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Executive Control Over Criminal Law Enforcement: Some Lessons From History

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EXECUTIVE CONTROL OVER CRIMINAL LAW ENFORCEMENT: SOME LESSONS FROM HISTORY

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INTRODUCTION

In *Morrison v. Olson*,[1] the Supreme Court held that Congress may vest prosecutorial authority in a government official independent of the President's effective control. Although the majority recognized that the independent counsel statute[2] "reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity,"[3] it concluded that the President retained "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties."[4] In essence, the Court determined that Congress' interest in providing for an impartial investigation of senior executive branch officials outweighed the intrusion on the Executive's prerogative to control criminal law enforcement.[5]

In a sharp dissent, Justice Scalia rejected the *Morrison* majority's premise that granting the independent counsel a measure of statutory tenure[6] comported with the President's constitutional responsibility to "take care" that the laws are faithfully executed.[7] Fragmenting control over criminal law enforcement, in his view, undermined the constitutional mandate for a unitary executive.[8] To buttress that determination, Justice Scalia, as had the Court of Ap-

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1. 108 S. Ct. 2597 (1988).

2. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1867 (codified as amended in scattered sections of 28 U.S.C.) (providing for appointment of a special prosecutor to investigate, and if appropriate, prosecute certain high ranking government officials for violations of federal criminal laws). The Ethics in Government Act has twice been reenacted with amendments. *See* Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039; Ethics in Government Act Amendments of 1986, Pub. L. No. 100-191, 101 Stat. 1293.

3. Morrison v. Olson, 108 S. Ct. 2597, 2621 (1988) (recognizing that the Attorney General "is not allowed to appoint the individual of his choice [,] . . . does not determine the counsel's jurisdiction, and his power to remove a counsel is limited").

4. *Id.*

5. In undertaking a balancing test, the Court stressed that the President, through the Attorney General, retained the power to trigger the independent counsel's appointment, to help define the independent counsel's jurisdiction, and to dismiss the independent counsel for good cause. *Id.*

6. Ethics in Government Act, 28 U.S.C. § 596(a) (1982 & Supp. IV 1986) (providing for removal of independent counsel from office by the Attorney General only for "good cause").

7. U.S. CONST. art. II, § 3.

8. *Morrison*, 108 S. Ct. at 2625-31 (Scalia, J., dissenting). *Morrison* represents the first case since Myers v. United States, 272 U.S. 52 (1926), in which the Court addressed a presidential assertion of the right to remove at will an officer who unquestionably discharged "purely" executive authority. *Compare* Wiener v. United States, 357 U.S. 349 (1958) (upholding limitation on President's ability to remove official exercising quasi-judicial functions); Humphrey's Executor v. United States, 295 U.S. 602 (1935) (upholding statutory limitation on President's ability to remove FTC Commissioner on ground that his functions were quasi-judicial and quasi-legislative). All parties agreed that the independent counsel performed purely executive functions.

peals for the District of Columbia,[9] asserted that criminal law enforcement is a "core" or exclusive function of the executive branch, which must be directed by the President or by someone under the President's control.[10] He concluded that "the President's constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law."[11]

The assertion that criminal law enforcement is a core executive function carries a certain ring of plausibility. To many, criminal law enforcement is almost synonymous with the executive arm of the state. Several Supreme Court opinions have suggested as much,[12] and statements to that effect appear in lower court opinions.[13]

Although the asserted special status of criminal law enforcement constituted one of the principal disputes in the court of appeals,[14] the majority in *Morrison* never addressed the issue directly. The

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9. *In re* Sealed Case, 838 F.2d 476, 500 (D.C. Cir.), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988).

10. *Morrison*, 108 S. Ct. at 2626 (Scalia, J., dissenting) (finding that criminal prosecution and investigation represents purely executive power); *id.* at 2627 (holding that Ethics Act and thus independent counsel "deprives the president of exclusive control over that quintessentially executive activity").

11. *Id.* at 2629 (emphasis in original).

12. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 832 (1985) (holding that certain aspects of criminal law enforcement "have long been regarded as the special province of the Executive Branch"); Buckley v. Valeo, 424 U.S. 1, 285 (1976) (White, J., concurring in part and dissenting in part) (stating "I would be much more concerned if Congress purported to usurp the function of law enforcement").

13. *See, e.g.*, Community for Creative Non-Violence v. Pierce, 786 F.2d 1199, 1201 (D.C. Cir. 1986) (holding that power to decide to investigate and to prosecute "lies at the core of the Executive's duty to see to the faithful execution of the laws"); United States v. Cowan, 524 F.2d 504 (5th Cir. 1975) (reversing district court's appointment of special prosecutor), *cert. denied*, 425 U.S. 971 (1976); Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81, 86-88 (2d Cir. 1972) (declining to recognize qui tam action in part because of tradition of Executive's total control over federal prosecutions); Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967) (stating that "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought"); United States v. Cox, 342 F.2d 167, 190 (5th Cir.) (opinion of Wisdom, J.) (finding that "[t]he prosecution of offenses against the United States is an executive function within the exclusive prerogative of the Attorney General . . ."), *cert. denied*, 381 U.S. 935 (1965).

Indeed, courts have granted the Executive virtually unreviewable discretion in deciding whom to prosecute and what criminal charges to seek. Heckler v. Chaney, 470 U.S. 821, 832 (1985) (holding that, even in the civil context, an executive agency's decision not to take enforcement action is presumed immune from judicial review); United States v. Alessio, 528 F.2d 1079, 1081-82 (9th Cir.) (holding that Executive's power to determine which cases will be prosecuted is rooted in Executive's constitutional duty to take care that laws of United States are faithfully executed), *cert. denied*, 426 U.S. 948 (1976). *But see* Smith v. Meese, 821 F.2d 1484, 1490-91 (11th Cir. 1987) (permitting judicial review of pre-indictment challenge to criminal investigation, despite asserting that "[t]he prosecutorial function, and the discretion that accompanies it, is thus committed by the Constitution to the executive, and the judicial branch's deference to the executive on prosecutorial decision-making is grounded in the constitutional separation of powers").

14. *Compare In Re* Sealed Case, 838 F.2d 476, 500 (D.C. Cir. 1987) (stating that criminal law enforcement is "core" function of Executive), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988) *with id.* at 526-27 (Ginsburg, J., dissenting) (arguing that criminal law enforce-

Supreme Court stated only that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the executive branch."[15] The *Morrison* majority skirted the question whether criminal law enforcement stands on a different footing from the exercise of other executive branch functions, such as implementation of the civil laws passed by Congress or conduct of foreign relations.

In this Article, I will focus on the question left unanswered by the majority and argue that, at least from a historical perspective, criminal law enforcement cannot be considered a core or exclusive power of the executive branch. Resolving whether criminal law enforcement is an exclusive executive branch function is critical not only to assess the propriety of the Supreme Court's decision in *Morrison*, but also to gauge its scope. If criminal law enforcement rests uniquely within the executive's control, then the validity of the Court's analysis would be open to serious question.[16] Moreover, the Court's decision would then suggest that Congress can interfere substantially with other "special" or "core" executive functions, such as the foreign relations power.[17]

If, on the other hand, contrary to past judicial pronouncements, criminal law enforcement does not warrant such distinctive status, that finding would bolster the result reached by the *Morrison* Court. Congress could then exercise at least some discretion in shaping how criminal laws are to be enforced, though perhaps not as fully as it has historically in the civil context by establishing independent agencies to implement broad statutory mandates.[18] At the same

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ment is not core function of Executive and not comparable to either President's role as Commander-in-Chief of the armed forces, or his power to make treaties and grant pardons).

15. Morrison v. Olson, 108 S. Ct. 2597, 2619 (1988).

16. I will not address all of the separation of powers problems posed by the independent counsel statute. For example, I will discuss neither the Appointments Clause question nor the problem raised by the supervisory power vested in the special District of Columbia court. Rather, I will focus on Congress' historical exercise of the authority to designate the personnel who wield criminal law enforcement authority, even if such personnel are shielded from the President's plenary removal authority. For a more narrowly directed discussion of the unitary executive issue, see Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (1987) (defending expansive view of unitary executive); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (analyzing relationship of Congress, President, Supreme Court, and administrative agencies and concluding that more circumscribed view of unitary executive is needed).

17. *See Morrison*, 108 S. Ct. at 2637 (Scalia, J., dissenting) (suggesting that, under majority's analysis, an Assistant Secretary of State with responsibility for one narrow area of foreign policy could be insulated from direct presidential control).

18. Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935) (holding that Congress has authority to create independent administrative agencies that operate free from direct executive control). Congress and the courts might be unwilling to intrude significantly into the Executive's control of criminal law enforcement for prudential reasons. *See infra* text

time, the *Morrison* analysis might not necessarily apply in areas subject to more exclusive Presidential direction.[19]

Most commentators agree that the Executive's power vis-a-vis the other branches rests on a continuum.[20] At one end is the discharge of ministerial duties in civil matters, a function subject to considerable congressional and judicial intrusion.[21] There is generally no dispute that Congress can direct an officer in the executive branch to make a report to Congress[22] or to pay a specified amount to a claimant.[23] At the other end of the spectrum are the discretionary conduct of foreign relations and authority to grant pardons, powers with which Congress and the judiciary can only minimally interfere.[24] The Executive's more routine responsibility to exercise dis-

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accompanying notes 170-76. And, of course, the courts' authority to circumscribe the discretion of executive officers charged with the responsibility to make prosecutorial decisions is limited. *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985). Even if criminal and civil law enforcement stand on the same constitutional footing, proponents of a strong unitary executive might still disagree with the independent counsel decision on the ground that federal officers exercising both civil and criminal responsibilities must be subject to the plenary removal authority of the President. *See* Miller, *supra* note 16. That view, of course, would require invalidating much of the administrative state.

19. *See infra* note 24 and accompanying text.

20. *See, e.g.*, E. CORWIN, THE PRESIDENT: OFFICE AND POWERS (rev. ed. 1984); Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863 (1983) (documenting Supreme Court interpretation of separation of powers); Kurland, *The Rise and Fall of the "Doctrine of Separation of Powers"*, 85 MICH. L. REV. 592, 602-03 (1986) (analyzing when President can act without constitutional or statutory authority); *see generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Jackson, J., concurring) (discussing limitations on Executive's power).

21. *See generally* Kendall v. United States *ex rel.* Stokes, 37 U.S. 524, 563 (1838) (holding that executive branch official is bound to perform certain ministerial acts when, by writ of mandamus, court orders performance); National Treasury Employees Union v. Nixon, 492 F.2d 587, 616 (D.C. Cir. 1974) (finding court has authority to issue writ of mandamus to compel President's performance of ministerial duties).

22. *See* Immigration & Naturalization Service v. Chadha, 462 U.S. 919, 924 (1983) (citing with approval requirement of Attorney General to report to Congress certain actions under provisions of Immigration and Nationality Act, 8 U.S.C. § 1254(c)(1) (1982 & Supp. IV 1986)).

23. *Kendall*, 37 U.S. at 563 (writ of mandamus issued by court to compel United States Postmaster General to pay creditor sums due).

24. The President's distinctive authority in foreign affairs probably stems from the power to receive ambassadors, U.S. CONST. art. II, § 3, from the power to make treaties (subject to the Senate's consent), *id.* § 2, and from his status as Commander-In-Chief of the Armed Forces, *id.* *See* Dames & Moore v. Regan, 453 U.S. 654, 677 (1981) (recognizing broad authority for President to conduct international relations); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-21 (1936) (holding powers of federal government over foreign or external affairs differ in nature and origin from powers over domestic or internal affairs); Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985) (holding nonjusticiable challenge to government aid supporting the Contras); *see generally* C. CRABB & P. HOLT, INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT AND FOREIGN POLICY (1980); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972).

The President's pardon power lies toward that end of the continuum as well, brooking little congressional interference. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872) (holding executive branch alone has "power of pardon"; *see generally* W. HUMBERT, THE PARDONING POWER OF THE PRESIDENT (1941).

cretion in executing the broad mandates passed by Congress lies somewhere between the two poles. Because there is probably no presidential task completely immune from congressional regulation,[25] some accommodation among the branches is required to determine whether a disputed congressional measure unduly intrudes into the prerogatives of the President.[26] The accommodation, however, will differ substantially depending upon the nature and source of the executive power at stake. Thus, the question avoided by the *Morrison* majority concerns where on the continuum the Executive's responsibility for criminal law enforcement should lie, towards the end with the foreign relations power, or towards the middle, closer to the Executive's duty to implement the many non-criminal laws enacted by Congress.

There is no question but that the Executive historically has enjoyed substantial authority in overseeing and coordinating criminal law enforcement efforts. The executive branch of the new nation enjoyed greater authority in criminal law enforcement than had the comparatively impotent Executive under the Articles of Confederation and even in comparison to the executive governments in the colonies and newly-formed states.[27]

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25. Even in the foreign affairs arena, the Supreme Court has long held that Congress can limit the President's powers by establishing procedures to channel and confine exercise of such powers. Little v. Barreme, 6 U.S. (2 Cranch) 170, 177-79 (1804) (President must abide by Congress' specification of when vessels trading with the enemy can be seized on the high seas). *See also* Brown v. United States, 12 U.S. (8 Cranch) 110, 125-29 (1814) (countermanding Executive's order confiscating property held by aliens during War of 1812). The exercise of some authority, however, is immune from judicial review.

26. For a discussion of why some balancing is appropriate in this context, see Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1316-19 (1988).

27. For a discussion of the Executive's limited powers under the Articles of Confederation, see THE FEDERALIST No. 21 (A. Hamilton) 138-39 (C. Rossiter ed. 1961); E. SURRENCY, HISTORY OF THE FEDERAL COURTS 7-8 (1987); J. FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783-1789 at 99 (1916); A. MCLAUGHLIN, THE CONFEDERATION AND THE CONSTITUTION, 1783-1789 at 36-47 (1962). For a discussion of criminal law enforcement authority in the colonies and states, see J. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY (1980); Robinson, *Private Prosecutors in Criminal Cases*, 4 WAKE FOREST L. REV. 300 (1908); Note, *The History and Development of Qui Tam*, 1972 WASH. U.L.Q. 81 (1972).

Even in the colonies with public prosecutors, grand juries and private citizens enjoyed much more active roles in criminal law enforcement than they would under the Constitution. For a discussion of the role of private citizens see Robinson, *supra*. For a discussion of the broader role of grand juries in overseeing executive branch conduct, see R. YOUNGER, THE PEOPLE'S PANEL (1963). Indeed, law enforcement officers in some states then as today are elected, and thus not directly accountable to the state executive. *See Report on the Office of Att'y General* 62-63, 105 (Nat'l Ass'n of Attys. Gen'l 1971); Note, *Private Prosecution: A Remedy For District Attorneys' Unwarranted Inaction*, 65 YALE L.J. 209, 211 (1955).

In the federal system, courts from an early period allowed the Executive wide discretion in deciding whom to prosecute and when to discontinue prosecution. *See generally* Schwartz, *Federal Criminal Jurisdiction and Prosecutorial Discretion*, 13 LAW & CONTEMP. PROBS. 64, 83 (1948); M. TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC (1978); United States v. Hill, 26 F. Cas. 317 (C.C.D. Va. 1809) (No. 15,364); United States v. Morris, 26 F. Cas. 1337, 1348 (C.C.D.N.Y. 1822) (No. 15,816).

Yet from the inception of the republic, the President has not exercised total dominion over criminal law enforcement matters. Despite the executive branch's leading part, Congress, the courts, private citizens, and state officials have played significant supporting roles in federal criminal law enforcement. Although the historical record may not answer directly the precise question reached by the Supreme Court—whether federal prosecutors must be subject to the President's plenary removal authority—it lends considerable support to the majority's conclusion that Congress retains wide latitude in deciding the extent and manner of the Executive's criminal law enforcement efforts.[28]

In this Article, I do not by any means purport to present a definitive historical account of the Executive's criminal law enforcement efforts. I will, however, dispute Justice Scalia's implicit conclusion that criminal law enforcement must be historically viewed as a core executive function. After briefly addressing in Part I the constitutionally prescribed role of Congress in shaping criminal law enforcement policy, I will focus in Part II on three contexts in which Congress has acted "affirmatively" to circumscribe executive control.

First, Congress for almost a century directed that criminal law enforcement responsibility be decentralized, entrusting the bulk of such efforts to part-time district attorneys who had little contact with the President and his subordinates in the nation's capital. Second, private citizens, even after the Constitution was ratified, continued to play a prominent role in enforcing the criminal laws, just as they did at common law and continue to do today in England. Third, the initial and succeeding Congresses vested federal criminal law enforcement responsibilities in state officials, thereby removing a segment of overall enforcement from the Executive's direct control. Thus, Congress, by determining both who can enforce the criminal laws and how those laws should be enforced, has long helped shape and confine the Executive's discretion in criminal law enforcement matters.

I. THE CONSTITUTIONALLY PRESCRIBED ROLE OF CONGRESS IN CRIMINAL LAW ENFORCEMENT

Before examining the historical underpinnings of the majority's

28. Of course, the historical record may be viewed by some as largely irrelevant to the constitutional question facing the Court. Irrespective of the role played by history in shaping constitutional law jurisprudence, the perception that criminal law has always been a core executive function helped form the basis for Justice Scalia's dissent. *See Morrison*, 108 S. Ct. at 2626.

conclusion in *Morrison*, it is helpful to sketch the respective constitutional powers of Congress and the Executive in shaping federal criminal law enforcement.[29] The Constitution explicitly grants neither the Executive nor the legislative branches full control over federal criminal law enforcement.[30] To be sure, the Constitution vests the President with the "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment,"[31] but it nowhere directs the President explicitly to assume unfettered control of criminal law enforcement.[32] Similarly, the Constitution directs the Executive to "take care that the laws be faithfully executed,"[33] yet does not distinguish between criminal and civil law enforcement. From a textual analysis, therefore, the President's control over enforcement of the criminal laws seems to stand on much the same footing as civil law enforcement: certainly, the Executive is to carry out the law in both contexts, but that duty is shaped largely by the "laws" that Congress enacts.[34]

In contrast to the President's uncertain responsibilities, the Constitution affords Congress a more tangible role in shaping criminal law enforcement. First, the Constitution assigns Congress the fundamental task of defining the content of criminal laws. Congress retains the discretion to table or modify any criminal law proposed by the executive branch. Indeed, Congress historically has refused

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29. The judiciary as well shares overall responsibility for criminal law enforcement. Through supervision of grand juries, through superintendence of pre-trial proceedings, and through control over trials themselves, judges wield unquestionable influence in criminal law enforcement. *See, e.g.*, FED. R. CRIM. P. 48 (recognizing judicial power to dismiss indictments for want of prosecution). *See generally* Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984) (discussing judicial supervision of federal prosecutions).

30. The judicial power to supervise criminal law enforcement primarily stems from the judiciary's authority to adjudicate cases and controversies under Article III of the Constitution. Some control might also derive from the fifth amendment's requirement of a grand jury.

31. U.S. CONST. Art. II, § 2.

32. The debates surrounding enactment of the pardon clause, however, suggest that the Framers did not envision total executive control over criminal prosecutions. At several points in the debate, an amendment was suggested that would have confined the President's exercise of the pardon power to non-treasonous offenses. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 564, 626-27 (1966 ed.). Some feared that the President, through the pardon power, could insulate his own efforts to seize dictatorial power. George Mason, for example, warned that presidential exercise of the pardon power could be used to "screen from punishment those whom he [the president] had secretly instigated to commit the crime and thereby prevent a discovery of his own guilt." *Id.* at 639. They evidently assumed that the President could not have similarly shielded his treasonous confederates from criminal prosecutions. For a general discussion of the decision to vest the pardon power in the President, see W. HUMBERT *supra* note 24, at 9-20.

33. U.S. CONST. Art. II, § 3.

34. Congress has long vested civil enforcement functions in officers insulated from the President's plenary removal authority. *See, e.g.*, Humphrey's Executor v. United States, 295 U.S. 602, 630 (1935) (Congress may vest some control over enforcement of civil laws in independent administrative agencies).

to enact many criminal laws suggested by the executive branch.[35] Even if the Executive urges that such laws are imperative because of the threat that particular conduct poses to the well-being of the nation, Congress may disagree and refuse to act.[36] Conversely, if Congress objects to the Executive's enforcement of a particular criminal law, Congress can of course repeal or suspend the law.[37]

Second, the Constitution also grants Congress some authority to decide how the criminal laws are to be enforced. Congress may specify what penalties are to be assessed for various criminal violations,[38] what law enforcement agencies have jurisdiction over particular criminal investigations,[39] and what procedures the executive branch must follow in investigating crimes.[40] As an initial matter, therefore, Congress and not the President decides how best to meet criminal law enforcement objectives. Moreover, even after enactment of a criminal law, Congress may decide to confer amnesty upon those who have violated that law and thereby directly partici-

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35. During Jefferson's administration, Congress defeated at least one attempt by the President to expand the Executive's prerogatives in criminal law enforcement. *See* Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223, 243 n.66 (1986) (addressing Congress' refusal to accede to request by Jefferson for authorization to suspend writ of habeas corpus). Furthermore, in response to United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) (denying validity of federal prosecutions for common law crimes), the Executive sought legislation from Congress vesting it with wide discretion to indict individuals for common law crimes, but Congress refused. 27 ANNALS OF CONG. 1768-70 (1814) (introducing bill to amend judicial system of United States on which action was postponed indefinitely). *See* D. HENDERSON, CONGRESS, COURTS & CRIMINALS 29 (1985) (discussing common law jurisdiction and federal courts). Justice Story decried the Executive's inability to protect itself, and sought to persuade Congress of the necessity to enact more criminal laws. 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 1789-1821 at 438-41 (1922) (criticizing Congress for lack of action with respect to codifying common law crimes).

36. *Cf.* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812) (rejecting argument that prosecutions for common law crimes were needed to enable national government "to preserve its own existence and promote the end and object of its creation").

37. In the wake of the 1800 election, for example, Congress declined to reenact the Sedition Act. *See* Act of July 14, 1798; § 4, 1 Stat. 596, 597 (1798) (establishing that Act was to expire on March 3, 1801).

38. The Supreme Court in *Hudson* concluded that courts lacked the power to mete punishment until Congress "first ma[d]e an act a crime, affix[ed] a punishment to it, and declar[ed] the court that shall have jurisdiction of the offense." *Id.* at 34. *See* United States v. Worrall, 2 U.S. (2 Dall.) 384, 395 (1798) (Chase, J.) ("if [C]ongress had ever declared and defined the offense, without prescribing a punishment, I should still have thought it improper to exercise a discretion upon that part of the subject").

39. *See, e.g.*, 14 U.S.C. § 2 (Supp. IV 1986) (jurisdictional authority of Coast Guard); 16 U.S.C. § 1a-6 (1982) (enforcement authority of National Park Service); 39 U.S.C. § 404 (1982) (investigative authority of Postal Service).

40. For instance, Congress has forbidden the Attorney General to grant immunity in conducting the preliminary investigation under the Ethics in Government Act, 28 U.S.C. § 592. Moreover, Congress has mandated that only the Attorney General, or any Assistant Attorney General specially designated by him or her, may authorize certain wiretaps. 18 U.S.C. § 2516 (1982 & Supp. IV 1986).

pate in criminal law enforcement.[41]

Third, Congress' control over the appropriations process affords the legislature a potent weapon with which to influence the Executive's criminal law enforcement authority.[42] Article I, section 9 provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Justice Story explained that but for the appropriations clause,

> the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure. The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation.[43]

Congress has in fact made it a crime for any executive official to spend monies in excess of that appropriated by Congress.[44] As with its authority to define the content of the criminal laws, Congress' control over the purse strings represents a "negative" restraint on the Executive's duty to enforce the criminal laws.[45] The Executive

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41. The Supreme Court has stated that Congress has full authority to declare an amnesty and thereby immunize individuals from prosecution. Brown v. Walker, 161 U.S. 591, 601 (1896) (addressing congressional enactment immunizing any individual testifying before the Interstate Commerce Commission from prosecution stemming from the testimony provided to the Commission). *See also* United States v. Tynen, 78 U.S. (11 Wall.) 95 (1871) (dismissing indictment because of subsequent congressional repeal of criminal enactment).

42. Congress' control over the purse strings similarly limits the Executive's authority in other contexts as well. *See generally* Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1386-98 (1988).

43. II J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1348, at 242 (3d ed. 1858). *See* THE FEDERALIST No. 24, at 157-58 (A. Hamilton) (C. Rossiter ed. 1961).

The Supreme Court has long held that the President cannot expend money to take care that the laws be faithfully executed except pursuant to an appropriation from Congress. Reeside v. Walker, 52 U.S. (11 How.) 271, 291 (1851) (stating that "[n]o officer, however high, not even the President . . . is empowered to pay the debts of the United States . . . . [T]he difficulty in the way is the want of any appropriation by Congress."); *see* Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937) (stating that appropriations provision "was intended as a restriction upon the disbursing authority of the executive department."); Hart's Case, 16 Ct. Cl. 459, 484 (1880) ("the absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people"), *aff'd*, Hart v. United States, 118 U.S. 62 (1886). The President's authority is directly confined by the appropriation which Congress sees fit to make.

44. Anti-Deficiency Act, 31 U.S.C. § 1341 (1982 & Supp. IV 1986).

45. Congress on occasion has not been shy in wielding its appropriation power to influence executive enforcement of the laws. For example, in Section 309 of the Energy and Water Developments Appropriation Act, Pub. L. No. 100-202, 101 Stat. 1329-126 (1987), Congress prohibited the Department of Energy and the Department of Justice from using any funds for a period of ten months to "prosecute" or "enforce any judgment" against specified persons subject to a judgment entered in the Temporary Emergency Court of Appeals, Citronelle-Mobile Gathering, Inc. v. Herrington, 826 F.2d 16 (Temp. Emer. Ct. App.), *cert. denied*, 108 S. Ct. 327 (1987). *See* 133 CONG. REC. S16275-76 (daily ed. Nov. 13, 1987) (discussing intent behind provision) (remarks of Senator Shelby). Congress objected to the Department of Energy's successful efforts to recover restitution from corporate officials who had overcharged

must obtain Congress' agreement prior to taking any law enforcement measure which expends resources.[46]

The constitutional structure does not directly answer the question whether Congress may vest criminal law enforcement authority in an officer independent of the President's plenary removal authority. Yet our system of separated powers affords Congress the ability to influence the Executive's enforcement of the criminal laws in various ways. Congress' powers to decide which conduct to make criminal, to prescribe how the Executive is to enforce such laws, and to appropriate funds only for criminal law enforcement purposes which it approves provide a structure within which Congress can check the Executive's control over criminal law enforcement.

II. PRIOR CONGRESSIONAL ACTIONS CIRCUMSCRIBING EXECUTIVE CONTROL OVER CRIMINAL LAW ENFORCEMENT

The constitutionality of the independent counsel statute hinges upon Congress' power to designate the personnel who are to exercise federal criminal law enforcement responsibility. Congress at a minimum enjoys the authority to determine which executive branch agency is to carry out specific criminal enforcement functions;[47] the question posed by the independent counsel statute concerns whether Congress may in addition vest enforcement responsibilities

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customers in sales of oil and gas, ostensibly on the ground that Congress disagreed with the executive branch's theory of enforcing the law. Congress could in all likelihood exercise its appropriation power as explicitly in the criminal context, and indeed, it has accomplished the analogous objective by suspending enforcement of the criminal laws. *Cf.* United States v. Tynen, 78 U.S. (11 Wall.) 95 (1871).

46. The first Congresses declined to appropriate sufficient money to enable the Executive to pursue extensive law enforcement measures. The Executive lacked the manpower and resources to coordinate enforcement efforts effectively. There was no Department of Justice, no FBI, nor in fact any employee under the Attorney General's direction. Congress authorized the Attorney General to receive only $1500 per year in salary (as compared to $3,500 per year received by the Secretaries of State and Treasury), and thus forced the Attorney General to engage in private practice to make ends meet. *See generally* A. LANGELLUTIG, THE DEPARTMENT OF JUSTICE OF THE UNITED STATES 3 (1927); Key, *The Legal Work of the Federal Government*, 25 VA. L. REV. 165, 176 (1938).

The first Attorney General, Edmund Randolph, soon protested to the President that such conditions made his work impossible to complete. He requested funds to allow him to procure a clerk and to facilitate communication with other government officials. Am. State Papers, Misc. I, 45, No. 25. Although President Washington forwarded the requests to Congress, Congress declined to respond. L. WHITE, THE FEDERALISTS 168 (1948); Key, *supra*, at 176. President Madison made a similar request of Congress some twenty years later with similar results. 1 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 at 577-78 (1898); Key, *supra*, at 176. Only in 1818 did Congress provide the Attorney General with a clerk. Act of April 20, 1818, ch. 87, § 6, 3 Stat. 445, 447. Even then, Congress reduced the clerk's salary in 1820 and apparently allowed the Attorney General no contingent expenses for the next ten years. Key, *supra*, at 176. Battles with Congress over funding have, of course, continued.

47. *See supra* note 39.

in personnel who are not subject to the President's plenary removal power. In other words, the issue focuses on whether Congress' exercise of its Article I authority to determine the manner in which the federal criminal laws are to be enforced has intruded into the Executive's Article II prerogative to enforce the criminal laws. Examination of prior congressional enactments is quite illuminating, for Congress has vested criminal law enforcement responsibility not only in senior executive branch officials but also in executive branch officials insulated from direct control of the Attorney General, in individuals shielded from any executive branch control, and in state officials similarly independent of the executive branch's supervision.

A. The Absence of Centralized Control Within the Executive Branch Over Criminal Law Enforcement

From an early period, Congress limited the Executive's effective control over criminal law enforcement "affirmatively" by dispersing supervisory responsibility among various executive officials. Congress vested limited supervisory authority in the Attorney General, declining to provide him with the means to develop and implement effective federal policy to combat crime. Although there were marshals and deputy marshals who served as federal enforcement officials, the Executive also had to rely on private citizens and state officials to aid in apprehending and holding criminals.[48] The deputy marshals were subject to removal not by the Executive, but by the courts.[49] The reality of a vigorous, unified criminal law enforcement machine in the executive branch is of comparatively recent origin.

Although Congress created the office of Attorney General in the 1789 Judiciary Act, it vested that office with only limited power. Congress directed the Attorney General "to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments. . . ."[50] Yet Congress provided the Attorney General with no mechanism for supervising the federal district attorneys.[51] The Attorney General

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48. *See* Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87; *see generally* L. WHITE, *supra* note 46, at 411. Congress today has still vested state officials with some authority in terms of arrest. 18 U.S.C. § 3041 (1985).

49. Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87.

50. *Id.*, § 35, 1 Stat. 73, 93.

51. Congress in the 1789 Judiciary Act authorized the President to appoint in each district "a meet person, learned in the law, to act as attorney-general for the United States." Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

might not learn of suits progressing in the newly created trial courts, had virtually no say in the positions taken by the district attorneys in such suits, and had little opportunity to coordinate the positions taken by the district attorneys. As a result, the Attorney General could not shape the record in cases winding their way to the Supreme Court.[52] Attorney General Randolph soon complained that:

> [I]t may frequently arise that the United States may be deeply affected by various proceedings in the inferior courts, which no appeal can rectify. The peculiar duty of the Attorney General calls upon him to watch over these cases; and being, in the eye of the world, responsible for the final issue, to offer advice at the earliest stage of any business; and indeed, until repeated adjudications shall have settled a clear line of partition between the federal and State courts, his best exertions cannot be too often repeated to oppose the danger of a schism. For this purpose the attorneys of the districts ought, I conceive, to be under an obligation to transmit to him a state of every case in which the harmony of the two judiciaries may be hazarded, and to communicate to him those topics on which the subjects of foreign nations may complain in the administration of justice.
>
> Perhaps, too, in the review which the President takes of the affairs of the Union at the opening of each session of Congress, the judicial department will be comprehended. But the Attorney General, who ought to be able to represent the true situation of it, must be forever incompetent to the task until he may officially, and with the right of expecting an answer, propound his inquiries to the district attorneys.[53]

Congress, however, failed to respond to Randolph's entreaty.[54]

During President Washington's administration, the Secretary of State evidently assumed titular responsibility for supervising the district attorneys, although that supervision was lax.[55] Moreover, the

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52. *See generally* L. WHITE, *supra* note 46, at 164-66; Key, *supra* note 46, at 175-76. Indeed, Congress did not vest jurisdiction in the Supreme Court to entertain direct review of criminal actions in capital cases until 1889. Act of Feb. 6, 1889, ch. 113, 25 Stat. 655, 656. Before that time, the Supreme Court heard criminal matters only through habeas corpus or when there was a division of opinion within the two-judge circuit court. Act of April 29, 1802, ch. 31, § 1, 2 Stat. 156, 159-61. *See generally* VII C. FAIRMAN, HISTORY OF THE SUPREME COURT, RECONSTRUCTION AND REVISION, 1864-1888 (PART II) at 269 (1987). Thus, during this time the Attorney General could wield little influence in shaping interpretation and application of the criminal laws. *Id.*

53. Am. State Papers, Misc. I, 46, No. 26 (1791).

54. L. WHITE, *supra* note 46, at 168.

55. *Id.* at 408. Thus, even the controversial attempted prosecution of Aaron Burr in Kentucky apparently was launched by the district attorney without any guidance from higher political officials. M. TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816 at 140 (1978). During the period of hostilities prior to the War of 1812, Secretary of the Treasury Albert Gallatin complained on several occasions that the district attorney in Massa-

district attorneys did not even have control over all legal proceedings in their districts, for Congress vested the Comptroller of the Treasury with the power and discretion to institute legal proceedings in cases of delinquent revenue officers.[56] In 1816, President Madison complained to Congress of the lack of overall coordination of the nation's legal affairs.[57] Congress, however, declined to vest the Attorney General with greater power, and several years later merely transfered the Comptroller's power to a new Agent of the Treasury[58] and vested that agent with the authority to supervise the district attorneys.[59]

Similarly, when President Jackson later protested to Congress that this bifurcated authority resulted in inefficient and insufficient law enforcement control, Congress chose not to centralize authority in the Attorney General, as Jackson had sought, but instead created a new office, Solicitor of the Treasury, with powers comparable to those formerly enjoyed by the Agent of the Treasury.[60] While some in Congress agreed with the President that unifying control over law enforcement would enhance the Executive's authority to enforce the

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chusetts never returned his letters, and the port collectors under Gallatin's control were forced to rely on the services of private counsel. L. WHITE, THE JEFFERSONIANS 455-56 (1951) [hereinafter JEFFERSONIANS].

At times, of course, presidents did show special interest in particular prosecutions. *See, e.g.*, 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 768-84 (1953); D. HENDERSON, *supra* note 35, at 198; L. LEVY, THE LEGACY OF SUPPRESSION 241-42 (1960); J. SMITH, FREEDOM'S FETTERS 182-86 (1956). Nonetheless, even the President's control over district attorneys, at least in the view of several attorneys general, was not complete. 2 Op. Att'y Gen. 53 (1827) (William Wirt) (setting bounds on orders that President can give district attorney); 2 Op. Att'y Gen. 482, 488-89 (1831) (Roger Taney) (stating that President can only rarely interfere with district attorney's handling of cases).

56. Act of March 3, 1797, ch. 20, § 1, 1 Stat. 512, 512.

57. J. RICHARDSON, *supra* note 46, at 577-78.

58. Act of May 15, 1820, ch. 107, § 1, 3 Stat. 592, 592. Indeed, Attorney General Wirt under President Monroe refused to respond to legal inquiries from the district attorney's office because such duties lay outside his statutory responsibilities. 1 Op. Att'y Gen. 608, 609-11 (1823). *See also* JEFFERSONIANS, *supra* note 55, at 340-41.

59. Even the Secretary of the Treasury wielded only limited control over the district attorneys. Attorney General Wirt commented that "[T]he Secretary of the Treasury is not necessarily a lawyer by profession .... It could never have been considered, therefore, as among the duties of that officer, that he should instruct and direct the district attorneys as to the mere technicalities of their profession .... [Imposing such duties] would be ... to confound and amalgamate duties which are separated by our laws, and to shift to the Secretary of the Treasury responsibilities which properly belong to the district attorneys." 1 Op. Att'y Gen. 608, 611-12 (1823) (emphasis omitted).

60. Key, *supra* note 46, at 178. The Solicitor had jurisdiction over most civil actions, including suits for penalties and fines.

Creation of the new office of Solicitor of the Treasury apparently arose out of two concerns: first, that the Attorney General would not be an effective legal officer if he needed to discharge too many administrative duties (*see* H. LEARNED, THE PRESIDENT'S CABINET 174 (1912)); and second, that if such an office were not created, the demand for a new Home Department might have received greater congressional support. *Id.* at 272.

law effectively,[61] others were suspicious of adding duties to the office of the Attorney General.[62] Jackson signed the bill, but lamented that:

> [T]he public interest would be greatly promoted by giving to that officer [the Attorney General] the general superintendance of the various law agents of the Government, and of all law proceedings, whether civil or criminal, in which the United States may be interested. . . .[63]

In the succeeding years, new executive efforts to centralize responsibility and control of law enforcement matters were unsuccessful.[64] Indeed, even the Solicitor of the Treasury had reason to complain, importuning Congress that:

> It is respectfully suggested that criminal cases be reported to the solicitor in the same manner as those of a civil nature. . . . A general supervisory power over these cases would enable the solicitor to give such instructions to marshals and district attorneys as would secure the apprehension of many dangerous criminals who might otherwise escape by fleeing from one district to another.[65]

It was not until the centripetal pressures of the Civil War that Congress agreed to begin centralizing law enforcement authority.[66]

For almost a century, Congress thus withheld the means necessary to enable the Executive to coordinate effective control over criminal law enforcement. By diffusing supervisory responsibility,[67] Congress circumscribed the Executive's practical ability to control law enforcement. Therefore, any claim that criminal law enforcement is a "core" or exclusive executive power must explain the em-

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61. *See* 6 CONG. DEB. 323 (1830) (statement of Mr. McKinley) ("in no country was the Law Department in so wretched a condition as in the United States").

62. *See id.* at 324 (statement of Mr. Webster) (no "good would result from the metamorphasis of the Attorney General into the head of a bureau").

63. 2 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 527 (1896).

64. Key, *supra* note 46, at 179-81. *See National Commission on Law Observance and Enforcement: Report on Prosecution* at 8 (1931) [hereinafter *Report on Prosecution*].

65. *See* J. RICHARDSON, *supra* note 63, at 13 (message of President Polk on behalf of R. H. Gillet, Solicitor of the Treasury).

66. *Id.*; A. LANGELLUTIG, *supra* note 46, at 8, *Report on Prosecution*, *supra* note 64, at 8-9. Even then, Congress still chose to vest some jurisdiction over criminal matters in the Department of the Treasury. *See* 20 Op. Att'y Gen. 714, 715-16 (1894) (referring to statute placing Department of the Treasury, rather than the Department of Justice, in charge of criminal prosecutions for revenue fraud).

67. The Supreme Court has recently adverted to the congressional power to disperse decisionmaking responsibility, even as to criminal matters, within the executive branch. United States v. Providence Journal, 108 S. Ct. 1502, 1509 n.9 (1988) (asserting that Congress may carve out exceptions to Solicitor General's litigating authority in Supreme Court). Indeed, Congress more routinely disperses authority for enforcing federal criminal provisions by establishing independent administrative agencies and vesting them with the authority to restrain and prevent criminal violations. *See infra* note 166.

barrassing early history of largely ineffective executive control over law enforcement matters.

As this historical perspective suggests, the Attorney General need not be vested with the authority to oversee or trigger an investigation by the independent counsel. Rather, that role could, consistent with historical practice, be assigned to the United States Attorney for the Southern District of New York or to any other officer within the executive branch. Indeed, the Department of Justice need not be involved at all in the investigation and prosecution. There traditionally has been no requirement of a centralized criminal justice bureaucracy.[68]

To be sure, the limited funding and dispersal of authority within the executive branch by themselves do not imply that Congress, or anyone other than an officer removable at the President's pleasure, has ever exercised a direct role in criminal law enforcement. What federal criminal law enforcement existed could still have remained within the Executive's control, subject only to Congress' appropriations power. But the decentralization does suggest that the President historically has not been able to structure the Executive's law enforcement machinery in the way he sees fit—rather, Congress has joined in determining that structure.

B. Participation by Private Parties in Criminal Law Enforcement

Congress has also acted in more direct ways to shape the contours of criminal law enforcement, particularly by vesting significant responsibility in private citizens. Congress has long assigned some criminal law enforcement responsibility outside of the Executive's control altogether. Although that responsibility has today diminished, the past participation by private citizens in criminal law enforcement indicates that the Executive has not historically enjoyed exclusive authority over criminal law enforcement measures.

1. The role of individuals in criminal law enforcement prior to the ratification of the Constitution

At common law in England, law enforcement actions generally were initiated and prosecuted by the individuals who were victims of crime. Crime was viewed not as an attack upon the public, but essentially as an attack upon the individual victim.[69] At their own expense, victims could initiate prosecutions against those suspected of

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68. *See supra* notes 55-67.

69. *See generally* 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160; 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 245 (1883).

theft, battery, and other crimes, and they would typically hire attorneys to prosecute the cases.[70] For the victims, personal access to the criminal justice system replaced the prior tradition of individual or family retribution.

Because of the expense involved in private prosecution, Parliament provided a series of monetary incentives to encourage suits. In some contexts, a successful prosecutor could recover the costs of the suit, in others, a victim could obtain restitution, and in still others, the victim could gain double damages from the defendant. Damages were considered part of the criminal case.[71] Although by the eighteenth century public officials in England prosecuted "public" crimes in the name of the king,[72] the criminal law enforcement system was largely dependent upon the actions of private individuals.

To augment the private law enforcement scheme, Parliament also provided incentives for persons other than victims to participate in law enforcement activities. If a private individual successfully initiated and then completed a prosecution against a wrongdoer, he or she could split a statutory fine or forfeiture with the government.[73] These civil suits, so-termed "qui tam" actions,[74] grew out of the criminal statute and were considered an integral means of promoting criminal law enforcement. Qui tam actions served as a type of informer's statute, encouraging those aware of criminal activity to come forward to help enforce the laws.

The system of private law enforcement existed, with variations, in the colonies.[75] Although the importance of public prosecutors grew with the expansion and increasing mobility of the population,[76] individuals still played a fundamental role in the criminal justice system. Private citizens initiated prosecutions directly or sued via qui tam actions to collect penalties owed to the state.[77] In the United States, because the Articles of Confederation did not provide for general

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70. Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 360 (1986); Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 518 (1982).

71. Cardenas, *supra* note 70, at 367; Goldstein, *supra* note 70, at 521, 529-30.

72. 3 W. BLACKSTONE, *supra* note 69, at 160; Cardenas *supra* note 70, at 361.

73. 3 W. BLACKSTONE, *supra* note 69, at 160; Cardenas, *supra* note 70, at 360.

74. The name "qui tam" derives from the Latin phrase "qui tam pro domino rege quam pro seipson," which means "he who as much for the king as for himself."

75. *See* J. JACOBY, *supra* note 27, at 13; Note, *supra* note 27, at 93-97.

76. Cardenas, *supra* note 70, at 368. The colonies were also influenced by the continental heritage, particularly the Dutch "schout" and the French public prosecutor. *See* Jacoby, *supra*, at 4.

77. Cardenas, *supra* note 70, at 368; Note, *The Outmoded Concept of Private Prosecution*, 25 AM. U.L. REV. 754, 762-64 (1976).

federal criminal law enforcement,[78] private citizens were primarily responsible for criminal law enforcement in the period prior to the ratification of the Constitution.

2. *The role of private citizens in criminal law enforcement under the Constitution*

The creation of a formidable federal executive power in the Constitution did not automatically end the participation of private citizens in enforcing the criminal law. Although Congress never vested victims with a general right to prosecute defendants under federal criminal provisions, citizens in the first years under the Constitution evidently presented evidence of crimes directly to the grand jury.[79] More commonly, individuals continued as at common law to bring evidence of crimes before magistrates and then, upon the magistrate's approval, to obtain a bench warrant for the defendant's arrest.[80] Without any involvement from the district attorneys,

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78. J. FISKE, *supra* note 27, at 99.

79. For over a century individuals have not been able to approach a grand jury directly, but can at most file a complaint before a magistrate. *See* United States v. Kilpatrick, 16 F. 765, 796 (W.D.N.C. 1883) (prohibiting individuals from contacting grand jury directly); Grand Jury Charge, 30 F. Cas. 992, 994 (C.C.D. Cal. 1872) (No. 18,255). Such practice today is condemned and precluded by Rule 6 of the Federal Rules of Criminal Procedure, which provides that only

> Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

FED. R. CRIM. P. 6(d).

80. Rule 3 of the Federal Rules of Criminal Procedure provides that "[t]he complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate." FED. R. CRIM. P. 3. The rule does not specify whether private citizens as well as law enforcement officers may appear before a magistrate to swear out a complaint. At one time, it was assumed that private citizens could avail themselves of this mechanism for initiating a prosecution. *See* United States v. Pickard, 207 F.2d 472, 475 (9th Cir. 1953) (adverting in dictum to privately initiated complaints); Ruth v. First Nat'l Bank of New Jersey, 410 F. Supp. 1233, 1234 (D.N.J. 1976) ("Ruth, like any individual having knowledge of an alleged criminal violation, may present a complaint to a U.S. Magistrate under the criminal rules").

The role for private citizens has more recently been discouraged by the courts. *See* United States *ex rel.* Savage v. Arnold, 403 F. Supp. 172, 174 (E.D. Pa. 1975) (stating that "rather than permit private complaints to be filed, it has been suggested that such matters be referred to the United States Attorney"); Brown v. Duggan, 329 F. Supp. 207, 210 (W.D. Pa. 1971) (providing that "[i]f investigation is required, a complaint should be addressed to the United States Attorney who is charged with the duty of investigating bona fide criminal activity").

The prevailing trend at the present appears to be to proscribe completely any involvement by private citizens. *See* Barnes v. Smith, 654 F. Supp. 1244, 1247 (E.D. Mo. 1987) (stating "[t]he plaintiff . . . has no right to swear out a criminal complaint."); United States v. Bryson, 434 F. Supp. 986 (W.D. Okla. 1977) (holding "[t]he Court would not accept for filing a complaint which had not been authorized by the United States Attorney"); *see also* Keenan v. McGrath, 328 F.2d 610-11 (1st Cir. 1964) (commenting that allowing private criminal prosecutions would provide a means to circumvent legal safeguards); United States v. Panza, 381 F. Supp. 1133 (W.D. Pa. 1974) (holding that private litigant may not institute criminal proceedings before magistrate). The *only* support for the current view lies in the proposition,

therefore, grand juries issued presentments of crimes[81] and judges ordered suspects arrested, pending trial. More importantly, Congress enacted a web of civil qui tam provisions that authorized victims and non-victims alike to help enforce the criminal laws.

a. Initiation of prosecutions by private citizens

After ratification of the Constitution, victims did not directly participate in criminal prosecutions in federal court, as they had in the colonies and continued to a certain extent to do in the states.[82] When Congress under the 1789 Judiciary Act established the office of district attorney, it implicitly vested the district attorneys with exclusive authority to prosecute *all* federal crimes within their jurisdiction.[83]

Nonetheless, private citizens helped initiate prosecutions by contacting the grand jury and attempting to persuade it to issue presentments against suspects. More commonly, judges on their own volition exhorted grand juries to investigate certain conduct or to issue presentments against particular individuals.[84] Members of the grand jury could share with other members any evidence of crime that came to their attention.[85] Although individuals or judges were also free to present evidence of wrongdoing to the district attorneys, they retained the discretion to bypass the executive branch at this early stage of the criminal process and contact the grand jury directly.

An early opinion by Attorney General Bradford indicates that the colonial practice of privately-initiated prosecutions continued at

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apparently grounded in constitutional theory, that "the prosecution of criminal actions in the federal courts is a matter solely within the discretion of the Attorney General of the United States and duly authorized United States Attorneys." *Id.* at 1138.

81. Presentments differed from indictments in that they represented the findings of the grand jury itself, couched in the vernacular, without any involvement by the district attorney. District attorneys would therefore customarily reduce the presentment into the more arcane indictment form and thereby bind the defendant for trial. *See generally* G. EDWARDS, THE GRAND JURY 106-08 (1906); R. YOUNGER, THE PEOPLE'S PANEL 1 (1963). By itself, the grand jury presentment was without legal force. *See* United States v. Hill, 26 F. Cas. 315 (C.C.D. Va. 1809) (No. 15,364).

82. *See generally* Cardenas, *supra* note 70, at 357-72 (discussing history of private prosecution). *See also* Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L.J. 209, 218-24 (1955) (reviewing role of private prosecutors in the several states).

83. The Judiciary Act provided that the district attorney was to "prosecute in such district all delinquents for crimes and . . . offenses, cognizable under the authority of the United States." The Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 72, 92.

84. R. YOUNGER, *supra* note 81, at 49-51. Judges commonly directed grand juries to investigate certain conduct and, while some grand juries were not persuaded, some not surprisingly followed the judges' lead. *See id.*; 1 J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 622 (1971).

85. R. YOUNGER, *supra* note 81, at 47-52.

least for a brief period under the Constitution.[86] Bradford responded to a request made by the Secretary of State on behalf of the British consul stationed in Norfolk, Virginia.[87] Apparently, a crowd had gathered outside the consul's residence in early 1794, insulting him and demanding that he deliver individuals within the residence to the crowd, presumably because the crowd believed that the individuals had committed various criminal violations.[88] The district attorney declined to prosecute members of the crowd on the ground that violence perpetrated upon a consul did not constitute a federal crime.[89]

Despite agreeing with the district attorney that federal prosecution was not warranted, the Attorney General apprised the Secretary of State that an avenue of redress was still available to the consul. Attorney General Bradford stated that:

> [I]f the party injured is advised or believes that the federal courts are competent to sustain the prosecution, I conceive he ought not to be concluded by my opinion or that of the district attorney. If he desires it, he ought to have access to the grand jury with his witnesses; and if the grand jury will take it upon themselves to *present* the offense in that court, it will be the duty of the district attorney to reduce the presentment into form, and the point in controversy will thus be put in a train for *judicial* determination.[90]

The Attorney General thus plainly believed that private citizens could, in effect, lobby the grand jury, even if the Executive had already determined not to press charges.[91]

Instead of contacting the grand jury directly, private citizens could appear before a federal or state judicial official and swear out a complaint against a suspected criminal. The magistrate was empowered to order the defendant incarcerated pending further proceedings before a grand jury. Since there was no federal police force and there were so few district attorneys, this direct involvement of private citizens was important to effective law

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86. *See* 1 Op. Att'y Gen. 42 (1794).

87. *Id.* at 41.

88. *Id.*

89. *Id.* at 42. The district attorney evidently reasoned that the Act of April 30, 1790 proscribed violence only against ambassadors and other public ministers, but not against consuls who under traditional international law did not enjoy comparable status. *Id. See also* Hyneman, *The First American Neutrality: A Study of the American Understanding of Neutral Obligations During the Years 1792 to 1815*, 20 U. ILL. BULL. 3, 152 (1934) (discussing incident).

90. 1 Op. Att'y Gen. 43 (1794) (emphasis in original).

91. As the Supreme Court later held, grand juries may investigate and issue presentments for crimes "no matter how or by whom suggested to them." Frisbie v. United States, 157 U.S. 160, 163 (1895). *See also* Hale v. Henkel, 201 U.S. 43, 61 (1906) (sanctioning practice of federal grand juries to act upon their own notice or upon information obtained from non-governmental sources).

enforcement.[92]

The proceedings in *United States v. Skinner*[93] are illustrative. Upon application of a private citizen, Justice Livingston issued warrants against three suspects for violation of the Neutrality Act.[94] This Act proscribed, in part, outfitting ships with the intent of employing those ships against foreign nations with whom the United States was at peace.[95] The Act set criminal penalties and included a qui tam provision providing that, upon conviction, the ships would be forfeited.[96]

Counsel for the defendants moved in part that their clients be released on the ground that the prosecution had been commenced without direction from the government.[97] Private counsel for the informer argued that the involvement of the district attorney was not needed, and the court agreed in emphatic terms:

> [N]o instructions were necessary on the part of the president, or any other officer of government, to justify the issuing a warrant for the violation of this or any other law . . . . Nor was it necessary that the application for a warrant should be made by the district attorney, as any individual might complain of the infraction of a law, and he considered it his duty to award a warrant whenever complaint was made to him on oath of a crime's being committed, whether such warrant were applied for by the district attorney or any other person.[98]

Prosecutions were thus launched by private initiative, and private citizens could participate in the legal process even after the arrest.[99]

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92. At the outset of our nation, the practice was relatively common. *See* United States v. Johnson (C.C.D. Va. 1806) (Box 69, Virginia State Library) (four private citizens swore out complaints of embezzlement and robbery and state judge issued warrant of arrest based on testimony); United States v. Goosely (C.C.D. Va. 1796) (Box 15, Virginia State Library) (private citizen swore out complaint of embezzlement, justice of the peace issued warrant, and then private citizen testified before grand jury which issued presentment against defendant).

93. 27 F. Cas. 1123 (C.C.D.N.Y. 1818) (No. 16,309).

94. United States v. Skinner, 27 F. Cas. 1123, 1123-24 (C.C.D.N.Y. 1818) (No. 16,309).

95. The Neutrality Act of 1794, ch. 50, § 3, 1 Stat. 381, 383. Today, the Neutrality Act is codified at 18 U.S.C. § 962, *et. seq.* (1982).

96. Act of June 5, 1794, ch. 50, § 3, 1 Stat. 381, 383.

97. *Skinner*, 27 F. Cas. at 1124.

98. *Id.* The court, however, ordered the defendants released on other grounds. *Id. See also In re* Rule of Court, 20 F. Cas. 1336, 1337 (C.C.N.D. Ga. 1877) (No. 12,126) (stating that "[t]he magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit, or taken down by himself by personal examination, exhibiting the facts on which the charge is based. . .").

99. The power to cause the arrest of a fellow citizen suspected of criminal conduct should not be very surprising. Throughout the nineteenth century, private citizens could, without any direct involvement by the executive branch, seek the arrest of defendants in civil actions. Through various common law and statutory means, an arrest could be made to ensure jurisdiction over the defendant or to ensure that the defendant would pay the ultimate judgment. The most frequently used means of arrest was via the writ *capias ad respondendum*. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (discussing historical use

Despite the involvement of private citizens at the initial phase of criminal prosecutions, district attorneys apparently retained the discretion not to act on presentments brought by grand juries.[100] Public prosecutors on numerous occasions dropped prosecutions for any number of reasons, whether for reasons of strategy, legal judgment, or politics.[101] As Chief Justice John Marshall noted, "[t]he usage in this country has been, to pass over, unnoticed, presentments on which the [district] attorney does not think it proper to institute proceedings."[102] The case in *Hill* itself arose out of the district attorney's issuance of a series of *nolle prosequis*.[103] Thus, while individuals played a role in starting the prosecution process, they did not control the prosecutions once begun.

b. Qui tam actions

In addition to initiating criminal prosecutions, private citizens also indirectly participated in enforcing the criminal law through civil qui tam actions. Within the first decade after the Constitution was ratified, Congress enacted approximately ten qui tam provisions authorizing individuals to sue under criminal statutes to help enforce the law.[104] For example, under a regulatory act passed in

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of writ). The coercive power of the state could thus be brought to bear upon an individual for essentially private purposes.

In United States v. Griswold, 26 F. Cas. 42, 43 (D. Or. 1877) (No. 15,266), one B.F. Dowell instituted suit for himself as well as on behalf of the United States to recover penalties from the defendant Griswold for filing false claims against the United States arising out of the Oregon Indian War of 1854. The statute provided that a defendant could be arrested and "held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of damages sworn to, in the affidavit of the person bringing suit." *Id.* Upon a complaint filed with the court by counsel for Mr. Dowell, the district court ordered the arrest of the defendant pursuant to the Act, without any involvement by the district attorney. *Griswold*, 26 F. Cas. at 43. The defendant then challenged the propriety of the arrest, contending that it was invalid because the complaint had not been signed by the district attorney, as required for all suits brought in the name of the United States. *Id.* The court rejected the challenge, reasoning that "[a]though the United States is the plaintiff, Dowell is its authorized representative, and not the district attorney." *Id.* at 44.

100. The opinion of Attorney General Bradford discussed previously casts some doubt on what the practice was in the early years. *See supra* notes 86-91 and accompanying text (discussing influence of private citizens).

101. *See generally* M. TACHAU, *supra* note 27; Schwartz, *supra* note 27, at 83.

102. United States v. Hill, 26 F. Cas. 315, 316 (C.C.D. Va. 1809) (No. 15,364).

103. A *nolle prosequis* is a formal entry on the record by the prosecuting officer by which he declares he will not prosecute the case further. BLACK'S LAW DICTIONARY 545 (5th ed. 1983).

104. The number is particularly significant given the relative paucity of criminal provisions passed by Congress. Five provisions plainly authorize participation by private individuals. *See, e.g.*, Act of March 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (criminalizing importation of liquor without paying specified duties); Act of Feb. 20, 1792, ch. 7, § 25, 1 Stat. 232, 239 (making criminal failure to abide by certain postal regulations); Act of March 1, 1793, ch. 19, § 12, 1 Stat. 329, 331 (prohibiting certain trade with Indian Tribes); Act of March 22, 1794, ch. 11, § 2, 1 Stat. 347, 349 (making criminal carrying on of slave trade with foreign nations); Act of May 19, 1796, ch. 30, § 18, 1 Stat. 469, 474 (prohibiting certain trade with Indian Tribes). In addition, Congress at least implicitly provided for qui tam actions on six other

1791, Congress specified duties on liquor imported from abroad as well as on that manufactured domestically. The law made criminal the willful failure to pay the duties and set a range of penalties and forfeitures correspondingly. Congress further provided that:

> One half of all penalties and forfeitures incurred by virtue of this act shall be for the benefit of the person or persons who shall make a seizure, or shall first discover the matter . . . . And any such penalty and forfeiture shall be recoverable with costs of suit, by action of debt, in the name of the person or persons entitled thereto, or by information, in the name of the United States of America; and it shall be the duty of the attorney of the district wherein any such penalty or forfeiture may have been incurred, upon application to him, to institute or bring such information accordingly.[105]

Thus, as was relatively typical, Congress provided what we would now consider to be both civil and criminal penalties for the same conduct, and authorized private citizens to bring defendants to justice "by action of debt."[106] Moreover, the district attorney, upon receiving evidence of a criminal violation, was not authorized to use independent discretion in determining whether to bring a criminal action.

Through the qui tam actions, private citizens helped enforce the criminal laws. Such actions were long considered quasi-criminal. Indeed, during the nineteenth and early twentieth centuries, civil qui tam actions represented the functional equivalent of criminal prosecution, and initiation of a qui tam action probably precluded the executive branch from initiating its own criminal prosecution for

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occasions. *See* Act of June 5, 1794, ch. 48, § 5, 1 Stat. 373, 375 (prohibiting failure to abide by certain regulations for transport); Act of June 5, 1794, ch. 48, § 5, 1 Stat. 376, 378 (prohibiting failure to pay duty on wine); Act of June 5, 1794, ch. 51, § 21, 1 Stat. 384, 389 (making criminal failure to pay certain duties on refined sugar); Act of June 9, 1794, ch. 65, § 12, 1 Stat. 397, 400 (making criminal failure to pay duty on property sold at auction); Act of July 6, 1797, ch. 11, § 20, 1 Stat. 527, 532 (making criminal failure to pay duty on parchment); Act of Feb. 28, 1799, ch. 17, § 5, 1 Stat. 622, 623 (prescribing duties on stamped paper).

105. Imported Spirits Tax Repeal Act of March 3, 1791, ch. 15, § 44, 1 Stat. 199, 209.

106. The Act of February 20, 1792, which established a national postal service, similarly provides that "all pecuniary penalties and forfeitures, incurred under this act, shall be, one half for the use of the person or persons informing and prosecuting for the same, the other half to the use of the United States." National Postal Services Act of 1792, ch. 7, § 25, 1 Stat. 232, 239. The Act of May 19, 1796, which regulated trade with Indian Tribes, provided that "the amount of fines and duration of imprisonment . . . shall be ascertained and fixed . . . in the discretion of the court . . . and that all fines and forfeitures, which shall accrue under this act, shall be, one half to the use of the informant [if the informant initiates the action]." Indian Trade Relation Act of 1796, ch. 30, § 18, 1 Stat. 469, 474. *See also* Slave Trading Act of April 20, 1818, ch. 91, § 3, 3 Stat. 450, 451 (prescribing civil and criminal penalties in same section and only referring explicitly to availability of qui tam action); Alien Immigration Act of March 3, 1903, 32 Stat. 1213 (upholding identical remedies for both civil and criminal action).

the same conduct.[107]

The Supreme Court first addressed the nature of "civil" qui tam actions in *Adams, qui tam v. Woods*.[108] The question raised was whether the two-year statute of limitations prescribed for all criminal prosecutions applied to a qui tam action.[109] The plaintiff had sued the defendant under a criminal provision which made it unlawful for any individual to carry on the slave trade from the United States to a foreign nation.[110] The plaintiff argued that, because the qui tam suit was a civil action, the two-year statute of limitations was inapplicable. The Supreme Court rejected that argument, reasoning that the statute protected individuals from punishment, no matter whether by the government in a criminal prosecution, or by an individual through a "penal" qui tam civil action. Chief Justice Marshall noted that:

> [A]lmost every fine or forfeiture under a penal statute may be recovered by an action of debt, as well as by information; and to declare that the information was barred, while the action of debt was left without limitation, would be to attribute a capriciousness on this subject to the legislature, which could not be accounted for.[111]

Courts during the ensuing century also viewed qui tam actions as criminal for purposes of applying the fifth amendment privilege against self-incrimination. For example, in *Newgold v. American Electrical Novelty & Mfg. Co.*,[112] the plaintiff moved to compel the defendant to produce his books and papers in order to demonstrate certain alleged patent infringements. The court, however, denied the motion, ruling that compelled production in the qui tam setting—unlike in a civil context—would violate the defendant's privilege against self-incrimination.[113] The court noted that the qui tam pro-

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107. *See infra* text accompanying notes 120-28.

108. 6 U.S. (2 Cranch) 200 (1805).

109. Adams, *qui tam* v. Woods, 6 U.S. (2 Cranch) 200, 200 (1805). The Act of April 30, 1790, entitled, An Act For the Punishment of Certain Crimes Against the United States, ch. 9, § 32, 1 Stat. 112, 119 provides in pertinent part:

> [N]or shall any person be prosecuted, tried or punished for any offense not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offense, or incurring the fine or forfeiture aforesaid.

110. The Slave Trade Act of March 22, 1794, ch. 11, § 4, 1 Stat. 347, 349. The statute provided that a defendant adjudged liable "shall forfeit and pay . . . the sum of two hundred dollars . . .; the one moiety thereof to the use of the United States, and the other moiety to the use of such person or persons, who shall sue for and prosecute the same."

111. *Adams*, 6 U.S. at 203.

112. 108 F. 341 (S.D.N.Y. 1901).

113. Newgold v. American Elec. Novelty & Mfg. Co., 108 F. 341, 344 (S.D.N.Y. 1901). The court adhered to the ruling in Boyd v. United States, 116 U.S. 616, 634 (1886), which held that "proceedings instituted for the purpose of declaring the forfeiture of a man's prop-

vision at stake "not only describes the recovery as a penalty, but omits altogether any special reference to any private injury to the patentee, [and] seems to contemplate only the deceit of the public and the public wrong."[114]

Similarly, courts also construed qui tam actions to require plaintiffs to prove liability under the "beyond a reasonable doubt" standard of proof reserved for criminal actions.[115] In *United States v. Shapleigh*[116] the government had sued under the False Claims Act to recover for the defendant's alleged overcharge of merchandise to the United States Army. The court acknowledged that "[i]n controversies of a civil nature the purpose is generally to obtain the determination of some rights of person or property, or to recover compensation for some injury."[117] But in qui tam actions, the court continued, "the government enacts a statute which provides that a case in its nature criminal, whose purpose is punishment . . . and whose successful prosecution disgraces the defendant, and forfeits his property to the state as a punishment for crime," is civil in form. The court concluded that the form should not be controlling, for "[e]very consideration which induced the courts to establish the rule that the prosecutor must prove the crime charged beyond a reasonable doubt . . . demands that this rule be applied [in the qui tam setting]."[118]

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erty by reason of offenses committed by him, though they may be civil in form, are in their nature criminal." *Boyd* is of limited vitality today. *See* United States v. Doe, 465 U.S. 605, 610 n.8 (1984) (stating that validity of *Boyd* is open to serious question); Fisher v. United States, 425 U.S. 391, 405-08 (1976) (same).

114. *Newgold*, 108 F. at 344; *see also* Johnson v. Donaldson, 3 F. 22 (C.C.S.D.N.Y. 1880) (affirming that "as the action was for penalties and a forfeiture, the defendant could not be compelled to furnish evidence against himself").

115. United States v. Shapleigh, 54 F. 126 (8th Cir. 1893). Other courts noted that, because qui tam actions are "penal" in nature, their provisions should be strictly construed, and require careful adherence to the law. *See, e.g.*, Brose v. Sears, Roebuck & Co., 455 F.2d 763, 765 (5th Cir. 1972); United States *ex rel.* Felt v. Ronson Art Metal Works, 107 F. Supp. 84, 86 (D. Minn. 1952); Schwebel v. Bothe, 40 F. 478, 478 (E.D. Mo. 1889); United States v. Kansas Pacific Ry., 26 F. Cas. 680, 680 (D. Kan. 1877) (No. 15,506); Ferrett v. Atwill, 8 F. Cas. 1161, 1163 (S.D.N.Y. 1846) (No. 4,747).

116. 54 F. 126 (8th Cir. 1893).

117. United States v. Shapleigh, 54 F. 126, 129 (8th Cir. 1893).

118. *Id.* at 129-30. *Accord* Chaffee & Co. v. United States, 85 U.S. (18 Wall) 516, 545 (1873) (holding that government under qui tam provision must prove the defendant "guilty" beyond a reasonable doubt); United States v. The Brig Burdett, 34 U.S. (9 Pet.) 682, 691 (1835) (holding that "[n]o individual should be punished for a violation of the law which inflicts a forfeiture of property, unless the offense shall be established beyond a reasonable doubt"); *but cf.* New York Cent. & H.R.R. Co. v. United States, 165 F. 833, 839-40 (1st Cir. 1908) (requiring only a preponderance of evidence in penalty case brought by United States); Pooler v. United States, 127 F. 519, 521 (1st Cir. 1904) (same).

Some state courts also required more than a preponderance of the evidence in qui tam proceedings, requiring that the jury have a "reasonable and well founded belief that the defendant is guilty." Toledo, Peoria and Warsaw Ry. v. Foster, 43 Ill. 480, 481 (1867). The district court in United States *ex rel.* Marcus v. Hess, 41 F. Supp. 197, 216 (W.D. Pa. 1941),

Because qui tam actions historically were viewed as criminal or quasi-criminal, Congress, by authorizing such actions, determined that private individuals could don the mantle of a public prosecutor. To a substantial extent, those proceedings were treated as criminal for purposes of statutes of limitation, evidentiary rulings, and the relevant standard of proof.[119] In the proceedings, private individuals represented the United States in construing the reach and import of the relevant criminal provisions, in selecting the appropriate penalty, and in arguing any jurisdictional or procedural questions which arose in the case. By shaping precedents, as well as by litigating specific cases, individuals through qui tam actions unquestionably participated in setting federal criminal law policy.

The significant role afforded private citizens in law enforcement looms larger when considering that initiation of a qui tam action, at least during the late nineteenth and early twentieth centuries,[120] likely precluded a subsequent criminal action based upon the same conduct. In that period, the Supreme Court held in a series of cases that, after institution of criminal proceedings, double jeopardy precluded a defendant from being sued for what we would consider today civil penalties. In *United States v. Chouteau*,[121] for example, the government had sued a distiller for defrauding the government of tax revenues under Rev. Stat. 3303, after settling a prior criminal prosecution. The Supreme Court held that the government could not proceed with the civil suit:

> Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term "penalty" involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by civil actions or a criminal prosecution.[122]

Only one suit for penalties could therefore be instituted, irrespective of its form, and the sequence of the suits was irrelevant.[123]

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aff'd, 317 U.S. 537 (1943), consistent with the evolving distinctions between civil and criminal actions, rejected the reasonable doubt standard, adopting the preponderance of the evidence standard used in almost all civil proceedings. *See infra* note 128.

119. *See* Union Tool Co. v. Wilson, 259 U.S. 107 (1922). The *Union* Court held "[w]here a fine is imposed partly as compensation to the complainant and partly as punishment, the criminal feature of the order is dominant and fixes its character for purposes of review." *Id.* at 110.

120. Some doubt remains as to the preclusive effect of a qui tam action in the early years. *Compare* 1 J. CHITTY, CRIMINAL LAW 7-9 (1819) (suggesting that at common law in England there was no preclusive effect) *with* 3 W. BLACKSTONE, *supra* note 69, at 160 (suggesting preclusive effect).

121. 102 U.S. 603 (1880).

122. United States v. Chouteau, 102 U.S. 603, 611 (1880).

123. *See* United States v. La Franca, 282 U.S. 568, 575 (1931); United States v. McKee, 26

Because civil qui tam actions were viewed as "penal," institution of a qui tam action apparently precluded a later criminal action. In the qui tam setting, the court in *Shapleigh* explained that:

> [W]here provision is made by statute for the punishment of an offense by fine or imprisonment, and also for the recovery of a penalty for the same offense by a civil suit, a trial and judgment of conviction or acquittal in the criminal proceeding is a bar to the civil suit, and a trial and judgment for the plaintiff or defendant in the civil suit is a bar to the criminal proceeding.[124]

The qui tam action thus was dispositive of any subsequent criminal proceeding.[125] Because the qui tam action, like a criminal prosecution, was brought on behalf of the United States, and because the two actions were nearly identical in terms of penalty prescribed, statutes of limitation, evidentiary considerations, and burden of proof, the preclusive effect of one on the other seems logical.[126] Such was the result in at least some state courts.[127] Therefore, by authorizing civil qui tam actions in the past,[128] Congress not merely

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F. Cas. 1116, 1117 (C.C.E.D. Mo. 1877) (No. 15,688); *but see In re* Leszynsky, 15 F. Cas. 397 (C.C.S.D.N.Y. 1879) (No. 8,279) (allowing criminal prosecution by United States after civil IRS suit on ground that statute provided different punishment for civil and criminal actions).

124. United States v. Shapleigh, 54 F. 126, 134 (8th Cir. 1893). Indeed, in its brief as amicus curiae in United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943), the government represented that it had never instituted both a criminal proceeding and a qui tam action against the same defendant. Amicus Brief for the United States at 45, United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943).

125. As the court stated in an analogous context in United States v. Gates, 25 F. Cas. 1263, 1266 (S.D.N.Y. 1845) (No. 15,191), "where the proceedings are founded upon the same statutory penalty . . . the government is restricted to a single exaction of the penalty, whether enforced by action or indictment . . . . The government will be restricted to one satisfaction for an offense." For discussion of the conflicting commentary on this issue during the early part of the twentieth century, compare Note, *Double Jeopardy in an Action for a Penalty*, 13 COLUM. L. REV. 529, 530-31 (1913) (arguing for general preclusive effect) and Note, *Former Jeopardy as Bar to Civil Suit for Penalty Tax*, 29 MICH. L. REV. 930, 931 (1931) (same) with Note, *Conviction for False Return of Income No Bar to Civil Action for Penalty*, 47 HARV. L. REV. 1438 (1934) (arguing for limited application of double jeopardy doctrine) and Note, *Double Jeopardy — Acquittal in Prior Criminal Prosecution As Bar to Action for Penalties Based in Fraud*, 37 MICH. L. REV. 647 (1939) (same).

126. United States v. Gates, 25 F. Cas. 1263, 1266 (S.D.N.Y. 1845) (No. 15,191).

127. The state court in Commonwealth v. Churchill, 5 Mass. 174 (1809), held that a qui tam action for usury precluded a subsequent state criminal prosecution for the same offense. One judge in concurrence, however, lamented that "[i]f the pendency of a qui tam action is to prevent a prosecution for usury by the government, unless collusion can be proved, a discreet usurer will always save himself from a penalty, to which he apprehends himself exposed, by procuring an action to be instituted by some confidential friend." *Id.* at 182-83. *See also* Koerner v. Oberly, 56 Ind. 284, 287 (1877) (holding that double jeopardy precluded institution of both civil and criminal penalties for same conduct).

128. In United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943), the Supreme Court ruled that an individual could be subject to both criminal and civil penalties for the identical conduct. The Court rejected the defendant's claim that double jeopardy barred the qui tam action since the government had already instituted criminal proceedings and settled the case upon a plea of nolo contendere. *Id.* at 545. *Hess* marks a turning point in the evolution of judicial attitudes towards the distinction between civil and criminal penalties.

Nonetheless, the Court in *Hess* still noted that, in many cases, filing the civil False Claims

supplemented but also to some extent supplanted the Executive's role in enforcing criminal provisions.

Nor could the government intervene to take charge of the civil qui tam action once filed. The court in *United States v. Griswold* articulated the conventional view that "although the United States is the plaintiff, [the private plaintiff] is its authorized representative, and not the district attorney, who is not authorized or required to act or interfere in the matter, otherwise than as expressly provided by the statute."[129] By authorizing civil qui tam actions, therefore, Congress partially displaced executive authority over enforcing criminal statutes.[130]

Congress thus has long acted affirmatively to circumscribe the Executive's overall authority over criminal law enforcement. In authorizing civil qui tam actions, Congress limited the Executive's ability not only to control all law enforcement, but even to initiate its own criminal prosecution for the same conduct. As with contemporary citizen suits,[131] Congress determined that private enforcement was needed to supplement executive branch oversight. Congress clearly has limited overall executive control in experimenting with other ways to ensure effective criminal law enforcement.[132]

Act suit would hinder the government's ability to prosecute a criminal action. The government argued as amicus curiae in the case that the civil suit should not proceed because it would tend to fragment responsibility for overseeing enforcement of the criminal laws and because "effective law enforcement requires that control of litigation be left to the Attorney General." *Id.* at 547. The Court rejected the argument, reasoning that it lay within Congress' power to determine that other policy considerations outweighed the executive interest in undivided enforcement authority. *Id.* Even though the Court recognized that pursuit of a civil suit could directly interfere with the Executive's plans to bring criminal proceedings, *id.* at 560-61, (Jackson, J., dissenting), it concluded that the legislature's discretion should prevail. *Id.* at 546-47.

129. United States v. Griswold, 26 F. Cas. 42, 44 (D. Or. 1877) (No. 15,266). *See also* United States v. Bush, 13 F. 625, 629 (D. Or. 1882) (stating that under statute, private citizen who sues on behalf of United States has right to control suit). Congress has since limited the control wielded by private citizens in bringing some qui tam actions. *See* 31 U.S.C. § 3730(b) (1982) (permitting executive branch to take over qui tam action under False Claims Act after notification by private citizen).

130. Other civil actions, such as antitrust treble damage suits, also contain a punitive component. Certainly, private citizens help enforce the criminal laws in such contexts as well. But qui tam actions differ markedly from such actions both because the plaintiff sues on behalf of the United States and, more importantly, because historically the qui tam action much more directly encroached upon the executive's ability to institute criminal proceedings.

131. *See, e.g.*, Clean Water Act, 33 U.S.C.A. 1365 (West Supp. 1987) (providing that "[a]ny person . . . having an interest which is or may be adversely affected [by the violation of a permit limitation]" may sue for civil penalties which are to be paid to the federal government); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 108 S. Ct. 376 (1987) (discussing citizen suit provision of Clean Water Act).

132. To be sure, it could be argued that the sharper distinction between civil and criminal penalties that exists today undercuts the significance of the prior private involvement in qui tam actions. In other words, presidential authority over criminal law enforcement arguably should be enhanced today given the doctrinal evolution of the civil/criminal distinction. Yet the separation between civil and criminal penalties has been forged not to augment presiden-

In accordance with the historical tradition, therefore, Congress could vest in private citizens the power to trigger the criminal investigation of high-ranking officials within the executive branch. Information gathered by private citizens could provide grounds for appointment of an independent counsel. Alternatively, by authorizing a qui tam action, Congress could permit private citizens to sue the government officials to collect penalties incurred because of misfeasance in office. The history of involvement by private parties in federal criminal prosecutions lends considerable support to the result reached in the independent counsel case.

C. Prosecutorial and Investigative Functions Vested in State Officials

The first Congresses feared that exclusive reliance upon federal law enforcement machinery would not suffice to enforce the penal laws of the nation. In addition to affording individuals significant enforcement responsibility, Congress vested jurisdiction in state courts over actions seeking penalties and forfeitures, granted concurrent jurisdiction to state courts over some criminal actions, and assigned state officials auxiliary law enforcement tasks. Thus, Congress assigned law enforcement responsibility to state officials who were far removed from control of the executive branch.

Initially, Congress vested district courts with the jurisdiction "exclusively of the courts of the several States" over all crimes and offenses "that shall be cognizable under the authority of the United States."[133] The Act further vested the circuit courts with concurrent jurisdiction over the same criminal offenses.[134] At the time, Federalists apparently wished to preserve as much authority as possible for the national government, but they as well as anti-Federalists agreed that jurisdiction over federal offenses did not have to be vested exclusively in federal courts.[135]

Congress soon determined that including state courts in its grant of jurisdiction over penal offenses would aid law enforcement efforts. In 1794, for example, Congress provided in the Carriage Tax

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tial authority but largely because of the needs of the burgeoning regulatory bureaucracy (see *Hess*, 317 U.S. at 548-52), and the concomitant necessity of determining the appropriate protections for individuals subject to the coercive power of those regulatory entities (see Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-70 (1963)). It cannot plausibly be argued that the demarcation between civil and criminal actions has arisen to segregate a power that must exclusively be exercised by the President.

133. Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 76, 77.

134. *Id.* at 3, 11, 1 Stat. 73, 78-79.

135. *See generally* 1 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 at 124 (1966 ed.) (remarks of Mr. Madison and Mr. Wilson); E. SURRENCY, *supra* note 27, at 114; Note, *Utilization of State Courts to Enforce Penal and Criminal Statutes*, 60 HARV. L. REV. 966 (1947).

Act that all fines, penalties, and forfeitures might be sought "before any magistrate or state court, having competent jurisdiction."[136] A similar jurisdictional provision was included in the License Tax on Wines and Spirit Act.[137] Also in 1794, Congress vested in state courts jurisdiction not only over qui tam actions but also over "all suits, actions, and causes of action" arising out of the laws for collecting revenue upon stills and spirits distilled in the United States accruing more than fifty miles from the nearest federal district court.[138] Other penal provisions could be enforced similarly in the state courts.[139]

As discussed previously, actions for penalties and fines were viewed largely as criminal in those years; indeed, some of the provisions might still be viewed as criminal today. The decisions whether to sue and what punishments to seek remained in the discretion of individuals outside the Executive's control. Vesting such jurisdiction in state courts made the executive branch, to a certain extent, dependent upon state officials in executing federal laws. State magistrates, judges, and juries all played integral parts in upholding the efficacy of the enforcement scheme. Whatever modest influence the Executive could wield over federal judges, who had been appointed by the President and remained subject to congressional oversight, certainly did not exist at the state level. Indeed, some members of Congress objected to granting state courts jurisdiction over penal actions for just that reason.[140]

Furthermore, Congress assigned state officials specific law enforcement tasks as well as authorizing jurisdiction in their courts. Congress in 1806 and in 1808 granted to certain county courts in New York and Pennsylvania "cognizance of all complaints and prosecutions for fines, penalties and forfeitures arising under the United States revenue laws," including the power "to exercise all and every power in the cases of a criminal nature, cognizable before them . . . for the purpose of obtaining a mitigation or remission of any fine,

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136. Carriage Tax Act of June 5, 1794, ch. 45, § 10, 1 Stat. 373, 375.

137. *Id.*, ch. 48, § 5, 1 Stat. 376, 378. *See* Buckwalter v. United States, 11 Serg & Rawle 193, 196-97 (Pa. 1824) (upholding jurisdiction over qui tam action to recover liquor duties and characterizing such action as criminal in nature).

138. Spirits Tax Act of June 5, 1794, ch. 49, § 9, 1 Stat. 378; *see* Hartley v. United States, 4 Tenn. 45 (1816) (upholding jurisdiction over action for penalty under liquor laws); Worthington v. Masters, 1 Hall's Jour. Juris. 196 (Ohio C.P. 1804) (sustaining penalty action by equally divided vote).

139. *See* Indian Trading Act of April 18, 1796, ch. 13, § 7, 1 Stat. 452, 453 (imposing penalties for making certain trades with Indian Tribes); Act of July 6, 1797, ch. 11, § 20, 1 Stat. 527, 532 (imposing penalties for failure to pay stamp duties).

140. *See infra* note 150.

penalty or forfeiture."[141] Thus, Congress vested the state courts with the authority not only to preside over federal penal actions, but also to exercise discretion in recommending to the Secretary of the Treasury whether or not federal law enforcement would best be served by remitting particular punishments. Accordingly, some federal criminal law enforcement decisions were largely dependent upon the discretion exercised by state officials. In vesting such jurisdiction and authority in state courts, Congress followed the tradition first adopted under the Articles of Confederation.[142]

Congress vested other auxiliary law enforcement duties directly in state officials. Under the Fugitive Slave Act of 1793,[143] Congress directed state magistrates to arrest alleged fugitives, and then upon a proper showing, to issue a certificate to permit removing the slaves from the jurisdiction.[144] Under the Alien Enemy Act of 1798,[145] the state courts were empowered to direct the apprehension of aliens and to order their removal after a hearing.[146] State officials were also given the power to arrest deserting seamen.[147] Although the tasks required by Congress cannot be characterized as prosecution, they were certainly related to criminal law enforcement.[148] Congress directed that state officials could arrest those suspected of violating federal law, and then determine whether or not to deprive the individuals of freedom through either deportation or a remand to servitude.

In addition, Congress also vested jurisdiction in state courts to

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141. Act of March 8, 1806, ch. 14, §§ 1, 2, 2 Stat. 354, 354-55; Jurisdiction Extension Act of April 21, 1808, ch. 51, 2 Stat. 489. *See generally* T. SERGEANT, CONSTITUTIONAL LAW 268-73 (1822).

142. E. SURRENCY, *supra* note 27, at 114.

143. Fugitive Slave Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302, 302-03.

144. *See* Burke, *What Did the Prigg Decision Really Decide?*, 93 PA. MAG. HIST. & BIOG. 73, 74-75 (1969). The duties Congress assigned under the Fugitive Slave Act served as a continuous source of irritation in federal-state relations. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 616-22 (1842) (holding that state magistrates may exercise administrative authority prescribed in Act).

145. Alien Enemy Act of July 6, 1798, ch. 66, § 2, 1 Stat. 577, 577.

146. *Id.* at 577-78. *See* Morgan v. Dudley, 57 Ky. 693, 713 (1857) (upholding state discharge of tasks allotted under immigration laws); State v. Penny, 10 Ark. 621 (1850) (same).

147. Act of July 20, 1790, ch. 29, § 7, 1 Stat. 71, 131, 134-41. *See Ex parte* Pool, 2 Va. Cas. 276, 280 (1821) (upholding act of Congress requiring justice of the peace to arrest and detain sailor deserting from merchant service until ship could retrieve him). The Supreme Court ultimately upheld the practice. Robertson v. Baldwin, 165 U.S. 275 (1897) (upholding Congress' right to authorize state officials to arrest deserting seamen and deliver them on board their vessels).

148. Congress has periodically vested the power to arrest not only in private citizens, but also in federal officers not subject to the plenary control of the executive. *See, e.g., Ex parte* Siebold, 100 U.S. 371 (1879) (discussing role of election supervisors appointed by Article III courts); *Ex parte* Geissler, 4 F. 188 (C.C. Ill. 1880) (same).

hear at least some criminal prosecutions. Under the Post Office Act of 1799, Congress provided that:

> All causes of action arising under this act may be sued, and all offenders against this act may be prosecuted, before the justices of the peace, magistrates, and other judicial courts of the several states . . . and such justices, magistrates, or judiciary shall take cognizance thereof, and proceed to judgment and execution as in other cases.[149]

Far from fearing loss of control, the Postmaster General welcomed the measure, explaining that vesting jurisdiction in state courts was necessary "to prosecute at as little expense to the public and individuals as can be conveniently done."[150] Indeed, the provision in the postal laws for concurrent jurisdiction over some crimes remained in force until 1960.[151]

Although Congress was silent as to whether the criminal cases were to be tried by a federal or state prosecutor, at least some prosecutions were initiated and carried out by state officials. For instance, in *State v. Wells*,[152] the defendant challenged an indictment in state court based upon his violation of the postal laws. He contended in part that Congress could not constitutionally assign jurisdiction over criminal matters to the state courts. Although the trial court was sympathetic to the defendant's claims, the appellate court reversed, holding that "[a]n offense against the laws of the United States is an offense against the laws of South Carolina; and she has the right to punish it."[153] Enforcement of the federal laws was thus made dependent upon individuals who in no way were under the control of the President.

To be sure, as the federal government continued to grow, many

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149. Post Office Act of March 2, 1799, ch. 43, § 28, 1 Stat. 733, 740-41.

150. 9 ANNALS OF CONGRESS 3671 (1799) (report of the Postmaster General). Some Federalists, however, feared that granting too much jurisdiction in state courts would undermine national governmental objectives because of the growing state-federal tensions. One aim of the Judiciary Act of 1801 was to alleviate the dependence on state courts. *See* 10 ANNALS OF CONGRESS 867 (1801) (statement of Rep. Bird) ("it was not unfair to suppose, in the succession of events, the occasional existence in particular States of a spirit of hostility to some measure of the Federal Government"). In arguing against the subsequent repeal, Senator Griswold commented that "[t]he absurdity of relying on State justice for the execution of our penal laws or the laws relating to the revenue cannot be overlooked;" *cited in* C. WARREN, *supra* note 35, at 567.

151. The Postal Service Act, Pub. L. No. 86-682, 74 Stat. 578 (codified as amended at 39 U.S.C. § 1 (1960)). *See* H.R. REP. No. 86-36, 86th Cong., 1st Sess. 127A (1959).

152. 20 S.C.L. (2 Hill) 687 (1835).

153. State v. Wells, 20 S.C.L. (2 Hill) 687, 695 (1835); *see also* State v. McBride, 24 S.C.L. (1 Rice) 400 (1839) (reversing on other grounds prosecution for violation of postal laws brought by state official). *Cf. In re* Gill, 3 City Hall Rec. (N.Y.) 61 (1818) (sustaining indictment at common law which tracked congressional postal statute). In addition, a criminal prosecution in state court under federal law may have precluded any federal prosecution for violation of the same law.

who had first championed concurrent jurisdiction as a means of checking the power of the federal judiciary began to fear federal encroachment upon the independence of the states.[154] State courts increasingly refused to exercise jurisdiction over federal crimes as well as over federal penal statutes.[155] Such refusals to accept jurisdiction, however, stemmed not from any concern for diluting the executive branch's control over criminal prosecution, but rather from the perceived intrusion into state sovereignty. In general, state judges, as well as some federal judges,[156] believed that no juristic entity could punish for criminal acts threatening another entity's sovereignty. Some state courts in the first half of the nineteenth century acted on this belief not only by declining jurisdiction over penal actions brought under federal laws, but also by refusing to undertake some ancillary law enforcement duties prescribed by Congress.[157]

A series of Supreme Court decisions starting at the turn of the century rejected the notion of inviolable sovereignties. The Court upheld the right of Congress to provide for federal bankruptcy proceedings in state courts (and the concomitant authority of state courts to entertain such jurisdiction),[158] to direct that federal officials be tried for state crimes in federal courts,[159] to punish state officials for their failure to discharge duties prescribed by Congress,[160] and to authorize federal causes of action to be heard in state court,[161] even if they were penal in

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154. Note, *supra* note 135, at 967.

155. *See, e.g.*, State v. McBride, 24 S.C.L. (1 Rice) 400 (1839) (overruling *Wells* on ground that courts of one sovereign lack jurisdiction to try crimes against another sovereign); Jackson v. Rose, 2 Va. Cases 34, 35-38 (1815) (denying jurisdiction over federal penalty action); United States v. Campbell, 6 HALL'S AMER. L.J. 113 (1814) (same); Brigham v. Claflin, 31 Wis. 607 (1872) (same); Haney v. Sharp, 31 Ky. (1 Dana) 442 (1833) (same); Davison v. Champlin, 7 Conn. 244 (1828) (same); United States v. Lathrop, 17 Johns 4 (N.Y. 1819) (same).

156. Federal judges argued in dicta against the exercise of such concurrent jurisdiction, albeit from a different political bent. *See* The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) (Marshall, C.J.); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 336-37 (1816) (Story, J.).

157. Stephens, Petitioner, 70 Mass. (4 Gray) 559, 562-63 (1855) (declining to rule on application for citizenship); Beavins' Petition, 33 N.H. 89, 94 (1856) (same); Maryland v. Rutter, 12 Niles Register 114, 118 (1817) (concluding that state justice of peace could not lawfully order arrest for violation of federal law). The Federal Gazette commented that the decision declared "that no state Judge or Justice of the Peace has power to arrest or commit any person for a violation of the laws of the United States," *cited in* D. HENDERSON, *supra* note 35, at 128-29.

158. Claflin v. Houseman, 93 U.S. 130 (1876) (holding that state courts might permissibly exercise jurisdiction granted by Congress).

159. Tennessee v. Davis, 100 U.S. 257, 271 (1879).

160. *Ex parte* Siebold, 100 U.S. 371, 381-89 (1879).

161. Second Employer's Liability Cases, 223 U.S. 1, 59 (1912) (concluding that rights arising under act of Congress must be enforced in state court when within state court's jurisdiction).

nature.[162] In light of these decisions, the jurisprudential obstacle blocking Congress from authorizing state officials to prosecute their citizens for violation of federal laws was removed.

Although Congress has not recently provided for concurrent jurisdiction over criminal offenses,[163] it achieved substantially the same objective under the Volstead Act[164] by authorizing state officials to sue in equity on behalf of the United States in order to restrain conduct made criminal by that Act. Thus, state officials exercised the discretion to determine what conduct fell under the federal criminal laws and when to sue for violations of those criminal laws. Moreover, state officials at times brought state criminal charges against defendants who continued a course of unlawful conduct.[165] State officials acted as proxies for executive branch officials in enforcing the prohibition laws.[166] Congress presumably could

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162. Testa v. Katt, 330 U.S. 386 (1947) (holding Rhode Island under obligation to enforce penal laws of United States).

163. Such course of action was evidently considered in the Emergency Price Control Act of 1942. P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 437 (1973 ed.).

164. National Prohibition Act, Pub. L. No. 66-66, 41 Stat. 305, 314-15 (1919). *See Ex parte* Brambini, 192 Cal. 19, 218 P. 569 (1923) (en banc); Carse v. Marsh, 189 Cal. 743, 210 P. 257 (1922) (finding that "[t]he right of the district attorney to proceed in the name of the United States is given by the Volstead Act. There can be no doubt of the right of the United States to avail itself of the law officers of the state for the purpose of enforcing the act of Congress"); *Ex parte* Gounis, 304 Mo. 428, 263 S.W. 988 (1924) (same); United States v. Stevens, 103 Conn. 7, 130 A. 249 (1925); United States v. Richards, 201 Wisc. 130, 229 N.W. 657 (1930) (same).

165. *See* Carse v. Marsh, 189 Cal. 743, 210 P. 257 (1922) (sustaining criminal conviction under state law for contempt of injunction entered in name of United States).

166. More recently, Congress has vested similar law enforcement responsibilities in independent administrative agencies. As a matter of course, Congress has empowered independent agencies to seek either an injunction to restrain ongoing criminal conduct or civil penalties to deter that conduct. The Securities & Exchange Commission, for example, may file for a civil injunction against certain insider trading practices, see SEC v. Materia, 745 F.2d 197, 201 (2d Cir. 1984), may impose monetary sanctions for that same conduct, *id.* at 200-01, or may refer such matters to the United States Attorney for criminal prosecution. Congress thus has authorized officers shielded from the President's plenary removal authority to help enforce the criminal laws.

Indeed, Congress has conferred particularly expansive authority upon the independent Federal Election Commission (FEC). The FEC, like other independent agencies, may sue civilly to enjoin practices made criminal by Congress. 2 U.S.C. § 437d(a) (1982). As an alternative, the FEC may enter into a compliance agreement (2 U.S.C. § 437g(a)(4)) with the individual accused of unlawful conduct. Congress has provided that the FEC's decision to enter into a compliance agreement is evidence of a lack of *mens rea* in any subsequent criminal investigation. 2 U.S.C. § 437g(d)(2). Thus, Congress determined that, although the FEC could not block a criminal prosecution initiated by the Attorney General, the judgment of the FEC would at least impede future criminal prosecution by the Attorney General. As the sponsor of the provision explained on the Senate floor, "No one would want the Department of Justice to be continually undercutting the action of the Federal Election Commission by initiating criminal prosecutions against people who have already entered into conciliation agreements with the FEC." 122 CONG. REC. 6956 (1976) (statement of Senator Clark). *See also* United States v. International Union of Operating Engineers, 638 F.2d 1161 (9th Cir. 1979) (addressing relevance of compliance agreement to subsequent criminal prosecution), *cert. denied*, 444 U.S. 1077 (1980).

vest state officials with more direct criminal responsibilities.[167]

Once again, the historical examples do not illustrate who within the federal government can be charged with the responsibility to enforce the criminal laws. These examples do show, however, that significant law enforcement responsibilities have at times been discharged by state officials immune from close executive branch supervision. State officials have wielded influence in determining when to arrest individuals suspected of violating federal laws, when to recommend mitigation of a punishment otherwise due under federal law, and even when to prosecute. The historical examples suggest that some responsibility to enforce the Ethics in Government Act, whether through direct criminal actions or suits in equity, could be vested in the state judicial system, outside the direct control of the Executive.

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Examining prior congressional enactments concerning criminal law enforcement demonstrates that Congress has long influenced and conditioned the Executive's constitutional responsibility to enforce the criminal laws. Congressional dispersal of supervisory authority over criminal laws, and congressional authorization for private individuals and state officials to play a prominent role in criminal law enforcement are ample testament to Congress' power to help shape criminal law enforcement. Historical support for the view that criminal law enforcement constitutes a "core" or exclusive executive power is thus scant.

Viewed through a historical lens, criminal law enforcement does not lie at the end of the continuum marking the Executive's greatest power in relation to the coordinate branches of government. Rather, Congress possesses considerable discretion in shaping and guiding the Executive's enforcement of the criminal laws. The Ethics in Government Act, to the extent of assigning discrete prosecutorial responsibility to an officer somewhat independent of the President, appears consistent with historical precedent.

Moreover, the balance of power between Congress and the Executive has unquestionably shifted in the two hundred years since the 1789 Judiciary Act. If Congress could, consistent with the separation of powers doctrine, exercise such significant authority in criminal law enforcement in the early years of the republic when the Executive was comparatively weak,[168] then its recent exercise of dis-

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167. *See* Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 517 (1928).

168. Through a system of checks and balances, the Framers sought to circumscribe pri-

cretion in granting the independent counsel a measure of statutory tenure seems unobjectionable, at least from a historical perspective. Although granting all prosecutorial authority to officers independent of the President's control might disrupt the balance among the branches,[169] the limited measure adopted by Congress in the Ethics Act comports with the place historically occupied by criminal law enforcement on the continuum marking the Executive's powers.

CONCLUSION

As a practical matter, the Executive today enjoys near total control over federal criminal law enforcement, with the exception perhaps of the investigations and prosecutions covered in the Ethics in Government Act.[170] The increase in executive control over criminal law enforcement probably stems from the dramatic expansion of both federal crime and the sophistication of criminals engaged in such conduct.[171] Congress has therefore legislated an administrative structure and provided the resources to enable the Executive to develop a strong, centralized arm for enforcing the criminal laws. Unlike its counterparts in the first years of the republic, therefore, recent Congresses willingly have granted increased powers to the Executive over federal criminal law enforcement.

With the perceived need to increase centralization of criminal law enforcement, Congress has drastically reduced the role of private citizens in enforcing the criminal laws. Non-governmental personnel can no longer present evidence directly to the grand jury and are unlikely to do so indirectly by filing a complaint with a magistrate. Moreover, Congress has cut back on the availability of qui tam actions and those that exist do not preclude future criminal actions brought by the federal government. Even then, some civil qui tam actions are subject to executive branch control.[172]

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marily the legislature's authority. *See generally* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 at 403-13 (1969). As Madison explained, "[i]n republican government, the legislative authority necessarily predominates." THE FEDERALIST No. 51 (J. Madison) 322 (C. Rossiter ed. 1961).

169. The majority so intimated. *Morrison*, 108 S. Ct. at 2619.

170. Prosecutions for contempt of court are another exception. *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 107 S. Ct. 2124 (1987) (recognizing authority in Article III courts to appoint private prosecutor, under certain conditions, to prosecute contempt of court).

171. As the Executive's power has expanded in many other ways since the nineteenth century, the accretions in control over criminal law enforcement may seem modest. *See generally* E. CORWIN, *supra* note 20.

172. Congress afforded the Executive greater control over qui tam actions under the False Claims Act in the wake of the *Hess* opinion. Pub. L. No. 78-213, 57 Stat. 608 (1943). Similarly, in revising the Internal Revenue Code in 1939, Congress vested the Internal Revenue Commissioner with greater authority over private qui tam actions. *See* I.R.C. § 3740, 53 Stat.

To augment the centralization, Congress has also reduced the role assigned to state courts and state officials. Congress has withdrawn the jurisdiction previously vested in state courts over federal crimes, and it has also greatly restricted the auxiliary law enforcement tasks assigned to state officials. Congress has concurred with the Executive that, in many contexts, state officials only inefficiently aid in enforcing federal criminal statutes. Thus, Congress' present agreement with the Executive on effective criminal law enforcement strategy masks the historical conflicts that have taken place.

In turn, the enactment of broader criminal provisions has fostered increased sensitivity to notions of individual justice. The expanded breadth of federal criminal legislation today subjects more individuals to potential federal prosecution and thereby calls for greater exercise of prosecutorial discretion.[173] Reinstitution of a broad scheme of privately-initiated prosecutions (or quasi-criminal qui tam actions) would therefore cast a wide net and could well result in less even-handed enforcement of the law, permitting private motives to dominate instead of what one hopes is dispassionate professional judgment.[174] Furthermore, allowing prosecution by government officials who are not subject to close supervision gives rise to similar concern over arbitrary and uneven enforcement of the law.[175] Unified executive control over lawmaking may promote fairness for the individual defendant.

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460 (1939) (stating that no suit for recovery of taxes or penalties allowed unless authorized by Commissioner and Attorney General).

173. *See generally* Schwartz, *supra* note 27, at 64-66.

174. The Supreme Court's recent decision in *Young* is illustrative. There, the Court overturned a criminal contempt conviction obtained by a private prosecutor appointed by the judge. As frequently occurs in the civil contempt context, the prosecutor was one of the parties involved in the underlying case. The Court rejected the defendant's claim that the exercise of prosecutorial authority by a private citizen robbed him of due process, *Young*, 107 S. Ct. at 2133-34. The Court, however, reversed the conviction on the ground that the private prosecutor was "interested" in the outcome of the case, and that such interest might "tempt" him "to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client [or] to abandon a meritorious prosecution if a settlement providing benefits to the private client is conditioned on a recommendation against criminal charges." *Id.* at 2136.

In contrast, the Court noted that a government prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, . . . therefore, is not that it shall win a case, but that justice shall be done." *Id.* at 2135 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). Public prosecutions, therefore, bring the hope of a "dispassionate assessment of the propriety of criminal charges." *Id.* at 2136.

175. If it deems appropriate, however, Congress may withdraw its comparatively recent delegations of authority to the executive branch in the criminal law enforcement context. Congress could presumably reinstitute qui tam actions for certain crimes, or it could direct executive branch officials, as it did during the First Congress, to initiate prosecutions for *every* known violation of the law. Congress' decision in the Ethics in Government Act to remove some of the discretion currently enjoyed by executive branch prosecutors poses no intractable separation of powers concern when viewed from a historical perspective.

The increased executive control over criminal law enforcement may therefore have stemmed from the tacit concurrence of all three branches of government. Congress, for its part, has strengthened the Executive's hand in its efforts to combat crime and to ensure uniform law enforcement. And, in some contexts, courts have augmented the Executive's authority in criminal law enforcement to promote unified enforcement efforts at the expense of individual involvement in criminal prosecutions.[176]

Such enhanced executive control may represent sound policy grounded in concern for both effective and fair criminal law enforcement. But sage policy should not be confused with constitutional mandate. Congress, at least historically, has possessed the authority to shape executive discretion in criminal law enforcement matters in various ways, including designation of the personnel who are to exercise federal law enforcement responsibility. While criminal law enforcement should perhaps remain under the President's direct control, there is little historical support for the effort to transform that policy into a constitutional norm.

Thus, a look to history sheds new light on the Supreme Court's recent decision in *Morrison v. Olson*, providing support for the Court's unstated premise that criminal law enforcement is not an exclusive function of the executive branch. That conclusion, oddly enough, suggests that the independent counsel decision may have a more limited impact than might otherwise be imagined. Although the Supreme Court has decisively and, in my view, correctly decided where criminal law enforcement falls on the continuum marking the Executive's powers, it has yet to decide whether Congress can similarly circumscribe the Executive's authority over functions such as the conduct of foreign relations that rest more fully in the Executive's control.

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176. The development of the law concerning an individual's ability to swear out a complaint before a magistrate provides a case in point. Those courts that have barred individuals from access to a magistrate or a commissioner under Fed. R. Crim. P. 3 have ignored the countervailing history and failed to cite any authority in concluding that obtaining either a complaint or a warrant for arrest is inherently an executive function. *See supra* note 80 and accompanying text. Similarly, courts from an early period in our history prevented individuals from contacting grand juries directly. *See supra* note 79. Courts also have been increasingly loathe to recognize a qui tam action unless Congress has explicitly so provided. *See* Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (2d Cir. 1972) (declining to recognize qui tam action). The Supreme Court has also denied an individual standing to contest a prosecutorial decision by a government official. Linda R. S. v. Richard D., 410 U.S. 614 (1973).