ARTICLE III STANDING IN FEDERAL PROSECUTIONS OF "VICTIMLESS CRIMES"

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Plaintiffs in federal court bear the burden of proving their standing, as Article III permits inferior federal courts, after Congressional authorization, to exercise jurisdiction over "Cases" and "Controversies" alone. From these constitutional terms of art—"Cases" and "Controversies"—we derive the familiar case-or-controversy requirement of standing, including injury. These terms of art authorize Congress to empower the inferior federal courts to hear civil and criminal actions alike, but federal prosecutors have never been similarly burdened with proving the standing of the United States in federal court, including that the United States has suffered injury. This Essay examines that lapse and contends that Article III compels federal prosecutors to shoulder the burden of proving that the United States has been injured—a burden easily carried in all but federal prosecutions of so-called "victimless crimes" where the United States has not been, and never will be, harmed.

INTRODUCTION

Article III, Section 2 of the U.S. Constitution delimits the subject matter jurisdiction that Congress may afford to inferior federal courts to "Cases" and "Controversies" of different stripes.[1] Included are several jurisdictional bases relevant to federal criminal prosecutions: "Cases . . . arising under . . . the Laws of the United States," which legal scholars generally agree encompasses criminal and civil actions alike, and "Controversies to which the United States shall be a Party," which certainly includes civil

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1. U.S. CONST. art. III, § 2.

actions and arguably extends to criminal actions as well.[2] Congress has invoked its authority under Article III expansively by creating the federal district courts and giving original jurisdiction to them over "all offenses against the laws of the United States."[3]

From Article III arises the familiar requirement that all parties bringing suit in federal court have standing, meaning a redressable injury in fact caused by the defendant's conduct.[4] That injury must be concrete and particularized to the party bringing the action rather than a "generalized grievance" suffered by the public writ large.[5] Nevertheless, Article III standing—and, in particular, its injury prerequisite—traditionally has been a hurdle only for plaintiffs in federal civil actions, not for the government in federal criminal prosecutions.[6] Indeed, a plaintiff in a federal civil action must plead and prove, by a preponderance of the evidence, that they have availed themselves of the subject matter jurisdiction of the federal district court by showing, inter alia, a concrete and particularized injury that they have suffered.[7] No federal court has imposed this requirement on the United States in criminal prosecutions.[8]

Legal scholars overwhelmingly have endorsed this result as axiomatic. For example, in an influential law review article on the topic, Professor Edward A. Hartnett stated, "all concede" that "the United States can prosecute crimes in the federal courts," ipso facto "a '[C]ase' within the meaning of Article III must include litigation that is based on nothing more

2. *Id.* Other bases relevant to some federal prosecutions include "Cases affecting Ambassadors, other public Ministers and Consuls" and "Cases of admiralty and maritime Jurisdiction." *Id.* All remaining bases involve controversies between states, foreign states, or citizens or subjects of the foregoing, *id.*, none of which are relevant to a federal criminal prosecution. For a discussion of the putative criminal/civil distinction between "Cases" and "Controversies" in Article III, see Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 460–64 (1994).

3. 18 U.S.C. § 3231; 28 U.S.C. § 132(a); *see also* Turkiye Halk Bankasi A.S. v. United States, 143 S. Ct. 940, 944 (2023). Congress has empowered federal prosecutors to invoke this jurisdiction on behalf of the United States. *See* 28 U.S.C. § 547(1); *see also id.* §§ 509, 515(a), 519.

4. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

5. *Id.*; Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 n.3 (2014) (highlighting, albeit in dicta, that this requirement is constitutional, not prudential).

6. The government's Article III standing in federal criminal prosecutions is distinguished from a defendant's standing to challenge unconstitutional criminal procedures. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 137 (1978) (describing a criminal defendant's "standing" to assert a violation of constitutional rights); Welsh S. White & Robert S. Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 333 (1970) (concerning only the latter conception of standing, not the former).

7. *See* FED. R. CIV. P. 8(a)(1), 12(b)(1); *Lujan*, 504 U.S. at 561; Richard D. Freer, *Courts of Limited Jurisdiction*, *in* 13 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3522 (3d ed.), Westlaw (database updated June 2024).

8. United States v. Underwood, 726 F. App'x 945, 948 (4th Cir. 2018) (collecting cases); Sessum v. United States, No. 15 CR. 667-6, 2020 WL 1243783, at *8–9 (S.D.N.Y. Mar. 16, 2020) (same); Roberson v. United States, No. 19CV473, 2019 WL 4927055, at *2 (M.D. Ala. Aug. 12, 2019), *report and recommendation adopted*, No. 19CV473, 2019 WL 4923183 (M.D. Ala. Oct. 4, 2019) (same).

than the 'harm to the common concern for obedience to law,' and the '*abstract* . . . injury to the interest in seeing that the law is obeyed.'"[9] Other scholars have opined similarly.[10]

With respect, this author believes Professor Hartnett and like-minded scholars, as well as the whole of the federal judiciary who have weighed in on this issue, to be mistaken in light of modern developments in standing jurisprudence. Article III standing requires concrete, not abstract, injury. As such, the federal district courts should dismiss federal criminal prosecutions unless the prosecution can prove, by a preponderance of the evidence, that the United States has suffered an injury in fact, meaning a concrete and particularized harm or risk of harm. This Essay makes that novel argument and encourages criminal defense attorneys to move to dismiss particular federal criminal prosecutions—those based upon so-called "victimless crimes"—for want of Article III standing and, therefore, subject matter jurisdiction.[11] Part I examines modern standing caselaw. Part II applies that caselaw to federal criminal prosecutions. Part III assesses the implications of this thesis and its viability.

I. MODERN STANDING JURISPRUDENCE

Foremost, consider the U.S. Supreme Court's recent, watershed Article III standing jurisprudence. In *Clapper v. Amnesty International USA*,[12] attorneys and various human rights, labor, legal, and media organizations filed a federal civil action against the Director of National Intelligence, among other defendants.[13] Plaintiffs argued that the defendants were engaged in "sensitive international communications" with individuals believed to be likely targets of surveillance under a provision of the Foreign

9. Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2251 (2019) (emphasis added) (quoting Fed. Elec. Comm'n v. Akins, 524 U.S. 11, 22–25 (1998)).

10. *See* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CAL. L. REV. 411, 458 (2018) ("Standing seems to be no limit for traditional public enforcement."); Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1080 (2015) ("[T]he government need not make a showing of personal injury to itself or anyone else in order to initiate a criminal prosecution."); Thomas R. Lee, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543, 570 (1990) ("The government . . . need not show a particularized injury as a predicate to sue."); Jonathan Remy Nash, *Nontraditional Criminal Prosecutions in Federal Court*, 53 ARIZ. ST. L.J. 143, 157 (2021) ("[T]hat the government has no particularized grievance—a requirement for an ordinary plaintiff's standing—is no obstacle to the federal government's criminal standing."); Michael Sant'Ambrogio, *Standing in the Shadow of Popular Sovereignty*, 95 B.U. L. REV. 1869, 1902 (2015) ("[T]he executive has standing to bring criminal . . . enforcement actions whenever a law is violated that the executive believes it has a duty to ensure is faithfully executed."); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 695 (2004) ("[C]riminal prosecutions brought by the United States are universally acknowledged to be 'Cases' within the meaning of Article III" even though "federal crimes usually do not inflict any particularized injury upon the United States.").

11. *See* FED. R. CRIM. P. 12(b)(1)–(2).

12. 568 U.S. 398 (2013).

13. *Id.* at 398.

Intelligence Surveillance Act of 1978[14] (FISA).[15] These plaintiffs sought a declaration that the relevant FISA provision was unconstitutional and an injunction against the surveillance it authorized.[16] The Court held that the plaintiffs lacked Article III standing, inter alia, because hypothetical, future injury was "too speculative to satisfy the well-established requirement that threatened injury must be certainly impending."[17]

In 2016, in *Spokeo, Inc. v. Robins*,[18] a putative class representative brought a federal civil action against an alleged consumer reporting agency for generating a profile with inaccurate information in violation of the Fair Credit Reporting Act of 1970[19] (FCRA),[20] which requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of" such consumer reports.[21] The Court rejected the argument that a statutory violation necessarily constituted Article III harm.[22] Injury is not "concrete" unless it is "real," not "abstract," the Court counseled, and some "bare procedural violation, divorced from any concrete harm," fails that Article III imperative.[23]

Lastly, in 2021, *TransUnion LLC v. Ramirez*,[24] a putative class of consumers brought a similar federal civil action against a different consumer reporting agency under the FCRA for failing to use reasonable procedures to ensure their credit files' accuracy.[25] During the applicable class period, the agency sent some, not all, of the class members' allegedly inaccurate credit files to third parties.[26] As such, the Court determined that the class members whose credit files had been disseminated had shown Article III standing, but the class members whose credit files had not been disseminated lacked Article III standing because they demonstrated neither "that the risk of future harm materialized" nor "that the class members were independently harmed by their exposure to the risk [of dissemination] itself."[27]

II. FEDERAL CRIMINAL PROSECUTIONS

Consider the import of these cases on standing in federal criminal prosecutions—a logical move justified by the lack of any distinction between criminal and civil actions in the text of Article III itself.[28] To do so, we might

14. 50 U.S.C. §§ 1801–11, 1821–29, 1841–46, 1861–62, 1871.
15. *Clapper*, 568 U.S. at 401, 406.
16. *Id.* at 407.
17. *Id.* at 401–02.
18. 136 S. Ct. 1540 (2016).
19. 15 U.S.C. §§ 1681–1681x.
20. *Spokeo*, 136 S. Ct. at 1545–46.
21. *Id*. at 1545 (quoting 15 U.S.C. § 1681e(b)).
22. *Id.* at 1549.
23. *Id.*
24. 141 S. Ct. 2190 (2021).
25. *Id.* at 2200.
26. *Id.*
27. *Id.* at 2199.
28. We are, of course, left to conjecture whether the U.S. Supreme Court would find these civil cases instructive in criminal prosecutions because the Court has never directly contended

stratify into three tiers the sorts of conduct underlying various federal criminal prosecutions, assuming *arguendo* the requisite mens rea:

(1) conduct that caused harm to persons or their property, like assault[29] or arson;[30]
(2) conduct that, if it had persisted, carries some risk of causing harm to persons or their property, even if it caused no such harm before prosecution, like driving under the influence[31] or voter intimidation;[32]
(3) conduct that, even if it had persisted forever, carries no risk of harm to persons or their property, like gambling[33] or sex work.[34]

There is no doubt that the United States has suffered a concrete and particularized injury to prosecute crimes arising from the conduct in tier 1 since the government is a representative of the people, and "the people" includes the victim who suffered a concrete (i.e., "real," to use *Spokeo*'s language) and particularized injury.[35] Similarly, there also is little doubt that the United States, as the representative of all of the people in the aggregate over an infinite time horizon, likely has standing to prosecute crimes arising from conduct in tier 2. After all, what is a particularized risk of harm to the sovereign other than the aggregate risk of harm to its people? Perhaps there exists a minimum threshold of risk of harm caused by tier 2 conduct that, even if aggregated across all the people over all time, nonetheless fails to satisfy Article III. However, that prospect would place upon the government a remarkable burden of proving standing by resorting to anecdotal and empirical data—quantified statistically, perhaps—to show that this risk of harm to persons or their property was caused by conduct underlying a criminal charge. Set aside such a possibility for now if for no other reason than the impracticality of convincing any federal judge to impose such a stringent burden on federal prosecutors.

Yet, this author can imagine a federal judge or two dismissing federal prosecutions of crimes arising from conduct in tier 3 from federal court for lack of subject matter jurisdiction. These crimes are predicated upon conduct that did not cause harm to persons or their property and that risks no such

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with Article III standing in federal criminal prosecutions. *See infra* notes 60–65 and accompanying text. Yet, as these cases are the Court's most recent pronouncements on Article III standing, they are, at a minimum, persuasive, if not binding, authorities with respect to the United States' standing in federal criminal prosecutions.

29. 18 U.S.C. § 351(e).
30. *Id.* § 81.
31. *Id.* § 13(b)(1).
32. *Id.* § 594.
33. *Id.* § 1955(a).
34. *Id.* § 2421(a).
35. *See, e.g.*, Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923) (dicta); Pennsylvania v. Porter, 659 F.2d 306, 316 (3d Cir. 1981) ("The United States has been a frequent parens patriae plaintiff.").

harm—some refer to these as "victimless crimes."[36] That being said, opponents might well counter that "[t]here is no such thing as a victimless crime" because "every imaginable regulation, however inimical to freedom, is designed to prevent some harm to someone, even if only to someone's feelings or moral sensibilities."[37] In the alternative, opponents may contend that the conduct that routinely accompanies so-called victimless crimes (e.g., the human trafficking that often accompanies sex work[38] or personal bankruptcies that often accompany gambling[39]) causes harm or increases the risk of harm and, as such, disproves the very notion of "victimless" crime in the first place.[40]

However, this author maintains that victimless crimes do exist and that the conduct underlying such crimes lacks both harm to any person or their property, as well as any risk of such harm.[41] That said, this Essay does not intend to contribute materially to the debate over the existence of victimless crimes. Instead, it assumes *arguendo* that such crimes do exist and contends with the procedural ramifications thereof. In the prosecution of such crimes, the executive branch cannot simply speak the magic word "harm" and force the rest of us to accept that it is true; after all, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[42] If the emperor has no clothes, our federal judges must say so. And, if there exists neither actual harm nor a risk of actual harm to the people that the United States and its prosecutors seek to represent, then there exists no injury in fact, meaning there is no "Case" or "Controversy" under Article III, and the federal district courts lack subject matter jurisdiction to hear the prosecution.

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36. *See generally* Alan Wertheimer, *Victimless Crimes*, 87 ETHICS 302 (1977); *see also* Bowers v. Hardwick, 478 U.S. 186, 195 (1986) ("Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home."), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

37. Larry Alexander & Maimon Schwarzschild, *Subversive Thoughts on Freedom and the Common Good*, 97 MICH. L. REV. 1813, 1816 & n.7 (1999) (citing JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 60 (R.J. White ed., Univ. of Chi. Press 1991)).

38. *See* Seo-Young Cho, Axel Dreher & Eric Neumayer, *Does Legalized Prostitution Increase Human Trafficking?*, 41 WORLD DEV. 67, 67 (2013).

39. *See* Mark W. Nichols, B. Grant Stitt & David Giacopassi, *Casino Gambling and Bankruptcy in New United States Casino Jurisdictions*, 29 J. SOCIO-ECONOMICS 247, 247 (2000).

40. *See* ROBIN CAMPBELL, CTR. FOR CT. INNOVATION, 'THERE ARE NO VICTIMLESS CRIMES': COMMUNITY IMPACT PANELS AT THE MIDTOWN COMMUNITY COURT 2 (2000), http://www.courtinnovation.org/sites/default/files/No%20Victimless%20Crimes1.pdf [https://perma.cc/9QDV-JZSJ].

41. For collections of sources opining that, inter alia, gambling and sex work are victimless crimes, see Brad Jolly, *The Indian Gaming Regulatory Act: The Unwavering Policy of Termination Continues*, 29 ARIZ. ST. L.J. 273, 284 (1997) ("Violations of state criminal gaming laws are generally victimless crimes."); Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220, 1301 (1999) ("[T]he prevailing legal and social view of prostitution is that it is a victimless crime . . . .").

42. Marbury v. Madison, 5 U.S. 137, 177 (1803).

III. IMPLICATIONS AND VIABILITY

To be clear, this reasoning implies that the crimes in tier 3 may have no forum where they could ever be prosecuted.[43] Regardless, the *Clapper* Court discounted that concern: "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."[44] Furthermore, this Essay does not mean to suggest that history supports the thesis that the United States lacks Article III standing in federal criminal prosecutions of victimless crimes. On the contrary, "[v]ictimless crimes are as old as criminal law itself."[45] If Article III standing is guided by history and tradition, as much of federal constitutional law seems to be of late, then there is no doubt that the federal courts have served as the fora for prosecutions of victimless crimes for as long as the federal courts have existed.[46] And finally, even if standing is a barrier to prosecuting victimless crimes in federal court, Article III has nothing to say about prosecutions in state courts; further research into the standing of the United States to prosecute such federal crimes in state courts would be warranted.[47]

This Essay is also careful not to oversell its argument. It is highly unlikely, to say the least, that a federal district judge would grant a motion to dismiss a criminal prosecution of, or an application for a writ of habeas corpus seeking to overturn a conviction of, a victimless crime for a want of Article III standing and, therefore, subject matter jurisdiction. Indeed, this argument routinely has been commingled or confused with the appropriately doomed argument that "sovereign citizens" are not subject to federal court jurisdiction,[48] tainting its credibility from the get-go.[49] Furthermore, this argument has been tried many, many times before, and each and every time it has been rejected[50]—so forcefully that some courts decry the argument as "frivolous" or "absurd."[51]

Far from it. First and foremost, the author has only seen this argument made in prosecutions of federal crimes where the underlying conduct falls

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43. *See generally* Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243 (2011).

44. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 420 (2013) (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 489 (1982)).

45. Brennan T. Hughes, *Strictly Taboo: Cultural Anthropology's Insights into Mass Incarceration and Victimless Crime*, 41 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 49, 54 (2015).

46. *See id.*

47. *See generally* CAMPBELL, *supra* note 40.

48. *See generally* Francis X. Sullivan, Comment, *The "Usurping Octopus of Jurisdictional/Authority": The Legal Theories of the Sovereign Citizen Movement*, 1999 WIS. L. REV. 785.

49. *E.g.*, United States v. Rock, No. 21-CR-00358, 2022 WL 486313, at *1 (W.D. Pa. Feb. 17, 2022); United States v. Hakim, No. 18-CR-126, 2018 WL 6184796, at *1 (N.D. Ga. Aug. 22, 2018), *report and recommendation adopted*, No. 18-CR-00126, 2018 WL 4791085 (N.D. Ga. Oct. 4, 2018).

50. *See, e.g.*, *supra* note 8 and accompanying text.

51. United States v. Daniels, 48 F. App'x 409, 418 (3d Cir. 2002); Awwad v. United States, No. 16CV643, 2016 WL 9109114, at *3 (E.D. Va. Dec. 30, 2016).

into tiers 1 or 2 above—that is, crimes based on conduct that has caused harm to persons or their property (e.g., bank robbery,[52] mail and wire fraud,[53] or willfully failing to file a tax return[54]) or crimes based on conduct that, had it persisted, carries some risk of causing harm to persons or their property (e.g., possession of a firearm by a convicted felon,[55] distribution and possession with an intent to distribute a controlled substance,[56] or attempted espionage[57]). From the author's review, there has not yet been a single federal prosecution of tier 3 conduct wherein this argument has been made and rejected.

Moreover, several of these cases make the mistaken assertion that the Supreme Court has held that all federal criminal prosecutions have Article III standing.[58] Not true. For example, some cases cite to *Vermont Agency of Natural Resources v. United States ex rel. Stevens*[59] for the proposition that the "government suffers injury from the 'violation of its laws.'"[60] However, the rest of the quote from *Vermont Agency of Natural Resources* reveals that this language is just what one party asserted rather than the Court's actual holding (and even if it had held as much, it would have been mere dicta).[61] Others cite in tandem to *In re Debs*[62] for the proposition that "[t]he obligation[] which [the federal government] is under to promote the interest of all and to prevent the wrongdoing of one, resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court" and *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*[63] for the related claim that the government has an interest in "creat[ing] and enforc[ing] a legal code, both civil and criminal."[64] However, *Debs* conditions what is "often" enough for standing on an "injury to the general welfare";[65] if no injury exists or could exist, neither could standing exist. Plus, *Snapp & Son* merely reiterates

52. *See* Rice v. Farley, No. CIV. 14-31, 2014 WL 2441260, at *2–3 (E.D. Ky. May 30, 2014).

53. *See* Thomas v. United States, No. 15 CR. 667-5, 2020 WL 1243803, at *12–15 (S.D.N.Y. Mar. 16, 2020); United States v. Ulloa, No. 10 CR. 321, 2011 WL 13128610, at *5 (N.D.N.Y. May 13, 2011).

54. *See Hakim*, 2018 WL 6184796, at *6.

55. *See* United States v. Yarbrough, 452 F. App'x 186, 189 (3d Cir. 2011).

56. *See* United States v. Ellis, No. 06CR390, 2007 WL 2028908, at *1–3 (W.D. Pa. July 12, 2007).

57. *See* Awwad v. United States, No. 16CV643, 2016 WL 9109114, at *3 (E.D. Va. Dec. 30, 2016).

58. *See, e.g.*, *infra* notes 60, 64 and accompanying text.

59. 529 U.S. 765 (2000).

60. *E.g.*, *Yarbrough*, 452 F. App'x at 189 (quoting *Vt. Agency of Nat. Res.*, 529 U.S. at 771).

61. *Vt. Agency of Nat. Res.*, 529 U.S. at 771.

62. 158 U.S. 564 (1895).

63. 458 U.S. 592 (1982).

64. *See, e.g.*, Rice v. Farley, No. CIV. 14-31, 2014 WL 2441260, at *3 (E.D. Ky. May 30, 2014) (first citing *In re Debs*, 158 U.S. at 584; and then citing *Snapp & Son*, 458 U.S. at 601); Thomas v. United States, No. 15 CR. 667-5, 2020 WL 1243803, at *15 (S.D.N.Y. Mar. 16, 2020) (same).

65. *In re Debs*, 158 U.S. at 584.

the truism that governments have an interest in enforcing a criminal code, not that all enforcement will comply with the Constitution.

That said, in recent years, the Supreme Court has seemed far more likely to endorse the (mistaken) notion that the United States is not only injured, but injured irreparably, when any federal law is enjoined.[66] For example, when the United States brought suit as the plaintiff in *United States v. Idaho*[67] and sought an injunction against the State of Idaho to prevent it from enforcing a state law that allegedly violated a federal statute, the federal court determined that the United States had satisfied its burden of proving irreparable harm by a preponderance of the evidence because "Supremacy Clause violations trigger a presumption of irreparable harm when the United States is a plaintiff."[68] This view seems to endorse some belief that harm to a sovereign flows from an inability to enforce its laws rather than the underlying, real harm to the sovereign's people and their property. Alternatively, consider the Supreme Court's grant of the federal government's application for a stay of a district court injunction pending appeal in *Trump v. Sierra Club*.[69] In that decision, a majority of the Court granted the application, presumably because most justices "did not believe that the irreparable harm a stay might cause to the plaintiffs was even relevant in light of the irreparable harm the underlying injunction inflicted upon the government."[70] Because the federal judiciary is want to proclaim, without citation, that the United States has been harmed merely because its laws are not being enforced, without requiring it to show any conduct that would cause harm to the people or their property or the risk of such harm absent enforcement of those laws, there is quite a low likelihood of that same judiciary requiring federal prosecutors to demonstrate in criminal prosecutions that the United States has been harmed.

Finally, many of the cases cited above rejecting arguments that federal criminal prosecutions of victimless crimes lack Article III standing predate the Court's opinions in *Clapper*, *Spokeo*, and/or *TransUnion*, and the few that postdate these cases rarely cite or substantively engage with them. However, these three watershed cases confirm the absurdity of carte blanche standing in federal criminal prosecutions of victimless crimes. Per *Clapper*, speculative injuries can preclude standing.[71] Per *Spokeo*, injuries that are not

66. *See* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 155 (2019).

67. 623 F. Supp. 3d 1096 (D. Idaho 2022).

68. *Id.* at 1115 ; *see also* United States v. Alabama, 691 F.3d 1269, 1301 (11th Cir. 2012) ("The United States suffers injury when its valid laws in a domain of federal authority are undermined by impermissible state regulations."); United States v. Arizona, 641 F.3d 339, 366 (9th Cir. 2011), *rev'd in part on other grounds*, 567 U.S. 387 (2012) ("[A]n alleged constitutional infringement will often alone constitute irreparable harm.").

69. 140 S. Ct. 1 (2019).

70. Vladeck, *supra* note 66, at 156 (emphasis omitted).

71. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401–02 (2013); *see also supra* note 17 and accompanying text.

"real" can also preclude Article III standing.[72] Per *TransUnion*, injuries premised on a risk of unrealized harm can likewise preclude Article III standing.[73] The common and unsurprising thread in all these cases is injury. In federal criminal prosecutions where the underlying conduct has caused harm, of course there is injury to the sovereign via the harm to the victim. In federal criminal prosecutions where the underlying conduct, if it persisted, carries some risk of causing harm, there is most likely injury to the sovereign via the aggregation of risk across all putative victims across all time. However, in federal criminal prosecutions where the underlying conduct, even if it persisted forever, carries absolutely zero risk of causing harm to anyone or anything anywhere ever, the government should not be allowed to lie to us and decree that harm exists when it does not. And if the federal government believes it *ought* to be allowed to prosecute victimless crimes in its own courts of limited jurisdiction, Congress is welcome to propose a constitutional amendment to the several states to revise Article III.[74]

CONCLUSION

The federal judiciary has two paths before it. Down one is the history and tradition of the federal district courts which countenances subject matter jurisdiction over all criminal prosecutions brought by the United States, the text of Article III notwithstanding. Down the other is the text of Article III itself, interpreted strictly by the Supreme Court in cases like *Clapper*, *Spokeo*, and *TransUnion*, as well as the harm principle that often guides criminal law.[75] The latter path seems to refute the federal government's presumption that a defendant's violation of a criminal statute—notwithstanding the absence of actual harm to the people or their property or the real risk thereof—ipso facto gives federal courts subject matter jurisdiction over the resulting prosecution. This author believes it is incumbent upon the federal judiciary to follow the text of an unambiguous and reasonable law like Article III, traditions and norms to the contrary be damned. It is an affront to the separation of powers that the executive branch be allowed to declare harmless conduct to be harmful and force the judicial branch to accept such gaslighting. This writing encourages criminal defense attorneys in federal prosecutions of victimless crimes to sing the same tune.

72. *See* Spokeo v. Robbins, 136 S. Ct. 1540, 1549 (2016); *see also supra* note 23 and accompanying text.

73. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2199 (2021); *see also supra* note 27 and accompanying text.

74. *See* U.S. CONST. art. V (establishing the amendment process).

75. *See* JOHN STUART MILL, ON LIBERTY 18 (The Floating Press 2009) (1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civili[z]ed community, against his will, is to prevent harm to others.").