ROBERTSON V. UNITED STATES, EX REL. WATSON - AMICUS (MERITS)

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No. 08-6261

In the Supreme Court of the United States

JOHN ROBERTSON, PETITIONER

v.

UNITED STATES, EX REL. WYKENNA WATSON

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

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

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INTEREST OF THE UNITED STATES

The Court's order granting certiorari limited the question to "[w]hether an action for criminal contempt in a congressionally created court may constitutio in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States." 130 S. Ct. 1011 (2 United States has an interest in the proper resolu tion of that question. In addition, the judgment of con viction at issue in this case remanded petitioner of the Attorney General of the United States or his authorized representative. See D.C. Code § 24-201.26 (2001). The United States thus has an inter e of that judgment.1

STATEMENT

Following a bench trial in the Superior Court of the District of Columbia, petitioner was convicted of three counts of criminal contempt, in violation of D.(16-1005(f) (2001). The court sentenced petitioner to three consecutive 180-day terms of imprisonment, with one of those terms suspended in favor of f probation. The District of Columbia Court of Appeals affirmed. J.A. 63-65; Pet. App. A1-A25.

1. Section 16-1003 of the D.C. Code permits any vic tim of domestic violence to petition for a civil protection order (CPO) in family court, and Section 1(vides that any violation of a temporary or permanent CPO issued by that court "shall be punishable as con tempt." Section 16-1005(g) further provides conviction," such criminal contempt "shall be punished by a fine not exceeding $1,000 or imprisonment for not more than 180 days, or both."

In Green v. Green, 642 A.2d 1275 (1994), the District of Columbia Court of Appeals interpreted Section 16-1005(f) to "reflect a determination by the Co District of Columbia] that the beneficiary of a CPO should be permitted to enforce that order through an intrafamily contempt proceeding." Id. at 1279. A court, when the Council amended the Dis trict's intrafamily offenses statute in 1982, the Council created a private right of action to obtain a CPO becau

the Attorney General for the District of Columbia (OAG) (then called the Office of the Corpora tion Counsel)2 was unable to effectively prosecute inci de violence. Id. at 1279 n.7. The court then observed that OAG had professed a similar inabil ity to effectively prosecute criminal contempt motions for viol Ibid. Based on that observation, "as well as the procedural scheme established for en forcing CPOs," the court concluded that "[the] consider ations su private right of action to seek a CPO apply equally to a private right of action to enforce the CPO through an intrafamily contempt proceeding." Id. at 12

The District of Columbia rules governing domestic violence proceedings thus provide that a "motion re questing that the court order a person to show c she/he should not be held in criminal contempt for violation of a temporary protection order or civil protec tion order may be filed by an individual, [OAG appointed by the Court for that purpose." D.C. Super. Ct. Domestic Violence Unit R. 12(d).

2. On March 27, 1999, petitioner argued with re spondent, his girlfriend. J.A. 40. The argument esca lated, and petitioner hit respondent several times i chest. J.A. 42-46. Respondent sustained seri ous injuries as a result of the incident. J.A. 51, 76.

On March 29, 1999, respondent filed a petition for a CPO in the Family Division of the Superior Court of the District of Columbia. J.A. 11-17. She allege had assaulted her during the March 27 incident, and she requested an order prohibiting respondent from abusing, threatening, harassing, or contacting The court issued a temporary protection order that day. Pet. App. A3. On April 26, 1999, the OAG en tered an appearance on behalf of respondent. J.A hearing, the court that day issued a CPO ordering petitioner to stay at least 100 feet away from respondent's person, home, and workplace, and prohib from assaulting, threatening, harassing, physically abusing, or contacting respondent. J.A. 20. The CPO stated that any failure to comply "is punish abl contempt." J.A. 25 (capitalization and emphasis omitted).

3. At the same time that respondent pursued a CPO, the United States Attorney's Office for the District of Columbia (USAO) independently pursued crir stemming from the March 27 incident. On March 29, 1999, petitioner was charged by complaint in the Criminal Division of the Superior Court of the Dis Columbia. J.A. 9. While those charges were pending, on June 26, 1999 (and continuing into the early morning hours of June 27), petitioner violated the to get respondent to drop the criminal charges and by throwing drain-cleaning acid on her face. Pet. App. A4-A5; J.A. 76-77. The acid caused serious ir respondent was taken to the hospital. Ibid.

The USAO did not amend the complaint to add any charges related to the June incident. On July 8, 1999, a grand jury indicted petitioner on one count assault and two counts of assault with a dangerous weapon for the March incident. J.A. 26-27. On July 28, 1999, petitioner entered into a plea agreem USAO to resolve the pending criminal charges. J.A. 28- 30; see U.S. Petition-Stage Br. App 1a. The agreement was hand-written on a one-page standa ment form that both the USAO and the OAG use in the Superior Court. Because the printed form is designed for use by both offices, it lists both the "Ur and the "District of Columbia" in the case caption. Ibid. It also includes a signature line at the bottom for an "Assistant U.S. Attorney or [an] Assistant Co Counsel." Ibid.

In this case, the Assistant United States Attorney (AUSA) handling the matter crossed out "District of Columbia" in the caption, so that it read only "Unit John Robertson." J.A. 28. The AUSA also crossed out "Assistant Corporation Counsel" in the sig nature line, so that it read only "Assistant U.S. Attor ne AUSA wrote at the top of the form: "In exchange for Mr. Robertson's plea of guilty to attempt[ed] aggravated assault, the gov't agrees to" dismiss the re charges and "[n]ot pursue any charges concerning an incident on 6-26-99." J.A. 28 (capitalization omitted). Petitioner, his counsel, and the AUSA signe agreement. J.A. 30. The court accepted petitioner's plea, J.A. 30, 46, and sentenced petitioner to one to three years' imprisonment. J.A. 53.

4. On January 28, 2000, respondent, represented by OAG, filed a motion pursuant to Section 16-1005(f) in the Family Division of the Superior Court se petitioner adjudicated guilty of criminal contempt for violations of the CPO. J.A. 59. The motion was cap tioned as Watson v. Robertson, IF No. 785-99, and case number as respondent's initial petition for a CPO. J.A. 11, 59. Respondent also filed an affida vit alleging five specific actions by respondent tl CPO, J.A. 56-57, and a separate motion to mod ify and extend the CPO, J.A. 61-62. The violations al leged arose out of the June 26 incident. J.A. 56-5

On May 10-11, 2000, the court held a bench trial to adjudicate the criminal contempt charges and to resolve the motion to modify and extend the CPO. App. A5. The court found petitioner guilty on three counts of criminal contempt. J.A. 2, 63. The court en tered a Judgment and Commitment/Probation C sentencing petitioner to three consecutive 180-day terms of imprisonment, but suspending execution of one of those terms and instead imposing five y tion. J.A. 63-65. The court also ordered petitioner to pay approximately $10,000 in restitution for medical expenses that respondent incurred as a result

J.A. 64. Although the pleadings in the case were styled Watson v. Robertson, see, e.g., J.A. 59, the form Judgment listed both the United States of Ame District of Columbia (but not respondent) as plaintiffs, and petitioner as defendant. J.A. 63. Peti tioner appealed from the judgment of criminal contempt caption Robertson v. Watson. J.A. 3, 4.

5. a. More than three years later (while his direct appeal was still pending), in November 2003, petitioner moved the Superior Court pursuant to D.C. Co (2001) to vacate his criminal contempt convic tions. Pet. App. A6; J.A. 3. In that motion, petitioner contended for the first time that the contempt proceed violated his plea agreement with the USAO and that his counsel had been ineffective in failing to raise that claim. Pet. App. A6-A7. On August 27, 2004 denied petitioner's motion to vacate. J.A. 89- 93. Petitioner appealed from that order, and the appeal was consolidated with the pending direct appeal fr contempt convictions (in which he had not made a claim pertaining to his plea agreement). J.A. 4.

b. The court of appeals affirmed. Pet. App. A1-A25. Relying on its earlier precedent, the court read Section 16-1005(f) to confer "a private right of actior of a CPO "to enforce the CPO through an in trafamily contempt proceeding." Id. at A13 (quoting Green, 642 A.2d at 1280 n.7). The court rejected peti ti submission that the contempt proceeding could "only be brought in the name of the relevant sovereign, the United States." Id. at A15 (internal quotation ellipsis omitted). The court reasoned that confer ring such a private right of action "does not contravene the general principle that criminal prosecutions in the name of the sovereign," because of "the special nature of criminal contempt." Ibid. Unlike other criminal prosecutions, the court explained, crimi n enforces judicial orders rather than gen eral criminal laws. Ibid.

The court further held that petitioner's plea agree ment did not bar the contempt proceeding because that agreement bound only the USAO-not respon Pet. App. A19-A20. In light of the handwritten changes to the plea agreement form, the court found, "no objectively reasonable person could understan [petitioner's] plea agreement bound [respondent] * * * [or] the District." Id. at A20. The court added that D.C. Code § 16-1002(c) (2001), which provided stitution of criminal charges by the United States attor ney shall be in addition to, and shall not affect the rights of the complainant to seek any other reli subchapter," confirmed the absence of a bar on respon dent's action. Ibid.; see Pet. App. A20 n.7.

SUMMARY OF ARGUMENT

The Constitution presupposes that the real party in interest in any criminal prosecution is the sovereign. That principle, however, is of no help to petitior because nothing in the Constitution requires that a criminal contempt be prosecuted in the name of the sov ereign. And, equally important, nothing in p agreement with the United States Attorney's Office barred an intrafamily contempt proceeding initiated by respondent. Accordingly, the judgment should

A. The Constitution's use of terms such as "crime," "offense," and "criminal prosecution" must be under stood in light of their common law heritage. At c crime was a public wrong, and the sovereign was "the proper prosecutor for every public offence." 4 Wil liam Blackstone, Commentaries *2. Although E a system of largely private prosecution in its criminal proceedings, private prosecutors were under stood to be acting on behalf of the King. The America States moved away from England's practice of private prosecution and toward the concentration of prosecutorial authority in the hands of public official definition exercise governmental power. Even where privately conducted criminal proceedings contin ued to exist, the sovereign was understood to be all criminal prosecutions.

Consistent with the historical understanding of crim inal prosecution as an exercise of sovereign authority, this Court's criminal procedure jurisprudence that the party adverse to the criminal defendant represents the government. This Court has marked the commencement of a criminal case, for purpose Amendment right to counsel, as "the point at which the government has committed itself to prose cute." Rothgery v. Gillespie County, 128 S. Ct. 2578, (internal quotation marks and citation omit ted). And the obligations that the Court has held the Due Process Clause to impose on prosecutors as critica defendant's right to a fair trial-including the re quirement that the prosecutor provide defendants with material exculpatory evidence, see Brady v. Maryl 83, 87 (1963)-could be effective only if prose cutors were understood to be exercising sovereign power (because the Due Process Clause has no appli action).

The foundational premise that the prosecution of criminal offenses is an exercise of sovereign power holds true in criminal contempt proceedings. The sure, has called contempt "an offense sui generis" and has interpreted the Constitution to permit greater pro cedural flexibility in contempt proceedings criminal cases. Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966). But the Court also has called contempt "a crime in the ordinary sense," Bloom v. Illi

194, 201 (1968), and, in the context of a federal court contempt, has held that "[t]he fact that the allegedly criminal conduct concerns the violation of a c instead of common law or a statutory prohibition does not render the prosecution any less an exercise of the sovereign power of the United States." Un Providence Journal Co., 485 U.S. 693, 700 (1988). The Court's understanding of the nature of criminal con tempt is consistent with its treatment at com public offense whose prosecution was an exercise of sovereign power.

Yet the Constitution does not require that a prosecu tion for criminal contempt be brought in the name of the government (as contrasted to being deem of sovereign power). This Court has made clear that "[h]ow a case is captioned is of no significance" when determining whom the parties in a criminal c proceeding must be understood to represent. Provi dence Journal, 485 U.S. at 708 n.11. Likewise, at com mon law no consistent practice governed ca criminal contempt proceedings. Although captioning all criminal contempt proceedings in the name of the relevant sovereign would promote transparen constitutional requirement that this occur.

B. The exercise of the sovereign's prosecutorial au thority by private individuals may raise constitutional questions, but none is presented in this case. A legislatively created right of criminal prosecution by private individuals in Article III courts would raise seri ous separation of powers concerns, it does n Columbia courts because of the District's unique sta tus. The Constitution grants broad authority over the District to Congress. U.S. Const. Art. I, § 8, C cordingly, the provisions Congress adopts for the gov ernment of the District are not subject to the same sepa ration of powers constraints that limit its national level. See Palmore v. United States, 411 U.S. 389, 397 (1973). Congress may therefore delegate prose cutorial powers in the District to individ Executive Branch, including employees of the congres sionally created D.C. government or private individuals. In neither case does the delegation infri stitutional prerogatives of the Executive Branch.

Private prosecutions by interested parties (such as respondent) also have the potential to raise due process questions. In Young v. United States ex rel S.A., 481 U.S. 787 (1987), the Court relied on its supervisory authority over Article III courts to hold that "counsel for a party that is the beneficiary of a not be appointed as prosecutor in a contempt action alleging a violation of that order." Id. at 809. Since Young, state courts have divided on whether the Clause includes a similar prohibition. Peti tioner, however, has expressly disavowed this claim, so it is not before the Court. Likewise, petitioner did not that his criminal prosecution by respondent violated due process because respondent was insuffi ciently controlled or supervised by a public official. As record before the Court includes no expla nation from the court of appeals on what authority (if any) D.C. judges have to terminate or otherwise overse conducted intrafamily contempt proceedings in the District. Neither does it include any analysis from that court of the significance of respondent's repre OAG attorneys.

C. The one argument that petitioner did belatedly press below was that his plea agreement barred the criminal contempt prosecution. The court of appe rejected that claim. A plea agreement made by one United States Attorney's Office does not nor mally bind any other agency or entity acting on behalf States. Petitioner's plea agreement, by its terms, binds only the United States Attorney's Office for the District of Columbia, and respondent is not part

That conclusion is reinforced by a D.C. statute pro viding that criminal charges pursued by the Office of the United States Attorney "shall not affect the protective order recipient] to seek any other relief" un der D.C. law. D.C. Code § 16-1002(c) (2001). At the time of petitioner's plea, the D.C. Court of Ap identified the right to bring criminal contempt actions as an available form of "relief" for private beneficiaries of protective orders. Petitioner was thus on matter of D.C. law that his agreement with the Office of the United States Attorney would not bar a privately initiated criminal contempt proceeding.

ARGUMENT

THE PROSECUTION OF PETITIONER WAS AN EXERCISE OF SOVEREIGN POWER, BUT HE IS NOT ENTITLED TO RELIEF UNDER THE CONS HIS PLEA AGREEMENT

A. All Criminal Prosecutions, Including For Contempt, Must Be Understood As Exercises of Sovereign Power Although They Need Not Be Styled As Su

Both the common law background of the Constitution and assumptions embedded in this Court's criminal pro cedure decisions lead to the conclusion t prosecutions must be understood as exercises of sover eign power. Although criminal contempt proceedings are for some purposes sui generis and th cedural flexibility unavailable in regular criminal cases, prosecution of criminal contempt (whether or not con ducted by a government employee) must

stood as an exercise of sovereign power.3 Nonetheless, the Constitution does not require that they be captioned as such.

1. Crime is a breach of public norms, and its prosecu tion is a sovereign function

As this Court has explained, the "purpose of a crimi nal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate th in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant." Standefer v. United States, 447 U.S. (quoting United States v. Standefer, 610 F.2d 1076, 1093 (3d Cir. 1979) (en banc)). Both elements of the Court's observation about criminal proceeding understanding that they vindicate the public interest and the need to ensure that they safeguard de fendants' rights-presuppose that prosecution is an i sovereign function.

a. The Constitution makes a number of references to "crimes," "offence[s]," and "criminal prosecutions." See Pet. Br. at 14 n.9. Although the Constitutic define these terms, their meaning is illumi nated by common law traditions at the time the Consti tution was drafted and ratified. See Crawford v. Wash 36, 42-50 (2004) (interpreting constitu tional provisions in light of common law understandings and assumptions).4

As petitioner demonstrates (Br. 14-35), the Constitu tion's common-law background suggests that the Fram ers understood a "crime" as an injury to the criminal prosecution as a response taken on the pub lic's behalf. See, e.g., 4 William Blackstone, Commentar ies *2 (the sovereign is "in all cases the p tor for every public offence"). According to Blackstone, crimes, or public wrongs, are distinguished from civil actions, or private wrongs, in that civil injur infringement or privation of the civil rights which belong to individuals, considered merely as individuals" while crimes "are a breach and violation of the and duties due to the whole community, considered as a community." Id. at *5.

Thus, even though England had a long history of pri vately initiated criminal prosecution, see Resp. Br. 40, those privately conducted actions were und exercises of the King's power. That is shown by the au thority of the attorney general of England (who initiated his own prosecutions only "in cases of s importance to the Crown") to file "a writ of nolle prosequi" to dis miss any privately initiated prosecution. Abraham S. Goldstein, Prosecution: History of Prosecu tor, in 3 Encyclopedia of Crime & Justice 1242 (Joshua Dressler ed., 2d ed. 2002). "[H]is decisions in such mat ters were treated by the courts within his discretion." Ibid.

American practice began departing early from the English tradition of private prosecution in favor of a system of public prosecution conducted by public federal system in particular, the idea that a criminal prosecution is an action on behalf of the public was reflected in the decision to give prosecutorial au officials alone. In 1789, Congress granted to the district attorneys exclusive authority to "prosecute in such district all delinquents for crimes and offence under the authority of the United States." Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 92. Accordingly, from the beginning of the federal judicial system, p the Attorney General and the United States Attorneys (and their predecessors)- prosecuted federal crimes. See National Comm'n on Law Observance Report on Prosecution 7-9 (1931).

The colonies and early states also largely abandoned the English tradition of private prosecution and instead put prosecutorial authority in the hands of See Roscoe Pound, Criminal Justice in America 108 (1930). To be sure, the trend was not complete at the time of independence; privately conducted p continued into the nineteenth century (and, in some very limited contexts, still exist). Resp. Br. 40-41. Throughout this period, however, prosecutions in generally understood to be actions on behalf of the sovereign, whether or not they were conducted by one of the sovereign's employees. See Pet. Br. 1 Huntington v. Attrill, 146 U.S. 657, 669 (1892) ("Crimes and offenses against the laws of any state can only be defined, prosecuted, and pardoned by th authority of that State.").5

b. Much of the Court's criminal procedure jurispru dence rests on the premise that the criminal defendant is prosecuted by a state actor. For example, t tied the attachment of the Sixth Amendment right to counsel to "the point at which 'the government has committed itself to prosecute,' 'the adverse posi government and defendant have solidified,' and the ac cused 'finds himself faced with the prosecutorial forces of organized society.'" Rothgery v. Gilles S. Ct. 2578, 2583 (2008) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion)).

Similarly, the Court's understanding of the due pro cess protections available to criminal defendants reflects an understanding of the prosecutor as a st filling a "duty on the part of the government." Kyles v. Whitley, 514 U.S. 419, 433 (1995). The Court has inter preted the Due Process Clause to impose

various obligations thought integral to the defendant's ability to receive a fair trial. See, e.g., Brady v. Mary land, 373 U.S. 83, 87 (1963) (prosecutor mu favorable material evidence to defendant); Mooney v. Holohan, 294 U.S. 103, 112 (1935) (prosecutor may not procure conviction through testimony he false). The Court has also recognized constraints on prosecutorial discretion flowing from due process princi ples. See United States v. Armstrong, 517 (1996) ("[T]he equal protection component of the Due Process Clause of the Fifth Amendment" prohibits pros ecutors from making decisions based on able standard such as race, religion, or other arbitrary classification.") (internal quotation marks and citation omitted).

The Due Process Clause is a limitation on govern ment authority; it does not apply to private actors acting on their own. Jackson v. Metropolitan Edisor 345, 349 (1974) (noting "the essential dichotomy" in the Due Process Clause "between deprivation by the State, subject to scrutiny under its provisions conduct" against which it "offers no shield"). Ac cordingly, this Court's understanding of the Constitu tion's "basic 'fair trial' guarantee," United States v. F 622, 628 (2002), can be universally effec tive only if a criminal prosecutor-whether or not a gov ernment employee-is understood to be exercising gov e power.6 Indeed, this Court has described the prosecutor as "a quintessential state actor." Georgia v. McCollum, 505 U.S. 42, 50 (1992).

2. Prosecution of criminal contempt is also an exercise of sovereign power

The government is the true party in interest in a prosecution for criminal contempt, just as it is for the prosecution of ordinary crimes. Criminal contempt described as sui generis for certain purposes, and the Constitution affords greater procedural flexibility in criminal contempt proceedings than it does in criminal cases. Nonetheless, prosecution of criminal contempt, just like prosecution for ordinary crimes, is an exercise of sovereign, not private, power.

a. In light of the unique function of contempt, this Court has declined to interpret the Constitution to re quire criminal contempt proceedings to be condu the same way as ordinary criminal prosecu tions. See Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966) (describing criminal contempt as "an offense Resp. Br. 23-27. The purpose underlying criminal contempt-the vindication of the court's au thority-is not co-extensive with the general purpose of subs statutes. See Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 804 (1987).

Principally because of that difference, the proce dures governing prosecution of criminal contempt vary in several respects from the procedures used tc ordinary crimes. For example, criminal contempt, unlike any other offense punishable by death or impris onment in excess of one year, does not have t cuted by an indictment. See Green v. United States, 356 U.S. 165, 184-185 (1958), overruled in part on other grounds by Bloom v. Illinois, 391 U.S. 19 addition, contempts committed in the court's presence may be punished summarily, without the normal due process requirements applicable to ordinar Pounders v. Watson, 521 U.S. 982, 987-988 (1997) (per curiam); see Fed. R. Crim. P. 42(b).7

b. Nonetheless, the Court has also described crimi nal contempt as a "crime in the ordinary sense," Bloom, 391 U.S. at 201, and has extended a variet tional protections applicable in ordinary criminal cases to nonsummary criminal contempt proceedings. See e.g., United States v. Dixon, 509 U.S. 688, (double jeopardy); Hicks ex rel. Feiock v. Feiock, 485 U.S. 624, 632 (1988) (proof beyond a reasonable doubt); Cooke v. United States, 267 U.S. 517, 5 (notice of charges, assistance of counsel, and compulsory pro cess); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911) (privilege agains incrimination and presumption of innocence); see also Bloom, 391 U.S. at 201-202 (jury trial for nonpetty contempt).

As these holdings suggest, this Court has generally conceived of criminal contempts in the same essential way it has ordinary crimes-as offenses agai ereign. See e.g., United States v. Providence Journal Co., 485 U.S. 693, 700 (1988) ("The fact that the alleg edly criminal conduct concerns the violatic order instead of common law or a statutory prohibition does not render the prosecution any less an exercise of the sovereign power of the United State Grossman, 267 U.S. 87, 115 (1925) (President could par don individual convicted of criminal contempt because it was an "offense[] against the United

Indeed, the Court has often distinguished civil from criminal contempt by noting that criminal contempt is typically a separate public action brought on b government, while a civil contempt is generally a part of the original private suit. See Gompers, 221 U.S. at 445 (while civil contempts are "between the parties," "proceedings at law for criminal contempt are between the public and the defendant"); Bessette v. W.B. Conkey Co., 194 U.S. 324, 328 (1904) individuals are the "parties chiefly in interest" in civil contempt; "the government, the courts, and the people are inter ested in the[] prosecution" of crimi "and private parties have little, if any, interest" in such pro ceedings) (quoting In re Nevitt, 117 F. 448, 458 (8th Cir. 1902)).

The Court's understanding of the nature of criminal contempt is consistent with the status of criminal con tempt at common law. See, e.g., Ronald L. Go

Contempt Power 58 (1963) ("Reference again to the his torical nature of the contempt power indicates that in any event, contempt of any kind or classi historically only be a governmental power to be used essentially for governmental purposes, any private as pects notwithstanding. This is incontrovertit history."); Wilbur Larremore, Constitutional Regula tion of Contempt of Court, 13 Harv. L. Rev. 615, 622 (1900) ("Contempt is, of course, a public offenc special kind of public offence. It is, like any infrac tion of law, an offence against the whole people, but, in addition and more important, it is an offence a dignity and a defiance of the authority of the court.").8

The D.C. Court of Appeals in this case held that the criminal contempt prosecution was properly character ized as "a private right of action brought in th of [respondent], not as a public action brought in the * * * interest of the United States or any other governmental entity." Pet. App. A15. It is not clear wl that statement the court of appeals was addressing the same question now before this Court. See Resp. Br. 43. Assuming it was, the court of appeals e abstract question of characteriza tion. The criminal contempt prosecution here, like any other, was an exercise of sovereign power. As explained below infra), however, the D.C. Court of Ap peals' failure to recognize the true character of the pros ecution does not require reversal.

3. The Constitution does not require a criminal prosecu tion to be brought in the name of the sovereign

Although the sovereign is the real party in interest in any criminal contempt prosecution, the Constitution does not require that the case be brought in th "name." See Resp. Br. at 28-32. Proceeding in the name of the government promotes transparency and helps to ensure that the defendant receives ac that the proceedings are criminal in nature. See McCann v. New York Stock Exch., 80 F.2d 211, 214-215 (2d Cir. 1935), cert. denied, 299 U.S. 603 (193 Gompers, 221 U.S. at 446.9 The Constitution, however, is not concerned with technical rules governing pleading captions.

This Court's decision in Providence Journal confirms the immateriality of the way parties are listed in the case caption of a criminal contempt proceedin Court held that a privately conducted contempt prosecution in an Article III court was a case in which the United States was "interested" for purposes o requirement that the Solicitor General appear (or authorize someone else to appear) in this Court in all such cases. 485 U.S. at 707-708; see note 1, su that conclusion, the Court noted that

[h]ow a case is captioned is of no significance to our holding. As we have previously observed, "courts must look behind names that symbolize the part whether a justiciable case or controversy is presented." Thus, even if the case had not been recaptioned by the special prosecutor upon the filing of a p Court to reflect the "adversary nature of the proceeding," we would have been re quired to determine whether this was a case "in which the United Stat interested." A criminal contempt prosecution in federal court, however styled, is such a case.

Id. at 708 n.11 (citations omitted).

Likewise, in determining whether a contempt is criminal, this Court has indicated that what matters is the "substance of the proceeding and the charact rather than the label that the state or the parties have placed on the action. Feiock, 485 U.S. at 631. The Court has treated the styling of the case as an indicators of whether a contempt proceeding is at bottom criminal or civil, but not as a matter subject to constitutional requirements. See id. at 638-639; States, 313 U.S. 33, 42 (1941) ("While the pro ceedings in the District Court were entitled [as in the private action] and the United States was not a part appeal, those circumstances though relevant are not conclusive as to the nature of the contempt.") (citation omitted). The Court has thus reviewed crim under a variety of captions, including for mulations that make no reference to any sovereign. See Resp. Br. 30-31; see also Gompers, 221 U.S. at 446 contempt proceedings can be properly cap tioned "In re" followed by name of defendant).

The Court's focus on substance over form is consis tent with the common law tradition, which yielded no consistent answer on how to style criminal con proceedings. At common law, "the better practice" was "to institute an independent action [for criminal con tempt] in the name of the state" even when i ducted by private counsel. James L. High, A Treatise on the Law of Injunctions § 1449, at 1460 (4th ed. 1905). But "it [was] not error to entitle the proce civil case." Ibid.; see Stewart Rapalje, A Treatise on Contempt § 95, at 124 (1890) ("The decisions upon [the] comparatively unimportant matter [of how criminal contempt proceedings] are not harmonious.").

B. Criminal Contempt Prosecutions By Private Parties On Behalf Of The Sovereign May Raise Constitutional Questions, But None Is Presented Here

To say that a prosecution for criminal contempt in a congressionally created court must be understood as an exercise of sovereign power (even if not ta ereign's name) is not to end the inquiry. As this Court has recognized, private parties may "represent the United States" as criminal contempt prosecutc circumstances. Young, 481 U.S. at 804. Thus, a prosecutor acting pursuant to the power of the sovereign does not in all cases have to be the sovereig When the prosecutor is not a public employee, however, separation of powers and due process questions can arise. Those constitutional concerns ma private person from representing the United States in a criminal contempt proceeding. But they are not pre sented in this case.

1. Congress has plenary authority over the District of Columbia and thus may delegate prosecutorial au thority there to individuals outside the Executiv

a. The Constitution "sought to divide the delegated powers of the new Federal Government into three de fined categories, Legislative, Executive, and J Bowsher v. Synar, 478 U.S. 714, 721 (1986) (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)). A primary consti tutional responsibility of the Executive "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. That responsibility has long been understood to encompass the responsibility f prosecuting criminal cases. Heckler v. Chaney, 470 U.S. 821, 832 (1985); Buckley v. Valeo, 424 U.S. 1, 138 (1976) (per curiam); United States v. Nixor 693 (1974).

In Young, however, the Court held that the prosecu tion of criminal contempt in Article III courts need not "be considered an execution of the criminal la the Executive Branch may engage." 481 U.S. at 799-800. The Court based this conclusion on "the long standing acknowledgment that the initiation of proceedings to punish disobedience to court orders is a part of the judicial function" and on the Judiciary's "need for an independent means of self-prot 795, 796.

If Congress by statute were to confer authority on private individuals or entities (outside the Executive or Judicial Branches) to prosecute contempts in neither the tradition of judicial control over con tempt proceedings nor the interest in judicial self- protection that the Court invoked in Young would be p novel scheme would thus raise serious separation of powers concerns.

b. Contrary to petitioner's contention (Br. 53-55), however, those concerns are not implicated in this case because of the unique constitutional status of Columbia.

The Constitution authorizes Congress "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District * * * as may * * * become the Seat Government of the United States." U.S. Const. Art. I, § 8, Cl. 17. Acting pursuant to this authority, Congress may "exercise all the police and regulatory District of Columbia] which a state legislature or municipal government would have in legislating for state or local purposes." Palmore v. United States, 397 (1973); see Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 619 (1838) ("Congress has the entire control over the [District of Columb purpose of government."); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76 (1982) (plurality opinion) ("Congress' power over t Columbia encompasses the full authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative.") (second added).

Congress delegated a portion of its plenary authority over the District to the D.C. government. See District of Columbia Home Rule Act (D.C. Home Rul No. 93-198, 87 Stat. 774. As part of that delegation, Congress provided that "the legislative power granted to the District by this Act is vested in and sha by the [D.C.] Council," Id. § 404(a), 87 Stat. 787; see D.C. Code § 1-227 (1992). When the D.C. Council acts "within that authority" delegated by Congr analyzes the constitutional limits on that action "as if that act * * * had been passed directly by Con gress" in its administration of District affairs. Welch 541, 542 (1879).

Accordingly, decisions made by the D.C. Council within the scope of its delegated authority are treated as exercises of Congress's "entire control" over constitutional purposes. Kendall, 37 U.S. (12 Pet.) at 619.10 In this case, the D.C. Court of Appeals in Green understood the Council to have granted p als the power to prosecute intrafamily contempts in Dis trict of Columbia courts. In other instances, Congress itself has expressly delegated prosecutor the D.C. Office of Attorney General. See, e.g., D.C. Code § 23-101(a) (2001). Neither the private contempt prosecutors nor the attorneys in OAG are fe Branch officials. But that is immaterial because both exercise a portion of Congress's "Executive * * * powers" in the District. Northern Pipeline, 458 U.S opinion). In short, the location of this case removes any separation of powers issue.

2. Petitioner has not preserved a due process challenge based on respondent's personal interest or the ab sence of public control over her actions

In Young, the Court relied on its supervisory author ity over Article III courts to hold that "counsel for a party that is the beneficiary of a court order may appointed as prosecutor in a contempt action alleging a violation of that order." 481 U.S. at 809. Justice Black mun would have gone "further" and held practice-federal or state-of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process." Id. at 814-815 (Bla concurring).

Since Young, state courts have reached different conclusions on the question whether there is a due pro cess right to a disinterested prosecutor. Comp Wilson v. Wilson, 984 S.W.2d 898, 903-904 (Tenn. 1998) ("We hold that Due Process does not mandate adoption of a rule which automatically disquali pri vate counsel from prosecuting a contempt action."), cert. denied, 528 U.S. 822 (1999), with, e.g., People v. Calde rone, 573 N.Y.S.2d 1005, 1007 (N Ct. 1991) ("[P]rivate prosecutions by interested parties or their attorneys present inherent conflicts of interest which violate defendants' due process rigl

Petitioner does not raise this due process claim in his brief, however, and he has affirmatively disavowed it previously.11 It is accordingly not before the

Likewise, petitioner never argued below that the D.C. scheme violated due process because of an absence of effective governmental control over the cutor. See generally Patricia Moran, Private Prosecu tors in Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure, 5 Rev. 1141, 1152-1155 (1986) (States that permit pri vate participation in criminal prosecutions typically re quire some degree of oversight by the district Indeed, petitioner "never has challenged the Green court's holding" that the private party or his lawyer "can stand in the courtroom well and physically [Section] § 16-1005(f) actions." Pet. 17 n.13. Petitioner's entire argument has rested on how his contempt prose cution should be characterized, not on ally conducted.

In his merits brief, petitioner for the first time sug gests that "because the government was entirely unin volved in conducting the prosecution, the mann prosecution raises due process concerns as well." Pet. Br. 51. Respondent counters that, to the extent some degree of governmental supervision over ecutor is constitutionally required, it was provided here by the superior court, which "exercised substantial con trol over the proceeding." Resp. Br. 60-6 the government was not "entirely uninvolved" in the prosecution (Pet. Br. 51); attorneys from OAG repre sented respondent.

This Court does not typically decide questions that were neither raised nor passed on below. See Pennsyl vania Dep't of Corr. v. Yeskey, 524 U.S. 206, Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). It would be particularly inappropriate to do so in this c petitioner's waiver of this claim means that the D.C. Court of Appeals never had an opportunity to answer key questions about the nature and degree o OAG oversight over private contempt prosecutors in the District.

C. The Criminal Contempt Prosecution Did Not Violate Petitioner's Plea Agreement With The United States At torney's Office

The D.C. Court of Appeals' affirmance of petitioner's contempt conviction was correct, notwithstanding its apparent failure to recognize that his prosecu those in congressionally created courts, was con ducted pursuant to the power of the United States. In deed, it was not necessary for the court of appe characterize the prosecution (as either governmental or private) to resolve the only claim petitioner raised be low, which was that his plea agreement b tempt prosecution. That claims fails regardless because the agreement bound only the Office of the United States Attorney for the District of Columbia, individual or entity, including respondent, exercis ing governmental power.12

As the D.C. Court of Appeals stated, a "plea agree ment is a contract," and "[a]s a consequence, courts will look to principles of contract law to determi plea agreement has been breached." Pet. App. A19 (quoting United States v. Jones, 58 F.3d 688, 691 (D.C. Cir.), cert. denied, 516 U.S. 970 (1995)).

The plea agreement in this case was solely between petitioner and the United States Attorney's Office for the District of Columbia. The AUSA handling case crossed out "District of Columbia" in the caption of the agreement, so that it read only "United States vs. John Robertson." J.A. 28. The AUSA alsc "Assistant Corporation Counsel" in the sig nature line, so that it read only "Assistant U.S. Attor ney." J.A. 30. The AUSA then wrote at the top of the forn for Mr. Robertson's plea of guilty to Attempt[ed] Aggravated assault, the gov't agrees to" dismiss the remaining charges and "[n]ot pursue any charges incident on 6-26-99." J.A. 28.

In the context of this plea agreement, the word "gov't" referred only to the Office of the United States Attorney for the District of Columbia. The standarc agreement could be used to bind two entities-the United States Attorney's Office for the District of Co lumbia, the Office of the D.C. Attorney General, o crossing out "the District of Columbia" and "Assis tant Corporation Counsel," the AUSA made clear that the plea agreement with petitioner covered only States Attorney's Office. Indeed, "within the criminal justice system throughout the country, the term 'the government' is widely used and understood to 'prosecution' or 'the United States Attor ney.'" United States v. Rourke, 74 F.3d 802, 807 (7th Cir.), cert. denied, 517 U.S. 1215 (1996).

A plea agreement made by one United States Attor ney's Office does not normally bind any other agency or entity acting on behalf of the United States United States v. Camacho-Bordes, 94 F.3d 1168, 1175 (8th Cir. 1996) (plea agreement by United States Attor ney, on behalf of "the Government," did n INS); United States v. Annabi, 771 F.2d 670, 672 (2d Cir. 1985) (per curiam) (plea agreement by one United States Attorney's Office, on behalf of "the C did not bind another United States Attorney's Office, "unless it affirmatively appears that the agreement con templates a broader restriction").

When other courts have interpreted plea agreements with one United States Attorney's Office to cover other such offices, they have done so because r the agreement at issue indicated that it was intended to be limited. See United States v. Gebbie, 294 F.3d 540, 550 (3d Cir. 2002); United States v. Har 294, 301-302 (4th Cir. 1986). Even under that approach, petitioner's claim would fail given that the agreement here evinces an intent to limit its scope t States Attorney's Office for the District of Columbia. The plea agreement could not reasonably be construed to cover a contempt prosecution by a priva one understood to be acting on behalf of the gov ernment-because she was not part of that office.

If any doubt remained on this question, it would be settled by D.C. Code § 16-1002(c) (2001). See Pet. App. A20 n.7. At the time petitioner signed his p Section 16-1002(c) provided that "[t]he institution of criminal charges by the United States attorney shall be in addition to, and shall not affect the rights complainant to seek any other relief under this subchap ter."13 The D.C. Court of Appeals in Green had held that one form of "relief under this subchap right to initiate criminal contempt proceedings for CPO viola tions. Petitioner was thus on notice that his plea agree ment with the United States Attorne not bar the subsequent contempt prosecution initiated by respondent.

CONCLUSION

The judgment of the court of appeals should be af firmed.

Respectfully submitted.

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1 The United States believes this case falls within the scope of 28 U.S.C. 518(a), which provides that unless "the Attorney General in a particular case otherwise," the Solicitor General is to conduct and argue all cases in this Court "in which the United States is inter ested." Ibid.; see United States v. Pr Journal Co., 485 U.S. 693, 700 (1988). In order to ensure that the Court has the benefit of the arguments in support of a purely private right of action in this, the Solicitor General has authorized private counsel for respon dent to appear on her behalf in this Court. Accordingly, the Solicitor General files th

behalf of the United States as amicus curiae. The United States followed the same course in Young v. United States ex rel Vuitton et Fils S.A., 481 U.S See U.S. Amicus Br. at 2 n.1, Young, supra (No. 08-1329).

2 This brief will refer to this office as OAG.

3 As the government argued in its petition-stage brief (Br. 9), we do not believe this Court's precedents directly control the question pre sented in this ca the absence of direct authority from this Court and the D.C. Court of Appeals' binding local precedent in Green v. Green, 642 A.2d 1275, 1280 n.7 (199 granted recipients of CPOs a "private right of action" to pursue criminal contempt charges, the United States took the position below that "criminal cont prosecutions under § 16-1005(f) may lawfully be conducted as private actions." Gov't. C.A. Br. 9. Although the United States no longer be lieves the co prosecution at issue can be understood as a purely "private action[]," its ultimate position is the same now as it was before: Petitioner is not entitled to r claim that the plea agreement barred his prosecution. Compare id. at 26-36 with Section C, infra.

4 Respondent contends that the Constitution's terms capture only the "indispensable" components of the common law. Resp. Br. 19-20 (quoting William 399 U.S. 78, 100 (1970)). As shown below, the principle that criminal prosecution represents the exercise of sover eign power was "indispensable" to th law's understanding of crime as a public offense.

5 See also State v. Westbrook, 181 S.E.2d 572, 583 (N.C. 1971) (the prosecuting attorney, whether public or private, "represents the state"), vacated in grounds, 408 U.S. 939 (1972); Cronan ex rel. State v. Cronan, 774 A.2d 866, 877 (R.I. 2001) ("[A]ttorneys con ducting private prosecutions stand in the state."); Andrew Sidman, The Outmoded Concept of Private Prosecution, 25 Am. U. L. Rev. 754, 774 (1976) ("[T]he privately retained attorney become temporary public prosecutor.") (footnote omitted).

6 When private individuals undertake an action, such as prosecution, that is "traditionally associated with sovereignty," they are deemed state actors ex sovereign power and thus become subject to constitutional constraints. Jackson, 419 U.S. at 352-353.

7 As respondent points out (Br. 23-26), this Court held prior to Bloom, 391 U.S. 194, that a contempt was not a "crime" for purposes of the Constitution' Bloom, however, questioned the historical basis for that now repudiated view. See 391 U.S. at 198 n.2. In any event, even the earlier cases finding no j not question the fundamental premise that a criminal contempt proceeding involved an exercise of sovereign power.

8 Indeed, the D.C. court rule that governed the intrafamily contempt proceedings at issue here describes criminal contempt as "a violation of the law, a which is punishable by fine or imprisonment or both." D.C. Super. Ct. Domestic Violence Unit R. 12(a).

9 The use of respondent's name in the case caption of this proceeding would not have misled petitioner into thinking it was civil. Respondent initiated th by filing a "Motion to Adjudicate Criminal Contempt." J.A. 59-60 (emphasis added).

10 Congress has granted the D.C. Office of Attorney General the power to conduct certain prosecutions, while specifying that "[a]ll other criminal prose conducted in the name of the United States by the United States attorney for the District of Columbia or his assistants, except as otherwise provided by District of Co lumbia Court Reorganization Act of 1970, Pub. L. No. 91-358, § 210(a), 84 Stat. 605 (D.C. Code § 23-101(c) (2001)); see also D.C. Home 602(a)(8), 87 Stat. 813 (D.C. Code § 1-206.02(a)(8) (2001)) (D.C. Council may not "enact any act or regulation relating to * * * the duties or powers of t States Attorney * * * for the District of Columbia."). Petitioner did not argue below and does not argue now that the D.C. Council's decision (as inferred b Court of Appeals in Green) to permit private individuals to prosecute intrafamily contempts was in excess of the Council's delegated authority as estab statutes. See Pet. Br. 55-56 n.23. Nor did petitioner argue below that permitting private parties to prosecute in the District violates a D.C.-specific princi separation of powers derived from the Congressional home rule statutes. See ibid.; see also Whalen v. United States, 445 U.S. 684, 687 (1980) (This C defers to D.C. Court of Appeals on "matters of exclusively local concern," including the meaning of "Acts of Congress applicable only within the District

11 See, e.g., Pet. C.A. Reply Br. 4 & n.3 ("[Petitioner] in no way challenges the Green holding" that "interested CPO holders can serve as private prose [Section] § 16-1005(f) criminal contempt actions."); see also Resp. Br. 62 (citing additional examples).

12 As the government noted in its amicus brief at the petition stage (at 18-19), petitioner's claim is subject to particularly stringent review be cause he d

preserve it in the Superior Court.

13 Section 16-1002(c) was subsequently amended and now provides in pertinent part: "A petitioner has a right to seek relief under this subc hapter. Th depend on the decision of the Attorney Gen eral, the United States Attorney for the District of Columbia, or a pros ecuting attorney in any jurisdiction to initiate a crim inal or delinquency case or on the pendency or termination of a criminal or delinquency case involving the same parties or issues." D.C. ((Supp. 2009).

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