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No. 08-6261

In The
Supreme Court of the United States

JOHN ROBERTSON,

Petitioner,

v.

UNITED STATES *ex rel.* WYKENNA WATSON,

Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States.

LIST OF PARTIES

Petitioner captioned this proceeding *John Robertson v. United States ex rel. Wykenna Watson*, believing that the criminal contempt proceeding giving rise to this action could only have constitutionally been brought on behalf of the sovereign. The District of Columbia Court of Appeals held that Wykenna Watson, rather than the United States, was the real party-in-interest to the criminal contempt prosecution. The District of Columbia, through the Attorney General for the District of Columbia, participated in this litigation initially, maintaining that it represented Ms. Watson in her individual capacity. Ms. Watson now has private counsel. The United States filed a brief with this Court as *amicus curiae*.

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DECISIONS BELOW

The opinion of the District of Columbia Court of Appeals (Cert. Pet. App. A.) is reported at *In re John Robertson*, 940 A.2d 1050 (D.C. 2008). The order denying rehearing (Cert. Pet. App. B.) is unpublished.

STATEMENT OF JURISDICTION

The District of Columbia Court of Appeals denied rehearing in this case on June 13, 2008. (Cert. Pet. App. B.) Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §§ 1257(a) & (b).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner has set forth the constitutional and statutory provisions involved in this case in his Appendix.

PRELIMINARY STATEMENT

John Robertson was convicted of three counts of criminal contempt in the Superior Court of the District of Columbia for violating the terms of a civil protection order ("CPO"), despite a promise by the United States that he would not be prosecuted for the events which gave rise to the contempt convictions. The District of Columbia Court of Appeals concluded

that no plea breach had occurred, as in its view the criminal contempt proceeding had been maintained not in the name and pursuant to the power of the United States, but rather in the name and pursuant to the power of Ms. Wykenna Watson, the private party who had secured the CPO against Mr. Robertson. The lower court erred in concluding that a criminal contempt proceeding in a congressionally created court constitutionally can be brought in the name and pursuant to the power of a private individual. The judgment must be reversed.

STATEMENT OF THE CASE

On March 29, 1999, Petitioner John Robertson was charged by complaint in the Superior Court, Criminal Division, with one count of aggravated assault for an assault on Wykenna Watson, Mr. Robertson's girlfriend at the time. (J.A. 9.) On the same day, Ms. Watson filed a petition for a CPO against Mr. Robertson in the Superior Court, Family Division, pursuant to the District of Columbia Intrafamily Offenses Act, D.C. Code §§ 16-1001-1006 (1981 & 1998 Supp.). (J.A. 11-17.)

A hearing on the motion was held on April 26, 1999. At that time, an attorney from the Office of the

Attorney General for the District of Columbia[1] "enter[ed] an appearance on behalf of" Ms. Watson. (J.A. 18.)[2] At the conclusion of the hearing, the Family Division judge entered a CPO ordering, inter alia, that Mr. Robertson not contact, assault, threaten, harass, or abuse Ms. Watson. (J.A. 20.)

On July 8, 1999, a grand jury indicted Mr. Robertson for three counts of felony assault based on the March incident. (J.A. 26.) Just prior to the filing of the indictment, the Assistant United States Attorney ("AUSA") who was prosecuting the case extended Mr. Robertson a plea offer. (J.A. 50.) When Mr. Robertson's counsel called to accept, the AUSA informed counsel that he was withdrawing the plea offer in light of an incident that had occurred on June 26, 1999, involving another possible assault by Mr. Robertson on Ms. Watson. The AUSA indicated that he likely would seek an additional indictment against Mr. Robertson for the June 26th incident. (J.A. 50.)

After investigating the June incident, the AUSA decided that the United States would not seek additional charges against Mr. Robertson. (J.A. 51.)

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[1] In 2004, the name of the Corporation Counsel for the District of Columbia changed to the Attorney General. Petitioner uses the "Attorney General" title.

[2] At the time, the Attorney General was authorized by court rule to represent the petitioner whenever a petition for a civil protection order was filed. D.C. Super. Ct. Intra-Fam. R. 9(a)(2). This practice has since been codified by statute. *See* D.C. Code § 16-1003(b) (2001 & Supp.).

Instead, the AUSA re-extended the plea offer, this time promising that if Mr. Robertson entered a guilty plea to one count of attempted aggravated assault with respect to the March incident, the United States not only would dismiss the three indicted charges, but also would agree not to prosecute Mr. Robertson for the events of June 26, 1999. (J.A. 50-51.)

Mr. Robertson accepted this offer and on July 28, 1999, entered a guilty plea to one count of attempted aggravated assault. (J.A. 46.) Pursuant to the plea agreement, the United States dismissed the indicted counts relating to the March incident and promised that the government would not pursue any charges relating to the events of June 26, 1999. (J.A. 33-34.) The terms of the plea agreement were handwritten onto the standard Superior Court "waiver of trial" form, which was signed by the AUSA, counsel for Mr. Robertson, and the judge: "In exchange for Mr. Robertson's plea of guilty to attempted aggravated assault, the gov't agrees to: DISMISS the charges of Agg Assault, ADW knife, ADW. Not pursue any charges concerning an incident on 6-26-99. Reserves step-back & allocution." (J.A. 28.) The judge accepted Mr. Robertson's guilty plea and sentenced Mr. Robertson to a term of imprisonment of not less than one year and not more than three years in prison. (J.A. 53.)

Several months later, Ms. Watson, aided by the Attorney General, filed a "Motion to Adjudicate

Criminal Contempt" in the Family Division case. (J.A. 59.)[3] In her supporting affidavit, Ms. Watson enumerated five actions occurring on the evening of June 26th and into the early morning hours of June 27, 1999, which she alleged constituted violations of the CPO. (J.A. 56-57.)[4] Ms. Watson also filed a motion to modify and extend the CPO based on these events. (J.A. 61.)

On May 10, 2000, a bench trial commenced to resolve both the criminal contempt charges and the motion to modify and extend the CPO. (J.A. 2.) Ms. Watson was represented by an Assistant Attorney General for the District of Columbia throughout the proceeding. (J.A. 2.) At the conclusion of the trial, the Family Division judge adjudicated Mr. Robertson guilty of three of the five counts of criminal contempt for the events of June 26, 1999, acquitting him of two charges. (J.A. 2.) The judge thereafter entered a Criminal Judgment and Conviction Order, sentencing Mr. Robertson to three consecutive 180-day jail terms

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[3] In 1999, D.C. Code § 16-1005(f) (1981 & 1998 Supp.) provided: "Violation of any temporary or permanent order issued under this subchapter . . . shall be punishable as contempt." Court rule provided the penalty: "Contempt may be punished by a fine or penalty of not more than $300.00 or by imprisonment for not more than six (6) months, or both." D.C. Super. Ct. Intra-Fam. R. 12(e).

[4] Ms. Watson subsequently acknowledged in Superior Court that the actions that flowed from the evening of June 26, 1999, into the early morning hours of June 27th were encompassed in the "incident" that the government agreed not to pursue in the plea agreement. (Pet. C.A. App. 45.)

(execution of one count suspended), imposing a five-year period of probation, ordering him to pay court costs to a victim's compensation fund, and requiring him to pay $10,009.23 in restitution as a condition of probation. (J.A. 63-64.)[5]

Mr. Robertson filed an appeal from the judgment of criminal contempt. (J.A. 3.) While his appeal was pending, Mr. Robertson – represented by new counsel – filed a collateral motion to vacate his criminal contempt convictions. (J.A. 3.) In his collateral challenge, Mr. Robertson argued that his criminal contempt prosecution could only have lawfully been maintained in the name of the government, noting it is "beyond dispute that criminal contempt 'is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both.'" (Pet. C.A. App. 31 (citations omitted).) He contended that the prosecution of the contempt was a violation of the United States' agreement not to prosecute him for the events of June 26, 1999, and that in light of the plea breach, the Due Process Clause of the Fifth Amendment to the United States Constitution compelled the court to vacate his criminal contempt convictions. (Pet. C.A. App. 30-38.) He also contended that his trial counsel had been

[5] The judge also granted the motion to modify and extend the CPO. (J.A. 82.)

ineffective for failing to move to dismiss the criminal contempt charges on this ground.[6]

The Attorney General for the District of Columbia opposed the motion and argued that Mr. Robertson's criminal contempt prosecution had not violated the United States' plea agreement because the action had been maintained in the name and pursuant to the power of Ms. Watson in her "private capacity," rather than in the name and pursuant to the power of the United States. (Pet. C.A. App. 42-46.)[7] The Attorney General wrote that the Assistant Attorney General ("AAG") at the hearing had been representing Ms. Watson, and if the AAG "had determined that the case lacked merit, or for any other reason should not have proceeded, her only recourse would have been to request permission from the court to withdraw. The [AAG] could not have unilaterally dismissed the motion because it belonged to Ms. Watson." (Pet. C.A. App. 43-44.) The judge who had presided over the contempt trial denied Mr.

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[6] Appended to his motion was a declaration from trial counsel, in which counsel stated that his decision not to file a motion to dismiss "was not a strategic or tactical decision, as my client had every interest in avoiding criminal prosecution for an event that we believed was covered by the terms of his plea agreement." (J.A. 88.)

[7] The Attorney General noted that under the statutorily mandated division of prosecutorial authority in the District of Columbia, only the Office of the United States Attorney could have initiated a "government" prosecution for contempt. (Pet. C.A. App. 43 (citing D.C. Code § 23-101 (1981 & 1998 Supp.).))

Robertson's motion to vacate his convictions, agreeing with the Attorney General that the criminal contempt prosecution had been a "private right of action" and that Ms. Watson, as a "private petitioner," was "not bound by a plea agreement entered into by government prosecutors." (J.A. 89-93.) Mr. Robertson filed a notice of appeal, and the appeal from the collateral proceeding was consolidated with Mr. Robertson's direct appeal. (J.A. 4.)

Before the District of Columbia Court of Appeals, Mr. Robertson argued that an unbroken line of precedent from this Court established that criminal contempt prosecutions "are between the public and the defendant, and are not part of the original [civil] cause." (Pet. C.A. Br. 20-21.) He contended that the Council of the District of Columbia could not "abrogate th[is] fundamental constitutional principle." (Pet. C.A. Br. 28.) Because, in Mr. Robertson's view, his criminal contempt prosecution only could have lawfully been brought in the name and pursuant to the power of the United States, the prosecution constituted a breach of the plea agreement and due process required that his convictions be vacated. (Pet. C.A. Br. 34-35.)

The Attorney General filed a brief in opposition, again relying primarily on the argument that the contempt prosecution had been brought in the name and interest of Ms. Watson, rather than in the name

and interest of the United States. (Resp. C.A. Br. 14.)[8] During the course of the litigation, the court of appeals invited the views of the United States. (J.A. 5.) The United States filed a brief, contending that the contempt case brought against Mr. Robertson was a "private action for criminal contempt brought by Watson in her own name and interest" (U.S. C.A. Br. 21), and that "criminal contempt prosecutions under D.C. Code § 16-1005(f) may lawfully be conducted as private actions." (U.S. C.A. Br. 9.) It relied on local precedent to contend that "such prosecutions are constitutional." (U.S. C.A. Br. 4.) In the view of the United States, because the contempt prosecution had not been brought in the name or pursuant to the power of the United States, the plea agreement had not been breached. (U.S. C.A. Br. 5-6.)

In an opinion issued on January 24, 2008, the court of appeals affirmed Mr. Robertson's convictions. (Cert. Pet. App. A.) It concluded that § 16-1005(f) authorized the beneficiary of a civil protection order to bring a criminal contempt action in her own name, "rather than in the name of the sovereign." (Cert. Pet. App. A.15.) The court recounted that "Mr. Robertson describe[d] the contempt proceeding brought against him . . . as a 'criminal action,'" and that he "assert[ed]

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[8] Contrary to its position in the trial court, *see supra* n.7, the Attorney General argued that if the court concluded that the criminal contempt prosecution had not been brought in Ms. Watson's name, it should find that the action had been maintained in the name of the District of Columbia. (Resp. C.A. Br. 18.)

that such an action could only be brought 'in the name of the relevant sovereign,'" in this case "'the United States.'" (Cert. Pet. App. A.14.) The court found, however, "that Mr. Robertson's characterization of the proceeding against him lo[st] sight of the special nature of criminal contempt." (Cert. Pet. App. A.14.) Quoting from Justice Blackmun's dissenting opinion in *United States v. Dixon*, 509 U.S. 688, 742 (1993), the court stated that "criminal contempt is 'a special situation'" and a "'court [] enforcing obedience to its orders by proceedings for contempt [] is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.'" (Cert. Pet. App. A.14 (citations omitted).) The court therefore held that, under § 16-1005(f), "a criminal contempt proceeding is properly brought in the name of a private person . . . rather than in the name of the sovereign," and concluded that the action brought in Ms. Watson's "name and interest" was not barred by the United States' promise not to prosecute Mr. Robertson for the events of June 26, 1999. (Cert. Pet. App. A.15, 19.) The court denied en banc review. (J.A. 8.) On December 14, 2009, this Court granted Mr. Robertson's petition for a writ of certiorari. (J.A. 94.)

SUMMARY OF ARGUMENT

The Framers of our Constitution employed terms such as "crimes," "offenses," "criminal cases," and "criminal prosecutions" with the understanding,

grounded in both English and Colonial common law, that a "crime" is a "public wrong," "a breach and violation of the public rights and duties, due to the whole community, considered as a community, in it's [sic] social aggregate capacity." William Blackstone, 4 *Commentaries* *5 [hereinafter 4 *Commentaries*]. In England, the Crown was "in all cases the proper prosecutor for every public offense," 4 *Commentaries* *2; upon the Revolution, the United States became the proper prosecutor for every public offense against it. Therefore, at root, there are two parties to a criminal action in our system: the government and "the individual whom [it] seek[s] to punish." *United States v. Ortega*, 24 U.S. (11 Wheat.) 467, 469 (1826).

The Framers' assumption that criminal actions would be brought in the name of the sovereign is evident not only from the settled meaning circa 1787 of the concept of "crime," but further from the Framers' insistence that felonies be indicted by grand juries, offenses be amenable to pardon by the President, and persons not be subjected to jeopardy twice for the same offense. These required accoutrements of criminal actions under our Constitution are incompatible with the only historical action in the English common law whereby a private party actually could prosecute "crime" and obtain punishment in such party's own name: the anachronistic private "appeal of felony." In addition to being inconsistent with the procedural requirements placed by the Framers into the Constitution, the appeal of felony was in virtual disuse in England by the 1780s and – more importantly – apart

from one pre-Revolutionary case involving the hanging of a slave in Maryland, was "never adopted here." *State v. Gerry*, 38 A. 272, 273 (N.H. 1896). Our Constitution does not admit of a prosecution maintained in the name and power of a private person. Rather, as the text and history of the Constitution and this Court's jurisprudence demonstrate, a "crime" is a public wrong and a "criminal prosecution" may be constitutionally prosecuted only by the sovereign in whom the public has entrusted this power.

The same is true for criminal contempt, which is a "'crime in the ordinary sense.'" *United States v. Dixon*, 509 U.S. 688, 696 (1993) (citations omitted). Whether a contempt proceeding is criminal or civil depends on the "character and purpose" of the remedy imposed. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). Here, where Mr. Robertson was sentenced to multiple fixed terms of incarceration, the proceeding was most decidedly criminal. Criminal contempt, like all other crime, is a public wrong. "If such acts are not criminal, we are in error as to the most fundamental characteristics of crimes as that word has been understood in English speech." *Gompers v. United States*, 233 U.S. 604, 610 (1914). Because criminal contempt prosecutions are "crimes in the ordinary sense," brought to vindicate the authority of public institutions, they are necessarily brought on behalf of the sovereign; they are "between the public and the defendant." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. at 445. Since, as understood by the lower court, the criminal contempt

prosecution against Mr. Robertson was brought in the name and pursuant to the power of Respondent Wykenna Watson, the prosecution was "as fundamentally erroneous as if in an action of 'A vs. B, for assault and battery,' the judgment entered had been that the defendant be confined in prison for twelve months." *Id.* at 449. This Court's contempt jurisprudence demonstrates that a criminal contempt proceeding, as with any criminal action, must be brought in the name and interest of the sovereign.

This Court tolerates limited intrusions into traditional notions of separation of powers and due process in criminal contempt proceedings because of the doctrine of necessity. The criminal contempt power rests upon the need of public institutions to vindicate their authority. Because a court cannot be at the mercy of another branch of government when its dignity is at stake, it can appoint a private prosecutor to initiate a contempt proceeding when the Executive declines to do so. Such a system intrudes into traditional separation of powers principles, as does a criminal prosecution for violation of a judicial order, rather than a legislatively enacted code. Also, because courts must sometimes act quickly to quell disturbance or disrespect, some criminal contempt prosecutions proceed without traditional due process protections. But necessity is a limiting principle as well. Courts must exercise "*the least power adequate to the end proposed*." *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821). Here, Mr. Robertson was prosecuted for violation of a judicial order in a case

over which the Executive could exercise no control, after the Executive had demonstrated that it had no interest in prosecuting the case, by a private party who had no obligation to ensure "that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Such a prosecution, neither justified by the doctrine of necessity nor limited by the principle of restraint, does not comport with the Constitution.

ARGUMENT

I. THE HISTORY AND TEXT OF THE CONSTITUTION DEMONSTRATE THAT CRIMES ARE "PUBLIC WRONGS" AND THAT THE ONLY CRIMINAL PROCEEDING CONTEMPLATED BY THE CONSTITUTION IS ONE BROUGHT IN THE NAME OF THE SOVEREIGN.

A congressionally created court tried, convicted, and imprisoned Mr. Robertson for criminal contempt in a proceeding where a private person pursued a private cause of action on her own behalf. This was not the type of prosecution leading to criminal punishment envisioned by the Constitution. The many references in the Constitution to crimes, offenses, criminal cases, and criminal prosecutions[9] reflect

[9] *See, e.g.*, U.S. Const. art. III, § 2, cl. 3 ("Crimes"); *id.* at art. IV, § 2, cl. 2 ("Crime"); *id.* at amend. V ("crime"); *id.* at amend. VI ("crime"); *id.* at art. II, § 2, cl. 1 ("Offenses"); *id.* at

(Continued on following page)

settled common-law principles and definitions entirely familiar to the framing generation: crimes are public wrongs, visited with punitive sanctions for their violations and prosecuted by and in the name of the sovereign, which is considered the injured party in all criminal cases. The Constitution and the Bill of Rights constrain the exercise of governmental power in criminal prosecutions and rest on the axiomatic assumption that there are two parties in criminal prosecutions – the government and the person accused. The Constitution leaves no room for the exploitation of federal power to construct an alternative universe in which persons lose their liberty in criminal prosecutions of a type never contemplated by the Framers.

The "language of the Constitution . . . could not be understood without reference to the . . . common law, the principles and history of which were familiarly known to the framers of the Constitution." *Schick v. United States*, 195 U.S. 65, 69 (1904) (citations omitted). The Framers understood, as Blackstone explained, that in civil society, the individual's "right of punishing crimes against the law of nature" "is transferred from individuals to the sovereign power." 4 *Commentaries* *7-8; *see also* 2 John Locke, *Two Treatises of Government* 180-81 (12th ed. 1827) (1690) ("[E]very man who has entered into civil

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amend. V ("offence," "criminal case"); *id.* at amend. VI ("criminal prosecutions").

society, and [ha]s become a member of any commonwealth, has thereby quitted his power to punish offences against the law of nature, in prosecution of his own private judgment."). Crime, at that point, is properly understood as a breach of the public good.

The common-law commentators consistently described crime by reference to its public nature, often simultaneously contrasting it to its civil counterpart. Again, in Blackstone's words:

> The distinction of public from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in it's [sic] social aggregate capacity.

4 *Commentaries* *5. Lord Mansfield aptly described the general acceptance of Blackstone's famous formulation: "Now, there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions. Mr. Justice Blackstone and all modern and ancient writers upon the subject distinguish between them." *Atcheson v. Everitt*, (1776) 98 Eng. Rep. 1142, 1147 (K.B.).

Although crimes often result in "injury done to individuals," Blackstone explained that their essence was nonetheless public: "they strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity." 4 *Commentaries* *5. For example, "[m]urder is an injury to the life of an individual; but the law of society considers principally the loss which the state sustains by being deprived of a member, and the pernicious example thereby set, for others to do the like." *Id.* at *6. Put otherwise, the criminal law "secure[s] to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish, for the government and tranquility of the whole." *Id.* at *7.

The common-law definition of crime further turned on the type of relief or punishment attendant to criminal cases, again in contrast to its civil counterpart: criminal punishment by death, "fine," or "imprisonment," versus "civil satisfaction in damages" or injunctive relief. 4 *Commentaries* *6. Blackstone noted, for instance, that in the case of battery the King could indict "for disturbing the public peace" and punish the "aggressor" "criminally by fine and imprisonment"; the "party beaten," on the other hand, could have "his private remedy by action of trespass for the injury, which he in particular sustains, and recover a civil satisfaction in damages." *Id.* A century later, Stephen similarly contrasted civil remedies "imposed entirely for the sake of the injured party"

with criminal sanctions "consist[ing] in suffering imposed on the person disobeying . . . for the public, and at the discretion and by the direction of those who represent the public." 1 James F. Stephen, *A General View of the Criminal Law* 4 (London, Cambridge, MacMillan 1863).

Because crimes were "a breach and violation of the public rights and duties," 4 *Commentaries* *5, and the King was charged with protecting the public, criminal proceedings were conducted in the name of the sovereign, who "is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the proper prosecutor for every public offense." *Id.* at *2; *see also* Cesare Beccaria, *On Crimes & Punishments* 21 (Edward Ingraham, trans., 2nd Am. ed. 1819) (1764) ("[I]n this case there are two parties, one represented by the sovereign, who insists upon the violation of the contract, and the other is the person accused, who denies it."). As Blackstone explained:

> All offences are either against the king's peace, or his crown and dignity; and are so laid in every indictment. For, though in their consequences they generally seem (except in the case of treason and a very few others) to be rather offences against the kingdom than the king; yet, as the public, which is an invisible body, has delegated all it's [sic] power and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to that power and breaches of those

> rights, are immediately offences against him, to whom they are so delegated by the public.

William Blackstone, 1 *Commentaries* *258-59 [hereinafter 1 *Commentaries*]. Indictments received by the grand jury were "preferred to them in the name of the king," 4 *Commentaries* *300, and were invalid unless concluded with the phrase "against the peace of the King . . . ; because all crimes which are the subjects of a criminal prosecution, are injurious to public peace and order, and the injury done to the commonwealth is considered as done to the Sovereign." 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* *246 (1819); *see also* 6 *Encyclopedia of the Laws of England* 374 (A. Wood Renton, ed., 1898) (stating that words "against the peace of our Lady the Queen, Her Crown and dignity" reveal public nature of all crime). Similarly, the power to pardon offenses belonged to the Crown, because "it is reasonable that he only who is injured should have the power of forgiving." 1 *Commentaries* *259; *see also* 4 *Commentaries* *391.

American common law firmly embraced the principle that a crime is an offense against the sovereign and that suits are therefore brought in the name of the sovereign. *See, e.g.*, *Commonwealth v. Casey*, 94 Mass. (12 Allen) 214, 219 (1866) (Gray, J.) ("It is an axiom of public law . . . that 'every criminal prosecution must charge the offence to have been committed against the sovereign whose courts sit in judgment upon the offender, and whose executive may pardon him.'") (quoting 1 James Kent, *Commentaries on*

American Law 403 (6th ed.) (1826)); 1 Joel P. Bishop, *Commentaries on the Criminal Law* § 43 (2d ed. 1858) ("Criminal law treats of those wrongs which the government . . . punishes in what is called a criminal proceeding, in its own name."); 1 Emlin McClain, *A Treatise on the Criminal Law* § 4 (1897) ("A crime is an act or omission punishable as an offense against the state. . . . [I]n case of a crime, the state is deemed the injured party and punishes the wrong-doer [ ] in its own name."); 1 Francis Wharton, *Wharton's Criminal Law* § 10 (10th ed. 1896) ("Penal justice, therefore, is a distinctive prerogative of the State, to be exercised in the service [of] the State."). And many of the original Colonies made the public nature of criminal prosecutions an explicit feature of their State constitutions by incorporating the requirement that indictments read "against the peace and dignity" of the sovereign. *See, e.g.*, Del. Const. of 1776, art. 20 ("Indictments shall conclude, '*Against the peace and dignity of the State*'."); Md. Const. of 1776, § 57 (same); N.J. Const. of 1776, § 15 (same); N.C. Const. of 1776, § 36 (same); Pa. Const. of 1776, § 27 (same); S.C. Const. of 1790, art. III, § 2 (same); Va. Const. of 1776 (same); *see also* Vt. Const. of 1786, ch. 2, § 29 (same).

American acceptance of the axiomatic principle that crimes are public wrongs emerges in even bolder relief when viewed in tandem with the historical rejection of a close analogue to the type of private

criminal cause of action endorsed by the court of appeals in Mr. Robertson's case. The "appeal,"[10] a medieval-era mode of criminal prosecution, was a private suit that stemmed from the natural-law notion of private vengeance for *mala in se* acts. In his chapter on "Modes of Prosecution," Blackstone described presentments and indictments, which he characterized as "methods of prosecution at the suit of the king." 4 *Commentaries* *308. He continued:

> There yet remains another, which is merely at the suit of the subject, and is called an *appeal*. . . . An appeal . . . when spoken of as a criminal prosecution, denotes an accusation by a private subject against another, for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offense against the public.

Id. Thus, while prosecutions by indictment or presentment were public actions at the suit of the King, appeals were private actions grounded in notions of personal vengeance, historically settled through the decidedly personal and vengeful mechanism of "trial by battle." Raymond K. Berg, *Criminal Procedure: France, England, & the United States*, 8 DePaul L. Rev. 256, 265 (1959); *see also* 1 James F. Stephen, *A*

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[10] This action variously went by the names "appeals of felony," "appeals of murder," and "appeals of death." *See generally* William R. Riddell, *Appeal of Death & Its Abolition*, 24 Mich. L. Rev. 786 (1926).

History of the Criminal Law of England 245 (London, MacMillan 1883) [hereinafter Stephen, *History of the Criminal Law*] ("The history of appeals or accusations by a private person and trial by battle go together, as trial by battle was an incident of appeals.").

The appeal, a vestigial remnant of the "primitive conditions of society," Riddell, *supra* n.10 at 1, was in virtual disuse in England by the late eighteenth century. While Stephen explained that "the only appeals which can be said to have . . . formed a substantial part of the criminal procedure of [England] were appeals of murder," 1 Stephen, *History of the Criminal Law* at 248, he noted that even the appeal of murder virtually had ended in England by the late eighteenth century. *See id.* at 248-49. Blackstone felt constrained to describe appeals, but only while simultaneously noting that the practice was already then in virtual disuse: "As this method of prosecutions is still in force, I cannot omit to mention it: but as it is very little in use . . . I shall treat of it very briefly." 4 *Commentaries* *308.

Perhaps more important than its declining status in England at the time of the framing, the practice never took hold in the Colonies. *See generally Burns v. Reed*, 500 U.S. 478, 493 (1991) ("[I]t is American common law that is determinative."). Early jurisprudence in the States recognized the appeal of felony as an oddity of the English common law, never practiced after independence on this side of the ocean. *See Boston & W.R. Corp. v. Dana*, 67 Mass. (1 Gray) 83, 97-98 (1854) ("No one has ever heard of an appeal

of felony . . . in our courts. So far therefore as we know the origin of the rule and the reasons on which it was founded, it would seem very clear that it was never adopted here as part of our common law."); *State v. Gerry*, 38 A. 272, 273 (N.H. 1896) ("The English common law respecting appeals of murder and other crimes and its rule that one found guilty of a felony by the verdict of a jury in a civil cause might, without other accusation, be put on trial for the crime were never adopted here.") (citations omitted); *In re Presentment by Camden County Grand Jury*, 89 A.2d 416, 423-24 (N.J. 1952) (noting "no record of its use has been located" in New Jersey); *Barnet v. Ihrie*, 17 Serg. & Rawle 174, 214 (Pa. 1828) (Huston, J., dissenting) ("I think no one will say, that an appeal of murder or felony was ever in use in Pennsylvania, or that it can be, since the present constitution."); *Allison v. Farmers' Bank of Va.*, 27 Va. (6 Rand.) 204, 225 (1828) ("In all these respects, the policy and spirit of our Laws are the reverse of those of the English Laws. We have no appeal, in which the right to a civil action can merge."). The colorful words of a Pennsylvania court reflect American distaste for the private criminal suit:

> The old common-law right of prosecuting the higher felonies by appeal, which had sprung from a barbarous state of society, was left by our ancestors in the lumber garrets of the law at home. . . . These are not the days to encourage individuals, or the masses, to snatch the reins from the constituted organs of the government. . . . Astounding results

> proceed from small beginnings; and we have already beheld appalling scenes enacted in our commercial emporium with impunity, and almost without resistance, by men who took the law into their own hands in the name of the people.

Commonwealth v. Burrell, 7 Pa. 34, 39 (1847).[11]

This Court previously identified only a single instance of the appeal used here, a 1765 case in the Maryland province, *Soaper v. Negro Tom*, 1 H. & McH. 227 (Md. 1765), where under English law a private appeal of murder resulted in the hanging of a slave. *See Hurtado v. California,* 110 U.S. 516, 526 (1884). Notably, the private cause of action was subsequently deemed inconsistent with the Maryland Constitution. *See* William Kilty, *A Report of English Statutes* 141, 143, 158 (1811); *see generally Dashiell v. Attorney General*, 5 H. & J. 392 (Md. 1822) (relying on *A Report of English Statutes* to determine which English statutes were applicable in Maryland). In *Louisville, Evansville, & St. Louis R.R. Co. v. Clarke*, 152 U.S. 230 (1894), this Court described the English

[11] These words echo the sentiments of Montesquieu, who unfavorably compared the Roman practice of permitting "one citizen to accuse another," that led to "a pernicious tribe, a swarm of informers" with the more modern and "admirable law . . . by which the prince, who is established for the execution of the laws, appoints an officer . . . to prosecute all sorts of crimes in his name." 1 Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* 87 (Thomas Nugent trans., J.V. Prichard rev. 1914) (1748).

practice of the appeal, but recognized that "we do not in this country depend upon the injured party, or his representative, to institute criminal prosecutions." 152 U.S. at 235-36.

This critical understanding that all criminal prosecutions were brought on behalf of the sovereign was in no sense compromised by the practice, employed less frequently in the Colonies than it had been in England, of utilizing private individuals to represent the State in some criminal prosecutions. *See generally* Lawrence M. Friedman, *Crime and Punishment in American History* 29 (1993) ("The public prosecutor – a government officer in charge of prosecution – appeared quite early on this side of the Atlantic."). As in England, where "all prosecutions were formerly conducted on behalf of the crown by the privately retained counsel of private prosecutors," *King v. State,* 31 So. 254, 257 (Fla. 1901), in the circumstances where the practice of private prosecutions continued in the Colonies or States, such actions were brought in the name of and pursuant to the power of the sovereign. In importing the English private-prosecutor tradition to our legal system, American courts merely substituted the new world's sovereign – the "State" – for the old world's sovereign – "the Crown." *See, e.g.*, 31 So. at 257 ("The fact that [counsel] may have been retained by the prosecuting witnesses to prosecute the case does not render him ineligible to represent the interests of the state in such prosecution."); *Waldron v. Tuttle*, 4 N.H. 149, 151 (1827) ("[P]rivate individuals . . . have the power to prosecute in the

name of the state."). Thus, in *State v. Peabody*, 55 A. 323 (R.I. 1903), where Peabody had been privately prosecuted on a misdemeanor charge of failing to support his children and argued on appeal that the death of the private prosecutor had the effect of extinguishing his criminal conviction, the court soundly rejected his argument:

> The position taken by defendant's counsel that the death of the complainant operates as an abatement of the proceeding, is untenable. The state is the real party in all criminal prosecutions. . . . It is the peace and dignity of the state which has been violated in the commission of any crime or offense, and hence no one but the state can, in any true sense, prosecute the offender for such a wrong.

55 A. at 323.[12]

It is not possible to read the Constitution correctly, in particular its pervasive dependence on the

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[12] Modern cases in jurisdictions that permit private prosecutions also recognize that such actions are brought in the name of the sovereign. *See Rogowicz v. O'Connell*, 786 A.2d 841, 844 (N.H. 2001) ("Private attorneys appointed to prosecute [a criminal action] . . . represent the State."); *State v. Westbrook*, 181 S.E.2d 572, 583 (N.C. 1971) ("The prosecuting attorney, whether the solicitor or privately employed counsel, represents the State."), *vacated on other grounds*, 408 U.S. 939 (1972) (mem.); *Cronan ex rel. State v. Cronan*, 774 A.2d 866, 880 (R.I. 2001) ("Although they were privately employed [by the alleged victim to a domestic assault], the attorneys who prosecuted this case represented the state.").

concept of crime and its scrupulous attention to how the federal government's power to establish, prosecute, and punish crimes should be allocated among the branches of government and regulated in application to individual persons, without appreciating that the Framers believed that criminal prosecutions could only be brought on behalf of the sovereign. As this Court has often recognized, the Framers were "steeped in the common-law tradition of England. They read Blackstone, a classic tradition of the bar in the United States and the oracle of the common law in the minds of the American Framers." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 382 n.14 (1974) (citations and quotations omitted). The settled understanding of crimes as public wrongs prosecuted on behalf of the people as a whole is an axiom of our common-law heritage that limits and controls the interpretation of the words used in the Constitution. *See generally Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934). If the Framers had wanted "crimes" in the Constitution to encompass anything beyond the established definition at the time, surely they would have said so explicitly.

What the Framers did say explicitly was that our criminal prosecutions would be characterized by a right to grand jury indictment (in the case of felonies), executive pardon power, and protection against being put in jeopardy twice for the same offense, all features of a system of criminal justice that turns its face on the moribund English practice of appeals. Appeals, as Blackstone described them, were

alternatives to the "methods of prosecution at the suit of the king" – that is, public criminal actions by indictment or information. 4 *Commentaries* *308; *see also* 1 Stephen, *History of the Criminal Law* at 244 ("Since the Norman Conquest there have been . . . three modes of accusation, namely, appeal . . . by a private person, indictment . . . by a grand jury, and informations."). The Indictment Clause of the Fifth Amendment therefore is inconsistent with the possibility of federal private criminal rights of action in this country.[13]

Similarly, the Constitution grants the President the "Power to grant Reprieves and Pardons for Offenses against the United States," U.S. Const. art. II, § 2, cl. 1, whereas at English common law the King could "no more pardon [an appeal] than he c[ould] remit the damages recovered on an action of battery." 4 *Commentaries* *311; *see also* 1 Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, & Other Pleas of the Crown, & Criminal Causes* 236 (1797) ("[T]he king cannot pardon the defendant for the appeal is the suit of the party."). Also, an acquittal on an indictment did not bar an appeal of felony: "on the contrary, if [the

[13] Story's influential work on the Constitution discusses both indictments and informations, but makes no mention of the "appeal of felony," the only private criminal action known to our common-law tradition. *See* 2 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1780-1786 (Melville Bigelow ed., William S. Hein Co., 5th ed., 1994) (1833).

accused] made peace with the king, still he might be prosecuted at the suit of the party." 4 *Commentaries* *311; *see also Bigby v. Kennedy*, (1770) 98 Eng. Rep. 389 (K.B.); 1 Stephen, *History of the Criminal Law* at 249 (stating that acquittal on indictment "was practically conclusive, unless the prisoner was acquitted under circumstances which greatly dissatisfied the parties concerned").[14] Thus, the Pardon Clause and the Double Jeopardy Clause cannot be reconciled with an alternative system for prosecuting crimes in which the suit belongs to an individual and not the government.

More broadly, the protections the Framers placed into the Bill of Rights regulate the relationship between individuals and the *government* that might seek to prosecute or punish them. When the First Congress wrote the Fifth Amendment and stated that "no person . . . shall be compelled in any criminal case to be a witness against himself," certainly they were contemplating a "criminal case" to be one prosecuted by the sovereign, as all criminal cases were. U.S. Const. amend. V; *see also Chavez v. Martinez*, 568

[14] Although no bar existed to an appeal of felony after an acquittal on an indictment, it is unclear whether double jeopardy barred indictment by the Crown after acquittal on an appeal. *Compare* 4 *Commentaries* *311 (stating that appeals of felony "may be brought, previous to any indictment; and, if the appellee be acquitted thereon, he cannot be afterwards indicted for the same offence"), *with* 1 Stephen, *History of the Criminal Law* at 246 (maintaining that if defendant were acquitted on appeal of felony, he nonetheless could "be tried by the country as if he had been indicted").

U.S. 760, 770 (2003) (finding that constitutional right against self-incrimination applies only in criminal cases). The same can be said for the Sixth Amendment guarantees of confrontation, compulsory process, and the right to counsel, which are all guaranteed to the accused in "criminal prosecutions." U.S. Const. amend. VI. The Eighth Amendment's prohibition against excessive fines, U.S. Const. amend. VIII, applies only to criminal actions, not suits between private parties. *See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989). The protections that the Framers wrote into the Bill of Rights leave no doubt that the Framers contemplated that the government would be party to all criminal prosecutions.[15]

This Court's constitutional jurisprudence has followed Blackstone's definition of a crime as a public wrong and has reflected, without exception, the understanding that all criminal actions in this country are brought in the name of the sovereign. As far back as *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court made clear that the power to punish violators of the criminal law in this country is a *sovereign* power:

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[15] If this Court sustains the right of a legislature to create a private federal criminal right of action, each of these procedural protections, including those secured by the Due Process and Equal Protection clauses, will become open questions in new, uncharted territory. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959).

> The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers.

Id. at 418; *see also Heath v. Alabama*, 474 U.S. 82, 93 (1985) ("Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code.").

Not long after *M'Culloch*, this Court considered a case in which a defendant had been indicted for a federal crime of violence against an ambassador. *United States v. Ortega*, 24 U.S. (11 Wheat.) 467 (1826). Presented with the question whether this was a "case affecting an ambassador or other public minister, within the meaning of the second section of the third article of the constitution of the United States," thereby implicating this Court's original jurisdiction, the Court deemed it "clear[]" that "this is not a case affecting a public minister, within the plain meaning of the constitution." 24 U.S. at 468-69. Rather, the only parties to a federal criminal action are the United States and the individual it seeks to punish:

> It is that of a public prosecution, instituted and conducted by and in the name of the United States for the purpose of vindicating the law of nations, and that of the United States. . . . It is a case, then, which affects the United States, and the individual whom

> they seek to punish; but one in which the minister himself, although he was the person injured by the assault, has no concern.

Id. at 469; *see also Blyew v. United States*, 80 U.S. (13 Wall.) 581, 591 (1871) ("Obviously the only parties to [a criminal prosecution] are the government and the persons indicted.").

In *Huntington v. Attrill*, 146 U.S. 657 (1892), this Court needed to determine whether a judgment was civil or criminal in order to decide whether the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, applied. The *Huntington* Court rooted its conception of crime in the common-law understanding of an offense against the sovereign: "Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon." 146 U.S. at 667. *Huntington* also relied on Blackstone's definition of crime as a public wrong, stating:

> The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed 'civil injuries;' the latter are a breach and violation of public

> rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of 'crimes and misdemeanors.'"

Id. at 668-69 (quoting William Blackstone, 3 *Commentaries* *2). In discussing extradition, the *Huntington* Court could hardly have been more explicit that in our constitutional system the party to a criminal action is the sovereign, whose "peace" has been broken:

> Crimes and offenses against the laws of any state can only be defined, prosecuted, and pardoned by the sovereign authority of that state; and the authorities, legislative, executive or judicial, of other states take no action with regard to them, except by way of extradition, to surrender offenders to the state whose laws they have violated, and whose peace they have broken.

Id. at 669.

This Court also has grounded its double jeopardy jurisprudence in the bedrock understanding that criminal prosecutions are prosecuted in the name and power of the sovereign. The holding in *Heath v. Alabama*, 474 U.S. 82 (1985), that "successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause," was based on the "common-law conception of crime as an offense against the sovereignty of the government," and the understanding that an "offence," as that term is used in the Fifth Amendment, occurs when the "peace and

dignity" of a sovereign have been violated. 474 U.S. at 88; *see also United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (describing "crime" as "act done by an individual in supposed violation of the peace and dignity of the sovereign power"). This conception of a crime as an injury to the sovereign similarly led this Court to hold that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *United States v. Lanza*, 260 U.S. 377, 382 (1922).

Given this unwavering understanding of a criminal prosecution as an action brought by the sovereign, it is not surprising that, close to a century after *Huntington*, this Court defined a federal "criminal prosecution" as "a judicial proceeding in a federal court alleging violation of federal laws and . . . brought in the name of the United States as sovereign." *United States v. Nixon*, 418 U.S. 683, 694 (1974). And, echoing *Ortega*, this Court has stated, in a variety of contexts, that, "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *see also Town of Castle Rock v. Gonzales*, 545 U.S. 748, 767 n.13 (2005); *Diamond v. Charles*, 476 U.S. 54, 64 (1986).[16] As the Constitution's text, its

[16] The Judiciary Act of 1789 provided for the appointment in each judicial district of "a meet person learned in the law to act as attorney for the United States . . . whose duty it shall be to prosecute in such district all delinquents for crimes and offences,

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history, and the constitutional jurisprudence of this Court make clear, when the Framers drafted our Constitution, they incorporated into it a definition of crime as a public wrong, and of a criminal proceeding as an action between a sovereign and the individual whom the sovereign seeks to punish.

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cognizable under the authority of the United States." Judiciary Act of 1789, Ch. 20, § 35, 1 Stat. 92. Federal courts have rejected the notion of an individual pursuing a private criminal right of action. *See Keenan v. McGrath*, 328 F.2d 610, 611 (1st Cir. 1964) ("[W]e [are] unaware of any authority for permitting a private individual to initiate a criminal prosecution in his own name in a United States District Court."); *Bass Angler Sportsman Soc'y v. United States Steel Corp.*, 324 F. Supp. 412, 415 (S.D. Ala. 1971) ("Equally important is the firmly established principle that criminal statutes can only be enforced by the proper authorities of the United States Government and a private party has no right to enforce these sanctions."); *Pugach v. Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961) ("Nor is there a residual power in private citizens to take law enforcement into their own hands when the United States Attorney does not prosecute, for any, or for no reason."); *see also Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 816 n.2 (1987) (Scalia, J., concurring) ("I am unaware . . . of any private prosecution of federal crimes.").

II. THE CONSTITUTION REQUIRES THAT CRIMINAL CONTEMPT PROCEEDINGS IN CONGRESSIONALLY CREATED COURTS BE BROUGHT ON BEHALF OF THE GOVERNMENT.

A. BECAUSE CRIMINAL CONTEMPTS ARE CRIMES IN THE ORDINARY SENSE, CRIMINAL CONTEMPT PROSECUTIONS ARE ACTIONS BETWEEN THE PUBLIC AND THE ACCUSED.

Criminal contempt, like every other crime, is a public wrong. Thus, a criminal contempt prosecution, like every other criminal prosecution, is "between the public and the defendant." *Michaelson v. United States ex rel. Chi., St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42, 64 (1924). As this Court has explained:

> Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. In the words of Mr. Justice Holmes: "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristics of crimes as that word has been understood in English speech."

Bloom v. Illinois, 391 U.S. 194, 201 (1968) (footnote omitted) (quoting *Gompers v. United States*, 233 U.S. 604, 610 (1914)). The word "crime," as it "has been understood in English speech," 391 U.S. at 201,

denotes a "public wrong[,] . . . a breach and violation of public rights and duties, which affect the whole community, considered as a community." William Blackstone, 3 *Commentaries* *2. As was clear to Justice Holmes in 1914, criminal contempt is absolutely no different.

Blackstone characterized criminal contempt as a "disturbance of public justice." 4 *Commentaries* *125. It is an affront to the authority of a specific organ of government, an act which "violates the dignity and authority of the . . . courts." *Ex Parte Grossman*, 267 U.S. 87, 115 (1925). Because a criminal contempt action vindicates the authority of the court, it serves the sovereign's interest in ensuring that its institutions are respected and indeed preserved. *See United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). It is a power of a public institution that "cannot be dispensed with in a Court, because [it is] necessary to the exercise of all others." *Id.* And, in *Ex Parte Grossman*, *supra*, this Court noted that, "long before our Constitution," it was "recognized at common law" that a sentence for criminal contempt was "imposed to punish the contemnor for violating the dignity of the court and the king, in the *public interest*." 267 U.S. at 111 (emphasis added). Like all crimes, therefore, criminal contempt is an offense against the sovereign, and a public wrong.

Because an attack on the dignity of the court can be addressed either through criminal or civil contempt, courts are often called upon to discern whether a particular contempt proceeding is criminal or civil

in nature. The fundamental difference has been long-established:

> Proceedings for contempts are of two classes, – those prosecuted to preserve the power, and vindicate the dignity, of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. . . . A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little, if any, interest in the proceedings for its punishment.

Bessette v. W. B. Conkey Co., 194 U.S. 324, 328 (1904) (citations and quotations omitted).

Of course, when a criminal contempt action brought to "vindicate the authority of the law" penalizes disobedience of a court order, the private order holder may "derive some incidental benefit" because the punishment imposed in the name of the sovereign

"tends to prevent a repetition of the disobedience" of the order. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 443 (1911). This fact, however, is true of virtually any successful criminal prosecution. "It is true that the private party receives an incidental advantage from the infliction of the penalty" in a criminal contempt case, but it is the same sort of advantage which accrues to the prosecuting witness in any criminal case: "the advantage being that the punishment . . . has a tendency to prevent the repetition of the offence." Stewart Rapalje, *A Treatise on Contempt* § 21 (1884) (citations and quotations omitted); *see also Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994) ("Most contempt sanctions, like most criminal punishments, to some extent punish a prior offense as well as coerce an offender's future obedience."). But, just as the incidental vindication of private interests does not alter the public nature of any criminal prosecution, the potential for such "indirect consequences" to flow from a criminal contempt prosecution does not alter the bedrock principle that such prosecution is necessarily on behalf of the sovereign. 221 U.S. at 443.[17]

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[17] The court of appeals' holding here was infected fatally by its perception that criminal contempt presents a "special situation" because, in its view, "'[a] court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.'" (Cert. Pet. App. A.14.) As this Court has repeated on multiple occasions, the purpose of a criminal contempt prosecution is to protect "the institutions of our

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In *Gompers v. Buck's Stove & Range Co.*, *supra*, this Court held that the determination of whether a contempt is civil or criminal rests on the "character and purpose" of the remedy imposed. 221 U.S. at 441. "If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." *Id.* The other "important difference" the *Gompers* Court identified related to the identification of the parties to the different types of contempt proceedings: "Proceedings for civil contempt are between the original parties, and are instituted and tried as part of the main cause. But, on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause." *Id.* at 444-45. Thus *Gompers* made clear that criminal contempt actions, like all criminal actions, are actions "between the public and the defendant." *Id.* at 445.

Applying these principles to the facts before it, the *Gompers* Court determined that the contempt proceeding at issue was criminal, as fixed terms of imprisonment had been imposed on the three defendants. 221 U.S. at 444. But because the case had been litigated with Buck's Stove & Range Company, a private entity, as the "actual [ ] party on the one side,

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government." *Bloom*, 391 U.S. at 201. The fact that some "incidental benefit" might flow to the civil litigant does not change the fundamental nature of the proceeding. *Gompers*, 221 U.S. at 443.

with the defendants on the other," *id.* at 445, this Court concluded that the imposition of criminal penalties was improper. In the words of this Court: "The result was as fundamentally erroneous as if in an action of 'A vs. B, for assault and battery,' the judgment entered had been that the defendant be confined in prison for twelve months." *Id.* at 449. Consequently, it set aside the orders of imprisonment. *Id.*

There can be no question that Mr. Robertson suffered criminal penalties in this case.[18] It is equally clear, under the lower court's holding, that the proceeding was prosecuted by Ms. Watson as the "actual[ ] party on the one side," with Mr. Robertson on the other. (Cert. Pet. App. A.14 (holding that criminal prosecution was brought "in the name and interest of [Ms.] Watson, not as a public action brought in the name and interest of the United States or any other governmental entity").) Because these circumstances make Mr. Robertson's case indistinguishable from *Gompers*, his sentence must be set aside.

This Court consistently has relied on *Gompers* in making nuanced distinctions in the nature of the remedy to distinguish between criminal and civil contempt actions. "[T]he critical features are the substance of the proceeding and the character of the

[18] The judge sentenced Mr. Robertson to three 180-day jail sentences (one term suspended) and a five-year term of probation. (J.A. at 63.)

relief that the proceeding will afford." *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 631 (1988) (citing *Gompers*); *see also Bagwell*, 512 U.S. at 827 ("In the leading early case addressing this issue in the context of imprisonment, *Gompers* . . . , the Court emphasized that whether a contempt is civil or criminal turns on the 'character and purpose' of the sanction involved.") (citation omitted); *Shillitani v. United States*, 384 U.S. 364, 369 (1966) (" 'It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish' civil from criminal contempt.") (quoting *Gompers*, 221 U.S. at 441); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 302 (1947) ("Sentences for criminal contempt are punitive in their nature and are imposed for the purpose of vindicating the authority of the court.") (citing *Gompers*). Equally important, this Court repeatedly and necessarily has applied the fundamental proposition from *Gompers* that criminal contempt proceedings arising out of civil litigation "are between the public and the defendant," because the party alignment is essential to the definition of crime itself. *See, e.g., United States v. Providence Journal Co.*, 485 U.S. 693, 700 (1988); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987); *Ex Parte Grossman*, 267 U.S. at 111; *Michaelson*, 266 U.S. at 67. Indeed, this Court's view of criminal contempt as a "crime in the ordinary sense" and a "public wrong" has been unwavering, a fact that perhaps is unsurprising given that Justice Holmes labeled the matter so "fundamental" in 1914. *Gompers v. United States*, 233 U.S. 604, 610 (1914).

Because criminal contempt is by definition a punitive remedy to vindicate the authority of the court and, as with all crimes, is an action between the sovereign and the accused, this Court also has made it abundantly clear that the party to a criminal contempt prosecution in federal court is the United States even when a case is privately prosecuted. In *Young*, *supra*, this Court affirmed the authority of a court to appoint a private prosecutor if necessary to vindicate its authority in a contempt proceeding, but directed, as a matter of this Court's supervisory authority, that an interested party's counsel not receive such an appointment. The decision was rooted in the same fundamental principle that animated this Court's holding in *Gompers v. Buck's Stove & Range Co.* – a criminal contempt prosecution, no matter whether a public or private lawyer actually stands in the courtroom well and serves as prosecuting attorney, is brought by the government to vindicate public wrongs. "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. . . . The prosecutor is appointed *solely* to pursue the public interest in vindication of the court's authority." *Young*, 481 U.S. at 804 (emphasis added).

The notion that criminal contempt proceedings are "between the public and the defendant" also animated this Court's decision in *United States v. Dixon*, 509 U.S. 688 (1993), where this Court deemed it "obvious" that the protection of the Double Jeopardy Clause of the Fifth Amendment attaches

to nonsummary criminal contempt proceedings – including a proceeding that was privately prosecuted – because of the "well established" proposition "that criminal contempt . . . is 'a crime in the ordinary sense.'" 509 U.S. at 696 (citations omitted). This Court in *Dixon* construed precisely the contempt provision at issue in this case, as the consolidated case of Michael Foster involved a criminal contempt action brought pursuant to D.C. Code § 16-1005(f), and was prosecuted by private counsel for the beneficiary of the civil protection order. 509 U.S. at 693. But Mr. Foster's case could not have been correctly decided if, as construed by the court of appeals here, D.C. Code § 16-1005(f) authorizes a private right of action, and a prosecution by the private party under D.C. Code § 16-1005(f) is brought in her own name and interest, because "[t]he protections of the Double Jeopardy Clause are not triggered by litigation between private parties." *United States v. Halper*, 490 U.S. 435, 451 (1989), *abrogated on other grounds by Hudson v. United States*, 522 U.S. 93 (1997); *see also Heath v. Alabama*, 474 U.S. 82, 88 (1985) (noting that dual sovereignty doctrine "is founded on the common-law conception of crime as an offense against the sovereignty of the government"); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-49 (1943) (noting "the line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice," and holding that "[o]nly the latter subject the defendant to 'jeopardy' within the constitutional meaning").

This Court, fully aware that a private person prosecuted Mr. Foster, never countenanced the possibility that in the case before it the United States did not enjoy party status. Indeed, the United States and Michael Foster were the only parties to that action. Nor did the United States even intimate that the Double Jeopardy Clause was not implicated because the government was not the real party-in-interest, although it is axiomatic that the Double Jeopardy Clause does not apply to suits between private parties. And, this Court *held* that the contempt prosecuted against Mr. Foster was "'a crime in the ordinary sense,'" 509 U.S. at 696 (quoting *Bloom*, 391 U.S. at 201), which is most certainly a "public wrong," lest we be "'in error as to the most fundamental characteristics of crime as that word has been understood in English speech.'" *Bloom*, 391 U.S. at 201 (quoting *Gompers*, 233 U.S. at 610 (Holmes, J.)). Therefore, to the extent that this Court is constrained by the interpretation of the District of Columbia Court of Appeals that D.C. Code § 16-1005(f) permits a private right of action, this Court must conclude that it should have held the contempt prosecuted against Mr. Foster void. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. at 449. Instead, this Court should conclude that the lower court erred in holding that a private party may constitutionally pursue a private right of action for criminal contempt of a congressionally created court. Because criminal contempt is a crime in the ordinary sense, the action brought against Mr. Robertson could have only lawfully and constitutionally been prosecuted by the United States.

This Court must reverse the decision of the lower court.

B. A PRIVATE CRIMINAL CONTEMPT ACTION, NEITHER JUSTIFIED BY THE DOCTRINE OF NECESSITY NOR LIMITED BY THE PRINCIPLE OF RESTRAINT, CREATES AN IMPERMISSIBLE THREAT TO LIBERTY.

The justification for the contempt power rests in the need for public institutions, the institutions of government, to have a mechanism to vindicate their authority. The contempt power thus is rooted in the "one maxim which necessarily rides over all others" – "that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them." *Anderson v. Dunn*, 19 (6 Wheat.) U.S. 204, 226 (1821). This doctrine of necessity animates all criminal contempt proceedings:

> The traditional justification for the relative breadth of the contempt power has been necessity: Courts independently must be vested with "power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and . . . to preserve themselves and their officers from the approach and insults of pollution." *Anderson v. Dunn*, [19 U.S. (6 Wheat.) 204, 226 (1821)]. Courts thus have embraced an inherent contempt authority, *see Gompers*, [221 U.S. at 450; *Ex parte Robinson*, 86 U.S. (19 Wall.)

> 505, 510 (1873)], as a power "necessary to the exercise of all others," *United States v. Hudson*, [11 U.S. (7 Cranch) 32, 34 (1812)].

Bagwell, 512 U.S. at 831.

Furthermore, because "courts cannot be at the mercy of another Branch in deciding whether such proceedings should be initiated," courts have the ability to appoint a private attorney to prosecute a criminal contempt proceeding should the Executive decline to do so. *Young*, 481 U.S. at 796. Thus, in criminal contempt jurisprudence, born from the doctrine of necessity rises a tolerated intrusion into separation of powers principles that otherwise govern criminal prosecutions. Similarly, when "disturbance or violence or physical obstruction or disrespect to the court" occurs in open court and immediate punishment is essential to prevent "demoralization of the court's authority before the public," traditional due process requirements, such as a hearing, counsel, and the opportunity to call witnesses need not be provided. *Pounders v. Watson*, 521 U.S. 982, 987-88 (1997) (citations and quotations eliminated). It is in this respect – the necessary toleration of limited intrusions on traditional separation of powers and due process principles – that criminal contempt cases differ from other criminal actions, although they all most decidedly involve public wrongs; and it is for this additional reason that the reins of a contempt proceeding cannot be handed to a private party without undermining important constitutional

principles governing the structure of government and the prosecution of crime.

A prosecution for criminal contempt can involve inroads into traditional separation of powers principles in two fundamental respects. First, such a prosecution allows for judicial intrusion into the Legislature's traditional law-making role, as the violated court order stands in the stead of the legislative code. It is a "plain principle" of our government "that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime and ordain its punishment." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). In the contempt context, however, a court order directed at an individual takes the place of penal laws of general applicability enacted by lawmakers answerable to the electorate. Second, because a judge retains the right to appoint a private prosecutor if the Executive declines to prosecute a contempt, a criminal contempt action can allow for intrusion by the Judiciary into the traditional role of the Executive. This constitutes a significant departure from normal separation of power principles, since the Executive Branch traditionally has exclusive authority and absolute discretion to decide whether and how to prosecute a case. *See Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965). Thus, as this Court has observed regarding civil contempt: "Unlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be

imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct." *Bagwell*, 512 U.S. at 831. This "fusion of legislative, executive, and judicial powers 'summons forth . . . the prospect of "the most tyrannical licentiousness."'" *Id.* (quoting *Young*, 481 U.S. at 822 (Scalia, J., concurring) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 228 (1821))).

This Court tolerates the threat to individual liberty presented by a federal court's exercise of its inherent power to initiate proceedings for contempt because of the doctrine of necessity: the "need for an independent means of self-protection, without which courts would be mere boards of arbitration whose judgments and decrees would be only advisory." *Young*, 481 U.S. at 796 (citations and quotations omitted). But necessity is the limiting principle as well. "[T]he very amplitude of the power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper." *Gompers*, 221 U.S. at 451. Thus, while courts can exercise a limited right of self-preservation by pursuing criminal contempt, they must do so only by exercising "the least power adequate to the end proposed." *Young*, 481 U.S. at 801 (citations and quotations omitted). It is a principle this Court has applied with utmost seriousness.

In the due process context, for instance, although courts have license to proceed with summary adjudication of petty direct contempts while dispensing with

many of the traditional protections of due process in order "to maintain order in the courtroom and the integrity of the trial process in the face of an actual obstruction of justice," *Bagwell*, 512 U.S. at 832 (citations and quotations omitted), if a court delays punishing a direct contempt until the completion of trial, the necessity of proceeding without due process protections vanishes and the contemnor's due process rights to notice and a hearing must be respected. *See Taylor v. Hayes*, 418 U.S. 488, 497-98 (1974). Similar notions of necessity and restraint require a court to consider civil contempt before resorting to criminal contempt, *Shillitani v. United States*, 384 U.S. 364, 371 (1966), and to exercise restraint in the imposition of contempt sanctions. *Feiock*, 485 U.S. at 637 n.8. In *Bloom*, *supra*, "considerations of necessity" could not "justify denying a jury trial in serious criminal contempt cases." 391 U.S. at 199-200. And in *Young*, although this Court recognized that, "courts have long had, and must continue to have, the authority to appoint private attorneys to initiate [criminal contempt] proceedings when the need arises," it simultaneously noted that "the rationale for the appointment authority is necessity" and directed that federal courts should first refer the case to the appropriate prosecuting authority. 481 U.S. at 801. "Such a procedure ensures that the court will exercise its inherent power of self-protection only as a last resort." *Id.*

The private criminal right of action brought against Mr. Robertson was neither justified by the

doctrine of necessity nor limited by the related principle of restraint. Contempt "is a means to an end, and not the end itself," and "rests solely upon the right of self-preservation to enable the public powers given to be exerted." *Marshall v. Gordon*, 243 U.S. 521, 541 (1917). Ms. Watson had no public powers to exert; her private right of action cannot be justified by the notion "that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them." *Anderson*, 19 U.S. at 226. No principle of restraint limited her actions. By permitting a private criminal contempt action that is neither justified by the necessity doctrine nor limited by restraint, the lower court left entirely uncontained the intrusion into separation of powers principles that has been tolerated to a limited extent in criminal contempt cases necessary to vindicate the authority of the court. And the manner in which Mr. Robertson was prosecuted involved significant – and in critical respects unprecedented – departures from the roles traditionally played by the three branches of government in criminal prosecutions. Indeed, because the government was entirely uninvolved in conducting the prosecution, the manner of prosecution raises due process concerns as well.

Pursuant to D.C. Code § 16-1005(c) (1981 & 1998 Supp.), which governed the issuance of civil protection orders in the Superior Court of the District of Columbia, a judicial finding of mere "good cause" to

believe that a respondent had either committed – or threatened to commit – an "intrafamily offense"[19] unleashed the power for a court to issue, upon petitioner's request, a civil protection order of extraordinarily broad scope. A court could direct the respondent, among other options, to "keep the peace toward the family member," to participate in psychiatric treatment, medical treatment, or "appropriate" counseling programs, to avoid the presence of the endangered family member, to vacate the dwelling unit of the complainant even if the dwelling is marital property of the parties or jointly owned or occupied, or "to perform or refrain from other actions as may be appropriate to the effective resolution of the matter." D.C. Code § 16-1005(c) (1981 & 1998 Supp.). Unlike in a case in which a court order is tethered to the particular complaint – an eviction proceeding leading to an injunction directing a tenant to vacate the premises, for instance – here the authority of the judge to create a private "criminal code" governing the single individual involved in the dispute is virtually unbounded. *See Bagwell*, 512 U.S. at 837 (noting that when contempt involved "widespread, ongoing, out-of-court violations of a complex injunction," "the court effectively policed petitioners'

[19] An "intrafamily offense" is any act punishable as a criminal offense, committed upon certain statutorily designated persons. D.C. Code § 16-1001(5) (1981 & 1998 Supp.).

compliance with an entire code of conduct that the court itself had imposed").[20]

Then, once the judge crafts the order, the prosecutorial authority for a violation of this private criminal code can be placed solely into the hands of the private party that has requested and secured it. This too is an extraordinary departure from the norm in criminal prosecutions. "This Court has long acknowledged the Government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case." *Ball v. United States*, 470 U.S. 856, 859 (1985) (citing *United States v. Goodwin*, 457 U.S. 368, 382 (1982); *Confiscation Cases*, 74 U.S. at 457-59). It has guarded tightly the right of the Executive to control criminal prosecutions. *See Morrison v. Olson*, 487 U.S. 654, 695 (1988); *Confiscation Cases*, 74 U.S. at 457-59. Yet here, the Executive had no control.[21] In addition, the record in this case exposes what the Executive's prosecutorial decision *would have been* had it possessed

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[20] The civil protection order in this case compelled Mr. Robertson to "pick up the dog" from Ms. Watson's father's house on May 2, 1999. (J.A. 24.)

[21] Both the United States Attorney and the Attorney General for the District of Columbia indicated in their submissions below that they had no control over Ms. Watson's pursuit of this case. (C.A. U.S. Br. 32 ("[T]he United States Attorney's Office would not have authority to bind third parties not privy to the plea agreement.").); (Pet. C.A. App. 43-44 ("Unlike the government" the Assistant Attorney General "could not have unilaterally dismissed the motion because it belonged to Ms. Watson.").)

the right to make it. *Cf. Young*, 481 U.S. at 815 (Scalia, J., concurring) ("[W]e cannot know whether petitioners would have been prosecuted had the matter been referred to a proper prosecuting authority."). The AUSA prosecuting Mr. Robertson's initial felony case investigated the incident of June 26, 1999, and chose not to present the matter to the grand jury. (J.A. 50-51.) The fact that he then re-extended the initial plea offer, adding to it a promise not to prosecute Mr. Robertson for the June events, is further evidence that the United States had no interest in pursuing the case. (J.A. 50-51.)

This Court has described the decision whether to prosecute a criminal case as a "core executive constitutional function." *United States v. Armstrong*, 517 U.S. 456, 465 (1996). Here, as the lower court described it, the Council of the District of Columbia chose to divest the Executive of its traditional role, apparently due to a difference of opinion regarding the enforcement priority of the Executive. (Cert. Pet. App. A.12 (citing legislative determination that Office of Attorney General lacked adequate resources to prosecute criminal contempt and "prosecutes less than 10 percent of the criminal contempt motions brought for violations of civil protection orders" as basis for private right of action).) "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charted with the duty of such enforcement. The latter are executive functions." *Springer v. Philippine Islands*, 277 U.S. 189, 202

(1928).[22] For the Legislature to divest the Executive of its constitutional function in this matter disrupts the constitutional allocation of power among the three branches of government, an allocation of power that "serves not only to make Government more accountable but also to secure individual liberty." *Boumediene v. Bush*, ___ U.S. ___, 128 S. Ct. 2229, 2246 (2008).[23]

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[22] The statute as interpreted by the lower court also interferes with the President's pardon power, as by permitting the criminal contempt action to be brought in the name of the private party, the statute defines a federal criminal action that is not "an offense against the United States." The Legislature cannot exclude a federal crime from the scope of the President's pardon power. *See Ex Parte Garland*, 71 U.S. 333, 380 (1866) ("This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders."); *see also Schick v. Reed*, 419 U.S. 256, 266 (1974) ("[T]he power flows from the Constitution alone, not from any legislative enactments, and . . . it cannot be modified, abridged, or diminished by the Congress.").

[23] Congress has established a government for the District of Columbia that incorporates constitutional notions of separation of powers. *See generally Springer*, 277 U.S. 189 (finding separation of powers principle implicit in the Organic Act of the Philippine Islands); *see also Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (relying on *Springer* for constitutional separation of powers analysis). The judicial power in the District's local court system is exercised by Article I courts. *See Palmore v. United States*, 411 U.S. 389 (1973). The local legislature is subject to ultimate congressional review and control. *See* D.C. Code § 1-206.02 (1981 & Supp.). And Congress has required that, but for some inconsequential police ordinances and their equivalent, all criminal prosecutions shall be conducted "in the name of the United States by the United States attorney for the District of Columbia," unless Congress otherwise provides by law. *See* D.C.

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The problem reaches beyond an impermissible allocation of power among the three branches of government, however. In this case, the executive power shifted not to the Judiciary, as it does in judicially initiated contempt prosecutions, but rather was lodged in an entirely non-governmental actor. (J.A. 93 (in trial court's view, pursuit of contempt action was solely Ms. Watson's choice).) "[E]ven when exercising distinct and jealously separated powers, the three branches are but 'co-ordinate parts of one government.'" *Providence Journal Co.*, 485 U.S. at 701 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)). Therefore, when a court assumes the role of the Executive in a court-initiated contempt, not only are separation of powers concerns cabined by the court's obligation to act solely when necessary for self-preservation and guided by

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Code § 23-101 (1981 & Supp.); *In re Crawley*, 978 A.2d 608, 620 (D.C. 2009); *see also Metro. R.R. Co. v. Dist. of Columbia*, 132 U.S. 1, 9 (1889) ("Crimes committed in the District are not crimes against the District, but against the United States."); *Snow v. United States*, 85 U.S. 317, 321 (1873) ("Strictly speaking, there is no sovereignty in a Territory of the United States but that of the United States itself. Crimes committed therein are committed against the government and dignity of the United States."). Critically, Congress expressly has removed from the local legislature the ability to affect the power or prosecutorial authority of the United States. *See* D.C. Code §§ 1-206.02(a)(3) & (8) (1981 & Supp.) (precluding Council of the District of Columbia from "[e]nact[ing] any act or regulation . . . relating to the duties or powers of the United States Attorney . . . for the District of Columbia" or any act or regulation "which concerns the functions . . . of the United States").

the principle of restraint, but due process concerns are minimized by the fact that control of the prosecution still rests with the government. *See Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 384 n.12 (1978) ("The responsibility of the prosecutor as a representative of the public . . . requires him to be sensitive to the due process rights of a defendant to a fair trial. *A fortiori*, the trial judge has the same . . . obligation."). To remove the government entirely from the criminal enforcement process is a structural change of enormous consequence.

Quoting the oft-quoted language from *Berger v. United States*, 295 U.S. 78 (1935), this Court in *Young* emphasized the critical role of the prosecutor (whether public or private) as a representative of the *sovereign*:

> "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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer."

Young, 481 U.S. at 803 (quoting *Berger*, 295 U.S. at 88); *see also id.* at 814 ("Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching

disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice."). This right to be prosecuted by the government, whose interest is that justice be served, is grounded in the Due Process Clause. *Cone v. Bell*, ___ U.S. ___, 129 S. Ct. 1769, 1772 (2009) (reiterating that Due Process Clause includes sovereign obligation to ensure that "justice shall be done" in all criminal prosecutions); *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980) (stating that due process requires that prosecutors serve the public interest). Furthermore, this Court has recognized that prosecutors are uniquely suited to serving this role: prosecutorial discretion, in the hands of a public prosecutor, serves the critical function of filtering out insubstantial legal claims. *Cheney v. United States Dist. Court for Dist. of Columbia*, 542 U.S. 367 (2004). Our system has confidence in public prosecutors' decisions because public prosecutors are presumed to act lawfully, *Armstrong*, 517 U.S. at 464, they are "publicly accountable," and they are "subject to budgetary considerations and under an ethical obligation, not only to win and zealously to advocate for [the] client but also to serve the cause of justice." *Cheney*, 542 U.S. at 386. "Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).

None of these constraints exist when the party bringing the criminal action bears no relation to, and is in no sense controlled by, the Executive Branch or the government. *Cf. Morrison*, 487 U.S. at 695 (upholding constitutionality of Ethics in Government Act against separation of powers challenge because Act gave "Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel"). To shift prosecutorial power from the Executive to the Judiciary in a criminal contempt action alleging violation of a court order presents separation of powers concerns; to allow the Legislature to shift the power entirely out of the hands of the sovereign presents due process concerns as well. Whatever incursion into due process and separation of powers principles this Court has been willing to tolerate in criminal contempt cases in order to enable courts to vindicate their authority, it has done so only to allow courts their limited right of self-preservation, and then only if they exercise "the least power adequate to the end proposed." *Young*, 481 U.S. at 801 (citations and quotations omitted). No such justification exists here. The lower court erred in concluding that the criminal contempt action brought against Mr. Robertson by Ms. Watson in her own name and in pursuit of her own private interests, cabined neither by the doctrine of necessity nor restraint, was lawful and constitutional. This Court should reverse.

CONCLUSION

A prosecution for criminal contempt in a federal court can only lawfully be brought in the name and interest of the United States; in Mr. Robertson's case, the United States had bargained away its right to do so. Because the lower court erred in holding that the criminal contempt proceeding against Mr. Robertson lawfully was brought by Ms. Watson in her own name and interest, the judgment of the District of Columbia Court of Appeals must be reversed.

Respectfully submitted,

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Appendix of Constitutional Provisions, Statutes and Rules

1. The United States Constitution, Article II, § 2, clause 1, states in pertinent part:

> The President . . . shall have Power to Grant Reprieves and Pardons for Offenses against the United States. . . .

2. The United States Constitution, Article III, § 2, clause 3, states:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

3. The United States Constitution, Article IV, § 2, clause 2, states:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

4. The United States Constitution, Amendment V, states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

> Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5. The United States Constitution, Amendment VI, states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

6. D.C. Code § 1-206.02 (1981 & 1998 Supp.), states in pertinent part:

> § 1-206.02. Limitations on the Council.
>
> (a) The Council [of the District of Columbia] shall have no authority . . . to:
>
> * * *

> (3) Enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions . . . of the United States. . . .
>
> * * *
>
> (8) Enact any act or regulation . . . relating to the duties or powers of the United States Attorney . . . for the District of Columbia. . . .
>
> * * *

7. D.C. Code § 16-1001 (1981 & 1998 Supp.), states in pertinent part:

> § 16-1001. Definitions.
>
> For purposes of this subchapter:
>
> (1) The term "complainant" means an individual in the relationship described in paragraph (5) who is the victim of an intrafamily offense and who files or for whom is filed a petition for protection under this subchapter.
>
> * * *
>
> (5) The term "intrafamily offense" means an act punishable as a criminal offense committed by an offender upon a person:
>
> > (A) to whom the offender is related by blood, legal custody, marriage, having a child in common, or with whom the offender shares or has shared a mutual residence; or

(B) with whom the offender maintains or maintained a romantic relationship not necessarily including a sexual relationship. A person seeking a protection order under this subparagraph shall reside in the District of Columbia or the underlying intrafamily offense shall have occurred in the District of Columbia.

(6) The term "respondent" means any person who is accused of having committed an intrafamily offense in a petition for protection filed under this subchapter.

8. D.C. Code § 16-1002 (1981 & 1998 Supp.), states:

§ 16-1002. Complaint of criminal conduct; referrals to Family Division.

(a) If, upon the complaint of any person of criminal conduct by another or the arrest of a person charged with criminal conduct, it appears to the United States Attorney for the District of Columbia (hereafter in this subchapter referred to as the "United States attorney") that the conduct involves an intrafamily offense, he shall notify the Director of Social Services. The Director of Social Services may investigate the matter and make such recommendations to the United States attorney as the Director deems appropriate.

(b) The United States attorney may also (1) file a criminal charge based upon the conduct and may consult with the Director of Social

Services concerning appropriate recommendations for conditions of release taking into account the intrafamily nature of the offense; or (2) refer the matter to the Corporation Counsel for the filing of a petition for civil protection in the Family Division. Prior to any such referral, the United States attorney shall consult with the Director of Social Services concerning the appropriateness of the referral.

(c) The institution of criminal charges by the United States attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under this subchapter. Testimony of the respondent in any civil proceedings under this subchapter and the fruits of that testimony shall be inadmissible as evidence in a criminal trial except in a prosecution for perjury or false statement.

9. D.C. Code § 16-1003 (1981 & 1998 Supp.), states:

§ 16-1003. Petition for civil protection.

(a) Upon referral by the United States attorney, or upon application of any person or agency for a civil protection order with respect to an intrafamily offense committed or threatened, the Corporation Counsel may file a petition for civil protection in the Family Division. In the alternative to referral to the Corporation Counsel, a complainant on his or her own initiative may file a petition for civil protection in the Family Division.

(b) In any matter referred to the Corporation Counsel by the United States attorney in which the Corporation Counsel does not file a petition, he shall so notify the United States attorney.

(c) Whenever a petition is filed by a complainant at his or her initiative or whenever private counsel enters an appearance in a case originally petitioned by the Corporation Counsel, the complainant or his or her counsel shall promptly notify the Corporation Counsel regarding the filing or entry of appearance.

(d) An action for an intrafamily offense under section 16-1001(5)(B) shall not be brought more than 2 years from the date the right to maintain the action accrues.

10. D.C. Code § 16-1005 (1981 & 1998 Supp.), states:

§ 16-1005. Hearing; evidence; protection order.

(a) Members of the family receiving notice shall appear at the hearing. In addition to the parties, the Corporation Counsel and the Director of Social Services may present evidence at the hearing in cases where the petition was filed by the Corporation Counsel.

(b) Notwithstanding section 14-306, in a hearing under this section, one spouse shall be a competent and compellable witness

against the other and may testify as to confidential communications, but testimony compelled over a claim of a privilege conferred by such section shall be inadmissible in evidence in a criminal trial over the objection of a spouse entitled to claim that privilege.

(c) If, after hearing, the Family Division finds that there is good cause to believe the respondent has committed or is threatening an intrafamily offense, it may issue a protection order –

(1) directing the respondent to refrain from the conduct committed or threatened and to keep the peace toward the family member;

(2) requiring the respondent, alone or in conjunction with any other member of the family before the court, to participate in psychiatric or medical treatment or appropriate counseling programs;

(3) directing, where appropriate, that the respondent avoid the presence of the family member endangered;

(4) directing a respondent to refrain from entering or to vacate the dwelling unit of the complainant when the dwelling is (A) marital property of the parties; or (B) jointly owned, leased, or rented and occupied by both parties; provided, that joint occupancy shall not be required if a party is forced by the

respondent to relinquish occupancy; or (C) owned, leased, or rented by the complainant individually; or (D) jointly owned, leased, or rented by the complainant and a person other than the respondent;

(5) directing the respondent to relinquish possession or use of certain personal property owned jointly by the parties or by the complainant individually;

(6) awarding temporary custody of a minor child of the parties;

(7) providing for visitation rights with appropriate restrictions to protect the safety of the complainant;

(8) awarding costs and attorney fees;

(9) ordering the Metropolitan Police Department to take such action as the Family Division deems necessary to enforce its orders;

(10) directing the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter; or

(11) combining two or more of the directions or requirements prescribed by the preceding paragraphs.

(c-1) For the purposes of subsection (c)(6) and (7) of this section, if the judicial officer finds by a preponderance of evidence that a

contestant for custody has committed an intrafamily offense, any determination that custody or visitation is to be granted to the abusive parent shall be supported by a written statement by the judicial officer specifying factors and findings which support that determination. In determining visitation arrangements, if the judicial officer finds that an intrafamily offense has occurred, the judicial officer shall only award visitation if the judicial officer finds that the child and custodial parent can be adequately protected from harm inflicted by the other party. The party found to have committed an intrafamily offense has the burden of proving that visitation will not endanger the child or significantly impair the child's emotional development.

(d) A protection order issued pursuant to this section shall be effective for such period up to one year as the Family Division may specify, but the Family Division may, upon motion of any party to the original proceeding, extend, rescind, or modify the order for good cause shown.

(e) Any final order issued pursuant to this section and any order granting or denying extension, modification, or rescission of such order shall be appealable.

(f) Violation of any temporary or permanent order issued under this subchapter and failure to appear as provided in subsection (a) shall be punishable as contempt.

(g) Any person who violates any protection order issued under this subchapter shall be chargeable with a misdemeanor and upon conviction shall be punished by a fine not exceeding $1,000 or by imprisonment for not more than 180 days, or both.

11. D.C. Code § 23-101 (1981 & 1998 Supp.), states in pertinent part:

§ 23-101. Conduct of prosecutions.

(a) Prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia by the Corporation Counsel for the District of Columbia or his assistants, except as otherwise provided in such ordinance, regulation, or statute, or in this section.

(b) Prosecutions for violations of section 6 of the Act of July 29, 1892 (D.C. Code, sec. 22-1107), relating to disorderly conduct, and for violations of section 9 of that Act (D.C. Code, sec. 22-1112), relating to lewd, indecent, or obscene acts, shall be conducted in the name of the District of Columbia by the Corporation Counsel or his assistants.

(c) All other criminal prosecutions shall be conducted in the name of the United States by the United States attorney for the District

of Columbia or his assistants, except as otherwise provided by law.

* * *

12. Rule 7 of the District of Columbia Superior Court Rules Governing Intrafamily Proceedings (superseded by the Rules Governing Proceedings in the Domestic Violence Unit), states in pertinent part:

Rule 7. Motions.

* * *

(c) *Motion for contempt for violation of protection order.* When a motion for contempt is filed alleging violation of a civil protection order or temporary protection order, the Intrafamily Clerk shall issue a notice of hearing and order directing appearance. The motion shall be in writing and shall be supported by affidavit. A statement of points and authorities shall not be required for a motion for contempt. The notice of hearing and order directing appearance shall be served in the same manner set forth in SCR Intrafamily 3. Punishment upon a finding of contempt shall be limited as provided in SCR Intrafamily 12(e).

* * *

13. Rule 9 of the District of Columbia Superior Court Rules Governing Intrafamily Proceedings

(superseded by the Rules Governing Proceedings in the Domestic Violence Unit), states in pertinent part:

> Rule 9. Conduct of hearings.
>
> (a) *Representation by counsel.* (1) By private counsel. Whenever a petition for a civil protection order or a motion pursuant to these rules is filed by a petitioner, at his or her initiative, the petitioner and the respondent may be represented by private counsel.
>
> (2) Representation by the Corporation Counsel. Whenever a petition for a civil protection order or a motion pursuant to these rules is filed by the Corporation Counsel, the Corporation Counsel shall represent the petitioner unless private counsel enters an appearance in the case or the Court permits the Corporation Counsel to withdraw.

* * *

14. Rule 12 of the District of Columbia Superior Court Rules Governing Intrafamily Proceedings (superseded by the Rules Governing Proceedings in the Domestic Violence Unit), states in pertinent part:

> Rule 12. Contempt.
>
> * * *
>
> (b) *Violation of protection order.* A motion alleging one or more violations of a temporary protection order or civil protection order shall be filed and served pursuant to Rule 7(c).

(c) *Contempt hearing procedures.* (1) The respondent has the right to counsel and shall be so advised.

(2) Anytime the judge contemplates imposing a sentence of imprisonment if the contempt is proven beyond a reasonable doubt, the judge may appoint counsel for the respondent. The Court may also request that the Corporation Counsel represent the petitioner.

(3) If the respondent requests a continuance the judge may grant the continuance on any one or all of the following conditions:

(A) That any existing temporary protection order or civil protection order be extended.

(B) That additional conditions to ensure the safety of the moving party be imposed (e.g., vacation of the premises pending the continuance; a temporary total ban on visitation; awarding temporary custody of a minor child of the parties),

(C) That the respondent receive no further continuances.

(4) Both parties have the right to present sworn testimony of witnesses and other evidence in support of or in opposition to the motion. The respondent may not be compelled to testify or give evidence.

* * *

(e) *Punishment upon finding of contempt by the Division.* Contempt may be unpunished by a fine or penalty of not more than $300.00 or by imprisonment for not more than six (6) months, or both.