Nontraditional Criminal Prosecutions in Federal Court

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ABSTRACT

Who, besides the U.S. Department of Justice, can prosecute criminal actions in federal court? This Article considers this question, which has arisen recently in various contexts—the DOJ's attempt to abort the prosecution of former National Security Advisor Michael Flynn, the contempt prosecution of former Sheriff Joseph Arpaio (who received a presidential pardon), the confrontation over the court-appointed interim U.S. Attorney in New York, and a local District Attorney's threats to prosecute lawbreaking federal law enforcement officials.

Consider first nontraditional, trial-level federal prosecutions. The Constitution's Take Care and Appointments Clauses, as well as standing doctrine, preclude private prosecutions and prosecutions by states and Houses of Congress. Court-appointed interim U.S. Attorneys may oversee federal prosecutions, and court-appointed special prosecutors may prosecute criminal contempt cases. However, court-appointed attorneys likely cannot undertake broader responsibilities.

Consider next criminal appeals. While the Supreme Court has acknowledged the possibility of a state's appellate standing where the DOJ declines to appeal a federal criminal decision holding a state statute unconstitutional, that precedent is dubious. Moreover, even if a state's standing is sometimes proper, the case for appellate standing of a House of Congress is weaker.

Finally, consider state prosecutions in federal court. A state should have standing to appeal criminal cases to the Supreme Court and to pursue properly removed state criminal prosecutions in the lower federal courts, as should any properly designated state governmental entity. To the extent a

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state allows private prosecutions, aggrieved individuals ought to be able to pursue such prosecutions if they are properly removed.

I. INTRODUCTION

In a typical federal criminal prosecution, the local U.S. Attorney's Office, acting on behalf of the United States Department of Justice ("DOJ"),[1] prosecutes a criminal defendant under a provision of the federal criminal code. Such a prosecution proceeds under the auspices of the U.S. Attorney for the district, who, in the ordinary course, is appointed by the President with the advice and consent of the Senate.[2] The typical prosecution takes place in a federal district court and is governed procedurally by the Federal Rules of Criminal Procedure.[3] If there is a conviction, sentencing is accomplished with reference to the (now-advisory) United States Sentencing Guidelines, and any prison sentence is administered by the DOJ's Bureau of Prisons.[4] Appeal lies to the appropriate regional federal court of appeals, with certiorari review thereafter available by the U.S. Supreme Court.[5]

But can an actor outside of the DOJ maintain a prosecution in federal court? Consider the following disputes that arose during the administration of President Donald Trump.

After former National Security Advisor Michael Flynn pleaded guilty to charges of making false statements to agents of the Federal Bureau of Investigation and then moved to withdraw his guilty plea, the DOJ moved to drop the charges.[6] But Rule 48 of the Federal Rules of Criminal Procedure requires "leave of court" for the DOJ to "dismiss an indictment, information, or [a] complaint."[7] The district judge appointed a private attorney—retired U.S. District Judge John Gleeson, who had previously coauthored a newspaper editorial endorsing the court's power to deny the motion and proceed to sentencing[8]—to argue against the DOJ's motion as an amicus curiae.[9] While a court of appeals panel initially granted Flynn's request for a writ of mandamus directing the district judge to grant the government's

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1. *See infra* Part II.A (discussing the assignment of typical prosecutorial responsibilities in a federal criminal prosecution).

2. *See infra* note 40 and accompanying text.

3. *See infra* note 68 and accompanying text.

4. *See infra* notes 69–70 and accompanying text.

5. *See infra* notes 74–75 and accompanying text.

6. *In re* Flynn, 961 F.3d 1215, 1219 (D.C. Cir.), *vacated*, No. 20-5143, 2020 WL 4355389 (D.C. Cir. July 30, 2020).

7. FED. R. CRIM. P. 48(a).

8. *See* John Gleeson, David O'Neil & Marshall Miller, Opinion, *The Flynn Case Isn't Over Until the Judge Says It's Over*, WASH. POST (May 11, 2020, 3:52 PM), https://www.washingtonpost.com/opinions/2020/05/11/flynn-case-isnt-over-until-judge-says-its-over/ [https://perma.cc/XN45-VAV7].

9. *See Flynn*, 961 F.3d at 1222 ("The district court chose an amicus who had publicly advocated for a full adversarial process.").

motion to dismiss and to vacate the appointment of the amicus,[10] the court subsequently granted en banc review and denied Flynn relief, leaving the district court to hear argument over the matter.[11] (President Trump's pardon of Flynn ultimately mooted the matter.)[12]

Similar issues can arise on appeal. Consider the case of Joseph Arpaio, the former sheriff of Maricopa County, Arizona (self-titled as "America's toughest sheriff" and popularly known as "Sheriff Joe").[13] Arpaio was the subject of a preliminary injunction issued by the federal district court precluding him (and those working in his office) from "detaining any person based on knowledge, without more, that the person is unlawfully present within the United States."[14] When the district court found that Arpaio had "'intentionally disobeyed' the injunction," it recommended prosecution for criminal contempt.[15] The DOJ agreed to prosecute the case, and Arpaio was convicted after a bench trial.[16] Before sentencing could take place, however, President Trump pardoned Arpaio.[17] On that basis, Arpaio moved the district court to dismiss the criminal contempt case with prejudice and vacate the guilty verdict.[18] When the district court refused to vacate the verdict, Arpaio appealed.[19] And, when the DOJ refused on appeal to defend the district court's judgment,[20] the court of appeals appointed a special prosecutor to do so.[21] (The court of appeals ultimately affirmed the district court's judgment.)[22]

Along similar lines, in *Holguin-Hernandez v. United States*, the United States Court of Appeals for the Fifth Circuit held that the criminal defendant had not preserved his objection to his sentence by failing to argue before the trial court that it was unreasonable, even though he had argued in favor of a

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10. *Id.* at 1227.
11. *See In re* Flynn, 973 F.3d 74, 78 (D.C. Cir. 2020).
12. *See* United States v. Flynn, No. 17-232 (EGS), 2020 WL 7230702 (D.D.C. Dec. 8, 2020).
13. *See* Jacey Fortin, *A Guide to Joe Arpaio, the Longtime Sheriff Who Escaped Strife*, N.Y. TIMES (Aug. 27, 2017), https://www.nytimes.com/2017/08/27/us/joe-arpaio-sheriff-pardon.html [https://perma.cc/4B8B-TSK3]; William Finnegan, *Sheriff Joe*, NEW YORKER (July 13, 2009), https://www.newyorker.com/magazine/2009/07/20/sheriff-joe [https://perma.cc/SM4N-SY2M].
14. Ortega-Melendres v. Arpaio, 836 F. Supp. 2d 959, 992–93 (D. Ariz. 2011), *aff'd sub nom.* Melendres v. Arpaio, 695 F.3d 990 (9th Cir. 2012).
15. United States v. Arpaio, 951 F.3d 1001, 1003 (9th Cir. 2020).
16. *Id.*
17. *Id.*
18. *Id.* at 1004.
19. *Id.*
20. United States v. Arpaio, 887 F.3d 979, 981 (9th Cir. 2018).
21. *See id.* at 981–82.
22. *See Arpaio*, 951 F.3d at 1005–08.

shorter sentence.[23] Finding no plain error, the court of appeals affirmed the sentence.[24] The defendant sought, and the Supreme Court granted, certiorari.[25] When the DOJ "agree[d] with petitioner that the Fifth Circuit's approach [was] inconsistent with the Federal Rules of Criminal Procedure," the Court appointed a private attorney "to defend the judgment below as amicus curiae."[26] (The Court ultimately rejected the amicus curiae's argument and vacated the judgment.)[27]

Consider as well a criminal case brought in Michigan federal district court against several defendants—the first criminal case to bring charges under a federal criminal statute that outlawed female genital mutilation of minors.[28] In late 2018, the district court granted a defense motion to dismiss those charges, reasoning that, in enacting the criminal statute, Congress had exceeded its enumerated powers.[29] While the local U.S. Attorney's Office initially filed a notice that it would appeal the district court's decision to the United States Court of Appeals for the Sixth Circuit, the DOJ then withdrew that notice.[30] In a statutorily required notification to Congress,[31] the DOJ explained that, though it recognized that the statute at issue "targets an especially heinous practice—permanently mutilating young girls—that should be universally condemned," it had "reluctantly" decided that it "lacks a reasonable defense of the provision, as currently worded."[32]

Rather than taking up the DOJ's suggestion that it draft a new statute directed at female genital mutilation that might pass constitutional muster,[33] the House of Representatives elected to take up the federal government's appeal on its own. Following a party-line vote by the House's Bipartisan

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23. 140 S. Ct. 762, 765 (2020).

24. *See id.*; FED. R. CRIM. P. 52(b).

25. Holguin-Hernandez v. United States, 139 S. Ct. 2666 (2019) (mem.).

26. *Holguin-Hernandez*, 140 S. Ct. at 765; Holguin-Hernandez v. United States, 139 S. Ct. 2779 (2019) (mem.).

27. *See Holguin-Hernandez*, 140 S. Ct. at 765–67.

28. *See* 18 U.S.C. § 116(a); Letter from Noel J. Francisco, Solic. Gen., U.S. Dep't of Just., to Diane Feinstein, Sen., U.S. Senate (Apr. 10, 2019) [hereinafter Francisco Letter], https://www.justice.gov/oip/foia-library/osg-530d-letters/4_10_2019/download [https://perma.cc/5XFS-3VS6].

29. *See* United States v. Nagarwala, 350 F. Supp. 3d 613, 616–31 (E.D. Mich. 2018), *appeal dismissed*, No. 19-1015, 2019 WL 7425389 (6th Cir. Sept. 13, 2019).

30. Motion of the U.S. House of Representatives to Intervene at 4, *Nagarwala*, No. 19-1015 (6th Cir. Sept. 13, 2019) [hereinafter *Nagarwala* House Motion], https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2019/04/Nagarwala-Motion-to-Intervene.pdf [https://perma.cc/F6FS-K4TU].

31. *See* 28 U.S.C. § 530D(a).

32. *See* Francisco Letter, *supra* note 28, at 2.

33. *See id.* at 2–3.

Legal Advisory Group ("BLAG")[34]—the House institution charged with "speak[ing] for, and articulat[ing] the institutional position of, the House in all litigation matters"[35]—the House filed with the United States Court of Appeals for the Sixth Circuit a motion to intervene and appeal the district court's conclusion of unconstitutionality.[36] The House's motion cited *Maine v. Taylor*,[37] where the Supreme Court upheld a *state*'s standing to appeal as an intervenor where a lower federal court ruling effectively invalidated a state criminal law.[38] But would the *House of Representatives* have capacity to argue such an appeal? (Without ruling on that issue, the Sixth Circuit granted the DOJ's motion to dismiss the appeal.)[39]

The examples we have seen to this point are all settings where the DOJ commenced, but at some point decided to abandon, a prosecution. Now consider a setting where what would otherwise be typical federal criminal prosecutions—that is, prosecutions brought under the federal criminal code in federal court—are handled from the outset under the auspices of a prosecutor not appointed by an executive branch actor. Typical prosecutions are spearheaded under the auspices of a local U.S. Attorney's Office. In the ordinary course, each U.S. Attorney is appointed by the President with the advice and consent of the Senate.[40] And, in the event a vacancy arises, the Attorney General—who heads the DOJ and is himself appointed by the President subject to confirmation by the Senate[41]—is empowered to appoint an interim U.S. Attorney for a period of up to 120 days.[42] But once an interim U.S. Attorney's 120-day term has expired (and the President has not had a new nominee confirmed), statutory law allows the "the district court for such district" to appoint an interim U.S. Attorney "to serve until the vacancy is filled."[43]

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34. The BLAG consists of "the Speaker and the majority and minority leaderships." RULES OF THE HOUSE OF REPRESENTATIVES: ONE HUNDRED SIXTEENTH CONGRESS, H.R. DOC. NO. 115-117, at 3 (2d Session 2019), https://rules.house.gov/sites/democrats.rules.house.gov/files/116-1/116-House-Rules-Clerk.pdf [https://perma.cc/A6P4-YKPZ].

35. *Id.*

36. *See Nagarwala* House Motion, *supra* note 30, at 1.

37. *See id.* at 13 (citing Maine v. Taylor, 477 U.S. 131 (1986)).

38. *See Taylor*, 477 U.S. at 136–37; *infra* text accompanying notes 268–276.

39. *See* United States v. Nagarwala, No. 19-1015, 2019 WL 7425389, at *1 (6th Cir. Sept. 13, 2019) (granting the government's motion to dismiss its appeal with the consent of all defendants, thereby "moot[ing]" the House's intervention motion, since the court "generally grant[s] motions to voluntarily dismiss unless it would be unjust or unfair to do so," and the court saw "no reason to disregard [its] general rule").

40. 28 U.S.C. § 541(a).

41. *Id.* § 503.

42. *Id.* § 546(a), (c).

43. *Id.* § 546(d).

The extent to which an interim U.S. Attorney appointed by a federal district court is subject to DOJ—and more generally executive branch—supervision came to a head in 2020 in a brief, but contentious, dispute involving the position of the U.S. Attorney for the Southern District of New York. In January 2018, then-Attorney General Jeff Sessions named Geoffrey Berman to the post as interim U.S. Attorney.[44] When no permanent replacement was nominated after 120 days, the district court exercised its statutory authority to name Berman to the post on a continuing basis.[45] In June 2020, Attorney General William Barr announced that Berman was "stepping down" and would be replaced with a new interim appointment, pending confirmation of a new nominee to the post.[46] In response, Berman countered that he was not stepping down and would continue to serve until the Senate confirmed his replacement.[47] The conflict was resolved when President Trump fired Berman (with no further contestation on Berman's part).[48] Notably, Berman acquiesced to his dismissal by the President while still highlighting the executive branch's inability to name his successor (absent formal nomination and confirmation): "In light of Attorney General Barr's decision to respect the normal operation of law and have Deputy U.S. Attorney Audrey Strauss become Acting U.S. Attorney, I will be leaving the U.S. Attorney's Office for the Southern District of New York, effective immediately."[49] In short, a court-appointed interim U.S. Attorney is hardly

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44. *See* Press Release, Off. Pub. Affs., Attorney General Sessions Appoints 17 Current and Former Federal Prosecutors as Interim United States Attorneys (Jan. 3, 2018), https://www.justice.gov/opa/pr/attorney-general-sessions-appoints-17-current-and-former-federal-prosecutors-interim-united [https://perma.cc/QD2L-U7F9].

45. Benjamin Weiser, *With No Nomination from Trump, Judges Choose U.S. Attorney for Manhattan*, N.Y. TIMES (Apr. 25, 2018), https://www.nytimes.com/2018/04/25/nyregion/geoffrey-berman-us-attorney-manhattan.html [https://perma.cc/T6JS-RRZT].

46. Press Release, Off. Pub. Affs., Attorney General William P. Barr on the Nomination of Jay Clayton To Serve as U.S. Attorney for the Southern District of New York (June 19, 2020), https://www.justice.gov/opa/pr/attorney-general-william-p-barr-nomination-jay-clayton-serve-us-attorney-southern-district [https://perma.cc/2MWL-8RHH].

47. Press Release, U.S. Att'y's Off., Statement of U.S. Attorney Geoffrey S. Berman on Announcement by Attorney General Barr (June 19, 2020), https://www.justice.gov/usao-sdny/pr/statement-us-attorney-geoffrey-s-berman-announcement-attorney-general-barr [https://perma.cc/2MSV-4YA7].

48. *See* Alan Feuer et al., *Trump Fires U.S. Attorney in New York Who Investigated His Inner Circle*, N.Y. TIMES (June 20, 2020), https://www.nytimes.com/2020/06/20/nyregion/trump-geoffrey-berman-fired-sdny.html [https://perma.cc/CDK5-ZMBK].

49. Press Release, U.S. Att'y's Off., Statement of Geoffrey S. Berman (June 20, 2020), https://www.justice.gov/usao-sdny/pr/statement-geoffrey-s-berman [https://perma.cc/DQ64-L3Y2]; *see also* Ross E. Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV. 363, 402–04 (2001) (noting,

within the typical DOJ prosecutorial hierarchy; as such, prosecutions led by such an officer are inherently nontraditional.[50]

The foregoing examples are all attempts at criminal prosecutions under federal law advanced by individuals or entities other than the DOJ. But the federal courts can also host another type of nontraditional criminal prosecution: a prosecution under *state criminal law*. By virtue of the Supreme Court's certiorari review power over the state courts and (perhaps somewhat surprisingly) by virtue of federal criminal removal provisions,[51] state criminal prosecutions can be maintained in the federal courts—a real possibility in light of recent threats by local state prosecutors to pursue criminal charges against federal law enforcement personnel who allegedly violate the law while deployed into cities.[52] Can any duly authorized representative of the state prosecute such a case in federal court? In particular, to the extent that the state authorizes private prosecutions, may a private individual prosecute a state crime in federal court?

The question this Article considers—who has capacity to prosecute criminal actions in federal court?—manifests along three dimensions. First, both federal criminal prosecutions and state criminal prosecutions can be maintained in the federal courts. Second, different actors (beyond the relevant sovereign's typically designated prosecutor) could conceivably conduct criminal prosecutions. Third, prosecution can mean different things at different postures of a criminal case: Prosecution at the trial stage includes commencing criminal proceedings and conducting a trial, while prosecution after an adverse judgment may mean pursuing an appeal of that adverse

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under a prior version of the statute, conflicting Office of Legal Counsel memoranda on the question of whether the Attorney General had the power to appoint a second interim U.S. Attorney).

50. Controversy over the Berman dismissal did not center on the validity of the prosecutions conducted under his purview but rather over the question of whether President Trump had sought Berman's dismissal in order to influence investigations in the office of individuals and entities close to the President. *See, e.g.*, Feuer et al., *supra* note 48. But defendants faced with prosecutions brought under other court-appointed interim U.S. Attorneys have brought challenges to the validity of those prosecutions. *See infra* note 143.

51. *See infra* text accompanying notes 309–314.

52. *See* Nick Miroff & Mark Berman, *Trump Threatens To Deploy Federal Agents to Chicago and Other U.S. Cities Led by Democrats*, WASH. POST (July 20, 2020, 2:05 PM), https://www.washingtonpost.com/national/defending-portland-crackdown-trump-pledges-to-deploys-feds-to-chicago-and-other-us-cities-led-by-democrats/2020/07/20/fda42b8a-caaa-11ea-89ce-ac7d5e4a5a38_story.html [https://perma.cc/VZG3-CK8G] (noting such a threat by the Philadelphia district attorney); Brentin Mock, *Philadelphia's Top Prosecutor Is Prepared To Arrest Federal Agents*, BLOOMBERG CITYLAB (July 22, 2020, 2:00 AM), https://www.bloomberg.com/news/articles/2020-07-22/philly-d-a-threatens-to-arrest-federal-agents [https://perma.cc/4E46-6KWX].

judgment[53] or defending the judgment below if the criminal defendant has appealed. Along the way, this Article addresses whether prosecution by different individuals and entities is consistent with the Constitution (in particular, the Appointments and Take Care Clauses, and separation-of-powers concerns), Article III standing, and subconstitutional concerns (such as whether the DOJ would provide support for imprisonment).

Beginning with the setting of initiating federal criminal proceedings in federal court, this Article argues that a limited historical record of private individuals initiating federal prosecutions may support individual standing to play some role in commencing federal criminal prosecutions (possibly by initiating contact with a grand jury).[54] However, concerns beyond standing—in particular, the Constitution's Appointments and Take Care Clauses[55]—surely limit any such ability (if they allow it at all).[56]

A federal district court enjoys proper authority to appoint interim U.S. Attorneys (under appropriate circumstances) and special prosecutors to pursue criminal contempt prosecutions for violations of prior court. But it is doubtful that a court has authority to appoint a special prosecutor to pursue prosecutions for other matters—for example, where the DOJ has decided to abandon a prosecution.

If states can pursue federal criminal prosecutions, it is only under narrow circumstances. States may have standing to pursue federal criminal prosecutions where the effects of out-of-state criminal activity are felt in-state. Even if there is standing, however, the Take Care and Appointments Clauses pose obstacles that are likely insurmountable.

Finally, Houses of Congress likely have no standing at all.[57] Further, the Take Care and Appointments Clauses—and general separation-of-powers concerns—are inconsistent with prosecutions maintained by a House of Congress.

Turning to the setting of appeals, private individuals should have no opportunity to stand in the shoes of the DOJ on appeal. However, the federal judiciary should have, and indeed sometimes exercises, the power to appoint

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53. This is subject to the usual rule that judgments of acquittal are generally not appealable. *See infra* note 233 and accompanying text.

54. *See infra* text accompanying notes 108–111.

55. *See* U.S. CONST. art. II, § 2, cl. 2; *id.* art. II, § 3.

56. *See infra* notes 112–114 and accompanying text.

57. Professor Tara Leigh Grove has argued that Article I imposes a separate standing barrier on congressional standing. *See* Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1353–65 (2014) (stating that Congress lacks standing to represent the federal government because no provision in Article I confers upon Congress any such authority). I restrict my analysis in this Article to traditional Article III standing. Of course, if there is no Article III standing, then it is irrelevant whether Article I would pose a distinct barrier.

a special prosecutor (or, in the case of the Supreme Court, an attorney amicus curiae) to defend a judgment of the district court that the DOJ will not defend. And a special prosecutor who has pursued a prosecution in the district court (for example, for criminal contempt) ought to be able to continue that representation in the court of appeals.

In the context of the capacity of a state to appeal as an intervenor in a federal criminal case, this Article argues for reconsideration of the Court's holding in *Taylor*.[58] A state should not have standing to appeal a federal criminal decision where the DOJ has declined to do so.

This Article further argues that Houses of Congress should not have capacity to maintain federal criminal appeals, even where the lower court has held a federal criminal statute unconstitutional.[59] Even if *Taylor* is correctly decided, the case for standing for a House of Congress to appeal an adverse federal criminal decision is weaker than the analogous case for a state.[60]

Finally, this Article confirms, in line with existing precedent, that a state should have capacity to argue an appeal in a state criminal case before the United States Supreme Court and to pursue properly removed state criminal prosecutions in the lower federal courts.[61] Moreover, this Article argues that any state governmental entity properly designated by the state ought to be able to handle such duties.[62]

Insofar as some states retain limited authority for private prosecutions, aggrieved individuals ought to be able to pursue such prosecutions provided removal to federal court is proper.[63] While an argument advanced by Chief Justice Roberts in a dissenting opinion—to the effect that private prosecutions must constitutionally be maintained on behalf of the government—could limit or change this conclusion, the argument (for now at least) is not the law of the land.[64]

This Article proceeds as follows. Part II provides a broad overview of the decision makers responsible for typical criminal prosecutions in federal and state court. It also discusses the bases for standing in these typical settings. Part III examines the possible standing of a private citizen, a state, and a congressional plaintiff to initiate and pursue a federal criminal prosecution. Part IV looks at the possible standing of private citizens, states, and congressional plaintiffs to appeal as intervenors decisions adverse to the DOJ

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58. *See infra* text accompanying notes 268–289.
59. *See infra* Part IV.D.
60. *See infra* text accompanying notes 300–301.
61. *See infra* text accompanying notes 315–329.
62. *See infra* text accompanying notes 330–339.
63. *See infra* Part V.B.
64. *See* Robertson v. United States *ex rel.* Watson, 560 U.S. 272, 273 (2010) (Roberts, C.J., dissenting from dismissal of certiorari); *infra* text accompanying notes 349–361.

in criminal proceedings where the DOJ has declined to pursue an appeal. Part V examines the standing of states, and more importantly private citizens, to prosecute *state crimes* in *federal court*.

II. AN OVERVIEW OF TYPICAL FEDERAL AND STATE CRIMINAL PROSECUTIONS

In this Part, I offer a brief overview of typical federal criminal prosecutions and state criminal prosecutions. I touch upon the federal constitutional rights that criminal defendants are entitled to invoke, the applicable procedures, the allocation of prosecutorial authority, and the prosecution's standing to pursue convictions.

A. Typical Federal Criminal Prosecutions

Typical federal criminal cases allege violations of the federal criminal code[65] by one or more defendants. They are litigated in the federal courts.[66]

Federal criminal defendants are entitled to invoke all applicable federal constitutional rights.[67] Federal criminal trials are subject to the Federal Rules of Criminal Procedure,[68] and the United States Sentencing Guidelines generally apply to federal criminal sentencings.[69] The DOJ's Bureau of Prisons is responsible for implementing prison sentences.[70]

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65. Most federal criminal statutory provisions fall under Title 18 of the United States Code. There are no federal common law crimes. *See* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812). A few federal criminal statutes—for example, the Assimilative Crimes Act, 18 U.S.C. § 13—incorporate state law crimes by reference. Prosecutions under such provisions are nevertheless brought by the federal government under the federal criminal law. *See id.* § 3231.

66. A federal statute vests the federal district courts with sole authority to hear federal criminal cases. *See* § 3231. While some have proposed allowing federal criminal prosecutions to proceed in the state courts, *see, e.g.*, Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243, 245–47 (2011) (discussing such proposals), substantial legal questions would attend any such effort, *see id.* at 278–315.

67. This includes those constitutional rights that have yet to be incorporated against the states. *See infra* note 97.

68. *See* FED. R. CRIM. P. 1(a)(1).

69. *See* § 3553. The Court in *United States v. Booker*, 543 U.S. 220 (2005), held the mandatory application of the Sentencing Guidelines to be unconstitutional. *See id.* at 245. At the same time, the Court held that "[t]he district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing." *Id.* at 264.

70. *See generally* §§ 4001–4050. For a historical discussion, see *Historical Information*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/history/ [https://perma.cc/K9U5-HC4L].

Federal criminal prosecutions are ordinarily initiated and pursued in federal court by the DOJ.[71] All DOJ actions in criminal proceedings are presumptively subject to guidance in the DOJ's *Justice Manual*.[72] Federal criminal charges are usually brought by the U.S. Attorney's Office for the applicable district.[73] Appeals to the federal courts of appeals are also typically handled by the applicable U.S. Attorney's Office,[74] while the Solicitor General has primary responsibility for arguing cases before the United States Supreme Court.[75]

Two constitutional provisions suggest that authority to prosecute federal criminal violations must largely reside in the federal executive branch. The Take Care Clause calls upon the President to "take Care that the Laws be faithfully executed,"[76] while the Appointments Clause directs that principal officers of the United States be appointed by the President with the advice

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71. *See* 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."); *id.* § 519 ("Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.").

Federal criminal prosecutions have not always been handled by the DOJ. The DOJ dates back only to 1870. *See* Act To Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870); GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT 12 (2006); *About DOJ*, U.S. DEP'T OF JUST., https://www.justice.gov/about [https://perma.cc/TLJ6-QF9J]. For a historical discussion, see Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121 (2014). The Office of the Attorney General dates back to the Judiciary Act of 1789. *See* Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (establishing the Attorney General as a part-time position); SISK, *supra*, at 12; Shugerman, *supra*, at 129; U.S. DEP'T OF JUST., *supra*. That Act also created the offices of the U.S. Attorney for each federal district. *See* ch. 20, § 35, 1 Stat. at 92–93. Though today the U.S. Attorneys are subordinate to the Attorney General, this was not the case before the creation of the DOJ; instead, the U.S. Attorneys acted independently. *See* SISK, *supra*, at 12; Shugerman, *supra*, at 129–32 (explaining that, to the extent U.S. Attorneys were supervised and constrained prior to the creation of the DOJ, it was by the Treasury Department).

All of this said, the fact remains that federal criminal prosecutions have always been handled within the executive branch.

72. *See* U.S. Dep't of Just., Just. Manual tit. 9 (2018) ("Criminal").

73. *See id.* § 9-2.001 ("The United States Attorney, within his/her district, has plenary authority with regard to federal criminal matters. This authority is exercised under the supervision and direction of the Attorney General and his/her delegates.").

74. *See id.* § 2-3.100 (directing that, other than tax and antitrust cases, appeals to the court of appeals be handled by the U.S. Attorney's Office where that office was lead counsel at trial, unless senior DOJ leadership determines otherwise). The Solicitor General must sign off on any appeal to the court of appeals, *see id.* § 2-2.121, including petitions for rehearing en banc, *see id.* § 2-2.122.

75. *See id.* § 2-2.510.

76. U.S. CONST. art. II, § 3.

and consent of the Senate, and inferior officers (as authorized by Congress) by the President, the heads of departments, or the courts.[77] Together, these Clauses bolster the notion that criminal prosecutorial action should be vested in the executive branch[78]—a notion further bolstered by separation-of-powers concerns in a context where it is the federal legislative or judicial branch that is attempting to involve itself in a prosecution.[79]

The existing allocation of prosecutorial authority in federal criminal cases largely accords with these Clauses and with preserving the separation of powers: But for the lone exception I noted above (regarding the power of the district court to appoint an interim U.S. Attorney under limited circumstances)[80], all the actors with responsibility for prosecuting federal criminal cases are within the DOJ hierarchy and appointed by executive branch actors. The Attorney General, who is "the head of the Department of Justice," is appointed by the President with the advice and consent of the Senate.[81] The same is true of the Solicitor General, who handles appeals to the Supreme Court.[82] And the U.S. Attorney for each district is appointed by the President with the advice and consent of the Senate,[83] or if a vacancy arises, then by the Attorney General.[84]

Because federal criminal prosecutions are maintained in federal court, it is necessary to consider whether criminal cases fall within the scope of the federal judicial power under Article III of the Constitution—that is, whether there is proper standing. The Supreme Court has made clear that in a typical case Article III standing requires three showings by a plaintiff: (1) "injury in fact," (2) a causal link between that injury and the conduct complained of, and (3) redressability.[85] The "injury in fact" prong demands that the plaintiff show that she has suffered "an invasion of a legally protected interest" which is (i) "concrete and particularized," and (ii) "actual or imminent" as opposed

77. *See id.* art. II, § 2.

78. *See* Collins & Nash, *supra* note 66, at 296–302.

79. *See* Morrison v. Olson, 487 U.S. 654, 685 (1988).

80. *See supra* text accompanying note 43, *infra* note 138.

81. 28 U.S.C. § 503.

82. *Id.* § 505; U.S. Dep't of Just., *supra* note 72, § 2-2.510.

83. § 541(a). A U.S. Attorney is initially appointed for terms of four years. *Id.* § 541(b). After the expiration of the four-year term, the U.S. Attorney "shall continue to perform the duties of his office until his successor is appointed and qualifies." *Id.* U.S. Attorneys are subject to removal by the President. *Id.* § 541(c).

84. *See* § 546(a), (c) (permitting appointment of an interim U.S. Attorney for a period of up to 120 days). The Attorney General may not name to the vacancy someone "whose appointment by the President to that office the Senate refused to give advice and consent." *Id.* § 546(b).

85. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992). For an extended discussion of federal standing doctrine, see, for example, Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494, 504–07 (2008).

to conjectural or hypothetical.[86] Causation calls on the plaintiff to establish that the injury is the result of action by the defendant that is subject to challenge and not the result of independent action by a party not before the court.[87] Finally, the "redressability" prong requires the plaintiff to show that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[88]

Commentators and courts have identified several policies that standing doctrine vindicates. For one thing, standing acts to preserve the separation of powers among the branches of government and to advance democratic accountability. It advances the separation of powers by restricting courts to deciding truly judicial matters and by keeping the courts out of matters that are better decided by the political branches.[89] Along similar lines, standing furthers democratic accountability by constraining judicial power in favor of the branches of government that are populated by elections.[90]

For another thing, standing protects the legitimacy of courts. It does this first by ensuring genuine adversity between parties in court cases, which positions courts to hear cases argued by parties who have incentives to make the strongest possible arguments for their positions and to gather and present pertinent information.[91] Second, standing constrains the ability of courts (and savvy litigants as well) to manipulate court dockets to develop precedent selectively.[92]

The typical requirements for standing do not clearly map onto criminal prosecutions. Standing in the setting where the DOJ pursues a criminal prosecution (to the extent it is ever specified) is grounded in the notion that the criminal defendant has allegedly caused harm to the federal sovereign by

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86. *Lujan*, 504 U.S. at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). The belief among many commentators is that the bar against pursuing "generalized injuries" is of prudential, not constitutional, weight. *See, e.g.*, Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201, 245 & n.225 (2017).

87. *See Lujan*, 504 U.S. at 560.

88. *Id.* at 561 (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 38, 43 (1976)).

89. *See* Jonathan Remy Nash, *Standing's Expected Value*, 111 MICH. L. REV. 1283, 1329 (2013).

90. *See* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 475–83 (2008) (pro-democratic function); *see also id.* at 492–96 (anti-conscription function).

91. *See id.* at 468–74.

92. *See* Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CALIF. L. REV. 1309, 1323 n.48 (1995) (arguing that dispensing with standing "would enable ideological litigants to manipulate the critically important path of case presentation"); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 348–404 (1995) (marshalling historical evidence in support of this argument).

violating the federal criminal laws.[93] Thus, the DOJ—an executive branch department with responsibility to prosecute federal crimes—is the proper actor to pursue the prosecution since it is fulfilling the executive branch's constitutional responsibility to "take Care that the Laws be faithfully executed."[94] The fact that the government has no particularized grievance—a requirement for an ordinary plaintiff's standing[95]—is no obstacle to the federal government's criminal standing.[96]

The policies underlying standing doctrine are not undermined by the general recognition of the DOJ to prosecute federal crimes in federal court. Separation-of-powers concerns are allayed by the fact that the legislature defines the contours of federal crimes by enacting statutes, while the executive branch handles prosecutions under those statutes. Democratic accountability is sustained by the fact that the DOJ is subordinate to (and its leaders are appointed by) the President. It stands to reason that the DOJ, and the defendants and their attorneys in criminal cases, have large incentives to advance their best arguments in support of their respective positions. Finally, allowing the DOJ to assemble the federal courts' criminal dockets does not empower the courts to design their own dockets.

B. Typical State Criminal Prosecutions

State criminal prosecutions are maintained in the state courts. State criminal defendants are entitled to invoke those federal criminal constitutional rights that have been incorporated against the states,[97] as well

93. *See* Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney 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, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

94. U.S. CONST. art. II, § 3.

95. *See supra* note 86 and accompanying text.

96. *See* Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2251 (1999); Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1080 (2015).

97. The Supreme Court has held that the Fourteenth Amendment's Due Process Clause incorporates most, but not all, constitutional provisions in the Bill of Rights applicable to criminal defendants against the states. *See* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019); Ramos v. Louisiana, 140 S. Ct. 1390, 1395–1408 (2020) (overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972) and concluding that the Sixth Amendment requirement of a unanimous jury trial is incorporated against the states).

as applicable state constitutional protections. State procedures apply to state criminal prosecutions,[98] as do state sentencing laws.

State authority for conducting criminal prosecutions is hardly uniform. Still, it is possible to describe a unifying, overarching structure. States divide authority for bringing criminal prosecutions between the state's attorney general and local prosecutors' offices.[99] Attorneys general, however, are given exclusive and concurrent jurisdiction over relatively few categories of prosecutions[100] and infrequently exercise grants of discretion to assert broader authority.[101] State attorneys general enjoy essentially no hierarchical control over local prosecutors (even in states that provide for formal hierarchical control, that control is rarely exercised),[102] with the exception that the decision whether to appeal a case to the state high court typically lies with the attorney general.[103]

State courts are not bound by Article III[104] and have their own requirements—often laxer than the federal requirements—for standing.[105] The common wisdom is that a state, through its representatives, has jurisdiction to pursue state criminal prosecutions in that state's courts.[106] That said, for reasons analogous to those I identified above in the context of typical federal criminal prosecutions in federal court,[107] the core values advanced by standing will in any event be vindicated in a typical state court criminal prosecution.

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98. Indeed, the failure to comply with a neutral, applicable state criminal procedural rule is ordinarily a bar to collateral federal habeas review of a subsequent state court conviction. *See, e.g.*, Davila v. Davis, 137 S. Ct. 2058, 2064 (2017).

99. *See* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 545 (2011). The most common moniker across states for local prosecutors is "district attorneys." *E.g.*, Charles C. Olson, *"Pro Bono Publico": A History of Georgia's Prosecuting Attorneys (1732–2012)*, 25 J.S. LEGAL HIST. 235, 235 (2017).

100. *See* Barkow, *supra* note 99, at 545–50.

101. *See id.* at 550–56; Tyler Quinn Yeargain, Note, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95, 110–26 (2018) (providing a fifty-state survey).

102. *See* Barkow, *supra* note 99, at 556–60.

103. *See id.* at 560–64.

104. *See* ASARCO, Inc. v. Kadish, 490 U.S. 605, 617 (1989); Peter N. Salib & David K. Suska, *The Federal-State Standing Gap: How To Enforce Federal Law in Federal Court Without Article III Standing*, 26 WM. & MARY BILL RTS. J. 1155, 1169 (2018).

105. *See* Salib & Suska, *supra* note 104, at 1169.

106. 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3531.11.1 (3d ed. 2020) ("There can be no doubt whatever that in its own courts and under its own law, a state has standing to enforce broad concepts of the public interest against individual defendants, whether through criminal or civil proceedings.").

107. *See supra* Part II.A.

III. CAPACITY OUTSIDE THE EXECUTIVE BRANCH TO PURSUE FEDERAL CRIMINAL PROSECUTIONS AT THE TRIAL LEVEL

In this Part, I consider the capacity of parties outside the executive branch to initiate and pursue federal criminal prosecutions in federal court. I discuss four such parties—private citizens, court-appointed attorneys (including amici curiae and special prosecutors), the state, and a House of Congress.

A. Private Prosecution

The eighteenth and nineteenth centuries witnessed a significant volume of state criminal private prosecutions.[108] A few states today retain the possibility of private prosecutions for low-level crimes.[109] On the federal side of the ledger, private parties do not have the general power to pursue criminal prosecutions.[110] However, there is some historical evidence that private parties in the early Republic may have had the chance to play some role in starting federal criminal proceedings, "including directly appealing to grand juries."[111]

To whatever extent historical practice may provide a limited basis for private-party involvement in originating a federal criminal prosecution, there are substantial obstacles to the private party's continued involvement in any such prosecution: the Take Care and Appointments Clauses, practical considerations (with respect to both constitutional and non-constitutional obligations that attend ordinary federal criminal prosecutions), and standing doctrine. I consider each of these in turn.

First, the Take Care and Appointments Clauses pose a significant barrier—possibly an insurmountable one—to substantial private-party involvement in a federal criminal prosecution.[112] This would seem to foreclose the possibility of a victim playing a substantial role in pursuing a

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108. *See* Shugerman, *supra* note 71, at 129.

109. *See, e.g.*, State v. Martineau, 808 A.2d 51, 53–54 (N.H. 2002) (reaffirming common law basis for private prosecutions for crimes not punishable by imprisonment); Cronan *ex rel.* State v. Cronan, 774 A.2d 866, 872 (R.I. 2001) (upholding "private misdemeanor prosecutions"); N.J. CT. R. 7:8-7(b) (permitting "an attorney to appear as a private prosecutor to represent the State in cases involving cross-complaints").

110. Collins & Nash, *supra* note 66, at 298; *see* United States v. Nixon, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.").

111. Collins & Nash, *supra* note 66, at 298 & n.225. *But see* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 816 n.2 (1987) (Scalia, J., concurring) (noting that private prosecutions were common in England at the time of the founding, but there do not seem to have been any private prosecutions of federal crimes).

112. *See supra* text accompanying notes 76–84.

federal criminal prosecution. To be sure, the Supreme Court has approved the enforcement of federal penal laws by private individuals in qui tam actions.[113] However, the private enforcement of a penal law is a far cry from the exercise of criminal prosecutorial power.[114]

Second, practical considerations attend how a private party would comply with requirements—both constitutional and non-constitutional—that obligate DOJ prosecutors in an ordinary federal criminal prosecution. The Supreme Court has recognized constitutional requirements on the part of prosecutors to turn exculpatory evidence over to the defense[115] and to provide a *Miranda* warning before interviewing a criminal defendant.[116] Chief Justice Roberts cited such concerns in arguing, in a dissent from the dismissal of certiorari as improvidently granted, that a private citizen only can bring a criminal prosecution on behalf of the relevant sovereign, not on her own behalf[117] (a point to which I return below in the context of state criminal private prosecutions under state law in federal court)[118]. Even if these concerns are not sufficient to support the conclusion of the Chief Justice's dissent, still one might think that they pose substantial hurdles to realistic private-party federal criminal prosecutions.

Pragmatic concerns about non-constitutional matters would also attend a private prosecution under federal criminal law. Would the private prosecutor be bound by the DOJ's *Justice Manual*? And how would plea bargaining and

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113. One can argue that qui tam relators are not continuous employees, and therefore not officers in the first place. *See* United States v. Germaine, 99 U.S. 508, 511–12 (1878) (suggesting that an "officer" is someone whose tenure and duties are "continuing and permanent, not occasional or temporary"). *But see* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778 n.8 (2000) (upholding the standing of a qui tam relator but "express[ing] no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause . . . and the [Take Care] Clause").

114. *See* Collins & Nash, *supra* note 66, at 299 ("Even if . . . Article II problems can be surmounted in the *qui tam* setting, they are obviously magnified in the setting of a criminal prosecution." (footnote omitted)).

115. *See* Brady v. Maryland, 373 U.S. 83, 86–87 (1963).

116. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

Another complicating factor (albeit not one that would pose a barrier to an initial private prosecution) is whether a private prosecution would preclude a subsequent DOJ prosecution for the same offense. *See* United States v. Dixon, 509 U.S. 688, 712 (1993) (holding that a private party's prosecution of a defendant for contempt in the District of Columbia precluded a subsequent prosecution by the government for the same offense).

117. *See* Robertson v. United States *ex rel.* Watson, 560 U.S. 272, 273 (2010) (Roberts, C.J., dissenting).

118. *See infra* text accompanying notes 349–361.

sentencing be handled?[119] Would the federal government provide support for sentences involving parole?

Third, the case for standing of a victim to pursue a federal criminal prosecution is an uneasy one. On one hand, to the extent that historical practice confirms the possible role of an aggrieved private party in pursuing some aspect of a criminal prosecution,[120] the basis for standing seems clear: The private party has suffered an injury and alleges that it was caused by the criminal defendant. Moreover, while it might be subject to debate, one can argue that the private party's injury is "redressed" to at least some degree by the imposition of a criminal sanction.[121] In other words, a private-party prosecutor's standing is quite similar to the standing that person would have were he or she to bring a civil action against the defendant.[122]

On the other hand, the Supreme Court has never formally endorsed the standing of a private citizen even to play a role in commencing a criminal action.[123] And, albeit in dicta, the Court has stated that "private parties . . . have no legally cognizable interest in the prosecutorial decisions of the Federal Government."[124]

Some lower courts have interpreted a 1973 Supreme Court opinion—*Linda R.S. v. Richard D.*[125]—to foreclose the possibility of standing to pursue a federal private prosecution.[126] The *Linda R.S.* Court stated that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[127] Yet the facts of the case and the Court's reasoning render the breadth of this claim less clear.

The plaintiff in *Linda R.S.*, the mother of an illegitimate child, brought a federal civil rights action—on her own behalf and on behalf of others

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119. *Cf.* Collins & Nash, *supra* note 66, at 314 & n.289 (describing how "uncertainties" over subconstitutional matters relating to "punishment and sentencing" could pose pragmatic barriers to prosecution of federal crimes in state court).

120. *See supra* text accompanying notes 108–109.

121. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 127 (1998) (Stevens, J., concurring).

122. *See id.* at 127–28 (arguing that the history of private prosecutions in England and the American colonies shows that "[t]he interest in punishing the defendant and deterring violations of law by the defendant and others was sufficient to support the 'standing' of the private prosecutor," and that consequently "the Framers of Article III surely would have considered such proceedings to be 'Cases' that would 'redress' an injury even though the party bringing suit did not receive any monetary compensation").

123. *See* Collins & Nash, *supra* note 66, at 298.

124. Maine v. Taylor, 477 U.S. 131, 137 (1986).

125. 410 U.S. 614 (1973).

126. *See, e.g.*, Williams *ex rel.* Faison v. U.S. Penitentiary Lewisburg, 377 F. App'x 255, 256 (3d Cir. 2010) (per curiam) (dismissing a civil rights complaint demanding that criminal charges be filed in connection with the death of plaintiff's brother).

127. 410 U.S. at 619.

similarly situated—against a state district attorney.[128] She alleged that the district attorney was failing to enforce a Texas statute that criminalized the failure to pay child support against parents of *illegitimate* children.[129] While the case is sometimes cited as definitively ruling on the question of private standing to compel a criminal prosecution,[130] the Court noted that whether the complaint even sought such relief was "not entirely clear."[131] Moreover, in concluding that "[t]he prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative," the *Linda R.S.* Court specifically noted that the Texas criminal statute "creates a completed offense with a fixed penalty as soon as a parent fails to support his child."[132] In other words, it is conceivable that a different result might have been obtained had the Texas statutory scheme instead created a greater incentive for the father to make support payments.[133] Finally, it bears emphasis that *Linda R.S.* addressed standing in the context of a non-criminal civil rights action (and a purported class action, at that).[134] Thus, the Court's statement about the plaintiff's lack of a "judicially cognizable interest in the prosecution or nonprosecution of another" can be read to apply narrowly as to the lack of an interest in the *government's decision* to prosecute or not, and

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128. *See id.* at 614–16.

129. *See id.* at 615–16.

130. *See, e.g.*, *Williams ex rel. Faison*, 377 F. App'x at 256.

131. *Linda R.S.*, 410 U.S. at 616 ("Although her complaint is not entirely clear on this point, she apparently seeks an injunction running against the district attorney forbidding him from declining prosecution on the ground that the unsupported child is illegitimate.").

132. *Id.* at 618.

133. *See id.* (noting that Texas "does not follow the civil contempt model whereby the defendant 'keeps the keys to the jail in his own pocket,' and may be released whenever he complies with his legal obligations").

Another case sometimes cited for the proposition that standing is unavailable to compel a criminal prosecution is *Leeke v. Timmerman*, 454 U.S. 83 (1981) (per curiam), which refers to the holding in *Linda R.S.* as "control[ling]," *id.* at 86. Plaintiffs in *Leeke*—inmates at a state correctional facility—filed a civil rights lawsuit alleging that certain state officials had "conspired in bad faith to block the issuance of . . . arrest warrants" with respect to beatings that the plaintiffs alleged they had suffered. *See id.* at 84–85. As in *Linda R.S.*, the Court found it "questionable" whether the relief sought (the issuance of arrest warrants) would remedy the injury suffered (the beatings) since "[e]ven if a prosecution could remedy respondents' injury, the *issuance* of an arrest warrant in this case is simply a prelude to actual prosecution." *Id.* at 86. But, in so reasoning, the Court in *Leeke* did not hold that prosecutors enjoyed absolute discretion over whether to bring criminal proceedings in all cases; rather, the Court relied on the defendants' "*conce*[*ssion*] that the decision to prosecute is solely within the discretion of the prosecutor." *Id.* at 86–87 (emphasis added). Once again, the scope of the holding is debatable.

134. 410 U.S. at 614–15.

not to restrict the plaintiff's freedom to elect to commence a private prosecution (provided that option is authorized by law).[135]

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In sum, the argument for victim standing to pursue private federal criminal prosecutions is ambiguous. But the Take Care and Appointments Clauses and pragmatic concerns (both constitutional and subconstitutional) seem to pose insurmountable barriers to such prosecutions.

B. Prosecution by a Court-Appointed Attorney

I address here settings where attorneys appointed by the court advance arguments in favor of prosecution. I consider both attorneys formally appointed by a court to act as prosecutors and attorneys proceeding as amici curiae.

1. Prosecutions Under the Auspices of a U.S. Attorney Appointed by the Federal District Court

I begin with prosecutions undertaken under the auspices of an interim U.S. Attorney appointed by the federal district court. The governing statute calls upon the President to appoint U.S. Attorneys with the advice and consent of the Senate.[136] If, however, a vacancy arises in a U.S. Attorney slot, statutory law authorizes the Attorney General to fill the vacancy for a period of 120 days.[137] There is one opportunity for an actor outside the executive branch to appoint an interim U.S. Attorney: If, in fact, 120 days elapse after the Attorney General makes an interim U.S. Attorney appointment, and no permanent U.S. Attorney has received Senate confirmation, then "the district court for such district may appoint a United States attorney to serve until the vacancy is filled."[138]

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135. In his concurring opinion in *Heckler v. Chaney*, 470 U.S. 821 (1985), Justice Marshall noted a distinct argument that bolsters the argument in the text. Justice Marshall observed that "[l]egal historians have suggested that the notion of prosecutorial discretion developed in England and America largely because private prosecutions were simultaneously available at the time." *Id.* at 849 n.6 (Marshall, J., concurring). If that is true, then there is a historical justification for continuing to recognize the standing of individuals to bring private prosecutions to the extent that (as *Linda R.S.* ruled) they lack standing to challenge the exercise of discretion by public prosecutors. *See id.*; *Linda R.S.*, 410 U.S. at 619.

136. *See* 28 U.S.C. § 541(a).

137. *See id.* § 546(a)–(c).

138. *Id.* § 546(d).

May a district court validly appoint a U.S. Attorney to direct prosecutions undertaken by a U.S. Attorney's office? The Supreme Court has never addressed the issue of whether the appointment method passes constitutional muster, and at least one commentator thinks that it does not.[139]

There are several grounds on which the appointment methodology is potentially subject to constitutional challenge. First, if the U.S. Attorney is a principal officer, then appointment must be by the President with the advice and consent of the Senate;[140] if that is so, then the judicial appointment of a U.S. Attorney would be constitutionally infirm (as would be the appointment by the Attorney General). On the other hand, if the U.S. Attorney is an inferior officer, then appointment by the federal district courts is consistent with the Appointments Clause: That Clause permits appointment of inferior officers by "Courts of Law."[141]

While the Supreme Court has yet to address the issue, it has made statements in dicta indicating that the U.S. Attorney is an inferior officer.[142] Lower courts have reached the same conclusion.[143] This conclusion is most likely correct under at least one of two tests the Court has offered for an officer's "inferior" status. In *Morrison v. Olson*, the Court said that courts should look at the extent to which an officer (i) is "subject to removal by a higher Executive Branch official"; (ii) "is empowered . . . to perform only certain, limited duties"; (iii) has limited jurisdiction; and (iv) has limited tenure.[144] The first prong is clearly met: The President has the authority to dismiss a U.S. Attorney, as confirmed both by statute[145] and by the resolution

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139. *See* Wiener, *supra* note 49, at 404–42.

140. *See* U.S. CONST. art. II, § 2, cl. 2.

141. *See id.*; Freytag v. Comm'r, 501 U.S. 868, 888–92 (1991) (finding that appointment of an inferior officer even by a legislative court (the Tax Court) satisfied the Appointments Clause).

142. *See* Myers v. United States, 272 U.S. 52, 159 (1926) (describing, in passing, the "United States attorney" as "an inferior officer"); Morrison v. Olson, 487 U.S. 654, 676 (1988) (noting favorably that "[l]ower courts have . . . upheld interim judicial appointments of United States Attorneys, and Congress itself has vested the power to make these interim appointments in the district courts" (citation omitted)).

143. *See* United States v. Gantt, 194 F.3d 987, 999–1000 (9th Cir. 1999); United States v. Hilario, 218 F.3d 19, 24–26 (1st Cir. 2000); United States v. Baldwin, 541 F. Supp. 2d 1184, 1217 (D.N.M. 2008) ("Without deciding the issue, . . . the Court notes that . . . there is a strong argument that the United States Attorney is an 'inferior' officer."); *see also* U.S. Att'ys—Suggested Appointment Power of the Att'y Gen.—Const. L. (Article II, § 2, cl. 2), 2 Op. O.L.C. 58, 58–59 (1978) (explaining that insofar as United States Attorneys are inferior officers, vesting appointment and removal power in Attorney General would be constitutional).

144. 487 U.S. at 671–72.

145. 28 U.S.C. § 541(c) ("Each United States attorney is subject to removal by the President.").

of the recent conflict over the court-appointed interim U.S. Attorney for the Southern District of New York.[146]

Morrison's other prongs are more ambiguous. It can be argued that a U.S. Attorney has limited duties, jurisdiction, and tenure.[147] That said, in a subsequent "inferior officer" case, *Edmond v. United States*, the Court emphasized that "limited in tenure" meant limited to performing a single task after which the job would terminate and that "limited in jurisdiction" meant limited to prosecuting particular individuals for particular crimes.[148] Just as the *Edmond* Court concluded that the military judges at issue there did not satisfy these *Morrison* prongs, so too could one draw a similar conclusion about court-appointed interim U.S. Attorneys.

But the *Edmond* Court denied *Morrison* as having offered the sole basis for determining whether an officer serves in an inferior capacity[149] and proceeded to offer its own test: The Court explained that "inferior officers" are "officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[150] Insofar as U.S. Attorneys—including court-appointed interim U.S. Attorneys—are subject to supervision by the Attorney General,[151] it seems clear that U.S. Attorneys qualify as inferior officers under this standard,[152] if not under the *Morrison* standard as well.[153]

There is a coda to the Appointments Clause analysis: An appointment of an inferior officer by the courts of law is "improper" if there is "'incongruity' between the functions normally performed by the courts and the performance

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146. *See supra* text accompanying notes 44–49 (stating that interim U.S. Attorney did not recognize termination by Attorney General but did recognize termination by the President).

147. *See Hilario*, 218 F.3d at 25.

148. 520 U.S. 651, 661 (1997).

149. *Id.* ("Our cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes.").

150. *Id.* at 663.

151. *See* 28 U.S.C. § 519 ("Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys . . . in the discharge of their respective duties."); *id.* § 518(b) ("When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so."); *id.* § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

152. *See* United States v. Gantt, 194 F.3d 987, 999–1000 (9th Cir. 1999).

153. Some lower courts have applied *Edmond*'s standard without regard to *Morrison*'s. *See id.* at 999 & n.6. Other courts have concluded that court-appointed interim U.S. Attorneys are inferior officers under both tests. *See* United States v. Hilario, 218 F.3d 19, 25 (1st Cir. 2000).

of their duty to appoint."[154] But, in holding that vesting the appointment of a special counsel in the judiciary was not incongruous, the Court relied upon, and cited favorably, the congressional decision to vest authority to appoint interim U.S. Attorneys in the courts.[155]

Because the appointment power is vested in the federal judiciary, separation-of-powers concerns arise beyond mere Appointments Clause issues. Here, as the *Morrison* Court explained, one must ask whether the appointment "impermissibly interferes with the President's exercise of his constitutionally appointed functions" and whether the judicial appointment power "reduc[es] the President's ability to control the prosecutorial powers."[156] This inquiry is readily satisfied in the context of the judicial appointment of an interim U.S. Attorney because the Executive Branch dominates the relationship in terms of its statutory authority to direct litigation and to supplant local U.S. Attorneys as necessary.[157]

It remains to consider standing and subconstitutional issues. It is readily apparent that the standing of a court-appointed interim U.S. Attorney is derivative of the executive branch's standing (or, to the extent that ordinary standing is not required, its inherent capacity to bring criminal prosecutions).[158] It also seems clear that an interim U.S. Attorney will abide by the DOJ's *Justice Manual* and that the DOJ would provide typical support (including with regard to sentencing and imprisonment).[159]

2. Prosecutions for Contempt of Court by Special Prosecutors Appointed by the Federal Court

On occasion, a federal judge will conclude that a party in a case has flouted an order of the court and, on that basis, recommend that the party be prosecuted for criminal contempt of court.[160] Rule 42 of the Federal Rules of Criminal Procedure contemplates the DOJ undertaking such a prosecution,[161] but it allows the federal court to appoint a special prosecutor where either the

154. Morrison v. Olson, 487 U.S. 654, 676 (1988) (quoting *Ex parte* Siebold, 100 U.S. 371, 398 (1879)). The *Morrison* Court noted that this concern arises "[i]n addition to separation-of-powers concerns." *Id.* at 675–76.

155. *See id.* at 676–77.

156. *See id.* at 685.

157. *See Hilario*, 218 F.3d at 27–28 (citing 28 U.S.C. §§ 518, 541(c)–(d)). These powers likely could overcome even district judges determined to make appointments ideologically opposed to the President. *Cf. supra* text accompanying notes 43–48.

158. *See generally* Hartnett, *supra* note 96 (discussing the relationship—or lack thereof—between modern standing doctrine and federal criminal prosecutions).

159. *See supra* notes 67–75 and accompanying text.

160. Congress has codified contempt of court in the criminal code. *See* 18 U.S.C. § 401.

161. *See* FED. R. CRIM. P. 42(a)(2).

DOJ declines the court's request to prosecute the matter or "the interest of justice requires the appointment of another attorney."[162]

The Court explicitly endorsed the power of a federal court to appoint a private attorney to prosecute a claim of criminal contempt for violation of a prior order of the court in its 1987 decision in *Young v. United States ex rel. Vuitton et Fils*.[163] But the Court's decision in *Young* is surely not a carte blanche for the judiciary to appoint special prosecutors in all circumstances (especially after the Court's decision in *Morrison v. Olson* the next year).[164] After all, it is hard to see the judicial appointment of a special prosecutor to handle a contempt prosecution as a valid appointment of an inferior officer by the "Courts of Law." First, the special attorney does not qualify as an "inferior officer" under either existing test for that status. While *Morrison* emphasized that an inferior officer should be "subject to removal by a higher Executive Branch official,"[165] this is presumably not the case for a court-appointed special prosecutor. And, while *Edmond* calls for an inferior officer to be "directed and supervised" by some principal officer,[166] that also is presumably not the case for a court-appointed special prosecutor. Second, it does seem that a court-appointed special prosecutor interferes with the executive branch's traditional prosecutorial function.[167] While the DOJ may be able to avert the appointment of a special prosecutor by agreeing to conduct the prosecution itself, once the prosecutor is appointed, the scope of the DOJ's control seems quite limited. Moreover, if the district court appointed the special prosecutor "in the interest of justice,"[168] then the DOJ seems to have no basis for control whatsoever.

The justification for the judicial power to appoint a private attorney must rest, then, not on the Appointments Clause, but instead on the federal judiciary's inherent power to maintain order and respect in the federal courts.[169] On this account, the power to appoint private attorneys to prosecute contempt would exist even if there was no applicable provision of the federal criminal code.[170] One thus can understand the setting of contempt of court as

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162. *Id.*

163. 481 U.S. 787, 793–802 (1987).

164. 487 U.S. 654, 696–97 (1988).

165. *Id.* at 671.

166. *See supra* text accompanying note 150.

167. *See supra* text accompanying notes 156–157.

168. *See supra* text accompanying note 162.

169. *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 795–96, 795 n.7 (1987).

170. *See id.* at 801 ("[T]he rationale for the appointment authority is necessity. If the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that Branch declined prosecution.").

a limited exception to the ordinary requirement for an officer to qualify as inferior—one based on the inherent power of the courts to protect their own legitimacy and authority.[171]

Standing is an easier hurdle here than it would be in the context of a private victim criminal prosecution. While the standing of an aggrieved private citizen to play a role in commencing a federal criminal prosecution must rest (if it exists) on the private citizen's injury, the standing of a private attorney appointed by a court to pursue contempt must rest on a different ground. Although the *Young* Court affirmed the viability of a court-appointed private prosecutor for criminal contempt (albeit without explicitly addressing the question of standing), it specifically held that a court cannot appoint "counsel for an interested party in the underlying civil litigation."[172] Thus, the standing of the appointed private counsel must be derivative of the federal government's standing (as expressed through the federal judiciary).[173]

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In sum, the power of federal courts to appoint private attorneys to prosecute contempt of court passes muster. It is critical to bear in mind, however, that such private prosecutions are sui generis: They arise in this narrow context out of the inherent power of the federal courts to protect their authority and legitimacy.

3. Prosecutions for Other Federal Statutory Charges by Special Prosecutors Appointed by the Federal Court

Leaving prosecutions for contempt of court and court-appointed interim U.S. Attorneys to the side, there is no provision in federal law for anyone other than the DOJ to commence a federal criminal prosecution. However, what if a criminal prosecution is commenced by the DOJ but then the DOJ decides to discontinue it? Can the federal district court before which the prosecution was pending appoint an attorney to serve as a "special prosecutor" of sorts to continue the prosecution?

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171. *See* Collins & Nash, *supra* note 66, at 298 ("[C]riminal contempt may be *sui generis* to the extent that it is thought to involve one of the genuinely inherent powers of the courts."); *see also* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 849 (2008) (noting the unusual, inherent nature of the contempt power).

172. *Young*, 481 U.S. at 802; *see id.* at 802–09.

173. *See id.* at 804 ("Private attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated.").

Rule 48(a) of the Federal Rules of Criminal Procedure requires "leave of court" for the DOJ to "dismiss an indictment, information, or [a] complaint."[174] While recognizing that the precise reason for the inclusion of the "leave of court" language in Rule 48 is murky,[175] the Supreme Court has offered some insight into the factors a district court may consider in deciding whether to grant such leave. According to the Court's opinion in *Rinaldi v. United States*, the "principal object" of Rule 48's "leave of court" language—and therefore a proper factor for the court to consider—is "apparently to protect a defendant against prosecutorial harassment."[176] Beyond this, the *Rinaldi* Court noted the Rule 48 requirement "has also been held to permit the court to deny a Government dismissal motion to which the defendant has consented if the motion is prompted by considerations clearly contrary to the public interest."[177] Of particular relevance to the inquiry here, some lower federal courts have interpreted consideration of the public interest under Rule 48 to include the impact of suspending prosecution on the alleged crime's victims.[178]

Commentators have divided over how Rule 48 should be interpreted and applied. Professor (and former U.S. District Judge) Paul Cassell commended courts that already considered victims' interests as part of the Rule 48 calculus;[179] he further argued that the rule be amended to make such consideration explicitly mandatory,[180] but the Advisory Committee ultimately rejected the suggestion.[181] In contrast, recent scholarship by Thomas Frampton argues that, contrary to the Court's assertion in *Rinaldi*, the Rule's purpose was to empower the Judiciary to limit dismissal in cases "where the [district] court suspects that some impropriety has prompted [the Executive's decision] to abandon a case."[182]

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174. FED. R. CRIM. P. 48(a).

175. Rinaldi v. United States, 434 U.S. 22, 29 n.15 (1977).

176. *Id.*

177. *Id.*

178. *See, e.g.*, *In re* Richards, 213 F.3d 773, 787 (3d Cir. 2000); United States v. Smith, 55 F.3d 157, 159 (4th Cir. 1995).

179. *See* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 B.Y.U. L. REV. 835, 918 [hereinafter Cassell, *Recognizing Victims*]; Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 945 [hereinafter Cassell, *Treating Crime Victims Fairly*].

180. *See* Cassell, *Recognizing Victims*, *supra* note 179, at 917–18.

181. *See* Cassell, *Treating Crime Victims Fairly*, *supra* note 179, at 944–46.

182. *See* Thomas Ward Frampton, Essay, *Why Do Rule 48(a) Dismissals Require "Leave of Court"?*, 73 STAN. L. REV. ONLINE 28, 29 (2020), https://review.law.stanford.edu/wp-content/uploads/sites/3/2020/06/73-Stan.-L.-Rev.-Online-Frampton.pdf [https://perma.cc/QV5Y-PDNJ].

Moving beyond the precise scope of Rule 48, what happens if the court denies the motion and the DOJ refuses to move forward with the prosecution?[183] The procedural device utilized by state courts under analogous circumstances is the appointment by the court of a private attorney to serve as special prosecutor.[184] And—apart from simply conceding the inevitable and granting the Rule 48 motion[185]—what scant federal caselaw there is points in the same direction.[186]

Does the appointment of a special prosecutor by the federal judiciary in the wake of a denial of a Rule 48 motion pass constitutional muster? Probably not.[187] First, it does not seem that a special prosecutor appointed to prosecute a garden-variety federal criminal violation qualifies as an inferior officer.[188] While a Rule 48 special prosecutor has (like the special prosecutor in *Morrison*) limited tenure and powers, the executive branch presumably lacks oversight over, and the ability to remove, a Rule 48 special prosecutor—who would have been, after all, appointed precisely because the DOJ did not want

183. If the DOJ is willing to proceed with prosecution in the event that its Rule 48 motion is denied, then the path forward is clear. *See* United States v. Cowan, 381 F. Supp. 214, 223 (N.D. Tex. 1974) (denying Rule 48 motion without naming replacement prosecutor where "every indication is that the United States will go forward in this case upon the court's overruling the motion to dismiss"), *rev'd on other grounds*, 524 F.2d 504 (5th Cir. 1975).

184. *See* State v. Lloyd, 310 N.W.2d 617, 622 (Wis. Ct. App. 1981) (upholding trial court's authority to appoint special prosecutor in criminal case where district attorney refused to continue prosecution unless trial judge recused himself). *See generally* Annotation, *Power and Duty of Court as to Continuation of Action or Prosecution Upon Refusal of City, County, or District Attorney to Proceed Therewith*, 103 A.L.R. 1253 (2020) (summarizing caselaw related to the "power of the court to keep alive, against the will of the prosecuting attorney, an action or prosecution brought in behalf of the people").

185. *See* United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n, 228 F. Supp. 483, 489 (S.D.N.Y. 1964) (stating that "[e]ven were leave of Court to the dismissal of the indictment denied, the Attorney General would still have the right to . . . decline to move the case for trial," and the court "would be without power to issue a mandamus or other order to compel prosecution of the indictment").

186. The only federal case I have been able to find is *In re Slovenec*, 799 F. Supp. 1441 (W.D.N.Y. 1992), where the district court appointed special prosecutors. In part, *Slovenec* was a simple application of *Young*, insofar as the court appointed the special prosecutors to pursue criminal contempt charges against two defendants where the U.S. Attorney's Office had moved under Rule 48 to dismiss charges. *See id.* at 1447–48. But the court went beyond *Young* and also replaced the U.S. Attorney's Office with the same special prosecutors as to additional defendants for whom no Rule 48 motion had been filed. *See id.* at 1448–49. The judge reasoned that "the interests of justice will be better served" and that it was "troubled by the assignment of an inexperienced prosecutor as lead counsel in this case." *Id.* at 1448.

187. *See In re* United States, 345 F.3d 450, 452–54 (7th Cir. 2003) (citing Take Care Clause and separation-of-powers concerns in granting writ of mandamus reversing district court's decision to deny government's Rule 48 motion and appoint special prosecutor).

188. *See supra* text accompanying notes 149–153.

to pursue the prosecution.[189] Second, from a separation-of-powers perspective, the appointment of such a special prosecutor would interfere with executive branch control over prosecutions.[190] Finally, the Court's opinion in *Young* is of no avail, since it rests upon the narrow, inherent power of the federal courts to protect their judgments.[191]

Subconstitutional concerns would also attend a generic prosecution by a court-appointed lawyer of a generic federal criminal violation.[192] For example, would the special prosecutor be bound by the DOJ's *Justice Manual*, and would the federal government provide support for the implementation of sentences?

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In sum, it is highly doubtful that federal courts have the power to appoint private attorneys to continue to prosecute where the DOJ has decided not to.

4. Oppositions to a Rule 48 Motion by an Attorney Amicus Curiae Appointed by the Court Following a Guilty Plea or Guilty Verdict

A special case arises under Rule 48(a) where the DOJ, without objection from the defendant, moves to dismiss charges after there has been a guilty plea or guilty verdict. There is no need for a special prosecutor since (assuming the conviction stands) all that remains is for the court to impose a sentence (and the DOJ to implement it). If the district court is dubious of the government's motion to dismiss, it might in this setting instead appoint an attorney to argue against the motion as amicus curiae. Indeed, this is what happened in the criminal case of Michael Flynn, where the DOJ sought to dismiss criminal charges following Flynn's guilty plea.[193]

The fact that a conviction has already been entered provides the district court with the option of appointing an attorney amicus curiae to defend the conviction rather than appointing a special prosecutor. After all, if the court denies the Rule 48 motion, then there should be little need for further prosecution; there is nothing left for the DOJ to do but to participate in the

189. *See supra* text accompanying notes 149–153.

190. *See In re United States*, 345 F.3d at 452–54.

191. *See* Wiener, *supra* note 49, at 434 n.330 ("Courts have no inherent authority or any legitimate interest in the institution of criminal proceedings outside the limited circumstance of criminal contempt for lack of compliance with a court's own orders.").

192. Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1071 (2017).

193. *See supra* text accompanying notes 6–11.

setting, and implementation, of the sentence—something that is likely to be much more mechanical than actively prosecuting a case. This obviates the need for a special prosecutor.[194] And Article III standing persists between the DOJ and the criminal defendant since there remains a live controversy between the DOJ and the defendant: The DOJ will proceed with sentencing if the court in the end denies the Rule 48 motion.[195] Perhaps, then, this setting might allow the district court more leeway than a setting where the government's Rule 48 motion predates the verdict, as suggested by the court of appeals' decision to allow the district court to hold argument over the Rule 48 motion in the *Flynn* case.[196]

C. Prosecution by a State

The Take Care and Appointments Clauses provide a substantial barrier to prosecutions by a state, much as they do in the context of private

194. *See* United States v. Cowan, 381 F. Supp. 214, 223 (N.D. Tex. 1974) (denying an unopposed Rule 48(a) motion, but not appointing a special prosecutor, where "every indication is that the United States will go forward in this case upon the court's overruling the motion to dismiss"), *rev'd on other grounds*, 524 F.2d 504 (5th Cir. 1975).

195. The requisite Article III standing here would seem similar to appellate standing for an attorney amicus curiae to argue in defense of the decision of a lower court imposing a criminal conviction where the government has declined to defend that decision. *See infra* note 264 and accompanying text.

196. The en banc court did not opine on the proper disposition of the Rule 48 motion; it simply denied Flynn's mandamus petition. *See In re* Flynn, 973 F.3d 74, 85 (D.C. Cir. 2020).

To be sure, a panel of the court of appeals had previously disallowed the district court's appointment of an attorney amicus curiae. *See supra* text accompanying notes 10–11. One can read the panel majority's opinion to reject completely a district court's power to name an attorney amicus curiae under Rule 48. On the other hand, one can argue that the holding rested on some factors specific to the *Flynn* case itself. The panel questioned the district court's selection of an amicus curiae who had taken so public a position on the matter at hand. *In re* Flynn, 961 F.3d 1215, 1222 (D.C. Cir.) ("[T]he contemplated hearing could require the government to defend its charging decision on two fronts—answering the district court's inquiries as well as combatting Gleeson's arguments."), *vacated*, No. 20-5143, 2020 WL 4355389 (July 30, 2020). And it noted disparagingly "the district court's invitation to members of the general public to appear as amici." *Id.* These two factors suggest a concern that the district court was seeking to politicize the case rather than reach a reasoned decision. *Id.* ("This sort of broadside inquiry would rewrite Rule 48(a)'s narrow 'leave of court' provision.").

Moreover, the panel emphasized its understanding—in line with the language in *Rinaldi*—that the "principal object" of Rule 48's "leave of court" language is to protect the defendant from prosecutorial harassment. *See id.* at 1220. Judges who subscribed to the denial of a Rule 48 motion where the government did not act in good faith might be open to the appointment of an amicus curiae under such circumstances.

prosecutions.[197] These provisions likely constrain the state to—at most—simply commencing a prosecution (perhaps by advising a grand jury).[198]

Pragmatic concerns are likely to be less of an issue in the context of a federal criminal prosecution maintained by a state actor than by a private individual—assuming, as seems most probable, that the state actor is one (or is represented by someone) who usually pursues *state* criminal prosecutions. Such a state actor is likely to be familiar with most governing constitutional provisions; have the institutional knowledge and support to deal with additional requirements; and work with appropriate federal actors and resources. Such a state actor might also be inclined to conform her actions to the DOJ's *Justice Manual* (or at least the state equivalent thereto). It remains unclear, however, whether and how the federal government would support sentences resulting from state-led prosecutions.

Finally, standing poses yet another substantial barrier to state prosecutions under federal criminal law. The sovereign status of a state does not allow it to prosecute a federal criminal case without a proper showing of standing. The Supreme Court has recognized state standing at least to appeal an adverse judgment in a federal criminal case, holding in *Maine v. Taylor* that a state had standing to appeal a decision by a federal appeals court dismissing criminal charges on the ground that the federal criminal statute in question incorporated by reference a state law that was unconstitutional.[199] But the Court in *Taylor* did not rubberstamp Maine's standing based on its sovereign status.[200] Rather, it found Maine's interest in the appeal sufficient to justify standing.[201]

The *Taylor* Court did leave the door to more general state standing in federal criminal proceedings slightly ajar. It speculated (albeit in dicta) that while "private parties . . . have no legally cognizable interest in the prosecutorial decisions of the Federal Government," that is only "perhaps" the case for "separate sovereigns."[202]

Despite the *Taylor* Court's holding in favor of state appellate standing and its statement in dicta, the standing of a state to commence and pursue a federal criminal prosecution is at best likely highly circumscribed. A state's interest is in the ordinary course simply a generalized interest—perhaps shared by numerous private citizens—and therefore not cognizable.[203] A state might be

197. *See supra* text accompanying notes 52–54.

198. *See supra* text accompanying notes 52–54.

199. 477 U.S. 131, 133–37 (1986).

200. *See* Jonathan Remy Nash, *Standing Doctrine Notwithstanding*, 93 TEX. L. REV. SEE ALSO 189, 191 (2015).

201. *See Taylor*, 477 U.S. at 136–37.

202. *Id.* at 137.

203. *See supra* text accompanying note 86.

able to advance a more particularized interest in some settings. Perhaps the federal government has indicated an intent, or (more strongly) announced a decision, not to bring prosecutions under a particular federal criminal statute that the state believes would, if enforced, protect its citizenry.[204] I have argued elsewhere that a state should have standing to sue the federal government where the federal government has preempted state law and then under-enforces the federal law Congress designed to fill the resulting legal gap.[205] However, even if this argument might apply in the context of under-enforcement of the federal criminal laws, the argument would only supply the basis for a state to sue the federal government,[206] not to bring particular criminal prosecutions. And, from the perspective of any single criminal prosecution against a would-be defendant, the state's interest continues to seem quite generalized. Moreover, the state could presumably in most cases solve the problem by enacting, and then enforcing, state criminal provisions that outlawed the same behavior.[207]

Perhaps the strongest setting (although still not a very strong setting) in which a state might claim a particularized interest in pursuing particular federal criminal prosecutions is the setting where a state claims harm resulting from behavior that the federal criminal law prohibits but a neighboring state has legalized.[208] For example, Nebraska and Oklahoma (unsuccessfully) pursued legal relief against Colorado, alleging that Colorado's decriminalization of marijuana is inconsistent with federal law and has had spillover effects in their states.[209] One might imagine that, as part

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204. The DOJ might take such a position because, for example, it believes the federal criminal statute is unconstitutional or because the DOJ believes it can use scarce prosecutorial resources in other ways. *See* Nash, *supra* note 86, at 203.

205. *See id.* at 230–52.

206. *See id.* at 230.

207. *Cf.* Gamble v. United States, 139 S. Ct. 1960, 1966 (2019) (noting the "substantive differences between the interests that two sovereigns can have in punishing the same act").

208. *See generally* Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 512–19, 517 n.73 (2008) (discussing state and federal responses to state-level legal "havens"). The setting might be stronger still to the extent that the federal government is comparatively under-enforcing federal law in the jurisdiction that has legalized the behavior in question, i.e., to the extent that the federal government is indirectly supporting that state's legalization effort. *See, e.g.*, Memorandum from James M. Cole, Deputy Att'y Gen., Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf [https://perma.cc/9PHB-VVVW] (emphasizing the DOJ's priorities in marijuana enforcement); John Ingold, *Federal Government Won't Block Colorado Marijuana Legalization*, DENVER POST (Oct. 2, 2016, 6:00 PM), https://www.denverpost.com/2013/08/29/federal-government-wont-block-colorado-marijuana-legalization/ [https://perma.cc/K2ST-K8H9] (characterizing the memo as allowing recreational marijuana businesses to operate "without federal interference").

209. *See* Nebraska v. Colorado, 136 S. Ct. 1034 (2016) (mem.) (denial of motion for leave to file such a complaint).

of their legal strategy, Nebraska and Oklahoma could try to bring federal criminal charges against individuals purveying marijuana near their borders.[210] Standing to bring such charges would be based on the more particularized notion that out-of-state behavior is having spillover effects within the state.[211] The Supreme Court in the early twentieth century recognized standing (and indeed a common law basis for pursuing relief) against out-of-state actors (and even sibling states) in the context of transboundary pollution.[212] Indeed, the modern Court has relied upon those cases to conclude that states enjoy "special solicitude" in the standing calculus to bring suits in the federal courts.[213] All of this said, the same result could be attained, with no questions dogging standing, if states were simply given the power to petition the DOJ to file federal criminal charges against actors in a neighboring state where there are alleged spillover effects.[214]

D. Prosecution by a House of Congress

There are several barriers to congressional ability to prosecute federal crimes: constitutional barriers, pragmatic barriers, and barriers related to Article III standing.[215] I discuss each in turn before distinguishing congressional civil contempt proceedings.

First, the constitutional design casts doubt on the propriety of congressional ability to prosecute federal crimes. For one thing, as in the

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210. *See generally* Collins & Nash, supra note 66, at 296–306 (discussing federal standing and state efforts to enforce federal criminal law). Given that the sales take place across state boundary lines, home-state criminal laws would be unavailing. *Id.* at 244.

211. *See* Georgia v. Tenn. Copper Co., 206 U.S. 230, 238 (1907).

212. *See* Missouri v. Illinois, 200 U.S. 496, 517–22 (1906); *Tenn. Copper Co.*, 206 U.S. at 237–38.

213. *E.g.*, Massachusetts v. EPA, 549 U.S. 497, 518–20 (2007) (citing, inter alia, *Tenn. Copper Co.*, 206 U.S. at 237). *But see id.* at 537 (Roberts, C.J., dissenting) (criticizing the majority for its reliance on *Tenn. Copper Co.*, "a case that did indeed draw a distinction between a State and private litigants, but solely with respect to available remedies," and that "had nothing to do with Article III standing").

214. *Cf.* Clean Air Act, 42 U.S.C. § 7426(b) (empowering "[a]ny State or political subdivision [to] petition the Administrator [of the federal Environmental Protection Agency] for a finding that any major source [of pollution] or group of stationary sources emits or would emit any air pollutant in violation" of certain Clean Air Act provisions, and directing the Administrator "[w]ithin 60 days after receipt of any [such] petition . . . [to] make such a finding or deny the petition").

215. I discuss in the text the standing of a "House of Congress" to pursue a federal criminal prosecution. However, to whatever extent there might be legislative standing (for example, based upon the executive's failure to enforce or defend a federal statute's constitutionality), a recent decision by the Court suggests that perhaps *both* Houses of Congress must join together to establish standing. *See* Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1953–54 (2019).

context of private prosecutions and state prosecutions, the Take Care and Appointments Clauses would constrain congressional efforts to undertake federal criminal prosecutions.[216] Next, the Constitution specifically bars Congress from passing bills of attainder.[217] This bar against statutes that hold individuals guilty of a crime without trial speaks to the Framers' concern about vesting Congress, as the branch of government responsible for drafting federal criminal statutes, with prosecutorial power.[218] Last, even to the extent that the Constitution vests—in the context of impeachment[219]—Congress with power to punish individuals for "high crimes and misdemeanors," [220] that power is not to pursue a criminal prosecution but solely to remove individuals from federal office.[221]

Second, the pragmatic concerns that would dog private prosecutions and state prosecutions also would impede congressional criminal prosecutions. While one might think that an institutional actor like a House of Congress would be better positioned than a private individual to ensure compliance with applicable constitutional, and subconstitutional, obligations, still a House of Congress is hardly in the business of conducting criminal prosecutions and is likely less prepared than a state actor on this front.

Third, though it is a part of the federal government, it seems unlikely that a House of Congress has the requisite standing to commence a federal criminal prosecution. Unlike the executive branch, a House of Congress must

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216. *See supra* text accompanying notes 75–83.

217. U.S. CONST. art. I, § 9, cl. 3.

218. The usual emphasis is the infringement bills of attainder impose on the judicial function, *see, e.g.*, Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1866) (stating that by enacting a bill of attainder, "the legislative body, in addition to its legitimate functions, exercises the powers and office of judge"), but in fact bills of attainder also appropriate for the legislature the executive prerogative to prosecute, *see* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810) ("It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."). *See generally* Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 343–48 (1962) (discussing separation-of-powers implications of the Bill of Attainder Clause).

219. *See* U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."); *id.* art. I, § 2, cl. 5 (vesting the House of Representatives with the power to impeach); *id.* art. I, § 3, cl. 6 (vesting the Senate with power to try impeachments).

220. *Id.* art. II, § 4.

221. *See id.* art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.").

establish its own standing to proceed in federal court.[222] And, insofar as it has never been, or understood to be, a congressional function to pursue prosecutions under the federal criminal laws, it seems unlikely that a House of Congress could establish standing for a federal criminal prosecution.[223] Indeed, recognizing congressional standing to pursue federal criminal prosecutions would undermine the core separation-of-powers value that standing advances.[224] If Congress had standing to prosecute federal crimes, then it could prosecute the very crimes that it defined.[225]

To be sure, the Court has recognized congressional authority, pursuant to its factfinding and oversight functions, to hold individuals who fail to comply with congressional subpoenas (or otherwise disrespect a House of Congress) in civil contempt.[226] Moreover, the Houses of Congress have enjoyed and

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222. Far from presuming that standing exists, the Supreme Court and lower federal courts routinely explain why a congressional actor has, or does not have, standing. *See* United States v. Windsor, 570 U.S. 744, 755–63 (2013) (concluding that an active dispute between the plaintiff and the executive branch satisfied Article III, while the willingness of the House of Representatives (as intervenor) to defend the statute in question satisfied prudential standing concerns where the executive branch declined to defend the statute); United States v. AT&T, 551 F.2d 384, 391 (D.C. Cir. 1976) (analyzing whether the House of Representatives had standing to seek enforcement of subpoena); U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 69–75 (D.D.C. 2015) (analyzing the standing of the House of Representatives to sue the executive branch); *see also* Raines v. Byrd, 521 U.S. 811, 820–30 (1997) (finding that individual members of Congress lacked standing to challenge the Line Item Veto Act); *id.* at 829 ("attach[ing] some importance to the fact that appellee[ ] [members of Congress] have not been authorized to represent their respective Houses of Congress in this action," thus implying that, while the claim to standing of the Houses of Congress would be stronger, they would still have make a showing to establish standing); Bradford C. Mank, *Does a House of Congress Have Standing over Appropriations?: The House of Representatives Challenges the Affordable Care Act*, 19 U. PA. J. CONST. L. 141, 147–59 (2016) (analyzing whether a House of Congress has standing to challenge the executive branch, on the assumption that the answer is not automatic).

223. *See* Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 367–73 (2015) (defending a functional approach to congressional standing).

While I have argued that congressional plaintiffs should have standing to sue in limited circumstances where "the executive branch has acted so as to threaten permanent and substantial diminution in congressional bargaining power," *see id.* at 339, 378–86, that standing is specific to a suit against the executive branch, *see id.* at 343. Any such standing would thus be unavailing to congressional plaintiffs who wish to commence federal criminal prosecutions.

224. *See supra* text accompanying notes 96–97.

225. *See* Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 593 (1991).

226. *See, e.g.*, Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 226–28 (1821) (recognizing Congress's inherent power to hold individuals in contempt); *see also* McGrain v. Daugherty, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."); Comm. on the Judiciary v. McGahn, 391 F. Supp. 3d 116, 119–22 (D.C. Cir. 2019) (determining that typical rules for civil case assignment apply to action by House to enforce congressional subpoena, rejecting argument that action was

presumably retain the power to imprison contemnors[227] (a power that neither House has exercised in some three-quarters of a century).[228] But that power is surely not the power to undertake a federal criminal prosecution. No trial (or appeal) precedes the imprisonment, and no judge enters a verdict or sentence.[229] Indeed, the power to imprison a contemnor is limited to the term of the House of Congress in question, with release mandated upon the House's adjournment.[230] In short, neither practice nor precedent suggests any standing on the part of a House of Congress to exercise the federal criminal prosecutorial power.[231]

IV. CAPACITY OUTSIDE THE EXECUTIVE BRANCH TO ARGUE APPEALS IN FEDERAL CRIMINAL PROCEEDINGS

In this Part, I discuss the possibility that an actor other than the executive branch might have capacity to appeal an adverse ruling against the DOJ in a criminal proceeding where the DOJ declines to pursue an appeal. As in the previous Part, I consider the possible appellate capacity of (i) a private actor, (ii) a court-appointed attorney, (iii) a state, and (iv) a House of Congress. But a few preliminarily notes are in order.

First, pursuant to the Double Jeopardy Clause,[232] a judgment of acquittal is not appealable.[233] This prohibition applies equally to the DOJ or any other

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related to Office of Special Counsel criminal investigation). *But see* Kilbourn v. Thompson, 103 U.S. 168, 190 (1880) ("Whether the power of punishment in either House by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire . . . .").

A federal statute makes it a federal crime for someone duly summoned to refuse to provide testimony or documents to Congress. 2 U.S.C. § 192. But the Court has explained that this statute makes such action an offense against the United States *in addition* to an offense against Congress. *See In re* Chapman, 166 U.S. 661, 671 (1897) ("The refusal to answer pertinent questions in a matter of inquiry within the jurisdiction of the senate, of course, constitutes a contempt of that body, and by the statute this is *also* made an offense against the United States." (emphasis added)).

227. *See Anderson*, 19 U.S. at 230–31.

228. *See* Brian Wanglin, Note, *Reclaiming Congress's Contempt Powers over the Executive*, 15 GEO. J.L. & PUB. POL'Y 457, 463 & n.29 (2017) (citing authorities to the effect that the last such occurrences were in the 1930s and 1940s).

229. Relief for those subject to imprisonment can come by means of a petition for writ of habeas corpus. *See, e.g.*, *McGrain*, 273 U.S. at 150. The Court has indicated that relief might be forthcoming where either Congress goes beyond its proper investigatory powers or operates "without due regard to the rights of witnesses." *Id.* at 175–76.

230. *See Anderson*, 19 U.S. at 231.

231. *See generally* Peterson, *supra* note 225 (discussing the limits of the federal prosecutorial power).

232. U.S. CONST. amend. V.

233. *See, e.g.*, Ball v. United States, 163 U.S. 662, 669–70 (1896).

party seeking to hold the defendant in further jeopardy.[234] To the extent the discussion here is of appeals of rulings adverse to the DOJ, it is of that subset of rulings that are appealable.

Second, just as a plaintiff needs standing to commence a lawsuit, so too does an appellant need appellate standing to pursue an appeal.[235] While standing to sue on a claim turns on the plaintiff's relationship to the claim(s) the plaintiff is advancing, standing to appeal turns on the appellant's relationship to the issue(s) to be appealed.[236] As a leading treatise puts it, "the focus shifts to injury caused by the judgment rather than injury caused by the underlying facts."[237]

The distinction between standing to commence a lawsuit and standing to appeal means that the posture of a lawsuit may provide standing to a party to pursue an appeal where that party would not have had standing to initiate the lawsuit: The ruling appealed from could impose an injury on the appellant.[238] In the settings under study here, if a party other than the DOJ had standing to bring a federal criminal prosecution (which, as discussed in the previous Part, would be unlikely but possible in a few limited circumstances), then that party would likely have standing to pursue a viable appeal of a judgment against it.[239] More importantly, a party other than the DOJ conceivably might have standing, as an intervenor, to appeal a judgment adverse to the DOJ that the DOJ decides not to appeal.[240]

Third, and conversely, the fact that a party intervened (or could have intervened) in a case at the trial level does not mean that the party should have standing to pursue an appeal independently as an intervenor.[241] Indeed, intervening in a case with two currently adverse parties may not implicate

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234. *See* Tibbs v. Florida, 457 U.S. 31, 41 (1982) ("[T]he Double Jeopardy Clause attaches special weight to judgments of acquittal. A verdict of not guilty . . . absolutely shields the defendant from retrial." (footnotes omitted)).

235. 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3902 (2d ed. 2020); *see* Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1951 (2019) ("[T]o appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing.").

236. *See* Joan Steinman, *Shining a Light in a Dim Corner: Standing To Appeal and the Right To Defend a Judgment in the Federal Courts*, 38 GA. L. REV. 813, 838 (2004).

237. 15A WRIGHT ET AL., *supra* note 235, § 3902.

238. *See, e.g.*, ASARCO Inc. v. Kadish, 490 U.S. 605, 617–24 (1989) (explaining that while standing did not exist for plaintiff to have brought case in federal court in the first instance, petitioners had standing to appeal state court ruling to the Supreme Court insofar as petitioners could successfully "allege a specific injury stemming from the state-court decree, a decree which rests on principles of federal law").

239. *See* 15A WRIGHT ET AL., *supra* note 235, § 3902.

240. *Id.* § 3902.1.

241. David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 727 (1968).

Article III at all[242] (provided the intervenor does not seek independent relief).[243] But to pursue an appeal on its own, the intervenor must be adverse to the would-be appellee (or at least must rely upon continued adversity, despite the DOJ's position, between the DOJ and the defendant) and must have suffered its own particularized harm by virtue of the decision below.[244]

A. Appeal by a Private Party

The same constraints that standing and the Take Care and Appointments Clauses impose on a private party seeking to pursue a prosecution in federal district court would apply in the context of a private party seeking to appeal.[245] In general, moreover, it is unclear how the resolution of the case adversely to the DOJ (and therefore also to the aggrieved) could impose any additional particularized injury upon the private party.

That said, some lower courts have recognized the constitutional standing of crime victims to appeal criminal restitution orders,[246] and of qui tam relators who brought to light behavior that prompted federal criminal charges to intervene and appeal adverse judgments in federal criminal forfeiture proceedings.[247] While no court seems to have recognized statutory authorization to proceed further in either category of cases,[248] to the extent

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242. *Id.* at 753–54 ("Adding *C* to a litigation between *A* and *B* may pose no problems under article III of the Constitution, but permitting *C* to be the sole adversary of *B* on appeal, when his interest in the case may be only in its value as precedent, certainly does give difficulty since there is no real controversy between *A* and *C*.").

243. Town of Chester v. Laroe Ests., Inc., 137 S. Ct. 1645, 1651 (2017) ("[A]n intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests.").

244. *See* Diamond v. Charles, 476 U.S. 54, 68–71 (1986); *see also* Caleb Nelson, *Intervention*, 106 VA. L. REV. 271, 293–94 (2020) (identifying lower court decisions that conflate the ability to intervene at the trial level with the ability to pursue an independent appeal of an adverse judgment and characterizing them as "exceptionally odd").

245. *See supra* Part III.A.

246. *Compare* United States v. Kovall, 857 F.3d 1060, 1065–68 (9th Cir. 2017) (holding that victim has Article III standing to appeal restitution order under Mandatory Victims Restitution Act), *with* United States v. Stoerr, 695 F.3d 271, 277–78 (3d Cir. 2012) (holding that victim lacks Article III standing to appeal a restitution order).

247. *Compare* United States v. Couch, 906 F.3d 1223, 1226–27 (11th Cir. 2018) (holding that qui tam relator had constitutional standing to intervene in federal criminal forfeiture proceeding), *with* United States v. Van Dyck, 866 F.3d 1130, 1134 (9th Cir. 2017) (holding that qui tam relators did not have standing to intervene in federal criminal forfeiture proceeding where they "ha[d] not established a right to a share of the proceedings" but "simply assert[ed] an unliquidated, undetermined, and speculative interest in the forfeited money").

248. *See Kovall*, 857 F.3d at 1068–70 (holding that victim lacks statutory authorization to appeal restitution order); *Couch*, 906 F.3d at 1227–29 (holding that qui tam relator lacks statutory authorization to appeal).

that lower courts are correct that there is constitutional standing, that would open the door for Congress to extend standing as it saw fit.

B. Appeal, and Defense Against an Appeal, by a Court-Appointed Attorney

There are a few scenarios under which a court-appointed attorney can pursue appeal or defend against a criminal defendant's appeal. First, consider the setting where the district court has appointed a special prosecutor to pursue a prosecution in the DOJ's stead.[249] That special prosecutor presumably has the authority to continue to appeal—or oppose the defendant's appeal before the federal court of appeals.[250]

But a special prosecutor does not, it seems, have authority to pursue Supreme Court review of an adverse appellate court ruling or to respond to the criminal defendant's attempt to invoke Supreme Court review. The Judicial Code provides: "Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court . . . in which the United States is interested."[251] The Supreme Court in *United States v. Providence Journal Co.* held that this provision precluded a court-appointed special prosecutor attorney from appealing the dismissal of criminal contempt charges before the Supreme Court without the permission of the Attorney General and Solicitor General.[252] After the federal court of appeals reversed the district court's criminal contempt conviction, the special prosecutor sought, but was denied, permission from the Solicitor General to petition the Supreme Court for a writ of certiorari.[253] The special prosecutor nevertheless filed a petition, which the Court initially granted.[254] But the Court then dismissed the petition, reasoning that the case was one "in which the United States [was] interested"; the statutory language was not limited to the interests of the executive branch.[255] Moreover, as the Court noted, its holding did "not interfere with the Judiciary's power to protect itself" since

249. *See supra* Part III.B.

250. United States v. Arpaio, 887 F.3d 979, 981 (9th Cir. 2018) ("A private attorney appointed under [Federal Rule of Criminal Procedure 42(a)(2)] has the authority to act as a special prosecutor not only in the district court but also in the court of appeals.").

251. 28 U.S.C. § 518(a). The provision also applies to litigation before the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit, and the U.S. Court of International Trade. *See id.*

252. 485 U.S. 693, 698–700 (1988).

253. *Id.* at 698.

254. *See id.* at 698–99.

255. *Id.* at 700–07.

"members of the Judiciary had [already] decided that the District Judge erred in adjudging the defendants in contempt"; as such, "the necessity that required the appointment of an independent prosecutor ha[d] faded and, indeed, [wa]s no longer present."[256] Thus, absent the Solicitor General's assent, the special prosecutor could not proceed.[257]

While the Court's *Providence Journal Co.* decision precludes a court-appointed attorney from independently appealing a case to the Supreme Court, it does not preclude a court-appointed attorney from *defending* a lower court decision against appellate challenge by a criminal defendant. Once the lower courts have concluded that a judgment of criminal contempt is appropriate, and the Solicitor General "declines to authorize a defense of the judgment" below, then, if the statute "prevented the special prosecutor from proceeding, the independent ability of the Judiciary to vindicate its authority might appear to be threatened."[258] The Court concluded, however, any such threat was "inconsequential": The Supreme Court—"a part of the Judicial Branch"—retains "discretion to review the judgment below, and it is well within this Court's authority to appoint an *amicus curiae* to file briefs and present oral argument in support of that judgment."[259]

Second, consider the setting where a federal court has ruled in favor of the DOJ against a criminal defendant, but upon the criminal defendant's appeal, the DOJ declines to defend the judgment of the court below. If the court below is the federal court of appeals, then the reasoning of *Providence Journal Co.* would permit the Supreme Court (if it chose to review the case) to name an attorney amicus curiae to argue in favor of the judgment. Indeed, the Court has pursued such a course in a few criminal cases in recent years,[260]

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256. *Id.* at 702–03.

257. *Id.* at 699 & n.5.

258. *Id.* at 703.

259. *Id.* at 703–04.

260. *See* Dorsey v. United States, 567 U.S. 260, 272 (2012) (appointing attorney amicus curiae to argue in favor of lower court's conclusion that Fair Sentencing Act's more lenient minimum sentence did not apply to crimes committed before the Act's effective date, even where sentence was handed down after that date); Pepper v. United States, 562 U.S. 476, 487 & n.7 (2011) (appointing attorney amicus curiae to argue in favor of lower court's conclusion that, when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's post-sentencing rehabilitation); Dickerson v. United States, 530 U.S. 428, 441 & n.7 (2000) (appointing attorney amicus curiae to argue in favor of lower court's conclusion that, despite *Miranda v. Arizona*, 384 U.S. 436 (1966), federal statute allowing into evidence voluntary statements by criminal defendants was constitutional).

The Court also appointed private attorneys to defend lower court judgments against challenge by convicted criminals where the DOJ declined to do so in *Clay v. United States*, 537 U.S. 522, 526 n.2 (2003); *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016); and *Beckles v. United States*, 137 S. Ct. 886, 892 (2017). But these were post-conviction challenges under 28 U.S.C. § 2255 (i.e., habeas challenges) and thus technically civil actions, not criminal proceedings.

including *Holguin-Hernandez v. United States*.[261]

On the other hand, the Judicial Code's restriction on obtaining the Attorney General and Solicitor General's permission applies only to litigation before the Supreme Court.[262] Thus, if the decision below is that of a district court, and the case is pending before the federal court of appeals, then the court of appeals should be able to proceed by naming a special prosecutor to argue in favor of the district court's judgment. The Ninth Circuit took this tack in the *Arpaio* case.[263]

Unlike an appeal by a purely private prosecutor, an appeal advanced by an attorney amicus curiae in a case such as this does not raise Article III standing concerns. This is because, even though the DOJ will not argue against the criminal defendant at this juncture in the case, the DOJ nevertheless remains a party with interests adverse to the defendant (insofar as the DOJ has chosen not to drop the case but instead awaits the courts' ruling).[264] Also, an attorney amicus curiae does not pose Take Care Clause or Appointments Clause concerns, since the attorney is not a prosecutor acting in the stead of the DOJ.[265]

C. Appeal by a State

Consider first the possibility of an appeal by a state where the state would have had standing to commence a federal criminal prosecution. As discussed above, the "best case" for such a scenario is a case where the alleged criminal behavior takes place out-of-state with harm inflicted in-state.[266] To whatever extent that argument for standing holds water, the same Take Care and

261. *See supra* text accompanying notes 22–27.

262. *See supra* note 251 and accompanying text.

263. *See supra* text accompanying notes 13–22.

264. *See* United States v. Brainer, 691 F.2d 691, 692–93 (4th Cir. 1982) (appointing amicus counsel to defend lower court criminal conviction, reasoning that the court "acquired jurisdiction when Brainer filed his notice of appeal," and that "the government's subsequent change of position neither mooted the case nor otherwise transformed it into something less than a case or controversy"); *cf.* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2196 (2020) ("[A] lower court order that presents real-world consequences for the Government and its adversary suffices to support Article III jurisdiction—even if 'the Executive may welcome' an adverse order that 'is accompanied by the constitutional ruling it wants.'" (quoting United States v. Windsor, 570 U.S. 744, 758 (2013))). For discussion of *Windsor*, see *infra* text accompanying notes 302–307.

265. In contrast, where the conviction that the DOJ has chosen not to defend is one for criminal contempt, under *Young* the appellate court can draw upon its inherent authority to appoint a special prosecutor much as a trial court can. *See supra* Part III.B.2; United States v. Arpaio, 887 F.3d 979, 981–82 (9th Cir. 2018) (appointing special prosecutor to defend conviction against challenge by convict who received presidential pardon where the DOJ would not).

266. *See supra* text accompanying notes 208–214.

Appointments Clause arguments that limit the state's ability to prosecute at the trial level would doubtless limit the state's ability to intervene and appeal.[267]

There is, however, a scenario under which a lower federal court's adverse ruling might inflict an additional, arguably particularized, harm on a state such that the state might have standing to appeal as an intervenor: In ruling in favor of the criminal defendant, the lower court judgment might invalidate a provision of *state* law, and the state might then have standing to appeal that conclusion. Indeed, that was the holding in the Court's 1986 decision in *Maine v. Taylor*.[268]

The defendant in *Taylor* was charged by federal prosecutors with violating a federal statute that criminalizes the importation of fish in violation of governing state importation statutory restrictions.[269] The defendant moved to dismiss the indictment on the ground that the federal criminal statute incorporated a state statute that was unconstitutional under the Commerce Clause.[270] With the constitutionality of a state statute now at issue, the state of Maine opted to intervene in the criminal case.[271] After the district court denied the defendant's motion, the defendant entered a guilty plea conditioned only on the possibility that he might win an appeal contesting the constitutionality of the underlying state statute.[272] The United States Court of Appeals for the First Circuit reversed, finding the Maine statute unconstitutional.[273] When the federal government decided not to pursue Supreme Court review,[274] Maine, as intervenor, appealed to the Supreme Court.[275] The Court upheld Maine's standing to pursue the appeal, reasoning, "Maine's stake in the outcome of this litigation is substantial: if the judgment of the Court of Appeals is left undisturbed, the State will be bound by the conclusive adjudication that its import ban is unconstitutional."[276]

The reasoning of the *Taylor* Court on the question of standing leaves much to be desired. [277] While the Court was surely correct that "a State clearly has a legitimate interest in the continued enforceability of its own statutes,"[278] it

267. *See supra* text accompanying notes 197–198.
268. 477 U.S. 131, 136–37 (1986).
269. *Id.* at 132–33.
270. *Id.* at 133.
271. *Id.*; *see* 28 U.S.C. § 2403(b).
272. *Taylor*, 477 U.S. at 133.
273. *Id.*
274. The DOJ initially filed an appeal but then withdrew it. *See id.* at 136 & n.5.
275. *Id.* at 133; *see* § 1254(2) (repealed 1988) (allowing appeal as-of-right to the Supreme Court where a court of appeals ruled against a party by invalidating a state statute).
276. *Taylor*, 477 U.S. at 137.
277. The Court proceeded to reverse the court of appeals on the merits. *See id.* at 137–52.
278. *Id.* at 137.

is far from clear that Maine would indeed have been "bound" by the First Circuit's invalidation of its statute.[279] First, if Maine was indeed merely an intervenor and not a full-fledged party to the lawsuit, then the state would not have been bound by the First Circuit's holding[280] (unless, as seems unlikely, the First Circuit issued a non-party injunction against enforcement of the Maine statute).[281]

Neither, moreover, would the First Circuit's opinion have substantially constrained Maine as a matter of precedent. Maine would ordinarily bring a criminal prosecution for a violation of its own criminal statute in a Maine state court.[282] And, under the federal-state judicial hierarchy, Maine state courts are not bound by decisions of the First Circuit.[283] To be sure, Maine's state courts might be persuaded by the First Circuit's reasoning, in which case the issue would be settled (without the need for Supreme Court intervention). Alternatively, the Maine state courts might opt to follow the First Circuit's holding in the future, reasoning that any defendant convicted under the state law in question would petition for federal habeas relief and that, since the First Circuit's holding would govern there, why bother to buck the First Circuit? Still, were that to happen, the state would have *two* opportunities for Supreme Court review with proper standing: once on direct review and a second time on habeas review. Finally, the state courts might in fact disagree with the First Circuit on the constitutionality of the state statute, setting up a split of authority that well might invite Supreme Court review. In short, had

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279. *See id.*

280. *See* Robert A. Mikos, *Standing for Nothing*, 94 NOTRE DAME L. REV. 2033, 2043 (2019) ("[I]f a lower federal court indeed finds that state law is preempted or unconstitutional, the state would not be bound by that judgment if it were not a party to the case."); *id.* at 2046 (noting that the *Taylor* Court's assertion that Maine could not enforce its law in its state courts were the decision left unappealed "would not be accurate if Maine really had been only an intervenor").

281. On the topic of non-party injunctions, see Jonathan Remy Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 NOTRE DAME L. REV. 1985, 1989 (2019). Non-party injunctions—today, the subject of much controversy under the guise of "nationwide injunctions"—did not use to be so popular. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 437–44 (2017).

282. *See supra* Part II.B.

283. *See* Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("[N]either federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."); Mikos, *supra* note 280, at 2043–44 (stating that a "state court . . . is not bound by lower federal court judgments concerning the validity of state laws"); *cf.* Tafflin v. Levitt, 493 U.S. 455, 464–65 (1990) (upholding concurrent state and federal jurisdiction over *civil* RICO claims, despite the exclusive jurisdiction of the federal courts over *criminal* RICO claims, since "federal courts . . . would retain full authority and responsibility for the interpretation and application of federal criminal law, for they would not be bound by state court interpretations of the federal offenses constituting RICO's predicate acts").

the First Circuit's decision stood, it is not at all clear that the Maine state courts would have followed the First Circuit; moreover, Maine would have had standing to pursue higher review had the Maine courts decided to side with the First Circuit.

Second, even if Maine were akin to a true party to the lawsuit (again assuming there was no non-party injunction), a non-party—i.e., a future criminal defendant—probably could not have invoked the First Circuit's opinion (or the district court's order on remand under the First Circuit's mandate) to enjoin Maine from enforcing its own statute. One might argue that subsequent criminal defendants could use the court's judgment as a shield to prosecution by relying on defensive issue preclusion (or that would-be defendants could try to obtain affirmative relief against the state by relying on issue preclusion offensively).[284] However, the Supreme Court has held that nonmutual collateral estoppel does not apply to the federal government,[285] and there is authority among the federal courts of appeals extending that holding to state governments.[286] If that is true, then the federal court judgment would be entirely unavailing to nonparties. Moreover, even if states are generally subject to nonmutual collateral estoppel (or if one should read narrowly the Court's holding restricting the application of nonmutual collateral estoppel to governments,[287] or if the Court were to overturn that holding),[288] one can argue that it cannot be invoked in a setting of intervention where the state in fact lacks standing to appeal.[289] Put another

284. *See* Wooley v. Maynard, 430 U.S. 705, 711–12 (1977) (finding standing to bring action under 42 U.S.C. § 1983 to enjoin future criminal prosecutions under a plainly unconstitutional state statute under which the plaintiff had been convicted several times before).

285. *See* United States v. Mendoza, 464 U.S. 154, 160 (1984).

286. *See* Idaho Potato Comm'n v. G & T Terminal Packaging, Inc., 425 F.3d 708, 714 (9th Cir. 2005); Hercules Carriers, Inc. v. Fla., Dep't of Transp., 768 F.2d 1558, 1579 (11th Cir. 1985); *see also* Chambers v. Ohio Dep't of Hum. Servs., 145 F.3d 793, 801 n.14 (6th Cir. 1998) (noting support for the proposition, without ruling on the issue); Milton S. Kronheim & Co. v. District of Columbia, 91 F.3d 193, 205 (D.C. Cir. 1996) (Silberman, J., concurring) ("Collateral estoppel is not generally available against the federal government, and this rule may very well apply to the states." (citation omitted)).

The Second Circuit has allowed the use of nonmutual collateral estoppel against a state government. *See* Benjamin v. Coughlin, 905 F.2d 571, 576 (2d Cir. 1990). In that case, however, the state had previously litigated the pertinent issue before the state's high court on two previous occasions. *See id.* That was not the case in *Maine v. Taylor* and would ordinarily not be the case in such a setting.

287. For such an argument, see Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 98 (2019).

288. For an argument that the Court should do just that, see Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 20–37 (2019).

289. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28(1) (AM. L. INST. 1982) (allowing an exception to the usual rules of preclusion where "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action").

way, a strong argument can be made against justifying appellate state standing based on concerns that the state will be bound by an adverse lower court judgment where in fact the state would likely not be bound in any significant way were the conclusion instead that there is no appellate standing.

In closing, it is important to note that, even assuming *Maine v. Taylor* was correctly decided and remains good law, it provides only a narrow window for state standing to appeal a decision adverse to the DOJ.

D. Appeal by a House of Congress

The discussion in the preceding Part established that a congressional plaintiff will not have standing to pursue a federal criminal prosecution.[290] Are there any situations where a congressional actor can, by virtue of a decision adverse to the DOJ in a federal criminal case, suffer some type of particularized injury? The House of Representatives characterized the *Nagarwala* case as presenting such a setting, arguing that the district court's decision, combined with the DOJ's decision not to appeal, nullified a duly enacted congressional statute.[291]

The House's argument aligns to some degree with the argument I have advanced (and discussed above in the context of congressional standing to *commence* a federal criminal prosecution) that congressional plaintiffs should have standing in limited circumstances to challenge the executive branch's action (or inaction) where "the executive branch has acted so as to threaten permanent and substantial diminution in congressional bargaining power."[292] But there are two important limits *on* this argument. First, such standing is rightly limited to suits against the executive branch. It would not authorize suits (including criminal suits) against private parties.[293] Second, I have posited that the argument for congressional standing is stronger where the executive branch acts (i) in a way that results in a substantial change in the balance of power between the branches, and (ii) unilaterally (as opposed to acting in conjunction with other branches of government).[294]

In the setting at issue here, however, the executive branch would simply have declared its acquiescence in a court determination that a statute is

290. *See supra* Part III.D.
291. *See supra* text accompanying notes 28–39.
292. *See* Nash, *supra* note 223, at 339.
293. *See supra* note 223 and accompanying text.
294. *See* Nash, *supra* note 223, at 378–86.

unconstitutional.[295] As such, any long-term effect on the constitutional balance of power is low, and the action is hardly unilateral. Moreover, any concern that the DOJ's action effects a blanket exercise of prosecutorial discretion (thus frustrating Congress's implicit intent in delegating such discretion on the DOJ) is cabined by the fact that future administrations would be free to seek prosecutions under the statute.[296] No reliance rights are conferred on private actors by virtue of the DOJ's action, except to whatever extent the federal court decision remains as binding authority. And, even there, if the federal court decision is merely that of a district court, it is unlikely that the decision would preclude relitigation of the issue in the same district by a future administration seeking prosecution.[297] Moreover, if future federal courts came to the same conclusion—whether because they considered the earlier federal court decision binding or merely persuasive—higher courts (including the Supreme Court, as necessary) would remain free to weigh in on the issue.

Might *Maine v. Taylor* provide a basis for standing for a congressional party to pursue an appeal as an intervenor in a federal criminal appeal? Probably not. First, as I have discussed above, there are reasons to believe that *Maine v. Taylor* was wrongly decided.[298] If it was, then it provides no basis for congressional plaintiffs to assert standing on appeal.

Second, even accepting the reasoning and holding of *Maine v. Taylor*, there are strong reasons to think that a *state*'s standing to appeal a decision in a federal criminal case holding a *state* statute unconstitutional is far stronger than the analogous claim of *congressional* standing to appeal a decision in a federal criminal case holding a *federal* statute unconstitutional. After all, in a setting like *Maine v. Taylor* itself, the entity seeking to intervene and appeal the constitutionality of the statute—the state—is (based on the reasoning in

295. It is hardly uncommon for executive branch actors to acquiesce in lower courts' interpretations of statutes and regulations (although not their determinations of statutory constitutionality). *See, e.g.*, LESLIE BOOK & MICHAEL SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 3.04(5) (Thomson Reuters Checkpoint rev. 2d ed. 2019). For discussion and defense of the freedom *not* to acquiesce, see Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989); Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence*, 99 YALE L.J. 831 (1990).

296. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 935–37 (2018) (explaining that a statute remains on the books even after a court concludes it is unconstitutional); *cf.* Kay L. Levine, *The External Evolution of Criminal Law*, 45 AM. CRIM. L. REV. 1039, 1057–87 (2008) (discussing how statutory rape law evolved in many states from being a virtual "dead letter" to being revived in light of new prosecutorial agendas).

297. *See* Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1750 & n.13 (2008) (noting the limited recognition of horizontal stare decisis among federal district courts and even among district judges in the same district).

298. *See supra* text accompanying notes 280–289.

Maine v. Taylor itself)[299] precisely the entity that would be precluded from enforcing the statute in question if the case were to go unappealed.

In contrast, in the analogous setting, the House faces no prospect in the future of enforcing the federal criminal statute even if the district court decision is reversed. While (again on the reasoning of the Court in the case) the state in *Maine v. Taylor* faced future hurdles regarding enforcement of the state statute at issue,[300] the interest in a House of Congress extends solely to the constitutionality of the statute. Put another way, the affront in the vertical separation-of-powers context—visited upon the state executive branch by the federal executive branch declining to defend on appeal a state statute against constitutional challenge—is greater than the affront in the horizontal separation-of-powers context—visited upon the federal legislature by the federal executive branch declining to defend on appeal a federal criminal statute against constitutional challenge.[301]

A final consideration is the Supreme Court's opinion in *United States v. Windsor*, which provides some basis for Congress's standing to step into the shoes of the executive branch to defend a statute's constitutionality.[302] The *Windsor* Court relied upon the House of Representative's efforts to defend on appeal the constitutionality of the Defense of Marriage Act ("DOMA") after the Obama administration had conceded the statute's unconstitutionality.[303] But there the Court understood that a fundamental disagreement remained between the plaintiffs and the executive branch: While the executive branch agreed with the plaintiffs that DOMA was unconstitutional, it refused to pay the tax refund that the plaintiffs sought.[304] Thus, Article III standing rested on the ongoing dispute between the plaintiffs and the *executive branch*.[305] The Court relied upon the House's argument in favor of constitutionality in order to overcome prudential objections to

299. *See supra* text accompanying note 276.

300. *See supra* text accompanying note 276.

301. Congress itself seems to have recognized this logic when it drafted 28 U.S.C. § 2403 (the provision that allowed Maine to intervene in *Maine v. Taylor*). 477 U.S. 131, 136–37 (1986). In any case that draws into question the constitutionality of a state statute that addresses the public interest where the state is not already a party, the statute calls for a federal court to notify the state's Attorney General, not the state legislature, of that fact. § 2403(b). Analogously, notification of a challenge to a *federal* statute's constitutionality is to go to the *U.S. Attorney General*, not to Congress. *Id.* § 2403(a). *But see* Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1952 (2019) (noting that some states do empower their legislative bodies to "litigate on the State's behalf").

302. 570 U.S. 744 (2013).

303. *See id.* at 753–54, 761–63.

304. *Id.* at 754–55.

305. *See id.* at 756–59.

hearing the case;[306] indeed, the House made its argument solely in an amicus capacity, not as an intervenor.[307]

V. CAPACITY TO PROSECUTE STATE CRIMES IN FEDERAL COURT

In this Part, I consider the capacity of states—and private citizens—to pursue prosecutions of state crimes in federal court. While state criminal prosecutions are typically handled by the courts of the state, they can arrive in the federal courts in a couple of ways. The Supreme Court has (and has had since the First Judiciary Act of 1789) jurisdiction to review state court criminal proceedings.[308]

In addition, federal law has long allowed the removal of certain state criminal prosecutions to federal court. First, with antecedents dating back to 1815,[309] the current federal-officer removal statute allows for removal to federal district court of prosecutions brought in state court against federal officers for "any act under color" of their office.[310] Second, the civil rights removal statute—which dates back to Reconstruction-era statutes[311]—today provides for removal to federal district court of state court prosecutions "[a]gainst any person who is denied or cannot enforce in the [state] courts . . . a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof."[312] Last, a provision today allows members of the armed services facing state court

306. *See id.* at 759–63.

307. *See id.* at 754.

308. The First Judiciary Act required the Supreme Court to hear an appeal in any case decided by a state high court that denied a claim of federal right. *See* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87. The current statute confers on the Court jurisdiction to review, by writ of certiorari, a decision by a state high court that either denies or upholds a claim of federal right. *See* 28 U.S.C. § 1257.

Ironically, general Supreme Court review of *federal court criminal prosecutions* is a much more recent phenomenon. *See* Jonathan Remy Nash & Michael G. Collins, *The Certificate of Division and the Early Supreme Court*, 94 S. CAL. L. REV. (forthcoming 2021).

309. Collins & Nash, *supra* note 66, at 278.

310. 28 U.S.C. § 1442(a)(1). For a discussion, see Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2228–30 (2003).

While § 1442(a)(1) provides statutory subject-matter jurisdiction, constitutional subject-matter jurisdiction is grounded in Article III federal-question jurisdiction. *See* Tennessee v. Davis, 100 U.S. 257 (1879); Mesa v. California, 489 U.S. 121, 127–28 (1989) (construing *Davis*). Noting Article III concerns, the Supreme Court has read federal officer removal statutes to allow for jurisdiction only when there is a colorable federal defense to the state court proceeding. *See Mesa*, 489 U.S. at 129; Collins & Nash, *supra* note 66, at 281.

311. *See* Collins & Nash, *supra* note 66, at 282.

312. 28 U.S.C. § 1443(1).

prosecution to remove those cases to federal district court.[313] While the very thing that allowed the initial removal of a state court prosecution to federal district court often results in quick dismissal of the prosecution on immunity grounds,[314] still the prosecution must have representation in federal court.

Since the propriety of the state arguing a criminal appeal before the Supreme Court is clear, I focus my discussion here on two issues. The first is the prosecution by a state of a criminal case that has been removed to federal court. The second is the capacity of a private prosecutor to proceed in federal court (whether in a removed case or before the Supreme Court).

A. Prosecution by the State

When a state criminal prosecution is removed to federal court, the federal court adjudicates a cause of action that arises under state law (the criminal code violation).[315] As the framework of the line of cases beginning with *Erie Railroad Co. v. Tompkins*[316] would suggest,[317] the federal courts apply the

313. *Id.* § 1442a; *see also id.* § 1455 (providing procedural requirements for removal of state criminal prosecutions).

314. *See* Collins & Nash, *supra* note 66, at 281–82 ("[O]fficer removal may operate more as a mechanism to allow federal courts to resolve officers' federal defenses in state criminal prosecutions, often peremptorily."); *id.* at 282 ("[C]ivil rights removal has not provided much of an avenue for federal-court trials of state criminal cases, as opposed to providing immunity from prosecution altogether . . . .").

315. While the cause of action arises under state law, constitutional subject-matter jurisdiction is based on Article III's grant of federal-question jurisdiction. *See* U.S. CONST. art. III, § 2. The Supreme Court has held that constitutional federal-question jurisdiction over a case requires only the presence of a federal "ingredient." Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 823 (1824). In a criminal case removed to federal court, the federal ingredient must come (at least) from the nature or affiliation of the defendant, or from an assertion that the defendant will advance arguments grounded in federal law. *See Davis*, 100 U.S. at 262–71.

316. *See* 304 U.S. 64, 78–80 (1938) (holding that the Rules of Decision Act requires federal courts to apply state substantive law where it applies by its own terms).

317. The Court in *Hanna v. Plumer* explained that the *Erie* analysis should not be conducted "without reference to the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." 380 U.S. 460, 468 (1965). But neither of these aims seems particularly applicable in the context of state criminal prosecutions. The prosecutor never has a choice of forum, and only a select group of defendants will have such a choice. And, in light of the heavily limited universe of prosecutions that can go forward in federal court, concerns about the inequitable administration of the laws would seem minimal. Thus, perhaps the *Erie* analysis differs in the criminal, as opposed to the civil, context.

For a discussion of the application of *Erie* in the context of federal criminal prosecutions—including the difficulties courts have confronted and created in trying to apply *Erie*—see Wayne A. Logan, Erie *and Federal Criminal Courts*, 63 VAND. L. REV. 1243, 1255–67 (2010).

substantive law of the state but federal procedural law.[318] Consistent with the Court's holding in *Hanna v. Plumer*[319] (where the Court held that the Federal Rules of Civil Procedure presumptively apply in diversity cases),[320] the Federal Rules of Criminal Procedure thus presumptively govern state criminal trials in federal court.[321]

While constitutional protections that are not incorporated against the states are not automatically applicable in state-court prosecutions, they likely do apply in state criminal prosecutions removed to federal court. For one thing, on the civil side, the Supreme Court has held that constitutional provisions that do not by their terms apply in state court (like the Seventh Amendment right to a jury trial) *do apply* in diversity cases litigated in federal court.[322] For another, some Federal Rules of Criminal Procedure separately effectuate certain constitutional protections; the applicability of the Rules thus obligates federal courts to follow some constitutional requirements even if the

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318. *See* Arizona v. Manypenny, 451 U.S. 232, 241 (1981) (stating that "the federal court conducts the trial under federal rules of procedure while applying the criminal law of the State" in a criminal case brought under state law that is removed to federal court).

319. 380 U.S. 460. *Hanna* instructs that a federal court can refuse to apply a duly promulgated federal procedural rule "only if the Advisory Committee, this Court, and Congress erred in their *prima facie judgment* that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." *Id.* at 471 (emphasis added). These constraints are fairly minimal; essentially, a rule is sustainable if it is arguably procedural in nature. *See id.* at 472.

320. *Id.* at 463–64. The Court in *Hanna* considered the applicability of a rule of the Federal Rules of Civil Procedure. Those rules were promulgated under the Rules Enabling Act, 28 U.S.C. § 2072. While today § 2072 authorizes the promulgation of rules of procedure in civil *and criminal* actions, at the time the provision authorized the promulgation of procedural rules only in civil actions. *See Hanna*, 380 U.S. at 464. The Court has never had occasion to confirm that *Hanna*'s reasoning applies equally in the context of the Federal Rules of Criminal Procedure, though there is no reason to think otherwise. *Cf.* McInnis v. A.M.F., Inc., 765 F.2d 240, 244–45 (1st Cir. 1985) (using *Hanna*'s reasoning to conclude that the Federal Rules of Evidence presumptively apply in diversity cases).

321. *E.g.*, Arizona v. Files, No. CR13-00436-PHX-DGC, 2013 WL 4834024, at *2 (D. Ariz. Sept. 10, 2013) ("[T]his case will proceed under the Federal Rules of Criminal Procedure."); *see* FED. R. CRIM. P. 1(a)(1) ("These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States."); *id.* 1(a)(4) ("Although these rules govern all proceedings after removal from a state court, state law governs a dismissal by the prosecution.").

322. *See* Simler v. Conner, 372 U.S. 221, 222 (1963) ("[T]he right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions."); Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 185 (2000). Indeed, the Court has gone further, holding that, while "[a] State may . . . distribute the functions of its judicial machinery as it sees fit," nevertheless the federal courts should follow "the influence" of the Seventh Amendment, "if not [its] command." Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536–39 (1958).

Constitution itself does not mandate it.[323] Finally, the set of criminal constitutional protections that are not incorporated against the states is small, and—especially after the Court's 2020 decision in *Ramos v. Louisiana*, incorporating the Sixth Amendment's unanimous jury verdict requirement against the states[324]—the subset of those that reasonably might arise after case removal is smaller still.[325]

Having described the applicable choice-of-law in a removed state criminal prosecution, I turn next to the question of standing. As I have described above, state prosecutions are typically handled by state prosecutors. When these prosecutions are conducted in state court, standing is not an issue;[326] as the *Federal Practice and Procedure* treatise explains, "There can be no doubt whatever that in its own courts and under its own law, a state has standing to enforce broad concepts of the public interest against individual defendants, whether through criminal or civil proceedings."[327] The same conclusion would seem to apply equally to state criminal prosecutions in federal court.[328]

Just as a state has standing to pursue a state prosecution that has been removed to federal district court, so too ought it to have standing to pursue appropriate appeals within the federal judiciary. In *Arizona v. Manypenny*, the Court held that a state had a statutory right to appeal a federal district court's dismissal of criminal charges it had brought,[329] implicitly acknowledging the propriety of the state's appellate standing.

The conclusion that the state has standing to pursue a state criminal prosecution that has been removed to federal court should extend to all duly designated state governmental actors.[330] The Court in *Hollingsworth v. Perry* imposed a limitation on the state's freedom to designate agents,[331] but this

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323. For example, the common wisdom is that the Sixth Amendment's right to a jury selected from residents of the location of the crime has not been incorporated, *see* Caudill v. Scott, 857 F.2d 344, 345–46 (6th Cir. 1988), but the Federal Rules of Criminal Procedure call for the government to prosecute a case "in a district where the offense was committed," FED. R. CRIM. P. 18.

324. 140 S. Ct. 1390, 1397 (2020).

325. For example, the Fifth Amendment right to indictment by a grand jury has not been incorporated against the states. *See* Hurtado v. California, 110 U.S. 516, 538 (1884). But of course a state criminal case cannot be removed until after indictment.

326. *See supra* text accompanying notes 104–107.

327. 13B WRIGHT ET AL., *supra* note 106, § 3531.11.1.

328. To be sure, the *Federal Practice and Procedure* treatise suggests otherwise, stating that "[t]his conclusion does not transfer readily to federal courts." *Id.* Subsequent discussion indicates, however, that the treatise authors mean to refer more to the question of *jurisdiction* (which often will be a barrier to state actors pursing relief in federal court) than standing (which will not). *See id.*

329. 451 U.S. 232, 250 (1981).

330. *See* Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1951 (2019).

331. 570 U.S. 693, 705–07 (2013).

limitation would not restrict a state from designating a *state governmental actor* from assuming federal court criminal case representation. *Hollingsworth* involved a federal constitutional challenge to a California state constitutional amendment that had been enacted by ballot initiative under state law.[332] When the various California state and local officials named as defendants refused to defend the amendment (though they continued to enforce its terms), the official proponents of the initiative that begat the amendment intervened in the federal court case to defend it.[333] The Supreme Court found that the proponents' authority under state law to defend the amendment—which the California Supreme Court had confirmed in response to a certified question[334]—was insufficient to support standing.[335] The proponents had to show in addition that they had some "direct" or "personal" stake in the outcome of the litigation.[336] But they could not: While recognizing the special role the proponents played in enacting the amendment, once the proposition was approved by the voters, and the amendment was duly enacted, the proponents "ha[d] no 'personal stake' in defending [the amendment's] enforcement that is distinguishable from the general interest of every citizen of California."[337]

But *Hollingsworth*'s requirement of a personal stake does not apply to duly designated state government actors. The Court expressly distinguished the situation before it—where private actors sought to advance the state's interest in defending a law—from a setting where a duly designated *state governmental actor* advanced such an interest.[338] While private actors had to establish a personal stake above and beyond the mere defense of state law, a duly designated state governmental actor did not.[339] Thus, the state—acting through any duly designated state governmental actor—should have capacity to prosecute a state criminal proceeding that has been removed to federal court.

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332. *Id.* at 701–02. The state constitutional amendment provided that "[o]nly marriage between a man and a woman is valid or recognized in California." *Id.* at 701 (quoting CAL. CONST. art. I, § 7.5).

333. *Id.* at 702.

334. *Id.* at 702–03.

335. *Id.* at 715.

336. *Id.* at 705–07.

337. *Id.* at 707.

338. *See id.* at 709–10.

339. *See id.* at 702.

B. Private Prosecution

Recall that some states have authorized aggrieved individuals to maintain criminal prosecutions under limited circumstances.[340] Could such an aggrieved individual petition the United States Supreme Court for review of an adverse state court ruling? And could such an individual prosecute a criminal case in federal court (assuming the case were properly removed there)?

An initial question is whether state provisions authorizing private prosecutions have validity in federal court. Lower federal courts handling removed private prosecutions have applied the *Erie* analysis to uphold the effectiveness of such provisions: They are at least somewhat substantive in nature, and they do not conflict with any federal procedural rule.[341] Indeed, the federal courts have hosted a few removed private state prosecutions,[342] and appellate courts have accepted appeals by private prosecutors.[343] The one limitation they have placed on state-authorized private prosecutors is that, pursuant to the Supreme Court's *Young* opinion (or perhaps a more general Due Process Clause concern),[344] the private prosecutor can pursue only low-level criminal penalties[345] and introduce no intolerable conflict of interest.[346]

I turn next to standing. Provided that they were indeed personally aggrieved by the defendant's alleged conduct, private prosecutors would

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340. *See supra* text accompanying notes 108–109.

341. *See* New Jersey v. Kinder, 701 F. Supp. 486, 488–89 (D.N.J. 1988).

342. *See id.*; New Jersey v. Imperiale, 773 F. Supp. 747, 749 (D.N.J. 1991); New Jersey v. Bazin, 912 F. Supp. 106, 110 (D.N.J. 1995).

343. *See* New Mexico v. Dwyer, No. 95-2221, 1997 WL 8874, at *1 (10th Cir. Jan. 10, 1997).

344. *See supra* text accompanying note 163.

The *Young* Court rested its decision on its "supervisory authority" over the federal judiciary so that it could "avoid the necessity of reaching any constitutional issues." Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 809 n.21 (1987). As such, the holding is not directly binding on the state courts. But it would be binding precedent in a case pending in federal court—even a state prosecution that originated in state court. *See Imperiale*, 773 F. Supp. at 756 ("relying on this court's inherent authority to control who may appear before it and this court's inherent authority to disqualify overzealous prosecutors and interested prosecutors plagued by an intolerable conflict of interest" to disqualify the private prosecutor); *id.* at 757–58 (deciding, upon motion for reconsideration and receipt of additional information, that the court's "supervisory power" did not warrant per se removal of private prosecutor at that stage).

State courts, of course, may impose their own conflicts-based limitations on private prosecutions. *See* State v. Storm, 661 A.2d 790, 794–96 (N.J. 1995); *Bazin*, 912 F. Supp. at 109–12 (discussing both *Young* and *Storm* before ultimately allowing private prosecutor to proceed).

345. *See Kinder*, 701 F. Supp. at 490 (distinguishing *Young* on the ground that "the defendants in [*Young*] were given sentences ranging up to five years, far exceeding the maximum exposure for a disorderly persons offense which is the subject of the present case").

346. *See Imperiale*, 773 F. Supp. at 749–56.

seem to satisfy *Hollingsworth*'s requirement that they have a personal stake in the outcome of the criminal litigation.[347]

Potentially problematic for private criminal plaintiffs' standing is the Court's assertion in *Linda R.S. v. Richard D.* that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[348] As I have discussed above, however, that case and its holding can be read more narrowly to preserve standing to pursue private criminal prosecutions.[349]

Also potentially problematic for private criminal plaintiffs' standing is an argument advanced by Chief Justice Roberts in an opinion—joined by three other Justices—dissenting from the Supreme Court's 2010 dismissal of certiorari as improvidently granted. *Robertson v. United States ex rel. Watson* involved a private criminal contempt prosecution under local D.C. law by a woman against her ex-boyfriend John Robertson for violation of a civil protective order she had obtained against him.[350] Robertson argued that the private prosecution violated a plea agreement into which he had entered with the U.S. Attorney's Office, the entity responsible for local prosecutions in the District of Columbia.[351] He pleaded guilty to an aggravated assault charge, and in return the U.S. Attorney's Office agreed to dismiss other charges and not to bring other charges arising out of the same incident.[352] When the local D.C. courts upheld Robertson's conviction under the private prosecution, Robertson sought review by the United States Supreme Court.[353] The Court initially granted review on the question of whether, in pursuing her private criminal prosecution, Watson acted in her own personal interest or instead on behalf of the government[354] but subsequently dismissed the writ of certiorari as improvidently granted.[355]

Writing in dissent from the dismissal of the writ of certiorari, Chief Justice Roberts argued that, whoever the prosecutor, criminal prosecutions only can be undertaken on behalf of, and as an exercise of the power of, the government.[356] Chief Justice Roberts conceded the historical practice of so-called private prosecutions but found their existence not inconsistent with

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347. *See supra* text accompanying note 336.
348. 410 U.S. 614, 619 (1973).
349. *See supra* text accompanying notes 125–135.
350. 560 U.S. 272, 273–74 (2010) (Roberts, C.J., dissenting from dismissal of certiorari).
351. *Id.* at 274.
352. *Id.*
353. *Id.* at 274–75.
354. *Id.*
355. *Id.* at 272 (majority opinion).
356. *See id.* at 275–83 (Roberts, C.J., dissenting from dismissal of certiorari).

the notion that they, like typical publicly administered prosecutions, are brought on the government's behalf.[357]

How might Chief Justice Roberts's argument in *Robertson* affect the viability of private prosecutors' standing in federal court? A broad reading of the argument that private prosecutions must be brought on the government's behalf could mean that a private prosecutor's standing must be understood to be derivative of the government's standing. While this would be of no moment to state court private prosecutions (at least to the extent that the state does not impose standing requirements analogous to those of Article III), one could imagine that, as a consequence, an aggrieved person's injury would not be relevant to the standing calculus for prosecutions maintained in the federal courts. To be sure, one might counter that, insofar as the private prosecutor's standing is derivative of the government's, the private prosecutor automatically has standing as a proper delegee of the government. But that argument proves too much, for then *any individual* could have standing to serve as a private prosecutor *in any case*, a conclusion that would seem to run afoul of *Hollingsworth*'s requirement that private actors designated by the state to represent state interests have some personal stake in the litigation.[358] Put succinctly, Chief Justice Roberts's argument can be read to bar a private prosecutor's Article III standing based on her personal injury and allow standing based on the authority conferred by the state, but then *Hollingsworth* would seem to preclude the latter form of standing, thus leaving the private prosecutor with no valid claim to Article III standing in federal court.[359]

At the same time, it is possible to read Chief Justice Roberts's argument more narrowly, in ways that preserve private prosecutors' standing based on their personal injury. One can read the argument simply not to implicate Article III standing. Beyond that, one can read the Chief Justice not to argue broadly that *all* prosecutions must be understood to have been brought on behalf of the government but instead more narrowly to express a simple

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357. *Id.* at 279.

358. *See supra* text accompanying note 336.

359. Some commentators have drawn upon a broad reading of the Chief Justice's argument—perhaps especially the point that it is difficult to square truly private prosecutors with certain obligations that the Constitution imposes on government prosecutors, *see supra* text accompanying note 117,—to draw into question the very viability of private prosecutions. *See* Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1355–56 (2015) ("[T]here could be due process issues with permitting ultimately unaccountable entities from criminally prosecuting individuals."); Dina Mishra, *An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law*, 68 VAND. L. REV. 1509, 1545–53 (2015) (relying in part on the Chief Justice's argument in *Robertson* to argue in favor of limits on the freedom of the executive branch to delegate authority to private parties, with particular bite in the area of criminal law enforcement).

preference for public over private prosecutors.[360] This narrower reading is certainly more consistent with the strong history of private prosecutions across the United States.

Finally, it bears emphasizing that, whatever its scope, the argument advanced by Chief Justice Roberts in *Robertson* is not the law. Indeed, the Court might take up a case similar to *Robertson* and issue a narrower holding.[361] In short, unless and until Chief Justice Roberts's argument is adopted by the Court, it seems that private prosecutors should enjoy standing to proceed in federal court.

VI. CONCLUSION

In this Article, I have considered the standing of individuals and governmental entities to prosecute crimes in the federal courts. With respect to federal crimes, I have argued that standing to initiate such proceedings is greatly circumscribed and that the Take Care and Appointments Clauses likely constrain any leeway that standing doctrine affords. Court-appointed attorneys do have capacity to pursue criminal contempt proceedings, but their capacity to proceed in other circumstances is surely circumscribed if it exists at all.

With respect to appeals of adverse decisions that the DOJ has decided not to undertake, I have questioned Supreme Court precedent that recognizes state standing under limited circumstances. I have argued further that, even if states sometimes enjoy appellate standing in federal criminal cases, Houses of Congress do not. Court-appointed attorneys can prosecute criminal contempt appeals and defend lower court judgments that the DOJ has declined to defend.

With respect to state crimes, states—represented by any state governmental entity duly so designated by state law—should have capacity to proceed in federal court. Individuals should be free to pursue private prosecutions of state crimes in federal court, provided state law would allow them to do so in state court and that the criminal case is properly in federal court.

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360. *See* Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1237 (2014) ("In the typical criminal case, punishments are justified by retribution and deterrence—and the government, not the victim, has the greatest stake in pursuing those generalized values.").

361. *See* Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1254 n.234 (2012) (characterizing the issue in *Robertson* as applying specifically to criminal contempt proceedings brought in a congressionally created court); Collins & Nash, *supra* note 66, at 298 (characterizing the dismissal of certiorari in *Robertson* as having left open "the ability of a private party to pursue a contempt proceeding when the government has chosen not to").