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Promoting Executive Accountability Through *Qui Tam* Legislation

*Randy Beck**

The United States government has experienced a profound rebalancing of power over the past century as authority has shifted from the legislative branch to the executive branch.[1] In domestic affairs, much federal law now comes from agencies operating under broad statutory mandates, and the tasks of weighing conflicting interests, devising specific regulatory standards, and setting enforcement priorities often fall to the executive.[2] In the international sphere, there has been a rapid expansion in the number of agreements negotiated unilaterally by the executive branch, without submission to the Senate for ratification as treaties.[3] With respect to military affairs, presidents have become increasingly comfortable with unilateral decisions to initiate combat and have sometimes side-stepped even the post-hoc congressional review process contemplated by the War Powers Resolution.[4]

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* Justice Thomas O. Marshall Chair of Constitutional Law, University of Georgia School of Law. The research for this essay was conducted while the author was a Garwood Visiting Fellow in the James Madison Program in American Ideals and Institutions at Princeton University. I would like to express my appreciation to Tom Campbell for his comments on a draft of this essay.

1 Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 444–45 (2012) ("The power of the modern presidency has been enhanced by the gradual accumulation over time of an extensive array of legislative delegations of power. The complexities of the modern economy and administrative state, along with the heightened role of the United States in foreign affairs, have necessitated broad delegations of authority to the executive branch.").

2 *See* Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 961–62 (2016) (delegations of authority by Congress have increased the power of the executive branch, particularly in light of legislative gridlock); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 111–28 (2014) (detailing numerous mechanisms through which executive branch agencies exercise legislative functions).

3 *See Treaties*, UNITED STATES SENATE https://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm#3 (last visited May 10, 2017) [http://perma.cc/876P-NYLL]; Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1258–60 (2008) (375 treaties entered into by the U.S. from 1980–2000, compared to 2744 congressionally authorized executive agreements).

4 Douglas Kriner, *Accountability Without Deliberation? Separation of Powers in Times of War*, 95 B.U. L. REV. 1275, 1284 (2015) ("Since Truman, all presidents have asserted the office's unilateral authority to order American military forces abroad, absent explicit congressional authorization, to pursue a wide range of policy goals."); *see also* Eric

The increasing power of the executive branch underscores the importance of effective mechanisms to enforce legal constraints on executive conduct. The Constitution imposes on the president the duty to "take [c]are that the laws be faithfully executed,"[5] and affords him the ability to respond to misconduct by his subordinates.[6] But relying on the executive branch to police its own members will often prove inadequate due to unavoidable conflicts of interest and the difficulty of managing a vast bureaucracy. Congress can conduct occasional oversight hearings to investigate the legality of executive actions, but cannot directly respond to executive misconduct except through cumbersome processes like lawmaking or impeachment.[7] That leaves the option of judicial enforcement of the law in suits by persons outside the executive branch. However, this mechanism can be stymied through application of Article III standing principles and other justiciability rules like the political question doctrine.[8] In short, there may be many instances in which potentially illegal executive conduct goes unaddressed due to limitations of the standard options for ensuring executive branch legal compliance.

In a forthcoming article, I review the history of a now largely-abandoned method for enforcing the law against government officials.[9] From the fourteenth-century through the establishment of the United States government, it was very common for Anglo-American legislatures to regulate government officials through *qui tam* legislation. A *qui tam* statute allowed any member of the community to collect a fine for violation of a legal duty, and keep part of the proceeds, even if the litigant did

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A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485, 497–98 (2016) (noting partisan invocation of constitutional and War Powers Act restrictions in response to unilateral executive military interventions in Grenada, Panama, Serbia and Libya); Bradley & Morrison, *supra* note 1, at 440–47 (explaining reasons it can be easier for the executive branch to act than the legislative branch).

5 U.S. CONST. art I, § 3, cl. 1.

6 *See* Jurisdiction of Integrity Comm. When Inspector Gen. Leaves Office After Referral of Allegations, 2006 WL 5779980, at 3–4 (O.L.C. Sept. 5, 2006).

7 Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 951–59 (1983) (Congress must comply with bicameralism and presentment requirements when acting to change legal rights, duties or relations of persons outside the legislative branch); U.S. CONST. art. I, §§ 2–3 (impeachment procedures), § 7 (procedures for passage of legislation).

8 *See* Lujan v. Def. of Wildlife, 504 U.S. 555, 575–78 (1992) (applying standing doctrine to reject case against executive branch official); Stephen I. Vladeck, *War and Justiciability*, 49 SUFFOLK L. REV. 47, 47–48 (2016) (courts avoided ruling on the merits of Vietnam War cases in various ways including standing and political question grounds).

9 Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. (forthcoming 2018) [hereinafter Beck, *Qui Tam Litigation Against Government Officials*].

not have a particularized injury as required by modern rules of standing.[10]

This essay will consider the possibility of selectively reviving the tradition of *qui tam* legislation to enforce particular legal duties of executive branch officials. By overcoming Article III standing concerns, *qui tam* legislation has the capacity to fill gaps left by more common methods of enforcing the law. At the same time, introducing a profit motive into law enforcement carries risks that legislators should take into account. Part I will briefly describe the history of *qui tam* regulation of government officials in England, the early American states and the first two Congresses, and discuss the Supreme Court's conclusion that *qui tam* litigation satisfies Article III standing requirements.[11] Part II will consider hypothetical *qui tam* legislation to enforce executive branch legal duties in three areas: (1) expending funds without a supporting congressional appropriation, or refusing to spend funds as directed by statute; (2) pursuing military action in violation of the War Powers Resolution; and (3) using private email systems for public business.[12] Part III briefly considers downsides of reviving *qui tam* legislation to regulate executive officials.[13]

I. QUI TAM REGULATION OF GOVERNMENT OFFICIALS

The fourteenth-century English Parliament faced significant challenges in providing for enforcement of laws governing a large country with a dispersed population.[14] Some legislation was less problematic because it was designed to benefit private citizens individually. Violation of this kind of statute could be addressed through litigation pursued by the victim of illegal conduct.[15] The more difficult problem arose when a law protected interests of the entire community or of the central government, rather than individual citizens. Today, government officials typically enforce such laws. In the fourteenth-century, however, there were far fewer government officials, and those at the local level might not

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10 *Id.* at 3; *see also* Vt. Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 771–78 (2000) (finding *qui tam* plaintiff satisfied Article III standing requirements, even though suing based on injury to the United States).

11 *See infra* notes 14–34 and accompanying text.

12 *See infra* notes 35–73 and accompanying text.

13 *See infra* notes 74–81 and accompanying text.

14 *See* Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 567 (2000) [hereinafter Beck, *English Eradication*].

15 *See, e.g.*, Statute of Labourers, 23 Edw. 3, ch. 1 (1349) (cause of action for party "damnified" by food merchant charging excessive prices, but also allowing *qui tam* enforcement as a backup).

vigorously enforce laws designed to advance goals of the central government.[16]

Parliament developed the *qui tam* statute to prevent under-enforcement of penal statutes, which could deprive laws of their deterrent effect.[17] The typical *qui tam* statute imposed a legal obligation, specified a forfeiture for violation, and provided that any person could sue to collect the penalty, with the informer entitled to keep a percentage (usually half) if successful.[18] The statutory authorization for anyone to sue, and the bounty offered to the successful informer, effectively deputized any member of the community to enforce the law, vastly expanding available law enforcement resources.[19]

Most English *qui tam* statutes regulated private conduct, often commercial in nature.[20] Early on, however, Parliament also deployed *qui tam* statutes to enforce specified duties of government officials. Initially, such *qui tam* provisions were used as a supplement to regulation of private commercial conduct, promoting integrity and diligence among regulatory officials. For instance, fourteenth-century statutes permitted *qui tam* actions against officials who traded in regulated commodities or who were less than diligent in enforcing regulatory requirements.[21] Over time, though, Parliament expanded the practice to take in an increasing array of officials performing a growing list of functions, e.g., purveyors acquiring goods for the royal household, ecclesiastical judges exceeding the limits on their jurisdiction, officials responsible for enforcing religious uniformity laws, revenue officers handling tax receipts, and individuals serving in Parliament despite a statutory disqualification.[22]

Regulation of government officials through *qui tam* legislation was widely practiced in the American colonies and early states. *Qui tam* monitoring was used to promote statutory compliance by an enormous variety of state officials, particularly those performing decentralized functions such as road construction and maintenance, judicial administration, and

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16 Beck, *English Eradication*, *supra* note 14, at 567.

17 *Id.* at 568 (*qui tam* statute increased chances statutory forfeiture would be enforced). The *qui tam* label derives from a longer Latin phrase that can be translated "who pursues this action on our Lord the King's behalf as well as his own." Vt. Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000).

18 Beck, *English Eradication, supra* note 14, at 552–53 (describing characteristics of *qui tam* statutes).

19 *Id.* at 569.

20 *Id.* at 570–71.

21 *See* Beck, *supra* note 9, at 22–24.

22 *See id.* at 25–29.

regulation of commercial activities.[23] It was common for early states to rely on *qui tam* oversight to ensure lawful conduct by officials performing functions critical to public confidence in government, such as conducting elections and collecting taxes.[24]

The United States Constitution was ratified against the backdrop of over four and a half centuries in which Anglo-American legislatures had often regulated government officials through *qui tam* legislation.[25] It should come as no surprise, then, that the earliest Congresses extensively employed *qui tam* statutes to regulate both private parties and executive branch officials. Statutes enacted in the first two Congresses included *qui tam* provisions applicable to federal revenue officers, census workers, Treasury officials, postal workers, and those regulating trade with Native American tribes.[26] *Qui tam* regulation of executive branch officials disappeared over time as the growing number of government employees reduced the need for *qui tam* oversight and the demand for professionalization of public service prompted movement away from profit-motivated law enforcement mechanisms.[27] There can be no doubt though that supervising the legality of executive branch conduct through *qui tam* litigation was understood as a permissible legislative option when the Constitution took effect.

The case for selective *qui tam* monitoring of the executive branch rests on the Supreme Court's understanding of standing principles flowing from the Article III "case or controversy" requirement. The Court has articulated a familiar injury-causation-redressability test for evaluating a litigant's standing to sue: "The plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision."[28] For a quarter century, the Supreme Court has said that the requirement of a "particularized" injury—i.e., one that affects the plaintiff in a manner distinct from the public at large—represents part of the "irreducible constitutional minimum" of standing.[29] This particularized injury requirement is often applied to deny standing in cases against the executive

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23 *Id.* at 29–42.

24 *Id.* at 45–49.

25 *Id.* at 63.

26 *See id.* at 50–62.

27 *See generally* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940 (2013) (detailing the shift away from profit-incentivized enforcement of the laws).

28 Lexmark Int'l Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014).

29 *Id.* (quoting Lujan v. Def. of Wildlife, 504 U.S. 555, 560 (1992)).

branch, with courts dismissing claims that present only "generalized grievances" about the legality of government conduct.[30]

Notwithstanding the rule that standing requires a particularized injury, the Court has found that *qui tam* litigation satisfies Article III requirements. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the Court considered a False Claims Act case in which a *qui tam* "relator" (*i.e.*, informer) alleged that a federal grant recipient submitted false claims to the Environmental Protection Agency in an effort to obtain excess grant funds.[31] The Court recognized that the relator had no personal injury in fact; the only particularized injury was suffered by the government.[32] The Court nevertheless found Article III standing on the theory that the statute's *qui tam* provision acted as a partial assignment to the relator of the government's claim.[33] The Court's finding of standing for informers was supported by the "long tradition of *qui tam* actions in England and the American Colonies," a history "well nigh conclusive with respect to the question before us here: whether *qui tam* actions were 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'"[34] Since *qui tam* litigation allows the informer to challenge the legality of conduct that inflicts no particularized harm on the litigant, it creates the possibility of enhancing the legal accountability of executive officials in situations where private suits might easily be dismissed as generalized grievances.

II. POSSIBLE MODERN APPLICATIONS OF *QUI TAM* LEGISLATION TO THE EXECUTIVE BRANCH

Qui tam legislation offers a potentially appealing mechanism for promoting legal compliance by executive branch officers because it allows judicial consideration of legal challenges that might otherwise fail for lack of standing. Let's consider three types of legal duties that might be enforceable through *qui tam* monitoring.

A. Reinforcing the Congressional Power of the Purse

The Constitution vests in Congress broad control over the use of public money. Congress has the affirmative power "to pay the Debts and provide for the common Defense and general

30 *See*, *e.g.*, *Lujan*, 504 U.S. at 571–78.

31 Vt. Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 770 (2000).

32 *See id.* at 772–73.

33 *Id.* at 774.

34 *Id.* at 766–77 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998)).

Welfare of the United States."[35] This power is reinforced by a negative prohibition: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law."[36] Administrations of both major political parties have sometimes sought to circumvent the congressional power of the purse. The Nixon Administration famously asserted an authority to "impound" public funds, refusing to spend money on grounds unrelated to the congressional spending program in question.[37] The Obama Administration, on the other hand, was found to have violated the Constitution by sending money to insurance companies under the Affordable Care Act without a supporting congressional appropriation.[38]

Standing doctrine tends to foreclose many lawsuits challenging the use of public money.[39] In *Frothingham v. Mellon*, the Supreme Court determined that taxpayer status did not give an individual standing to challenge the constitutionality of a federal expenditure.[40] An individual's interest in money in the U.S. Treasury "is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity."[41] This bar to taxpayer standing has long been understood as one application of the generalized grievance principle.[42] Other case law has strictly limited lawsuits by individual members of Congress seeking to protect legislative powers.[43] The recent case challenging Affordable Care Act payments to insurers satisfied standing concerns only because an entire house of Congress decided to file suit, something that would be impossible in many cases.[44]

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35 U.S. CONST. art. I, § 8, cl. 1.

36 *Id.* art. I, § 9, cl. 7.

37 *See* Train v. City of N.Y., 420 U.S. 35, 40–41 (1975) (finding the statute did not permit Environmental Protection Agency to allocate less funds for municipal sewage and treatment facilities than Congress authorized for appropriation); Adam Rozenzweig, *The Article III Fiscal Power*, 29 CONST. COMM. 127, 138–39 (2014) (discussing impoundment controversy).

38 *See* U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165, 174–75 (D.D.C. 2016).

39 *See, e.g.*, Brown v. Ruckelshaus, 364 F. Supp. 258, 265 (C.D. Cal. 1973) (plaintiff lacked standing to challenge Environmental Protection Agency's withholding of funds).

40 Frothingham v. Mellon, 262 U.S. 447, 488 (1923).

41 *Id.* at 487.

42 *See* Turner v. City & Cty. of S.F., 617 Fed. Appx. 674, 677 (9th Cir. 2015) (claim asserted as taxpayer could not be pursued in federal court because only raised generalized grievance).

43 *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 830 (1997) (holding individual members of Congress lacked standing to challenge Line Item Veto Act).

44 U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 80–81 (D.D.C. 2015).

There is precedent for using *qui tam* legislation to monitor government officials in connection with fiscal matters, as in the English and American statutes that regulated tax collection efforts.[45] *Caswell v. Allen*[46] was an early American case against one of the county supervisors of Cayuga County, New York. The New York legislature had instructed the county to raise up to $800 in tax revenues to build a fireproof clerk's office near an anticipated new courthouse.[47] The defendant joined the majority that voted down a proposal to comply with the legislative directive. A *qui tam* informer then sued the defendant under a statute imposing a $250 forfeiture on any county supervisor who neglected or refused to follow a law directing the county to levy funds for public buildings.[48] The issue on appeal was whether the legislation concerning funds for a clerk's office was mandatory or discretionary. The appellate court concluded that the legislation imposed a mandatory duty to raise revenue for a clerk's office and therefore granted a new trial against the defendant.[49]

A modern *qui tam* statute could be used to reinforce Congress' power of the purse. The statute could impose a forfeiture on any executive official who refused to spend funds where a statute made the expenditure mandatory, or who authorized an expenditure that was not supported by a congressional appropriation. The *qui tam* provision would overcome Article III objections and eliminate the barrier to adjudication created by the rule against taxpayer standing.

B. Preserving the Congressional Role in Military Affairs

The constitutional allocation to Congress of the power to "declare war" has proved ineffective in ensuring congressional control over the use of military force. Our political and legal institutions early on accepted the lawfulness of military engagements that involved no such declaration.[50] In the aftermath of the Vietnam War, Congress sought to reinvigorate the legislative role in military decision-making by adopting the War Powers Resolution ("WPR"). The provisions are complex, but the key points can be outlined succinctly. The president must

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45 *See supra* notes 22, 24 and 26 and accompanying text.

46 7 Johns. 63 (N.Y. 1810).

47 *Id.* at 63.

48 *Id.*

49 *Id.* at 68–69.

50 Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2059–60 (2005) ("One reason is historical practice. Starting with early conflicts against Indian tribes and the Quasi-War with France at the end of the 1700s, the United States has been involved in hundreds of military conflicts that have not involved declarations of war.").

consult with Congress whenever possible before introducing military forces into actual or imminent "hostilities,"[51] and must report such deployments to Congress.[52] As a general rule, the resolution instructs the president to terminate the deployment of troops unless Congress within sixty days declares war or adopts "specific authorization" for the use of force.[53] Authorization may not be inferred from a provision of an appropriation statute unless it "specifically authorizes the introduction of United States Armed Forces into hostilities" and states that it is intended to satisfy the WPR authorization requirement.[54]

Many observers argue that certain recent military operations have violated the letter or spirit of the WPR. President Clinton continued U.S. participation in the NATO bombing of Kosovo beyond the sixty day limit of the WPR based on the theory that Congress authorized the action through an appropriation provision, even though the statute rejects authorization by that means.[55] President Obama claimed that extended participation in the NATO operation in Libya was not subject to the WPR because our drone and bombing attacks did not amount to "hostilities."[56]

Qui tam legislation was used historically to regulate militia service, enforcing duties such as showing up for training exercises with the necessary equipment.[57] Could *qui tam* legislation potentially help Congress in the higher profile context of enforcing the WPR? Imagine a law imposing *qui tam* forfeitures on executive branch officials for acts such as (1) introducing troops into hostilities (perhaps accompanied by further definition of the term) without consulting with Congress in a situation where such consultation was possible, (2) failing to report to Congress within a specified time period after troops have been introduced into hostilities, or (3) continuing

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51 50 U.S.C. § 1542.

52 *Id.* § 1543(a).

53 *Id.* § 1544(b).

54 *Id.* § 1547(a)(1).

55 *See* Jason Reed Struble & Richard A.C. Alton, *The Legacy of Operation Allied Force: A Reflection on Its Legality Under United States and International Law*, 20 MICH. ST. INT'L L. REV. 293, 310–13 (2012). *But see* Abraham D. Sofaer, *The War Powers Resolution and Kosovo*, 34 LOY. L.A. L. REV. 71, 76–77 (2000) (arguing WPR provision preventing appropriations from serving as approval of a military operation is legally ineffective).

56 Jack Goldsmith & Matthew Waxman, *Obama, Not Bush, Is the Master of Unilateral War*, NEW REPUBLIC (Oct. 14, 2014), https://newrepublic.com/article/119827/obamas-war-powers-legacy-he-must-seek-congressional-authorization [http://perma.cc/R34Z-8NPC] (stating that Obama administration construction of War Powers Resolution in connection with Libya operations was unconvincing).

57 *See* Beck, *supra* note 9, at 43.

participation in hostilities for more than 60 days without congressional authorization in the required form.

A *qui tam* provision could remove the Article III standing barrier that courts have invoked to avoid adjudication of claims under the WPR.[58] Cases seeking to enforce the resolution could nevertheless face other barriers to justiciability, especially the political question doctrine.[59] The application of the political question doctrine depends on a variety of factors,[60] but the force of some factors could be minimized by careful drafting. For instance, if Congress specified objective conditions that would trigger legal duties under the WPR and made clear that the duties are mandatory rather than discretionary, a court would be less likely to find a lack of "judicially discoverable and manageable standards" for resolving the case or the need for "an initial policy determination of a kind clearly for nonjudicial discretion."[61] Dismissal on political question grounds would be more likely if the legal question arguably turned on the exercise of military or foreign affairs expertise. For instance, a court might find a political question if the executive branch was offering an intelligence-based analysis of the historical relationship between Al Qaeda and the Islamic State to argue that operations against the Islamic State come within the scope of the 2001 Authorization for the Use of Military Force against Al Qaeda.[62] On the other hand, if the sole issue was whether Congress had authorized a military action and (as in Kosovo) the only arguable authorization was an appropriations bill, the questions presented to the court would seem more legal in nature.

While a *qui tam* provision might help get a WPR case into court, it is an open question whether one should view that as a desirable outcome. Some people would consider it unwise to place

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58 *See* Campbell v. Clinton, 203 F.3d 19, 20–26 (D.C. Cir. 2000) (finding members of Congress lacked standing to challenge Kosovo bombing as a violation of the War Powers Resolution).

59 *See* Vladeck, *supra* note 8, at 47–48 (noting that in cases challenging the Vietnam War, courts avoided decisions on the merits in "every way imaginable," including political question doctrine).

60 *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

61 *Id.*

62 *See* MATTHEW C. WEED, CONGRESSIONAL RESEARCH SERVICE, R43760, A NEW AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE: ISSUES AND CURRENT PROPOSALS (2017) ("During his Administration, President Obama stated that the Islamic State can be targeted under the 2001 AUMF because its predecessor organization, Al Qaeda in Iraq, communicated and coordinated with Al Qaeda; the Islamic State currently has ties with Al Qaeda fighters and operatives; the Islamic State employs tactics similar to Al Qaeda; and the Islamic State, with its intentions of creating a new Islamic caliphate, is the 'true inheritor of Osama bin Laden's legacy.'").

the president under legally enforceable constraints—even the loose constraints of the WPR—in dealing with rapidly changing international threats. Moreover, those desiring a greater congressional voice in decisions about the use of military force might find that overcoming barriers to adjudication proved a Pyrrhic victory. A court could resolve a case on the merits by reading the WPR in a manner deferential to the executive.[63]

C. Preserving Official Email Records

So far, we have discussed use of *qui tam* legislation to allow adjudication of high-level legal conflicts central to the allocation of power between Congress and the president. Disputes over the congressional appropriations power or the president's unilateral initiation of military action are important, but not frequent. Historically, *qui tam* legislation was more often used to monitor activities of lower level officials performing the mundane daily tasks of government. For instance, *qui tam* statutes were often used in past centuries to promote thorough and accurate record keeping by public officials. English law used *qui tam* remedies to regulate record keeping regarding sales of horses at fairs and markets.[64] Early state laws deployed *qui tam* monitoring to ensure that records of a justice of the peace were preserved upon death or resignation.[65] The first Congress adopted *qui tam* legislation to govern creation and retention of census records.[66]

To round out our discussion of the potential use of *qui tam* legislation to promote executive branch accountability, it is worth considering a modern record-keeping question that has been much in the news. The 2016 presidential election was roiled by disclosures that the Democratic nominee had set up a private email system through which she sent and received official electronic correspondence in her role as Secretary of State.[67] Official inquiries confirmed that an earlier Republican Secretary of State had also conducted some government business through a private email account.[68] Doing public business on a private email

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63 Given longstanding questions about the constitutional status of the War Powers Resolution, the risk of an executive-leaning interpretation might be heightened by the canon of constitutional avoidance. *See* Clark v. Martinez, 543 U.S. 371, 380–81 (2005) ("If one of [two plausible statutory constructions] would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.").

64 Beck, *supra* note 9, at 25.

65 *Id.* at 37–38.

66 *Id.* at 56–57.

67 OFFICE OF INSPECTOR GENERAL, ESP-16-03, OFFICE OF THE SECRETARY: EVALUATION OF EMAIL RECORDS MANAGEMENT AND CYBERSECURITY REQUIREMENTS 23–25 (2016) (discussing private email use by Secretary Clinton).

68 *Id.* at 21–22 (discussing private email use by Secretary Powell).

system can undermine laws designed to ensure preservation of records, promote transparency, and reduce cybersecurity risks.[69] Notwithstanding campaign criticism of the Democratic nominee's email practices, at least six close advisors to President Trump have reportedly used private email accounts since the election to discuss White House matters.[70]

A private litigant might have difficulty challenging an official's practice of using a private email account for public business. Assuming a relevant cause of action could be identified, the plaintiff could be deemed to allege a generalized grievance widely shared by the public at large.[71] One public interest organization did manage to secure disclosure of many of the Secretary of State's emails using the Freedom of Information Act ("FOIA"), presumably establishing a particularized injury based on the rights created by a FOIA request.[72] However, since FOIA applies to an agency, it may not guarantee accountability of individual federal employees, and a significant number of agency records are exempt from release under the statute.[73]

So how might *qui tam* legislation address modern concerns about email preservation by government employees? Imagine a statute imposing a $1000 forfeiture for each email sent in the course of a government employee's official duties using a private email account. Statutory definitions could be used to create greater certainty about when an email was subject to the statute. A safe harbor provision could protect a government employee from suit if an email sent from a private account was promptly archived among the government's official email records. The legislation could be enforced by any *qui tam* informer with

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69 *See id*. at 2–19 (record keeping, preservation and transparency requirements), 26–34 (cybersecurity policies). Lisa Jackson, director of the Environmental Protection Agency in President Obama's first term, raised comparable transparency and record-keeping concerns (though not necessarily cybersecurity risks) when she sent emails on a second government email account registered under the alias "Richard Windsor." Julian Hattam, *Former EPA Chief Under Fire for New Batch of 'Richard Windsor' Emails*, THE HILL (May 1, 2013), http://thehill.com/regulation/energy-environment/297255-former-epa-chief-under-fire-for-new-batch-of-richard-windsor-emails [http://perma.cc/7E5L-5FXN]; *see also* Jaime Dupree, *Documents Show Ex-Attorney General Lynch Used "Elizabeth Carlisle" as Email Alias*, ATLANTA JOURNAL CONST. (Aug. 7, 2017), http://jamiedupree.blog.ajc.com/2017/08/07/documents-show-ex-attorney-general-lynch-used-elizabeth-carlisle-as-email-alias/ [http://perma.cc/864J-T3RP].

70 Matt Apuzzo & Maggie Haberman, *At Least 6 White House Advisers Used Private Email Accounts*, N.Y. TIMES (Sept. 25, 2017), https://www.nytimes.com/2017/09/25/us/politics/private-email-trump-kushner-bannon.html.

71 *See, e.g.*, United States v. Richardson, 418 U.S. 166, 176–77 (1974) (lawsuit challenging failure to release list of CIA expenditures presented a generalized grievance).

72 *See* Judicial Watch, Inc. v. Kerry, 844 F.3d 952, 953 (D.C. Cir. 2016) (case seeking to recover emails from former Secretary of State's private email accounts not moot).

73 *See, e.g.*, 5 U.S.C. § 552b(c) (1976) (FOIA exemptions).

evidence of an email violating the prohibition, with a successful informer entitled to keep half (or perhaps all) of the recovery as a bounty.

At this point, some readers may be thinking this sounds like an excellent way to ensure that executive branch employees comply with legal obligations flowing from their role as public servants. Other readers, however, may be getting nervous as they contemplate how the statute might work in practice. Would federal employees be distracted from their jobs by burdensome litigation? Would profit-motivated lawyers or informers develop a business of targeting careless federal employees? Would the statute be put to political use by interest groups or partisan warriors? Such concerns underscore some of the possible downsides of *qui tam* regulation and help explain why such statutes fell into disfavor in England and the United States. The next section discusses some of the problems with *qui tam* legislation and whether those problems might be ameliorated through legislative drafting.

III. POSSIBLE DRAWBACKS TO *QUI TAM* REGULATION OF EXECUTIVE OFFICIALS

England eliminated its remaining *qui tam* statutes in 1951.[74] I have argued elsewhere that recurring problems experienced in the history of *qui tam* enforcement flowed from a conflict of interest built into the design of the legislation. A *qui tam* statute deputizes private citizens to represent the interests of the public in enforcing the law, but simultaneously offers the informer a private financial interest in the outcome. When these public and private interests pull in different directions, informers may pursue private gain at the expense of the public good.[75]

English informers sometimes negotiated secret settlements with those allegedly in violation of *qui tam* legislation, keeping payments that should have been shared with the government.[76] They sometimes pursued fraudulent or malicious claims.[77] They brought suit in inconvenient locations, making it burdensome for defendants to litigate.[78] They sought to enforce statutes in ways that undermined the public good.[79] Legislative responses to such abuses were only partially successful.[80] Professional informers,

74 Beck, *English Eradication*, *supra* note 14, at 548–49.
75 *Id.* at 549.
76 *Id.* at 580–81.
77 *Id.* at 581–83.
78 *Id.* at 583.
79 *Id.* at 583–85.
80 *Id.* at 574–75, 590.

who made a livelihood through *qui tam* litigation, came to be despised by the public and were sometimes beaten by angry mobs.[81]

It is easy to imagine a modern informer's conflict of interest producing analogous problems to those experienced in English history. If a statute permitted *qui tam* litigation against executive branch employees for failing to perform some legal duty, lawyers might be tempted to build a practice around suing agents of the federal government. The public interest could be undermined by distracting employees from their duties, or by applying the statute to the limits of its language. If there was a *qui tam* statute penalizing government use of private email, for instance, and a federal employee used a private email system to deal with an unanticipated emergency, a public prosecutor would have discretion to decline to bring a case, reasoning that the public interest did not warrant prosecution. The bounty provision of a *qui tam* statute, however, tends to make profit maximization the goal of law enforcement. *Qui tam* legislation can effectively eliminate the disinterested exercise of prosecutorial discretion for the benefit of the public.

Such problems could potentially be ameliorated in the drafting process. Perhaps Congress could make *qui tam* bounties very low, so that such litigation would only be pursued by public interest firms motivated by considerations other than profit. Perhaps the legislation could place a cap on the amount a person could earn under a *qui tam* statute, preventing individuals from becoming professional informers. There could be a mechanism for the Department of Justice to dismiss *qui tam* cases it considered abusive or contrary to the public interest. At the very least, however, the problems that led England to eliminate *qui tam* legislation midway through the last century suggest that Congress should exercise great caution, carefully weighing costs and benefits, before deploying this particular tool for promoting executive branch accountability.

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81 *Id.* at 576–78.