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ARTICLE

# "CONSTITUTIONAL INQUISITORS:" THE PRAGMATIC ROOTS OF FEDERAL PROSECUTORIAL POWER

*Scott Ingram**

**Abstract**

*"Grand jurors are the constitutional inquisitors and informers of the country, they are scattered every where, see every thing, see it while they suppose themselves mere private persons, and not with the prejudiced eye of a permanent and systematic spy."*[1] – Thomas Jefferson to Edmund Randolph, May 8, 1793

*"As soon as the [United States] Attorney possesses the case, the grand jury, judges, and rest of the judicial apparatus, which I esteem with you, as bulwarks, will travel in the work according to the forms, which you*

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[1] Letter from Thomas Jefferson to Edmund Randolph (May 8, 1793), FOUNDERS ONLINE, http://founders.archives.gov/documents/Jefferson/01-25-02-0632 [https://perma.cc/HKY4-75CF].

*have delineated."*[2] – Edmund Randolph to Thomas Jefferson, May 9, 1793

Suppose a foreign nation, with knowing assistance from Americans, interfered in a United States national election. Following the election, a criminal investigation begins. Who is responsible for investigating and deciding whether the evidence warrants criminal prosecution? Who decides who is prosecuted? Answering that question takes little thought. The United States Department of Justice handles the case. The Federal Bureau of Investigation conducts the investigation and works closely with the Justice Department's Criminal Division and the United States Attorney's Office for whichever district the crime occurred. Who else could perform such tasks?

What if, instead, the presiding judge of the United States District Court for where the offense occurred impaneled a grand jury and the grand jury, without assistance from a United States Attorney, investigated the allegations? Suppose they called their own witnesses and asked their own questions. Upon completion, they presented their findings to the court. Only then would the court involve the United States Attorney, who would conduct the trial. Rather than the central role they play today, prosecutors would play no role investigating and charging criminal activity. They would not be the constitutional inquisitors that they are today.

This alternative might have been reality had President George Washington adopted Secretary of State Thomas Jefferson's approach to federal law enforcement rather than that of George Washington's Attorney General, Edmund Randolph. Randolph's proposal placed

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[2] Letter from Edmund Randolph to Thomas Jefferson (May, 9, 1793), FOUNDERS ONLINE, http://founders.archives.gov/documents/Jefferson/01-25-02-0640 [https://perma.cc/RG3N-A7LM].

federal prosecutors between the criminal act and the grand jurors and the court. Once in this position, federal prosecutors remained, slowly expanding their authority.

Today, federal prosecutors wield more power than any other government official.[3] Employing broad criminal statutes and largely unchecked power, federal prosecutors can select nearly anyone for prosecution.[4] Their power, therefore, emanates from their discretionary authority. As former United States Attorney General Robert Jackson stated:

> One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate. . . . What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.[5]

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[3] Angela Davis, *The American Prosecutor: Independence, Power and the Threat of Tyranny*, 86 IOWA L. REV. 393, 397–98 (2001); Robert Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940); Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1126 (2005).

[4] *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 722–24 (2005). *See generally* HARVEY SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2011) (providing commentary on various individuals selected for prosecution).

[5] Jackson, *supra* note 3, at 5.

This leads to the key question of who decides which cases to investigate and prosecute.[6] Who are, in Jefferson's words, the "constitutional inquisitors?"[7]

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[6] As Jackson noted, prosecutors derive their power from their ability to decide against whom the government's coercive power will be used. Jackson, *supra* note 3, at 5. Often, merely charging someone with a crime subjects the person to punishment. *See generally* MALCOM M. FREELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 199–215 (RUSSELL SAGE FOUNDATION 1979) (providing an overview of the pretrial process).

[7] Letter from Thomas Jefferson to Edmund Randolph, *supra* note 1. Jefferson does not define "constitutional inquisitors." In this article, the term is used for someone who investigates in an official capacity. *See Inquisitor*, DICTIONARY.COM https://www.dictionary.com/browse/inquisitor [https://perma.cc/43TV-QAY4]. Therefore, a constitutional inquisitor is someone whom the Constitution authorizes to inquire and decide upon offenses. *See* THE FEDERALIST NO. 65 (Alexander Hamilton). For example, Alexander Hamilton identified the Senate as the constitutional inquisitors on impeachment. He wrote:

> What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of NATIONAL INQUEST into the conduct of public men? If this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves? It is not disputed that the power of originating the inquiry, or, in other words, of preferring the impeachment, ought to be lodged in the hands of one branch of the legislative body. Will not the reasons which indicate the propriety of this arrangement strongly plead for an admission of the other branch of that body to a share of the inquiry? The model from which the idea of this institution has been borrowed, pointed out that course to the convention. In Great Britain it is the province of the House of Commons to prefer the impeachment, and of the House of Lords to decide upon it. Several of the State constitutions have followed the example. As well the latter, as the former,

Answers to that question differ. Most would respond that the Attorney General, as the nation's chief law enforcement officer, possesses ultimate discretionary power.[8] Others would assert the President is a unitary executive and the Constitution gives the President the duty to take care that the laws are faithfully executed.[9] A final group would claim that the United States Attorney in each federal district has that power, especially in the vast majority of cases.[10]

The answers differ because federal law enforcement was one of many questions unresolved during the Constitution's drafting and ratification.[11] This

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> seem to have regarded the practice of impeachments as a bridle in the hands of the legislative body upon the executive servants of the government. Is not this the true light in which it ought to be regarded?

*Id.*

[8] Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many*, 46 FORDHAM L. REV. 1049, 1067 (1978); Joseph R. Biden, Jr., *Balancing Law and Politics: Senate Oversight of the Attorney General Office*, 23 J. MARSHALL L. REV. 151, 157 (1990); *see also About the Office*, DEP'T JUST., https://www.justice.gov/ag/about-office [https://perma.cc/TD6Q-BA2R].

[9] *See* U.S. CONST. art. II, § 3; Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WAS. L. REV. 521 (2005).

[10] Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in the United States Attorneys' Offices: The Role of United States Attorneys and their Assistants*, 23 JUST. SYS. J. 271, 276–81 (2002); H.W. Perry, *United States Attorneys: Whom Shall They Serve?*, 61 L. CONTEMP. PROBS. 129, 131–34 (1998).

[11] JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 3–7 (2018) (arguing that the Constitution was not complete once it was ratified and that its precise contours were established through early practice).

forced those who served during the Constitution's early years to answer these constitutional questions through practice.[12] Their actions became precedent for future situations.

These first constitutional practices created ambiguity about prosecutorial power.[13] Concerns about

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[12] *Id.*

[13] JOAN JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY xv–xvi (1980); Bruce A. Green, *Why Should Prosecutors Seek Justice*, 26 FORDHAM URB. L.J. 607, 607–10 (1998) (identifying the need to give a more detailed definition to the concept of "doing justice"); Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453, 1453 (2000) (arguing that prosecutors are advocates similar to civil attorneys thus making their ethical requirements similar); Nirej Sekhon, *The Pedagogical Prosecutor*, 44 SETON HALL L. REV. 1, 6 (2014) (arguing that prosecutors, through their enforcement power, should advance political dialogue in pluralistic societies). A search of LEXIS NEXIS for "prosecutor" in the same paragraph as "chief law enforcement" revealed over fifty such references over a five-year time period. In most instances, the reference is to the Attorney General as the chief law enforcement officer of the state. There are also numerous references to the county prosecutor as the chief law enforcement officer of the county. *See, e.g.*, Amanda Bland, *DA-Elect Kunzweiler Outlines Changes in the Works*, TULSA WORLD (Oct. 18, 2014) (District Attorney is the chief law enforcement officer for the community); Dan Liljenquist, *It's Time for Swallow to Resign or be Impeached*, DESERET MORNING NEWS (Feb. 21, 2013) (Attorney General is the chief law enforcement officer of the state). *But see* Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 895 (2004) (arguing that neutrality is not a useful concept for analyzing prosecutorial actions because the term itself consists of contested concepts). *See generally* Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559 (2005) (arguing that prosecutors must remain neutral in relations with their

potential Presidential misuse of prosecutorial power have reinvigorated discussion about prosecutorial power. Some scholars point to prosecutorial abuses and propose solutions.[14] Others argue that prosecutors have too much unchecked power and that effectively checking that power requires new procedures.[15] Federal prosecutors have received additional attention due to the fragmented nature of their discretion.[16] In the federal system, the

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various constituencies); H. Richard Unviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695 (2000) (describing the prosecutor's duty to be neutral prior to making the charging decision).

[14] *See, e.g.*, ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 128–29, 141 (2007); Rachel Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 896 (2009) (suggesting that prosecutor offices be restructured to allow for "structural separation" to "ensure unbiased decision making"); Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 952–64 (2006) (detailing the author's proposals for the perceived abuses of prosecutorial power).

[15] *See, e.g.*, Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PENN. L. REV. 959, 1006 (2009) (noting that "elaborate procedures, adversarial submissions, and review by a specialized panel can promote equality" (internal citations omitted)); Richard Rosen, *Disciplinary Sanctions Against Prosecutors for Discovery Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 733–42 (1987) (recommending a variety of changes to how prosecutors are disciplined for *Brady* violations); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1560–72 (1981) (recommending a variety of policy changes to limit prosecutorial discretion).

[16] *See, e.g.*, Sara Sun Beale, *Rethinking the Identity and Roles of United States Attorneys*, 6 OHIO ST. J. CRIIM. L. 369, 421 (2009) (citing the fragmentation and localization of state

Department of Justice and the United States Attorneys share responsibility for charging cases.[17] While scholars debate resolutions to the problem of prosecutorial power, they do so without understanding the prosecutor's historical development. A small collection of scholarship exists but primarily focuses on state prosecutors.[18] Even less examines the federal prosecutor's origins.[19]

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prosecutorial authority as a model for an improved federal prosecutorial authority); James Eisenstein, *The U.S. Attorney Firings of 2006: Main Justice's Centralization Efforts in Historical Context*, 31 SEATTLE U. L. REV. 219, 226–53 (2008) (examining the changes in centralization since the 1960s); Bruce A. Green & Fred C. Zacharias, *"The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power*, 69 OHIO ST. L.J. 187, 197 (2008) (describing the structure and roles of the Attorney General office). These articles arose from the "political" firings of United States Attorneys by the Bush Administration following Bush's re-election. The debate about centralizing federal criminal prosecution is not new, however. *See, e.g.*, John G. Heinberg, *Centralization in Federal Prosecutions*, 50 MO. L. REV. 244, 252–53 (1950) (defining centralized control in federal criminal prosecutions). Heinberg begins his article by further quoting Supreme Court Justice Robert Jackson, who, as United States Attorney General, discussed the problem of centralization in the early 1940s. *Id.* at 244–45.

[17] The charging authority between the Justice Department and the United States Attorneys varies by case type. The Justice Department makes the decision in cases such as national security and tax. The United States Attorneys have authority in most other matters. *See* Dep't of Justice, *Justice Manual: 902.000-Authority of the U.S. Attorney in Criminal Division Matters/Prior Approvals*, http://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals [https://perma.cc/WW4K-Y9TR].

[18] *See infra* Section I.A.

[19] *See infra* notes 103, 120.

This article addresses this shortcoming by identifying the origins of today's problems in a key decision made during George Washington's presidency.[20] It argues that the Washington Administration, particularly Attorney General Edmund Randolph, adapted the prosecutor's role from that of a private advocate or minor judicial officer to one who exercises the government's inquisitorial power, ultimately deciding whom to prosecute for what. Seeking a compromise between Treasury Secretary Alexander Hamilton and Secretary of State Thomas Jefferson, Randolph proposed inserting United States Attorneys between the people and the courts. Randolph's proposal occurred in the midst of a series of meetings and correspondence between Washington's cabinet as they debated how to enforce President Washington's 1793 Neutrality Proclamation. The discussion revealed competing conceptions of federal law enforcement power. Randolph's practical resolution prevailed and set federal prosecutors on a path that made them the nation's constitutional inquisitors.

To understand how Randolph arrived at this resolution, one must first understand the role state prosecutors performed at the time. State prosecutorial work shaped the Washington Administration's perceptions of the federal prosecutor's role. Section II explains the immediate political concerns facing Randolph, namely the need to remain neutral between France and Great Britain, as he considered how to enforce federal law. Section III details the conversation between Jefferson and Randolph, discussing Hamilton's draft instructions to Customs Collectors about neutrality

[20] This approach—examining the Founder's actions—contrasts with an approach focusing on ideological perspectives. For an example of the ideological approach, see ALLISON LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 3–4 (2010).

enforcement. Jefferson's reaction to Hamilton's proposal and his different approach to federal criminal law enforcement led Randolph to place federal prosecutors between the people and the grand jury. Section IV analyzes two issues raised by establishing federal prosecutors as the constitutional inquisitors. First, it examines the centralization of federal prosecutorial discretion. Should the constitutional power to inquire reside locally with federal prosecutors (i.e. United States Attorneys) or centrally (i.e. the Attorney General)? Second, it examines whom the prosecutor represents. Related to the centralization question, whom the prosecutor represents implicates the values underlying criminal prosecution decisions. The final section connects Randolph's proposal to current debates concerning federal prosecutors.

## I. Criminal Prosecution in the Founding Era

The first Congress created the United States District Attorney—or federal prosecutor—as part of the 1789 Judiciary Act.[21] Those drafting the Judiciary Act walked a fine line between the need to create a strong judiciary for the new national government and the people's fears that national courts would deprive citizens of their rights.[22] This led them to adapt aspects of state court practice to fit federal requirements.[23] One adaptation was the public prosecutor. While establishing the attorney's qualifications, the Judiciary Act gave little guidance about how to perform the role.[24] This made

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[21] Judiciary Act of 1789, 1 Stat. 73 (1793), http://www.loc.gov/rr/program/bib/ourdocs/judiciary.html [https://perma.cc/9PPH-H3EK]. Originally, federal prosecutors went by the name "United States District Attorney." *See, e.g.*, Letter from Jabez Bowen to George Washington (June 19, 1790), FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-05-02-0341 [https://perma.cc/E6HQ-N7UB]. In 1870, the name was officially changed to "United States Attorney." ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 532 (2d ed. 2002).

[22] *See* WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789 5 (Wythe Holt & L.H. Rue eds., 1990).

[23] *See* LUTHER A. HUSTON, THE DEPARTMENT OF JUSTICE 4–5 (1967) (asserting that the Judiciary Act borrowed the state prosecutor system). *But see* RITZ, *supra* note 22, at 5 (arguing that the federal system was a historical novelty).

[24] Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1137 (1994) (stating that the original role of federal law enforcement was unclear).

state prosecutors the basis for how United States District Attorneys perceived their role.[25]

### A. Colonial and State Precedents

State prosecutors have murky origins.[26] Like much of the American legal system, the prosecutor position developed over time and adapted to fit a community's specific needs. Prior to the American Revolution, each colony developed its own unique legal system, some more functional than others.[27] Consequently, prosecutors played different roles in each system. Nonetheless, some similarities existed.[28]

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[25] Huston asserts that the Judiciary Act perpetuated the county attorney system employed by the states. HUSTON, *supra* note 23, at 4–5.

[26] JACOBY, *supra* note 13, at 3–5.

[27] For instance, New York's legal system functioned poorly, had a poor reputation, and used few professionals. *See* David H. Flaherty, *Crime and Social Control in Provincial Massachusetts*, 24 HIST. J. 339, 341–42 (1981); Douglas Greenberg, *The Effectiveness of Law Enforcement in Eighteenth-Century New York*, 19 AM. J. LEGAL HIST. 173, 174 (1975) (noting the "severe shortage of able nightwatchmen, constables, sheriffs, jailkeepers, and justices of the peace.") [hereinafter New York]. Massachusetts, conversely, was highly functional, had a strong local reputation, and handled many government functions. Douglas Greenberg, *Crime, Law Enforcement and Social Control in Colonial America*, 26 AM. J. LEGAL HIST. 293, 305 (1982) [hereinafter Colonial America].

[28] Scholars studying criminal courts during the eighteenth century often do not emphasize the importance of different levels of courts when discussing the prosecutor's role. This leads to overgeneralizations when looking at prosecutorial function. For example, historian Allen Steinberg emphasizes the private nature of criminal prosecution arguing that lawyers played a very small role in criminal prosecution during the late 1700s in Philadelphia. *See* ALLEN STEINBERG, THE

Colonial and early state court systems featured two levels of original jurisdiction courts.[29] Lower-level courts lacked formal procedures and mechanisms.[30] Upper-level courts employed grand juries to screen cases.[31] Cases with sufficient evidence were bound for trial where private and public prosecutors appeared.[32] States employed attorneys general who advised the governor and handled cases in the state or colony's supreme court.[33]

Understanding prosecutorial power during the revolutionary era requires understanding the courts in which they worked. Two court levels assumed original

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TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880 25 (1989). Conversely, George Fisher, studying Boston at approximately the same time period, emphasizes the expanding nature of public prosecutorial power as a reason for the beginnings of plea bargaining. *See* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2004). While this might be explained by the different state systems, they actually studied different levels of courts.

[29] One way to think about this system is to apply Friedman's theory of high and low law. Lawrence M. Friedman, *High Law and Low Law*, 10 FLA. INT'L U. L. REV. 53, 59 (2015). Low law dealt with informal sets of rules for the masses while high law dealt with more formal procedures for more serious matters. *Id.* Lower-level courts applied low law while the upper-level courts applied high law. *Id.*

[30] Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney and American Legal History*, 30 CRIME & DELINQ. 568, 571–72 (1984).

[31] *Id.* at 573.

[32] *Id.* at 577.

[33] JACOBY, *supra* note 13, at 19; Rita W. Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEGAL HIST. 304, 309–10 (1958).

jurisdiction over criminal cases. Minor matters, such as simple assaults or theft, initially appeared before a justice of the peace.[34] Professor Steinberg, who studied Philadelphia's lower-level courts, known as aldermanic courts, found they informally administered private dispute resolution while binding over more serious cases to a higher court.[35] Local citizens brought their complaints to justices of the peace, who often lacked legal training themselves.[36] Professor Fisher, on the other hand, studied mid-level courts.[37] These courts had jurisdiction over more serious offenses and utilized juries to decide fact and law.[38] These mid-level courts were the official state courts and met at different sessions

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[34] While the courts went by different names, they performed similar functions. For example, Steinberg studied aldermanic courts in Philadelphia. STEINBERG, *supra* note 28, at 6–7. These alderman heard complaints and resolved the minor matters while sending more serious offenses to the state quarter sessions court for Philadelphia County. *Id.* at 56–57. This work is strikingly similar to the justice of the peace courts Flaherty studies in Massachusetts. Flaherty, *supra* note 27, at 341.

[35] STEINBERG, *supra* note 28, at 17–18.

[36] *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 17–19 (3d ed. 2005); JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAWMAKERS 147 (Little, Brown, & Co. 1950) ("During most of our national history, the justice-of-the-peace court was the court which the states set up to handle the small disputes of the average man."); Steinberg, *supra* note 30, at 574 (law enforcement dictated by the relationship between the court and the people).

[37] FISHER, *supra* note 28, at 4.

[38] *Id.*; *see also* FRIEDMAN, *supra* note 36, at 17–19; Erwin R. Surrency, *The Evolution of an Urban Judicial System: The Philadelphia Story, 1683 to 1968*, 18 AM. J. LEGAL HIST. 95, 102 (1974).

throughout the state.[39] Criminal cases generally ended at these mid-level courts because there was no appeal by either side in criminal cases.[40]

In many instances, mid-level courts convened grand juries. Like with other facets of colonial courts, grand juries differed between states.[41] Some places saw the grand jury as a defender of individual liberties because grand juries had protected those who rebelled against oppressive British rule.[42] Others perceived grand juries as instruments of the state who indicted people opposing the government.[43] In either instance, however, the grand jury stood between the government and the people.[44] The work performed by grand juries also varied by location. In some colonies, grand juries functioned as

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[39] Fisher, *supra* note 28, at 6–7; Friedman, *supra* note 36, at 17–19; WILLIAM EDWARD NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 14–18 (1975).

[40] FRIEDMAN, *supra* note 36, at 225.

[41] *See, e.g.*, Richard D. Younger, *Grand Juries and the American Revolution*, 63 VA. MAG. HIST. & BIOGRAPHY 257, 260 (1955) (contrasting Boston and Philadelphia).

[42] RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941 21–24, 27 (1963) [hereinafter "The People's Panel"]; *see also* Younger, *supra* note 41, at 257–58 (1955).

[43] JACOBY, *supra* note 13, at 18 (stating that the prosecutor protected against grand jury abuses).

[44] Brent Tarter & Wythe Holt, *The Apparent Political Selection of Grand Juries in Virginia, 1789-1809*, 49 AM. J. LEGAL HIST. 257, 260 (2007) (discussing the importance of grand juries). While grand jurors were the formal mechanism for serious criminal cases and justice of the peace handled minor matters, as the post-Revolutionary War period began, the people were seen as the group primarily responsible for enforcing fundamental law.

governing bodies.[45] Other grand juries investigated local problems and presented their findings to the court or the government.[46] They also heard evidence in criminal cases, deciding whether the evidence was sufficient for trial.[47] In these instances, they returned indictments to the court.[48] The public prosecutor drafted the indictment.[49]

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[45] *See* "The People's Panel," *supra* note 42, at 3–11.

[46] JACOBY, *supra* note 13, at 18–19; Renee B. Lettow, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1337 (1994). This practice sometimes occurs in the modern criminal justice system. In Montgomery County, Pennsylvania, a Grand Jury investigated the state's Attorney General for unlawfully disclosing grand jury information. After considering the evidence, the Grand Jury delivered a presentment to the Montgomery County District Attorney. Following the District Attorney Office's review of the presentment, the Office filed criminal charges against the Attorney General. *See* Jon Hurdle, *Pennsylvania Attorney General, Kathleen Kane, Denies Charges*, N.Y. TIMES (AUG. 12, 2015), http://www.nytimes.com/2015/08/13/us/pennsylvania-attorney-general-kathleen-kane-denies-charges.html?_r=0 [https://perma.cc/XCL5-UN8Q]; Brian Wilson, *Charges Filed Against AG Kathleen Kane Surrounding Grand Jury Leaks*, FOX29 (AUG. 6, 2015), http://www.fox29.com/news/charges-filed-against-ag-kathleen-kane-surrounding-grand-jury-leaks [https://perma.cc/C8FK-PP7E]. Presentments were not limited to criminal activity. *See, e.g.*, Dwight F. Henderson, *Georgia Federal Grand Jury Presentments, 1791-1796*, 55 GA. HIST. Q. 282 (1971).

[47] LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 21 (1991).

[48] *Id.*

[49] DAVID J. BODENHAMER, FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY 63 (1992); *see* Steinberg, *supra* note 30, at 575–77 (noting that the public prosecutor acted like a law clerk).

After indictment, private attorneys usually appeared for both sides.[50] Attorneys and judges traveled circuits from county to county litigating criminal cases.[51] An attorney might represent a victim in one case and a defendant in the next.[52] Thus, attorneys served as both

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[50]*See* STEINBERG, *supra* note 28, at 38 (discussing the prevalence of private prosecutions in Philadelphia).

[51] FRIEDMAN, *supra* note 36, at 92.

[52] This is inferred from the practice in three jurisdictions. In Philadelphia, a close-knit legal community developed that included William Rawle, a future United States District Attorney. Rawle maintained a journal where he recorded cases he handled. *See generally* William Rawle Journal, *Rawle Family Papers*, Pennsylvania Historical Society, Philadelphia, PA (hereinafter "Rawle Journal"). Rawle indicated on at least one occasion that he represented the defendant in some cases and the "prosecutor" in other cases. Rawle Journal, July 24, 1786. Given the tradition of private prosecution in Philadelphia, it is likely these combinations worked together in criminal matters. *See generally* STEINBERG, *supra* note 28. In Connecticut, during colonial times, Jared Ingersoll served as a Justice of the Peace, a position akin to the public prosecutor. LAWRENCE HENRY GIPSON, AMERICAN LOYALIST: JARED INGERSOLL 229–30 (1971). *See generally* John H. Langbein, *The Origins on Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313 (1973). This was a part-time position, so Ingersoll likely used his prosecution background to his advantage. GIPSON, *supra*, at 48–53, 232. In 1791, in Rhode Island, Connecticut's United States District Attorney, Pierrepont Edwards, represented several federal criminal defendants. *See, e.g.*, United States v. Pettis, No. 83-673 (R.I. Cir. Ct. Dec. 1784) (on file at the National Archives in Boston). This resulted in attorneys who did not associate themselves with one side or the other in the case. While this has changed in the United States, it has remained so in the United Kingdom where it is not uncommon for barristers to represent the Crown one week and a criminal defendant the next. WILLIAM PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF TRIALS HAS

prosecutors and defense attorneys. In some instances, however, the victim lacked the financial resources to afford a private attorney.[53] When this occurred, the public prosecutor, who drafted the indictment, handled the case.[54]

Public and private prosecutors functioned together in these thirteen different systems. The colonies inherited the private prosecution system from the British.[55] In cases where one person harmed another, the victim initiated the case.[56] Initially, the victim presented evidence and the defendant responded. Neither side had an attorney.[57] Over time, attorneys entered the system,

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BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT 108–09 (New York Univ. Press 1999); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, BYU L. REV. 669, 669 (1992) (identifying himself as a prosecutor).

[53] Craig B. Little & Christopher P. Sheffield, *Frontiers and Criminal Justice: English Private Prosecution Societies and American Vigilantism in the Eighteenth and Nineteenth Centuries*, 48 AM. SOC. REV. 796, 803–04 (1983).

[54] JACOBY, *supra* note 13, at 18–19.

[55] JACOBY, *supra* note 13, at 4–5. *See generally* Langbein, *supra* note 52 (describing the English system's development); Yue Ma, *Exploring the Origins of Public Prosecution*, 18 INT'L CRIM. JUST. REV. 190, 191 (2008).

[56] Langbein, *supra* note 52, at 321–22; Steinberg, *supra* note 30, at 571; *see, e.g.*, *111. A Bill for Preventing Vexatious and Malicious Prosecutions and Moderating Amercements, 18 June 1779*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0111 [https://perma.cc/QL9H-8WCG] ("and the name and sur-name of the prosecutor, and the town or county, in which he shall reside, with his title or profession shall be written at the foot of the information, before it be filed, and of every bill of indictment for any trespass, or misdemeanor, before it be presented to the grand jury").

[57] *See generally* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 10 (Oxford Univ. Press 2003)

representing the victim.[58] The public prosecutor, a feature of European systems, also appeared in America.[59] In the colonies, public prosecutors handled primarily administrative matters such as scheduling cases and drafting legal documents.[60] In some places, especially in colonies with highly functional court systems, public prosecutors handled morality offenses.[61] These cases lacked identifiable victims; society was the victim. As a result, public prosecutors handled these cases. Public prosecutors were not the leaders of the legal profession.[62] Instead, they were often newly admitted to the bar and needed work.[63] Ultimately, they were minor judicial figures who served as administrators rather than inquisitors.[64]

Rather than consult prosecutors on legal questions, colonies, and later states, retained attorneys general. The colonial attorney general served as the

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(chapter one discusses the trial as it existed prior to the involvement of attorneys).

[58] *Id.* at 109–10.

[59] JACOBY, *supra* note 13, at 4–5; W. Scott Van Alstyne, *The District Attorney – A Historical Puzzle*, 1952 WISC. L. REV. 125, 128 (1952).

[60] Steinberg, *supra* note 30, at 577; Andrew M. Siegel, *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot*, 32 AM. J. CRIM. L. 325, 331–33 (2005).

[61] Colonial America, *supra* note 27, at 253–54; Flaherty, *supra* note 27, at 146–47 (focusing on offenses related to sexual immorality).

[62] *See* Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth Century United States*, 39 AM. J. LEGAL HIST. 43, 43–44 (1995).

[63] *See id.*

[64] JACOBY, *supra* note 13, at 6; Siegel, *supra* note 60, at 331–33 (at least this is how South Carolina worked).

English attorney general's colonial representative.[65] Their duties included supervising prosecutions for offenses against the crown and its revenue.[66] Like the local prosecutors, however, the attorneys filling this role were not always highly qualified.[67] This meant the colonial governors did not necessarily follow the attorney general's legal advice, and the crown often resorted to hiring private prosecutors to assist with major cases.[68] With the transition to statehood, the state Attorneys General retained their duties.[69] This aligned them more with the executive than the judiciary because Attorneys General provided general legal advice to the executive.

### B. Creating Federal Prosecutors - Continuity and Change

Against this backdrop, the first Congress brought criminal prosecution to the national level. The Constitution's drafters found the judicial branch one of the most difficult issues to resolve.[70] Many believed a

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[65] GIPSON, *supra* note 52, at 47–48; Cooley, *supra* note 33, at 309–10.
[66] Cooley, *supra* note 33, at 309.
[67] *Id.* at 310.
[68] *Id.* at 310–11; *see also* Steinberg, *supra* note 30, at 575–77 (public prosecutors were regularly superseded by private attorneys even in cases of "great public wrongs" where all agreed public prosecutors should be involved).
[69] Cooley, *supra* note 33, at 311–12.
[70] WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 32 (Univ. of South Carolina Press 1995); Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation*, *in* MAEVA MARCUS, ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789 13, 13 (Oxford Univ. Press 1992); RITZ, *supra* note 22, at 5.

strong national judiciary posed only slightly less danger than a monarch.[71] During the revolutionary years, the British used the courts to control the colonists.[72] This led people to equate despotic power with strong, centralized courts.[73] Others believed only strong national courts could prevent state judges from refusing to enforce federal laws or failing to protect federal interests.[74] This caused Constitutional Convention delegates to leave the details of the federal courts vague, creating only a Supreme Court with original and appellate jurisdiction but limiting its subject-matter jurisdiction.[75] The Constitution also granted Congress the power to create inferior federal courts.[76]

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[71] *See* RITZ, *supra* note 22, at 5.

[72] Jon P. McLanahan, *The 'True" Right to Trial by Jury: The Founders' Formulation and its Demise*, 111 W.VA. L. REV. 791, 799–802 (2009) (describing the importance of colonial juries in resisting British judicial authority).

[73] Gerhard Casper, *The Judiciary Act of 1789 and Judicial Independence*, *in* MARCUS, *supra* note 70, at 283, 289–91.

[74] Casto, *supra* note 70, at 11; Leonard Dupee White, *The Federalists: A Study in Administrative History*, 1789-1891, 392–94 (Macmillan 1956).

[75] U.S. CONST., art. III, § 2; *see also* HURST, *supra* note 36, at 108 (stating that all agreed a Supreme Court was necessary to protect federal interests).

[76] U.S. CONST., art. III, § 1; *see also* HURST, *supra* note 36, at 108 (stating that many objected to Congress having power to create inferior federal courts).

1. The Judiciary Act of 1789

When the First Congress met, creating lower federal courts was a top priority.[77] When drafting the Judiciary Act, Congress understood it was working with a new government system. It was republican in nature, meaning that the people were sovereign.[78] It was also a federal system where both the states and the national government exercised sovereign power.[79] They also knew that their constituents held competing beliefs about these concepts.[80] Many opposed the new national government, fearing, among other things, a centralized national judiciary. These divisions influenced how Congress organized the lower federal courts.

Congress created two levels of lower courts, essentially replicating the system used in several states.[81] The lower level was the district court. Each state

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[77] David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 208 (1995).

[78] Everyone agreed the "people" were sovereign. The problem was that not everyone agreed upon what this meant. *See* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Problem of the Denominator*, 65 U. COLO. L. REV. 749, 750 (1994).

[79] For an overview of the scholarship relating to this issue and the origins of the federalism concept, see LACROIX, *supra* note 20, at 1–11.

[80] *See* Marcus & Wexler, *supra* note 70, at 13–15.

[81] Some scholars assert that the federal judiciary was unique and innovative and that the states eventually copied it. *See* CASTO, *supra* note 70, at 45 (federal circuit courts were a major innovation); RITZ, *supra* note 22, at 5 ("[t]he national judicial system established in 1789 was a historical novelty. It was not modeled on the state systems; instead, the state systems have subsequently been modeled on it."). However, scholarship on the state courts at the time reflects a curiously similar

had its own district court with a single judge presiding.[82] This court worked similarly to justice of the peace courts. Those with criminal complaints could appear before the district court.[83] If the crime carried minimal punishment, the district court could hear the case. [84]Otherwise, the district court could only bind the case for trial in the mid-level court, the circuit court.[85] There were three circuit courts, one for the eastern states, one for the middle states, and one for the southern states.[86] During the course of a year, the circuit court met twice in each state.[87] The circuit court initially featured three judges, two Supreme Court Justices and the district court judge from that state.[88] The circuit court, unlike today's circuit

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structure. *See, e.g.*, FRIEDMAN, *supra* note 36, at 17; NELSON, *supra* note 39, at 15–18.

[82] Judiciary Act of 1789, ch. 20, § 3, 1 Stat. 73 (1793), http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=196_[https://perma.cc/GQ9N-GVRM].

[83] *Id.* § 9, 1 Stat. at 76.

[84] *Id.*

[85] *Id.*

[86] *Id.* § 4, 1 Stat. at 74. The Eastern Circuit included Massachusetts, Connecticut, Vermont, Rhode Island, and New York. The Middle Circuit included Pennsylvania, New Jersey, Delaware, Maryland, and Virginia. The Southern Circuit included North Carolina, South Carolina, and Georgia. Kentucky, upon admission to the Union, became its own Circuit. 2 MAEVA MARCUS, THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1897 2 n.3 (Columbia Univ. Press 1988).

[87] § 4, 1 Stat. at 74.

[88] *Id.* at 74–75. In 1793, Congress permitted the circuit courts to hold sessions with only one Supreme Court Justice. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 1789-1835 89 (Little, Brown & Co. 1926).

court, was a trial court, having jurisdiction over all federal criminal matters.[89]

Congress created these courts hoping to pacify citizen fears that the new federal government would transport defendants to the national capital for trial.[90] The public saw criminal prosecution as a local matter.[91] Defendants could easily defend themselves with witnesses. If trials took place far from the offense location, only the wealthiest defendants would be able to secure witnesses.[92] With local juries, jurors and defendants held similar beliefs, and the juries judged defendants based on local standards.[93] Creating local federal courts to try federal offenses allowed federal defendants to stand trial before their home-state jurors. Congress further protected defendants by permitting each state to use its own jury selection method.[94]

In addition, Congress created two new federal positions to give federal law enforcement a local flavor. First, each district had a United States marshal who had

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[89] § 4, 1 Stat. at 74.
[90] Marcus & Wexler, *supra* note 70, at 21.
[91] FRIEDMAN, *supra* note 47, at 37; NELSON, *supra* note 39, at 3–4, 14–15; Steinberg, *supra* note 30, at 573–74.
[92] RITZ, *supra* note 22, at 6. The circuit courts were essentially the compromise to this problem. If a person was tried before the district court and found guilty, the person would secure a re-trial in the circuit court without having to leave the district. *Id.* at 6, 27. As the Supreme Court only had appellate jurisdiction in such cases, there was no concern that a new trial would take place at the nation's capital. *Id.* at 36–40.
[93] *Id.* at 6, 30.
[94] Marcus & Wexler, *supra* note 70, at 23.

a variety of court-administration duties.[95] Second, each district had its own United States District Attorney.[96]

Section 35 of the Judiciary Act defined the District Attorney's qualifications and duties. The District Attorney had to be "learned in the law."[97] This meant that the prosecutor had to be admitted to the bar after studying law.[98] This brought a sense of professionalism

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[95] Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87, http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=210 [https://perma.cc/4U9C-3ZWJ]. The marshal was responsible for executing all written orders of the United States government. This included the Judiciary, Executive, and Legislative branches. Marshals distributed copies of new laws, handled court finances, and were supervised by the Secretary of State. *See* FREDERICK S. CALHOUN, THE LAWMEN: UNITED STATES MARSHALS AND THE DEPUTIES, 1789-1989 15–21 (Smithsonian Institution Press 1989). Like the United States District Attorneys, the marshals worked with all three branches. Also like the judges and attorneys, Washington appointed men who were locally prominent, knowing that these people would represent the federal government in distant places throughout the United States. *Id.* at 12.

[96] § 35, 1 Stat. at 92.

[97] *Id.* "And there shall be in each district a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents for crimes and offenses, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the Supreme Court in which district it shall be holden." *Id.* At the state level, many who served as lawyers were not necessarily legally trained. For more on the status of the legal profession at this time, see FRIEDMAN, *supra* note 36, at 53–60.

[98] Colonial America, *supra* note 27, at 275; STEINBERG, *supra* note 28, at 43; Surrency, *supra* note 38, at 741 (discussing the significance of the "learned in the law" language).

to the courts. At the state level, many judges and prosecutors lacked legal training.[99]The federal attorney was to prosecute "all delinquents for crimes and offences" arising under the authority of the United States in their district.[100] They also represented the United States in civil actions.[101] Their duties ended at the circuit courts though, because the Attorney General handled Supreme Court cases.[102] As compensation, the District Attorneys received fees based on the type and number of cases handled.[103]

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[99] Surrency, *supra* note 38, at 741.

[100] Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92, https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=215 [https://perma.cc/F32P-DNYH]. This gave a local element to criminal prosecution. However, by creating an Attorney General and then not giving the Attorney General control over the local prosecutors, Congress created a tension in federal criminal law enforcement that remains today. Should federal prosecutorial discretion be left at the local level or should it be centralized? *See, e.g.*, Eisenstein, *supra* note 16, at 221.

[101] § 35, 1 Stat. 73, 92.

[102] *Id.*

[103] *Id.* The fee-based compensation created an incentive for these part-time attorneys to work on the government's behalf. The more cases they filed, the more payment they received. NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940 255–56 (Yale Univ. Press 2013). Assuming Professor Parillo is correct, this raises a question about why the Administration was concerned that the United States Attorneys might not enforce neutrality. If the government paid them sufficiently, then they would enforce the law. Yet, several attorneys also submitted bills to the government for services rendered outside of the traditional case processing duties. *See* Letter from Edmund Randolph to Alexander Hamilton (July 2, 1794), FOUNDERS ONLINE , https://founders.archives.gov/documents/Hamilton/01-16-02-0540 [https://perma.cc/QPT9-HHK3]

These few provisions had two important implications.[104] First, the act effectively eliminated private prosecution from federal criminal cases, differentiating state and federal prosecutors.[105] In state

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Letter from Richard Harison to Alexander Hamilton (June 28, 1791), FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-16-02-0540 [https://perma.cc/ZY3V-UCSU].

[104] The scholarship on the regular practices of the first United States District Attorneys is severely lacking. What exists consists mostly of broad generalizations or is confined to very limited situations. For example, Mary K. Bonsteel Tachau explored the workings of Kentucky's United States District Attorneys for a period of twenty-seven years in the larger context of the work of the Kentucky federal courts. *See generally* MARY K. BONSTEEL TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC, 1789-1816 (Princeton Univ. Press 1978). Kentucky was hardly representative of the coastal states during the early 1790s. Kentucky was the only jurisdiction to have multiple people decline to serve as United States District Attorney. Scott Ingram, *George Washington's Attorneys: The Political Selection of United States Attorneys at the Founding*, 39 PACE L. REV. 163, 211 (2018) (citing MARY K. BONSTEEL TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY, 1789-1816 101 (Princeton Univ. Press 1978)). Another study looks at federal prosecutions across a larger geographic range but begins with the Jeffersonian period. *See* DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801-1829 7–16 (Greenwood Press 1985). With Jefferson's presidential election came a significant change in government philosophy. *See* STANLEY ELKINS & ERIK MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1789-1800 13–28 (Oxford Univ. Press 1995). Due to the lack of scholarship in the area, the conclusions stated here are based on my study of the Pennsylvania District Court and the proceedings of the Middle Circuit in Philadelphia.

[105] While it formally removed private prosecution, it did not prevent the United States District Attorneys from hiring

courts, private individuals brought complaints to the courts and hired private attorneys to pursue the claims; however, the Judiciary Act required United States District Attorneys to handle all federal criminal cases that went to trial.[106] This is indicated by the language that District Attorneys prosecute all delinquents for crimes cognizable under United States authority. For a private criminal action to proceed beyond the grand jury, the District Attorney had to act upon it. Second, the people who filled the District Attorney position had to maintain a private clientele.[107] An attorney could not survive professionally solely on fees generated from government cases. The court met only a few days each year.[108] While the federal prosecutor had a monopoly over

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special assistants, who were private attorneys, to prosecute specific cases. For example, in 1807, the government expended much effort to bring former Vice President Aaron Burr to trial. *See* Douglas Linder, *The Treason Trial of Aaron Burr* (2007), http://ssrn.com/abstract=1021331 [https://perma.cc/VPF8-KLD9] (article available for download). During the trial, Charles Lee, the Attorney General under Adams, and William Wirt, a future attorney general from Maryland, assisted the government. *Id.* Citizens also had the power to initiate cases before the district courts and the grand juries.

[106] *Id.*

[107] Richard Harison, the United States District Attorney for New York, Christopher Gore, the United States District Attorney for Massachusetts, and William Rawle, the United States District Attorney for Pennsylvania, worked in the largest cities in the United States and likely had the most money generated from fees. Even this trio maintained a private practice. *See also* Roger Conner et al., *The Office of U.S. Attorney and Public Safety: A Brief History Prepared for the "Changing Role of U.S. Attorneys' Offices in Public Safety" Symposium*, 28 CAP. U. L. REV. 753, 754–55 (2000).

[108] *See, e.g.*, MARCUS, *supra* note 86, at 164 (describing the term of New Jersey's 1791 Circuit Court).

federal prosecutions, [109] the limited work restricted federal prosecutorial power by necessitating that the attorneys find other clients, making their position part-time.

The arrangement established a simple attorney-client relationship between the government and the District Attorney. The District Attorney attended court when in session, represented the United States in any civil or criminal cases, and then handled private business until the next session.[110] There was no policy function. There was no sense that the District Attorney was the district's chief federal law enforcement official.[111] When a federal criminal case arose, the District Attorney drafted the indictment and presented the evidence.[112] This coincided with the District Attorney's civil responsibilities. If someone owed the government money, for instance, the District Attorney handled the collection proceedings.[113] In this respect, the District Attorney simply was a private attorney who counted the United States government as a client.

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[109] PARILLO, *supra* note 102, at 255–56.

[110] *Cf.* Krent, *supra* note 121, at 292–95 (asserting that private citizens could initiate complaints). While they could initiate complaints, a United States District Attorney had to proceed on the case. *See* Scott Ingram, *Representing the United States Government: Reconceiving the Federal Prosecutor's Role Through a Historical Lens*, 31 NOTRE DAME J.L. ETHICS & PUB. POL'Y 293, 324–27 (2017) (discussing how only cases pursued by the United States District Attorney were pursued in court).

[111] *See* discussion *supra* note 8.

[112] *See, e.g.*, Henfield's Case, 11 F. Cas. 1099, 1115 (Pa. D. 1793).

[113] *See, e.g.*, "Original Minutes of the Circuit Court of the United States of America for the Middle Circuit from October 1790 to April 1799" (on file with the National Archives in Philidelphia).

In addition to the District Attorneys, § 35 of the Judiciary Act established the Attorney General.[114] Like the District Attorneys, the Attorney General had to be learned in the law.[115] The Attorney General was "to prosecute and conduct all suits in the Supreme Court . . . ."[116] Under today's usage, one would conclude this means that the Attorney General handled criminal cases in the Supreme Court. However, based on usage at the time, prosecute meant initiating the case and could refer to civil cases.[117] Therefore, the "prosecute" language did not give the Attorney General control over federal criminal

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[114] Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92, http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=215 [https://perma.cc/F32P-DNYH] ("And there shall also be a meet person learned in the law to act as attorney-general for the United States, who shall be sworn or affirmed to faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion on questions of law when requested by the President of the United States, or when requested of any of the heads of the departments, touching any matters that may concern their departments, and shall receive such compensation as shall by law be provided.").

[115] *Id.*

[116] *Id.*

[117] *See, e.g.*, Chisholm v. Georgia, 2 U.S. 419, 472 (1793) (Chief Justice John Jay stating, "It is agreed, that one free citizen may sue any number on whom process can be conveniently executed; nay, in certain cases one citizen may sue forty thousand; for where a corporation is sued, all the members of it are actually sued, though not personally, sued. In this city there are forty odd thousand free citizens, all of whom may be collectively sued by any individual citizen. In the State of Delaware, there are fifty odd thousand free citizens, and what reason can be assigned why a free citizen who has demands against them should not prosecute them?").

prosecutions. Beyond the language difference, the Supreme Court lacked constitutional authority to hear criminal cases, unless they involved ambassadors or other public ministers and consuls, because the Supreme Court only had appellate jurisdiction.[118]

The Judiciary Act then gave the Attorney General an additional function. The Attorney General would give "his advice and opinion upon questions of law."[119] This duty differentiated the Attorney General's relationship with the government from the District Attorney's. The attorney general served as a legal advisor, assisting the government rather than someone who appeared only when court was in session. Yet, like the District Attorneys, the attorney general was not full-time. While the Judiciary Act established fixed compensation instead of a fee-based schedule, the amount curtailed the incumbent's ability to give government work full-time attention.[120]

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[118] U.S. Const. art. III, § 2.

[119] Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92, http://www.loc.gov/rr/program/bib/ourdocs/judiciary.html.

[120] HUSTON, *supra* note 23, at 5.

2. The First Federal Prosecutors[121]

Soon after Washington signed the Judiciary Act, he filled the new judiciary positions. [122] Washington

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[121] *See* Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 293 (1989) (discussing the role of federal prosecutors under the Judiciary Act). The work of federal prosecutors during the Early Republic period has received scant scholarly attention. When scholars have examined their work, it has been done as part of a larger study. Most recently, legal scholars have focused on the executive's power to not enforce the law. *See, e.g.*, Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 4–6 (2009); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 747 (2014). Prior to that scholars expounded on the separation of powers between the judiciary and executive. *See, e.g.*, Susan Low Bloch, *The Early Role of the Attorney General in our Constitutional Scheme: In the Beginning There was Pragmatism*, 1989 DUKE L.J. 561, 567–68 (1989). Historians discuss how prosecutors handled particular types of crimes or how the government addressed a particular problem. Examples include the Whiskey Rebellion and Sedition prosecutions. *See, e.g.*, THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION 192–204 (Oxford Univ. Press 1988); JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICA'S CIVIL LIBERTIES, 1798 177 (Cornell Univ. Press 1956). These studies have not analyzed prosecutorial powers but simply describe their actions.

[122] Letter from George Washington to the United States Senate (Sept. 24, 1789), FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/05-04-02-0053. The next day, he made initial selections for New York and New Jersey and appointed Attorney General Randolph. Letter from George Washington to the United States Senate (Sept. 25, 1789), FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/05-04-02-0058 [https://perma.cc/M3SF-FBVF].

keenly understood these initial selections were precedent setting.[123] He sought those loyal to the national government and who had strong local reputations.[124] The people filling the judicial positions would be the new federal government's face in their respective districts. His District Attorney nominees included Pierpont Edwards, who would serve for sixteen years and as a federal judge for twenty more;[125] Christopher Gore, who would later serve as Massachusetts governor and United States Senator;[126] Richard Harison, Alexander Hamilton's former law partner;[127] and John Marshall, the

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[123] Letter from George Washington to Edmund Randolph (Sept. 28, 1789), FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/05-04-02-0073 [https://perma.cc/RHW6-8W2H] ("Impressed with a conviction that the due administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country and to the stability of its' political system—hence the selection of the fittest characters to expound the laws, and dispense justice, has been an invariable object of my anxious concern."); *see also* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815 86–88 (Oxford Univ. Press 2009); Ingram, *supra* note 104, at 189.

[124] WOOD, *supra* note 123, at 107–09.

[125] Charles Heckman, *A Jeffersonian Lawyer and Judge in Federalist Connecticut: The Career of Pierpont Edwards*, 28 CONN. L. REV. 669 (1996).

[126] BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., *Gore, Christopher, (1758-1827)*, CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=G000322 [https://perma.cc/UDQ9-3JKF].

[127] *See Richard Harison Halts Vermont Statehood*, Founder Day, https://www.founderoftheday.com/founder-of-the-day/harison [https://perma.cc/T9RC-EJZL].

future Supreme Court Chief Justice.[128] Edmund Randolph received the Attorney General nomination.[129] Randolph came from a prominent Virginia legal family, had been a leading member of the Constitutional Convention and, although he initially opposed the Constitution, played an important role in Virginia's ratification.[130]

Although Washington consulted local officials for nomination recommendations, he nominated people without consulting them. George Nicholas, James Madison's friend, declined the nomination for Kentucky.[131] Washington's second choice, James Brown, also refused the nomination.[132] Edmund Randolph took several months to respond to Washington's nomination before ultimately accepting it.[133] John Marshall also declined his nomination, stating it would interfere with his state court business.[134] Despite these few failures,

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[128] Letter from John Marshall to George Washington (Oct. 14, 1789), FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/05-04-02-0130 [https://perma.cc/3937-PKW7].

[129] Letter from George Washington to the United States Senate, *supra* note 122.

[130] JOHN J. REARDON, EDMUND RANDOLPH: A BIOGRAPHY, 10–12, 96–98, 114–19, 125–27 (MacMillan 1975).

[131] TACHAU, *supra* note 104, at 66–70 (discussing the numerous people who had rejected the Kentucky position).

[132] *Id.*

[133] REARDON, *supra* note 130, at 179–80.

[134] Letter from John Marshall to George Washington, *supra* note 128. Apparently Washington spoke with a Samuel Griffin about various Virginians who would serve ably in the national judicial offices. Griffin put together a list, including Marshall. *Conversation with Samuel Griffin, 9 July 1789*, FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/05-03-02-0075 [https://perma.cc/S4M9-A5G7]. This would be the first of three federal appointments that Marshall declined. *See* DAVID SCOTT ROBARGE, A CHIEF JUSTICE'S PROGRESS: JOHN MARSHALL FROM REVOLUTIONARY VIRGINIA TO THE SUPREME

many of Washington's initial appointments served several years, leaving only for more prestigious federal appointments.[135]

The new District Attorneys encountered two significant problems. First, they had little business. Most of their work involved dealing with revenue matters, including forfeitures and collection actions.[136] Few prosecuted many criminal cases because the extent of federal criminal jurisdiction was ambiguous.[137] Some believed the federal government possessed common law criminal jurisdiction.[138] Others asserted the government

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COURT (Greenwood Press 2000). Washington sought to make Marshall Attorney General, and Adams sought to make Marshall an Associate Supreme Court Justice. *Id.*

[135] *See generally* Ingram, *supra* note 104; ARCHIVE OF SENATE JOURNALS FROM 1789-1801, http://memory.loc.gov/ammem/amlaw/lwsjlink.html [https://perma.cc/S2LL-E66D] (providing links to journals from this time period).

[136] MARCUS, *supra* note 86, at 8–9 (describing the work of the Circuit Courts during their first term); WARREN, *supra* note 88, at 58–63 (describing the work performed in the circuit courts).

[137] *See, e.g.*, Robert C. Palmer, *The Federal Common Law of Crime*, 4 L. & HIST. REV. 267, 272 (1986); Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 L. & HIST. REV. 223, 263 (1986) (both articles argue against a federal common law of crimes and describe the historical debate about the matter). *But see* CASTO, *supra* note 70, at 129–30 (pointing to an example of a federal common law crime occurring on the high seas; at the time the case was commenced, the Crimes Act had not been passed).

[138] Stephen B. Presser, *The Supra-Constitution, the Courts, and the Federal Common Law of Crimes: Some Comments on Palmer and Preyer, in* 4 LAW & HIST. REV. 325, 326 (1986) (listing the early Supreme Court Justices who endorsed a common law of crime).

could only prosecute violations of federal statutes.[139] While Congress passed an initial crimes law, the law covered few matters.[140] Most early criminal cases involved crimes occurring on the high seas. In the District of Pennsylvania, prior to 1793, nearly every case prosecuted involved a murder, assault, or theft on a maritime vessel.[141] Grand juries met in each district but were soon discharged for lack of business.[142]

Their second problem dealt with the United States District Attorney's relationship with the Executive.[143] How much control should the central

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[139] *See, e.g.*, Preyer, *supra* note 137, at 227–28 (citing grand jury charges defining the scope of criminal jurisdiction).

[140] Crimes Act of 1790, 1 Stat. 112 (1790), *reprinted in* MARCUS, *supra* note 86, 528–35. For a discussion of the scope of the Crimes Act, see Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 55–60 (1996). The Crimes Act also contained no crimes in which the district courts had jurisdiction. *See* HENDERSON, *supra* note 104, at 7.

[141] Minutes for the Circuit Court of the District of Pennsylvania, M986, "Criminal Case Files of the U.S. Circuit Court for the Eastern District of PA, 1791-1840" (on file with the National Archives in Philadelphia) [hereinafter *Minutes of Circuit Court*].

[142] *Id.* Maeva Marcus's edited work on the Documentary History of the Supreme Court includes a summary of every session held by the circuit courts from 1789 to 1794. In the early years, it was not uncommon for the sessions to only last a week or two, if even that long, due to a lack of business. Most of the cases presented to the circuit courts during this time were civil cases for which a grand jury was not needed. *See generally* MARCUS, *supra* note 86.

[143] HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 7 (Macmillan Co. 1937) (discussing questions to be resolved about the administration of criminal justice following ratification of the Constitution).

government exert over cases handled by the district attorneys? This question arose in different contexts during the national government's early years.[144] Would there be a strong, centralized government dictating policy for the entire nation or would the states, towns, and plantations have significant local autonomy? During Washington's first Presidential term, the local district attorneys exercised unfettered discretion.[145] Only rarely did local district attorneys contact the Administration.[146] In one instance, Pennsylvania's United States Attorney, William Lewis, wrote to Washington seeking a pardon for a counterfeiting suspect who offered to inform Lewis about a larger counterfeiting ring.[147] Determining control was so significant that, in 1791, Attorney General Randolph asked Congress to give the Attorney General supervisory authority over the district attorney's work.[148]

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[144] *See* WOOD, *supra* note 123, at 31–33, 53–54 (noting that the problem of centralization was a key consideration of the Constitutional Convention and that the subsequent ratification debates divided the Federalists, who favored centralization, and the Anti-Federalists, who opposed it).

[145] CORNELL CLAYTON, THE POLITICS OF JUSTICE: ATTORNEY GENERAL AND THE MAKING OF GOVERNMENT LEGAL POLICY 16 (M.E. Sharpe 1992) (stating there is no connection between the Attorney General and the United States District Attorneys); HUSTON, *supra* note 23, at 6–8.

[146] *See generally* Ingram, *supra* note 110 (addressing the relationship between the Administration and its attorneys).

[147] Letter from William Lewis to George Washington (Mar. 7, 1791), FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-07-02-0294 [https://perma.cc/FQ26-FVFH].

[148] Letter from the Attorney General to George Washington (Communicated to Congress) (Dec. 28, 1791), *in* 1 AMERICAN STATE PAPERS 45–46 (Library of Congress, American Memory Series) [hereinafter AMERICAN STATE PAPERS], http://memory.loc.gov/cgi-

Failing that, wrote Randolph, "[t]he attorneys of the districts ought . . . to be under an obligation to transmit to him a state of every case in which the harmony of the two judiciaries may be hazarded . . . ."[149] On routine matters, district attorneys clearly had autonomy, but did they have the same autonomy over cases of national significance? Could the President order the United States District Attorneys to prosecute? They were Presidential appointees and represented the United States, yet they also perceived themselves as judicial officers.[150] Could they refuse to comply if they believed the ordered action was not warranted?

A similar situation existed for the Attorney General. Randolph attended the Supreme Court's first session, which lasted one week.[150] The Court admitted several attorneys and then adjourned without hearing a case.[151] That routine continued until August 1791 when the first case arrived. It was immediately dismissed, however, because of a procedural error.[152] While the Attorney General had few cases to argue, Randolph wrote opinions to department heads as they considered their

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bin/ampage?collId=llsp&fileName=037/llsp037db&recNum=52 [https://perma.cc/387Z-2W4R] (explaining that it is apparent that the Attorney General did not have control over the District Attorneys, though it is unclear whether this was intended); *see* Bloch, *supra* note 121, at 567–68. *But see* CUMMINGS & MCFARLAND, *supra* note 143, at 11–13.

[149] Letter from the Attorney General to George Washington, *supra* note 147.

[150] *See generally* JACOBY, *supra* note 13; Ingram, *supra* note 104.

[150] REARDON, *supra* note 130, at 191–92; WARREN, *supra* note 88, at 46–47 (describing first day of Supreme Court).

[151] *See* WARREN, *supra* note 88, at 46–51 (describing the term).

[152] *Id.* at 56 (citing West v. Barnes, 2 U.S. 401 (1791)).

constitutional and statutory authority.[151] He soon found this work consumed substantial time.[152] In the same letter in which Randolph requested control over the United States District Attorneys, Randolph requested funds for a clerk because of the lengthy opinions he had to write.[153] Randolph became so engrossed in opinion writing that his private legal practice suffered.[154] His only other major assignment as Attorney General involved reviewing the federal court system.[155]

Though not a department head, Randolph similarly had to determine the scope of his authority. Without significant statutory guidance, Randolph adopted a pragmatic approach.[156] Having served in politics for much of his adult life, Randolph found himself mediating between Hamilton's and Jefferson's

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[151] Opinions written by the early Attorneys General, including Randolph's, were not formally preserved. It was not until William Wirt became the Attorney General under President Monroe that the Attorneys General began keeping a record of their opinions. LEONARD DUPEE WHITE, THE JEFFERSONIANS; A STUDY IN ADMINISTRATIVE HISTORY, 1801-1829 337 (Macmillan 1951) (stating that Attorney General William Wirt was the first to establish written opinions); CLAYTON, *supra,* note 145, at 17–18. Nonetheless, a large number of Randolph's opinions are now available through the National Archives' Founder's Online database.

[152] *Id.* at 197–206. A search of the Founder's Online database yielded at least thirty-seven opinions from February 1790 when Randolph arrived in New York for the Supreme Court's first term to January 3, 1794 when Randolph took the oath to become Secretary of States.

[153] AMERICAN STATE PAPERS, *supra* note 148.

[154] REARDON, *supra* note 130, at 195.

[155] *Id.* at 193–96.

[156] *See generally* Bloch, *supra* note 121 (arguing that the relationship between the President and Attorney General was not clearly defined).

increasingly hostile positions.[157] Replicating the state Attorney General role, Randolph provided whatever assistance the Administration required. These obligations, coupled with his long-standing relationship to Washington,[158] pushed the Attorney General away from judicial duties and toward an executive function.[159] In essence, Randolph became the administration's legal advisor rather than a neutral judicial officer.[160]

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[157] REARDON, *supra* note 130, at 207, 212–13.

[158] Washington and Randolph first worked together during the Revolutionary War. *Id.* at 21. Randolph, to prove his loyalty to the American side, sought and received a position on Washington's staff. *Id.* at 19–21. When Randolph's father fled to Great Britain and his uncle died, Randolph left Washington's service to take care of the Randolph family affairs. *Id.* at 22.

[159] CLAYTON, *supra* note 145, at 49–50 (stating that Attorney General began as a judicial figure and became administrative later). At this point, Randolph clearly moved beyond his statutory authority as the Attorney General, which was not on the same level as the Secretaries of Treasury, War, and State. Bloch, *supra* note 121, at 572, 578–79. For Randolph, the nature of the power exercised was more important than who exercised it. *See generally* Scott Ingram, *"[Perhaps] the Principle is Established": The Senate, George Washington, and the Ambiguous Origins of Executive Privilege*, 28 KAN. J.L. & PUB. POL'Y 1 (2018).

[160] Nancy Baker devised a continuum that assigned Attorneys General a place between legal (called "neutral") and political in terms of the relationship with the Presidential administration. *See* NANCY V. BAKER, CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE 35 (Univ. of Kan. Press 1992). On the political end, the Attorney General is an advocate for the administration by promoting "both the president's and his own policy agenda while in office." *Id.* The political landscape supersedes the legal landscape. *Id.* On the legal side, the Attorney General is independent and answers only to the rule of law. *Id.* This type of Attorney General is

This was the shape of federal criminal justice as Washington began his second term in March 1793. Events in Europe forced the federal government to confront what role its lawyers played in federal criminal justice.

## II. The Neutrality Crisis

As the new American federal government began, the French citizenry began a revolution, imitating their American counterparts.[161] Americans who initially observed these events equated the French Revolution with their own.[162] Over time, the French Revolution's tenor changed, becoming more radical and bloodier than the American one.[163] Nevertheless, most Americans enthusiastically supported the French Revolution with parades and festivals, celebrating French victories including their dethroning King Louis XVI.[164] For many

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"capable, cautious, thoughtful, legalistic and nonpolitical." *Id.* Randolph does not fit neatly along the continuum as he displayed aspects of each position. However, by the time of the writing, Randolph was more an advocate than a neutral. CLAYTON, *supra* note 145, at 16–17 (Randolph set the precedent for a close friend of the President serving as Attorney General). This is not to say that Washington agreed with or abided by Randolph's legal opinions. *See, e.g.*, Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinion*, 44 DUKE L.J. 110, 120 (1994).

[161] WOOD, *supra* note 123, at 174.

[162] ELKINS & MCKITRICK, *supra* note 104, at 308–09; WOOD, *supra* note 123, at 174.

[163] JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS 69, 83 (Yale Univ. Press 1993).

[164] SIMON P. NEWMAN, PARADES AND THE POLITICS OF THE STREET: FESTIVE CULTURE IN THE EARLY AMERICAN REPUBLIC

other Americans, their enthusiasm dampened as Revolutionary War hero, the Marquis de Lafayette, was forced to flee France and was captured in Austria.[165] It turned to fear when the new French government guillotined Louis XVI and declared war on Europe.[166]

When this news reached the United States, Washington immediately recognized the threat.[167] The United States found itself between the warring powers. Still repaying its Revolutionary War debt, working under a controversial four-year old federal government, and lacking a significant military, the United States could not fight a war, especially one in Europe.[168] While the

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139 (Univ. of Pa. Press 1997). These events were partisan in nature. The Federalists took notice of these events but did not participate. *Id.* at 120–22. These events only heightened Federalist fears that the French Revolution would come to the United States. RON CHERNOW, ALEXANDER HAMILTON 434 (Penguin Press 2004); ELKINS & MCKITRICK, *supra* note 104, at 310; WOOD, *supra* note 123, at 178–79, 183.

165 HARRY AMMON, THE GENET MISSION 41 (WW Norton & Co., Inc., 1973); ELKINS & MCKITRICK, *supra* note 104, at 311; WOOD, *supra* note 123, at 177.

166 AMMON, *supra* note 165, at 42; ELKINS & MCKITRICK, *supra* note 104, at 311.

167 Letter from George Washington to Alexander Hamilton, Thomas Jefferson, Henry Knox, and Edmund Randolph (Apr. 18, 1793), FOUNDERS ONLINE, http://founders.archives.gov/documents/Hamilton/01-14-02-0225-0001 [https://perma.cc/QX7R-NVRJ] (Washington calling the cabinet meeting). Eleven days prior, Washington became satisfied that war had, in fact, been declared. Letter from Thomas Jefferson to George Washington (Apr. 7, 1793), FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/05-12-02-0335 [https://perma.cc/XS99-NJVJ].

168 *See* ELKINS & MCKITRICK, *supra* note 104, at 334 (discussing the importance of the Revolutionary War debt owed to France); CHARLES MARION THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT 17 (Colum. Univ. Press 1931)

Administration realized this, not all Americans did. Many still supported France and believed the United States owed the French people support just as the French had supported the Americans Revolution.[169] A smaller number, who held significant power within Washington's Administration, relied on commerce with Great Britain for their livelihood.[170] Despite the strong desire to remain

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(discussing reasons why war had to be avoided). *See generally* RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT, 1783-1802 36–39 (Free Press 1975); PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788 (Simon & Schuster 2010) (discussing the controversial nature of the new national government). For the reasons why war had to be avoided, see THOMAS *supra*, at 17 (discussing the United States military establishment at this time).

[169] ELKINS & MCKITRICK, *supra* note 104, at 308–09; SHARP, *supra* note 163, at 81–86 (describing the popular divide and the different responses to it from the Administration).

[170] Jefferson presented his view of the divide in Philadelphia in a May 13, 1793 letter to James Madison. Letter from Thomas Jefferson to James Madison (May 13, 1793), FOUNDERS ONLINE, http://founders.archives.gov/documents/Jefferson/01-26-02-0021 [https://perma.cc/V7KG-AD23]. This was the end of the same letter in which Jefferson complains about the neutrality enforcement plans presented by Hamilton and Randolph. Alexander Hamilton was the driving force of the pro-British faction within the Administration. On Hamilton's relationship with Great Britain during this time period, see GILBERT L. LYCAN, ALEXANDER HAMILTON, & AMERICAN FOREIGN POLICY: A DESIGN FOR GREATNESS 148 (Univ. of Okla. Press 1970). On the influence Hamilton had over Washington and Jefferson's response to it, see AMMON, *supra* note 165, at 4; CHERNOW, *supra* note 164, at 440 (Jefferson informing Genet of the influence held by Hamilton and U.S. Senator Robert Morris as English supporters); JOHN FERLING, JEFFERSON AND HAMILTON: THE RIVALRY THAT FORGED A NATION 213–23 (Bloomsbury Press 2013).

out of war, the Treaty of Amity and Commerce with France, signed during the American Revolution, required the United States to aid France if France was attacked.[171] It was possible that the French would invoke this provision.[172] This situation forced the Administration to find a neutral path.

### A. First Cabinet Meetings

Upon learning of the war, Washington called a cabinet meeting to ask nine questions relating to the United States' response.[173] The first question posited whether the government should accept the new French Minister to the United States, Edmond Charles Genet.[174] Hamilton argued the government should not accept him because withholding recognition was a prerequisite for the United States to be able to assert that the Treaty of Amity and Commerce between the United States and France was no longer valid due to the lack of a stable

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171 WILLIAM R. CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL 20–21 (Univ. of S.C. Press 2006) (while this was a treaty term, the French had allegedly waived the provision).

172 AMMON, *supra* note 165, at 25–27 (describing French consul Edmond Genet's instructions for his mission to the United States).

173 CASTO, *supra* note 171, at 29–30. These questions set the stage for Cabinet dissension. Hamilton met with Washington prior to the meeting and presented the questions to Washington. *Id.* at 29. Also prior to the meeting, Randolph wrote the questions and distributed them *Id.* This likely irritated Jefferson as he recognized Hamilton's work based on the tenor of the questions. *Id.*; *see Minutes of a Cabinet Meeting*, FOUNDERS ONLINE (Apr. 19, 1793), http://founders.archives.gov/documents/Washington/05-12-02-0362 [https://perma.cc/W8FE-Q5AP] for a short summary of the meeting.

174 CASTO, *supra* note 171, at 26–27.

French government.[175] Jefferson countered that the United States should recognize Genet because the United States was bound by the treaty's terms as treaties bound nations, not governments.[176] Jefferson's position prevailed with Randolph's support.[177]

With the first question decided, the meeting turned to the United States' position vis-à-vis the warring powers. All agreed that the United States should remain neutral, but Hamilton and Jefferson contested the details.[178] Hamilton believed Washington should issue a statement proclaiming neutrality.[179] Prior to the meeting, United States Supreme Court Chief Justice John Jay provided Hamilton a proposed proclamation.[180] Hamilton, in turn, presented it to the Cabinet.[181] Jefferson opposed the proclamation.[182] He believed that the United States should seek concessions from the warring powers prior to declaring neutrality.[183] He

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[175] *Id.*; LYCAN, *supra* note 170, at 153–55.
[176] ELKINS & MCKITRICK, *supra* note 104, at 339.
[177] Letter from Edmund Randolph to George Washington (May 6, 1793), FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-12-02-0429 [https://perma.cc/V5DG-3NVW].
[178] AMMON, *supra* note 165, at 48; CASTO, *supra* note 171, at 26–27 (noting that "neutrality was not a clear and precisely developed concept"); ELKINS & MCKITRICK, *supra* note 104, at 337; FERLING, *supra* note 170, at 246. This left the Washington Administration a full cloth with which to work when crafting their version of neutrality. As made clear below, Jefferson favored a neutrality that benefitted France. Hamilton sought a strict neutrality that denied France any ally benefits from the United States. CASTO, *supra* note 171, at 24–25.
[179] AMMON, *supra* note 165, at 48–50.
[180] CASTO, *supra* note 171, at 28.
[181] *Id.* at 29–30.
[182] ELKINS & MCKITTRICK, *supra* note 104, at 337.
[183] *Id.*; LYCAN, *supra* note 170, at 160.

thought that this might help the United States' standing vis-à-vis the other European nations, particularly in terms of opening their ports to United States commerce.[184] When this approach failed, Jefferson argued Washington lacked the constitutional authority to declare neutrality because Congress had the power to declare war so Congress, alone, possessed the power to declare peace.[185] Hamilton countered that a neutrality proclamation did not announce a new policy but merely affirmed the status quo.[186] After some deliberation, Hamilton's position prevailed, with Randolph supporting the proclamation.[187]

Having decided to issue a statement announcing neutrality, Washington directed Randolph to write the draft.[188] Randolph's proposed proclamation demonstrated his preference for practicality over ideology. Likely influenced by Jay's draft, Randolph devised a similar proclamation but wrote it such that the Cabinet could unanimously support it.[189] Randolph's proclamation contained two notable features. First, it

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[184] FERLING, *supra* note 170, at 252–53 (using as evidence Jefferson's report in Fall 1793 about the necessity of America freeing itself from reliance on British commerce); ROBERT TUCKER & DAVID HENDRICKSON, EMPIRE OF LIBERTY: THE STATECRAFT OF THOMAS JEFFERSON 56 (Oxford Univ. Press 1992).

[185] It is important to note that Jefferson did not oppose *neutrality* but opposed the public declaration of it. U.S. CONST., art. I, § 8 (Congress has the power to declare war); AMMON, *supra* note 165, at 48.

[186] THOMAS, *supra* note 168, at 39.

[187] For a discussion of the debate, *see* THOMAS, *supra* note 168, at 40–41.

[188] REARDON, *supra* note 130, at 222.

[189] *Id.* at 224; CASTO, *supra* note 171, at 31.

omitted the word "neutrality."[190] Realizing that Jefferson adamantly denied the President's power to declare neutrality, Randolph wrote that the United States would "adopt and pursue a conduct friendly and impartial toward the belligerent powers."[191] While the omission of "neutrality" was significant, Randolph's final paragraph had more significant domestic consequences. He warned the citizenry that any conduct not "friendly and impartial" would result in criminal prosecution.[192] This included "committing, aiding or abetting hostilities against any of the said powers, or by carrying to any of them those articles, which are deemed contraband by the modern usage of nations."[193] Tying violations to the Law

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[190] *See* George Washington, *Neutrality Proclamation, 22 April 1793*, FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/05-12-02-0371 [https://perma.cc/MAQ5-ME2A].

[191] *Id.* Interestingly, Jefferson may have won this small battle but his victory likely cost him the larger political war over neutrality policy. Rather than use the term "neutrality," Randolph used "impartial." Jefferson did not want an impartial neutrality; however, once used in the proclamation, impartiality became the policy. THOMAS, *supra* note 168, at 21.

[192] *Neutrality Proclamation, 22 April 1793*, *supra* note 190. This was not the first time Washington used a proclamation to warn of criminal prosecution if the citizenry did not comply. *See Proclamation, 19 March 1791*, FOUNDER'S ONLINE, https://founders.archives.gov/documents/Washington/05-07-02-0343 [https://perma.cc/824X-NAXP].

[193] *Neutrality Proclamation, 22 April 1793*, *supra* note 190. There is some question about whether Randolph inserted this paragraph on his own or if he relied upon a similar provision in Supreme Court Chief Justice John Jay's draft proclamation. *Compare* CASTO, *supra* note 171, at 28, *with* REARDON, *supra* note 130, at 221–23 (lacking any discussion of reliance on Chief Justice John Jay's draft proclamation). Jay's draft was longer than the final draft approved by Washington. CASTO, *supra*

of Nations provided the constitutional basis for federal criminal prosecution.[194] The federal government had clear authority over international affairs[195] and, therefore, had power to enforce the law of nations.[196] After receiving unanimous Cabinet approval, Washington issued what became known as the "Neutrality Proclamation" on April 22.[197]

While Washington likely favored Hamilton's ideological position, Washington's desire to proclaim neutrality also resulted from practical reality. Writing to Hamilton about the European war prior to the April 19 meeting, Washington expressed his concern about American citizens involving themselves in the war.

> Hostilities having commenced between France and England, it is incumbent upon the Government of the United States to prevent, as far as in it lies, all interferences of our citizens in them; and immediate precautionary measures

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note 171, at 31. If it, in fact, came from Jay, who was a close friend of Hamilton's, it is further evidence that Jefferson succeeded only in removing the term "neutrality" from the document and, ultimately, lost the political struggle over neutrality policy. *Id.*

[194] Preyer, *supra* note 137, at 232.

[195] *See* U.S. Const. art. I, § 8; U.S. Const. art. I, § 10; U.S. Const. art. II, § 2; Casto, *supra* note 70.

[196] *See* Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations,* 109 COLUM. L. REV. 1, 2–7 (2009) (outlining competing views on the application of the law of nations and identifying an alternate view based on the nation's founders' practices); Stewart Jay, *The Status of the Law of Nations in Early American Law,* 42 VAND. L. REV. 819, 820–21 (1989).

[197] For one theory about how it became known as the "Neutrality Proclamation" without using the word "neutrality" *see* THOMAS, *supra* note 168, at 48.

> ought...to be taken...as I have reason to believe...that many vessels in different parts of the Union are designated for Privateers & are preparing accordingly. The means to prevent it, and for the United States to maintain a strict neutrality between the powers at war, I wish to have seriously thought of...[198]

Washington suspected American citizens were arming themselves to fight for the French.[199] He knew this could draw the United States into the war.[200]

The threat was greater than Washington knew. In February, even before word of the European war

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198 Letter from George Washington to Alexander Hamilton (April 12, 1793), FOUNDERS ONLINE, http://founders.archives.gov/documents/Hamilton/01-14-02-0207 [https://perma.cc/6TH Y-RFK3].

199 Letter from George Washington to Alexander Hamilton (April 12, 1793), FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/05-12-02-0352 [https://perma.cc/S V9J-WU5X]. On the same day, Washington wrote letters to Jefferson and Secretary of War Henry Knox. His message to Jefferson was similar to Hamilton's. Letter from George Washington to Thomas Jefferson (April 12, 1793), FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/05-12-02-0353 [https://perma.cc/5CJQ-LP25]. He did not mention neutrality in the letter to Knox. Letter from George Washington to Henry Knox (April 12, 1973), FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/05-12-02-0354 [https://perma.cc/E6HP-FFRP].

200 Scott Ingram, *Replacing the "Sword of War" with the "Scales of Justice": Henfield's Case and the Origins of Lawfare in the United States*, 9 J. NATI'L SECURITY L. & POL'Y 483, 489–90 (2018).

reached the United States, Genet set sail from France.[201] Rather than arrive at Philadelphia, the nation's capital, Genet landed at Charleston, South Carolina on April 8.[202] Following an enthusiastic welcome from Charleston's French supporters, Genet met with South Carolina's governor, William Moultrie, about commissioning privateers.[203] Moultrie listened to Genet and permitted him to outfit and commission privateers because Moultrie knew of no legal prohibition.[204] With Moultrie's

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[201] AMMON, *supra* note 165, at 31; CASTO, *supra* note 171, at 1. For a detailed background on Genet, see AMMON, *supra* note 165, at 1–18. For a shorter explanation of Genet's relationship with French government, see ELKINS & MCKITRICK, *supra* note 104, at 330–32.

[202] Why Genet landed at Charleston is a historical mystery. Genet claimed the captain had to sail south to avoid British navy vessels. LYCAN, *supra* note 170, at 146. Historians question his assertion. He may have gone there because he knew he would receive a favorable reception from the people. WOOD, *supra* note 123, at 185–86 (discussing the "warmth and enthusiasm" with which he was greeted. *Id.* at 185). It is also possible that he chose Charleston because his instructions involved, in part, establishing forces to occupy land south and west of the United States. AMMON, *supra* note 165, at 25–27. Regardless of the reason for his arrival at Charleston, arriving there and taking a long journey to Philadelphia cost Genet the opportunity to influence the initial framing of United States neutrality policy and arrived in Philadelphia not familiar with Washington's Neutrality Proclamation. AMMON, *supra* note 165, at 44; CASTO, *supra* note 171, at 35.

[203] CASTO, *supra* note 171, at 35. On the effect this had on Genet, *see* AMMON, *supra* note 165, at 45.

[204] This conversation occurred not only before Moultrie learned of Washington's proclamation but before Washington even issued the proclamation. C.L. BRAGG, CRESCENT MOON OVER CAROLINA: WILLIAM MOULTRIE AND AMERICAN LIBERTY 256 (2013); CASTO, *supra* note 171, at 45–47; ELKINS & MCKITRICK, *supra* note 104, at 335.

blessing and no contrary statement from the federal government, Genet began recruiting.[205] Privateering required a significant investment to outfit merchant ships with armaments and double the crew size because, for each prize taken, the privateer had to send a crew to sail the seized vessel.[206] Genet found many candidates. Charleston was the largest port in the south and had many French supporters.[207] It also teemed with merchants willing to forgo trade for the allure of capturing prizes.[208] Within ten days, Genet had his first two privateers manned and sent to sea. The *Citizen*

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[205] CASTO, *supra* note 171, at 45–49. Privateers were private vessels commissioned by warring nations to attack and capture enemy vessels. *Id.* at 44. Generally, these privateers preyed on commercial shipping. *Id.* at 43. There was a thin line between privateering and piracy. Warring powers granted privateers a letter of marque. This letter recognized the official nature of the privateer. *Id.* at 44. Without such a letter, the attacking vessel would be considered a pirate. *Id.* at 45. Once a vessel was seized, the seizing vessel had to take the seized vessel to a port where an admiralty court would determine whether the seizure was lawful. *Id.* at 37–38. If the court so decided, the seizing vessel could sell the seized vessel and share the proceeds with the nation granting the letter of marque. The first seizures by the French in America during 1793 were condemned by the courts Genet established and then sold back to the British owners. CASTO, *supra* note 171, at 39. Genet intended to use these proceeds to fund other aspects of his mission. *Id*; *see also* BRAGG, *supra* note 204, at 256–58.

[206] CASTO, *supra* note 171, at 43–44.

[207] ROBERT J. ALDERSON, JR., THE BRIGHT ERA OF HAPPY REVOLUTIONS: FRENCH CONSUL MICHEL-ANGE-BERNARD MANGOURIT AND INTERNATIONAL REPUBLICANISM IN CHARLESTON, 1792-1794, 40–53 (2008); BRAGG, *supra* note 204, at 255–57; CASTO, *supra* note 171, at 46–47.

[208] MELVIN H. JACKSON, PRIVATEERS IN CHARLESTON, 1793-1796, vi (1969).

*Genet* left on April 18 and *Le Sans Culotte* left soon after.[209] They joined Genet's vessel, *Le Embuscade*, on a journey north, seeking British commercial vessels.[210]

Reports quickly reached Philadelphia that French privateers were seizing British vessels along the United States' Atlantic coast.[211] The French sent the vessels to nearby American ports for condemnation.[212] To re-sell a captured vessel, a court had to review the seizure to ensure its legality.[213] Usually the seizing nation sent the captured vessel to the seizing nation's closest port.[214] Along the Atlantic coast, this posed a problem for France because captured vessels had to go to the French West Indies or across the Atlantic to France.[215] Both options left French prizes vulnerable to recapture.[216] To solve this, Genet established consular courts in the United States.[217] France's consuls to the United States served as admiralty courts, quickly ruling seizures legal while ignoring the infringement on United States sovereignty.[218] These seizures became fodder for British complaints to the United States government.[219]

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[209] CASTO, *supra* note 171, at 47–48.
[210] *Id.* at 47–48.
[211] *See Memorial from George Hammond, 2 May 1793*, FOUNDERS ONLINE, http://founders.archives.gov/documents/Jefferson/01-25-02-0584 [https://perma.cc/QWG5-AS94].
[212] CASTO, *supra* note 171, at 39.
[213] *Id.* at 38.
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.* at 39.
[218] *Id.* at 49.
[219] ALDERSON, *supra* note 207, at 63–65; BRAGG, *supra* note 204, at 257–58.

### B. Proposed Instructions for the Customs Collectors

To address French privateering activity, Alexander Hamilton drafted a circular letter for the Customs Collector at each United States port.[220] The letter instructed them on neutrality enforcement.[221] On May 4, 1793, Hamilton sent his draft to Washington.[222] Two days later, Washington consulted Jefferson about Hamilton's instructions.[223] According to Jefferson,

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[220] The draft Hamilton showed Washington, and later, the Administration, no longer exists. Letter from Alexander Hamilton to George Washington, *supra* note 1. The editors of Hamilton's papers argue that the final version Hamilton sent in August reflects his original other than the changes that are the subject of this article. *Id.* While this may be the case, I would suggest that the events that occurred between the first draft and the final draft caused multiple alterations. For example, the week before Hamilton sent the rules to the Collectors, Randolph presented proposed rules for arming privateers, the Cabinet discussed them and Randolph and Hamilton co-wrote rules for arming privateers which eventually went to the Collectors. *See Proposed Rules Concerning Arming and Equipping of Vessels By Belligerents in the Ports of the United States, First Version, 29-30 July 1793*, FOUNDER'S ONLINE, https://founders.archives.gov/documents/Hamilton/01-15-02-0116-0001 [https://perma.cc/TF27-VSH4]; *Proposed Rules Concerning Arming and Equipping of Vessels by Belligerents in the Ports of the United States, Second Version, 29-30 July 1793*, FOUNDER'S ONLINE, https://founders.archives.gov/documents/Hamilton/01-15-02-0116-0002 [https://perma.cc/GFZ8-Z7MH].

[221] Letter from Alexander Hamilton to George Washington, *supra* note 1.

[222] *Id.*

[223] *Notes on Alexander Hamilton and the Enforcement of Neutrality, 6 May 1793*, FOUNDERS ONLINE, http://founders.ar

Hamilton wanted the Collectors "to superintend their neighborhood, watch for all acts of our citizens contrary to laws of neutrality or tending to infringe those laws, and inform [Hamilton] of it...."[224] This proposal triggered discussion about the constitutionality and the practicalities of federal law enforcement.[225] These discussions led to a policy choice that established federal prosecutors as the nation's constitutional inquisitors.[226]

After learning about Hamilton's proposal, Jefferson responded in three parts. First, Jefferson voiced his objection while meeting with Randolph and Hamilton.[227] Following that meeting, Jefferson expanded on his objections in a letter to Randolph.[228] Five days later, after receiving Randolph's response, Jefferson sent a letter to Congressman and confidante James Madison restating Jefferson's arguments.[229] Despite Jefferson's objections, the Administration ultimately instructed the United States District Attorneys to prosecute neutrality violations based on information obtained from Customs Collectors.[230]

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chives.gov/documents/Jefferson/01-25-02-0608 [https://perma.cc/JX2Z-VBGW].

[224] *Id.*

[225] *Id.*; Letter from Thomas Jefferson to Edmund Randolph, *supra* note 1.

[226] Letter from Thomas Jefferson to Edmund Randolph, *supra* note 1.

[227] Editorial Notes, *Notes on Alexander Hamilton and the Enforcement of Neutrality, 6 May 1793*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-25-02-0608 [https://perma.cc/Q4BK-JBZ5].

[228] Letter from Thomas Jefferson to Edmund Randolph, *supra* note 1.

[229] *Id.*

[230] *Letter to William Channing [Newport, R.I.],* NEW YORK PUBLIC LIBRARY DIGITAL COLLECTIONS, MANUSCRIPTS & ARCHIVES DIVISION, THE NEW YORK PUBLIC LIBRARY,

Little detail remains from the May 7th meeting between Jefferson, Hamilton and Randolph. The three discussed Hamilton's proposal and Jefferson voiced his opposition. In the first paragraph of Jefferson's May 8 letter to Randolph, Jefferson stated that although the whole of the proposal was "disagreeable" to him, the last section, regarding the surveillance of shipbuilding to discover ships built for France, was his initial objection.[231] This indicates that the May 7 meeting may have focused more on domestic shipbuilding practices and their relation to neutrality enforcement than cases

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http://digitalcollections.nypl.org/items/bac0a75c-2673-b981-e040-e00a18067fd9 [https://perma.cc/T6M2-RBQY] (this is the letter sent to the United States District Attorney for Rhode Island, William Channing. This is almost certainly a circular letter Randolph sent to the United States District Attorneys. The text has no personal references and does not make any allusions to specific jurisdictions); Letter from Thomas Jefferson to James Madison, *supra* note 170 (Jefferson also references in his letter to Madison that Randolph was to send instructions to the prosecutors); *see also* Letter from Edmund Randolph to William Rawle (May 12, 1793), *in* RAWLE FAMILY PAPERS (on file with the Pennsylvania Historical Society) (the Rawle Family papers, which includes the papers of United States District Attorney William Rawle, also contain a copy of this letter).

[231] Letter from Thomas Jefferson to Edmund Randolph, *supra* note 1; *see also* Letter from George Washington to Alexander Hamilton from George Washington (May 7, 1793), FOUNDERS ONLINE, http://founders.archives.gov/documents/Hamilton/01-14-02-0283 (Washington's other concern about neutrality was the effect it would have on American ship building activities. In a letter to Hamilton, Washington voices this concern. As a result, it was likely on Jefferson's mind as he devised his arguments about enforcement).

where Americans served on French vessels.[232] Randolph's May 9th response furnishes another clue about Jefferson's objections.[233] In response to Jefferson's fear that the Customs Collectors would become spies, Randolph reminded Jefferson "...that I was on the point of making Your very objection, as deserving consideration, when you mentioned it."[234] Otherwise, the only other certainty from the meeting was that Jefferson felt compelled to write Randolph, expanding upon his objections and asking Randolph to communicate Jefferson's objections to Washington should Randolph have the opportunity.[235]

Jefferson's May 8 letter to Randolph provides the most complete record of Jefferson's objections. He first objected to using Customs Collectors for investigatory purposes.[236] Jefferson believed having them watch other citizens and report on citizen activity made the Customs Collectors spies.[237] Jefferson argued they "are to be made

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[232] Letter from George Washington to Alexander Hamilton, *supra* note 231; *see* JOSEPH ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 28, 39, 44 (1996) (it is also likely that Jefferson had not thought of his ideas until after the meeting. Jefferson was not noted for his oral debate skills and despised committee bickering); FERLING, *supra* note 170, at 19.
[233] *See* Letter from Edmund Randolph to Thomas Jefferson, *supra* note 2.
[234] *Id.*
[235] *See* Letter from Thomas Jefferson to Edmund Randolph, *supra* note 1. Jefferson likely inserted this because Jefferson knew that his policy arguments, especially when they opposed Hamilton's, were not likely to be well-received by Washington. Jefferson had worn out Washington with his complaints about Hamilton during the latter half of 1792. FERLING, *supra* note 170, at 239.
[236] Letter from Thomas Jefferson to Edmund Randolph, *supra* note 1.
[237] *Id.*

an established corps of spies or informers against their fellow citizens, whose actions they are to watch in secret, inform against in secret to the Secretary of the Treasury, who is to communicate to the President."[238] At that point the Administration would review the evidence and commence a criminal prosecution.[239] If there is not sufficient evidence, according to Jefferson, "then the only consequence is that the mind of the government has been poisoned against a citizen, neither knowing nor suspecting it, and perhaps too distant to bring forward his justification."[240] This comment echoes of the fears expressed by many regarding the establishment of federal courts. Jefferson then took his argument one step further asserting, "This will at least furnish the collector with a convenient weapon to keep down a rival, draw a cloud over an inconvenient censor, or satisfy mere malice and private enmity."[241] This argument anticipated law enforcement usurping national authority for personal gain.

Next Jefferson turned to which government department had law enforcement responsibility. Hamilton's proposal, according to Jefferson, moved responsibility from either the Secretary of War or State to Treasury.[242] Jefferson wrote, "Acts involving war, or proceedings which respect foreign nations, seem to belong either to the department of war, or to that which

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[238] *Id.*

[239] *Id.*

[240] *Id.* This threat may be overstated. It does not seem likely the government's mind would be poisoned or that the person would need a defense if the government itself determined the evidence was not sufficient.

[241] *Id.*

[242] Letter from Thomas Jefferson to Edmund Randolph, *supra* note 1.

is charged with the affairs of foreign nations."[243] After expressing his belief that Treasury only had responsibility for revenue, Jefferson stated his most serious objection, asserting Hamilton's plan was "...to add a new and large feild [*sic*] to a department already amply provided with business, patronage, and influence."[244] Apparently Jefferson voiced this objection at the meeting with Hamilton and Randolph and one of them, or both, responded that the Customs Collectors are in a prime position to observe violations.[245] To this Jefferson returned to shipbuilding. He wrote, "[the Customs Collectors] are in convenient positions too for building ships of war: but will that business be transplanted from [its] department, merely because it can be conveniently done in another?"[246]

Jefferson then proposed an alternative. He first distinguished between foreigners and American citizens. Foreigners should be turned over to the military while citizens may be proceeded against through the courts.[247]

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[243] *Id.*
[244] *Id.*
[245] *Id.*
[246] *Id.*
[247] *Id.* Jefferson leaves us to speculate about what would happen to foreigners *after* they were turned over to the military. In some respects, the question was answered during the fall of 1793 when United States District Attorney Christopher Gore attempted to prosecute a French consul and chancellor for arming privateers in Boston. The case led was eventually dismissed by the direction of Randolph, as Secretary of State. *See* United States v. Jutau (Mass. Cir. Ct. June 11, 1793) (on file with the National Archives in Boston); Letter from Christopher Gore to Thomas Jefferson (Sept. 10, 1793), FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-27-02-0075 [https://perma.cc/9PY5-LS6L]. The answer to this question lingers today in the guise of what to do about foreign terrorists seeking to attack the United

To Jefferson, the constitutional method to investigate citizens was the grand jury. He wrote, "Grand jurors are the constitutional inquisitors and informers of the country, they are scattered every where, see every thing, see it while they suppose themselves mere private persons, and not with the prejudiced eye of a permanent and systematic spy."[248] Using grand jurors protected citizens from false allegations: First, their information was on oath, thus making it more trustworthy and free of personal gain.[249] Second, it was public so that the accused person could respond.[250] Third, the grand jurors were local.[251] Jefferson believed this meant that false allegations could be refuted immediately and effectively.[252] Fourth, the potential for abuse, inherent with the Customs Collectors, would not arise with grand jurors.[253] Grand jurors were respected community

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States. *See, e.g.,* Robert Chesney et al., *Back to the Future on Detention and Military Commissions*, LAWFARE (Nov. 2, 2017), https://www.lawfareblog.com/back-future-detention-and-mili tary-commissions [https://perma.cc/9S33-5QGU] (discussing the debate about sending Sayfullo Saipov, who ran a truck into pedestrians on a New York City walkway, to Guantanamo Bay as an enemy combatant).

[248] Letter from Thomas Jefferson to Edmund Randolph, *supra* note 1.

[249] *Id.*

[250] *Id.* Today, there is a certain irony to this argument *in favor* of grand juries because the grand jury is one of the most secretive aspects of our government. *See* Sara Sun Beale & James E. Felman, *The Consequence of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA Patriot Act's Changes to Grand Jury Secrecy*, 25 HARV. J. L. & PUB. POL'Y 699, 699–707 (2001).

[251] Letter from Thomas Jefferson to Edmund Randolph, *supra* note 1.

[252] *Id.*

[253] *Id.*

members and their time as grand jurors was short compared to the Customs collector's unlimited tenure.[254]

Jefferson also argued that the law would be better enforced through judicial oversight. He predicted the following chain of events:

> "The Judges having notice of the [neutrality] proclamation, will perceive that the occurrence of a foreign war has brought into activity the laws of neutrality, as a part of the law of the land. This new branch of the law they will know needs explanation to the grand jurors more than any other. They will study and define the subject to them and to the public. The public mind will by this be warned against the acts which may endanger our peace . . . . " [255]

According to Jefferson, these events would occur by simply suggesting it to the judges.[256] Jefferson also perceived a foreign affairs benefit to his policy when he wrote, "foreign nations will see a much more respectable evidence of our bona fide intentions to preserve neutrality."[257]

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[254] *Id.*

[255] *Id.* This would be a very slow process. Of course, this also served Jefferson's foreign policy interests. If neutrality enforcement took time, the French could take advantage of the delays by seizing British ships with delayed impunity. On the speed of French consular courts in the United States, *see* CASTO, *supra* note 171, at 36–39.

[256] *Id.* In fact, this happened as Chief Justice Jay and Justice Wilson quickly gave grand jury charges explaining the topic. *Henfield's Case*, 11 F. Cas. 1099, 1099–109 (C.C.D. Pa. 1793) (No. 6,360) (reprinting the charges from both Justices).

[257] Letter from Thomas Jefferson to Edmund Randolph, *supra* note 1.

Finally, Jefferson listed two problems caused by Hamilton's proposal: First, society will be poisoned by the nature of secret accusations.[258] Second, the Administration will be discredited for planting "a germ of private inquisition absolutely unknown to our laws."[259] With this, Jefferson concluded his policy objections and proposals by stating he was uncertain about the outcome of the previous day's meeting but that it was not too late to change course.[260]

Randolph received Jefferson's objections the next day and responded immediately.[261] He informed Jefferson that Randolph asked Hamilton about Jefferson's concern regarding the Customs Collectors being trained as spies.[262] Randolph knew of past allegations of Customs Collectors prying into individual conduct.[263] Asking Hamilton, Randolph learned that Hamilton had never directed such conduct.[264] Hamilton showed his letter-books to Randolph as proof that no such directive was sent.[265] With his mind at ease over this matter, Randolph explained his support for Hamilton's proposal and presented his own modification.[266]

The attorney general first addressed Jefferson's objection to using the Customs Collectors. Randolph did

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[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] Letter from Edmund Randolph to Thomas Jefferson, *supra* note 2.
[262] *Id.*
[263] *Id.*
[264] *Id.*
[265] *Id.* While Hamilton apparently did not send any such directive, the absence of the directive does not mean that the Customs Collectors did not engage in such conduct on their own initiative.
[266] *Id.*

not perceive that they would be spies, but merely observe conduct in the course of their ordinary duties.[267] His reasoning began with the fact that Customs Collectors were executive officials; they were federal government employees.[268] To Randolph, it seemed reasonable for them to perform not only their jobs, but to provide general intelligence for the executive government.[269] He even suggested that their failure to provide such information was negligent, writing, "A refusal might not be the ground of an impeachment; but under the strictest constitution it would be deemed an indecorum, unless public duties absorbed too much of their time."[270] Not only should the collectors provide this information, but according to Randolph, they were duty-bound to enforce neutrality.[271]

Randolph argued Customs Collectors were essential to effective neutrality enforcement.[272] The United States government had to prove their neutrality to the world, especially considering "the preponderance of affection in the people towards the French. . . ."[273] To Randolph, identifying suspicious activity and violators supplied the best proof. The collectors were in the best position to identify this activity: "the collectors are, for their position near the water, the scene of those violations, best qualified to assist congress."[274] They were

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267 *Id.*
268 *Id.*
269 *Id.*
270 *Id.*
271 *Id.*
272 *Id.*
273 *Id.*
274 *Id.*

loyal to the federal government.[275] The same could not be said of all the citizenry.[276]

Having established the Collectors' importance, Randolph presented his modification to Hamilton's plan. Rather than have the Collectors report to Hamilton, Randolph proposed that collectors report unlawful activity to the United States District Attorneys.[277] He likened the collectors to ordinary citizens. "It is the right, nay duty of every citizen to enforce the laws. This has been the constant opinion of governments in most proclamations, which call upon the officers at large to cooperate in bringing offenders to justice."[278] Randolph also suggested only instructing the Customs Collectors at sea ports to report violations because informing "excise officers on the top of the Allegany" was useless. To Randolph, this limited the potential for corruption.[279]

Randolph concluded by responding directly to Jefferson's arguments. Jefferson, per Randolph's interpretation, objected to employing alternative means to initiate a criminal case.[280] Randolph stated that the instructions merely provided a stimulus for the collector to do something which the collector, as a citizen, could do on his own, namely report a violation of law.[281] Once the attorney had the case, according to Randolph, the prosecution process would be no different from any other

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[275] GAUTHAM RAO, NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE 69–72 (University of Chicago Press) (2016).

[276] Letter from Edmund Randolph to Thomas Jefferson, *supra* note 2.

[277] *Id.*

[278] *Id.*

[279] *Id.*

[280] *Id.*

[281] *Id.* This parallels the private/public prosecutor distinction and the morals offense versus victim offense distinction.

case.[282] Randolph insisted that Hamilton would not receive the information directly and reminded Jefferson that Hamilton already agreed to Randolph's modification during their meeting.[283] Finally, Randolph addressed Jefferson's separation of duty argument. He observed Jefferson barely raised the argument at the meeting stating, "The impropriety...was so slightly hinted by you during the consultation, that it did not pass thro' any discussion in my mind."[284] Acknowledging that the Secretary of State was the person who had the designated domestic authority, Randolph explained that the lines between departmental duties is not always clearly delineated.[285] He suggested that the President has the authority to "instruct, whom he pleases."[286] This shows Randolph as pragmatic rather than dogmatic.

Jefferson received Randolph's reply on May 10.[287] Three days later Jefferson was still upset with Randolph's response. Jefferson wrote to James Madison, describing the situation. Between Randolph's letter and the letter to Madison, the cabinet met to discuss the issue and settled on Randolph's modification.[288] While Randolph's modification was likely more palatable to Jefferson than Hamilton's, Jefferson's letter to Madison clearly expressed Jefferson's distaste for the resolution.[289]

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[282] Letter from Edmund Randolph to Thomas Jefferson, *supra* note 2.
[283] *Id.*
[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] Letter from Thomas Jefferson to James Madison, *supra* note 170; *see also* Editors Notes, *in* Letter from Edmund Randoph to Thomas Jefferson, *supra* note 2.
[288] *Id.*
[289] *Id.*

Jefferson complained how "Anglophobia has seised violently on three members of our council."[290] Considering only four served on the council, it appears Jefferson alone escaped it. The Anglophobia revealed itself whenever neutrality was discussed.[291] Jefferson then described Hamilton's proposal, emphasizing that Hamilton's plan made Hamilton the recipient of information about alleged violations.[292] Then he listed his three main points: (1) Hamilton's proposal established "a system of espionage" that would be "destructive of the peace of society;" (2) the proposal gave the Treasury Department too much power; and (3) that using the judges to instruct grand jurors, "the constitutional and public informers," would allow those accused to respond and justify their actions.[293] Jefferson's third point relied upon the speed with which federal courts processed cases. A circuit court session lasted two weeks, at most.[294] Criminal trials took place as early as two days after a grand jury returned the indictment.[295]

After giving Madison the options, Jefferson discussed Randolph's resolution. Jefferson wrote, "E.R. found a hair to split, which, as always happens, became the decision."[296] Hamilton was to instruct the Customs Collectors to convey any information regarding violations to the local United States District Attorney.[297] Randolph would instruct the district attorneys and inform them

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[290] *Id.*
[291] *Id.*
[292] *Id.*
[293] *Id.*
[294] *See generally* MARCUS, *supra* note 86.
[295] *See e.g.*, Ingram, *supra* note 200, at 501.
[296] Letter from Thomas Jefferson to James Madison, *supra* note 170.
[297] *Id.*

that they should proceed by indictment.[298] In Jefferson's mind, resolving neutrality questions hinged on Randolph's opinion.[299] Hamilton and Secretary of War Henry Knox generally voted together. Jefferson opposed. If Randolph agreed with Jefferson the vote was two to two.[300] However, if Randolph opposed Jefferson, Hamilton had his majority vote.[301] Jefferson described Randolph as "the most indecisive one I ever had to do business with. He always contrives to agree in principle with one, but in conclusion with the other."[302] Jefferson concluded his critique stating that Randolph's decisions were "unjustifiable in principle, in interest, and in respect to the wishes of our constituents."[303]

The letter to Madison concludes with observations about the Administration's neutrality policy. From Jefferson's perspective, only the President's inclinations and public opinion prevented an "English neutrality."[304] He also described Philadelphia's partisan divide. "[T]he fashionable circles of Phila., N. York, Boston & Charleston" combined with business speculators, and merchants who traded with the British were British supporters.[305] Those remaining—independent merchants, farmers, and mechanics—supported the French.[306] This indicates Jefferson's objections were more factional than ideological.

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[298] *Id.*
[299] *Id.*
[300] ALEXANDER DECONDE, ENTANGLING ALLIANCE: POLITICS AND DIPLOMACY UNDER GEORGE WASHINGTON 209–10 (Duke Univ. Press 1958).
[301] *Id.*
[302] *Id.*
[303] *Id.*
[304] *Id.*
[305] *Id.*
[306] *Id.* Through their correspondence, Jefferson and Madison labeled various groups. ELKINS & MCKITTRICK, *supra* note 104,

Intervening events ended the debate and forced the administration to act. As Jefferson voiced his objections, Genet's privateers captured several British vessels with the news spreading through the seaports.[307] Customs collectors and conscientious citizens reported that *Le Sans Culotte* seized a British vessel, the *Eagle*.[308] British Minister George Hammond petitioned the United States Government complaining that American citizens participated in the seizure.[309] He followed his first petition with another, reporting that additional Americans served on *The Citizen Genet* when it captured the *William* near the mouth of the Chesapeake.[310]

Washington held a Cabinet meeting to decide on a response. Discussions turned to Randolph's modification of Hamilton's plan and led to a vote. Hamilton and

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at 237. "Speculators" and "Tories" were "opponents on domestic and foreign matters." *Id.* "Aristocrats" were people of money rather than property. *Id.* "Monarchists" were "those who favored the English monarchy rather than French." *Id.* Jefferson also began identifying diverse interests, particularly agricultural and stock jobbers. *Id.*

[307] CASTO, *supra* note 171, at 48–50.

[308] Letter from Thomas Newton Jr. & William Lindsay to George Washington (May 5, 1793), FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/05-12-02-0423 [https://perma.cc/2QQ2-SM76]. In this letter, dated two days after the *Citizen Genet* seized the *William*, neither Lindsay nor Newton referenced the *Citizen Genet*. *Id.* Instead, they informed about other privateers, *Le Sans Culotte* and the *Eagle*. *Id.* More importantly, the report alleged that Americans were aboard the privateers. *Id.*

[309] *Memorial from George Hammond*, FOUNDERS ONLINE, (May 8, 1793), http://founders.archives.gov/documents/Jefferson/01-25-02-0626 [https://perma.cc/9YBZ-F3XW].

[310] Letter from George Hammond to Thomas (June 5, 1973), FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-26-02-0191 [https://perma.cc/YNK3-9H8M].

Secretary of War, Henry Knox, supported Randolph's modification and Jefferson provided the lone dissent. Following the meeting, Jefferson dispatched a letter to the United States District Attorney for Pennsylvania, William Rawle. Jefferson, however, softened the Administration's centralization efforts. Rather than write to Rawle as an executive official, Jefferson wrote as if Rawle was a private attorney. Jefferson, consistent with his preference for local action, left the charging decision to Rawle writing, "I have it in charge to express to you the desire of the Government that you would take such measures for apprehending and prosecuting them as shall be according to law." Jefferson's expression that it was the "desire of the Government" indicates that he did not personally advocate the action and that Rawle should decide independently whether the law applied or not. Jefferson instructed Rawle to contact Philadelphia's Customs Collector and a merchant who allegedly possessed information about "depredations on the property and commerce of some nations at peace with the United States."[311] Rawle, who supported federal power, immediately followed Jefferson's instructions and learned that Gideon Henfield, a Revolutionary War veteran, served as prize master on the *Citizen Genet*.[312] Rawle found sufficient evidence for grand jury

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[311] Letter from Thomas Jefferson to William Rawle (May 15, 1793), FOUNDERS ONLINE, http://founders.archives.gov/documents/Jefferson/01-26-02-0032 [https://perma.cc/9MLA-XK2A].

[312] *William Rawle (1759-1836)*, PENN U. ARCHIVES & RECS. CTR., https://web.archive.org/web/20150911230735/http://www.archives.upenn.edu/people/1700s/rawle_wm.html [https://perma.cc/D9LL-QJ39] (citing Rawle's Federalist affiliation). Rawle's actions to investigate the matter are reproduced in *Henfield's Case*, 11 F. Cas. 1099, 1101 (D. Penn. 1793).

consideration and later secured an indictment. Ultimately, a jury acquitted Henfield. Only then, in early August, did the Administration finally instruct the Customs Collectors on neutrality enforcement.[313]

## III. Federal Prosecutors as Constitutional Inquisitors

Making federal prosecutors the nation's constitutional inquisitors created two fundamental issues that remain contested today. The first issue entails who controls federal law enforcement power. Jefferson's perspective preferred decentralized, local, citizen-based control. Hamilton took the opposite view, preferring centralized control. The second issue--related to the first--entails the duty owed by the United States District Attorneys to the federal government. As constitutional inquisitors, an expectation followed that the District Attorneys would inquire into matters the government deemed important. Although the District Attorneys had leeway to perform their overall duties, they responded to federal government instructions.

### A. Centralization

Jefferson's objections illustrate a fundamental problem with the nation's federalism. When determining relative power between state and federal governments, which powers and how much power does each possess? Where does one begin and the other end? Jefferson and Hamilton took decidedly different views on the answers.

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313 *Treasury Department Circular to the Collectors of the Customs, 4 August 1793*, FOUNDERS ONLINE, http://founders.archives.gov/documents/Hamilton/01-15-02-0143 [https://perma.cc/MAP8-KGWT].

Jefferson favored a national government limited to the Constitution's terms.[314] If the Constitution did not specifically give the federal government the power, then the government did not possess it. This gave state and local authorities more power. Hamilton pursued expansive federal powers.[315] Assuming state revolutionary war debt and creating the Bank of the United States illustrated this.[316] These disputes divided Hamilton and Jefferson and neutrality enforcement expanded the divide.[317]

Hamilton's plan to have his Customs Collectors report neutrality violations directly to him replicated the process used against merchants and shippers who brought goods into the United States without paying customs duties. His plan contained one key difference that further centralized the process. When illicit goods entered the United States they were subject to forfeiture.[318] Customs Collectors identified violations

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[314] Jefferson was not an enthusiastic supporter of the Constitution. ELLIS, *supra* note 232, at 104. Though in France during its drafting, he received a copy of the completed document. *Id.* He believed that a Bill of Rights was essential to cure the potential abuses inherent in the flawed document. *See id.* No Constitution would have appealed to Jefferson. *Id.* He preferred a government that could not be felt by the people. *Id.* at 105; *see also* FERLING, *supra* 170, at 166–67.

[315] WOOD, *supra* note 123, at 103 (noting that "Hamilton wanted people to feel the presence of the new national government.").

[316] On the rift between Hamilton and Jefferson, see FERLING, *supra* note 170, at 203–14. On the revolutionary war debt and the Bank of the United States, see Elkins & McKitrick, *supra* note 104, at 223–36. On the constitutional nature of these debates, see Kramer, *supra* note 43, at 49.

[317] FERLING, *supra* note 170, at 203–14.

[318] On the complexity of the revenue collection statutes, see Jerry L. Mashaw, *Recovering American Administrative Law:*

and reported them to the District Court who heard the evidence and forwarded an opinion to Hamilton, who then decided whether to forfeit the goods.[319] To investigate neutrality, Hamilton circumvented the District Court, ordering the Customs Collectors report directly to Alexander Hamilton. Jefferson undoubtedly recognized this distinction thus concluding that neutrality enforcement was another means by which Hamilton planned to expand federal executive power.

Jefferson opposed Hamilton's expansion plans by arguing that Treasury should not oversee neutrality enforcement. Jefferson believed either the War Department or State Department should receive the information, if anyone. Embedded in his objection is a sign of Jefferson's distaste for Hamilton. Jefferson noted the Treasury Department already had enough business, patronage and influence.[320] Finally, Jefferson belittled Hamilton's centralization plan by sarcastically arguing

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*Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1278–80 (2006). On Hamilton's involvement in cases see for example Letter from Alexander Hamilton to James Duane (April 5, 1793), FOUNDERS ONLINE, http://founders.archives.gov/documents/Hamilton/01-14-02-0175 [https://perma.cc/55XU-NAD8]. The process described in this paragraph is taken from a review of records of the District Court for Pennsylvania from 1790 through 1795. *See generally* RAO, *supra* note 275, at 67–68; Statements of Facts in Forfeiture Cases Appealed to the Secretary of the Treasury, 1792-1918 (on file with the National Archives in Philadelphia).

[319] RAO, *supra* note 275, at 67–68.

[320] On the relationship between Washington and Hamilton as President and Treasury Secretary and the influence held by Treasury, see WOOD, *supra* note 123, at 91–92.

that the Customs Collectors should also build ships because they were already located near the water.[321]

The proposal Jefferson made also demonstrates a preference for localized federal law enforcement over executive branch control. Jefferson placed law enforcement in local hands by utilizing grand jurors and district court judges. Grand jurors resided where court was held.[322] In terms of neutrality enforcement this meant most grand jurors would come from the port cities. This included grand jurors drawn from Philadelphia and Charleston, two of the nation's largest ports and populated by those strongly favoring the French.[323] Yet he undoubtedly realized that large northern port cities such as Boston and New York identified more with the British. Jefferson also knew that Washington's federal judges were more pro-British in their orientation yet he also gave them an important role.[324] As the group responsible for charging the grand juries, Jefferson gave judges a significant role in neutrality enforcement.[325] This also gave control to local authorities as the district court judges served the district in which they resided. It

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[321] Jefferson's analogy fails because shipbuilding takes skill while reporting on neutrality violations simply requires observation.

[322] Tarter & Holt, *supra* note 44, at 261–62 (2007) (outlining the selection methods in each state).

[323] Both cities hosted large celebrations upon French consul Genet's arrival in their city. *See* AMMON, *supra* note 165, at 45, 54–57; CASTO, *supra* note 171, at 35, 53–54.

[324] On the appointment philosophy of Washington and Hamilton, see WOOD, *supra* note 123, at 107–09. On Washington's appointment qualifications for Supreme Court Justices, the Justices who were riding Circuit and would hear the cases see CASTO, *supra* note 70, at 56.

[325] On the importance of Grand Jury charges see CASTO, *supra* note 70, at 128.

also provided a check on federal law enforcement by spreading authority over multiple groups.

Randolph's response conceded Jefferson's ideological points but favored Hamilton's plan. Randolph analogized the Customs Collectors to any private citizen witnessing criminal activity by centralizing law enforcement without saying it. Randolph argued that private citizens could report crimes and did so regularly.[326] Even if the Customs Collectors did *not* report to the executive, nothing prevented them from presenting their information to the court or grand jury on their own accord. Therefore, according to Randolph, requiring the Customs Collectors report to the United States District Attorney provided procedural uniformity.

Randolph used the District Attorney as a compromise between Hamilton's efforts to centralize the government and Jefferson's preference for local control. Like the judges and grand jurors, the District Attorneys were local officials. If Jefferson supported local federal judges overseeing neutrality enforcement, then Randolph reasoned federal prosecutors taking the information from Customs collectors was sufficiently similar. Including the District Attorneys not only acknowledged Hamilton's centralization plans but, by drafting these typically judicial figures into the executive branch, Randolph expanded the prosecutorial function. Randolph had complained two years before about the need for Attorney General control over the District Attorneys and likely sought the opportunity to do this.[327] Randolph eventually instructed the District Attorneys to proceed by indictment when the Customs Collectors reported violations.

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[326] Krent, *supra* note 121, at 292–95.
[327] *See supra* notes 147–48.

### B. Representing the United States Government

The Hamilton-Jefferson-Randolph discussion also reveals competing conceptions of the prosecutorial function. Hamilton and Jefferson actually viewed prosecutors similarly. Federal prosecutors were, at most, supporting actors in criminal prosecution, who, like state prosecutors, were part-time. Randolph took a more progressive view by making prosecutors investigators, key players in federal criminal law enforcement. They could implement national policy.

Neither Hamilton's nor Jefferson's proposals included the United States District Attorneys. Hamilton envisioned the Customs Collectors reporting to him and then Hamilton would initiate prosecutions, perhaps with orders to the District Attorneys. Jefferson preferred judges and grand jurors. While the details of Hamilton's plan have been lost, Jefferson's argument reveals that, despite his progressive ideas about government, he perceived federal prosecutors the equivalent of their state counterparts. Most importantly, Jefferson labeled grand jurors the "constitutional inquisitors and informers of the country."[328] He saw grand juries investigating neutrality violations and issuing presentments about violations. Only at this stage would prosecutors appear to simply draft indictments.

Jefferson also implicitly dismissed prosecutors by expressing more concern for those accused of violations. He could not envision prosecutors investigating cases or evaluating evidence prior to proceeding with a case. Instead, he focused on false accusations. Using Customs Collectors to provide the government with violation reports would prejudice those suspected by making the

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[328] Letter from Thomas Jefferson to Edmund Randolph, *supra* note 1.

government presume guilt because of its distance from the alleged violation and inability to collect its own evidence.[329] Jefferson also anticipated the Customs Collectors would use their power to frame rivals.[330] It is conceivable Jefferson held the same concerns about federal prosecutors. He favored grand jurors because they only served for a single court term.[331] Prosecutors, like the Customs Collectors, served at the pleasure of the President. If Customs Collectors had the power to frame rivals, the prosecutors possessed the same potential.

Most likely, Jefferson ignored the prosecutor's potential power because he believed in the people's ability to govern themselves.[332] A government

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[329] *Id.* The emphasis Jefferson placed on the accused presenting evidence of innocence is fascinating. In today's criminal trials defendants are not required to present any evidence of innocence. At that time, defendants could not testify under oath on their own behalf. Stanton D. Krause, *Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. OF CRIM. L. & CRIMINOLOGY 111, 124 (1998); *see also* FRIEDMAN, *supra* note 47, at 245. Therefore, Jefferson is likely drawing on one of two ideas. First, he could be thinking to an earlier time when defendants were required to present evidence in their defense. LANGBEIN, *supra* note 57 (particularly chapter 2). Second, he could be drawing on his experience in France. In European systems, the defendant often presents evidence first and then the government presents its evidence. PIZZI, *supra* note 52, at 89–116 (chapter five describes four different European Court systems, noting in several that the defendant must provide evidence first).

[330] Letter from Thomas Jefferson to Edmund Randolph, *supra* note 1.

[331] *See* Tarter & Holt, *supra* note 44, at 262–63 (indicating the "small percentage" of grand jurors who served longer than a single term).

[332] CHRISTIAN FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITIONS BEFORE THE CIVIL

prosecutor, especially one with increased power, was anathema to Jefferson's government philosophy. In France during the Constitutional Convention, he observed the problems created by autocratic rule while missing the democratic excesses experienced under the Articles of Confederation.[333] Happy in France, he reluctantly accepted Washington's offer to become Secretary of State.[334] Once in office, Jefferson and Hamilton soon clashed.[335] Jefferson abhorred Hamilton's British sympathies and believed Hamilton wanted a monarchical government in the United States. To Jefferson, monarchy was antithetical to liberty.[336] Liberty required minimal government.[337] Strong executive power, such as prosecutorial power, did not fit Jefferson's political ideology.

Attorney General Randolph, to Jefferson's dismay, sought pragmatic solutions to political problems

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WAR 129 (2009); WOOD, *supra* note 123, at 10 (quoting Mark A. Noll, *Common Sense Traditions and American Evangelical Thought*, 37 AM. Q. 216, 218 (1985)).

[333] FERLING, *supra* note 170, at 165–67.

[334] *Id.* at 206.

[335] According to Elkins and McKittrick, the conflict with Hamilton was inevitable because Jefferson's foreign policy conflicted with Hamilton's domestic policy. ELKINS & MCKITTRICK, *supra* note 104, at 210. Hamilton's domestic policy emphasized commerce with Britain. *Id.* Jefferson's foreign policy was open commerce with all and, as a whole, anti-British. *Id.*

[336] TUCKER & HENDRICKSON, *supra* note 184, at ix.

[337] *Id.* at 16. Jefferson would later abandon his ideological principles out of political necessity. This demonstrates he had the capability to consider strong executive action. In 1793, however, Jefferson had not reached the point of necessity. Jefferson also had the ability to separate his ideals from his practical politics. Perhaps realizing that his political position was a losing one, Jefferson allowed himself to wander into idealism. *See generally,* ELLIS, *supra* note 232.

rather than rigidly adhere to ideology. Unlike Jefferson, Randolph played a key role in the Constitutional Convention and presented the Virginia Plan.[338] During the Convention, Randolph's opinion of the document soured to the point that he would not sign it.[339] A centrist, Randolph did not want the people to have too much power but was also wary of centralizing too much power in a single executive.[340] Ultimately Randolph supported the Constitution during Virginia's ratification debate.[341] While Congress considered the Judiciary Act, James Madison consulted Randolph, recognizing him as one of the nation's leading legal minds.[342] One of Randolph's significant critiques was the vague limits on federal court jurisdiction.[343] Soon after, Washington offered Randolph the Attorney General position.[344] By 1793, Randolph played a key advising role, serving as the "middle position" between Hamilton and Jefferson.[345] His solution to neutrality enforcement was the latest example.[346]

Searching for a compromise between Jefferson and Hamilton, Randolph's proposal envisioned a wider role for federal prosecutors than their state counterparts. He saw United States Attorneys as part of federal law enforcement. As a supporter of centralized government,

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[338] REARDON, *supra* note 130, at 96–100.
[339] *Id.* at 98–119.
[340] *Id.* at 102–08.
[341] *Id.* at 139.
[342] Marcus & Wexler, *supra* 70, at 15.
[343] REARDON, *supra* note 130, at 175.
[344] Letter from George Washington to Edmund Randolph (Sept. 28, 1789), FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/05-04-02-0073 [https://perma.cc/8DYV-Q2YE].
[345] REARDON, *supra* note 130, at 206–07.
[346] *Id.* at 226.

Randolph understood the need for the new government to enforce its laws. As a political operative, Randolph understood the need to balance federal and local interests. The District Attorneys fit requirements perfectly. They were local. Each United States District Attorney was from the state he served. At the same time, each had ties to Washington and supported the national government.[347] While many perceived the District Attorneys as judicial officials, Randolph connected the prosecutors with the Customs Collectors. He saw them as partners in federal law enforcement.

Using federal prosecutors as inquisitors was a novel idea. State criminal justice was highly decentralized.[348] No single role predominated. When criminal justice-related policies were created, there was no guarantee they would be enforced.[349] In most state prosecutions, if a prosecutor appeared, it was a private prosecutor hired by the victim.[350] Morals cases were the lone exception. Grand jurors usually initiated these cases.[351] This was the inspiration for Randolph's response to Jefferson. Like morals cases, the Customs Collectors could report to the Grand Jury about neutrality violations. For the morals case to progress, however, the local prosecutor had to prepare the charging document. Randolph likely saw federal prosecutors serving the same function.[352] Therefore, it was a reasonable step for Randolph to suggest that prosecutors pre-empt the grand

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[347] Ingram, *supra* note 104, at 189 (citing WOOD, *supra* note 123, at 106–10).
[348] FRIEDMAN, *supra* note 36, at 211.
[349] *Id.*
[350] Steinberg, *supra* note 30, at 571.
[351] YOUNGER, *supra* note 41, at 38–39.
[352] This was, in fact, what happened as Randolph worked with United States District Attorney William Rawle when drafting the neutrality violation cases in Philadelphia. CUMMINGS & MCFARLAND, *supra* note 143, at 38.

jury and work with Customs Collectors. This established federal prosecutors as constitutional inquisitors.[353]

## IV. The Practical Origins of Federal Criminal Prosecution

The Administration's decision to connect the Customs Collectors and the District Attorneys set the precedent for future federal law enforcement by placing prosecutors between the people and the courts.[354] Not only would the Washington Administration's process recur over the next fifteen years, but it began the steady expansion of prosecutorial power that continues today.[355] Five years after the neutrality crisis, President John Adams centralized sedition prosecutions through Secretary of State Timothy Pickering.[356] Ten years after that, President Thomas Jefferson copied Hamilton's idea when enforcing the Embargo Acts against the British.[357] After these events, prosecutors further developed their relationship with federal law enforcement agents such that today's prosecutors and agents jointly investigate and prosecute cases.[358]

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[353] *Id.* at 36.
[354] William McDonald, *The Prosecutor's Domain*, *in* THE PROSECUTOR 27 (1979).
[355] *See generally id.* at 15–51.
[356] JOHN CHESTER MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 73 (1951).
[357] Douglas Lamar Jones, *"The Caprice of Juries": The Enforcement of the Jeffersonian Embargo in Massachusetts*, 24 AM. J. LEGAL HIST. 307, 307 (1980).
[358] Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 751–52 (2003).

Five years after Jefferson and Randolph exchanged their letters, the partisan divide widened.[359] Washington, whose reputation held the factions together, left the Presidency after 1796 and was replaced by Vice President John Adams.[360] Adams put aside commercial problems with Britain to deal with the deteriorating relationship with the French.[361] As he did this, he came under heavy criticism from Jefferson's supporters.[362] Fearing that the dissent might undermine the still fledgling national government, Congress passed, and Adams enforced, a sedition law that prohibited people from making false, critical statements about the government.[363] Secretary of State Timothy Pickering, an ardent Massachusetts Federalist, assumed enforcement responsibility.[364] He scanned newspapers daily, looking for hints of sedition and ordered the United States

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[359] FERLING, *supra* note 170, at 289–91 (explaining the political tensions at the outset of the Adams Administration in 1796); MILLER, *supra* note 356, at 40–44 (1951) (explaining the political situation at the passage of the Alien and Sedition Acts); Smith, *supra* note 121, at 176–80 (describing the political context when passing the Sedition Act).

[360] *John Adams,* WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/john-adams/ [https://perma.cc/HGL3-55C9].

[361] On the problems with France following the ratification of the Jay Treaty and Adams' handling of it, see FERLING, *supra* note 170, at 296–300.

[362] MILLER, *supra* note 356, at 56–59 (identifying the need to suppress dissent from French supporters as the basis for the Sedition Act)

[363] 1 Stat. 596–597 (1798); MILLER, *supra* note 337, at 70.

[364] MILLER, *supra* note 356, at 73; SMITH, *supra* note 121, at 182; *Timothy Pickering*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=P000324 [https://perma.cc/7CNT-PWEJ].

District Attorneys to do the same.[365] He ordered several newspaper editors and a Congressman from Vermont prosecuted.[366] He had judges instruct grand jurors to be vigilant to identify seditious statements.[367] This was just as Jefferson feared in 1793: a centralized national government using its power to coerce adherence to a law that suppressed dissent.[368]

Ironically, ten years later, Jefferson imitated his executive predecessors.[369] This time, however, Jefferson grappled with the British.[370] While France stabilized under Napoleon's dictatorial rule, the British became the United States' primary foreign policy problem.[371] To gain leverage, Jefferson persuaded Congress to embargo trade with Great Britain.[372] While perhaps in the national interest, many merchants who relied on British trade for

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[365] MILLER, *supra* note 356, at 88; SMITH, *supra* note 121, at 182–85.

[366] The Congressman was Matthew Lyon. SMITH, *supra* note 121, at 221. Lyon came to the United States as an indentured servant, bought his freedom and fought in the Revolutionary War. *Id.* at 225. He was elected to Congress in 1797 and immediately became a Federalist target. *Id.* at 221–22. Lyon also published a newspaper in Vermont that challenged the notion that the President was infallible and had made other disparaging comments about the President. *Id.* at 225–26. For details about the case and Lyon's conviction and sentence, see SMITH, *supra* note 121, at 221–255.

[367] MILLER, *supra* note 356, at 137–39.

[368] TUCKER & HENDRICKSON, *supra* note 184, at 16.

[369] Jones, *supra* note 357.

[370] *Id.*

[371] On the foreign policy problems at the start of the Administration, see JON MEACHAM, THOMAS JEFFERSON: THE ART OF POWER 413–14 (2012). On the problems with the British at the start of the Embargo, see *id.* at 425–32.

[372] *Id.*

their livelihood vehemently opposed it.[373] The opposition caused embargo evasion to become a significant national problem.[374] With violators spread throughout the different ports along the Atlantic coast and no formal federal law enforcement agency, Jefferson turned to the group that had the potential to be "an established corps of spies or informers" for enforcement.[375] Jefferson had the Customs Collectors perform just as they did with neutrality violations in 1793.[376] Reports went to the District Attorneys who initiated cases when warranted.[377]

Within fifteen years of Randolph's pragmatic policy proposal, the existing federal law enforcement agents had established a consistent working relationship with the District Attorneys such that it became the default policy choice. The relationship continued to grow as the United States expanded westward and the national government assumed a larger law enforcement role.[378]

Today's federal prosecutors work closely with investigators to prosecute offenders.[379] Prosecutors must rely on federal investigators to collect quality evidence.[380]

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[373] *Id.* at 433; *see also* Jones, *supra* note 357, at 310 (1980).
[374] *Id.*; *see also* WHITE, *supra* note 151, at 434–37.
[375] Letter from Thomas Jefferson to Edmund Randolph, *supra* note 1.
[376] WHITE, *supra* note 151, at 434–37. In many instances, Jefferson employed Hamilton's proposal and reviews the information directly from the Customs Collectors. *Id.* at 435.
[377] Not all of the United States District Attorneys obeyed the instructions, citing their disagreement with the policy. When they offered to resign, Jefferson did not accept the resignations because he did not believe political differences were grounds for removal. *Id.* at 414–15.
[378] FRIEDMAN, *supra* note 47, at 261–67.
[379] Richman, *supra* note 358.
[380] *Id.* at 758.

They are also at the mercy of federal agencies regarding the types of cases investigated.[381] Agencies such as the Department of the Interior, which enforces criminal laws relating to fish and wildlife, dictate how many agents are dispersed around the nation and where they are placed.[382] In areas with high agent concentrations, more fish and wildlife cases will be sent to the local United States Attorney's Office.[383]

The reliance upon federal investigators to collect evidence and bring cases began with Randolph's proposal. Cases arising in Savannah, Georgia and in Philadelphia exemplify the important role Customs Collectors played. In Georgia, the District Judge circumvented the Customs Collector—and the United States Attorney—and provided the grand jury with evidence of a neutrality violation.[384] The grand jury indicted but the case resulted in an acquittal, because the Customs Collector and prosecutor did not act.[385] In Philadelphia, the Customs Collector provided the prosecutor with information regarding the *William*.[386] Others brought information about other violations and the grand jury indicted these too.[387] Rawle pursued only

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381 *Id.*

382 *Regional Law Enforcement Offices*, U.S. FISH & WILDLIFE SERV. OFF. L. ENFORCEMENT, http://www.fws.gov/le/regional-law-enforcement-offices.html [https://perma.cc/6757-QY99] (identifying the regions covered by the Fish and Wildlife Service).

383 *Id.*

384 ALDERSON, *supra* note 207, at 115.

385 *Id.*

386 Minutes of the Grand Jury for the Special Session of the Middle Circuit in the District of Pennsylvania (on file with the National Archives in Philadelphia) (hereinafter *Special Session*).

387 *Id.*

one of these cases and that one he later dismissed.[388] In both instances, the lack of cooperation from Customs officials correlated with unsuccessful prosecutions.

Likewise, federal law enforcement agents must work with prosecutors to complete their tasks.[389] Prosecutors often direct investigations, telling the agents when the evidence is sufficient.[390] In some instances, agents must receive prosecutorial and judicial approval prior to collecting certain evidence.[391] Especially at the federal level, prosecutors often draft the documents requesting permission from the judge to obtain the evidence. Prosecutors also lead task forces directed at particular federal crime problems. These task forces include terrorism, gun violence and drug distribution organizations.[392] They bring together agents from a variety of agencies to address a specific problem.

Randolph's proposal also initiated this aspect of the prosecutor-agent relationship. By having the Customs Collectors report to the United States District Attorney, the prosecutor became the inquisitor. The Customs Collector could not go directly to the grand jury

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[388] *Id.*

[389] Richman, *supra* note 358, at 778–82.

[390] *Id.*

[391] *See, e.g.*, 18 U.S.C. § 2516 (2012) (authorization to intercept wire, oral or electronic communications); 18 U.S.C. § 3122 (2012) (application for a pen register or trap and trace device). Search warrants are governed by FED. R. CRIM. P. 41(a).

[392] *See, e.g.*, *FBI Joint Terrorism Task Forces*, FBI, https://www.fbi.gov/investigate/terrorism/joint-terrorism-task-forces [https://perma.cc/U5X8-FAQD]; *Project Safe Neighborhood*, U.S. ATTY'S OFF., DISTRICT OF NEW HAMPSHIRE, http://www.justice.gov/usao-nh/project-safe-neighborhoods [https://perma.cc/BDM4-A37K]; *Organized Crime Drug Enforcement Task Force (OCDETF)*, U.S. DRUG ENFORCEMENT ADMINISTRATION, https://www.dea.gov/organized-crime-drug-enforcement-task-force-ocdetf [https://perma.cc/XKC3-Q5SB].

himself. Instead, he delivered evidence to the prosecutor.[393] William Rawle, in Philadelphia, handled a variety of matters the Customs Collector brought to him.[394] Likewise, Christopher Gore, in Boston, worked with the Customs Collector to obtain evidence incriminating the French consul in Boston for arming privateers in Boston Harbor.[395]

Randolph's pragmatic solution to the Jefferson/Hamilton proposals established the notion that federal prosecutors are the nation's constitutional inquisitors. Prior to the neutrality crisis, federal prosecutors only handled individual cases without considering enforcement priorities. During the colonial period and early statehood, governors did not dictate morality prosecutions.[396] Conversely, following the exchange between Jefferson and Randolph, orders went from Randolph to the United States District Attorneys ordering them to pursue prosecutions.[397] These prosecutions were necessary not only to enforce criminal law but also to demonstrate United States neutrality. [398]

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[393] *See Special Session*, *supra* note 386.

[394] *Id.*

[395] HELEN PINKNEY, CHRISTOPHER GORE, FEDERALIST OF MASSACHUSETTS, 1758-1827 52–55 (1969).

[396] *See* David H. Flaherty, *Law and the enforcement of Morals in Early America*, 1 CRIME AND JUSTICE IN AMERICAN HISTORY 127, 146–47 (Erik H. Monkonnen ed. 1991); New York, *supra* note 27, at 235. The one exception to this might be prosecutions for sedition or treason in the years leading to the Revolutionary War. Carlton F.W. Larson, *The Revolutionary American Jury: A Case Study of the 1778-1779 Philadelphia Treason Trials* 61 SMU L. REV. 1441, 1453–55 (2008).

[397] Letter from Edmund Randolph to William Channing (May 12, 1793), N.Y. PUB. LIBR. DIGITAL COLLECTIONS, http://digitalcollections.nypl.org/items/bac0a75c-2673-b981-e040-e00a18067fd9 [https://perma.cc/EW45-FTZJ].

[398] Ingram, *supra* note 200, at 503–06.

Therefore, these cases were not reactive criminal prosecutions but proactive matters.[399]

Finally, Randolph's resolution sowed the seeds of a debate that has continued for nearly 225 years. When Congress passed the Judiciary Act, it sought to decentralize prosecution, leaving it to local prosecutors to handle cases in their preferred manner.[400] Randolph's proposal to connect the Customs Collectors with the District Attorneys led to the first set of orders issued to local federal prosecutors from the Attorney General. These orders were the central government's first effort to control the United States District Attorneys and their discretionary power. Of course, this initial attempt did not resolve the matter. In fact, the history of federal criminal prosecution can be seen as an effort to increase centralization. Prior to the Justice Department's creation in 1871, several Attorneys General sought but were denied control over federal prosecutors.[401] With the Justice Department's creation, the Attorney General began initiating cases from Washington, D.C. rather than relying upon local United States Attorneys. Regulatory cases came first, followed by sedition cases during World War I.[402] Later, the Justice Department took control of

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[399] On the difference between "proactive" and "reactive" cases, see John Hagan & Ilene Nagel Bernstein, *The Sentence Bargaining of Upperworld and Underworld Crime in Ten Federal District Courts*, 13 LAW & SOC'Y REV. 467, 468–69 (1979).

[400] *See supra* notes 89–95 and accompanying text.

[401] Huston, *supra* note 23, at 13 (President Andrew Jackson seeks to give Attorney General control over criminal cases in early 1830); CLAYTON, *supra* note 145, at 20 (Caleb Cushing, as Attorney General, pushes for control over U.S. Attorneys in 1850s); Conner et al., *supra* note 107, at 757 (Lincoln gives Attorney General control over the U.S. Attorneys in 1861).

[402] FRIEDMAN, *supra* note 47, at 265.

tax cases[403] and RICO cases.[404] Most recently it assumed control over national security cases ranging from terrorism to export control.[405] The efforts to centralize discretion have extended to establishing review authority over Assistant United States Attorney hiring.[406] Within the last ten years, the Justice Department's centralization efforts have made some prefer decentralization.[407] A politically-oriented Justice Department used its power to prosecute political rivals in different parts of the country.[408] United States Attorneys who did not advance these policy prosecutions were fired.[409] The firings and the public antagonism to them trace directly to Randolph's solution to the Hamilton/Jefferson differences and the desire to centralize prosecutions despite the public's desire to maintain local control.

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[403] Johnnie M. Walters, *The Role of the Department of Justice in Tax Litigation*, 23 S. C. L. REV. 193, 194 (1971).

[404] James D. Calder, *RICO's "Troubled...Transition": Organized Crime, Strategic Institutional Factors, and Implementation Delay, 1971-1981*, 25 CRIM. JUST. REV. 31, 33 (2000).

[405] *National Security Division: About the Division*, U.S. DEPT. JUST., http://www.justice.gov/nsd/about-division.

[406] Lochner, *supra* note 10, at 280–88. For the duties of the Executive Office for the United States Attorneys, see *Mission and Functions*, OFF'S. U.S. ATTY'S, http://www.justice.gov/usao/eousa/mission-and-functions [https://perma.cc/Q7SB-6B5N].

[407] *See generally* Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice*, 70 ALA. L. REV. 1 (2018) (discussing the "evolving understanding of prosecutorial independence" that has categorized the continued existence of the Department of Justice. *Id.* at 2).

[408] *See* Beale, *supra* note 16, at 371; Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L. J. 2087, 2121 (2009).

[409] Eisenstein, *supra* note 16, at 219.

## V. Conclusion

The federal prosecutor's central role in criminal justice administration was not pre-ordained or inevitable, nor is it the only alternative. Instead, prosecutorial power grew from the need for a practical compromise between competing ideologies. While Thomas Jefferson and Alexander Hamilton could not see beyond their ideological objectives, Edmund Randolph sought a pragmatic solution to the neutrality enforcement problem. He placed prosecutors between the people and the grand jurors. Prosecutors began working with investigators to implement federal law enforcement policy. Once in that position, federal prosecutors slowly increased their domain such that, today, they are the nation's "constitutional inquisitors."[410]

[410] Letter from Thomas Jefferson to Edmund Randolph, *supra* note 1.