

# WILL SEPARATION OF POWERS CHALLENGES “TAKE CARE” OF ENVIRONMENTAL CITIZEN SUITS? ARTICLE II, INJURY-IN-FACT, PRIVATE “ENFORCERS,” AND LESSONS FROM *QUI TAM* LITIGATION

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## INTRODUCTION

What *are* environmental citizen suits? At one level, this question is easy to answer: an environmental citizen suit is a civil action brought by a private party against a defendant—either another private party or a government agency—who is allegedly violating a federal environmental statute. Against government agencies, citizen plaintiffs can generally seek declaratory and injunctive relief. Against private defendants, citizen plaintiffs can seek declaratory relief, injunctions, and, often, civil penalties. Since 1970, Congress has included provisions authorizing such citizen suits in almost all of the environmental statutes that it has passed. The Clean Air Act,<sup>1</sup> the Clean Water Act,<sup>2</sup> the Endangered Species Act (ESA),<sup>3</sup> the Resource Conservation and Recovery Act (RCRA),<sup>4</sup> the Comprehensive Environmental Response, Compensation, and Liability

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1. See 42 U.S.C. §§ 7401–7671 (1994 & Supp. IV 1998) (codifying Pub. L. 91-604, 84 Stat. 1676 (Dec. 31, 1970), and further amendments). For the Clean Air Act's citizen suit provision, see 42 U.S.C. § 7604 (1994).

2. See 33 U.S.C. §§ 1251–1387 (1994). For the citizen suit provision, see *id.* § 1365 (1994).

3. See 16 U.S.C. §§ 1531–1544 (1994). For the citizen suit provision, see *id.* § 1540(g) (1994).

4. See 42 U.S.C. §§ 6901–6992 (1994). For the citizen suit provision, see *id.* § 6972 (1994).

Act (CERCLA),<sup>5</sup> the Toxic Substances Control Act (TSCA),<sup>6</sup> and the Emergency Planning and Community Right to Know Act (EPCRA)<sup>7</sup> each contain citizen suit provisions.

The question of what environmental citizen suits are, however, has deeper constitutional implications when the focus turns to their relationship to the federal Executive Branch. Are citizen suits primarily enforcement mechanisms designed to ensure general compliance with federal law? Congress *has* given environmental citizen suit authority to "any person" or "any citizen,"<sup>8</sup> and the civil penalties citizen plaintiffs can seek are payable only to the United States Treasury.<sup>9</sup> Or are citizen suits private causes of action to redress private injuries? Citizen suit provisions *do* specify that a citizen plaintiff sues "on his own behalf,"<sup>10</sup> and some, like the Clean Water Act, expressly require suing citizens to be "adversely affected" or aggrieved by the defendant's violation.<sup>11</sup>

5. See *id.* §§ 9601–9675 (1994). For the citizen suit provision, see *id.* § 9659 (1994).

6. See 15 U.S.C. §§ 2601–2692 (1994). For the citizen suit provision, see *id.* § 2619 (1994).

7. See 42 U.S.C. §§ 11001–11050 (1994). For the citizen suit provision, see *id.* § 11046 (1994).

8. See, e.g., TSCA, 15 U.S.C. § 2619(a) (1994) ("[A]ny person may commence a civil action . . ."); see also ESA, 16 U.S.C. § 1540(g)(1) (1994) (same); Clean Water Act, 33 U.S.C. § 1365(a) (1994) ("[A]ny citizen may commence a civil action on his own behalf . . ."); RCRA, 42 U.S.C. § 6972(a) (1994) (same); Clean Air Act, 42 U.S.C. § 7604(a)(1994) (same); CERCLA, 42 U.S.C. § 9659(a) (1994) (same); EPCRA, 42 U.S.C. § 11046(a)(1)(1994) (same).

9. See, e.g., Clean Air Act, 42 U.S.C. § 7604(g)(1) (1994); see also *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 120 S. Ct. 693, 705–06 (2000) (regarding Clean Water Act); *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 106–07 (1998) (regarding EPCRA).

10. See Clean Water Act, 33 U.S.C. § 1365(a) (1994); see also RCRA, 42 U.S.C. § 6972(a) (1994); Clean Air Act, 42 U.S.C. § 7604(a) (1994); CERCLA, 42 U.S.C. § 9659(a) (1994); EPCRA, 42 U.S.C. § 11046(a) (1994).

11. See 33 U.S.C. § 1365(g) (1994). Somewhat ironically, given the amount of separation of powers attention that the Clean Water Act has received, see *infra* Parts II.C.2 and II.D.2 and note 28, Congress amended the 1972 enactment in conference expressly to provide that

'citizen' . . . means a person or persons having an interest which is or may be adversely affected. It is the understanding of the conferees that the conference substitute relating to the definition of the term 'citizen' reflects the decision of the U.S. Supreme Court in the case of *Sierra Club v. Morton* . . .

Federal courts have historically viewed environmental citizen suits as a type of enforcement mechanism,<sup>12</sup> with citizen suit injunctions and civil penalties supplementing the United States and state governments' abilities to pursue criminal, civil, and administrative enforcement.<sup>13</sup> The concept of "enforcement," however, resonates through many specific meanings. For example, "enforcement" can refer to *any* mechanism that ensures that a law is followed and/or implemented. These mechanisms can range from economic incentives for voluntary compliance such as grants and tax credits, to self-monitoring and reporting requirements, to publication of key information about a business (such as the quantity of toxic substances it releases every year), to private causes of action for people who are injured by regulated entities' illegal acts. Alternatively, "enforcement" can refer to government punishment of violators through fines, criminal prosecutions, and imprisonment—that is, to the full use of the government's coercive processes.

Implicitly focusing on this last concept of "enforcement," several Justices of the Supreme Court have raised a constitutional concern regarding environmental citizen suits: separation of powers. The separation of powers doctrine ensures that each branch of the federal government remains within its constitutionally delineated authority, with Article I governing the Legislative Branch, Article II governing the Executive Branch, and Article III governing the Judiciary. In several recent cases, various Justices, led by Justice Scalia, have suggested that environmental citizen suits violate the separation of pow-

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S. CONF. REP. NO. 92-1236, at 146 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3823. For a more complete discussion of *Sierra Club v. Morton* and standing, see *infra* Part II.B.

12. *See, e.g.*, *Hallstrom v. Tillamook County*, 439 U.S. 20, 29 (1989) (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987)).

13. Many federal environmental statutes allow states to implement the federal provisions if states meet certain requirements. For example, the Clean Water Act allows states to take over two permitting programs and the accompanying enforcement of those programs. *See* 33 U.S.C. §§ 1342(b), 1344(g)–(i) (1994). An exception to this kind of "cooperative federalism" is the Endangered Species Act (ESA), which is implemented solely by federal agencies. *See* 16 U.S.C. §§ 1533(a)(1), 1534(a), 1540(a), (b), (e), (f) (1994). *But see id.* § 1533(b)(5)(A)–(E) (allowing states to comment on proposals to list species and requiring the federal agencies to consider those comments); *id.* § 1535 (requiring cooperation with the states) (1994).

ers doctrine because they impermissibly interfere with the Executive Branch's constitutional right and duty to execute the law.<sup>14</sup>

In the 1992 decision of *Lujan v. Defenders of Wildlife*,<sup>15</sup> for example, Justice Scalia, writing for a majority of the Court, required citizen plaintiffs to have individual standing in order to bring their suits. Specifically, to satisfy the "injury in fact requirement," citizen suit plaintiffs must prove that they have suffered particularized, actual or imminent, and concrete harm from the environmental violation.<sup>16</sup> Although the Court reached this conclusion on the ground that Article III limits federal court jurisdiction to "cases" or "controversies,"<sup>17</sup> Justice Scalia also relied on Article II concerns to stress the importance of standing. The injury-in-fact requirement was constitutionally necessary, because

[t]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, Section 3.<sup>18</sup>

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14. See generally Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 193-95, 213 (1992) (discussing the Supreme Court's increasing interest in Article II in its standing decisions but concluding that Article II and Article III concerns need to be kept separate).

15. 504 U.S. 555 (1992).

16. See *id.* at 560, 578.

17. See *id.* at 560.

18. *Id.* at 577. Justice Scalia has long viewed environmental citizen suits as raising separation of powers issues. In 1983, then-Judge Scalia was already arguing that plaintiffs had to have "concrete injury" in order to preserve the separation of powers; if Congress intended to confer the right to sue on large numbers of similarly-affected people, then the political process was a better means of addressing the problem than the courts. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894-96 (1983). He also lauded, in the context of environmental litigation, the ability of the federal bureaucracy to lose or misdirect statutory programs. See *id.* at 897. See also Sunstein, *supra* note 14, at 211-13 (discussing but rejecting Justice Scalia's argument in *Lujan* that citizen suits interfere with the President's constitutional duty to execute the laws).

In 1998, the Court again addressed citizen suit standing in *Steel Co. v. Citizens for a Better Environment*,<sup>19</sup> this time emphasizing that plaintiffs in environmental citizen suits lack standing if the relief they seek will not redress their injuries.<sup>20</sup> However, in his concurring opinion for himself, Justice Souter, and Justice Ginsburg, Justice Stevens also raised the Article II separation of powers issue, noting that “[i]t could be argued that the Court’s decision is rooted in another separation of powers concern: that this citizen suit somehow interferes with the Executive’s power to ‘take Care that the Laws be faithfully executed,’ Art. II, [Section] 3.”<sup>21</sup>

Finally, in the Supreme Court’s most recent environmental standing decision, *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,<sup>22</sup> three Justices—Justice Kennedy in concurrence and Justices Scalia and Thomas in Justice Scalia’s dissent—again expressly raised the Article II separation of powers issue for citizen suits. Justice Kennedy’s concurrence was short and pointed:

Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States. The questions presented in the petition for certiorari did not identify these issues with particularity; and neither the Court of Appeals in deciding the case nor the parties in their briefing before this Court devoted specific attention to the subject. In my view these matters are best reserved for a later case. With this observation, I join the opinion of the Court.<sup>23</sup>

While Justice Scalia agreed with Justice Kennedy that the Article II separation of powers issue had not been argued,<sup>24</sup> he

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19. 523 U.S. 83 (1998).

20. *See id.* at 105–10.

21. *Id.* at 129 (Stevens, J., concurring). In support of this article’s arguments, however, the two Justices immediately concluded that “[i]t is hard to see, however, how EPCRA’s citizen-suit provision impinges on the power of the Executive.” *Id.*

22. 120 S.Ct. 693 (2000).

23. *Id.* at 713 (Kennedy, J., concurring).

24. *See id.* at 719 (Scalia, J., dissenting).

nevertheless emphasized that "Article II of the Constitution commits it to the President to 'take Care that the Laws be faithfully executed,' Art. II, [Section] 3, and provides specific methods by which all persons exercising significant executive power are to be appointed."<sup>25</sup>

Together, the opinions of Justices Kennedy and Scalia in *Laidlaw* amount to a virtual invitation to defendants to challenge environmental citizen suit provisions on Article II-based separation of powers grounds. Moreover, the persistence of the separation of powers theme in these recent citizen suit cases strongly suggests that the Justices would be willing to grant *certiorari* to resolve the issue.

As Justice Scalia's dissent in *Laidlaw* indicates, two Article II-based separation of powers challenges are particularly likely. First, opponents of citizen "enforcement" have argued that environmental citizen suit statutes violate the Appointments Clause<sup>26</sup> of the Constitution because citizens suing under these statutes act as "private attorneys general" who can enforce federal law.<sup>27</sup> As such, these citizen plaintiffs arguably wield enough Executive power to qualify as "Officers of the United States" who must be appointed according to constitutional procedures. Second, these citizen action provisions raise a more general question as to whether citizen "enforcement" of federal law impermissibly interferes with the Executive Branch's constitutional duty to "take Care that the Laws be

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25. *Id.* (Scalia, J., dissenting) (citation omitted).

26. *See* U.S. CONST., art. II, § 3.

27. *See, e.g.,* *Bennett v. Spear*, 520 U.S. 154, 165 (1997) (noting that the "obvious purpose" of the ESA's citizen suit provision "is to encourage enforcement by so-called 'private attorneys general'"); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 n.23 (1981) (noting that § 509 of the Clean Water Act establishes "an additional procedure to 'private attorneys general' seeking to enforce the Act, supplementing the citizen suits authorized in § 505"); *Burnette v. Carothers*, 192 F.3d 52, 57 (2d Cir. 1999) ("The CWA, RCRA, and CERCLA contain substantially identical provisions permitting citizens to sue as private attorneys general in circumstances where governmental authorities have, after notice, failed to take steps to remedy particular environmental harms."); *George E. Warren Corp. v. EPA*, 159 F.3d 616, 621 (D.C. Cir. 1998) (citing *Bennett v. Spear*, 520 U.S. 154, 164-65 (1997) to hold that the Clean Air Act's citizen suit provision, like the ESA's, confers standing on a broad range of private attorneys general); *Armstrong v. ASARCO, Inc.*, 138 F.3d 382, 387 (8th Cir. 1998) (awarding attorney fees to Clean Water Act citizen suit plaintiffs who "played the roles of catalyst and private attorney general, just as Congress envisioned").

faithfully executed.”<sup>28</sup> Despite extensive district court litigation of these issues, however, no federal appellate court has yet reviewed Article II-based separation of powers challenges to environmental citizen suits.

Nevertheless, similar separation of powers issues *have* been raised in the context of the FCA’s<sup>29</sup> *qui tam* provisions, and these decisions shed light on how the Court may resolve Article II-based challenges to environmental citizen suits. Courts have often compared citizen suits to *qui tam* litigation,<sup>30</sup> and Article II-based separation of powers challenges to *qui tam* provisions have been litigated repeatedly in the last decade. The Fifth Circuit recently found that the FCA’s *qui tam* provisions violate the “Take Care” Clause of the Constitution—but through reasoning that arguably does *not* apply to citizen suits. Nevertheless, the *qui tam* litigation demonstrates that the jurisprudential stage is thus ready for—indeed, arguably expecting—serious Article II-based separation of powers challenges to the environmental citizen suit provisions.

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28. U.S. CONST. art. II, § 3. For an impassioned argument that environmental citizen suit provisions, particularly that in the Clean Water Act, violate not only the Appointments Clause and separation of powers concerns with respect to the Take Care Clause but also Article III standing requirements, especially when the citizen plaintiff seeks only civil penalties, see Charles S. Abell, Note, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution’s Separation of Powers Principle*, 81 VA. L. REV. 1957 (1995). As should become obvious, this article takes issue with many of the conclusions in Mr. Abell’s note, particularly in light of the Supreme Court’s recent reassessment of the deterrent effect of civil penalties and in light of developing *qui tam* separation of powers litigation.

29. See 33 U.S.C. §§ 3729–3733 (1994). For the *qui tam* provision, see *id.* § 3730 (1994).

30. See, e.g., *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 129 (1998) (Stevens, J., dissenting); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572–73 (1992); *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1041–42 & n.9 (6<sup>th</sup> Cir. 1994); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1155 (2d Cir. 1993) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572–73 (1992)); *Atlantic States Legal Found. Inc. v. Buffalo Envelope*, 823 F. Supp. 1065, 1075 n.3 (W.D.N.Y. 1993); *United States ex rel. Givler v. Smith*, 775 F. Supp. 172, 175 n.4 (E.D. Penn. 1992); *United States ex rel. Truong v. Northrop Corp.*, 728 F. Supp. 615, 622 & nn.13–14, 623–24 (C.D. Cal. 1989); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 722 F. Supp. 607, 612 (N.D. Cal. 1989); *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1090 n.6 & 1092 (C.D. Cal. 1989); *Natural Resources Defense Council v. Outboard Marine Corp.*, 692 F. Supp. 801, 817 & n.28 (N.D. Ill. 1988).

Whether citizen suits violate the separation of powers doctrine will depend on the Supreme Court's resolution of two issues. First, as a basic matter of legal classification, the Court must determine exactly what Congress does when it enacts statutory citizen suit provisions. Does Congress impermissibly delegate core Executive enforcement power when it creates citizen suits, or are such enactments far more constitutionally innocent?<sup>31</sup>

Second, citizen suit provisions also raise more general structural and policy issues about the scope of the separation of powers doctrine and the exclusivity of the Executive's duty to execute federal law. Most federal environmental statutes incorporate not only citizen participation but also extensive roles for state governments. Congress's authority to delegate/create such state and private power thus raises not only separation of powers concerns but also concerns regarding public participation in a representative democracy and concerns about the relationship between separation of powers and federalism. While such issues, especially the federalism aspects of federal environmental law, are largely beyond the scope of this Article, they nevertheless should help to inform the Court's decisions regarding the constitutionality of environmental citizen suits. Citizen suits require courts to take a broader perspective of the separation of powers doctrine than is typical because citizen suits involve more than just relationships among the three branches of the federal government—they also involve citizen participation in the day-to-day implementation of federal law. Thus, resolution of the citizen suit separation of powers issues requires courts to determine what citizen suits are and where private citizens fit in our tripartite system of federal government.

For the moment, however, no court has yet articulated a complete and coherent view of how Congress's constitutional power to enact federal statutes, including their enforcement schemes, relates to its constitutional duty to abstain from un-

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31. While citizen *exercise* of such citizen suit authority is the occasion for most Article-II based challenges to environmental citizens suits, it is Congress's *enactment* of those provisions that must be the focus of their constitutionality. In other words, did Congress, in enacting environmental citizen suit provisions, impermissibly interfere with the Executive's constitutional authority to execute federal law by giving government enforcement power to private citizens?

duly interfering with the Executive Branch. Therefore, when the federal courts again address separation of powers challenges to environmental citizen suit provisions, they need to enunciate a framework for analyzing the separation of powers doctrine in the context of citizen “enforcement” of federal law.

This Article suggests that a public rights/private rights analytical framework preserves to the Executive its constitutional realm of purely public enforcement while allowing Congress its traditional right to create new private causes of action that simultaneously promote the general public interest in compliance with federal law. It also argues that a public rights/private rights framework will require federal courts to recognize that, regardless of whether Congress originally intended to confer public enforcement power on private citizens, the injury-in-fact standing requirement renders environmental citizen suits private causes of action to which the separation of powers doctrine does not apply.

Part I of this Article reviews representative citizen suit provisions, while Part II discusses the Appointments Clause, the “Take Care” Clause, the Supreme Court’s separation of powers decisions regarding the Executive Branch, and district court applications of those decisions to environmental citizen suit provisions. Because *qui tam* litigation has more thoughtfully discussed the role of the separation of powers doctrine in citizen enforcement of federal law, Part III of this Article discusses separation of powers litigation regarding the FCA’s *qui tam* provisions.

Part IV then compares environmental citizen suit provisions to the *qui tam* provisions from the perspective of public rights and private rights, arguing that the Supreme Court’s standing decisions have already distinguished the FCA’s *qui tam* provisions from environmental citizen suit provisions on a basis relevant to Article II-based separation of powers challenges. Through the FCA, Congress directly assigned to private citizens authority to sue to redress injury to the federal government itself, and that assignment has become the basis of those citizens’ standing to bring suit. As a result, *qui tam* plaintiffs directly displace the federal Executive and seek to enforce purely public rights. Environmental citizen suit plaintiffs, in contrast, must demonstrate individual injury that the court can redress by enjoining or penalizing the environmental

violator, rendering environmental citizen suits private causes of action, even though citizen suits also further the public interest in having the environmental laws obeyed. This Article argues that whether the plaintiff asserts public or private rights is critical to the separation of powers analysis, with the result that environmental citizen suits should be found constitutional.

## I. ENVIRONMENTAL CITIZEN SUIT PROVISIONS

### A. *Environmental Citizen Suits*

In the second half of the twentieth century, Congress enacted a number of statutes to protect the environment. These statutes govern a wide variety of subjects: air pollution, water pollution, endangered and threatened species, marine mammals, hazardous wastes, contaminated sites, the coastal zone, fisheries, and more. Although different in the details of their implementation, most of these statutes identify an event that triggers their coverage and then impose minimum federal requirements to protect the resource at issue.

Most federal environmental statutes also provide for extensive state involvement in environmental protection. For example, even under the ESA, where implementation and enforcement are federal responsibilities, states comment on proposed listing of species, and the federal government must consider those comments.<sup>32</sup> The Clean Air Act and Clean Water Act more fully rely on states to help set and achieve their environmental goals,<sup>33</sup> and, under both the Clean Air Act and

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32. See 16 U.S.C. § 1533(b)(5)(A)–(E) (1994).

33. Under the Clean Air Act, the EPA sets minimum standards—the National Ambient Air Quality Standards, or NAAQS—for various air pollutants, such as particulates. See 42 U.S.C. § 7409 (1994). States then enact state implementation plans (SIPs), see *id.* § 7410, to achieve those NAAQS, which they make enforceable through permits that regulate an individual polluter's emissions. See *id.* § 4661a(b), (d).

The Clean Water Act, in turn, establishes occasionally complex interactions between minimum federal effluent limitations, see 33 U.S.C. § 1311(b) (1994), and state water quality standards. See *id.* § 1313(a). Moreover, these standards and limitations are implemented through permits, and, although Congress gave initial permitting authority to federal agencies, see *id.* §§ 1342(a), 1344(a), states can acquire authority to execute both of the Act's major permitting programs. See *id.* §§ 1342(b), 1344(g)–(i); see also David R. Hodas, *Enforcement of Environmental Law*

the Clean Water Act, states can become the primary enforcers of the Acts' requirements.<sup>34</sup>

Implementation of federal environmental law is thus routinely a matter of shared sovereign power. However, Congress has also assigned a role to private citizens. Since the 1970 enactment of the Clean Air Act, Congress has included citizen suit provisions in almost all of the major environmental legislation that it has passed.<sup>35</sup> Most of these citizen suit provisions are modeled on the Clean Air Act's,<sup>36</sup> which provides that "any person may commence a civil action on his own behalf" against three types of defendants: (1) against "any person," including state and federal government agencies, "who is alleged to have violated (if there is evidence that the violation has been repeated) or to be in violation" of either the air emissions standards or limitations in the Act or state or federal orders related to those standards and limitations; (2) against the EPA Administrator if the Administrator fails to perform a nondiscretionary duty under the Act; or (3) against any person "who proposes to construct or who constructs any new or modified major emitting facility" without the required permit or in violation of that permit.<sup>37</sup> The federal district courts have jurisdiction to issue injunctions and to assess civil penalties against proven

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*in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?* 54 MD. L. REV. 1552-1656 (1995) (describing in great detail the relationships between federal and state enforcement and citizen suits under the Clean Water Act).

34. See, e.g. Clean Water Act, 33 U.S.C. §§ 1342(b)(7), 1344(h)(1)(G) (1994); Clean Air Act, 42 U.S.C. §§ 7410(a)(2)(A), (C), (G), 7416 (1994).

35. See, e.g., TSCA, 15 U.S.C. § 2619 (1994); ESA, 16 U.S.C. § 1540(g) (1994); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (1994); Clean Water Act, 33 U.S.C. § 1365 (1994); Marine Protection, Research, & Sanctuaries Act of 1972, 33 U.S.C. § 1415(g) (1994); Noise Control Act of 1972, 42 U.S.C. § 4911 (1994); Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (1994); Clean Air Act, 42 U.S.C. § 7604 (1994); CERCLA, 42 U.S.C. § 9659 (1994); EPCRA, 42 U.S.C. § 11046(a)(1) (1994). *But see* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (1994 & Supp. IV 1998), which contains no explicit citizen suit provision and has been judicially interpreted as not allowing a private right of action. See, e.g. Almond Hill Sch. v. United States Dep't of Agric., 768 F.2d 1030, 1036-38 (9th Cir. 1985); Fiedler v. Clark, 714 F.2d 77, 79 (9th Cir. 1983).

36. See *Hallstrom v. Tillamook County*, 493 U.S. 20, 23 & n.1 (1989); see also S. REP. NO. 92-414, at 79 (1971), reprinted in 1971 U.S.C.C.A.N. 3668, 3745 (noting that the Clean Water Act's citizen suit provision was modeled on that in the Clean Air Act).

37. 42 U.S.C. § 7604(a) (1994).

violators, except that no civil penalties are allowed against the EPA.<sup>38</sup> Civil penalties range up to \$25,000 per day of violation<sup>39</sup> and are generally payable to a special fund within the United States Treasury, although the court in its discretion can apply some civil penalties to mitigation projects.<sup>40</sup> Citizen plaintiffs are entitled to litigation costs, including reasonable attorney and expert witness fees, "whenever the court determines such award is appropriate,"<sup>41</sup> and they retain any additional rights that they may have under other statutes or common law.<sup>42</sup>

The most litigated citizen suit provision, however, has been the Clean Water Act's, which allows "any citizen" to "commence a civil action on his own behalf" against two types of defendants: (1) "any person," again including state and federal agencies, who "is alleged to be in violation" of any effluent standard or limitation or any government order respecting those standards and limitations; or (2) against the EPA Administrator if the Administrator fails to perform a nondiscretionary duty.<sup>43</sup> District courts again have authority to issue injunctions enforcing the Act and to assess civil penalties against the violator,<sup>44</sup> and civil penalties, as in the Clean Air Act, can be up to \$25,000 per day of violation.<sup>45</sup> Prevailing or substantially prevailing citizens are entitled to their litigation costs, including attorney fees and expert witness fees,<sup>46</sup> and they again retain "any right which any person (or class of persons) may have under any statute or common law . . . ."<sup>47</sup>

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38. *See id.*

39. *See id.* § 7413(d) (1994).

40. *See id.* § 7604(g)(1), (2) (1994).

41. *Id.* § 7604(d).

42. *See id.* § 7604(e). The citizen suit provision does not provide a damages remedy, but citizens can seek damages for any harm they suffered from the environmental violation through the nuisance, trespass, or negligence law of the "source state"—that is, the state that regulates the violator. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 487 & 493 (1987) (holding that the Clean Water Act preempts the common law of affected states, but not the common law of source states); *see also Milwaukee v. Illinois*, 451 U.S. 304, 325–26 (1981) (holding that the Clean Water Act preempts the federal common law of nuisance).

43. 33 U.S.C. § 1365(a) (1994).

44. *See id.*

45. *See id.* § 1319(d).

46. *See id.* § 1365(d).

47. *Id.* § 1365(e) (1994).

The ESA's citizen suit provision, in turn, has been prominent in standing litigation. The citizen suit provision begins with the familiar conferral on "any person" the power to "commence a citizen suit on his own behalf" for three purposes: (1) "to enjoin any person," including state and federal agencies, who violates the ESA or its implementing regulations; (2) to compel the appropriate Secretary to use its emergency powers under the Act to protect endangered and threatened species from takings; or (3) against the appropriate Secretary for failure to perform any nondiscretionary duty with respect to the listing of endangered and threatened species.<sup>48</sup> As in the Clean Air Act and Clean Water Act, the federal district courts have jurisdiction to enjoin violators,<sup>49</sup> and such injunctions do not restrict any other statutory or common-law rights that citizen plaintiffs may have.<sup>50</sup> Moreover, litigation costs, including attorney and expert witness fees, are available "whenever the court determines such an award is appropriate."<sup>51</sup> However, citizen plaintiffs may not seek civil penalties under the ESA's citizen suit provision.<sup>52</sup>

### *B. Citizen Suits and Government Enforcement*

In legislative history, Congress has indicated that it considers citizen suits to be an enforcement mechanism. For the Clean Water Act, for example, the Senate drafters noted "that if Federal, State, and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action under the citizen suit provisions . . . ."<sup>53</sup> Federal courts, moreover, "should recognize that

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48. 16 U.S.C. § 1540(g)(1) (1994).

49. *See id.*

50. *See id.* § 1540(g)(5).

51. *Id.* § 1540(g)(4).

52. *Compare id.* § 1540(g)(1) with 33 U.S.C. § 1365(a) (1994). The ESA, initially enacted in 1973, still reflects that fact that the right to claim civil penalties was relatively rare in environmental citizen suits when Congress first began enacting citizen suit provisions. For example, civil penalties were not part of the Clean Air Act's citizen suit provision—which Congress created in 1970—until the 1990 amendments. *See* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, Title VII, § 707(a), (g), 104 Stat. 2399, 2683 (1990).

53. S. REP. NO. 92-414, at 64 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730.

in bringing legitimate actions under [the citizen suit] section citizens would be performing a public service . . . ."<sup>54</sup> The ESA's citizen suit provision, similarly, "permits, subject to certain conditions, private actions to enforce the provisions of this Act,"<sup>55</sup> and House of Representatives committee members considered RCRA's citizen suit provision to be a type of "federal enforcement."<sup>56</sup>

Like their legislative history, the text of the environmental statutes also provides some evidence that Congress viewed citizen suits as enforcement mechanisms. For example, although the federal environmental statutes give citizens the right to sue regarding certain types of violations, the statutes also subordinate that right to the state or federal government's own enforcement action. For the ESA, such government enforcement is always federal. However, other statutes, as noted, create complex regulatory relationships between state and federal governments, with the result that government enforcement may be through a state rather than a federal agency. Nevertheless, when the statutes allow such delegations to states, the citizen suit limitations apply with equal force to state enforcement.<sup>57</sup>

The first enforcement-related limitation on citizen suits is that citizens generally must give sixty days' notice to the appropriate federal agency, the relevant state agency, and, if appropriate, the alleged private violator before bringing their suits.<sup>58</sup> When applicable, the sixty-day notice requirement is

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54. *Id.* at 81, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3747.

55. S. REP. NO. 93-307, at 11 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2999.

56. H.R. REP. NO. 94-1491(I), at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6244.

57. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365(b)(1)(B) (1994) (precluding citizen suits "if the Administrator or State has commenced and is diligently prosecuting" an action (emphasis added)); Clean Air Act, 42 U.S.C. § 7604(b)(1)(B) (1994) (same).

58. *See* ESA, 16 U.S.C. § 1540(g)(2)(A)(i), (B)(i), (C) (1994); Clean Water Act, 33 U.S.C. § 1365(b)(1)(A), (2) (1994); Clean Air Act, 42 U.S.C. § 7604(b)(1)(A), (2) (1994). Most of the environmental statutes, however, provide exemptions from the sixty-day notice requirements, usually for imminent hazards and emergencies. *See, e.g.*, ESA, 16 U.S.C. § 1540(g)(2)(C) (1994) (allowing citizens to file suit immediately after giving notice if an "emergency pos[es] a significant risk to the well-being of any species of fish or wildlife or plants"); Clean Water Act, 33 U.S.C. § 1365(b)(2) (1994) (allowing citizens to file suit immediately after giving notice if they allege violations of new source performance standards, effluent limitations

mandatory, and the Supreme Court requires federal courts to dismiss citizen suits that have not complied,<sup>59</sup> emphasizing that this sixty-day period is to allow federal and state agencies to take over enforcement against the violation.<sup>60</sup> The sixty-day notice requirement thus reflects a congressional compromise between desiring complete compliance and wanting citizen suit enforcement to remain supplemental to agency enforcement.<sup>61</sup>

Second, citizens cannot bring their citizen suits if the enforcing federal or state agency has already commenced—and, usually, is still “diligently prosecuting”—a government administrative or civil enforcement action or a criminal prosecution.<sup>62</sup> Determining whether the government has met the timing requirement is generally easy: either the agency filed suit before the citizen or it did not. The Clean Water Act’s administrative penalty procedures complicate this analysis somewhat, allowing a citizen suit to proceed when either: (1) the citizen files

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for toxic pollutants, or pretreatment requirements for discharges into sewage treatment systems); Clean Air Act, 42 U.S.C. § 7604(b)(2) (1994) (allowing citizens to sue immediately after giving notice if they allege violations of the emissions standards for hazardous air pollutants or of EPA orders to comply with the state implementation plan).

59. See *Hallstrom v. Tillamook County*, 493 U.S. 20, 28–31 (1989).

60. See *id.* at 29–30 (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987)).

61. See *id.* at 29; *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60, 62 (1987).

62. Under the ESA, citizen suits against most alleged violators of the Act cannot be commenced “if the [appropriate] Secretary has commenced action to impose a [civil] penalty” or “if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation.” 16 U.S.C. § 1540(g)(2)(A)(ii), (iii) (1994). Citizen suits to compel the Secretary to take emergency action regarding takings, in contrast, are precluded only “if the Secretary has commenced and is diligently prosecuting” a civil action “to determine whether any such emergency exists.” *Id.* § 1540(g)(2)(B)(ii).

Under the Clean Water Act, citizen suits against alleged violators of the Act cannot be commenced “if the Administrator or State has commenced and is diligently prosecuting a *civil or criminal* action in a court of the United States, or a State to require compliance with the standard, limitation, or order.” 33 U.S.C. § 1365(b)(1)(B) (1994) (emphasis added). However, if the agency enforcement takes place in federal court, “any citizen may intervene as a matter of right.” *Id.*

Under the Clean Air Act, federal enforcement precludes a citizen suit for violations of the Act only “if the Administrator or State has commenced and is diligently prosecuting a *civil* action in a court of the United States or a State to require compliance with the standard, limitation, or order.” 42 U.S.C. § 7604(b)(1)(B) (1994) (emphasis added). As under the Clean Water Act, however, if the agency enforcement action is in federal court, “any person may intervene as a matter of right.” *Id.*

suit before the government agency commences an administrative penalty action; or (2) the agency starts an administrative penalty action after the citizen files notice but the citizen still files the suit within 120 days of giving the notice.<sup>63</sup> Nevertheless, the timing is still relatively easy to discern.

The notice and timing requirements thus subordinate citizen suits to government enforcement, strongly suggesting that citizen suits are less preferable means of achieving basically the same end as government enforcement. In contrast, the "diligent prosecution" requirement allows citizens to "check" government enforcement decisions by forcing courts to engage in serious inquiry into the nature of the agency enforcement action to determine its legitimacy. Most federal courts that have addressed the issue agree that violators cannot "cut deals" with the relevant government agency, speed a settlement through the courts, and still hope to avoid citizen suit liability.<sup>64</sup>

Other statutory provisions, however, suggest that citizen suits serve at least some purposes that differ from government enforcement and/or that citizen plaintiffs have different goals and concerns than the implementing agencies. For example, even when citizens can bring their citizen suits, the federal or state enforcement agency retains the right to intervene.<sup>65</sup> Under the Clean Air and Clean Water Acts, moreover, no consent judgments can be entered in citizen suits where the United States is not a party until the Attorney General and the Administrator of the United States have had forty-five days to review the proposed consent decree.<sup>66</sup> The Clean Air Act goes even further, providing that "[a] judgment in an action under

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63. See 33 U.S.C. § 1319(g)(6)(B) (1994).

64. See, e.g., *Briggs & Stratton Corp. v. Concrete Sales & Servs.*, 20 F. Supp. 2d 1356, 1374 (M.D. Ga. 1998) (finding no diligent prosecution before the citizen suit filing when the state had issued only one administrative order against the defendant several years before); *Frilling v. Village of Anna*, 924 F. Supp. 821, 840-41 (S.D. Ohio 1996) (finding no diligent prosecution when the state filed its complaint against the noticed violator and a Consent Order simultaneously, without allowing the citizens who had given notice to participate in the settlement negotiations or intervene in the lawsuit); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 489-90 (D.S.C. 1995) (finding no diligent prosecution when the noticed violator cut a deal with the state enforcement agency for minimal penalties).

65. See ESA, 16 U.S.C. § 1540(g)(3)(B) (1994); Clean Water Act, 33 U.S.C. § 1365(c)(2) (1994); Clean Air Act, 42 U.S.C. § 7604(c)(2) (1994).

66. See 33 U.S.C. § 1365(c)(3) (1994); 42 U.S.C. § 7604(c)(3) (1994).

this section to which the United States is not a party shall not . . . have any binding effect upon the United States.”<sup>67</sup> Thus, whatever citizen suits accomplish, the statutes clearly do not equate them to government enforcement.

## II. SEPARATION OF POWERS AND ENVIRONMENTAL CITIZEN SUIT LITIGATION TO DATE

As the above discussion makes clear, environmental citizen suits have complex statutory relationships with government enforcement actions. However, the Supreme Court has characterized citizen suits as “supplementing” government enforcement, essentially filling in where the government chooses not to act.<sup>68</sup> Given this characterization—notwithstanding the numerous limitations placed on citizen suits—Congress thus arguably did delegate Executive enforcement power to citizen plaintiffs. Viewed in this light, Congress’s purported delegation raises separation of powers questions regarding both of the other two branches of the federal government.

### A. *The Separation of Powers Doctrine in General*

One of the fundamental aspects of American law is that our federal Constitution divides national governance among three branches—the Executive, the Legislative, and the Judicial—each of which has limited powers.<sup>69</sup> The Supreme Court

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67. 42 U.S.C. § 7604(c)(2) (1994). The Senate noted that this provision “ensures that citizen suits do not interfere unduly with the government’s own enforcement prerogatives.” S. REP. NO. 101-228, at 374 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3757.

68. *See* *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989) (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987)).

69. *See, e.g.,* *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (affirming that “the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty”); *Morrison v. Olson*, 487 U.S. 654, 693 (1988); *INS v. Chadha*, 462 U.S. 919, 945 (1983) (“Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process.”); *Id.* at 947 (“The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed.”); *Buckley v. Valeo*, 424 U.S. 1, 120–23 (1976) (discussing the Framers’ intent to keep the branches of government separate).

preserves this tripartite system through the principle of separation of powers, which has two basic modes:<sup>70</sup> no branch of government may aggrandize itself beyond its constitutional limits,<sup>71</sup> nor may any branch unduly interfere with or reduce the authority of another branch.<sup>72</sup>

Certain separation of powers issues are so common that they have individual labels and tests. For instance, Article III of the Constitution authorizes the federal courts to hear only "cases" and "controversies,"<sup>73</sup> and the Supreme Court has developed the concept of standing to ensure that it and other federal courts observe this restriction.<sup>74</sup> Another common separa-

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70. "Functionally, the doctrine may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another." *Chadha*, 462 U.S. at 963 (1983) (Powell, J., concurring) (citations omitted); *see also Mistretta*, 488 U.S. at 382 (1989) ("Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."); *Morrison*, 487 U.S. at 694-95 (1988) (discussing the two ways that the independent counsel provisions might violate separation of powers principles).

71. *See, e.g., Chadha*, 462 U.S. at 951 (1983) ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."); *Buckley*, 424 U.S. at 129 (noting that "the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches"); *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) ("Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection . . .").

72. *See, e.g., Myers v. United States*, 272 U.S. 52, 117, 163-64 (1926) (holding that Congress cannot by statute divest the President of the authority to remove an officer of the United States whom the President had the power to appoint).

73. U.S. CONST., art. III, § 2, cl.1.

74. *See Flast v. Cohen*, 392 U.S. 83, 94-97 (1968) (discussing the Article III separation of powers limitations on federal courts in the context of taxpayer standing).

The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

*Id.* at 99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *see also Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972) ("Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that contro-

tion of powers issue addresses Congress's ability to delegate law-making authority to the Executive Branch, particularly to administrative agencies. Under Article I, the power to make law resides with Congress and the Legislative Branch,<sup>75</sup> and therefore Congress cannot give the Executive unrestricted legislative power. Under the nondelegation doctrine, congressional delegations to the Executive Branch are constitutional only "if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."<sup>76</sup>

Nevertheless, more general separation of powers concerns can arise from the Supreme Court's basic ruling that

each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others . . . , and that "[t]he sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there."<sup>77</sup>

However, the Court has recognized "that the Constitution by no means contemplates total separation of each of these three essential branches of government,"<sup>78</sup> and it will uphold "statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment."<sup>79</sup>

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versy is what has traditionally been referred to as the question of standing to sue.").

75. See U.S. CONST., art. I, §§ 1, 8 cl.18.

76. *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); see also *Touby v. United States*, 500 U.S. 160, 164–65 (1991) (discussing separation of powers and the nondelegation doctrine in connection with the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801–812, 877 (1988)); *Mistretta v. United States*, 488 U.S. 361, 371–379 (1989) (discussing separation of powers principles, the nondelegation doctrine, and the "intelligible principle" test and applying the "intelligible principle" test in a constitutional challenge to the federal Sentencing Commission).

77. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 441–42 (1977) (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629, 630 (1935)) (citations omitted) (alterations in original).

78. *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). See also *Mistretta*, 488 U.S. at 380–82 (1989) (discussing the historical justification and practical need for some overlap between the branches).

79. *Mistretta*, 488 U.S. at 382.

*B. Separation of Powers, Environmental Citizen Suits, and Standing*

As written, many of the environmental citizen suit provisions would allow any person to sue to bring any violator into compliance with the relevant federal environmental statutes and regulations, regardless of the plaintiff's personal connection to the environmental violation. For example, "any person" can sue to remedy violations of the Clean Air Act or the ESA.<sup>80</sup> Such broad language suggests that Congress truly did intend citizen suits to share state and federal governments' sovereign right to ensure that the law is obeyed.

Nevertheless, whatever Congress might have intended, the Supreme Court has interpreted the "enforcement" scope of environmental citizen suit provisions to be more limited. Concerned about separation of powers and the constitutional limits on federal courts' jurisdiction, the Court has short-circuited arguments for such broad-ranging enforcement authority by insisting that environmental citizen plaintiffs have individual standing before they can bring their lawsuits.

Environmental standing litigation actually began with suits brought pursuant to the federal Administrative Procedure Act's judicial review provisions,<sup>81</sup> which allow persons who are adversely affected or aggrieved by federal agency actions to sue those agencies.<sup>82</sup> In *Sierra Club v. Morton*,<sup>83</sup> the Sierra Club challenged the U.S. Forest Service's decision to allow the Disney corporation to build a ski resort in the Mineral King Valley, claiming standing to sue solely because the Club had a "special interest" in preserving wild places.<sup>84</sup> The Supreme Court found that the Club lacked standing, stressing that in order to have standing to sue, the Sierra Club must have suffered an individualized injury from the development.<sup>85</sup> While the Court accepted that aesthetic and environmental injuries

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80. The Clean Water Act's citizen suit provision, in contrast, defines a "citizen" who may bring suit as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g) (1994).

81. See 5 U.S.C. §§ 701-706 (1994).

82. See *id.* § 702.

83. 405 U.S. 727 (1972).

84. See *id.* at 730.

85. See *id.* at 732-33.

could support standing,<sup>86</sup> it stressed that “the ‘injury in fact’ test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.”<sup>87</sup> The Sierra Club, it concluded, had failed to connect any of its members to the specific environmental harms at issue, stressing that “[t]he impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen.”<sup>88</sup> The personal injury requirement, the Court explained further, “serve[s] as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.”<sup>89</sup>

The Supreme Court further delineated environmental standing, this time for the ESA’s citizen suit provision, in *Lujan v. Defenders of Wildlife*,<sup>90</sup> a suit where Defenders of Wildlife challenged the Secretary of the Interior’s interpretation that the ESA did not apply to federal agency actions overseas.<sup>91</sup> The Court again found that the plaintiffs lacked standing, emphasizing the separation of powers issues inherent in the standing requirement:

[T]he Constitution’s central mechanism of separation of powers depends largely upon common understanding of

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86. *See id.* at 734.

87. *Id.* at 734–35.

88. *Id.* at 735.

89. *Id.* at 740.

90. 504 U.S. 555 (1992). For general discussions of the *Lujan* decision and its effect on environmental standing, see generally Karl S. Coplan, *Refracting the Spectrum of Clean Water Act Standing in Light of Lujan v. Defenders of Wildlife*, 22 COLUM. J. ENVTL. L. 169 (1997); William Grantham, *Restoring Citizen Suits after Lujan v. Defenders of Wildlife: The Use of Cooperative Federalism to Induce Non-Article III Standing in State Courts*, 21 VT. L. REV. 977 (1997); Raymond A. Just, *Intergenerational Standing under the Endangered Species Act: Giving Back the Right to Biodiversity After Lujan v. Defenders of Wildlife*, 71 TUL. L. REV. 597 (1996); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996); Sunstein, *supra* note 14; Christopher T. Burt, Comment, *Procedural Injury Standing After Lujan v. Defenders of Wildlife*, 62 U. CHI. L. REV. 275 (1995); Monica Reimer, Comment, *Competitive Injury as a Basis for Standing in Endangered Species Act Cases*, 9 TUL. ENVTL. L.J. 109 (1995); Stanley E. Rice, Note, *Standing on Shaky Ground: The Supreme Court Curbs Standing for Environmental Plaintiffs in Lujan v. Defenders of Wildlife*, 38 ST. LOUIS U. L.J. 199–230 (1993); Matthew M. Werner, Comment, *Mootness and Citizen Suit Civil Penalty Claims under the Clean Water Act: A Post-Lujan Reassessment*, 25 ENVTL. L. 801 (1995).

91. *See Lujan*, 504 U.S. at 557–58.

what activities are appropriate to legislatures, to executives, and to courts . . . . One of [the] landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in Article III . . . is the doctrine of standing.<sup>92</sup>

According to the *Defenders of Wildlife* Court, constitutional standing has three requirements: (1) injury-in-fact—that is, "an invasion of a legally protected interested which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical'"; (2) causation; and (3) redressability of the injury by the courts.<sup>93</sup> In *Defenders of Wildlife*, the plaintiffs failed both the injury and the redressability requirements.<sup>94</sup> Regarding injury, the Court again affirmed that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."<sup>95</sup> However, *Defenders of Wildlife* failed to show both "that listed species were in fact being threatened by funded activities abroad" and "that one or more of [its] members would thereby be 'directly' affected . . . ."<sup>96</sup> Two members of the group had submitted affidavits that they had traveled to Egypt and Sri Lanka, which provide habitat for endangered animals such as the Nile crocodile and the Asian elephant; that they hoped to return to those countries to see the animals; and that American-funded activities in those two countries were hastening the extinction of the endangered species.<sup>97</sup> The Court determined that these injuries were not concrete and imminent enough to support constitutional standing because "some day" intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."<sup>98</sup>

*Defenders of Wildlife* offered other theories of injury. Its "ecosystem nexus" theory argued "that any person who uses *any part* of a 'contiguous ecosystem' adversely affected by a

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92. *Id.* at 559–60.

93. *Id.* at 560–61 (citations omitted) (internal quotation marks omitted).

94. *See id.* at 562.

95. *Id.* at 562–63 (citing *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)).

96. *Id.* at 563.

97. *See id.* at 563–64.

98. *Id.* at 564.

funded activity has standing even if the activity is located a great distance away.”<sup>99</sup> However, the Court concluded, “[t]o say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question.”<sup>100</sup> Defenders also argued for an “animal nexus’ approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing,” and a “vocational nexus’ approach, under which anyone with a professional interest in such animals can sue.”<sup>101</sup> The Court rejected these theories for similar reasons.<sup>102</sup>

Finally, Defenders of Wildlife argued that the ESA’s “no jeopardy” provisions<sup>103</sup> created procedural requirements and that Defenders had suffered a “procedural injury” in not having those procedures followed—an injury made justiciable by the ESA’s citizen suit provision.<sup>104</sup> The Court again rejected the argument, distinguishing Defenders’ theory from several other, presumably acceptable, bases for standing, including mass tort litigation and *qui tam* or bounty provisions.<sup>105</sup> Instead, Defenders’ procedural argument rested on “an abstract, self-contained, noninstrumental ‘right’ to have the Executive observe the procedures required by law,” a “right” that Congress could not confer.<sup>106</sup>

The Court’s opinion in *Defenders of Wildlife* thus emphasizes the absolute importance of particularized, concrete, and actual or imminent injury to environmental citizen suit stand-

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99. *Id.* at 565.

100. *Id.* at 566.

101. *Id.*

102. *See id.* at 566–67.

103. *See* 16 U.S.C. § 1536(a)(2) (1994). At their heart, the “no jeopardy” provisions require

[e]ach federal agency . . . in consultation with and with the assistance of the Secretary [of the Interior or of Commerce], [to] insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is . . . critical . . . .

*Id.*

104. *See Lujan*, 504 U.S. at 571–72.

105. *See id.* at 572–73.

106. *Id.* at 573.

ing. As a result, a citizen suit plaintiff must be personally injured by the environmental violation at issue in the lawsuit. Moreover, under the third prong of the standing test, the federal court must be able to redress that personal injury. For example, Defenders of Wildlife also lacked standing because the Court could not redress its injury. Defenders had sued the Secretary of the Interior over the Secretary's interpretation of the ESA—not any of the federal agencies whose funding of overseas activities could actually harm endangered species.<sup>107</sup> The Court thus concluded that nothing it could do to the only defendant properly in court—the Secretary—would correct the actions of other agencies overseas.<sup>108</sup>

Redressability became the key focus in *Steel Co. v. Citizens for a Better Environment*,<sup>109</sup> a citizen suit brought pursuant to the Emergency Planning and Community Right-to-Know Act (EPCRA)<sup>110</sup> against a defendant who came into compliance with the Act after the citizens gave notice of their intent to sue but before they actually filed their suit.<sup>111</sup> The issue the Court decided was whether the citizen plaintiffs had standing against a compliant defendant for the defendant's past violations. On redressability grounds, the Court decided that they did not. Defining redressability as "a likelihood that the requested relief will redress the alleged injury,"<sup>112</sup> the Court analyzed the six types of relief that plaintiff Citizens for a Better Environment (CBE) had requested: a declaratory judgment that Steel

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107. See *id.* at 568.

108. See *id.* at 569–71.

109. 523 U.S. 83 (1998). For further analysis of the *Steel Co.* decision, see generally Janet A. Brown & Jeremy Rosen, *Spring 1998 Term: Steel Company v. Citizens for a Better Environment*, 4 ENVTL. LAW. 957 (1998); Heather Elliott, *Steel Company v. Citizens for a Better Environment*, 26 ECOLOGY L.Q. 709 (1999); Jack H. Friedenthal, *The Crack in the Steel Case*, 68 GEO. WASH. L. REV. 258 (2000); Krista Green, *An Analysis of the Supreme Court's Resolution of the Emergency Planning and Community Right-to-Know Act Citizen Suit Debate*, 26 B.C. ENVTL. AFF. L. REV. 387 (1999); Karin P. Sheldon, *Steel Company v. Citizens for a Better Environment: Citizens Can't Get No Psychic Satisfaction*, 12 TUL. ENVTL. L.J. 1 (1998); Michael J. Wray, *Still Standing? Citizen Suits, Justice Scalia's New Theory of Standing, and the Decision in Steel Company v. Citizens for a Better Environment*, 8 S.C. ENVTL. L.J. 207 (2000); Natalie Bussan, Note, *All Bark and No Bite: Citizen Suits After Steel Company v. CBE*, 6 WIS. ENVTL. L.J. 195 (1999).

110. See 42 U.S.C. § 11046 (1994).

111. See *Steel Co.*, 523 U.S. at 87–88.

112. *Id.* at 103.

Company had violated EPCRA; injunctions that would allow CBE to inspect periodically Steel Company's facility and records and that would require Steel Company to provide CBE with copies of all compliance reports that Steel Company submitted to the EPA; civil penalties of \$25,000 per day of violation; CBE's costs and attorney fees; and "such further relief as the court deems appropriate."<sup>113</sup>

The Court found a declaratory judgment to be "worthless" because there was no controversy that Steel Company had failed to file reports as EPCRA requires or that such failure constituted a violation.<sup>114</sup> CBE's requests for injunctive relief, in turn, "cannot conceivably remedy any past wrong but [are] aimed at deterring petitioner from violating EPCRA in the future."<sup>115</sup> Because CBE had alleged no ongoing violations, these deterrence injunctions could not remedy the injury complained of—the purely past violations.<sup>116</sup> The request for costs and attorney fees were insufficient on their own to confer standing because "litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself."<sup>117</sup>

That left civil penalties. The Court conceded that these penalties

might be viewed as a sort of compensation or redress to respondent if they were payable to respondent. But they are not. These penalties—the only damages authorized by EPCRA—are payable to the United States Treasury. In requesting them, therefore, respondent seeks not remediation of its own injury—reimbursement for the costs it incurred as a result of the late filing—but vindication of the rule of law—the "undifferentiated public interest" in faithful execution of EPCRA.<sup>118</sup>

Pursuit of the "public interest" in law enforcement could not support a citizen suit, because the "psychic satisfaction" in

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113. *Id.* at 105.

114. *See id.* at 106.

115. *Id.* at 108.

116. *See id.* at 108–09.

117. *Id.* at 107.

118. *Id.* at 106 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992); *Fairchild v. Hughes*, 258 U.S. 126, 129–30 (1922)).

seeing “that the Nation’s laws are faithfully enforced . . . is not an acceptable Article III remedy because it does not address a cognizable Article III injury.”<sup>119</sup>

*Steel Co.*, therefore, seemed to stand for the proposition that citizen suit plaintiffs must seek declaratory judgments and/or injunctive relief in order to have standing to bring their lawsuits, because only those types of relief could redress their particularized injuries from environmental violations. Penalties payable to the U.S. Treasury are an insufficient remedy. However, the exact status of civil penalties was already at issue in *Steel Co.*, as Justice Stevens’s lengthy concurrence made clear.<sup>120</sup> Two years later, the Court performed what can only be described as a complete about-face regarding the ability of civil penalties to redress citizen suit plaintiffs’ individual injuries.

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,<sup>121</sup> Friends of the Earth brought a Clean Water Act citizen suit against Laidlaw Environmental Services, arguing that Laidlaw had discharged pollutants, including toxic mercury, in excess of the limits allowed in its permit.<sup>122</sup> Laidlaw came into compliance with the Clean Water Act after the citizen suit was filed, but the Fourth Circuit nevertheless dismissed the case on the basis of *Steel Co.*, declaring that Friends of the Earth had lost standing because civil penalties could not

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119. *See id.* at 107.

120. Justice Stevens, joined by Justice Souter, challenged the majority’s conclusion that civil penalties could not redress a citizen plaintiffs’ personal injury. Noting that “the Court fails to specify why payment to [Citizens]—even if only a peppercorn—would redress [Citizens]’ injuries, while payment to the Treasury does not,” Justice Stevens argued that “[w]hen one private party is injured by another, the injury can be redressed in at least two ways: by awarding compensatory damages or by imposing a sanction on the wrongdoer that will minimize the risk that the harm-causing conduct will be repeated.” *Id.* at 127 (Stevens J., concurring).

121. 120 S. Ct. 693 (2000). For discussions of *Laidlaw*’s effect on environmental citizen suits, see generally Lt. Colonel Connelly, *Friends of the Earth Has Friends at the Court*, ARMY LAW., June, 2000, at 46; Daniel A. Farber, *Environmental Litigation After Laidlaw*, 30 ENVTL. L. REP. 10516 (2000); Michael P. Healy, *Standing in Environmental Citizen Suits: Laidlaw’s Clarification of the Injury-in-Fact and Redressability Requirements*, 30 ENVTL. L. REP. 10455 (2000); Craig N. Johnston, *Standing and Mootness After Laidlaw*, 30 ENVTL. L. REP. 10317 (2000).

122. *See Friends of the Earth*, 120 S. Ct. at 702.

redress its injuries.<sup>123</sup> A majority of the Supreme Court, however, relied upon the distinction between purely past and possible future violations to declare that “it is wrong to maintain that citizen plaintiffs facing ongoing violations never have standing to seek civil penalties.”<sup>124</sup> Noting that “[w]e have recognized on numerous occasions that ‘all civil penalties have some deterrent effect,’” the Court emphasized that “Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance . . . ; they also deter future violations. This congressional determination warrants judicial attention and respect.”<sup>125</sup> Furthermore, civil penalties could constitute “a sanction that effectively abates that conduct and prevents its recurrence,” providing the citizen plaintiff with “a form of redress.”<sup>126</sup> Because the district court had expressly found that the civil penalties it assessed against Laidlaw would have a deterrent effect, the Court held that those penalties effectively redressed Friends of the Earth’s environmental injuries for standing purposes.<sup>127</sup>

The primary purpose of standing, as noted, is to ensure that the federal courts do not reach beyond their constitutional role in our tripartite system of government. However, at least some Justices have already articulated a connection between Article III standing and Article II separation of powers concerns. Moreover, as will be discussed,<sup>128</sup> the injury-in-fact requirement for standing eliminates any Article II-based separation of powers challenges to environmental citizen suits.

### C. Separation of Powers and the “Take Care” Clause

#### 1. In General

As the standing litigation indicates, separation of powers problems can arise between any two of the three branches of the federal government, but those most relevant to this discus-

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123. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 149 F.3d 303, 306–07 (4th Cir. 1998), *rev’d*, 120 S. Ct. 693 (2000).

124. *Friends of the Earth*, 120 S. Ct. at 706.

125. *Id.*

126. *Id.* at 706–07.

127. See *id.* at 707.

128. See *infra* Part IV.B.

sion involve the interactions of the Executive and Legislative Branches. These separation of powers issues generally arise because Congress passes legislation that either usurps an Executive function or unduly interferes with Executive powers. For example, in 1977 the Executive Branch challenged the constitutionality of the Presidential Recordings and Materials Preservation Act,<sup>129</sup> arguing that the statutory provisions dictating the care of presidential materials unduly interfered with the Executive Branch. The Supreme Court created a two-part inquiry to resolve the issue. First, "in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions."<sup>130</sup> Second, "[o]nly where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."<sup>131</sup>

The Act in question was *not* unduly disruptive of the Executive Branch because custody of presidential materials remained within the Executive Branch: "The Executive Branch remains in full control of the Presidential materials, and the Act facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch."<sup>132</sup> Moreover, "there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch."<sup>133</sup>

Arguably, the most important Executive power under the Constitution is that the President "shall take Care that the Laws be faithfully executed."<sup>134</sup> In overturning the Brady Handgun Violence Protection Act in 1997, for example,<sup>135</sup> the

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129. Pub. L. No. 93-526, Title I, §§ 101-106, 88 Stat. 1695-98 (1974)

130. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977) (citing *United States v. Nixon*, 418 U.S. 683, 711-12 (1974)).

131. *Id.*

132. *Id.* at 444-45.

133. *Id.* at 445.

134. U.S. CONST., art. II, § 3.

135. Pub. L. No. 103-159, 107 Stat. 1536 (1993). "The Act requires the Attorney General to establish a national instant background check system by November 30, 1998, and immediately puts in place certain interim provisions until

Supreme Court emphasized in dicta the centrality of the Take Care Clause to the Executive Branch:

The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, “shall take Care that the Laws be faithfully executed,” personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the “Courts of Law” or by “the Heads of Departments” who are themselves presidential appointees). The Brady Act effectively transfers this responsibility to thousands of CLEOs [chief law enforcement officers] in the [fifty] states, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive—to *ensure* both vigor and accountability—is well known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.<sup>136</sup>

Nevertheless, the Court has not delineated the President’s exact duties and privileges of “execution,” particularly in terms of what powers are *exclusive* to the Executive Branch. It has, however, painted some broad boundaries. Thus, “[i]n the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is

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that system becomes operative.” *Printz v. United States*, 521 U.S. 898, 902 (1997). The interim provisions include requirements that gun dealers fill out forms for proposed gun sales, notify local law enforcement officials, and wait five days while local law enforcement determine whether the proposed sale would be illegal. *See id.* at 902–03.

136. *Printz*, 521 U.S. at 922–23 (1997) (emphasis added) (citations omitted). This dicta also calls into question the States’ roles in enforcing environmental statutes. While that subject is beyond the scope of this Article, it should be noted that States benefit from constitutional principles of federalism and from Supreme Court recognition of their police powers, both of which underscore a strong and protected tradition of *States* being the primary caretakers of Americans’ health, safety, and welfare. Federal environmental statutes thus arguably honor these legal principles by imposing minimum standards to protect the nation as a whole, while preserving to States the right to tailor the details of environmental regulation and enforcement to local needs. The role of private citizens in public regulation rests on far less secure constitutional and legal principles.

to be a lawmaker."<sup>137</sup> Instead, the executive power consists of "the general administrative control of those executing the laws,"<sup>138</sup> which includes the exclusive power to appoint and to remove principal officers of the United States, such as the heads of the various executive departments.<sup>139</sup> In contrast, the Court has held that neither the power to appoint inferior officers nor the ability to terminate inferior officers at will is crucial to the President's constitutional duties,<sup>140</sup> although congressional interference with and control over executive officers should be minimized.<sup>141</sup>

Of more direct relevance here is the President's duty to enforce the law. The powers "to enforce [the laws] or to appoint agents charged with the duty of such enforcement . . . are executive functions."<sup>142</sup> Moreover, the Court has clearly held that the Executive's discretionary ability to seek judicial relief is central to its constitutional authority. In *Buckley v. Valeo*,<sup>143</sup> for example, the Court declared that "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'"<sup>144</sup> In that case, the Court held that because the Federal Elections Campaign Act vested in the largely congressionally-appointed Federal Elections Commission "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights," the Commission exercised executive rather than legislative power.<sup>145</sup> However, the Court

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137. *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)) (alteration in original).

138. *Myers v. United States*, 272 U.S. 52, 164 (1926).

139. *See id.* at 163-64 (holding that "Article II grants to the President the executive power of the government, *i.e.* the general administrative control of those executing the laws, including the power of appointment and removal of executive officers").

140. *See Morrison v. Olson*, 487 U.S. 654, 691-92, 695 (1988).

141. *See infra* notes 147-156 and accompanying text (discussing *Bowsher v. Synar*, 478 U.S. 714 (1986)).

142. *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928).

143. 424 U.S. 1 (1976).

144. *Id.* at 138 (quoting U.S. CONST. art. II, § 3).

145. *Id.* at 140. In addition, "the Commission's broad administrative powers: rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself . . . are of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress." *Id.* at 140-41.

did not clearly determine that enforcement of federal law was exclusively a federal Executive Branch function—only that enforcement could not be under Congress's direct control.<sup>146</sup>

Later cases have focused less on the President's enforcement function than on the relationship between Congress and the Executive regarding the appointment of Executive officials. For example, in 1986, in *Bowsher v. Synar*,<sup>147</sup> the Supreme Court held that the Balanced Budget and Emergency Deficit Control Act of 1985<sup>148</sup> unconstitutionally interfered with the Executive Branch's duty to execute the law, linking the Executive's execution powers to the Appointments Clause. In order to eliminate the federal deficit, the Act required the President to mandate spending reductions that the Comptroller General specified.<sup>149</sup> Because the Comptroller General was not appointed in compliance with the Appointments Clause, major issues in the case were whether the Comptroller was a member of the Executive or the Legislative Branch and, if the latter, whether the Comptroller exercised executive powers under the Act.

The Comptroller's relation to Congress was important because "[a] direct congressional role in the removal of officers charged with the execution of the laws . . . is inconsistent with separation of powers."<sup>150</sup> In the Court's analysis, "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment"; because "[t]he structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess."<sup>151</sup>

Having thus established the basic separation of powers problem, the Court turned to the status of the Comptroller General. First, the Court determined that the Comptroller is

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146. *See id.* at 138–40.

147. 478 U.S. 714 (1986).

148. Pub. L. No. 99-177, 99 Stat. 1038 (1985) (codified as 2 U.S.C. §§ 901–922 (1982 & Supp. III 1985)).

149. *See Bowsher*, 478 U.S. at 718.

150. *Id.* at 723; *see also Myers v. United States*, 272 U.S. 52, 161 (1925) (holding that a federal statute requiring the Senate's consent before the President could remove a postmaster was unconstitutional).

151. *Bowsher*, 478 U.S. at 726–27.

indeed subservient to Congress because, although nominated by the President, the Comptroller "is removable only at the initiative of Congress,"<sup>152</sup> a statutory feature designed "to give the legislative branch of the Government control of the audit, not through the power of appointment, but through the power of removal."<sup>153</sup> Moreover, historically, both Congress and the Comptrollers have considered the Comptroller General to be part of the Legislative Branch.<sup>154</sup>

Second, the Court considered whether the Comptroller General does indeed exercise executive powers under the Act. Noting that the Comptroller General's primary responsibility under the Act is to prepare a report, the Court emphasized that the Comptroller "will exercise his independent judgment and evaluation" regarding estimated federal revenues and expenditures.<sup>155</sup> As a result, the Comptroller's role under the Act could not be considered "essentially ministerial and mechanical": "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."<sup>156</sup> Because the Act required a legislative officer to execute the law, it was unconstitutional.

Two years later, the Supreme Court decided *Morrison v. Olson*,<sup>157</sup> addressing the constitutionality of the Ethics in Government Act's<sup>158</sup> independent counsel provisions. The Act "allows for the appointment of an 'independent counsel' to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws."<sup>159</sup> Under the Act's provisions, the Attorney General conducts an investigation to determine whether appointment of independent counsel is warranted.<sup>160</sup> If so, the Special Division—a court

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152. *Id.* at 728.

153. *Id.* at 729 (quoting 58 CONG. REC. 7211 (1919) (remarks of Rep. Temple)).

154. *See id.* at 731.

155. *Id.* at 732.

156. *Id.* at 732-33. Specifically, under the Act, "the Comptroller General must exercise judgment concerning the facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute." *Id.* at 733.

157. 487 U.S. 654 (1988).

158. 28 U.S.C. §§ 49, 591-599 (1982 & Supp. V 1987).

159. *Morrison*, 487 U.S. 654, 660 (1988).

160. *See id.* at 660-61.

created by the Act—appoints the counsel and defines the independent counsel's prosecutorial jurisdiction.<sup>161</sup> "With respect to all matters within the independent counsel's jurisdiction, the Act grants the counsel 'full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice.'"<sup>162</sup> The Attorney General can remove an independent counsel only for cause.<sup>163</sup> Otherwise, the independent counsel's duties end "when he or she notifies the Attorney General that he or she has completed or substantially completed any investigations or prosecutions undertaken pursuant to the Act."<sup>164</sup> Congress keeps track of the independent counsel's prosecution through: oversight by congressional committees; a requirement that the independent counsel cooperate with Congress; a requirement that the independent counsel make statements and reports to Congress; and a requirement that the independent counsel inform the House of Representatives of any grounds for impeachment.<sup>165</sup> Members of Congress can also request that the Attorney General apply for an independent counsel.<sup>166</sup>

According to the Court, these provisions raised two separation of powers issues: "whether the provision of the Act restricting the Attorney General's power to remove the independent counsel [for cause only] . . . impermissibly interferes with the President's exercise of his constitutionally appointed functions"; and "whether, taken as a whole, the Act violates the separation of powers by reducing the President's ability to control the prosecutorial powers wielded by the independent counsel."<sup>167</sup>

On the first issue, the Court distinguished the independent counsel provisions from the Comptroller General's role in *Bowsher* because the Ethics in Government Act "does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeach-

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161. *See id.* at 661.

162. *Id.* at 662 (quoting 28 U.S.C. § 594(a) (1982 & Supp. V 1987)).

163. *See id.* at 663.

164. *Id.* at 664.

165. *See id.* at 664–65.

166. *See id.* at 665.

167. *Id.* at 685.

ment and conviction."<sup>168</sup> Instead, the issue was whether Congress could condition the Executive Branch's removal of executive officers.<sup>169</sup> The separation of powers doctrine "ensure[s] that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II."<sup>170</sup> Accordingly, "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light."<sup>171</sup>

While the Court acknowledged that "there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role"—especially principal officers like the members of the Cabinet—it concluded that the independent counsel was not such an officer.<sup>172</sup> The independent counsel clearly performed executive functions, "in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch."<sup>173</sup> However, the Court held that the independent counsel was too inferior an officer, "with limited jurisdiction and tenure and lacking policymaking or significant administrative authority,"<sup>174</sup> to warrant finding the statute unconstitutional. "[T]he President's need to control the exercise of [the independent counsel's] discretion [was not] so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President."<sup>175</sup>

More generally, the Court observed that the independent counsel provisions "[do] not involve an attempt by Congress to

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168. *Id.* at 686.

169. *See id.* at 687.

170. *Id.* at 689–90.

171. *Id.* at 691. See also *Mistretta v. United States*, 488 U.S. 361 (1989) in which the Court notes that the separation of powers inquiry focuses "on the extent to which [a provision of law] prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Id.* at 383 (quoting *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 443 (1977)) (alteration in original).

172. *Morrison*, 487 U.S. at 690.

173. *Id.* at 691.

174. *Id.*

175. *Id.* at 691–92.

increase its own powers at the expense of the Executive Branch” because “Congress retained for itself no powers of control or supervision over an independent counsel.”<sup>176</sup> Nor does “the Act work[] any *judicial* usurpation of properly executive functions.”<sup>177</sup>

Finally, the Court did not agree “that the Act ‘impermissibly undermine[s]’ the powers of the Executive Branch, or ‘disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.’”<sup>178</sup> “[I]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity.”<sup>179</sup> However, the Attorney General’s supervision, though not absolute, is constitutionally sufficient because: (1) the Attorney General retains the authority to remove an independent counsel for good cause; (2) “[n]o independent counsel may be appointed without a specific request by the Attorney General”; and (3) “the Attorney General’s decision not to request appointment . . . is committed to his unreviewable discretion.”<sup>180</sup> As a result, the Executive Branch retains considerable discretion over the initiation of the independent counsel’s investigation and prosecution. In addition, the scope of the independent counsel’s authority is based on the Attorney General’s submissions, and the independent counsel is bound to follow

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176. *Id.* at 694. Members of Congress could request that the Attorney General apply for an independent counsel, “but the Attorney General has no duty to comply with the request, although he must respond within a certain time limit.” *Id.* Otherwise, “Congress’[s] role under the Act is limited to receiving reports or other information and oversight of the independent counsel’s activities, functions that we have recognized generally as being incidental to the legislative function of Congress.” *Id.* (citations omitted).

177. *Id.* at 695. In reaching this conclusion, the Court emphasized that “the power to appoint inferior officers such as independent counsel is not in itself an ‘executive’ function in the constitutional sense,” and that “the Special Division has no power to appoint an independent counsel *sua sponte*.” *Id.* Moreover, the courts cannot review the Attorney General’s decision *not* to seek independent counsel, and, although the Act did give the Judiciary the “power to review the Attorney General’s decision to remove an independent counsel, . . . this is a function that is well within the traditional power of the Judiciary.” *Id.*

178. *Id.* at 695 (citations omitted).

179. *Id.*

180. *Id.* at 696.

Department of Justice policy.<sup>181</sup> Thus, the Court concluded: “[I]n our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.”<sup>182</sup>

## 2. The “Take Care” Clause and Environmental Citizen Suits

Article II-based separation of powers challenges to environmental citizen suit provisions began in the mid-1980s. However, the federal district courts that have addressed this issue have been unwilling to engage in complex constitutional analyses, relying instead on Congress’s plenary authority to invest enforcement authority in whomever it chooses and on broad statements that the separation of powers doctrine does not apply to private individuals. Moreover, while courts have given the civil penalty provisions special attention, none have decided citizen suits’ constitutionality on the basis of those provisions, to the outrage of at least two critics.<sup>183</sup>

In 1985, for example, defendants in a Clean Water Act citizen suit challenged the citizen suit provision’s constitutionality because “citizen enforcement, in the face of an agency enforce-

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181. *See id.*

182. *Id.* In a lengthy dissent, Justice Scalia argued that the separation of powers consideration was the most important and that the “whole object” of the independent counsel provisions was to “deprive[] the President of exclusive control over [the] quintessentially executive activity” of “[g]overnmental investigation and prosecution of crimes.” *Id.* at 706 (Scalia, J., dissenting). Justice Scalia would have found the Act unconstitutional the moment the Court decided that purely executive functions were at issue and the Act assigned those functions “to a person whose actions are not fully within the supervision and control of the President . . . .” *Id.* at 708 (Scalia, J., dissenting).

183. *See, e.g.,* William H. Lewis, Jr., *Environmentalists’ Authority to Sue Industry for Civil Penalties Is Unconstitutional Under the Separation of Powers Doctrine*, 16 ENVTL. L. REP. 10101, 10102-05 (1986); Abell, *supra* note 28. Both authors use the Clean Water Act as an example to argue that environmental citizen suit provisions violate separation of powers principles, both as expressed in *Morrison v. Olson*, and on Appointments Clause grounds. They also emphasize that citizen suit civil penalties are payable to the U.S. Treasury. Both authors assume, however, that citizen plaintiffs wield executive enforcement authority, an assumption that this Article seeks to refute. Moreover, neither had the benefit of the Supreme Court’s recent decision in *Laidlaw* that civil penalties *can* redress individual injuries. *See* discussion *supra* Part II.B.

ment action, presents the potential for disruption of the proper balance between branches of Government by infringing on the powers of the executive branch."<sup>184</sup> The New Jersey District Court quickly upheld the citizen suit provision on grounds that the Executive Branch is not the exclusive enforcer of federal law and because, when Congress creates statutory rights and obligations, "it is entirely appropriate for Congress in creating these rights and obligations to determine, in addition, who may enforce them and in what manner."<sup>185</sup> The defendant's challenges, according to the court, questioned congressional wisdom rather than raising constitutional issues, and hence were beyond the court's power to address.<sup>186</sup> The court did not consider whether Congress had unconstitutionally delegated executive enforcement power away from the Executive Branch.

Although the defendants also argued that the civil penalties provisions rendered citizen suits executive enforcement actions on behalf of the government, the New Jersey District

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184. *Students Pub. Interest Research Group of N.J. v. Monsanto Co.*, 600 F. Supp. 1474, 1478 (D.N.J. 1985).

185. *Id.* (quoting *Davis v. Passman*, 442 U.S. 228, 241 (1979)). The New Jersey District Court, like many of the federal district courts facing the separation of powers challenge for environmental citizen suits, relied on a line of cases wherein the Supreme Court has deferred to Congress's power to fashion enforcement schemes in statutes that address national problems. Most generally, the Court has stated that "[s]tatutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner." *Davis v. Passman*, 442 U.S. 228, 241 (1979). Similarly, in *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Court emphasized that "where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue[]' is one within the power of Congress to determine." *Id.* at 732 n.3 (quoting *Flast v. Cohen*, 392 U.S. 83, 100 (1968)) (internal citation omitted).

186. *See Monsanto*, 600 F. Supp. at 1478. Emphasizing that "Congress may vest enforcement power in whomever it pleases," the court noted that, with respect to the Clean Water Act in particular, "Congress apparently did not intend for the EPA's restraint in prosecuting Act violators to bar prosecution entirely, and its intent here is similar to its intent in so many 'private attorneys general' statutes." *Id.* Moreover,

Nor is it correct to say that [the citizen suit provision] allows citizens to "veto" EPA enforcement actions or that it forces the EPA to bring suit. These arguments are inaccurate; and even assuming their accuracy, they merely point to a consequence of nearly every dual enforcement scheme. Again, we are concerned with a policy decision of Congress, subject to question as to its wisdom rather than its constitutionality.

*Id.* at 1479.

Court held that the differences between damages payable to the plaintiff and civil penalties payable to the government were irrelevant to constitutional concerns. "This statute in no way vests plaintiffs with greater 'prosecutorial' powers than statutes authorizing private damages. In such statutes, after all, the recovery of damages is a vindication, in substantial part, of the public interest."<sup>187</sup> In the New Jersey District Court's view, therefore, the Clean Water Act's citizen suit provision created a right to sue akin to other private rights of action to redress personal injuries.

Article II-based separation of powers challenges received more ammunition after the Supreme Court's 1986 *Bowsher v. Synar* decision,<sup>188</sup> prompting the district courts to examine more closely the federal government's role in citizen suits. Nevertheless, the Maryland District Court concluded that Clean Water Act citizen suits do not interfere with Executive Branch enforcement of the laws in part because the EPA can intervene in citizen suits; the EPA regards citizen suits as valuable supplemental enforcement; and "[i]f a private suit truly interfered with national policy, the EPA Administrator would be entitled to intervene."<sup>189</sup> Similarly, the Northern District of Illinois emphasized that the Clean Water Act's citizen suit provision effectively gives the EPA and the state "the right of first refusal to bring an enforcement action."<sup>190</sup> However, congressional power to decide policy was still most important in these decisions. As the Northern District of Illinois concluded, "Congress decided that allowing strict enforcement of antipollution standards by those directly injured by violations of those standards was more important than giving sole discretion to the regulators. This Court can find no constitutional infirmity in that decision."<sup>191</sup>

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187. *Id.* at 1478.

188. 478 U.S. 714 (1986).

189. *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 625 (D. Md. 1987).

190. *Natural Resources Defense Council v. Outboard Marine Corp.*, 692 F. Supp. 801, 817 (N.D. Ill. 1988).

191. *Id.* (citations omitted); see also *Chesapeake Bay Found., Inc.*, 652 F. Supp. at 625 (emphasizing that "[s]tatutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner." (quoting *Davis v. Passman*, 442 U.S. 228, 241 (1979))).

More recently, defendants have leveled separation of powers challenges against the Emergency Planning and Community Right to Know Act's (EPCRA's) citizen suit provision. Because most environmental citizen suit provisions are basically similar, however, the judicial responses have been similar to those in the Clean Water Act opinions. Thus, when the Eastern District of Pennsylvania upheld EPCRA's citizen suit provision, it found that "citizen suits are not an unlawful delegation of executive power, since Congress in enacting the EPCRA did not grant to a person or persons under its control executive power," and "the executive branch retains the authority to commence action against alleged violators via the sixty day notice provision of the EPCRA."<sup>192</sup> Moreover, in answer to the defendant's civil penalties argument, the court cited to the New Jersey District Court's Clean Water Act decision to conclude that "[t]he fact that the EPCRA makes any fine assessed payable to the Treasury of the United States does not affect the constitutionality of citizen suits."<sup>193</sup>

In the same year, the Western District of New York, also upholding EPCRA's citizen suit provisions, cited to all of the prior separation of powers challenges to conclude that the separation of powers doctrine applies only between branches of the federal government, not between private citizens and the Executive.<sup>194</sup> Like its predecessor courts, it did not seriously consider whether Congress, in creating the citizen suit provision, had unduly interfered with the Executive Branch. However, the Western District of New York *did* more elaborately address the civil penalty argument. It concluded that "[t]he fact that the monetary penalties sought are payable to the Treasury rather than to the private individual is of no moment. Such penalties redress the injuries of private parties whose interests are met through compliance with EPCRA's reporting requirements."<sup>195</sup> Moreover, it emphasized "that the statutory rights conferred upon private citizens under EPCRA are lim-

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192. Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc., 813 F. Supp. 1132, 1138 (E.D. Penn. 1993).

193. *Id.* (citing Student Public Interest Research Group of N.J. v. Monsanto Co., 600 F. Supp. 1474, 1479 (D.N.J. 1985)).

194. See Atlantic States Legal Found., Inc. v. Buffalo Envelope, 823 F. Supp. 1065, 1073-75 (W.D.N.Y. 1993).

195. *Id.* at 1075.

ited to those who have standing under Article III of the Constitution."<sup>196</sup>

Like the New Jersey District Court almost a decade earlier, therefore, the Western District of New York effectively characterized environmental citizen suits as private rights of action to address private injuries. Moreover, in finding civil penalties of no constitutional import, these district courts effectively anticipated the Supreme Court's view of civil penalties in *Laidlaw* by emphasizing that civil penalties redress individual injuries as well as benefit the federal Treasury. However, because of their early timing, these courts could not enter into a full *Morrison* analysis—an analysis that has become the touchstone of later separation of powers litigation.

#### *D. Separation of Powers and the Appointments Clause*

##### 1. In General

As noted, the "Take Care" Clause separation of powers litigation in the Supreme Court has often involved the appointment and/or removal of various federal officials, on the logic that the President cannot adequately take care to execute the law if the President is not in control of the people who do most of the actual executing. Appointments, however, are more directly governed by the Appointments Clause of the Constitution, which provides that the President

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>197</sup>

The Appointments Clause raises two potential issues when applied to a particular person: first, whether the person is an

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196. *Id.*

197. U.S. CONST., art II, § 2, cl. 2.

“officer of the United States” at all, and second, if so, what kind of officer. The first issue addresses whether the Appointments Clause even applies, a problem the Supreme Court has been wrestling with since the nineteenth century. In 1879, in the seminal case of *United States v. Germaine*,<sup>198</sup> the Supreme Court established a basic distinction between “officers of the United States,” who must be appointed in conformity with the Appointments Clause, and mere “employees” of the federal government—that is, people “working for the federal government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its officers.”<sup>199</sup> The defendant in *Germaine*, who had been “appointed by the Commissioner of Pensions to act as surgeon,”<sup>200</sup> was clearly not an officer. The term “officer of the United States,” the Court said, “embraces the ideas of tenure, duration, emolument, and duties,” with the duties being “continuing and permanent,” not “occasional or temporary.”<sup>201</sup> The surgeon failed on nearly all counts, being clearly subordinate to the Commissioner of Pensions, acting only when the Commission of Pensions needed him for a special case, paid by means other than regular appropriations by Congress, and required to keep no public office.<sup>202</sup>

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198. 99 U.S. 508 (1879).

199. *Id.* at 509.

200. *Id.* at 508.

201. *Id.* at 511–12.

202. In more detail, the Court noted:

The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examinations in a year, or none. He is required to keep no place of business for the public use. He gives no bond and takes no oath . . .

No regular appropriation is made to pay his compensation . . . He is but an agent of the commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties.

*Id.* at 512. Similarly, in 1890, the Court held that a merchant appraiser for customs duties on imports was not an officer of the United States for constitutional purposes because the appraiser was merely an expert selected on a case-by-case basis, who “has no general functions, nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case.” *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890). Moreover, “[h]e has no claim or right to be designated, or to act except as he may be designated . . . His position is without tenure, duration, continuing emolument, or

The Court has continued to use its factor-based analysis to distinguish employees from officers of the United States. In 1991, for example, it decided *Freytag v. Commissioner*,<sup>203</sup> which involved the appointment of special trial judges in the Tax Court pursuant to the Tax Reform Act of 1986.<sup>204</sup> Under that Act, "Congress authorized the Chief Judge of the Tax Court to appoint and assign these special trial judges to hear certain specifically described proceedings . . . ."<sup>205</sup> The Court determined that special trial judges are inferior officers rather than employees on the basis of several factors. First, "[t]he office of special trial judge is 'established by Law,' and the duties, salary, and means of appointment for that office are specified by statute."<sup>206</sup> Second, "special trial judges perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion."<sup>207</sup> Finally, the special trial judges could render final decisions in certain types of tax court proceedings and thus exercised independent authority.<sup>208</sup>

Modern Appointments Clause cases, however, have also connected the Appointments Clause to separation of powers concerns. In *Buckley v. Valeo*,<sup>209</sup> for instance, Congress appointed most members of the Federal Elections Commission under the Federal Election Campaign Act, an option not allowed under the Appointments Clause for officers of the United States. As a result, "if Congress insists upon retaining the

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continuous duties, and he acts only occasionally and temporarily." *Id.* See also *Robb v. Connolly*, 111 U.S. 624, 635 (1884) (holding that a law enforcement officer was not an officer of the United States when "[h]e is not appointed by the United States, and owes no duty to the national government, for a violation of which he may be punished by its tribunals or removed from office").

203. 501 U.S. 868 (1991).

204. See *id.* at 870-71 (citing 26 U.S.C. § 7443A(a), (b) (1988)).

205. *Id.*

206. *Id.* at 881 (citation omitted).

207. *Id.* at 881-82.

208. See *id.* at 882. Because the special trial judges are inferior officers, they have to be appointed in compliance with the Appointments Clause. See *id.* at 882-83. However, the Supreme Court rather easily concluded that the Tax Court is a "Court of Law" for purposes of the Appointments Clause, to which Congress constitutionally can give the power to appoint inferior officers. See *id.* at 884-90.

209. 424 U.S. 1 (1976).

power to appoint, then the members of the Commission may not discharge those many functions of the Commission which can be performed only by 'Officers of the United States,' as that term must be construed within the doctrine of separation of powers."<sup>210</sup> The Appointments Clause does not merely deal in "etiquette or protocol"; instead,

"Officers of the United States" . . . is a term intended to have substantive meaning. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II].<sup>211</sup>

The Commissioners were not mere employees because they were "appointed for a statutory term, [and were] not subject to the control or direction of any other executive, judicial, or legislative authority."<sup>212</sup> Because the Appointments Clause would thus apply if the Commissioners were executive officers, the Court next examined the Commission's powers, which fell into three categories. The Commission's investigative and informational powers were "in the same general category as those powers which Congress might delegate to one of its own committees . . ."<sup>213</sup> However, "[t]he Commission's enforcement power . . . is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress," nor did its "broad administrative powers" function "merely [operate] in aid of congressional authority to legislate . . ."<sup>214</sup> As a result, the Court held that the Commission could not be considered merely a legislative body, and its enforcement functions in particular could be discharged "only by persons who are 'Officers of the United States' within the language of" the Appointments Clause.<sup>215</sup>

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210. *Id.* at 118–19.

211. *Id.* at 125–26.

212. *Id.* at 126 n.162.

213. *Id.* at 137–38 (citing *Kilbourn v. Thompson*, 103 U.S. 168 (1881); *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975)).

214. *Id.* at 138, 140–41.

215. *Id.* at 140.

The *Buckley* Court thus viewed the Appointments Clause as a device to keep Congress from asserting more than its constitutionally proper share of government authority. Moreover, the Court most zealously applied this view of the Appointment Clause's function to federal enforcement powers, upholding the Executive's primacy in enforcing the federal laws. However, because the Commissioners were clearly officers of the United States who had not been appointed in conformity with the Clause, the Court did not address the second issue of what kind of officers the Commissioners were.

This second issue arises because the Appointments Clause creates two categories of officers of the United States—principal officers that the President nominates and the Senate confirms, and inferior officers whose appointment can be vested “in the President alone, in the Courts of Law, or in the Heads of Departments.”<sup>216</sup> In 1988, the Supreme Court discussed the differences between principal and inferior officers in *Morrison v. Olson*,<sup>217</sup> in which the Court considered the constitutionality of the Special Court's appointment of independent counsel pursuant to the Ethics in Government Act of 1978.<sup>218</sup> Plaintiffs argued that an independent counsel was a principal officer of the United States that had to be appointed by the President with the advice and consent of the Senate. The Court determined, however, that the independent counsel “clearly falls on the ‘inferior officer’ side of that line.”<sup>219</sup>

Declining to establish an exact test for distinguishing principal and inferior officers, the Court relied on several factors to reach its conclusion. First, the independent counsel “is subject to removal by a higher Executive Branch official.”<sup>220</sup> Second, the independent counsel “is empowered by the Act to perform only certain, limited duties.”<sup>221</sup> Third, the independent coun-

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216. U.S. CONST., art. II, § 2, cl. 2.

217. 487 U.S. 654 (1988).

218. 28 U.S.C. §§ 49, 591–99 (1994).

219. *Morrison*, 487 U.S. at 671.

220. *Id.*

221. *Id.* at 671–72 (citing 28 U.S.C. § 594(f) (1982 ed., Supp. V 1987)). The Court considered the independent counsel's duties limited because “[a]n independent counsel's role is restricted primarily to investigation and, if appropriate, prosecution for certain federal crimes” and because the counsel's “grant of authority does not include any authority to formulate policy for the Government or the Executive Branch, nor does it give [the independent counsel] any adminis-

sel's "office is limited in jurisdiction."<sup>222</sup> Finally, the independent counsel's "office is limited in tenure": "[T]he office of independent counsel is 'temporary' in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated . . . ."<sup>223</sup> The Court emphasized that, "[u]nlike other prosecutors, [the independent counsel] has no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for and authorized by the Special Division to undertake."<sup>224</sup>

The Court's most recent major discussion of the Appointments Clause, *Edmonds v. United States*,<sup>225</sup> clarifies *Buckley* and *Morrison* and establishes a test for determining whether an officer of the United States is a principal or inferior officer. *Edmonds* addressed the constitutional status of judges on the Coast Guard Court of Criminal Appeals, who are assigned their duties—hearing appeals from the Coast Guard's courts martial, subject to further review—by the Judge Advocate General of the Coast Guard.<sup>226</sup> Convicted members of the Coast Guard challenged their convictions on the grounds that these judges were improperly-appointed *principal* officers of the United States.<sup>227</sup>

Citing to *Buckley*, the Court first stressed that "the Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme."<sup>228</sup> Noting that "[o]ur cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes," the Court reviewed the *Morrison* factors but emphasized that "*Morrison* did not purport to set forth a definitive test for whether an office is 'inferior' under the Appoint-

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trative duties outside of those necessary to operate her office"; instead, "[t]he Act specifically provides that in policy matters [the independent counsel] is to comply to the extent possible with the policies of the Department [of Justice]." *Id.*

222. *Id.* at 672.

223. *Id.*

224. *Id.*

225. 520 U.S. 651 (1997).

226. *See id.* at 653–54.

227. *See id.* at 655–56.

228. *Id.* at 659 (citing *Buckley v. Valeo*, 424 U.S. 1, 125 (1976)).

ments Clause.”<sup>229</sup> Furthermore, while the Court agreed with the petitioners “that the military appellate judges are charged with exercising significant authority on behalf of the United States,” it also emphasized that “[t]he exercise of ‘significant authority pursuant to the laws of the United States’ marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather, as we said in *Buckley*, the line between officer and nonofficer.”<sup>230</sup>

The Court concluded that the difference between principal and inferior officers was supervision: “Generally speaking, the term ‘inferior officer’ connotes a relationship with some higher ranking officer or officers below the President: Whether one is an ‘inferior’ officer depends on whether he [*sic*] has a superior.”<sup>231</sup> However, “to preserve political accountability relative to important Government assignments,” a special kind of inferior/superior relationship is required: “inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”<sup>232</sup>

Applying this test, the Court concluded that the military appellate judges were inferior officers because the Judge Advocate General controlled and supervised them. “What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.”<sup>233</sup>

## 2. The Appointments Clause and Environmental Citizen Suits

The Appointments Clause cases leave issues unresolved that could become important in Article II-based challenges to the environmental citizen suit provisions. For example, *Edmonds* clearly puts principal and inferior officers into a hierarchical relationship, and *Morrison*, *Freytag*, and the Court’s earlier decisions strongly suggest—but do not explicitly hold—that the hierarchy is a three-fold one. If so, then to be an officer of the United States who exercises “significant authority

229. *Id.* at 661.

230. *Id.* at 662 (citing *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

231. *Id.*

232. *Id.* at 663.

233. *Id.* at 665.

of the United States who exercises "significant authority pursuant to the laws of the United States," a person must first actually be working for the federal government as its employee or agent.

However, because the Court has largely relied on factors rather than bright-line tests, it may not be willing to exempt citizen enforcement provisions from an Appointments Clause analysis on the basis of a lack of federal employment. Like the special trial judges in *Freytag*, the position of "environmental citizen suit plaintiff" is established by law, at least in the sense that federal statutes make those lawsuits possible. Moreover, citizen plaintiffs exercise absolute discretion and independent authority in determining whether to give notice of their intent to sue—although their ability to successfully *file* the lawsuit depends both on their compliance with numerous statutory and regulatory procedural requirements and on governmental enforcement responses to the notice. Conversely, it is nearly impossible to view citizen suit plaintiffs as "employees" of the United States: they receive no salary or other payment for their work; they have no "job"; they use none of the government's resources to bring their suits except the availability of the federal court system; and they are not supervised by any federal employee or officer. A better fit, perhaps, is to characterize citizen suit plaintiffs as "agents" of the United States, particularly when citizen plaintiffs seek civil penalties that benefit the U.S. Treasury—but agency implies a conferral of authority to a *particular* person, whereas citizen suit plaintiffs in specific actions pick themselves.

The Appointments Clause challenges to environmental citizen suits provisions to date, however, have produced judicial opinions that fail to address these fundamental issues. Instead, the district courts have upheld those provisions by focusing primarily on the lack of congressional involvement in citizen suits. For example, in 1987, a Clean Water Act citizen suit defendant focused on the Appointments Clause to argue that enforcement of federal law was a core executive function that could only be performed by officers of the United States appointed by the President.<sup>234</sup> The Maryland District Court,

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234. See *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620 (D. Md. 1987).

however, found the defendant's argument "fundamentally flawed" because environmental citizen suits involve only a relationship between the Executive Branch and private persons.<sup>235</sup> Addressing the defendant's reliance on *Buckley v. Valeo*, for example, the court emphasized that "[t]hroughout its opinion, the Supreme Court stressed the fact that the separation of powers doctrine prohibited one branch from intruding into the sphere of another."<sup>236</sup> "The opinion does not stand for the proposition, as defendant would have this Court believe, that private persons may not enforce any federal laws simply because they are not Officers of the United States appointed in accordance with Article II of the Constitution."<sup>237</sup> *Bowsher* was similarly unhelpful to the citizen suit defendant, because it stood for the rule that "[e]xecutive powers may not be entrusted to an officer who is subservient to or may be controlled by Congress, as was the Comptroller General. Private litigants, however, are hardly controlled by Congress."<sup>238</sup>

The Northern District of Illinois had a similar response in addressing another Appointments Clause challenge to Clean Water Act citizen suits. It noted that the relevant question was not how citizen plaintiffs were "appointed" but rather "whether arguably executive functions, such as bringing a water pollution enforcement action, can be given only to duly appointed members of the Executive Branch or whether private citizens may also be allowed to bring such actions."<sup>239</sup> Like the Maryland District Court, the Northern District of Illinois viewed the separation of powers doctrine as applying only between branches of government.<sup>240</sup>

In blithely deciding that the Appointments Clause and the separation of powers doctrine do not apply to private citizens, however, these courts ignored the fact that *Congress* created citizen suit authority. Thus, *Congress* might have, inconsistently with both general separation of powers principles and the Appointments Clause as viewed in *Buckley*, reduced or

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235. *See id.* at 623.

236. *Id.* at 624.

237. *Id.*

238. *Id.* (citing *Bowsher v. Synar*, 478 U.S. 714, 734 (1986)).

239. *Natural Resources Defense Council v. Outboard Marine Corp.*, 692 F. Supp. 801, 815 (N.D. Ill. 1988).

240. *See id.* at 815-16.

impermissibly interfered with the Executive Branch's constitutional role of executing the law by displacing the power to "appoint" the persons who can "enforce" federal law. These courts thus did not adequately articulate *why* separation of powers was not a relevant concern—that is, why citizen suits are not "execution" of the law in a constitutionally relevant sense and hence cannot truly interfere with the Executive Branch. Courts facing similar challenges to the False Claims Act (FCA), however, could not so easily duck the constitutional analysis, providing a better framework for analyzing future separation of powers challenges to the environmental citizen suit provisions.

### III. SEPARATION OF POWERS AND THE FALSE CLAIMS ACT

#### A. *Qui Tam Lawsuits and the False Claim Act's Qui Tam Provisions*

Environmental citizen suits are not the only federal actions where private citizens "enforce" federal law. Importantly, the Supreme Court has explicitly compared environmental citizen suits to *qui tam* enforcement actions.<sup>241</sup> Moreover, as separation of powers challenges to environmental citizen suit provisions waned, similar challenges to the FCA's *qui tam* provisions gained force, resulting in a number of not only district court but also circuit court decisions—and a split of circuit court authority. These results are instructive for future separation of powers litigation involving citizen suits, because the *qui tam* separation of powers litigation has highlighted important constitutional differences between the *qui tam* and citizen suit provisions.

"*Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf, as well as his own.'<sup>242</sup> *Qui tam* provisions allow private individuals—the *qui tam* "relators"—to enforce federal law in the name of the gov-

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241. See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 129 (1998) (Stevens, J., concurring); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572–73 (1992).

242. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858, 1860 n.1 (2000).

ernment. Such provisions have a long history in English and American law,<sup>243</sup> and at least four federal statutes currently include *qui tam* provisions.<sup>244</sup> In general, the Supreme Court has upheld these federal statutes that award citizen plaintiffs all or part of a monetary penalty in return for bringing an action against someone who has violated federal law, even though the *qui tam* relator has no other interest in the action.<sup>245</sup>

The most commonly used *qui tam* provision is that in the FCA.<sup>246</sup> Enacted in 1863, the FCA "imposes civil liability upon '[a]ny person' who . . . 'knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval.'"<sup>247</sup> The Attorney General has the primary authority for bringing civil enforcement actions against persons who violate the Act,<sup>248</sup> but the FCA also allows private individuals to bring civil actions against violators "for the person and for the United States Government . . . in the name of the Government."<sup>249</sup> Once initiated, such *qui tam* actions "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."<sup>250</sup> FCA *qui tam*

243. See *id.* at 1863–65 (discussing the history of *qui tam* provisions in English and American law).

244. See *id.* at 1860 n.1 (discussing the *qui tam* provisions in 25 U.S.C. §§ 81, 201 (1994), and 35 U.S.C. § 292(b) (1994)); FCA, 31 U.S.C. § 3730(b)(1) (1994) (allowing *qui tam* actions against claimants who have defrauded the federal government).

245. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 (1943) (specifically upholding the False Claims Act's *qui tam* provision, noting that "[q]ui tam suits have been frequently permitted by legislative action, and have not been without defense by the courts"); *Marvin v. Trout*, 199 U.S. 212 (1905). In this case the court noted that

[s]tatutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by the statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our government. The right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer.

*Id.* at 225.

246. 31 U.S.C. §§ 3729–3733 (1994).

247. *Vermont Agency of Natural Resources*, 120 S. Ct. at 1860 (quoting 31 U.S.C. § 3729(a) (1994)).

248. See 31 U.S.C. § 3730(a) (1994).

249. 31 U.S.C. § 3730(b)(1) (1994).

250. *Id.*

plaintiffs must serve a copy of the complaint and the material evidence on the federal government, and the complaint remains *in camera* for sixty days.<sup>251</sup> “The Government may elect to intervene and proceed with the action within [sixty] days after it receives both the complaint and the material evidence and information.”<sup>252</sup> The government can also request extensions of the *in camera* period,<sup>253</sup> but no one other than the federal government “may intervene or bring a related action based on the facts underlying the pending action.”<sup>254</sup>

If the government elects to intervene during the initial review period, “it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action.”<sup>255</sup> However, the *qui tam* relator “shall have the right to continue as a party to the action,” although subject to several limitations.<sup>256</sup> “The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.”<sup>257</sup> The government may also “settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances.”<sup>258</sup> Finally, both the government and the court can limit the *qui tam* relator’s participation in the litigation if such participation would, respectively, “interfere with or unduly delay the Government’s prosecution of the case”<sup>259</sup> or “be for purposes of harassment or would cause the defendant undue burden or unnecessary expense.”<sup>260</sup> However, if the lawsuit is successful, the *qui tam* relator receives fifteen to twenty-five

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251. *See id.* § 3730(b)(2).

252. *Id.*

253. *See id.* § 3730(b)(3).

254. *Id.* § 3730(b)(5).

255. *Id.* § 3730(c)(1).

256. *Id.*

257. *Id.* § 3730(c)(2)(A).

258. *Id.* § 3730(c)(2)(B).

259. *Id.* § 3730(c)(2)(C).

260. *Id.* § 3730(c)(2)(D).

percent of the penalties assessed or settlement amount, plus costs, expenses, and attorney fees.<sup>261</sup>

If the federal government elects not to intervene during the initial review period, it must notify the court, and the *qui tam* relator "shall have the right to conduct the action."<sup>262</sup> Nevertheless, the government can request copies of all pleadings and all deposition transcripts and can intervene later "upon a showing of good cause."<sup>263</sup> Successful *qui tam* relators in this kind of suit receive twenty-five to thirty percent of the penalties or settlement, plus expenses, costs, and attorney fees.<sup>264</sup> However, if the defendant prevails, the court may only award the defendant its costs and attorney fees if "the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."<sup>265</sup>

In either situation, the government can have the court stay discovery for sixty days if the government shows "that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts."<sup>266</sup> In addition, "the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty."<sup>267</sup> The final results of that other proceeding become binding on the *qui tam* action;<sup>268</sup> however, the *qui tam* relator "shall have the same rights in such proceeding as such person would have had if the action continued under this section."<sup>269</sup> Finally, no *qui tam* actions are allowed if they are: (1) "based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding

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261. *See id.* § 3730(d)(1).

262. *Id.* § 3730(b)(4)(B), (c)(3).

263. *Id.* § 3730(c)(3).

264. *See id.* § 3730(d)(2).

265. *Id.* § 3730(d)(4).

266. *Id.* § 3730(c)(4). The stay can be extended if the government shows that it "has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings." *Id.*

267. *Id.* § 3730(c)(5).

268. *See id.*

269. *Id.*

in which the Government is already a party;<sup>270</sup> or (2) based on public disclosures of information, “unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.”<sup>271</sup>

Like the environmental citizen suit provisions, therefore, the FCA’s *qui tam* provisions allow private citizens to sue regarding violations of federal law and to seek civil penalties payable to the federal government—although *qui tam* relators directly share in those civil penalties, while environmental citizen suit plaintiffs do not. Furthermore, like the environmental citizen suit provisions, the FCA’s *qui tam* provisions have a rather complex relationship to federal government enforcement of the federal statute—but *qui tam* relators actually bring suit in the government’s name, for themselves and for the government, while environmental citizen suit plaintiffs bring suit only in their own names, and only for themselves. Finally, like the environmental citizen suit provisions, the FCA’s *qui tam* provisions have been subject in the last decade to a series of constitutional standing and separation of powers challenges. However, unlike those lawsuits challenging the constitutionality of environmental citizen suits, courts considering the constitutionality of the FCA’s *qui tam* provisions have been forced to face the separation of powers issue head on. The results of those lawsuits indicate that there are some important constitutional distinctions between the two kinds of actions.

### B. False Claims Act Qui Tam Actions and Standing

After over a decade of standing challenges against FCA *qui tam* litigants, the Supreme Court recently determined that relators do have Article III standing to bring their claims, even though *qui tam* relators generally have no direct connection to or injury from the fraud they enforce against. Moreover, the basis for the Supreme Court’s decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*<sup>272</sup> indicates that *qui tam* provisions differ significantly from environmental

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270. *Id.* § 3730(e)(3).

271. *Id.* § 3730(e)(4)(A).

272. 120 S. Ct. 1858 (2000).

citizen suit provisions with regard to separation of powers concerns.

In *Vermont Agency*, the *qui tam* relator, Jonathan Stevens, a former employee of the Vermont Agency of Natural Resources, filed an FCA *qui tam* action against that agency, "alleging that it had submitted false claims to the Environmental Protection Agency (EPA) in connection with various federal grant programs administered by the EPA."<sup>273</sup> Against the Vermont Agency's standing challenge, Stevens argued *not* that he had personally suffered an injury from the Agency's wrongdoing, but instead "that he [was] suing to remedy an injury in fact suffered by the United States."<sup>274</sup> His challenge required the Court to decide the validity of lower courts' "assignment" theory of standing—that is, the argument that one entity that had suffered an injury-in-fact can assign its standing to someone unrelated to the problem.

The Court agreed that if Stevens's allegations were true, the United States had indeed suffered an injury in fact, and in two senses: "both the injury to its sovereignty arising from violation of its laws (which suffices to support a criminal lawsuit by the Government) and the proprietary injury resulting from the alleged fraud."<sup>275</sup> It then confirmed that Stevens had suffered no personal injury sufficient to give him direct standing to bring the action. First, the mere existence of the *qui tam* cause of action was insufficient to confer standing on the relator as an *agent* of the government, because "the statute gives the relator himself an interest *in the lawsuit*, and not merely a right to retain a fee out of the recovery."<sup>276</sup>

Second, the relator's bounty was insufficient to confer direct standing. Because of the bounty, the Court conceded, "a *qui tam* relator has 'a concrete private interest in the outcome of [the] suit.'"<sup>277</sup> Nevertheless, the Court compared this inter-

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273. *Id.* at 1861. Specifically, Stevens alleged that the Agency "had overstated the amount of time spent by its employees on the federally funded projects, thereby inducing the Government to disburse more grant money than [the Agency] was entitled to receive." *Id.*

274. *Id.* at 1862.

275. *Id.*

276. *Id.* (citations omitted).

277. *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992)) (alteration in original).

est to a bet on the outcome of the case, emphasizing that “[a]n interest unrelated to injury in fact is insufficient to give a plaintiff standing.”<sup>278</sup> Instead, “[t]he interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. A *qui tam* relator has suffered no such invasion—indeed, the ‘right’ he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails.”<sup>279</sup>

Stevens, therefore, had no concrete and particularized injury of his own. Nevertheless, the Court found that *qui tam* relators could have standing on the basis of “the doctrine that the assignee of a claim has standing to assert the injury-in-fact suffered by the assignor.”<sup>280</sup> As a result, “the United States’ injury in fact suffices to confer standing on respondent Stevens.”<sup>281</sup> Unlike environmental citizen suit plaintiffs, therefore, *qui tam* relators rely entirely on the federal government’s injury for their standing in federal court.

In addition to validating the assignment theory of injury-in-fact, the *Vermont Agency* Court noted that the federal government can suffer two kinds of injuries from FCA violations. First, a violation of federal law can injure the federal government’s sovereignty. The Court has otherwise described this first type of harm as injuring the general public interest in seeing the law enforced. Second, deriving from the fact that the government has a direct financial interest in the actions that constitute the violation, the federal government can suffer proprietary injuries.

Violations of federal environmental laws, in contrast, always injure the government’s sovereignty but rarely injure its property. Except where federal lands are directly involved, it is difficult to characterize most of the general pollution-regulating statutes as protecting the federal government’s property in the same way that the FCA protects the govern-

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278. *Id.* (citing *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982); *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972)).

279. *Id.* (citation omitted).

280. *Id.* at 1863.

281. *Id.* However, although the *qui tam* plaintiff had standing, his False Claims Act suit still had to be dismissed because the Court went on to hold that the False Claims Act does not apply to states. *See id.* at 1868–71.

ment fisc. Even when federal lands happen to be involved in a particular case, they are still not the *focus* of much federal environmental law.<sup>282</sup> This distinction, combined with the fact that environmental citizen suit plaintiffs *cannot* rely on assignment of government injury but must show individual injury-in-fact, indicates that, unlike in FCA *qui tam* actions, where the government and the relator seek to redress the *same* injuries to the government, environmental citizen suit plaintiffs do, and in fact must, seek to redress injuries *different from* the injury to the sovereign when environmental laws are violated.

C. *The False Claims Act and Article-II-Based Separation of Powers Challenges*

The *Vermont Agency* Court emphasized that it “express[ed] no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of Section 2 and the ‘[T]ake Care’ Clause of Section 3.”<sup>283</sup> In leaving the Article II issue for another day, the Court left intact a split among the circuits as to whether the FCA’s *qui tam* provisions violate separation of powers principles with respect to the Executive Branch.

In 1993, in *United States ex rel. Kelly v. Boeing Company*,<sup>284</sup> the Ninth Circuit issued what has become the leading

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282. Indeed, those statutes that do focus directly on federal lands, such as the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–531 (1994), which governs national forests, or the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1782 (1994), which governs public lands administered by the Bureau of Land Management, are often classified separately from the more general, pollution-oriented environmental statutes as “public lands law.”

283. *Vermont Agency*, 120 S. Ct. at 1865 n.8. Nevertheless, Justice Stevens, joined by Justice Souter, suggested in his dissent that the historical evidence regarding *qui tam* statutes, “together with the evidence that private prosecutions were commonplace in the 19th century, is also sufficient to resolve the Article II question . . .” *Id.* at 1878 (citation omitted).

For more extensive discussions of whether the FCA’s *qui tam* provisions are constitutional, see generally Sean Hamer, *Lincoln’s Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, 6 KAN. J.L. & PUB. POL’Y 89 (1997); James T. Blanch, Note, *The Constitutionality of the False Claims Act’s Qui Tam Provision*, 16 HARV. J.L. & PUB. POL’Y 701 (1993); Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (Nov. 1989).

284. 9 F.3d 743 (9th Cir. 1993).

circuit court opinion for the majority of courts that have upheld the FCA's *qui tam* provisions in the face of Article II separation of powers challenges.<sup>285</sup> Defendant Boeing challenged the *qui tam* provisions under both the "Take Care" and Appointments Clauses.

Addressing the "Take Care" Clause first, the Ninth Circuit noted that *qui tam* provisions are "anomalous with respect to normal divisions of authority" but emphasized that "the question is whether the Constitution *prohibits* use of this mechanism of civil law enforcement."<sup>286</sup> Noting that "[t]his case does not involve the type of separation of powers problem posed by one branch of government arrogating power at the expense of another,"<sup>287</sup> it determined that the main issue was "the extent to which the legislative branch may, while remaining within constitutional boundaries, diminish the executive branch's authority without taking any of that authority as its own."<sup>288</sup>

Recognizing that the Supreme Court "has never considered a situation where Congress has sought to disperse some quantum of executive authority amongst the general public,"<sup>289</sup> the Ninth Circuit determined that "the proper separation of powers inquiry is whether Congress has 'impermissibly undermined' the role of [another] branch"—that is, "whether the *qui tam*

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285. See, e.g., *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, (6th Cir. 1994); *United States ex rel. Gublo v. Novacare, Inc.*, 62 F. Supp. 2d 347, 353–54 (D. Mass. 1999); *United States ex rel. Chandler v. Hektoen Inst. for Med. Research*, 35 F. Supp. 2d 1078, 1081–82 (N.D. Ill. 1999); *United States ex rel. Amin v. George Washington Univ.*, 26 F. Supp. 2d 162, 168–70 (D.D.C. 1998); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1044–46 (S.D. Tex. 1998); *United States ex rel. Fallon v. Accudyne Corp.*, 921 F. Supp. 611, 623 (W.D. Wis. 1995); *United States ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830, 836–38 (N.D. Ill. 1993); *United States ex rel. Burch v. Piqua Eng'g, Inc.*, 803 F. Supp. 115, 119–21 (S.D. Ohio 1992); *United States Dep't Hous. & Urban Dev. ex rel. Givler v. Smith*, 775 F. Supp. 172, 176–79 (E.D. Penn. 1991); *United States ex rel. Truong v. Northrop Corp.*, 728 F. Supp. 615, 620–24 (C.D. Cal. 1989); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 722 F. Supp. 607, 610–13 (N.D. Cal. 1989); *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1086–96 (C.D. Cal. 1989).

286. *Kelly*, 9 F.3d at 749.

287. *Id.* at 750 (citing *Mistretta v. United States*, 488 U.S. 361, 382 (1989); *Morrison v. Olson*, 487 U.S. 654, 693 (1988); *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991)).

288. *Id.*

289. *Id.*

provisions 'disrupt[] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.'<sup>290</sup>

Regarding *Morrison v. Olson*<sup>291</sup> as the most relevant Supreme Court precedent, the Ninth Circuit considered "the degree to which Congress may assign prosecutorial powers to persons not under the direct control of the Executive Branch."<sup>292</sup> Boeing argued first "that *only* the Executive Branch has the power to enforce laws, and therefore to prosecute violations of the law," but it was clear to the Ninth Circuit "that no such absolute rule exists."<sup>293</sup>

Having thus concluded that Congress could, constitutionally, assign some enforcement power to private citizens, the Ninth Circuit next examined whether the FCA's *qui tam* provisions encroached too far on the Executive powers. Boeing argued that in *Morrison* the Supreme Court had created a multi-part test and that, in order to determine whether the *qui tam* provisions were constitutional, the court had to compare them point-by-point with the Ethics in Government Act's independent counsel provisions.<sup>294</sup> The *qui tam* relator, on the other hand, argued that *Morrison* created a functional approach that required the court to view the *qui tam* provisions as a whole and to assess their total level of encroachment on the Executive Branch.<sup>295</sup> The Ninth Circuit adopted the latter approach,<sup>296</sup>

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290. *Id.* at 751 (quoting *Morrison v. Olson*, 487 U.S. 654, 695 (1988)).

291. 487 U.S. 654 (1988).

292. *Kelly*, 9 F.3d at 751.

293. *Id.* In rejecting this argument, the Ninth Circuit relied heavily on the Supreme Court's statement in *Morrison v. Olson* that "[t]here is no real dispute that the functions performed by the independent counsel are "executive" in the sense that they are law enforcement functions that *typically* have been undertaken by officials within the Executive Branch." *Id.* (quoting *Morrison v. Olson*, 487 U.S. 654, 691 (1988)). Focusing on the word "typically," the Ninth Circuit concluded that "[u]se of the word 'typically' . . . in light of the Court's ultimate conclusion upholding the independent counsel provisions, must mean that prosecutorial functions need not *always* be undertaken by Executive Branch officials." *Kelly*, 9 F.3d at 751. The Supreme Court's more recent decision in *Edmonds v. United States* indicates that the Ninth Circuit's interpretation was the correct one. See discussion *supra* Part II.D.1; see also Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069, 1070 (1990) (concluding that the Framers did not intend the Executive Branch to be the exclusive source of law enforcement).

294. See *Kelly*, 9 F.3d at 752.

295. See *id.*

and it began its comparison by noting that “[t]he powers of an independent counsel are quite broad” while “[t]he powers of a *qui tam* relator vary depending on whether and when the government takes over the *qui tam* action.”<sup>297</sup> Reasoning that the only time that a *qui tam* relator enjoys broad enforcement control over the action is when the government never intervenes, the Ninth Circuit concluded that “an independent counsel exercises broader investigative authority, prosecutorial discretion, and authority to use the resources of the U.S. government than does a *qui tam* relator.”<sup>298</sup>

In addition, although the independent counsel provisions provided several mechanisms through “which the Executive Branch can control an independent counsel’s exercise” of the independent counsel’s powers, “the Attorney General’s unreviewable discretion to request appointment of an independent counsel is the only unconditional means of executive control which the Ethics in Government Act provides.”<sup>299</sup> In comparison, “[u]nder the FCA, the Executive Branch can control a *qui tam* relator’s exercise of prosecutorial powers in several ways”—although none of those controls allowed the Executive to prevent initiation of the action.<sup>300</sup>

This last distinction became the focus of the Ninth Circuit’s decision because Boeing argued that “the power to initiate litigation is an important and exclusively executive function.”<sup>301</sup> The Ninth Circuit, though, refused to read Supreme Court precedent as creating “an absolute rule that only executive officers may initiate any type of litigation in the name of the United States”<sup>302</sup> or to view absolute Executive control over

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296. *See id.* The Ninth Circuit relied on the fact that the Supreme Court had twice stated in *Morrison* “that the proper inquiry is whether the Act ‘taken as a whole’ violates the principle of separation of powers by unduly interfering with the President’s constitutional role.” *Id.* (citing *Morrison v. Olson*, 487 U.S. 654, 685 (1988)).

297. *Id.*

298. *Id.* at 752–53.

299. *Id.* at 753.

300. *Id.* at 753–54.

301. *Id.* at 754.

302. *Id.* at 754 n.13.

the initiation of lawsuits as a *per se* constitutional requirement.<sup>303</sup>

Given the amount of time the Supreme Court spent on the Executive's power to remove enforcement officers in *Morrison*, the Ninth Circuit also "considered whether the lack of a provision permitting the government to 'remove' a relator invalidates the *qui tam* provisions."<sup>304</sup> "However, the concept of removal does not make much sense in the *qui tam* context, in which there is no 'office' from which to remove the relator and subsequently fill with someone else."<sup>305</sup> Instead, "[t]he only practicable way to 'remove' a relator is to end the *qui tam* litigation—and this the government has the power to do."<sup>306</sup>

The Ninth Circuit's treatment of removal foreshadowed its Appointments Clause analysis. Given that Congress had invested enforcement authority in private citizens, the Appointments Clause required the Ninth Circuit "to inquire whether completely *unappointed qui tam* relators wield so much governmental power that they *must* be appointed in conformity with the Appointments Clause."<sup>307</sup> The court used the "significant authority" test from *Buckley v. Valeo*,<sup>308</sup> but having already concluded that the Executive Branch retains sufficient control over *qui tam* litigation to avoid separation of powers problems, the Ninth Circuit found it "impossible to characterize the authority exercised by relators as so 'significant' that it must only be exercised by officers appointed in the manner in which Article II, Section 2, cl. 2 prescribes."<sup>309</sup>

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303. See *id.* at 754. Consistently with its functional approach, the Ninth Circuit reasoned:

Clearly, the government has greater authority to prevent the initiation of prosecution by an independent counsel than by a *qui tam* relator. But once prosecution has been initiated, the government has greater authority to limit the conduct of the prosecutor and ultimately *end* the litigation in a *qui tam* action than it does in an independent counsel's action. We conclude that because the Executive Branch has power, albeit somewhat qualified, to end *qui tam* litigation, it is not significant that it cannot prevent its start.

*Id.*

304. *Id.* at 755.

305. *Id.*

306. *Id.*

307. *Id.* at 757.

308. See *id.* at 758.

309. *Id.*

Nor would the Ninth Circuit construe *Buckley* “to state an unequivocal rule that only officers may exercise any prosecutorial authority in the name of the United States. Instead, the Court determined that *Buckley*, properly construed, directs only that persons who have ‘primary responsibility’ and ‘significant authority’ to enforce a law through litigation must be considered officers.”<sup>310</sup> Because *qui tam* relators prosecute their cases using their own resources and have enforcement authority only for the case they bring, “the *qui tam* scheme does not threaten the interest in preventing the exercise of unchecked or unbalanced government power which underlies the Appointments Clause.”<sup>311</sup> Thus, the *qui tam* relator “does not have ‘primary responsibility’ within the meaning of *Buckley* for enforcing the FCA. Nor does a relator exercise authority so ‘significant’ that the Constitution only permits an officer of the United States to exercise it.”<sup>312</sup> The FCA’s *qui tam* provisions were therefore deemed constitutional.

Six years later, the Fifth Circuit disagreed, holding in *Riley v. St. Luke’s Episcopal Hospital*<sup>313</sup> that the FCA’s *qui tam* provisions violate separation of powers principles and the “Take Care” Clause when the government does not intervene in the relator’s suit. The Fifth Circuit emphasized that “[t]he *qui tam* provisions indicate that the United States is the real party in interest, with the relator functioning as the government’s attorney.”<sup>314</sup> Given this fact, the court discounted the historical pedigree of *qui tam* provisions.<sup>315</sup>

Looking at the “Take Care” Clause, the Fifth Circuit agreed with the Ninth Circuit that the relevant issue for the FCA was not whether Congress had usurped Executive powers to its own aggrandizement, but instead whether it had “impermissibly undermine[d]” the Executive Branch’s author-

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310. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

311. *Id.*

312. *Id.* at 759.

313. 196 F.3d 514 (5th Cir. 1999).

314. *Id.* at 517.

315. *See id.* at 518. The Fifth Circuit noted that most early provisions were simply bounty provisions “that granted informers a reward but no right to sue on behalf of the government.” *Id.* at 519. Moreover, “[o]f those *qui tam* statutes that did permit private actions, most redressed injuries suffered by private individuals—not by the government exclusively.” *Id.*

ity to execute the law.<sup>316</sup> “The ‘Take Care’ Clause gives the Executive the power to enforce the laws, and such power includes the authority ‘to investigate and litigate offenses against the United States.’”<sup>317</sup> Moreover, “the [Supreme] Court [has] suggested that vesting federal law enforcement authority in officials who are not under the meaningful control of the President violates the ‘Take Care’ Clause.”<sup>318</sup>

Also like the Ninth, the Fifth Circuit determined that *Morrison v. Olson* was the most relevant Supreme Court precedent.<sup>319</sup> However, it viewed the independent counsel provisions that the *Morrison* Court upheld as “the outer limits of congressional encroachment on another branch’s powers and functions”<sup>320</sup> and proceeded to analyze the FCA’s *qui tam* provisions in that light. It conducted its analysis in two steps, first analyzing whether the *qui tam* provisions did in fact encroach on Executive Branch authority, then comparing that encroachment to the level allowed in *Morrison*.

In the first step, the Fifth Circuit concluded that the *qui tam* provisions “encroach on two aspects of the Executive’s authority: (1) the discretion to decide whether to prosecute a claim and (2) the control of litigation brought to protect the government’s interests.”<sup>321</sup> Regarding prosecutorial discretion, the Fifth Circuit emphasized that the *qui tam* provisions “permit a private citizen to sue on behalf of the government” even though the Executive Branch may consider a particular suit to be unwise.<sup>322</sup> As such, the *qui tam* provisions “remove[] from the Executive Branch the prosecutorial discretion that is at the heart of the President’s powers to execute the laws.”<sup>323</sup> The Fifth Circuit also emphasized that the Executive cannot freely dismiss a *qui tam* action, cannot freely settle a *qui tam* action, cannot freely restrict the relator’s participation, and cannot remove the relator from the action.<sup>324</sup>

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316. *See id.* at 524 n.29.

317. *Id.* at 524 (citations omitted).

318. *Id.* at 525 (citing *Printz v. United States*, 521 U.S. 898, 936 (1997)).

319. *See id.* at 525.

320. *Id.* at 525 n.32.

321. *Id.* at 525–26.

322. *Id.* at 526.

323. *Id.*

324. *See id.* at 526–27.

In the second step, the Fifth Circuit, unlike the Ninth Circuit, viewed *Morrison* as delineating, if not a four-part test, then at least four important touchstones that a statute must meet to withstand Article II-based separation of powers challenges.<sup>325</sup> “None of these features,” it concluded, “is present in the FCA’s *qui tam* provisions.”<sup>326</sup> The federal government’s lack of control over the initiation of a *qui tam* lawsuit particularly distressed the Fifth Circuit;<sup>327</sup> however, it declined to insist on a point-by-point congruence. Even so, it expressly disagreed with the Ninth Circuit’s view of FCA *qui tam* suits, concluding that “[e]ven taking the *qui tam* provisions ‘as a whole’ and not focusing on any of the particular differences between the provisions and the independent counsel statute, *qui tam* effects a greater degree of encroachment on Executive prerogatives than does the Ethics of Government Act upheld in *Morrison*.”<sup>328</sup> Having found the FCA’s *qui tam* provisions unconstitutional on general separation of powers grounds, the Fifth Circuit did not reach the Appointments Clause argument.<sup>329</sup>

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325. *See id.* at 527–28. The Fifth Circuit, quoting *Morrison*, emphasized that

the *Morrison* Court stressed four features of the Ethics in Government Act that preserved Executive control of prosecutions: “. . . (1) the Attorney General retains the power to remove the counsel for ‘good cause’. . . . (2) No independent counsel may be appointed without a specific request by the Attorney General . . . (3) . . . the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and (4) once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not ‘possible’ to do so.

*Id.* (quoting *Morrison v. Olson*, 487 U.S. 654, 698 (1988)).

326. *Id.* at 528.

327. *See id.* at 528–29. It also emphasized that the independent counsel provisions were “narrowly tailored” to solve a particular and unusual problem—“the perceived conflict of interest when the Attorney General is called on to investigate criminal wrongdoing by his close colleagues in the Executive Branch.” *Id.* at 529. In contrast, “[t]he FCA’s *qui tam* provisions . . . are not aimed at a structural defect within the Executive Branch . . . and are not narrowly tailored to achieve their ends.” *Id.* This difference, the Fifth Circuit determined, led the *Morrison* Court to be “especially forgiving of Executive encroachment.” *Id.*

328. *Id.* at 529.

329. *See id.* at 531. The Fifth Circuit was also unpersuaded by the *qui tam* relator’s argument that Congress had lawfully delegated Executive power to private individuals, concluding both that: (1) Congress, as the Legislative Branch,

The *qui tam* litigation makes it clear that citizen enforcement of federal law can raise serious Article II-based separation of powers concerns. If environmental citizen suit plaintiffs do in fact “enforce” federal law in a manner that interferes with the President’s duty to execute the law, Congress arguably violated the principle of separation of powers and the “Take Care” Clause in enacting the citizen suit provisions. Such federal enforcement authority could also arguably render citizen plaintiffs “officers of the United States” who must be appointed in conformity with the Appointments Clause. Finally, given the Supreme Court’s apparent willingness to hear such challenges, the applicability of the *qui tam* litigation to citizen suit challenges must be carefully considered.

#### IV. PRIVATE ACTIONS OR PUBLIC ENFORCEMENT: WHAT ARE CITIZEN SUITS?

##### A. *Qui Tam v. Citizen Suit: The Constitutional Implications*

Because of the numerous parallels that courts have drawn between *qui tam* and citizen suits, courts and litigants in future separation of powers challenges to environmental citizen suit provisions will undoubtedly be tempted to jump to the *Morrison* and *Buckley* issues that the Ninth and Fifth Circuits’ FCA decisions emphasized: Did *Morrison v. Olson* create a four-point test or a totality approach? Does citizen “enforcement” impermissibly interfere with the Executive Branch’s execution of federal law, particularly when the Executive cannot control the initiation of such actions or remove the citizen plaintiff? Do citizen suit plaintiffs wield such significant enforcement authority that they are officers of the United States who must be appointed in compliance with the Appointments Clause?

An equally natural—and, for courts that get so far in their analyses, completely legitimate—response to the *qui tam* litigation would be to point out the ways in which citizen suits differ from *qui tam* suits and to elaborate upon the policy consid-

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cannot delegate Executive power; and (2) in any case, the alleged delegation failed the intelligible principle test. *See id.* at 530–31.

erations that arise from those differences. For example, it could be worth noting that because citizen suit provisions impose a sixty-day *pre-filing* notice requirement, unlike the FCA's sixty-day *in camera* period *after* filing, federal and state governments can prevent citizens from ever initiating actual lawsuits—although only by initiating and diligently prosecuting enforcement actions of their own. Unlike the FCA, moreover, environmental statutes often give extensive enforcement roles to states as well as a cause of action to private citizens, requiring another level of separation of powers analysis: If Congress violated the separation of powers doctrine by allowing citizens to file civil actions against persons who violate environmental laws, how much more thoroughly has it intruded upon Executive power by giving whole-scale enforcement authority—including the power to issue permits, the power to bring administrative and criminal enforcement actions, and the power to file civil suits—to the states? Finally, environmental citizen suit provisions, unlike the FCA, almost always allow citizens to sue *federal agencies* as well as other private entities, and of course administrative agencies are agents of the Chief Executive. While not “enforcement” in the same sense that pursuit of private violators is, citizen suits against the government certainly “interfere” with the Executive’s self-supervision of its execution of the laws.<sup>330</sup>

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330. If courts go this far, then the constitutionality of the federal Administrative Procedure Act’s (APA’s) judicial review provisions will also be in question, because such provisions allow private citizens to challenge federal agency actions in federal court. See 5 U.S.C. §§ 701–706 (1994).

At least two commentators have focused on citizen suits against the federal government itself to formulate arguments that citizen suits do not violate the “Take Care” Clause. The gist of these arguments is that in bringing suits to compel federal agencies to implement the law, citizens do not interfere with the Executive’s power under the “Take Care” Clause, but rather advance the Executive’s duty to enforce the law as written. See, e.g., Sunstein, *supra* note 14, arguing that:

the Take Care Clause confers a duty insofar as it imposes on the President both a responsibility to be faithful to law and an obligation to enforce the law as it has been enacted, rather than as he would have wished it to be. It is for this reason that the standard administrative law case raises no issue under the Take Care Clause . . . .

*Id.* at 212–13. See also, e.g., George Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 ENVTL. L. REP. 10028, 10031 (1999) arguing that, “to assert that the President’s enforcement discretion cannot be constrained by granting citizens authority to sue is effectively to grant the

If such interference violates separation of powers, however, it is difficult to see how any citizen participation in public law could be constitutional. The differences between the FCA's *qui tam* provisions and environmental citizen suit provisions thus suggest that resolution of Article II-based separation of powers challenges against the latter requires a far broader policy perspective than has yet been seen in the *qui tam* litigation. This more inclusive perspective of American law should encompass not only the tripartite structure of the federal government but also principles of federalism between the federal and state governments—including the constitutional principle that the federal government *as a whole* is a government of limited powers—and private citizens' participation in a representative democracy.<sup>331</sup>

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President a wholly unchecked authority to dispense with laws—an authority that the Framers never thought the President had.”

This argument works well to validate the constitutionality of citizen suits against the government in situations where the government has overtly neglected or refused to implement and enforce federal law on a large scale. For example, Oliver Houck has detailed the vital role that citizen suits played in forcing both the federal and state governments to begin implementing the TMDL (total maximum daily load) requirements for impaired waterways under section 303(d) of the Clean Water Act. See OLIVER A. HOUCK, *THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION* 49–56 (1999).

The argument could also be extended to citizen suits against individual violators on the ground that federal law demands absolute compliance by all regulated entities at all times. However, the Executive's lack of discretion to ignore the mandates of federal law at a programmatic level does not eliminate the prosecutorial discretion that operates on a polluter-by-polluter basis. Not all environmental violations are equally serious, a fact Congress has recognized by giving federal and state agencies administrative and criminal enforcement powers as well as the ability to bring civil lawsuits. Whole-scale citizen enforcement against any and all violators through civil actions in federal court thus could interfere with the Executive's prosecutorial discretion and undermine, rather than promote, “faithful” execution of the laws.

331. Jody Freeman has recently argued that the private role in government needs to be thoroughly re-evaluated, and that private actors enhance, rather than detract from, the administration of federal law.

A careful inquiry into the private role in governance reveals not only its pervasiveness, but also the extent to which it operates symbiotically with public authority. That is, the relationship between public and private actors in administrative law cannot properly be understood in zero-sum terms, as if augmenting one necessarily depletes the other.

Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000).

In actually *applying* the separation of powers doctrine, however, the most important distinction between environmental citizen suits and *qui tam* litigation is the type of injury that the citizen plaintiffs seek to redress.

*B. The Public Interest, Private Rights, and Standing*

When defendants level separation of powers challenges against environmental citizen suit provisions, the first step in the Fifth Circuit's two-step analysis cannot be skipped: Do environmental citizen suits encroach on Executive authority? To answer that question, we must return to the question with which we began: What *are* environmental citizen suits?

As has been discussed, in contexts other than separation of powers, both Congress and the federal courts have viewed citizen suits as enforcement mechanisms.<sup>332</sup> Moreover, the Supreme Court has emphasized that enforcement of the law is an important part of the President's constitutional duty to execute the law,<sup>333</sup> immediately suggesting that citizen suits interfere with—or at least overlap—Executive Branch functions. To say that execution of the law includes enforcement, however, does not automatically mean that citizen “enforcement” of federal law implicates constitutional concerns. Private enforcement of private rights cannot interfere with the Executive Branch.<sup>334</sup> Thus, the often implicit, sometimes explicit gloss to the constitutional meaning of “execute” is that enforcement must be on behalf of the United States, in the name of the United States, and/or to protect public rights before separation of powers becomes a relevant concern. For example, the *Lujan v. Defenders of Wildlife*<sup>335</sup> Court noted that “[v]indicating the *public interest* (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.”<sup>336</sup> Similarly, in *Buckley*, the Court required that all suits brought in the federal courts, “*so far as the inter-*

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332. See discussion *supra* Part I.

333. See *Buckley v. Valeo*, 424 U.S. 1, 138 (1976).

334. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. J.J. Curran*, 456 U.S. 353, 376 (1982) (holding that “judicial recognition of an implied private remedy [does not] violate[] the separation of powers doctrine”).

335. 504 U.S. 555 (1992).

336. *Id.* at 576 (emphasis added).

*ests of the United States are concerned, [be] subject to the direction, and within the control of, the Attorney General.*<sup>337</sup> However, in the absence of an actual proprietary concern (such as the public fisc in FCA *qui tam* suits), the enforcement interest of the United States is to “vindicate public rights.”<sup>338</sup> The Federal Elections Commission at issue in *Buckley*, for example, exercised executive enforcement power because it had “primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights . . . .”<sup>339</sup>

The public/private distinction has been an important one in the *qui tam* separation of powers litigation. For example, the Fifth Circuit based its decision that the FCA’s *qui tam* provisions violate separation of powers principles in part on its conclusion that *qui tam* actions are not traditional private causes of action:

Riley and the government are falsely analogizing *qui tam* actions to actions in which the plaintiff sues on his own behalf and incidentally benefits the government, as in an anti-trust case.

Private enforcement actions by aggrieved individuals are not subject to the Executive’s prosecutorial discretion, but when the sole injury—the only ticket into court—belongs to the government, the Executive’s prosecutorial discretion must include the power whether to bring suit.<sup>340</sup>

Analogies to private suits under Title VII of the Civil Rights Act were similarly false, “because a private title VII plaintiff sues to redress his own injury and only incidentally benefits the government,” whereas “the only interest most *qui tam* relators vindicate is the government’s. *Qui tam* actions, unlike title VII suits, aim to redress *purely public injuries*.”<sup>341</sup>

337. *Confiscation Cases*, 74 U.S.(7 Wall.) 454, 458–59, (1869) (emphasis added); see also *Buckley*, 424 U.S. at 139 (quoting the same language).

338. *Buckley*, 424 U.S. at 140 (holding that persons given “primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights” must be officers of the United States appointed in compliance with the Appointments Clause).

339. *Id.* (emphasis added).

340. *Riley v. St. Luke’s Episcopal Hosp.*, 196 F.3d 514, 526 (5th Cir. 1999).

341. *Id.* at 526 n.35 (emphasis added). At least three district courts also emphasized the public right/private right distinction for the FCA *qui tam* litigation, although those courts reached a conclusion opposite to the Fifth Circuit’s.

Because the core executive enforcement power relates to the enforcement of *public* rights, the key issue in any Article II-based separation of powers argument against an environmental citizen suit provision is the issue of whether a citizen plaintiff is enforcing private rights or public rights, keeping in mind that Congress enjoys “the presumption that the challenged statute is valid.”<sup>342</sup> It is regarding this issue, moreover, that environmental citizen suits are distinctly different from *qui tam* litigation, as standing litigation for both kinds of provisions has emphasized.

The Supreme Court considers a right of action to be *personal* or *private* on the basis of the injury felt. The right is personal if the petitioner or plaintiff feels the effects of the violation of federal law.<sup>343</sup> A right is public, in contrast, if it “benefit[s] the public at large” rather than a “particular class” of persons.<sup>344</sup> The quintessential public right, as the *Defenders of Wildlife* Court noted, is the interest in seeing the laws obeyed.

While on their face the environmental citizen suit provisions often appear to allow *any* private citizens to bring suit against *any* statutorily-identified violator, the Supreme Court has already rendered Article II-based challenges to these provisions moot because it has glossed the “any person” or “any citizen” language to require all citizen plaintiffs to meet the constitutional requirements for standing—concrete and particularized injury, causation, and redressability. The standing requirement thus ensures that every citizen plaintiff personally feels the effects of the violation of law and that citizens cannot bring suit merely to ensure that the law is obeyed.

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*See United States ex rel. Gublo v. Novacare, Inc.*, 62 F. Supp. 2d 347, 353 (D. Mass. 1999) (holding that *qui tam* relators are not officers of the United States because they pursue private rights of action); *United States ex rel. Chandler v. Hektoen Inst. for Med. Research*, 35 F. Supp. 2d 1078, 1082 (N.D. Ill. 1999) (stating that “[t]he court finds that relators are unlike private prosecutors because they are suing to protect private rights, not just the public interest, and because they stand to reap private financial gain.”); *United States ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830, 837 (N.D. Ill. 1993) (stating that “[u]nlike the public rights that the Federal Election Commission sought to protect in *Buckley*, the rights at issue in this case are not purely public in nature. The False Claims Act grants substantive rights to particular private citizens.”).

342. *INS v. Chadha*, 462 U.S. 919, 944 (1983).

343. *See Davis v. Passman*, 442 U.S. 228, 235 n.10 (1979).

344. *California v. Sierra Club*, 451 U.S. 287, 297–98 (1981).

As such, citizen suits are constitutionally unlike *qui tam* litigation, where relators bring suit purely on the basis of the sovereign's injury.

The Supreme Court imposed standing requirements on citizen suits not only to preserve its own constitutional legitimacy by ensuring the federal courts hear only "cases" or "controversies," but also to ensure that citizen suits are privately justiciable actions rather than public enforcement. Thus, in *Sierra Club v. Morton*,<sup>345</sup> the Supreme Court addressed the injury-in-fact requirement specifically because the Sierra Club could not assert public rights, even in the context of an APA lawsuit, the purpose of which is often to compel the federal government to comply with federal law. The Sierra Club

apparently regarded any allegations of individualized injury as superfluous, on the theory that this was a "public" action involving questions as to the use of natural resources, and that the Club's longstanding concern with and expertise in such matters were sufficient to give it standing as a "representative of the public."<sup>346</sup>

Instead, the Court emphasized that personally-felt "injury is what gives a person standing to seek judicial review under the statute. . . ."<sup>347</sup>

The injury-in-fact standing requirement also preserves the principle of separation of powers, and not just with respect to Article III. As the *Defenders of Wildlife* Court recognized, the doctrine not only contains the Judicial Branch but helps to empower the Executive as well. Courts exist "to decide on the rights of individuals"; "[v]indicating the public interest . . . is the function of Congress and the Chief Executive."<sup>348</sup> The Court made the connection between citizen suit standing and Executive Branch separation of powers concerns even more explicit:

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345. 405 U.S. 727 (1972).

346. *Id.* at 736. Lower courts had upheld just such a theory of standing for environmental actions. See *Citizens Comm. for Hudson Valley v. Volpe*, 425 F.2d 97, 105 (2d Cir. 1970).

347. *Morton*, 405 U.S. at 737.

348. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

The question presented here is whether the public interest in proper administration of the laws . . . can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no discrete concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."<sup>349</sup>

The Court stressed that "[i]ndividual rights,' . . . do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public."<sup>350</sup> However, "[n]othing in this contradicts the principle that '[t]he . . . injury required by Art. III may exist solely by virtue of statutes cre-

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349. *Id.* at 576–77 (citation omitted). Other federal courts have also found the standing requirement relevant to whether citizen suits violate broader separation of powers principles. *See, e.g.,* Atlantic States Legal Found. v. Buffalo Envelope, 823 F. Supp. 1065, 1075 (W.D.N.Y. 1993) ("It must not be forgotten that the statutory rights conferred upon private citizens under EPCRA are limited to those who have standing under Article III of the Constitution," (citing *Muskrat v. United States*, 219 U.S. 346, 356–60 (1911); *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 65 (1987))); *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132, 1138 n.5 (E.D. Penn. 1993) (noting, in the midst of its separation of powers discussion, that "[a]ny citizen does not necessarily have standing to bring suit in federal court simply because a citizen suit provision authorizing that person to sue is constitutional"); *Natural Resources Defense Council v. Outboard Marine Corp.*, 692 F. Supp. 801, 817 (N.D. Ill. 1988) (refuting defendants' argument that citizen suits interfere with prosecutorial discretion in part because "such private rights of action, though congressionally conferred, are constitutionally limited to those who have standing in Article III terms."); *Student Pub. Interest Research Group of N.J. v. Monsanto Co.*, 600 F. Supp. 1474, 1479 (D.N.J. 1985) ("[T]he argument that Congress has granted citizens the power to protect more than just their own interests is a protest against the liberal standing requirement in another guise, and merely seeks to narrow the type of interests citizens may seek to protect."). None of these courts, however, generalized the standing requirement into any kind of separation of powers analysis.

350. *Lujan*, 504 U.S. at 578.

ating legal rights, the invasion of which creates standing.”<sup>351</sup> Therefore, while Congress cannot “privatize” general public rights—like the public interest in having all laws obeyed—it can write statutes, like the Civil Rights Act of 1964<sup>352</sup> or the Americans with Disabilities Act of 1990,<sup>353</sup> that create new private rights (the right not to be discriminated against, for example). By enacting statutes that create new *private* rights, Congress can confer standing on individuals to sue when their statutorily-recognized/created rights are violated.

In a concurring and dissenting opinion in *Defenders of Wildlife*, Justices Kennedy and Souter elaborated on the statutory injury issue, emphasizing that “[a]s Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition.”<sup>354</sup> The two Justices found citizen suits troubling, however, because although

Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, . . . Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.<sup>355</sup>

In enacting the ESA, these Justices concluded, Congress had done neither.<sup>356</sup>

By insisting that citizen suit plaintiffs demonstrate standing, however, the Supreme Court has established what the statutory provisions often, admittedly, do not: a requirement that the plaintiff suffer an injury that is fairly traceable to the violation of the environmental statute. In doing so, it has already effectively exercised its self-imposed right and duty to interpret federal statutes as being constitutional if at all

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351. *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) (internal quotation marks omitted))).

352. 42 U.S.C. §§ 2000a–2000h-6 (1994).

353. *Id.* §§12101–12213 (1994).

354. *Lujan*, 504 U.S. at 580 (Kennedy & Souter, JJ., concurring in part and dissenting in part).

355. *Id.* (citations omitted).

356. *See id.*

possible. Justice Kennedy himself approved of the Court's own power to referee "concrete injuries," and the majority of Justices in *Defenders of Wildlife* accepted concrete, particular, and actual or imminent injury as sufficient to ensure that the courts decided true private rights.<sup>357</sup>

It might be argued, nevertheless, that the only legal rights created by environmental statutes are in fact public rights that have been legislatively pronounced to belong to each individual—the general right to a clean and biologically diverse environment. The environment, however is not degraded uniformly, and new harms to the environment do not affect all citizens equally. The general public may have an undifferentiated interest in seeing the federal environmental statutes obeyed, but the standing requirement ensures that a given citizen may only seek redress for a violation of an environmental statute that concretely, actually, and particularly injures that citizen. Once a private injury has been established, the incidental benefit to the public from the citizen's attempt to redress his or her own injury does not render the provision unconstitutional.<sup>358</sup>

As such, citizen suits are now akin to privately-brought public nuisance suits, from which they are legally descended.<sup>359</sup> "A public nuisance is a species of catch-all low-grade criminal offense, consisting of an interference with the rights of the community at large . . ." <sup>360</sup> Accordingly, a public nuisance is an offense against the government, and it is usually the government that sues to abate the public nuisance.<sup>361</sup> However,

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357. *See id.* at 580–81.

The Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III . . . . While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way.

*Id.*

358. *See infra* Part IV.C.

359. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 87–89 (3d ed. 2000) (discussing environmental law's roots in public nuisance).

360. *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 315 (3d Cir. 1985).

361. *See New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050 (2d Cir. 1985).

private citizens can also bring suit to abate public nuisances if they suffer harm that is different in kind from the harm that the general public suffers.<sup>362</sup> Thus, while actions that interfere with the public's right to a clean environment bestow a cause of action on the government, private citizens are not prohibited from suing to abate this "public nuisance" if the environmental damage causes particular and direct injury to them.<sup>363</sup>

In this sense, too, environmental citizen suits differ from *qui tam* actions. The Court in *Defenders of Wildlife* expressly distinguished environmental citizen suits from "the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff."<sup>364</sup> The plain language of the two kinds of statutes supports this distinction, as does the basis for standing in each kind of suit. Environmental citizen suit provisions allow a citizen to sue "on his own behalf";<sup>365</sup> a relator under the FCA sues "in the name of the Government."<sup>366</sup> Environmental citizen suit plaintiffs have standing because of the individual injuries they suffer and lose standing if the courts cannot redress those injuries; *qui tam* relators have standing through assignment of an

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362. See *Alaska Natives Class v. Exxon Corp.*, 104 F.3d 1196, 1197 (9th Cir. 1997).

363. See *Philadelphia Elec. Co.*, 762 F.2d at 316 (noting that when the public right is a right to "pure water," a private litigant would have a private right of action if the litigant had used the polluted waterbody and was directly harmed as a result of the pollution); *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1234-35 (3d Cir. 1980), *vacated on other grounds sub nom Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (holding that fishermen could sue under a public nuisance theory when water pollution interfered with their fishing). *But see Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196, 1198 (9th Cir. 1997) (holding that Alaska Natives had not suffered any special injury from the *Exxon Valdez* oil spill because "[w]hile the oil spill may have affected Alaska Natives more severely than other members of the public, 'the right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual, and psychological benefits in pristine natural surroundings' is shared by all Alaskans").

364. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 (1992).

365. See, e.g. *Clean Air Act*, 42 U.S.C. § 7604(a) (1994); *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 120 S. Ct. 693, 705-06 (2000) (regarding the Clean Water Act); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998) (regarding EPCRA).

366. 31 U.S.C. § 3730(b)(1) (1994).

enforcement claim from the Government and often have no personal relationship to the wrongdoing at all.

Citizen suits, unlike federal enforcement actions, must seek to redress ongoing (or at least potentially ongoing) violations of law that cause concrete and particularized injury to the citizen plaintiff. Clearly, therefore, standing jurisprudence eliminates the possibility that plaintiffs can use environmental citizen suit provisions merely to ensure that federal environmental laws are enforced. The *Steel Co.* Court's emphasis on redressability and the role of civil penalties rested on exactly that point: whatever it is that citizens do in environmental citizen suits, their lawsuits have to be more personal and private than merely carrying out the public interest in having the laws obeyed. Standing requirements thus render environmental citizen suits something other than public enforcement, a point the *Laidlaw* Court reinforced by declaring "that private plaintiffs, unlike the Federal Government, may not sue to assess penalties for wholly past violations . . . ."<sup>367</sup>

### C. *The Public/Private Overlap*

The standing requirement ensures that citizen suit plaintiffs sue to redress personally-felt, concrete injuries, and therefore that such citizen suits are private rights of action. Nevertheless, there can be no question that citizen suits also advance the public interest—including the public interest in compliance with the law. The elaborate statutory provisions detailing how citizen suits dovetail with government enforcement, the Supreme Court's pronouncements that citizen suits are supplemental to government enforcement, the fact that civil penalties are still paid to the U.S. Treasury, and the Supreme Court's numerous references to "private attorneys general" all argue that citizen suits incidentally—at the very least—advance the public interest as well as redress private injuries.

The bipolar nature of citizen suits, however, does not render them unconstitutional. Indeed, the promotion of the public interest has been a facet of citizen-brought environmental litigation that the Supreme Court has long accepted—so long as

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367. *Friends of the Earth*, 120 S. Ct. at 708.

the plaintiff first asserts a redressable private injury. In *Sierra Club v. Morton*, for example, the Supreme Court noted that

once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate. . . . *It is in a similar sense that we have used the phrase 'private attorney general' to describe the function performed by persons upon whom Congress has conferred the right to seek judicial review of agency action.*<sup>368</sup>

Environmental "private attorneys general," therefore, *may* assert the public interest—but their right to be in court depends on their private injury and the court's ability to redress it.

The Court also has underscored the natural co-existence of public and private rights of action in its "implied right of action" cases, where private litigants raise the issue of whether federal law—including the Constitution itself—implicitly provides a private right of action for individual harms resulting from violations of a statute or constitutional provision, despite the lack of an explicit private remedy.<sup>369</sup> Such litigation emphasizes that the existence of a public enforcement scheme generally does not eliminate a private right of action unless Congress intended to deny such a right or such a right would be inconsistent with the explicit public enforcement scheme.<sup>370</sup>

368. *Sierra Club v. Morton*, 405 U.S. 727, 737–38 (1972) (emphasis added). The Court also noted that, "[o]nce this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief." *Id.* at 740 n.15.

369. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374–88 (1982) (finding an implied private right of action under the Commodity Exchange Act); *California v. Sierra Club*, 451 U.S. 287, 293–98 (1981) (finding no private cause of action for violations of the Rivers and Harbors Appropriation Act provisions that prohibit obstructions of the navigable waters because Congress was not concerned with private rights when it enacted the statute); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568–78 (1979) (finding no private cause of action regarding the provisions of the Securities Exchange Act requiring broker dealers to keep records); *Davis v. Passman*, 442 U.S. 228, 234–49 (1979) (finding a private right of action under the Fifth Amendment to remedy discrimination by a federal employee); *Cort v. Ash*, 422 U.S. 66, 78 (1975) (establishing the test for determining whether there is an implied private right of action in a federal statute); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 394–95 (1971) (implying a private right of action for damages when federal officers violate the Constitution).

370. *See Cort*, 422 U.S. at 78.

“The creation of one explicit mode of enforcement is not dispositive of congressional intent with respect to other complementary remedies.”<sup>371</sup> If the federal courts can imply private rights of action into statutes where Congress chooses not to include a specific private suit provision, however, it is difficult to argue that Congress’s explicit inclusion of the same kinds of provisions somehow creates a separation of powers problem.

Finally, civil penalties cannot change the constitutional character of citizen suits. First, some environmental citizen suit provisions, such as that in the ESA, do not even allow citizens to pursue civil penalties. Second, when citizens can pursue civil penalties, *Laidlaw* now controls, and thus civil penalties can redress injuries from environmental violations that are ongoing or that may recur. Third, civil penalties function in many ways like punitive damages, an accepted form of private redress. Punitive damages do not make the plaintiff whole for the harm suffered, but instead punish the defendant in an attempt to deter future bad conduct.

Because civil penalties have given even the Supreme Court pause, however, they are worth examining in greater detail. Justice Scalia argued in his dissent in *Laidlaw* that the availability of a public remedy—payment of civil penalties to the U.S. Treasury—rendered all citizen suits the private enforcement of public rights: “[B]y giving an individual plaintiff the power to invoke a public remedy, Congress has done precisely what we have said it cannot do: convert an ‘undifferentiated public interest’ into an ‘individual right’ vindicable in the courts.”<sup>372</sup> Justice Scalia’s argument, however, fails on two points. First, it assumes—as the majority explicitly refused to concede—that civil penalties are purely public remedies. The majority in *Laidlaw* expressly held that civil penalties can also redress private injury. Second, Justice Scalia’s use of remedy to define the cause of action is inconsistent with the Court’s prior views of the relationships between standing, causes of action, and remedies. While both injury and remedy are relevant to *standing* issues, the Court has emphasized that remedy has little relationship to whether a private cause of action exists; instead, a personally injured party has a private cause of action

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371. *California v. Sierra Club*, 451 U.S. 287, 295 n.6 (1981).

372. *Friends of the Earth, Inc.*, 120 S. Ct. at 716–17 (Scalia, J., dissenting).

if that “particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court . . . .”<sup>373</sup> As such, whether a plaintiff has a private cause of action and what relief the plaintiff may seek are two different issues.<sup>374</sup> Moreover, the Court has held that *remedy* issues—as opposed to cause-of-action issues—do *not* raise separation of powers concerns, at least as far as the Judicial Branch is concerned.<sup>375</sup>

## CONCLUSION

Given the concern of several Justices that environmental citizen suits might violate separation of powers principles by undermining the Executive’s power to execute federal law and by allowing improperly appointed “officers of the United States” to exercise federal enforcement authority, and given that similar separation of powers litigation regarding the FCA’s *qui tam* provisions has enjoyed serious attention at all levels of the federal courts, it seems inevitable that environmental defendants will be renewing Article II-based separation of powers challenges against environmental citizen suit provisions and that such challenges will generate serious discussion in the district courts, the courts of appeal, and, eventually, the Supreme Court itself. Many courts will undoubtedly decide that persons bringing environmental citizen suits are not “officers of the United States” because they hold no federal position, receive no federal pay, and have no continuing duties; hence, the Appointments Clause will not apply. Others may conclude that citizen plaintiffs wield substantial governmental power because they enforce federal law at their discretion; hence, arguably, the citizen suit provisions violate the Appointments Clause. “Take Care” Clause decisions will likely follow the

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373. *Davis v. Passman*, 442 U.S. 228, 239–40 n.18 (1975).

374. *See id.*; *see also* *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 65–66 (1992) (referring to 20 U.S.C. §§ 1681–1688 (1988) and emphasizing that, “[a]s we have often stated, the question of what remedies are available under a statute that provides a private right of action is ‘analytically distinct’ from the issue of whether such a right exists in the first place”).

375. *See Franklin*, 503 U.S. at 73–74 (holding that awarding damages does not violate separation of powers principles because “[u]nlike the finding of a cause of action, which authorizes a court to hear a case or controversy, the discretion to award appropriate relief involves no such increase in judicial power”).

Ninth Circuit/Fifth Circuit emphases in the *qui tam* litigation, with some courts focusing on the federal government's numerous opportunities to control citizen suit litigation, and others focusing on the government's inability to control the initiation of its enforcement response because citizens have absolute discretion in deciding when to send notice letters.

All of these analyses, however, rest on the prior assumption that environmental "enforcement" through citizen suits is constitutionally identical to Executive Branch enforcement of the law. The Supreme Court, however, has already effectively decided otherwise. By insisting, in environmental standing litigation, that citizen suit plaintiffs suffer individual injury from violations of environmental law that the courts can then redress—injury to the *person*, not just to the environment, as the *Laidlaw* Court made clear<sup>376</sup>—the Court has differentiated environmental citizen suits from government execution of the law. Because citizen suit plaintiffs do not—in fact, *cannot*—proceed with their suits on the basis of injury to the federal government or merely to ensure that federal law is obeyed, their suits are not "enforcement actions" in any constitutionally relevant sense. Citizen plaintiffs do not interfere with the Executive's authority because they do not "execute" the law: they do not sue in the government's name or on behalf of the government; they do not sue solely to advance the public interest; they do not base their suits on any injury to the federal government; and they cannot interpret the law (although they can certainly press the federal courts for interpretations). Similarly, citizen plaintiffs are not officers of the United States for purposes of the Appointments Clause, because, as private citizens seeking redress of a personal injury, they exercise no Executive authority.

On a broader scale, however, Article II-based challenges to environmental citizen suit provisions should also force federal courts to more precisely define the parameters of the separation of powers doctrine. It is not enough to say, as many district courts have, that the separation of powers doctrine does not apply to private citizens, because Congress enacts the federal environmental statutes. At the same time, current separation of powers jurisprudence provides no explicit role for the

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376. See *Friends of the Earth*, 120 S. Ct. at 704.

truism that the federal government is not the only player in American law. If the federal Executive is the only entity that can enforce federal law, then perfectly rational separation of powers arguments can be constructed to deny Congress the authority to set minimum federal requirements but to allow the fifty states to assume the day-to-day enforcement of those standards—a typical arrangement in federal environmental law. Such arguments, however, undermine another of the fundamental principles of our Constitution: that the federal government has limited powers, with the states and the people retaining all governmental authority not expressly given to the federal government.<sup>377</sup>

Citizen “enforcement” obviously does not raise such broad federalism concerns, but that does not mean that private individuals have no fundamentally important relationship to how federal laws actually work. Ours is, after all, a government “of the people, by the people, and for the people.”<sup>378</sup> Numerous statutes enacted in response to the growth of the administrative state attest to both Congress’s and the President’s recognition that citizen involvement in the functioning of government is a desirable thing.<sup>379</sup> Moreover, the separation of powers doctrine itself operates most fundamentally to secure citizens’ liberty, not to exclude them from participation in public law. James Madison, writing in *The Federalist* No. 47, relied on Montesquieu to make this point:

“When the legislative and executive powers are united in the same person or body,” says he, “there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.” Again: “Were the power of judging joined

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377. See U.S. CONST. amend. X.

378. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863). See also *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 (1995) (quoting Lincoln and noting that “the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people.”).

379. See, e.g., *Administrative Procedure Act*, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (1994); *Freedom of Information Act*, 5 U.S.C. § 552 (1994); *Government in Sunshine Act*, 5 U.S.C. § 552b (1994); see also Freeman, *supra* note 331 (discussing the desirability and legitimacy of private participation in administrative law).

with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.”<sup>380</sup>

In a very real sense, therefore, citizen suits should not raise separation of powers concerns because the separation of powers principle was intended from the beginning to protect citizens from government tyranny.<sup>381</sup> Even assuming *arguendo* that citizen suit provisions do take power away from the federal government and hand it to private citizens, that fact furthers the Framers’ purposes rather than thwarting them.

Of course, citizen involvement, like citizen exclusion, can also be extended to an undesirable extreme. Vigilante justice is not an end this Article seeks to promote, and Congress could not convey away all of the Executive’s enforcement duties to private citizens. The proper role for private citizens, like the separation of powers principle for the three Branches of the federal government, is a matter of balance. Allowing citizens to pursue environmental violators when citizens have personally suffered injury from those violations preserves a proper balance between public and private interests, governmental responsibility and citizen action.

The few district courts that have addressed Article II-based separation of powers challenges to environmental citizen suit provisions have upheld the constitutionality of citizen suits. They have not, however, articulated a theoretical framework that addresses how Congress’s plenary authority to create enforcement schemes dovetails with Congress’s duty under the separation of powers doctrine not to unduly interfere

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380. THE FEDERALIST NO. 47, at 302–03 (James Madison) (G. Putnam’s Sons ed., 1908) (quoting Montesquieu).

381. See *Mistretta v. United States*, 488 U.S. 361, 380 (1989). “This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.” *Id.* See also *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (Jackson, J., concurring) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)), in which the Court stated that “[t]he declared purpose of separating and dividing the powers of government, of course, was to ‘diffus[e] power the better to secure liberty.’” See also *Buckley v. Valeo*, 424 U.S. 1, 120–21 (1976) (quoting THE FEDERALIST NO. 47, at 302–03 (James Madison) (G. Putnam’s Sons ed. 1908)).

with the Executive Branch. When Congress gives private citizens a right to sue regarding environmental violations, the public rights/private rights analysis both clarifies Congress's powers and responsibilities and ensures that citizen enforcement does not replace the Executive's duty to "take care that the laws are faithfully executed." Perhaps most importantly, however, the public rights/private rights analysis also preserves for injured citizens a role in the American political scheme, allowing them to both redress their private harms and promote the public interest in a clean and functioning environment.