.S. Equal Employment Opportunity Commission (EEOC) instructs her employees to begin investigating and prosecuting claims of discrimination based on sexual orientation. An EEOC investigator sues on the ground that Title VII does not permit such claims and that he cannot enforce an *ultra vires* command.⁴

1. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Allen v. Wright*, 468 U.S. 737 (1984); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992).

2. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 479 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)).

3. See Second Amended Complaint for Declaratory and Injunctive Relief at 13, *Cooke v. Hickenlooper*, No. 13-cv-1300, 2013 WL 6384218 (D. Colo. Nov. 27, 2013). The district court ruled that the sheriffs lacked standing. *Cooke*, 2013 WL 6384218, at *12.

4. See Memorandum in Opposition to Defendants’ Motion to Dismiss at 7, *Somers v. EEOC*, No. 6:13-cv-00257, 2014 WL 1268582 (D.S.C. Mar. 26, 2014) [hereinafter *Somers Response*].

- The President of the United States announces that he will refrain from enforcing the immigration laws against certain undocumented immigrants brought to the United States as children. Ten Immigration and Customs Enforcement (ICE) agents sue on the ground that they are required by law to deport such immigrants, commanded by their superiors not to, and “risk adverse employment action if they disobey.”⁵

These suits are predicated on a common theory: when a legislature passes an unconstitutional statute or the executive unlawfully declines to enforce a valid one, the executive-branch employee who must enforce the statute or implement the command may suffer a legally cognizable injury, even if no one else does. Such a civil servant—or so the argument goes—does not possess the kind of “generalized grievance” the federal courts have no power to hear, for a single reason: he or she may be fired, disciplined, or otherwise penalized for disobeying. This theory is not merely an academic one—civil servants have brought suit in exactly the situations described above, and others—but it has received virtually no academic attention,⁶ and courts appear adrift in their consideration of such claims.

This Note remedies that gap by introducing, describing, and critically examining the theory behind what I call *civil servant suits*. It proceeds in four Parts. Part I introduces the problem, describing the separation-of-powers disputes that are the subject of these lawsuits; it traces the history of citizen suits and their rejection by the Court; and it introduces the civil servant suit by describing *Crane v. Napolitano*, the lawsuit brought by ICE agents to challenge President Obama’s policy permitting certain undocumented immigrants to remain in the United States.⁷

The district court dismissed the investigator’s claim as preempted by Title VII and declined to reach the standing issue. *Somers*, 2014 WL 1268582, at *6 n.3.

5. See Plaintiffs’ Response to Defendants’ Motion to Dismiss at 3, *Crane v. Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013) (No. 3:12-cv-03247), 2012 WL 6633749 [hereinafter *Crane Response*]. The district court found that the ICE agents had standing. *Crane*, 920 F. Supp. 2d at 740-41.
6. Several short paragraphs are devoted to the question in PAUL M. BATOR ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 182-83 (2d ed. 1973) (“Would routine litigation even by upper level officials to test the constitutionality of statutes they are charged with enforcing be desirable?”). But subsequent editions of the casebook pare down and ultimately eliminate discussion of the topic.
7. *Crane*, 920 F. Supp. 2d 724.

The key question for the federal courts and their academic interlocutors is whether civil servant suits should be permitted, and this Note offers both doctrinal and normative answers to that question. Part II examines the question from a doctrinal perspective: do civil servants have standing to challenge the statutes, regulations, and commands that they are charged with enforcing as unlawful? I argue that the Court's standing doctrine alone cannot furnish an answer. Echoing the doctrine's critics, I contend that we cannot determine whether civil servants have standing without a better understanding of the rights and duties of civil servants and their role in our system of separation of powers. Do civil servants have the right to resist orders they believe to be unlawful? Could our system even tolerate the expansion of judicial review that would result?

I consider these questions in Parts III and IV. Part III examines the statutory regime that sets out the rights and responsibilities of federal employees, including the right—set out in statutes and the common law, but rarely exercised and little understood—to resist unlawful orders. Part IV draws out the implications of a robust understanding of the right to resist. The consequences of allowing cases like *Crane* to proceed would be significant: doing so could subject every executive order—at least every executive order that requires the participation of civil servants—to judicial review. Many will reject this prospect as dangerous, but I suggest instead that the dangers are overstated; indeed, civil servant suits may represent one tool for ensuring executive compliance with the rule of law. I conclude by evaluating the efficacy of civil servant suits as a mechanism for legal compliance and for securing dissent, and by comparing them to other—less radical—alternatives.

Two clarifying remarks are in order. First, this Note focuses primarily on one form of civil servant suit: the suit brought to challenge executive action, and particularly the legality of executive-branch enforcement policies. This is not because challenges to executive action are the only form of civil servant suit; the lawsuit brought last year by Colorado sheriffs to invalidate the state's restrictive gun control statutes is an example of civil servants' assertion of standing to challenge statutory commands, not executive demurrals.⁸ But the standing issues that civil servant suits appear to ameliorate are most acute in the context of challenges to executive action. When the legislature passes a statute, it will often be the case (as it was in *Cooke*, the case challenging the Colorado gun regulation⁹) that a wide variety of regulated parties have

8. See *Cooke*, 2013 WL 6384218, at *12.

9. *Id.* (dismissing claims only of sheriff plaintiffs, but leaving claims brought by gun owners and hunters' associations).

standing to challenge its validity. When the executive interprets, delays, or declines to enforce a statute, no one will¹⁰ – except, perhaps, the civil servant.

Second, the central claim of the Note is not that the federal courts are awash with suits like *Crane*. Indeed, the unorthodox nature of the immigration agents’ standing argument in that case is presumably what made the question so difficult for the court to resolve. But even if claims like *Crane*’s are rare, they are worth taking seriously. For one, if federal courts find that civil servants have standing – as the court did in *Crane* – then presumably the courts will face increasingly common attempts to use civil servant suits to avoid the strictures of standing doctrine.¹¹ More importantly, such suits squarely present the question of how we are to understand the right of individual employees to exercise resistance and dissent within the federal bureaucracy, and whether and when we consider such resistance valuable. As I suggest below, even if we conclude that civil servant suits are not a useful way of expressing dissent, it may be worth paying more attention to how we allow civil servants’ voices to be expressed.

I. STANDING AND THE SEPARATION OF POWERS

It is by now well established that many disputes between the executive and legislative branches will never be reviewed by a court. This is for a simple reason: there is no plaintiff who is *injured* by many claims of executive authority. But this understanding was not always the law. Part I.A provides a brief sketch of the history of standing doctrine and the restrictions imposed, over time, on the citizen suit. Part I.B sets out the key premise behind civil servant standing: that standing doctrine prevents many separation-of-powers disputes from being heard by the courts. Part I.C introduces the question of whether civil servant suits are permitted and examines *Crane v. Napolitano*, the paradigmatic civil servant suit.

A. A Brief History of Standing

The standing inquiry stems from the premise that “Article III of the Constitution confines the federal courts to adjudicating actual ‘cases’ and ‘controversies.’”¹² The Supreme Court has explained that Article III therefore limits “the business of federal courts to questions presented in an adversary

10. I set this reasoning out in more detail *infra* Part I.B.

11. See, e.g., *Somers* Response, *supra* note 4, at 7 (citing *Crane*, 920 F. Supp. 2d at 738).

12. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting U.S. CONST. art. III).

context and in a form historically viewed as capable of resolution through the judicial process.”¹³ Despite the seeming simplicity of the premise, however, it has generated considerable confusion in practice. In an often-quoted phrase, Justice Douglas once remarked that “[g]eneralizations about standing to sue are largely worthless as such.”¹⁴ Standing doctrine, as one prominent account skeptically notes, “has been described as ‘permeated with sophistry,’ as ‘a word game played by secret rules,’ and . . . as a largely meaningless ‘litany’ recited before ‘the Court . . . chooses up sides and decides the case.’”¹⁵

The doctrine of standing, in other words, is a contingent one, and a judicially constructed one at that. Indeed, until the mid-twentieth century, as an array of commentators have observed, there was no standing doctrine at all.¹⁶ Instead, the question was whether a potential litigant had a cause of action: a right granted either by the common law or by a legislature. In early practice in England and in the United States, moreover, certain forms of action, or writs, were available to all citizens without any showing of a “personal stake” or an “injury in fact.”¹⁷ As late as 1961, Louis Jaffe was able to declare that “the public action—an action brought by a private person primarily to vindicate the public interest in the enforcement of public obligations—has long been a feature of our English and American law.”¹⁸

But the rise of the administrative state brought the matter into sharp focus. The growth of the executive branch, and the rise in the number of statutes it was charged with enforcing, led to concerns that congressional purpose could be undermined not only by excessive regulation, but also by agency hostility to, or inadvertent neglect of, statutory programs.¹⁹ Plaintiffs therefore argued, and courts found, that parties as varied as displaced urban residents, listeners of radio stations, and users of the environment could proceed against the

13. *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

14. *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151 (1970).

15. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) (footnotes omitted).

16. A concise history of the doctrine can be found at Sunstein, *supra* note 1, at 168-97. More thorough accounts include James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers’ Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1 (2001); and Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004).

17. See Sunstein, *supra* note 1, at 170-79.

18. Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 302 (1961).

19. See Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1682-87 (1975).

government to redress an agency's legally insufficient regulatory protection.²⁰ The theory undergirding these suits was that these plaintiffs were suffering what they described as a "legal injury": the violation of a statute or constitutional provision that they could plausibly argue was passed to protect their interests.²¹

But the term "legal injury" is not self-explanatory, as Cass Sunstein, among others, has suggested,²² and perhaps it is for that reason that the Supreme Court in a 1970 decision attempted to set out a more accessible—but still expansive—definition of what was by then understood as its standing doctrine.²³ The *Data Processing* case shifted the inquiry from "legal injury" to "injury in fact": under the new test, standing existed where plaintiffs could show (a) "injury in fact, economic or otherwise"²⁴ and (b) injury "arguably within the zone of interests"²⁵ of the regulatory statute. The second prong was designed to endorse the expansive vision of standing recognized in prior opinions, but the innovation that proved to be more significant was the Court's identification of a preliminary, fact-based prong.²⁶

Most contemporary accounts of standing doctrine describe *Data Processing* as the root of a broader change in the doctrine's development.²⁷ In the wake of that case, and influenced by then-Professor Antonin Scalia's critique of the

20. See *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920, 932-37 (2d Cir. 1968); *Office of Comm'n of the United Church of Christ v. FCC*, 359 F.2d 994, 1000-06 (D.C. Cir. 1967); *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 615-17 (2d Cir. 1965).

21. This is not, of course, to claim that in this period *anyone* could bring *any* suit to redress what he or she perceived as public misconduct; in the 1960s and 1970s, the Court drew an outer limit around self-described "taxpayer suits." See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); see also Fletcher, *supra* note 15, at 267-72 (offering a nuanced account of these cases); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1451-52 & nn.88-89 (1988) (same); Sunstein, *supra* note 1, at 183-86 (describing the trend toward recognizing standing in these cases).

22. See Sunstein, *supra* note 1, at 186.

23. *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

24. *Id.* at 152.

25. *Id.* at 153.

26. See Sunstein, *supra* note 1, at 185-86.

27. See Fletcher, *supra* note 15, at 229 ("More damage to the intellectual structure of the law of standing can be traced to *Data Processing* than to any other single decision."); Richard Stewart, *Standing for Solidarity*, 88 YALE L.J. 1559, 1569 (1979) (reviewing JOSEPH VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* (1978)) (describing *Data Processing* as an "unredeemed disaster"); Sunstein, *supra* note 1, at 185 (calling *Data Processing* a "remarkably sloppy opinion").

expansion of standing,²⁸ the Court began to rely on the “injury in fact” prong to dismiss claims brought by citizens to redress government misconduct.²⁹ Citizen suits, reasoned the Court, did not satisfy the standing requirements set out in *Data Processing* because their plaintiffs—the *beneficiaries* of congressional regulation rather than the targets, or *objects*, of such regulation—suffered no “actual” injury from the government’s failure to act.³⁰ In *Simon*, for instance, the Court denied standing to indigent people protesting a change in tax policy on the basis that the plaintiffs had not shown that the policy directly caused them to lose medical care; whatever injury they suffered, the Court reasoned, was merely “speculative” in nature.³¹

This trend culminated in the well-known *Lujan v. Defenders of Wildlife*, which denied standing to citizens claiming injury from the EPA’s failure to enforce environmental regulations, despite the existence of a statutory provision explicitly allowing regulatory beneficiaries to bring suit.³² *Lujan* set out the doctrine’s now-“numbingly familiar”³³ requirements: to have standing, (1) the plaintiff must have suffered an injury in fact; (2) the plaintiff’s injury must be fairly traceable to the actions of the defendant; and (3) the relief requested in the suit must redress the plaintiff’s injury.³⁴ Late in the opinion, now-Justice Scalia explicitly rejected the theory behind citizen suits as inconsistent with Article III, asserting that “an injury amounting only to the alleged violation of a right to have the Government act in accordance with law [i]s not judicially cognizable.”³⁵ These “generalized-grievance cases,” he explained, “cannot alone satisfy the requirements of Art[icle] III without draining those requirements of meaning.”³⁶

28. See Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345; see also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) [hereinafter Scalia, *The Doctrine of Standing*] (arguing against an expansive grant of standing).

29. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

30. The requirement that plaintiffs show an injury “in fact”—as opposed to a “legal” injury—has received significant criticism. See Fletcher, *supra* note 15, at 231–33 (arguing that the “injury in fact” requirement requires courts to “*sub silentio* insert[] into [their] ostensibly factual requirement of injury a normative structure of what constitutes judicially cognizable injury”).

31. *Simon*, 426 U.S. at 42, 44–45.

32. 504 U.S. 555 (1992).

33. Fletcher, *supra* note 15, at 222.

34. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

35. *Id.* at 575.

36. *Id.* at 576.

Allen v. Wright offers an even clearer indication of the Court's concern with structural separation-of-powers issues in standing cases.³⁷ In *Allen*, African-American parents brought a nationwide class action claiming that the Internal Revenue Service had violated its statutory "obligation to deny tax-exempt status to racially discriminatory private schools."³⁸ The result, the plaintiffs claimed, was that they had been denied access to integrated schools. But the Court turned the suit back on pragmatic grounds. If plaintiffs could obtain judicial review merely by alleging failures in "systemwide law enforcement practices," Justice O'Connor wrote for five Justices, "[t]hat conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations."³⁹ Because the case would require the judiciary to examine—and potentially enjoin—the manner in which the executive branch enforced a statute, she explained, it was a paradigmatic example of one in which "the idea of separation of powers[] counsels against recognizing standing."⁴⁰

Allen v. Wright made explicit what Justice Scalia, in his first years as a judge on the D.C. Circuit, had advocated: the judiciary should hesitate to interfere in cases that pit the executive branch against the legislative branch,⁴¹ or more generally, in which members of the public—in Sunstein's words, regulatory beneficiaries⁴²—seek to have judges adjudicate the legality of official action. In Justice Scalia's eyes, the suits that marked the high point of standing in the 1960s and 1970s represented an "overjudicialization of the processes of self-governance."⁴³ His position was that the Court should pull back on its expansive grants of standing in favor of the democratic process, and, by and large, it has. Justice Scalia's claim has received a healthy dose of criticism from both the Court's more liberal members⁴⁴ and the academy,⁴⁵ but it is clear that his critics are, at least for now, in the minority.

37. 468 U.S. 737 (1984).

38. *Id.* at 739.

39. *Id.* at 759-60.

40. *Id.* at 761.

41. See Scalia, *The Doctrine of Standing*, *supra* note 28, at 891 (arguing that standing "assure[s] that [courts] keep out of affairs better left to the other branches").

42. Sunstein, *supra* note 21, at 1433.

43. Scalia, *The Doctrine of Standing*, *supra* note 28, at 881.

44. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 589-90 (1992) (Blackmun, J., dissenting); *Allen*, 468 U.S. at 766 (Brennan, J., dissenting).

45. See, e.g., Heather Elliott, *The Functions of Standing*, 61 STAN L. REV. 459, 463 (2008) (calling standing doctrine "ill-suited to most of the functions it is asked to serve"); Gene R. Nichol,

B. Citizen Suits and the Separation of Powers

The constraints that the Court has imposed on citizen suits have had significant consequences for our system of separation of powers, and those consequences are growing rather than diminishing with time. The consequences of the doctrine are clear. By imposing significant limitations on the ability of diffuse groups of regulatory beneficiaries to bring suit, the Court has restricted the availability of judicial review over a particular kind of interbranch dispute: disputes over how the executive branch chooses to administer, interpret, and enforce the law. The result is a doctrine that operates asymmetrically in favor of the executive: while judicial review will often, if not always, be available to determine the constitutionality of new laws, it will often be unavailable when plaintiffs challenge the way in which those laws are enforced.

Consider, as an example, the paradigmatic case of an agency's decision not to bring an enforcement action.⁴⁶ As Justice Rehnquist explained in *Heckler v. Chaney*, "when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights,"⁴⁷ and thus there is no aggrieved individual with standing to sue. In all but the rarest cases, this will be true even when the agency's non-enforcement decision is categorical rather than individual in nature, and even when it is justified by an agency's interpretation of its substantive statute rather than, for instance, a re-allocation of its scarce resources.⁴⁸ The underlying dynamic is the same: because the act of administering and implementing statutes inevitably involves tradeoffs, most enforcement policies have no "victims" as a matter of black-letter standing doctrine, and cannot be challenged in court.

What is perhaps less clear is that these consequences are growing with time. This is because the structural features militating against judicial review of executive action have been aggravated by the expanding scope of executive

Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1168 (1993) ("Justice Scalia's view of separation of powers threatens to constitutionalize an unbalanced scheme of regulatory review.").

46. See *Heckler v. Chaney*, 470 U.S. 821, 828-35 (1985). *Heckler* analyzed whether the Administrative Procedure Act permits review of agency inaction, and the Court did not conduct a standing analysis. But as Lisa Bressman has explained, standing doctrine and nonreviewability doctrine "[f]airly interchangeably . . . bar judicial review of agency inaction." Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1675 (2004).

47. *Heckler*, 470 U.S. at 832 (emphasis omitted).

48. See *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 674-77 (D.C. Cir. 1994); Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 165 (1996).

power—and in particular the expansion of the administrative state.⁴⁹ The last five decades have witnessed an enormous expansion in federal legislation across a variety of domains, and today the federal government is intimately involved in the day-to-day regulation of once-local fields, including environmental law,⁵⁰ labor law,⁵¹ and criminal law.⁵² In each arena, executive actors make decisions on a day-to-day, year-to-year, and administration-to-administration basis about how to exercise the coercive power of the state. The vast majority of these decisions, for the reasons outlined above, “injure” no party and are accordingly not reviewable by courts.

Moreover, the increasing dysfunction of the legislative branch has led many recent commentators to claim that we are living in an age of unprecedented executive lawmaking.⁵³ The Obama Administration, in particular, has made clear that it intends to enact components of its second-term agenda via executive action if legislative progress is not made.⁵⁴ Many have decried aspects of this approach as unlawful, even unconstitutional.⁵⁵ Others have argued that

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49. See generally Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1033 (2013) (describing “[t]he growth of the administrative state and the expansion of presidential power” in the twentieth century); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (“We live today in an era of presidential administration.”).
50. See Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 159 (2006) (noting that “the federal government continues to address issues of purely local effect” in environmental law).
51. See Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1153 (2011) (“It would be difficult to find a regime of federal preemption broader than the one grounded in the National Labor Relations Act (NLRA).”).
52. See Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn From the States*, 109 MICH. L. REV. 519, 579 (2011) (observing that “the federal government has intervened in a host of areas of traditional local control”).
53. See Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159, 1193-95 (2014) (arguing that “a dysfunctional Congress tempts the executive to begin to act more and more unilaterally”); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 27-36 (2014), (offering a similar account); see also Andrias, *supra* note 49 (chronicling the rise of muscular executive action); Kagan, *supra* note 49 (to similar effect).
54. President Barack Obama, Remarks by the President in the State of the Union Address (Feb. 12, 2013), <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address> [<http://perma.cc/WGU9-N58S>] (“But if Congress won’t act soon to protect future generations, I will. . . . I will direct my Cabinet to come up with executive actions we can take, now and in the future, to reduce pollution, prepare our communities for the consequences of climate change, and speed the transition to more sustainable sources of energy.”).
55. Much commentary along these lines is ideological in nature. See, e.g., 158 CONG. REC. S286-87 (daily ed. Feb. 2, 2012) (statement of Sen. Alexander) (“The President’s recess appointments not only show disregard for the Constitution, they show disregard for every

executive action is necessary to overcome an increasingly partisan political landscape.⁵⁶ But regardless of the lawfulness of the underlying executive actions, one thing is clear: many such questions will never be resolved in court, because no party has standing to sue.

Take, for example, President Obama's decision to delay the enforcement of the employer mandate provisions of the Patient Protection and Affordable Care Act (ACA).⁵⁷ The Act requires covered employers to begin providing ACA-compliant healthcare to their employees by January 1, 2014.⁵⁸ Despite the fact that the Act contains no provision authorizing the executive branch to "waive" the requirement, temporarily or otherwise,⁵⁹ the White House announced in July 2013 that it would suspend the Act's reporting requirement, and the penalties associated with non-compliance, until 2015, citing as authority only a statutory provision authorizing the Secretary of the Treasury to "prescribe all needful rules and regulations for the enforcement of this title."⁶⁰

Commentators immediately questioned whether the delay was lawful.⁶¹ But who would have standing to force a judge to answer that question? Not the employers who would otherwise have had to comply with the law's reporting requirements: no "injury." Not the Democratic congressmen who voted for the

individual American who chooses liberty over tyranny, President over King."); Michael McConnell, *Democrats and Executive Overreach*, WALL ST. J., Jan. 10, 2012, <http://online.wsj.com/news/articles/SB10001424052970204257504577150661990141658> [<http://perma.cc/M6C4-S7S6>]. Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195 (2014); and Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014), however, offer more in-depth academic critiques.

56. See, e.g., Obama, *supra* note 54; see also Pozen, *supra* note 53, at 58-70 (outlining the conditions under which such interbranch "self-help" can be legitimate).
57. See Jackie Calmes & Robert Pear, *Crucial Rule Is Delayed a Year for Obama's Health Law*, N.Y. TIMES, July 2, 2013, <http://www.nytimes.com/2013/07/03/us/politics/obama-administration-to-delay-health-law-requirement-until-2015.html> [<http://perma.cc/F7W6-A37K>].
58. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1513-14, 124 Stat. 119, 253-58 (2010) (codified in scattered sections of 26 U.S.C.).
59. Cf. David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 281-84 (2013) (discussing other provisions of the ACA for which Congress *did* delegate the power to waive major requirements).
60. I.R.C. § 7805(a) (2012); see Letter from Mark J. Mazur, Assistant Sec'y for Tax Policy, to Fred Upton, Chairman, House Comm. on Energy and Commerce et al. 2 (July 9, 2013), <http://democrats.energycommerce.house.gov/sites/default/files/documents/Upton-Treasury-ACA-2013-7-9.pdf> [<http://perma.cc/3LJ9-3WTC>].
61. E.g., Michael W. McConnell, *Obama Suspends the Law*, WALL ST. J., July 8, 2013, <http://online.wsj.com/news/articles/SB10001424127887323823004578591503509555268> [<http://perma.cc/D3EA-WZWK>].

law: foreclosed by a 1997 decision imposing curbs on congressional standing.⁶² And certainly not the law's putative beneficiaries, low-income Americans who might have hoped the ACA would force their employers to improve their insurance policies: too speculative. As Michigan law professor Nicholas Bagley wrote shortly after the delay was announced, "Unless I'm missing something, no one has standing to challenge the waiver – whether it's legal or not."⁶³

The conventional wisdom holds that President Obama's other executive initiatives are equally likely to evade judicial review. The President's announced policy not to prosecute low-level marijuana users in states that have legalized marijuana sales⁶⁴ causes no "injury" to even the most steadfast opponent of legalization. His decision, in the wake of *United States v. Windsor*,⁶⁵ to implement facially discriminatory federal benefits laws in a non-discriminatory manner is almost certainly immune from challenge, despite the burdens it will place on the public fisc.⁶⁶ Even his announcement, in the wake of widespread criticism, that the administration would "fix" the ACA by allowing health insurers to renew non-compliant plans that they would otherwise have had to cancel⁶⁷ may be immune from suit on standing grounds.⁶⁸

62. *Raines v. Byrd*, 521 U.S. 811 (1997); see also Jack Goldsmith, *Suing the President for Executive Overreach*, LAWFARE (June 30, 2014, 10:48 AM), <http://www.lawfareblog.com/2014/06/suing-the-president-for-executive-overreach> [<http://perma.cc/H9LB-DXGD>] (making the same claim with respect to House Speaker John Boehner's proposed lawsuit against President Obama).

63. Nicholas Bagley, *Does the Administration Have the Legal Authority to Delay the Employer Mandate? And What If It Doesn't?*, THE INCIDENTAL ECONOMIST (July 3, 2013, 12:42 PM), <http://theincidentaleconomist.com/wordpress/does-the-administration-have-the-legal-authority-to-delay-the-employer-mandate-and-what-if-they-dont> [<http://perma.cc/MW5H-2SH9>]; see also Nicholas Bagley, *The Legality of Delaying Key Elements of the ACA*, 370 NEW ENG. J. MED 1967, 1969 (2014) ("[N]o one has standing to sue over the employer-mandate delays . . .").

64. See Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<http://perma.cc/6VLN-QMMJ>].

65. 133 S. Ct. 2675 (2013).

66. See Letter from Eric H. Holder, Jr., Att'y Gen., to John Boehner, Speaker, U.S. House of Representatives (Sept. 4, 2013), <http://www.justice.gov/iso/opa/resources/557201394151530910116.pdf> [<http://perma.cc/W9TP-PFN9>].

67. Ashley Parker & Robert Pear, *Obama Moves to Avert Cancellation of Insurance*, N.Y. TIMES, Nov. 14, 2013, <http://www.nytimes.com/2013/11/15/us/politics/obama-to-offer-health-care-fix-to-keep-plans-democrat-says.html> [<http://perma.cc/Z4J6-CFXB>].

68. See Nicholas Bagley, *Litigating Obama's Like It/Keep It Fix: The Question of Standing*, INCIDENTAL ECONOMIST (Nov. 19, 2013, 1:00 PM), <http://theincidentaleconomist.com/wordpress/litigating-obamas-like-it-keep-it-fix-the-question-of-standing> [<http://perma.cc/4BLJ-WH68>] (observing that any resulting injury may "never materialize, it may be too speculative, and too loosely connected to the administrative fix, to support standing"). *But*

Importantly, the impact of standing doctrine on claims of executive authority is not limited to Democratic administrations. In August 2012, for instance, Republican presidential candidate Mitt Romney declared that his first act as President would be to waive all state obligations under the ACA.⁶⁹ It is hard to imagine who would have standing to challenge that action: the same doctrine that shields President Obama's delay from suit would likely shield a putative President Romney's waiver. Moreover, the broad grant of discretionary authority that President Obama has claimed might seem to permit future Republican presidents to selectively enforce laws that are of greater significance to Democrats, including federal environmental and labor statutes. David Martin has sounded warnings along these lines, noting that the blanket non-deportation policies called for by some immigration advocates would have enabled a President Romney to "thwart[] . . . the new consumer protection laws by refusing to spend half the money Congress continually provides for their enforcement."⁷⁰ Martin didn't need to add that, if Romney had done so, then no one would have had standing to challenge him—at least according to the conventional wisdom. The project of this Note is to suggest that the conventional wisdom may be wrong.

C. *Civil Servant Suits*

When the President declines to enforce a statute, there is one party who suffers a legally cognizable injury: the executive-branch employee who must carry out an order that he or she believes is unlawful. Such a civil servant—or so the Note's argument goes—does not possess the kind of "generalized

see Eugene Kontorovich, *The Obamacare Fix's Legality, State Law and Standing*, VOLOKH CONSPIRACY (Nov. 23, 2013, 12:33 PM), <http://www.volokh.com/2013/11/23/obamacare-fixes-legality-state-law-standing> [<http://perma.cc/SUE4-4S72>] (arguing that a state that has passed legislation to implement the ACA might be able to challenge the "fix").

69. *Republican Primary Debate*, WASH. POST (Aug. 11, 2011), <http://www.washingtonpost.com/wp-srv/politics/2012-presidential-debates/republican-primary-debate-august-11-2011> [<http://perma.cc/4W4X-JES7>] ("And if I'm president of the United States, on my first day, I'll direct the [S]ecretary of [Health and Human Services] to grant a waiver from Obamacare to all 50 states."). There is a provision in the ACA that allows the Secretary of Health and Human Services (HHS) to waive the requirements for states, but only if she determines that a state's proposed plan will provide health care coverage "at least as comprehensive" and "at least as affordable" "to at least a comparable number of its residents" as that required by the Act's own scheme and will "not increase the Federal deficit." 42 U.S.C. § 18052(b)(1) (2012).
70. David A. Martin, *A Lawful Step for the Immigration System*, WASH. POST, June 24, 2012, http://www.washingtonpost.com/opinions/a-lawful-step-for-the-immigration-system/2012/06/24/gJQAgToOoV_story.html [<http://perma.cc/Z6US-HN72>]; *see also* Love & Garg, *supra* note 55 (arguing that presidents should be faithful to the enacting Congress).

grievance” the federal courts have no power to hear, for a single reason: he or she may be fired, disciplined, or otherwise penalized for disobeying.⁷¹ Accordingly, the civil servant—and perhaps *only* the civil servant—has standing to challenge the President’s order in court. This argument is an unorthodox one, but it is not an academic one: courts are hearing such claims right now, and in some cases, they are concluding that civil servants have standing. This section introduces the civil servant suit by describing *Crane v. Napolitano*, the paradigmatic such lawsuit.⁷²

The story of *Crane* begins in December 2010, when the Development, Relief, and Education for Alien Minors (DREAM) Act fell several votes short of passing in the U.S. Senate.⁷³ The DREAM Act would have provided conditional permanent residency to certain immigrants of “good moral character” who had arrived in the United States as minors, graduated from U.S. high schools, and lived in the country continuously for at least five years prior to the bill’s enactment.⁷⁴ The bill was generally popular⁷⁵ and had passed the House of Representatives, but it was opposed by conservative Republicans in the Senate.⁷⁶ The December vote against cloture, by a margin of 55-to-41,

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71. Title 5 defines the “civil service” to include “all appointive positions in the . . . Government of the United States, except positions in the uniformed services.” 5 U.S.C. § 2101(1) (2012). This definition is a broad one: it includes career employees and political appointees, and encompasses some positions exempted from the statutory protections that generally accompany federal service. *See id.* § 2302(a)(2)(B). But for present purposes, the statutory definition will do: while the differences in rights and responsibilities between, for instance, a career prosecutor and his presidentially appointed supervisor might bear on the normative questions I take up in Part IV, the implications of such a distinction lie largely beyond the scope of the Note.
72. The *Crane* suit was filed in 2012, when Janet Napolitano was Secretary of the Department of Homeland Security. In subsequent stages of litigation it has been known variously as *Crane v. Beers* and *Crane v. Johnson*, *see* FED. R. CIV. P. 25(d), but for the sake of simplicity I describe it in this Note only as *Crane v. Napolitano*.
73. David M. Herszenhorn, *Senate Blocks Bill for Young Illegal Immigrants*, N.Y. TIMES, Dec. 18, 2010, <http://www.nytimes.com/2010/12/19/us/politics/19immig.html> [<http://perma.cc/A5CN-Z686>].
74. *See* Development, Relief, and Education for Alien Minors Act of 2010, S. 3992, 111th Cong. § 4(a) (2010).
75. Jeffrey M. Jones, *Slim Majority of Americans Would Vote for DREAM Act Law*, GALLUP POLITICS (Dec. 10, 2010), <http://www.gallup.com/poll/145136/slim-majority-americans-vote-dream-act-law.aspx> [<http://perma.cc/W62W-2XWV>] (reporting that fifty-four percent of Americans would vote for the DREAM Act and forty-two percent would vote against it).
76. *See* Julia Preston, *House Backs Legal Status for Many Young Immigrants*, N.Y. TIMES, Dec. 8, 2010, <http://www.nytimes.com/2010/12/09/us/politics/09immig.html> [<http://perma.cc/6KGG-QN7H>].

was seen as the end of the line for the bill, especially given the newly elected Republican majority in the House.⁷⁷

Stymied in Congress, immigrant advocacy groups turned to the White House. The so-called “DREAMers” and their allies enlisted Democratic senators⁷⁸ and high-profile immigration scholars⁷⁹ to lobby the Obama Administration to take executive action to spare young immigrants from deportation. When Republican Senator Marco Rubio announced that he would introduce his own version of the DREAM Act, immigrant advocates indicated that they would consider supporting such an effort⁸⁰ – potentially handing a crucial political win to the Republicans. It did not take long for the White House to act.

On June 15, 2012, President Obama announced from the Rose Garden that he would take “a temporary stopgap measure” that would “lift the shadow of deportation” from DREAMers by allowing them to remain in the country indefinitely.⁸¹ Department of Homeland Security (DHS) Secretary Janet Napolitano issued a memorandum to the directors of DHS’s component branches “setting forth how, in the exercise of our prosecutorial discretion, [DHS] should enforce the Nation’s immigration laws against certain young people who were brought to this country as children and know only this country as home.”⁸² The Napolitano Memo instructed them to “immediately exercise their discretion, on an individual basis, in order to prevent [these

77. See Herszenhorn, *supra* note 73.

78. See Letter from Senator Harry Reid et al., to President Barack Obama (Apr. 13, 2011), <http://www.scribd.com/doc/53014785/22-Senators-Ltr-Obama-Relief-for-DREAMers-4> [<http://perma.cc/JQ9B-S6CY>].

79. See Letter from Professor Hiroshi Motomura et al., to President Barack Obama (May 28, 2012), <http://www.law.uh.edu/ihelg/documents/ExecutiveAuthorityForDREAMRelief28May2012withSignatures.pdf> [<http://perma.cc/MY4D-AGE5>] (arguing that there was “clear executive authority for several forms of administrative relief for DREAM Act beneficiaries”).

80. Peter Wallsten, *Marco Rubio’s Dream Act Alternative a Challenge for Obama on Illegal Immigration*, WASH. POST, Apr. 25, 2012, <http://www.washingtonpost.com/politics/marco-rubios-dream-act-alternative-a-challenge-for-obama-on-illegal-immigration/2012/04/25/gIQA5yqxhTstory.html> [<http://perma.cc/9KEZ-S5R8>].

81. Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 15, 2012, <http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html> [<http://perma.cc/K6WM-L4VL>].

82. Memorandum from Janet Napolitano, U.S. Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children at 1* (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/Q56M-HJ8J>] [hereinafter Napolitano Memo].

immigrants] from being placed into removal proceedings or removed from the United States.”⁸³

But as the Memo made clear, notwithstanding the instruction to exercise discretion “on an individual basis,” the command was categorical in nature. Any noncitizen who met the five criteria the Memo outlined—that is, who came to the United States under the age of sixteen, had resided in the U.S. for at least five years, was in or had graduated from high school or had served in the armed forces, had not been convicted of a serious crime, and was thirty years old or younger—should not be placed into removal proceedings.⁸⁴ The policy immediately came under attack from conservative Republicans and some scholars as unlawful, and perhaps unconstitutional.⁸⁵ It is possible to imagine arguments against the policy announced in the Memo that are grounded in constitutional law, statutory interpretation, and administrative procedure, and indeed many of those arguments have been made and robustly rebutted.⁸⁶

But for the purposes of this Note, what matters is that it is exceptionally unlikely that a federal court would ever hear *any* such claims. For the reasons described above, an enforcement policy—even one as “rule-like” as the one announced in the Napolitano Memo—is perhaps the paradigmatically

83. *Id.* at 2.

84. *See id.* (“ICE should exercise prosecutorial discretion, on an individual basis, for *individuals who meet the above criteria* by deferring action for a period of two years” (emphasis added)).

85. Attacks on the policy were widespread in the conservative press. *See, e.g., The O’Reilly Factor* (Fox News television broadcast Aug. 31, 2011) (featuring an interview with Charles Krauthammer describing the Napolitano Memo as an attempt to “essentially enact[] the DREAM Act through regulation,” and describing it as “a pretty radical sort of ‘in your face’ at the constitutional system”), <http://foxnewsinsider.com/2011/08/31/krauthammer-obama-is-using-regulations-to-bypass-congress-and-change-our-country> [<http://perma.cc/L6PD-4DA7>]. The most prominent academic criticism of the policy accuses the President of having abrogated his duty to “take Care that the laws be faithfully executed.” *See* Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784-85 (2013); *see also* Love & Garg, *supra* note 55, at 1198 (describing the events that led to the *Crane* suit as “[p]erhaps the most prominent example of unilateral policymaking through inaction”).

86. *Compare, e.g.,* Delahunty & Yoo, *supra* note 85, at 785-86 (attacking the policy on constitutional grounds), *with* Saikrishna Bangalore Prakash, *The Statutory Nonenforcement Power*, 91 TEX. L. REV. SEE ALSO 115 (2013) (defending it on constitutional grounds). The *Crane* suit, *see infra* notes 87-90 and accompanying text, attacks the policy primarily on *statutory* grounds, an attack gamely rebutted by David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade*, 122 YALE L.J. ONLINE 167 (2012), <http://yalelawjournal.org/forum/a-defense-of-immigration-enforcement-discretion-the-legal-and-policy-flaws-in-kris-kobachs-latest-crusade> [<http://perma.cc/59UK-WBEV>].

unreviewable separation-of-powers dispute: because it “injures” no one, there is no one with standing to sue. That defense would extend to even the most persuasive attack on the Napolitano Memo, namely that the policy within it should have been promulgated pursuant to notice-and-comment rulemaking: even Administrative Procedure Act (APA) claimants must have standing.⁸⁷ As Chief Justice Burger noted thirty years ago, a lawyer would be hard-pressed to find a case in which a federal court “reviewed a decision of the Attorney General suspending deportation of an alien This is not surprising, given that *no party to such action has either the motivation or the right to appeal from it.*”⁸⁸

But *Crane v. Napolitano*, the case brought to challenge the Memo, was not a garden-variety public-law challenge: it was a civil servant suit, brought by ten ICE officers to challenge the policy that they were charged with implementing. Chris Crane, the lead plaintiff, was an Immigration and Customs Enforcement (ICE) agent stationed in Salt Lake City and the head of the ICE Agents and Officers Union; his fellow plaintiffs were ICE agents stationed across the country.⁸⁹ They had standing, they argued, because they had been “directly commanded to do something by 8 U.S.C. §§ 1225(a)(3) and (b)(2)(A)” — that is, arrest and deport unlawfully present immigrants — “directly commanded to do the opposite by the [Napolitano Memo],” and “risk[ed] adverse employment action if they disobey[ed].”⁹⁰ In other words, they argued, they faced a Hobson’s choice: follow what they believed to be the law, or risk losing their jobs.⁹¹

This argument reflects the theory behind the civil servant suit, and the puzzle it poses. Disputes like *Crane* appear to be precisely the kind of “generalized-grievance cases”⁹² that contemporary standing doctrine intends to keep out of the courts. But the civil servant confronted with such a choice — follow the law or lose one’s job — seems just as clearly, at least at first blush, to

87. See *Klamath Water Users Ass’n v. FERC*, 534 F.3d 735, 738 (D.C. Cir. 2008) (finding no standing even for plaintiffs who participated in the agency rulemaking process).

88. *INS v. Chadha*, 462 U.S. 919, 957 n.22 (1983) (emphasis added).

89. Amended Complaint at 3-5, *Crane v. Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013) (No. 3:12-cv-03247) [hereinafter *Crane Complaint*]; see also Julia Preston, *Single-Minded Mission to Block an Immigration Bill*, N.Y. TIMES, June 1, 2013, <http://www.nytimes.com/2013/06/02/us/for-chris-crane-a-quest-to-block-an-immigration-bill.html> [<http://perma.cc/6263-5S7L>].

90. *Crane Response*, *supra* note 5, at 3.

91. *Id.* at 6 (“The Fifth Circuit has recognized that a plaintiff facing such a ‘Hobson’s choice’ between two injuries-in-fact possesses standing.”). The decision they faced was probably not, in fact, a Hobson’s choice. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1076 (rev. ed. 1993).

92. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992).

possess the kind of “personal stake in the outcome”⁹³ that standing doctrine requires. Although *Crane* has been lambasted as an ideologically motivated suit rather than a genuine conflict between an employee and an employer,⁹⁴ the facts pled by the plaintiffs suggest that their commitment is genuine: one ICE-agent plaintiff issued an immigration warrant against an immigrant who was eligible for relief under the Memo, despite orders to the contrary, and received a three-day suspension as a result.⁹⁵

What are federal courts faced with suits like *Crane* to do? The *Crane* court, somewhat to the surprise of most commentators, held that the plaintiffs were right. The ICE agents, reasoned the court, would be “exposed to adverse employment consequences” if they disobeyed their superiors, and accordingly, the court found they had standing to challenge the legality of the Memo.⁹⁶ But the court’s analysis, while plausible, seems open to critique. Can it possibly be the case that civil servants can evade the requirements of Article III standing simply by proffering a legal interpretation that differs from that of their superiors? *Should* it be the case?

II. CIVIL SERVANT STANDING

This Part takes up the first of those questions. It asks, as a doctrinal matter, whether civil servant suits are permitted under Article III—whether, in other words, civil servants have standing to challenge the legality of the programs they are charged with enforcing. Part II.A addresses the constitutional requirements of standing set out in *Lujan*. Part II.B addresses the objection that

93. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

94. The suit is almost universally described not by reference to its plaintiffs but by reference to its attorney, Kansas Secretary of State Kris Kobach, an anti-immigration advocate and one-time advisor to Mitt Romney. See, e.g., Alex Byers, *Kris Kobach, Informal Romney Adviser, Files Immigration Lawsuit*, POLITICO (Aug. 23, 2012, 8:53 PM), <http://www.politico.com/news/stories/0812/80069.html> [<http://perma.cc/GT2A-YNR4>]; Martin, *supra* note 86, at 167 (describing *Crane* as “Kris Kobach’s [l]atest [c]rusade”).

95. *Crane* Complaint, *supra* note 89, at 11.

96. *Crane v. Napolitano*, 920 F. Supp. 2d 724, 739-40 (N.D. Tex. 2013). Importantly, the court ultimately dismissed the challenge for lack of subject-matter jurisdiction, holding that the Civil Service Reform Act (CSRA) foreclosed the ICE officers’ suit. *Crane v. Napolitano*, No. 3:12-cv-03247, 2013 WL 8211660, at *1 (N.D. Tex. July 31, 2013). I discuss this development and its implications on the ability of civil servants to bring suit *infra* notes 153-154 and 175-179. Notably, the court declined to withdraw its standing opinion, which has subsequently been cited as authority that civil servants have standing to challenge executive actions. See, e.g., *Somers* Response, *supra* note 4, at 7. The civil servants have appealed to the U.S. Court of Appeals for the Fifth Circuit. See Brief of Appellants, *Crane v. Johnson*, No. 14-10049 (5th Cir. May 16, 2014).

these cases present only “generalized grievances” and are therefore not suitable for judicial resolution. I argue that the doctrinal inquiry cannot provide a satisfactory answer to the question of whether civil servant suits should proceed. That is because the important inquiry is not, as the court in *Crane* initially framed it, a question of standing at all, but a question of rights: do government employees have the right to resist orders they believe to be unlawful? I take up that inquiry in the following Part.

A. Constitutional Standing

The requirements of constitutional standing are familiar: (1) the plaintiff must have suffered an injury in fact; (2) the plaintiff’s injury must be fairly traceable to the actions of the defendant; and (3) the relief requested in the suit must redress the plaintiff’s injury.⁹⁷ I will set aside the third requirement here, because I believe it is amply met: if civil servants will suffer injury as a result of an unlawful command, then a court’s declaration that the command is unlawful and should be set aside clearly would redress the injury. But the first and second requirements raise difficult questions, as I explain below. I consider each requirement in turn.

1. Injury in Fact

Civil servants might argue that they suffer any one of three “injuries” when they are commanded to do something unlawful. First, they might argue that the *burden of compliance* is itself an “injury in fact”—that is, in the case of *Crane*,⁹⁸ that the act of not deporting undocumented immigrants constitutes an injury that gives rise to standing. Second, civil servants might argue that the act of compliance gives rise to standing because it requires them to *violate the law* (or, put differently, violate their oaths of office), itself an “injury in fact.” Finally, they might argue that the *consequences* of either action—compliance or disobedience—give rise to standing: compliance because they may be subject to some sort of penalty for violating the law; disobedience because they will face adverse employment consequences for resisting. These consequences, civil servants might argue, are “injuries in fact.”

Each of these claims of “injury” is analytically distinct. One common response, though, might be that none of these putative injuries should be

97. See *United States v. Windsor*, 133 S. Ct. 2675, 2685-86 (2013) (citing *Lujan*, 504 U.S. at 560-61).

98. Although I borrow the facts of *Crane* in this Note, the arguments I draw out in this Part are not the arguments that the plaintiffs (or the Department of Justice) made in the suit itself.

understood as sufficient to confer standing because the prospect of civil servant standing is itself undesirable. I put off this slippery-slope argument for now because—in the words of the Supreme Court—it “elides the distinction between two principles: the jurisdictional requirements of Article III and the prudential limits on its exercise.”⁹⁹ I address the possibility that standing should be denied on separation-of-powers grounds—because the dispute presents only a “generalized grievance”—in the subsequent section.

It seems clear, at least on first blush, that the first two putative injuries—the burden of compliance and the violation of one’s oath—cannot satisfy the standing inquiry under current law. Consider first the argument that the burden of compliance itself is an “injury in fact.” This argument resonates with Justice Scalia’s observation in *Lujan* that the standing inquiry “depends considerably upon whether the plaintiff is himself an *object* of the action (or forgone action) at issue.”¹⁰⁰ Under this argument, civil servants must themselves be considered the *objects* of the statutes they enforce; those statutes, the argument goes, determine what civil servants can permissibly do, just as they determine what regulated parties (here, immigrants) can permissibly do. So there should be “little question”¹⁰¹ that civil servants, like regulated entities, have standing to challenge interpretations of those statutes, or so the plaintiffs in *Crane* argued.

Such an argument seems intuitively implausible: can it possibly be the case that civil servants are *injured* when their duties change?¹⁰² But it is worth pausing to ask why. One answer might be that we simply do not understand substantive statutes as regulating the conduct of those who implement them.¹⁰³ Civil servants’ responsibilities, one might argue, are not within the “zone of interests” of the substantive statutes they enforce.¹⁰⁴ Note that this response sounds not in contemporary standing doctrine but in the language of the 1960s and 1970s: it is about “statutory injury,” not “injury in fact.” The contemporary response must instead be that civil servants are not “injured” when their responsibilities change, perhaps because those responsibilities were

99. *Windsor*, 133 S. Ct. at 2685.

100. *Lujan*, 504 U.S. at 561 (emphasis added).

101. *Id.*

102. Indeed, the *Crane* court quickly rejected this argument. *Crane v. Napolitano*, 920 F. Supp. 2d 724, 737-38 (N.D. Tex. 2013) (holding that the allegation that plaintiffs “must change the way they conduct their duties while performing their jobs as ICE agents” was not a sufficient injury-in-fact to satisfy the standing inquiry).

103. *But cf.* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2470 (1996) (describing constitutional criminal procedure as “a species of substantive criminal law for cops”).

104. *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

voluntarily incurred. One way of making this point is to reason that the baseline for civil servants, under this formulation, is different from the baseline for regulated entities: the latter have the right to be left alone, but civil servants have no right to remain civil servants.¹⁰⁵ I will return to this question later.

The second putative injury—the violation of one’s oath—is open to a similar critique. But while standing law provides no easy answers to the civil servants’ first claim (that compliance is itself an injury), a single dated case, cited by the *Crane* plaintiffs and defendants alike, provides the foundation of an answer to the civil servants’ second (that violating their oaths might be). In 1968, a local school board brought suit to challenge a New York law requiring public school authorities to lend textbooks to all schoolchildren, including those attending parochial schools.¹⁰⁶ The board argued that the state law violated the Establishment Clause, a claim the New York Court of Appeals rejected.¹⁰⁷ The Supreme Court affirmed.¹⁰⁸ Although the suit, *Board of Education v. Allen*, was not primarily a standing challenge, the Court addressed the standing question in an oblique footnote:

Appellants have taken an oath to support the United States Constitution. Believing § 701 to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step—refusal to comply with § 701—that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts. There can be no doubt that appellants thus have a ‘personal stake in the outcome’ of this litigation.¹⁰⁹

Allen would appear to suggest that the violation of one’s oath *can* give rise to “injury in fact,” and several courts held accordingly in its wake.¹¹⁰ It is easy

¹⁰⁵. In this way, contemporary standing analysis is vulnerable to the critiques made so powerfully by Fletcher and Sunstein in the late 1980s and early 1990s. See Fletcher, *supra* note 15, at 233 (arguing that the “injury in fact” requirement means that “the Court is either insisting on something that can have no meaning beyond a requirement that plaintiff be truthful about the injury she is claiming to suffer” or is “*sub silentio* inserting into its ostensibly factual requirement of injury a normative structure of what constitutes judicially cognizable injury”).

¹⁰⁶. *Bd. of Educ. v. Allen*, 392 U.S. 236, 238-39 (1968).

¹⁰⁷. *Id.* at 240-41.

¹⁰⁸. *Id.* at 238.

¹⁰⁹. *Id.* at 241 n.5 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

¹¹⁰. See *Aguayo v. Richardson*, 473 F.2d 1090, 1100 (2d Cir. 1973) (concluding that one “faced with what he deems a conflict between his oath to support the United States Constitution and his duty under [a] law” has standing to challenge the latter); see also *Regents of Univ. of Minn. v. Nat’l Collegiate Athletic Ass’n*, 560 F.2d 352, 363-64 (8th Cir. 1977) (to similar

enough to distinguish *Allen* by its vintage: it pre-dated contemporary standing doctrine in general, and *Data Processing* in particular. Indeed, several circuits have held in the intervening decades that *Allen* is no longer good law.¹¹¹ But we need not go that far to conclude that *Allen* does not support the claim that the violation of one’s oath itself confers standing. The *Allen* plaintiffs, after all, “ha[d] to choose between violating their oath and taking a step” with immediate consequences.¹¹² Their successful theory of standing, in other words, was the most plausible argument in favor of civil servant standing: that the consequences of the civil servants’ choice – and particularly the consequences of the choice to disobey an unlawful command – constitute “injury in fact.”

The argument based on consequences – the third putative injury – is considerably more difficult for standing doctrine to defeat. For one, civil servants who comply with unlawful commands (or enforce unconstitutional statutes) may face concrete and adverse consequences from doing so. Elected officials, like the school board officials in *Allen* or the elected sheriffs in *Cooke*, may be voted out of office. State and local officials may face lawsuits under 42 U.S.C. § 1983,¹¹³ and federal officials may face lawsuits under *Bivens*.¹¹⁴ Some of these potential consequences may, to a court, seem implausible or insufficiently imminent.¹¹⁵ But some may not.

Even more plausibly, civil servants who disobey commands they believe are unlawful are likely to face concrete and adverse consequences for their disobedience. The facts of *Crane* bring this possibility into focus: one plaintiff received a three-day suspension as a result of his decision to follow what he believed to be the requirements of federal immigration law.¹¹⁶ But it is easy to imagine a set of facts that bring the claim into even sharper relief: a career civil servant who disobeys orders by, for instance, issuing an environmental report

effect); *Akron Bd. of Educ. v. State Bd. of Educ.*, 490 F.2d 1285, 1290-91 (6th Cir. 1974) (same).

111. See, e.g., *Drake v. Obama*, 664 F.3d 774, 779-81 (9th Cir. 2011); *Donelon v. La. Div. of Admin. Law ex rel. Wise*, 522 F.3d 564, 567 n.5 (5th Cir. 2008); *City of S. Lake Tahoe v. Cal. Tahoe Reg’l Planning Agency*, 625 F.2d 231, 234-38 (9th Cir. 1980); *Finch v. Miss. State Med. Ass’n*, 585 F.2d 765, 773-75 (5th Cir. 1978).

112. *Allen*, 392 U.S. at 241 n.5 (emphasis added).

113. 42 U.S.C. § 1983 (2012). *But cf.* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (arguing that state and local officials face few consequences from damages actions because they are indemnified by their employers).

114. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

115. *Cf.* *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138, 1143 (2013) (describing “the well-established requirement that threatened injury must be ‘certainly impending’” (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990))).

116. *Crane* Complaint, *supra* note 89, at 11.

that her political supervisors do not wish published, and as a result is fired from her position at the EPA. Can it be the case that that civil servant has suffered no “injury in fact”? It clearly cannot: the loss of one’s job simply *must* be considered an injury, regardless of one’s normative priors.¹¹⁷ Nothing within the four corners of the injury inquiry demands a contrary result.

2. Causation

There is, however, at least one credible response to the claim that civil servants suffer an “injury in fact” when they disobey commands they perceive to be unlawful: the civil servant who disobeys such a command does so *voluntarily*. The civil servant’s “injury,” this argument goes, may be concrete, but it is self-inflicted: it is *caused* not by the lawfulness of the underlying command (or lack thereof) but by the employee’s own decision to disobey. This is roughly what the defendants in *Crane* claimed, although they did not frame it as a matter of causation. They argued that “a plaintiff cannot satisfy standing simply based on the prospect of a *voluntary* choice to risk an adverse employment action based on a personal opinion about what the law requires.”¹¹⁸

The “voluntariness” response seems intuitively plausible.¹¹⁹ But again it is worth asking why. Describing a civil servant’s decision to disobey a command that he or she believes to be unlawful as a *voluntary* one does not simply mean that he or she chose it freely. For the purposes of the standing inquiry, it must mean something more. A corporation’s decision to violate a new regulatory statute, for instance, can just as plausibly be described as *voluntary*, yet no one would question whether the corporation has standing to challenge that statute.¹²⁰ Instead, we must mean that the civil servant (unlike the regulated

117. The various statutes that protect employees from job-related discrimination, harassment, and retaliation all define “adverse action” to include termination. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (2012) (defining, in Title VII, “unlawful employment practice” to include “discharge”); 5 U.S.C. § 7512(1) (2012) (defining, in the Civil Service Reform Act, “covered action” to include “removal”). Questions of “standing” in the employment discrimination context are infrequent and, when they arise, turn on complex questions of statutory interpretation. *See, e.g.*, *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011) (finding constitutional and statutory standing for a third-party retaliation claim under Title VII).

118. Defendants’ Reply to Plaintiffs’ Response to Defendants’ Motion to Dismiss at 2, *Crane v. Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013) (No. 3:12-cv-03247) (emphasis added) [hereinafter *Crane Reply*].

119. The *Crane* court, of course, disagreed. *See Crane v. Napolitano*, 920 F. Supp. 2d 724, 739-40 (N.D. Tex. 2013).

120. *See Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002) (describing standing in such situations as “self-evident”).

entity) has no *right* to disobey the order. Civil servants, under this reading, simply have no particular duty to carry out their responsibilities in a lawful manner, or at the very least have no right to resist commands that they believe violate that duty.

Consider, in this light, the claims of the ICE agents in *Crane*. They argued that they had been ordered to act unlawfully—ordered to refrain from prosecuting undocumented immigrants in violation of 8 U.S.C. § 1225(b)(2)(A), which instructs “the examining immigration officer” to initiate deportation proceedings against any immigrant “not clearly and beyond a doubt entitled to be admitted.”¹²¹ As a result, the agents had been or would be subjected to disciplinary action. But the key question for the court should not have been whether the threat of disciplinary action constituted an “injury” for the purposes of Article III. It should have been whether the ICE agents could permissibly act on their own interpretation of the immigration statutes—that is, whether such disobedience was lawful or merely “voluntary.”

What is noteworthy about this dispute is that no matter who is right—that is, no matter if civil servants have the right to resist unlawful commands or not—the argument sounds not in “injury in fact” but in *legal* injury: what are the rights and responsibilities of the civil servant, and when are they abrogated? The Article III standing analysis developed in the 1980s and 1990s deemphasized “legal injury” in favor of a putatively objective inquiry into “injury in fact.” But such an inquiry cannot furnish an answer to the threshold question faced by the *Crane* court: can civil servants sue? The tools required to answer *this* question—the question behind civil servant suits—lie not in the domain of standing, but in the domain of rights and entitlements. The *Crane* court concluded that the ICE agents’ suit could proceed because they “alleged a sufficient injury-in-fact,” a finding that is itself hard to dispute.¹²² But the court erred by failing to ask the predicate question: do civil servants have the right to resist? After a brief detour to address an unresolved objection, I take up that question in Parts III and IV.

B. “Generalized Grievances”

It might be objected that whether or not civil servants have the right to resist unlawful orders, the resulting suits should be barred for a wholly distinct reason: they present only “generalized grievances about the conduct of government.”¹²³ The Court’s resistance to “generalized-grievance cases”¹²⁴

¹²¹. 8 U.S.C. § 1225(b)(2)(A) (2012).

¹²². *Crane*, 920 F. Supp. 2d at 740.

¹²³. *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

traces to the taxpayer suits it turned back in the 1960s and 1970s; in these cases, the Court has said, an undifferentiated plaintiff “claim[s] only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seek[s] relief that no more directly and tangibly benefits him than it does the public at large.”¹²⁵

Both the nature of this rule and its exact metes and bounds are far from clear. As recently as 2004, the Court described the bar against generalized grievances as one of three “prudential” factors counseling against standing in particular cases.¹²⁶ But the very concept of a “prudential” standing doctrine sits in tension, as the Court noted in 2014, with the longstanding principle that “a federal court’s obligation to hear and decide cases within its jurisdiction is virtually unflagging.”¹²⁷ In the last decade, accordingly, the Court has gradually refined and recharacterized the “prudential” standing factors as either statutory or constitutional in nature—a trend that culminated in the Court’s unanimous opinion in *Lexmark*, which concluded that the federal courts “cannot limit a cause of action . . . merely because ‘prudence’ dictates.”¹²⁸ Accordingly, the Court insisted in a footnote that the bar against generalized grievances must be understood to prohibit certain suits “for constitutional reasons, not ‘prudential’ ones.”¹²⁹

Regardless of whether the bar against generalized grievances is constitutional or prudential, however, it seems clear that it need not defeat civil servant suits. For one, if the bar is constitutional rather than prudential in nature, then it must be justified (as the Court has stated) by the presumption that judicial intervention in these cases is “unnecessary to protect individual rights.”¹³⁰ On this understanding, to describe a suit as a “generalized-grievance case” is simply to state that the conditions of Article III standing are not satisfied because no plaintiff will be injured by the challenged act.¹³¹ That

124. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992).

125. *Id.* at 573-74.

126. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004); see also *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (grounding the Court’s reluctance to entertain such suits in the “counsels of prudence”).

127. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (internal quotation marks omitted).

128. *Id.* at 1388.

129. *Id.* at 1387 n.3.

130. *Newdow*, 542 U.S. at 12 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

131. Cf. Richard M. Re, *The Rule Against Just One Generalized Grievance*, RE’S JUDICATA (Oct. 2, 2014, 9:00 PM), <http://richardresjudicata.wordpress.com/2014/10/02/the-rule-against-just>

condition necessarily fails where, as will sometimes be the case, civil servant plaintiffs can plausibly allege that they have been or will be injured. At stake in civil servant suits are federal employees' "rights to be free from adverse employment consequences"¹³² – at least if such a right exists.

If, on the other hand, the bar against generalized grievances does more than simply bar suits by plaintiffs who lack Article III standing – if the bar is better considered in some sense "prudential," *Lexmark* notwithstanding – it is clear that it is a hopelessly indeterminate rule, one that cannot tell us with any certainty whether civil servant suits should proceed. What does it mean, as Justice O'Connor once wrote, for "the idea of separation of powers [to] counsel[] against recognizing standing"?¹³³ The history of standing makes clear that there is no way to answer this question except with regard to a kind of normative baseline about when judicial review is appropriate and when it is not.¹³⁴

In other words, the bar against generalized grievances – like the Article III standing analysis itself – cannot defeat the civil servants' claim that their suits should proceed. It can only direct us to the doctrinal and normative questions that lie behind the standing inquiry: do government employees have the right to resist orders they believe to be unlawful? Can our system of separation of powers accommodate the expansion of judicial review that would result?

III. THE RIGHT TO RESIST

Our instinctive response to the question of whether civil servants have the right to resist may be the same as the Justice Department's: we may not want to empower each federal employee to act on his or her own "personal opinion about what the law requires."¹³⁵ As it turns out, though, this view is not the law – or at least it may not be. As a matter of law, civil servants have been protected for decades – first under the common law, and today by state and federal whistleblower statutes – from being disciplined for disobeying unlawful commands. As a matter of practice, however, it seems clear that the right is rarely exercised, and rarer still in circumstances like *Crane*, where disputes between the government and civil servants turn on the legality of high-profile

-one-generalized-grievance [<http://perma.cc/JK47-E3GX>] (arguing that the rule against generalized grievances "is rapidly becoming extinct").

132. *Crane v. Napolitano*, 920 F. Supp. 2d 724, 741 (N.D. Tex. 2013).

133. *Allen v. Wright*, 468 U.S. 737, 761 (1984).

134. See Elliott, *supra* note 45, at 460 (criticizing the claim that standing doctrine "is built on a single basic idea – the idea of separation of powers" (quoting *Allen*, 468 U.S. at 752)).

135. *Crane Reply*, *supra* note 118, at 2.

programs. There is a right to resist, in other words, but we lack a thorough understanding of what it entails.

Under the common law, civil servants dismissed for insubordination, or disobedience, could assert the defense of *illegality*: in other words, that the order they disobeyed was an illegal one and that their disobedience, accordingly, was justified.¹³⁶ Under the classic formulation, a civil servant could be dismissed only for “refusal to obey an order that a superior officer *is authorized to give*.”¹³⁷ Similarly, civil servants—like at-will employees in the private sector—could claim in some instances that their dismissal for refusal to obey an illegal order constituted a violation of public policy.¹³⁸ But the treatises report only a scarce number of cases in which public employees claimed this common-law right.¹³⁹ Robert Vaughn, one of the few scholars to have examined the issue in detail, observes several reasons for this dearth of case law, including the “extraordinary personal resources . . . required to resist authority” and the tendency of public employees to instead plead violations of their First Amendment rights.¹⁴⁰

Whatever the reason, the cases are rare and diverse, not only in their factual content but their legal analyses. Some consider politically salient constitutional claims: in *Parrish v. Civil Service Commission*, for instance, a county social worker was terminated for refusing to participate in a series of unannounced

136. See *Parrish v. Civil Serv. Comm'n*, 425 P.2d 223, 223 (Cal. 1967); 2 MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* § 9.8 n.19 (4th ed. 2009). The common-law right persists today in the decisions of the Merit Systems Protection Board, the administrative agency charged with adjudicating federal employment disputes. See *Bonanova v. Dep't of Educ.*, 49 M.S.P.R. 294, 302 (1991).

137. BLACK'S LAW DICTIONARY 870 (9th ed. 2009) (emphasis added) (defining “insubordination”).

138. ROTHSTEIN ET AL., *supra* note 136, at § 9.10; STEVEN L. WILLBORN ET AL., *EMPLOYMENT LAW: CASES AND MATERIALS* 147-80 (3d ed. 2002).

139. See sources cited *supra* note 138.

140. Robert G. Vaughn, *Public Employees and the Right to Disobey*, 29 HASTINGS L.J. 261, 261-62 n.2 (1977). Vaughn's thoughtful but dated account, with the exception of a student comment written shortly after its publication, Manfred H. Stucki, *Harley v. Schuylkill County—Section 1983 Protects a “New” Constitutional Right Arising from an “Old” Duty*, 1980 UTAH L. REV. 617, remains the only academic treatment of this subject. Recently, a pair of articles has taken up related topics. See Adam Shinar, *Dissenting From Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601 (2013); Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control*, 28 J.L. & POL. 129 (2013). But Shinar's treatment is quite abstract: it sets out a typology of official resistance that includes examples as disparate as the public school officials who resisted *Brown v. Board of Education* and the San Francisco gay-marriage litigation. Walters's treatment, by contrast, addresses only a single form of civil servant dissent, the decision to participate (for instance, as a witness) in litigation challenging administrative action.

eligibility checks on welfare recipients; the social worker challenged his termination in court, arguing that the practice was illegal and unconstitutional.¹⁴¹ The county subsequently abandoned the effort.¹⁴² Other cases involve low-profile disputes between employers and employees: in *Stephens v. Department of State Police*, for instance, a state trooper challenged his dismissal for refusing a command to act in contravention of his state statutory right to take leave for military training.¹⁴³ Oregon courts ordered the department to reinstate the trooper.¹⁴⁴

Over the course of the century, the common-law right became codified in a number of state statutes,¹⁴⁵ and, ultimately, in federal law. The Whistleblower Protection Act of 1989 (WPA)¹⁴⁶ was enacted “to improve the protections for federal employees who disclose, or ‘blow the whistle’ on, government mismanagement or fraud.”¹⁴⁷ Before its enactment, statutory protections for civil servant dissidents were generally seen as toothless, with few incentives for whistleblowers to report misconduct.¹⁴⁸ The WPA established a large number of reforms, including, most prominently, a sweeping overhaul of the U.S. Office of Special Counsel (OSC), the independent agency charged with representing civil servants within the executive branch. But in a largely unnoticed provision,¹⁴⁹ Congress also expanded the scope of civil servants’

141. *Parrish*, 425 P.2d at 224.

142. *Id.* at 224-25.

143. 526 P.2d 1043, 1044 (Or. Ct. App. 1974), *rev’d*, 532 P.2d 788 (Or. 1975).

144. *Stephens*, 532 P.2d at 790.

145. ARIZ. REV. STAT. ANN. § 23-1501(3)(c)(i) (2014); IDAHO CODE ANN. § 6-2104(3) (2014); LA. REV. STAT. ANN. § 23:967(A)(3) (2014); ME. REV. STAT. ANN. tit. 26, § 833(1)(D) (2014); MASS. GEN. LAWS ch. 149, § 185(b)(3) (2014); MINN. STAT. ANN. § 181.932(1)(3) (West 2014); N.H. REV. STAT. ANN. § 275-E:3 (2014); N.J. STAT. ANN. § 34:19-3(c) (West 2014); N.Y. LAB. LAW § 740(2)(c) (McKinney 2014); N.C. GEN. STAT. § 126-85(b)(1) (2014); UTAH CODE ANN. § 67-21-3(3) (West 2014); *see also* Robert G. Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581, 617-20 (1999) (canvassing these statutes).

146. Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified at 5 U.S.C. §§ 1201-1222 (1994 & Supp. III 1997)).

147. S. REP. NO. 100-413, at 1 (1988).

148. *See* Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531, 533-36 (1999).

149. The provision is briefly discussed in the statute’s legislative history but only superficially. *See, e.g.*, H.R. REP. NO. 100-274, at 15, 16, 28, 39 (1987) (discussing a predecessor provision, which prohibited supervisors from taking such action against an employee “for failing to follow orders to disobey a law”); 135 CONG. REC. 4514 (1989) (reporting that the bill “establishes a new prohibited personnel practice, which protects employees in their right to refuse to obey an order that would require the individual to violate a law”).

substantive rights by adding what is currently 5 U.S.C. § 2302(b)(9)(D). This provision purports to protect civil servants from being disciplined, demoted, or terminated “for refusing to obey an order that would require [them] to violate a law.”¹⁵⁰

But there is little jurisprudence interpreting this statutory provision. The most prominent history of the establishment of the WPA describes this provision as the culmination of a “twenty year campaign for public employees challenging their employment duty to act illegally on command,” but there is little evidence that such a campaign existed.¹⁵¹ To my knowledge, in the quarter-century since the provision was enacted, only a handful of cases in the Federal Reporter have cited the statute. Until *Crane*, the only reported decision to pay attention to the statute was a 1997 district-court case, *Olsen v. Albright*,¹⁵² which ruled for a civil servant plaintiff challenging the legality of the State Department’s use of racial profiles in visa processing. Even the decisions of the Merit Systems Protection Board (MSPB)—the administrative agency charged with adjudicating federal employment disputes—rarely cite this provision, which suggests that federal employees instead rely primarily on the analogous right to *disclose* unlawful behavior.¹⁵³

In other words, to the extent that civil servants have the right to resist commands that they perceive to be unlawful, we know little about the content of that right. Indeed, the case law is rife with unanswered questions, several of which go to the heart of the right. First, are civil servants entitled to directly resist allegedly unlawful commands, or must they “obey first, grieve later”?¹⁵⁴ This question, though somewhat tangential to this Note, is critical to the exercise of the right in practice. And the MSPB’s decisions, at least, appear to be in deep tension on this point. One line of cases concludes that civil servants “do not have the unfettered right to disregard a law . . . merely because substantial reason exists regarding the constitutionality or validity of that

150. 5 U.S.C. § 2302(b)(9)(D) (2012).

151. Devine, *supra* note 148, at 553. Devine cites only Vaughn, *supra* note 140, as evidence for such a campaign.

152. 990 F. Supp. 31, 36-37, 40 (D.D.C. 1997).

153. 5 U.S.C. § 2302(b)(8)(A)(i) (2012) (defining retaliation against an employee on the basis of any disclosure of information that the employee “reasonably believes evidences any violation of any law, rule, or regulation”).

154. *Garrison v. Dep’t of Justice*, 72 F.3d 1566, 1576 (Fed. Cir. 1995).

law,”¹⁵⁵ while another holds that civil servants need not obey “an order that the agency is not entitled to have obeyed.”¹⁵⁶

Second, and relatedly, when civil servants resist commands that they perceive to be unlawful, must they be *right*? Must the command, in fact, be unlawful? This question is at the heart of the government’s assertion, in *Crane*, that civil servants cannot act on their own “personal opinion[s] about what the law requires.”¹⁵⁷ At most, one might argue, they are entitled to act on what the law *in fact* requires. This is a question that preoccupied Robert Vaughn, who advocated for a standard based not on illegality in fact, but on the civil servant’s reasonable and good-faith belief that a command or instruction was illegal.¹⁵⁸ Many state statutes explicitly state whether a civil servant’s reasonable belief that a command is illegal will suffice to state a violation,¹⁵⁹ but the federal WPA contains no such indication.¹⁶⁰ Moreover, even in those states that permit civil servants to raise the defense that they reasonably and in good faith believed a command to be unlawful, it is not clear whether a court should adjudicate the merits of the dispute or inquire only into the employee’s state of mind.

Finally, what is the relationship between civil servant *disobedience* and civil servant *disclosure*? Many statutory schemes—including, most prominently, the federal WPA—codify the right to disobey in statutes that primarily protect *whistleblowers*: civil servants who disclose information to the public that would otherwise remain hidden, including, as in the federal scheme, information about the “violation of any law, rule, or regulation.”¹⁶¹ But are civil servant plaintiffs, like the ICE agents in *Crane*, properly considered whistleblowers? The prototypical whistleblower *speaks* truth in the face of power, exercising his

155. *Gragg v. U.S. Air Force*, 13 M.S.P.R. 296, 299 (1982).

156. *Fleckenstein v. Dep’t of Army*, 63 M.S.P.R. 470, 474 n.3 (1994). *Fleckenstein* purports to overrule *Gragg*, but subsequent adjudications continued to follow *Gragg* and cabin *Fleckenstein*. *E.g.*, *Cooke v. U.S. Postal Serv.*, 67 M.S.P.R. 401, 407 (1995).

157. *Crane Reply*, *supra* note 118, at 2.

158. *See Vaughn*, *supra* note 140, at 272 (arguing that “employees should be protected from disciplinary action if they in good faith refuse to obey an order with the reasonable belief that it is unconstitutional or illegal”); *Vaughn*, *supra* note 145, at 619 (same).

159. *Compare, e.g.*, N.Y. LAB. LAW § 740(2)(c) (2014), and *Bordell v. Gen. Elec. Co.*, 667 N.E.2d 922 (N.Y. 1996) (requiring a violation in fact), with MASS. GEN. LAWS ch. 149, § 185(b)(3) (2014) (resting the cause of action on the employee’s reasonable belief).

160. *Ferrone v. Dep’t of Labor*, 797 F.2d 962, 965 (Fed. Cir. 1986), appears to suggest that a civil servant’s reasonable and good-faith belief is insufficient to defend against disciplinary action. But the case predates the WPA’s enactment and proceeds on an insubordination theory.

161. 5 U.S.C. § 2302(b)(8)(A)(i) (2012).

right to share information with the public on matters that he may be uniquely positioned to disclose. The prototypical civil-servant resister, by contrast, must *act* in the face of contrary authority—she must, in Heather Gerken’s words, “dissent[] by deciding”¹⁶²—and it will often be the case that in doing so she shares *no* new information, discloses *no* secret wrongdoing. Should she still be protected by the same statutes that protect whistleblowers?¹⁶³

What jurisprudence there is interpreting the right to resist—state and federal, common-law and statutory—offers no hard-and-fast answers to these questions. Nor is it the project of this Note to take on a comprehensive evaluation of the costs and benefits of whether such a right should be robust, as Robert Vaughn argues, or vanishingly narrow, as the Justice Department claimed in *Crane*. In particular, this Note does not examine the benefits that a robust right to resist would confer upon individual civil servants: the security in their jobs, the empowerment with respect to their supervisors, and more. Instead, it focuses in the following Part on several large-scale systemic benefits that a robust right might provide, in particular on the benefits of the kind of “dissent” that civil servant disobedience might be seen to represent.

Before turning to that project, the fate of *Crane* bears mention. In an ironic turn, it was the Whistleblower Protection Act itself—the statute that confers upon federal employees their right to resist—that resulted in the dismissal of the suit. In a brief filed late in the initial stages of the case, the Justice Department argued for the first time that the ICE agents’ claim was “at root, a federal employment dispute for which this Court lacks jurisdiction.”¹⁶⁴ After ordering additional briefing, the district court agreed: the Civil Service Reform Act (CSRA) and WPA, the court reasoned, together established a “comprehensive and exclusive remedial scheme” for federal employment disputes, and so the ICE agents—while they had standing to sue—had chosen the wrong venue for their complaint.¹⁶⁵ Accordingly, the court dismissed the suit, leaving an exploration of the contours of the right to resist for another day, and another forum.

162. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1747 (2005).

163. One answer to this question, at least for federal workers, may be that the civil servant who disobeys—unlike the civil servant who discloses—cannot claim protection based on a reasonable but erroneous belief that official conduct is unlawful. Compare 5 U.S.C. § 2302(b)(8)(A) (2012) (protecting employees who “reasonably believe[]” they are disclosing information regarding the violation of a law), with *id.* § 2302(b)(9)(D) (containing no such “good-faith” clause).

164. *Crane* Reply, *supra* note 118, at 5 (citing 5 U.S.C. § 7103(a)(9)(C)(ii)).

165. *Crane v. Napolitano*, No. 3:12-cv-03247, 2013 WL 8211660, at *3 (N.D. Tex. July 31, 2013).

IV. CIVIL SERVANTS AND THE SEPARATION OF POWERS

This Part moves beyond the doctrinal inquiry over civil servant suits. It asks whether, as a normative matter, our system of separation of powers would benefit from allowing civil servants to challenge the statutes, regulations, and commands they are charged with implementing. Part IV.A sets out the case for recognizing a robust right to resist and permitting such suits to proceed. It argues that civil servant suits may vindicate important rule-of-law virtues and that, more broadly, there are systemic benefits to increasing the salience of civil servants' claims. Part IV.B sounds a note of caution, identifying the ways in which civil servant suits may ultimately disappoint their advocates. Part IV.C points to alternative mechanisms for vindicating the rule of law and amplifying the voices of civil servants in our system of separation of powers.

A. *The Rule of Law*

It is clear that recognizing a robust right to resist, and permitting civil servant suits to proceed, would permit judicial review of disputes that traditional standing doctrine would bar. The prototypical civil servant dispute involves the executive branch's enforcement of statutory or constitutional commands, such as the dispute in *Crane* over the legality of the Napolitano Memo, or a hypothetical dispute over the legality of President Obama's delay of the requirements of the Affordable Care Act. Such enforcement decisions stand, as Kate Andrias has explained, "at the very core of executive responsibility."¹⁶⁶ A robust doctrine of civil servant standing could allow civil servants who thought such decisions were unlawful to challenge them in court. The consequences of such a doctrine might be significant: broadly conceived, civil servant suits could subject the day-to-day mechanics of governance, including enforcement decisions large and small, to judicial review.

A critic would argue—perhaps crudely—that this is simply too much judicial review. Those with a healthy skepticism of the role of courts will find that argument appealing.¹⁶⁷ It is easy for those who doubt the systemic benefits of judicial review, in other words, to get off the bus here. But I want to take seriously the more nuanced argument that judicial review is unwarranted, and undesirable, when cases present questions that should be handled instead by

166. Andrias, *supra* note 49, at 1033; *see also* Price, *supra* note 55, at 673 (describing enforcement discretion as "central to the operation of both the federal criminal justice system and the administrative state").

167. *Cf.* United States v. Windsor, 133 S. Ct. 2675, 2697-98 (2013) (Scalia, J., dissenting) (criticizing the majority opinion for its "exalted conception of the role of [the Supreme Court] in America").

the political branches. In then-Professor Scalia's words, expansive grants of standing result in "an overjudicialization of the processes of self-governance."¹⁶⁸ It seems clear that many who share this sentiment would describe civil servant suits in exactly this manner and conclude that they produce few benefits and many costs for our system of separation of powers.

Such concerns, however, may be overstated. Consider the obstacles that still confront civil servants who wish to bring suit. First, as a preliminary matter, note that *some* executive actions do not require the participation of civil servants, or at least not many; President Obama's announced plan to delay the Affordable Care Act might fall into this category. Even if civil servants work in agencies that take such actions, they would be missing the essential ingredient of a civil servant suit—disobedience. There is no standing if there is no order to disobey.

Moreover, even those civil servants who *are* tempted to disobey orders that they perceive to be unlawful must overcome significant barriers to doing so. First, at the most fundamental level, they must care enough about the order—or believe assiduously enough that it is unlawful—to risk the adverse employment consequences of disobeying it.¹⁶⁹ This natural impediment to bringing suit is likely to dissuade many putative civil-servant plaintiffs from testing the legality of the orders they are instructed to enforce. Even if they do bring suit, civil servants—at least those challenging *agency* enforcement practices—must demonstrate that their actions are not barred by the APA and the case law interpreting it. Many such suits will be immune from review on these grounds, because the enforcement decisions that they challenge are either "committed to agency discretion by law"¹⁷⁰ or otherwise barred by the nonreviewability doctrine set forth in *Heckler v. Chaney*.¹⁷¹

168. Scalia, *The Doctrine of Standing*, *supra* note 28, at 881.

169. The authors of the 1973 edition of the Hart and Wechsler casebook questioned the Supreme Court's grant of standing in *Board of Education v. Allen*, 392 U.S. 236 (1968), but seemed to do so on the limited ground that the plaintiffs in that case had not *actually* taken action to disobey the law. See BATOR ET AL., *supra* note 6, at 182 ("If [the official] truly believes the statute to be unconstitutional, could he not refuse to enforce it and raise the question when challenged—*e.g.*, as a defense to dismissal?"); see also Vaughn, *supra* note 140, at 261–62 n.2 (noting that "extraordinary personal resources are required to resist authority").

170. 5 U.S.C. § 701(a)(2) (2012).

171. 470 U.S. 821 (1985). Additionally and alternatively, some courts might adopt reasoning like *Crane's*, limiting such challenges to enforcement policies that conflict with statutes that appear to impose affirmative duties on civil servants themselves. *Crane* Response, *supra* note 5, at 2 (arguing that "[t]he standing of the ICE Agent Plaintiffs is based first and foremost on the fact that the statutory obligations of 8 U.S.C. §§ 1225(a)(3) and (b)(2)(A) fall directly upon them as ICE agents"); *Crane v. Napolitano*, 920 F. Supp. 2d 724, 738 (N.D. Tex. 2013) (accepting this argument).

Finally, even when civil servants do bring suit, and their suits proceed to the merits, many will lose. David Martin has demonstrated why, as a matter of statutory interpretation, the *Crane* plaintiffs' claims lacked merit.¹⁷² And few plaintiffs will have claims even as strong as the ICE agents' in *Crane*; federal judges might easily dismiss most civil servant suits on the grounds that no law has been violated. Even a robust doctrine of civil servant standing might, in other words, primarily permit a check on *egregious* statutory and constitutional violations, not the policy-based deviations that are the product of day-to-day enforcement decision making.

Would judicial supervision over such issues be pro- or anti-democratic? It seems there is at least a credible argument that—Justice Scalia's critique notwithstanding—civil servant suits would promote rather than undermine the rule of law. In the rare instances where civil servants proceeded to court, enhanced judicial review over enforcement policies would ensure that Congress's will was not frustrated by executive branch actors acting for ideological reasons. In such cases, it is the *denial* of standing rather than the *grant* of standing that diminishes democratic accountability, for the simple reason that the denial risks keeping the executive branch's decision less salient and less likely to be corrected not only by the judiciary, but also by Congress.

Admittedly, this claim bears some resemblance to the argument that pro-review advocates made in the 1960s and 1970s—an argument implicitly rejected by the Court's more restrictive standing decisions.¹⁷³ But things have changed over the decades. The administrative state has grown larger, the use of enforcement discretion has become endemic, and critics both on and off the Court have expressed increasing concern about the ease with which the executive branch can neglect congressional commands.¹⁷⁴ These trends have made clear, moreover, that we lack the doctrinal and even the theoretical tools to determine whether executive enforcement policies are problematic. In recent work, Jeffrey Love and Arpit Garg have attempted to theorize executive inaction, arguing as a general matter that the executive should be faithful to the enacting Congress.¹⁷⁵ Zachary Price has similarly suggested that courts should

172. See Martin, *supra* note 86, at 169 (describing the ICE agents' claim as "superficially attractive" but incorrect).

173. See Sunstein, *supra* note 1, at 184 (noting that the key premise underlying standing for beneficiaries was the concern that political interference would defeat the implementation of statutory enactments, resulting in "government failure").

174. See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877-78 (2013) (Roberts, C.J., dissenting) (offering an extended critique of the growth of the regulatory state).

175. Love & Garg, *supra* note 55, at 1213 (arguing that, even if the executive need not exercise the maximum authority granted by Congress, its enforcement of the law must nevertheless exceed the law's minimum requirements).

look askance on executive-branch enforcement policies that make categorical, rather than case-by-case, determinations.¹⁷⁶ The problem with both theories, as Price implies, is that no one has standing to raise them in court.¹⁷⁷

Permitting civil servant suits to proceed would solve that problem. If civil servants have standing to sue, then the federal courts could consider exactly the claim that Love, Garg, and Price want to make: that some executive enforcement policies amount to malfeasance. Consider the question of whether and to what extent enforcement discretion is committed to the President, a question with both constitutional and statute-specific answers.¹⁷⁸ Price, in the most thorough treatment of the topic, argues for a pair of countervailing presumptions—a presumption in favor of executive discretion over individual cases, and a presumption against executive control over substantive policymaking via the categorical use of enforcement discretion, each “defeasible,” or alterable by Congress.¹⁷⁹ Recognizing standing in civil servant suits *might* require the courts to address the degree of enforcement discretion constitutionally entrusted to the President, a potentially fraught question. But it should first require them to define the discretion that *Congress* intended to confer on the executive—a question more capable of judicial resolution, and one that might promote rather than diminish the accountability of the executive branch to Congress and the public, and further the rule of law.

More broadly, permitting the suits described in this Note to proceed might also serve to amplify the voice of an important constituency in the burgeoning administrative state: the civil servant. In recent years, a small but vital literature has begun to examine the role that civil servants—and the civil service as an institution—play in our system of separation of powers.¹⁸⁰ Jon Michaels,

176. Price, *supra* note 55, at 704.

177. See *id.* at 687 (“[C]ourts appear quite unlikely to compel enforcement against the President’s wishes, even assuming a party with standing to bring a justiciable challenge may be found.”). Love and Garg, for their part, believe “it is unlikely that . . . standing would keep the plaintiffs out of court.” Love & Garg, *supra* note 55, at 1228 n.165. But they offer little support for their claim, and I believe that they significantly understate the difficulties in establishing standing to challenge inaction.

178. See U.S. CONST. art. II, § 3, cl. 5; *In re Aiken Cnty.*, 725 F.3d 255, 262–66 (D.C. Cir. 2013) (opinion of Kavanaugh, J.); Delahunty & Yoo, *supra* note 85, at 798–803; Prakash, *supra* note 86, at 117–21; Price, *supra* note 55, at 688–711.

179. Price, *supra* note 55, at 704–07.

180. See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. (forthcoming 2015), <http://ssrn.com/abstract=2444396> [<http://perma.cc/777T-EMMJ>].

for instance, argues that the “civil service has institutional, cultural, and legal incentives to insist that agency leaders follow the law.”¹⁸¹ Both Michaels and Neal Katyal point to statutory protections—including the anti-partisan Hatch Act, the CSRA’s tenure protections, and the whistleblowing provisions of the WPA—that strengthen the civil service’s ability to serve as a check on politically motivated executive action.¹⁸² If the civil service is as beneficial as Michaels, Katyal, and others have claimed, then permitting the federal courts to referee high-profile disputes between civil servants and their supervisors might check not only politically motivated actions, but also illegal ones.

At their most promising, civil servant suits might serve as a constraining force, ensuring that the executive branch complies, as Love, Garg, and Price would have it, with congressional will. Moreover, they might do so by channeling the voices of actors with built-in institutional legitimacy: the civil servants whose loyalties, as Michaels observes, “generally lie with their professional commitments . . . , the programs they advance, and the organizations they serve.”¹⁸³ If we believe that our system of separation of powers benefits from the kind of checking function that Michaels and Katyal posit the civil service performs, extending the statutory rights they describe to official resistance and permitting civil servant suits to proceed might underscore that important role.

B. “Garden-Variety Employment Disputes”

This section sounds a note of caution. Even accepting that civil servant suits might serve an important function in theory, I suggest several reasons to doubt that they will be useful in practice. The simplest reason is that, as noted above, civil servant suits will likely be rare, limited to those circumstances in which civil servants’ commitments are strong enough to outweigh the risk of adverse employment consequences and in which they raise claims plausible enough to overcome motions to dismiss.¹⁸⁴ The presumption that enforcement action is committed by law to agency discretion, in particular, is likely to make successful civil servant suits rare indeed.¹⁸⁵ But even in cases in which these threshold barriers are overcome—even in the “egregious” cases where civil servant suits proceed to the merits—there are reasons to doubt that they will be particularly effective at securing the rule-of-law benefits described above.

¹⁸¹. Michaels, *supra* note 180 (manuscript at 18) (footnote omitted).

¹⁸². Katyal, *supra* note 180, at 2331-32; Michaels, *supra* note 180 (manuscript at 18-19).

¹⁸³. Michaels, *supra* note 180 (manuscript at 19).

¹⁸⁴. See *supra* notes 169-172 and accompanying text.

¹⁸⁵. See 5 U.S.C. § 701(a)(2) (2012); Heckler v. Chaney, 470 U.S. 821, 828-35 (1985).

First, as a doctrinal matter, some such claims—in particular, *constitutional* claims—face a daunting set of procedural hurdles to obtaining judicial review, at least where federal officers are concerned. As the dismissal of *Crane* suggests, it does not appear to be the case, at least under current law, that civil servants are empowered to bring APA claims in federal district court; they must instead employ the administrative procedure set out in the CSRA and bring their claims first before the agencies empowered to adjudicate federal employment complaints.¹⁸⁶ This process imposes its own limitations: the agency that serves as the “first responder” for civil servant complaints, the U.S. Office of Special Counsel (OSC), has at best a mixed record on its responses to such complaints, with fewer than ten percent of OSC complainants reporting that they received the action they sought from the agency in 2013.¹⁸⁷

But more fundamentally—and more problematically for civil servants—the kinds of claims are simply not the sort that the OSC, and the Merit Systems Protection Board (MSPB), which adjudicates personnel complaints, are competent, or even authorized, to consider. The MSPB has repeatedly declined to rule on the constitutionality of federal statutes, holding that such power is outside its authority as an administrative agency.¹⁸⁸ Moreover, even if the agency were authorized to consider claims like the *Crane* plaintiffs’—regarding the legality of executive-branch enforcement policies—those claims are a far cry from the kind of workaday employment disputes that lie at the heart of the Board’s expertise. Indeed, this issue divided the Supreme Court as recently as 2012: in *Elgin v. Department of Treasury*, a six-Justice majority held that the CSRA divested the federal courts of jurisdiction over *all* claims, even constitutional claims, brought by civil servants.¹⁸⁹ Three Justices dissented,

186. See *Crane v. Napolitano*, No. 3:12-cv-03247, 2013 WL 8211660, at *3 (N.D. Tex. July 31, 2013); see also 5 U.S.C. § 1214 (2012) (setting out the administrative process). This issue—whether the CSRA precludes suit in federal district court—is the focus of the civil servants’ appeal. See Brief of Appellants, *Crane v. Johnson*, No. 14-10049 (5th Cir. May 16, 2014).

187. U.S. OFFICE OF SPECIAL COUNSEL, FISCAL YEAR 2013 REPORT TO CONGRESS 46 (2013), <https://osc.gov/Resources/6%2027%2014%20ANNUAL%20REPORT.pdf> [http://perma.cc/U3XL-3K5V]. Of the complaints that OSC received in 2013—generally claims of workplace discrimination and whistleblowing reprisal—it dismissed over ninety percent without opening an investigation. *Id.* at 17. (Both numbers represent improvements from prior administrations.) Indeed, “the consensus among Federal workers, unions, and outside commentators” five years after the passage of the WPA “[was] that OSC remain[ed] a barrier to achieving merit system principles in general, and whistleblower protection in particular.” H.R. REP. NO. 103-769, at 15 (1994).

188. See, e.g., *Malone v. Dep’t of Justice*, 14 M.S.P.R. 403, 406 (1983) (“[I]t is well settled that administrative agencies are without authority to determine the constitutionality of statutes.”).

189. 132 S. Ct. 2126, 2140 (2012).

arguing that the kinds of public-law claims brought by the plaintiffs in that case should not be heard first by an agency with primary expertise in adjudicating mundane employment disputes.¹⁹⁰

Indeed, the dissenting Justices' objections in *Elgin* illustrate a broader concern about the use of civil servant suits to vindicate rule-of-law values: the complexities of using private-law litigation, and in particular employment litigation, to vindicate public-law values. To be clear, similar complexities haunt all public-law suits in the United States. As Abram Chayes observed decades ago, "the dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights" but instead turn on "the vindication of constitutional or statutory policies."¹⁹¹ All such lawsuits unite private objectives and public ones, and at times subjugate the latter to the morass of rules and restrictions that govern the former. It should not necessarily concern us that civil servant suits turn disputes over high separation-of-powers questions into, in the words of the *Crane* litigants, "garden-variety employment disputes."¹⁹²

Nonetheless, the workaday doctrinal rules that govern claims like the ICE agents' will in large part determine whether civil servant suits are anywhere near as effective as the rosy portrait painted above, and those rules, as Part III demonstrates, are largely unwritten. Imagine, for instance, a rule that—as Vaughn advocates,¹⁹³ and as clearly exists in the context of protected-disclosure claims¹⁹⁴—shields federal employees from discipline if they refuse to obey an order that they reasonably and in good faith (but wrongly) believe violates a law. This rule would clearly protect more civil servants, because their claims would turn not on whether their beliefs regarding the legality of the order were accurate, but whether they reasonably and in good faith believed them. But this rule would be considerably less valuable from a systemic perspective, because it would force to the forefront the private-law elements of the civil servants'

190. See *id.* at 2143 (Alito, J., dissenting) (arguing that the plaintiffs' claims "have nothing to do with the statutory rules of federal employment, and nothing to do with any application of the 'merit system principles' or the 'prohibited personnel practices' that the Board administers").

191. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

192. Brief of Appellants at 41, *Crane v. Johnson*, No. 14-10049 (5th Cir. filed May 16, 2014); Brief for the Federal Appellees/Cross-Appellants at 74, *Crane v. Johnson*, No. 14-10049 (5th Cir. filed July 9, 2014).

193. See Vaughn, *supra* note 140, at 272.

194. See, e.g., *Shibuya v. Dep't of Agric.*, 119 M.S.P.R. 537, 549 (2013) (ruling for a civil-servant complainant because "he had a *reasonable belief* that the CFO's misuse of his government credit card violated laws, rules, and regulations regarding government credit cards and travel monies" (emphasis added)).

claims, and diminish—perhaps eliminate—the public-law elements.¹⁹⁵ What, moreover, would it mean for a civil servant to reasonably and in good faith believe that he had been commanded to act unlawfully? Did the *Crane* litigants meet this standard?

Many judges, I suspect, would be inclined to find that the *Crane* litigants did not. It is tempting to reason that any civil servant who resists an order like the Napolitano Memo—that is, a command at the center of a high-profile political dispute—does so not on the basis of a “good faith” belief, but instead on an overtly ideological one. Such an act might appear not an act of duty, but an act of politics. But we do not reason that way with respect to traditional civil-rights plaintiffs, whose private motives are often subsumed beneath their public ones.¹⁹⁶ Should we reason that way with respect to public employees? To ask the question is to turn a spotlight on the rights and duties of civil servants. Do those rights include the right to dissent so vocally, and in the vocabulary of partisan politics? When Michaels, Katyal, and others envision civil servants speaking truth to power, do they imagine those dissidents speaking as technocrats or as ideologues? Does it matter? Our conventional account of civil servants offers no easy answers to these questions.

One reason that the conventional account falls short is that, to the extent it glamorizes civil servant dissidents, it imagines them as whistleblowers. Though the right to resist is distinct from the right to disclose, to my knowledge *all* state and federal statutes that codify that right place it in immediate proximity to the whistleblower’s right.¹⁹⁷ But civil servant resisters like the ICE agents will often not be whistleblowers, of course, at least not as whistleblowers are conventionally understood: they will disclose no secret truths and provide fodder for few reforms. To the extent these resisters are speaking at all, it is their opinions they are offering, not any inside information. Orly Lobel has described the “deep ambivalence within judicial and statutory

195. In this sense, the doctrinal dynamics of adjudicating employment claims parallel the dynamics present in qualified-immunity doctrine, where the jurisprudence, and much academic commentary, has debated whether courts considering qualified-immunity defenses should address the merits of plaintiffs’ constitutional claims first, later, or never. See *Pearson v. Callahan*, 555 U.S. 223 (2009); *Saucier v. Katz*, 533 U.S. 194 (2001); John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115; Nancy Leong, *Rethinking the Order of Battle in Constitutional Torts: A Reply to John Jeffries*, 105 NW. U. L. REV. 969 (2011).

196. Edith Windsor, for instance, was not criticized for acting on an “ideological” motivation rather than out of her financial need for a tax refund. See Peter Appelbome, *Reveling in Her Supreme Court Moment*, N.Y. TIMES, Dec. 10, 2012, <http://www.nytimes.com/2012/12/11/nyregion/edith-windsor-gay-widow-revels-in-supreme-court-fight.html> [http://perma.cc/WU9M-E4ER].

197. See sources cited *supra* notes 145 and 150.

doctrines about the role of individuals in resisting illegality in their group settings.”¹⁹⁸ Suits like *Crane*, I believe, expose the ambivalence within even academic treatments of civil servant resistance. At their most fundamental level, they call into question whether such resistance is legitimate, and under what circumstances.

None of this is to suggest that civil servant suits are without promise, or that they may not, in many circumstances, vindicate the values described above. But it does suggest that the theory is built on an uneasy foundation. For one, as I have noted, there are many questions about how, exactly, civil servant suits would work—and whether, as a result, they would serve as a particularly effective check on the executive branch. More fundamentally, however, we may not know exactly what kind of resistance such suits would promote—nor what kind of resistance we would want them to promote. Is there value in resistance like *Crane*’s? Even if there is, is a lawsuit the best way to promote it?

C. *The Political Alternatives*

If we took these concerns seriously, are there alternative institutional mechanisms that would vindicate similar values: ensuring executive compliance with congressional command, promoting dissent from civil servants on the front lines over the metes and bounds of lawful conduct? Here I sketch several such devices, premised not on the prospect of judicial intervention, but on heightened dialogue and debate between the legislative and executive branches over the legality of executive action. These mechanisms are offered not as superior alternatives to civil servant suits; none, for instance, offers the benefits of finality or impartiality that inhere in an Article III proceeding. But they illustrate the importance of thinking critically and creatively about how to channel the voices of civil servants, and how to foster contestation over the kinds of executive action that such suits place into the spotlight.

Suits like *Crane* center on the executive enforcement of congressional commands—decision making that, as Kate Andrias has explained, lies “at the very core of executive responsibility.”¹⁹⁹ Andrias has argued for a set of institutional reforms regarding enforcement decision making, including increased transparency into enforcement policy and centralized presidential oversight over major enforcement decisions.²⁰⁰ If we believe that the

198. Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 433, 434 (2009).

199. Andrias, *supra* note 49, at 1033.

200. *Id.* at 1041.

perspective of rank-and-file civil servants is important, however, we should ensure that such voices are incorporated into the kind of policymaking apparatus that Andrias describes. Such a mechanism could be intra-agency: it could be as simple as ensuring that agencies developing enforcement policies consult a cross-section of relevant civil servants, or even of the relevant public employee union.²⁰¹ Or it could be inter-agency: a seat at the table within the Executive Office of the President for designated representatives of the institutional civil service.²⁰²

A more expansive version of this proposal might even develop the Office of Special Counsel into a broad-gauged advocate for the interests of civil servants. The Office's role today is primarily adjudicative: it investigates and resolves complaints from employees and, where appropriate, refers them to the MSPB. But it need not be so. It is possible to imagine a revitalized OSC not simply as an institution that looks out for the interests of whistleblowers, but as a robust participant in public debates: submitting comments to proposed rulemakings, advocating for civil servants at the White House and in the inter-agency process, and even – at an extreme – serving as a litigant.²⁰³

We might also imagine the civil service turning to a different inter-branch actor: Congress. At several points over the last few decades – particularly in eras of divided government – inter-branch fights have erupted over whether Congress can authorize individual executive-branch employees to appear before congressional panels.²⁰⁴ Such testimony can serve to catalyze public opinion and debate: when Christopher Crane, the lead *Crane* plaintiff and head of the ICE officers' union, appeared before the House Judiciary Committee in 2013, he offered a scathing indictment of the Napolitano Memo, arguing that it engendered confusion among front-line prosecutors by asking them “to basically ignore their law books.”²⁰⁵ To be sure, there are disadvantages to such testimony, which can easily be derided as politically motivated. But permitting

201. Cf. Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148 (2013) (proposing a heightened role for unions in politics).

202. See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012) (describing the inter-agency process).

203. Cf. Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress, 8 Op. O.L.C. 30, 30 (1984) (describing Congress's authority to authorize the “Special Counsel of the Merit Systems Protection Board to conduct any litigation in which he is interested, except litigation in which the Special Counsel's position would be adverse to that taken by the United States”).

204. See, e.g., Authority of Agency Officials to Prohibit Employees From Providing Information to Congress, 28 Op. O.L.C. 79 (2004) (arguing that it cannot); Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress, 6 Op. O.L.C. 632, 637 (1982) (same).

205. Preston, *supra* note 89.

civil servants to testify before Congress might secure some of the same benefits as permitting them to sue, and at lower cost.

Of course, these proposals are subject to a set of common criticisms. First and foremost, they may not work—at least not more effectively than lawsuits. For one, *all* of these mechanisms lack the finality and impartiality associated with the judicial process. There is no binding decision at the end of congressional testimony, at least not by an officer charged with enforcing, to the best of her ability, the laws and Constitution of the United States. Moreover, both the executive and legislative processes described here are simply less efficacious, as a matter of course, than the judicial process described in the rest of the Note: they are notoriously sclerotic and bureaucratic by turn. Ensuring the presence of civil servant voices in the policymaking process does not ensure those voices will be heard. Facilitating civil-servant testimony may not facilitate the passage of responsive legislation.

More substantively, it is not clear that aggregating the dissenting voices of civil servants—as many of these mechanisms would—would in fact produce the kind of checking function that civil servant suits might permit. The civil service as an institution may care more about the terms and conditions of federal employment than the legality of the orders they are charged with implementing. Still, this concern may be overstated: many unions representing rank-and-file officers develop institutional interests that go beyond pay and benefits. These interests are evidenced not only by the *Crane* lawsuit, which pitted ICE agents against reform-minded Democratic appointees, but also by the controversy that erupted in the mid-2000s when the National Association of Immigration Judges resisted Attorney General John Ashcroft’s proposal to reform immigration adjudication.²⁰⁶ More broadly, the move to aggregate civil-servant perspectives may even itself be flawed: it may result in the expression of more moderate consensus positions and the minimization of true dissent.²⁰⁷

The political alternatives discussed in this section may be no better than second-best solutions, a set of mechanisms that may substitute in for civil servant suits but not fully replace them. The important point, though, is that each of these proposals—like civil servant suits themselves—relies on a different understanding of the rights and duties of civil servants, and their role

²⁰⁶ See *Immigration Reform and the Reorganization of Homeland Defense: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 14-16, 70-98 (2002) (statement of Dana Marks Keener, President, Nat’l Ass’n of Immigration Judges) (arguing for the creation of an independent immigration court, and expressing concern regarding the politicization of immigration judges writ large). Thanks to Nicholas Parrillo for this example.

²⁰⁷ I am grateful to Heather Gerken for pushing me on this point.

in our system of separation of powers. Whether we permit civil servants to resist unlawful commands turns in large part on whether we think their understanding of their duties is worth heeding. *How* we permit them to do so—whether through lawsuits or the more diffuse mechanisms outlined above—may depend on how valuable we believe that understanding to be. When a civil servant disagrees with her superior about how to interpret the law, what should she do? Do we care what she thinks, or do we dismiss it as her “personal opinion about what the law requires”?²⁰⁸ One purpose of this Note has been to expose these unanswered questions and to situate them within our understanding of civil servants and their rights and duties.

CONCLUSION

This Note has advanced three related projects. The first is descriptive: it offers the first sustained treatment of an important but previously unnoticed form of public-law litigation, the civil servant suit. The suits described above are novel and perplexing; they raise persistent and important questions about bureaucracy and the rule of law. Moreover, these questions are not merely theoretical in nature. When a county clerk steps in to defend a lawsuit, arguing that she cannot lawfully perform same-sex marriages, how should a court consider her request?²⁰⁹ Can she challenge her statutory mandate because she believes it to be inconsistent with what the law requires? These questions are a growing part of contemporary public-law litigation, but they admit of no easy answers.

The Note’s second project is doctrinal: it argues that when courts ask, as the *Crane* court asked, whether civil servants have *standing* to challenge the statutes, regulations, and commands they are charged with enforcing, they ask the wrong question. They should instead ask whether civil servants have the *right* to raise those challenges in the first instance. Such a right, I argue, may seem radical, but it is a real—if neglected—part of our legal landscape. Still, we do not know what the right entails, how it is exercised, or even whether it is desirable.

Thus the final project of this Note is a normative one: it points out that we lack a firm account of the rights and duties of civil servants and their role in our

208. *Crane* Reply, *supra* note 118, at 2.

209. Compare *Whitewood v. Wolf*, No. 1:13-cv-1861, slip op. at 9 (M.D. Pa. June 18, 2014) (sharply criticizing a Pennsylvania county clerk for “us[ing] her office as a platform” to defend the ban on same-sex marriage on the basis of her “deep personal disagreement” with the practice), with *McQuigg v. Bostic*, No. 14A196 (U.S. Aug. 20, 2014) (granting a stay of a circuit court mandate in an appeal now defended solely by Virginia county clerks).

CIVIL SERVANT SUITS

system of separation of powers. Civil servant suits illustrate the ameliorative role that the civil service may play in ensuring executive compliance with the law. But they also demonstrate that civil servant resistance is faceted and complex, grounded as often in ideological or political considerations as it is in technocratic ones. Is such resistance valuable? Is it legitimate? Such questions point toward the kind of account that we need to fully evaluate the promises and pitfalls of civil servant resistance, and of civil servant suits.