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Qui Tam: An Abridged Look at the False Claims Act and Related Federal Statutes

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Qui Tam: An Abridged Look at the False Claims Act and Related Federal Statutes

Qui tam statutes enlist the public to sue to recover civil penalties and forfeitures from those who have defrauded the government. Qui tam rewards those who sue in the government's name (called relators) with a portion of the recovered proceeds. A creature of antiquity, once common, today qui tam lives on in federal law only in the False Claims Act and in Indian protection laws.

The False Claims Act proscribes: (1) presenting a false claim; (2) making or using a false record or statement material to a false claim; (3) possessing property or money of the U.S. and delivering less than all of it; (4) delivering a certified receipt with intent to defraud the U.S.; (5) buying public property from a federal officer or employee, who may not lawfully sell it; (6) using a false record or statement material to an obligation to pay or transmit money or property to the U.S., or concealing or improperly avoiding or decreasing an obligation to pay or transmit money or property to the U.S.; or (7) conspiring to commit any such offense. Offenders face the prospect of costs, expenses, attorneys' fees, damages, and perhaps triple damages in a civil action brought either by the U.S. or by a relator in the name of the U.S. Additional liability may flow from any retaliatory action taken against a False Claims Act whistleblower. The False Claims Act features a first-to-file bar that precludes copycat or piggyback relator suits and a public disclosure bar that precludes suits based on old news unless the relator is an original source.

If the government initiates the suit, others may not join. If the government has not brought suit, a relator may do so, but must give the government notice and afford it 60 days to decide whether to take over the litigation. If the government declines to intervene, a prevailing relator's share of any recovery is capped at 30%; if the government intervenes, the cap is lower and depends upon the circumstances. Relators in Indian protection qui tam cases are entitled to half of the recovery.

Federal qui tam statutes have survived two types of constitutional challenges—those based on defendants' rights in criminal cases and those based on the doctrine of separation of powers. The courts have found the rights required in criminal cases inapplicable, because qui tam actions are civil matters. They have generally rejected standing arguments, because relators stand in the shoes of the United States in whose name qui tam actions are brought. They have rejected Appointments Clause arguments, because relators hold no appointed office. They have rejected Take Care Clause arguments, because the residue of governmental control over qui tam actions is considered constitutionally sufficient.

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Introduction

Qui tam is a whistleblower concept.¹ It is the process whereby an individual sues or prosecutes in the name of the government and shares in the proceeds of any successful litigation or settlement. Although frequently punitive, it is generally a civil proceeding. Unlike antitrust, RICO, and other federal punitive-damage, private-attorney-general provisions, the individual who brings the suit in the name of the United States (called a relator) need not have been a victim of the misconduct giving rise to the litigation.

The name qui tam is the shortened version of an oft-abbreviated Latin phrase which roughly translates to “he who prosecutes for himself as well as for the King.” Qui tam comes to us from before the dawn of the common law. Reviled at various times throughout the ages as a breeding ground for “viperous vermin” and parasites, qui tam has been authorized by legislative bodies when they consider the enforcement of some law beyond the unaided capacity or interest of authorized law enforcement officials.

Best known of the contemporary members of the line is the federal False Claims Act (31 U.S.C. §§ 3729-3733). From 1986 until expansion of the Act in 2009, Justice Department recoveries totaled in excess of \$20 billion. Since then, the Justice Department has recovered over \$40 billion, including over \$3 billion in FY 2019.

This is a brief discussion of the history of federal qui tam provisions; of the two existing federal qui tam statutes—the False Claims Act and an Indian protection provision—and of the constitutional questions raised by federal qui tam provisions.

Background

The earliest cited example of a qui tam provision is the 695 declaration of King Wihtrud of Kent, which stated, “If a freeman works during the forbidden time [*i.e.*, the Sabbath], he shall forfeit his *healsfang*, and the man who informs against him shall have half the fine, and [the profits arising] from the labour.” By the fourteenth, fifteenth, and sixteenth century, qui tam statutes had become a common feature of English law. They brought with them, however, unintended consequences. They gave rise to a class of bounty hunters who unscrupulously exploited weaknesses in the system. “Old statutes which had been forgotten were unearthed and used as means to gratify ill-will. Litigation was stirred up simply in order that the informer might compound [*i.e.*, settle] for a sum of money. Threats to sue were easy means of levying blackmail.” Coke in his *Third Part of the Institutes of the Laws of England* devotes a chapter to the reform legislation designed to control the practices of these “vexatious relators, informers, and promoters,” whom he classifies as *turbidum hominum genus* (a class of unruly men) and as a species among the classes of “viperous vermin”—a class so unpopular that Queen Elizabeth I at one time found it necessary to issue a proclamation shielding its members from mob violence. Legislative reform, however, appears to have been effective, because a century and a half after Coke’s comments, Blackstone describes qui tam without criticism, except to note statutorily-cured abuse.

Qui tam was no stranger to colonial America or to the early Republic. Colonial legislatures enacted qui tam statutes of their own, and colonial courts heard qui tam cases arising under these statutes, as well as under English law. Qui tam statutes dot the work of the first Congresses of the new Republic, and qui tam cases appear among the cases of the early federal courts. By the turn

¹ This report is an abridged version of CRS Report R40785, *Qui Tam: The False Claims Act and Related Federal Statutes*, by Charles Doyle, without the footnotes, attribution, appendices, and most of the citations to authority found there.

of the twentieth century, qui tam statutes had largely fallen into disuse in this country, although they often remained on the books.

Contemporary Federal Qui Tam Statutes

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the Supreme Court identified four contemporary federal qui tam statutes: the False Claims Act, the Patent Act, and two Indian protection laws. One of the Indian protection statutes has since been amended, so that it no longer authorizes a qui tam action. The Leahy-Smith America Invests Act replaced the Patent Act qui tam provision with one that affords victims a cause of action. Of the two survivors, the False Claims provision is by far the more often invoked.

Congress has enacted a number of other statutes, beyond those with obvious qui tam markings, which might be similarly characterized. The Supreme Court observed in *United States ex rel. Marcus v. Hess* that “statutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue.” The suggestion encouraged environmentalists to bring qui tam actions based on an informer-reward provision in the Rivers and Harbors Act. The lower courts were not particularly receptive to the suggestion and refused to recognize any implicit authority to bring a qui tam action under the Rivers and Harbors Act.

Yet the Court mentioned the suggestion again in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, and in citing the existing qui tam-specific statutes, pointed out two of the qui tam-silent informer-reward statutes. The lower federal courts, however, continue to maintain that “Congress must *explicitly* create *qui tam* statutes.”

False Claims Act

The False Claims Act originated as the Act of March 2, 1863. Its brief legislative history is devoted almost exclusively to a subsequently abandoned proposal that all offenders, both military and civilian, had to be tried by courts martial. Senator Howard, the sponsor and floor manager of the bill in the Senate, provided the only explicit explanation of the qui tam provision:

The other clauses which follow, and which prescribe the mode of proceeding to punish persons who are not in the military service of the United States, I take it, are open to no serious objection. The effect of them is simply to hold out to a confederate a strong temptation to betray his coconspirator, and bring him to justice. The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator, if he be such; but it is not confined to that class. Even the district attorney, who is required to be vigilant in the prosecution of such cases, may be also the informer, and entitle himself to one half the forfeiture under the *qui tam* clause, and to one half of the double damages which may be recovered against the person committing the act. In short, sir, I have based the fourth, fifth, sixth, and seventh sections upon the old-fashion idea of holding out a temptation, and “setting a rogue to catch a rogue,” which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.

As enacted, the statute prohibited various frauds against the government, including making or presenting false claims, false vouchers, false oaths, forged signatures, theft, embezzlement, and conspiracy. The proscriptions applied to both military personnel and civilians. Civilian offenders faced a sentence of imprisonment of from one to five years or a fine of not less than \$1,000 or more than \$5,000. They also faced civil liability in the amount of \$2,000, double the amount of damage sustained by the United States, and costs. Any person might bring suit in the name of the

United States to recover the civil penalties, although the suit could only be settled with the consent of the court and federal prosecutors. The private parties, known as relators, were entitled to half of the penalty recovered and costs, if successful. The qui tam provisions were codified in the Revised Statutes and continued relatively unchanged until 1943 when the Attorney General sought to have them repealed.

Persons Who May Be Liable: The False Claims Act declares that any “person” who violates its prohibitions may incur liability. It does not define the term “person.” As a general rule, federal law understands the term to “include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” Local governments are considered persons for purposes of False Claims Act suits brought against them, but states and Indian tribes are not. The statute also denies federal courts jurisdiction over certain False Claims Act suits brought by private parties against Members of Congress, members of the federal judiciary, senior federal officials, or members of the armed forces.

Who May Sue: The False Claims Act allows private individuals to sue on behalf of the government, but any False Claims Act litigation takes place in the shadow of the government’s prerogatives. The action is brought in the name of the United States. The Attorney General may bring an action for violations. A private party (called a relator) may also bring such an action, but the government may elect to assume primary responsibility for the litigation from the beginning. If it initially chooses not to do so, the government is nevertheless free to intervene later in the proceedings upon a showing of cause. The government is likewise free to move to dismiss or settle the litigation over the objections of the relator, as long as the relator is given an opportunity to be heard. The Department of Justice’s JUSTICE MANUAL, which replaced the U.S. ATTORNEYS’ MANUAL, provides a “non-exhaustive list” of government interests that—in addition to the first-to-file, public-disclosure, and tax bars—should be considered in filing a motion to dismiss. The government may also petition the court to limit the relator’s participation in the litigation in the interest of a more effective prosecution of the action.

Who May Not Sue: Only the First to File: The False Claims Act features a first-to-file bar which precludes a second relator from bringing a later copycat action while the first claim is still pending. The bar extends to any claims that allege the same material or essential elements of the same underlying fraud.

Only Original Sources: A relator may not bring a False Claims Act action based on public information or information from official proceedings, unless he or she is the original source of the information.

Other Bars: The False Claims Act contains a number of other actions on behalf of the government. One applies with respect to actions based on civil litigation or administrative penalty enforcement proceedings to which the United States is a party. In addition, a person convicted for conduct related to a False Claims Act violation may not participate in a False Claims Act civil action and a person who planned or initiated a False Claims Act violation may not share in the proceeds from a civil action under the Act. Furthermore, a member of the armed forces may not bring a False Claims Act action against another member based on the defendant’s service, nor may an action be brought under the statute for false tax claims or statements.

Even though relators are often referred to as private parties, government employees may bring a False Claims Act qui tam action as long as one of the statutory bars does not apply.

Basis for Liability: Seven forms of misconduct give rise to civil liability under Section 3729. They occur when anyone: (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; (C) conspires to commit a violation of

subparagraph (A), (B), (D), (E), (F), or (G); (D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property; (E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; (F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government. Additional liability may also flow from any retaliatory action taken against those who seek to stop violations of the False Claims Act.

Common Elements: State-of-Mind: Section 3729(b) supplies definitions that govern the scope of the seven proscriptions found in Section 3729(a)(1) and requires less than actual knowledge to establish the state of mind necessary for conviction. Thus, it defines the terms “knowing” and “knowingly” to make clear that the government need not show that the defendant acted with the intent to defraud. Moreover, Section 3729(b)(1) ensures that the knowledge element may be satisfied with a showing that the defendant acted knowingly, with deliberate ignorance, or with reckless disregard. The “knowing” standard demands that the defendant act with the intent to engage in conduct that the law proscribes whether he is aware of the proscription or not. The “deliberate ignorance standard” is an ostrich-with-his-head-in-the-sand standard. And, the “reckless disregard” standard contemplates a state-of-mind element found somewhere between deliberate disregard and gross negligence.

False: The False Claims Act does not define either the term “false” or the term “fraudulent.” Congress and the courts have endeavored to fill the gap. Congress has declared that the terms include more than conduct intended to defraud and that the terms encompass information presented blindly or in reckless disregard of its veracity.

The courts have held that the terms embody both factually false and legally false claims. Factually false claims inaccurately describe the goods or services provided. Legally false claims can be either expressly or implicitly false; they can either explicitly certify that they comply with all the material statutory, regulatory, and contractual prerequisites for payment or that they present a claim but fail to disclose violation of a statutory, regulatory, or contractual condition of payment. A defendant may be liable under an implicit certification theory when “first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant’s failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes the representations misleading half-truths.”

Materiality: Section 3729(b)(4) adopts the traditional definition of materiality: “the term ‘material’ means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”

Materiality, like knowledge, cabins the Act’s falsity requirement. As the Supreme Court has explained, not every false statement is actionable; only those likely to induce an unwitting government payment or forbearance. The parties asked the Supreme Court in *Escobar* whether for False Claims Act purposes a statement, true on its face, could be made false by omission. The Court held that “liability can attach when the defendant submits a claim for payment that makes specific representation about the goods or services provided but knowingly fails to disclose the defendant’s violation of a *material* statutory, regulatory, or contractual requirement.” *Escobar* has

supplied later courts with factors to assist in the determination of whether a false statement is material, such as whether the government has consistently honored claims that it knew involved false information.

Misconduct: Presentation of a false or fraudulent claim: "... [A]ny person who – (A) knowingly presents, or causes to be presented, a false claim for payment or approval ... is liable. . . ."

As noted earlier, the term "person" encompasses any individual or legal entity other than a State or its alter ego. "Presentation" is Section 3729(a)(1)(A)'s distinctive element. A decade ago, Congress adjusted this element. Prior to enactment of the Fraud Enforcement and Recovery Act of 2009 (2009 Act), this section was designated 31 U.S.C. § 3279(a)(1) and read, "(a) Any person who – knowingly presents, or causes to be presented, to an officer or employee of the United States Government or member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." The language had been construed in the D.C. Circuit's *Totten* opinion to mean that liability "only attach[ed] if the claim [was] 'presented to an officer or employee of the Government.'" Congress removed the reference to federal government employees and members of the armed services in order to clarify "that direct presentment is not required for liability to attach." The claims encompassed within Section 3729(a)(1)(A) are those presented to the federal government, its employees or agents, as well as those presented to others for payment, directly or indirectly, out of federal funds.

Use of false records or statements material to a false or fraudulent claim: "... [A]ny person who – (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim ... is liable. . . ."

Before the 2009 Act's amendments, this section applied to, "Any person who . . . knowingly makes, uses, or causes to be made, or used, a false record or statement to get a false or fraudulent claim *paid or approved by the Government*." The 2009 Act amended the section to negate the Supreme Court's suggestion in *Allison Engine* that liability under its provisions required proof that "a defendant must intend that the Government itself pay the claim." The 2009 Act also made materiality a specific element of Section 3729(a)(1)(B), thus requiring that the false record or statement have "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." At the time of enactment, most but not all of the lower courts to consider the issue believed that Section 3729 contained an implicit materiality requirement. The 2009 amendments also made its modifications retroactively applicable to cases pending on June 7, 2008 and thereafter.

As it now stands, the existence of a false record relating to a claim provides Section 3729(a)(1)(B) with its distinctive element. Otherwise, as in the case of Section 3729(a)(1)(A), "[a]n FCA violation has four elements: falsity, causation, knowledge, and materiality."

"A claim is false if it is an assertion that is untrue when it is made." "Ordinarily, facts are the only item that fits in the false statement category; opinions – when given honestly – are almost never false." Yet, "opinions may trigger liability for fraud when they are not honestly held by their maker, or when the speaker knows the facts are fundamentally incompatible with his opinion."

"[T]he False Claims Act requires that the defendants know, deliberately ignore, or recklessly disregard the falsity of their claim. But it does not require a specific intent to defraud." Causation is a product of materiality, which Congress made explicit in 2009.

Conspiracy to commit liability triggering misconduct: "... [A]ny person who – (C) conspires to commit a violation of subparagraph (A), (B), (D), (E) (F), or (G)... is liable. . . ."

At one time, this section (then referred to as Section 3729(a)(3)) imposed civil liability upon those who conspired "to defraud the Government by getting a false or fraudulent claim allowed or

paid.” To some, this meant that liability for the substantive misconduct and conspiracy did not correspond. For example, although civil liability might be incurred under then Section 3279(a)(7) for false statements calculated to conceal an obligation to pay the United States (reverse false claims), a reverse false claims conspiracy might not be thought to result in liability since it would not constitute a conspiracy to get a “claim allowed or paid,” as the language of the conspiracy prohibition then required. The 2009 Act resolved the incongruity by recasting the section to establish liability for conspiracy to engage in any misconduct covered by the substantive pronouncements in Section 3729(a)(1), not just the misconduct described in Section 3729(a)(1)(A) and Section 3729(a)(1)(B) (the only two sections to expressly refer to claims).

The subsequent case law is sparse, but indicates that a violation of Section 3729(a)(1)(C) is not “independently actionable” without an underlying violation of one of the other prohibitions of Section 3729(a)(1).

Short-changing the government: “Any person who . . . (D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property . . . is liable. . . .” The 2009 Act streamlined this section, eliminating the receipt requirement and substituting a knowledge element for one that once insisted on willful concealment or an intent to defraud. The section once declared:

Any person who . . . (4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt . . . is liable. . . .

Conversion stands as the distinctive element of Section 3729(a)(1)(D). Consequently liability requires both the defendant’s possession of the money or property and the defendant’s knowledge, as defined in Section 3729(b)(1), that the money or property belonged to the government.

Issuing a false government receipt: “Any person who . . . (E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true . . . is liable. . . .” To date, federal courts have yet to construed Section 3729(a)(1)(E)’s language. On its face, Section 3729(a)(1)(E) (previously designated Section 3729(a)(5)) establishes civil liability for anyone, authorized to certify receipt of property on behalf of the government, who knowingly certifies receipt falsely with the intent to defraud the government. Section 3729(a)(1)(E) is the only one of the offenses enumerated in Section 3729(a)(1) that explicitly refers to an intent to defraud. The reference seems to fly in the face of Section 3729(b)(1)(B) which declares that an intent to defraud is not a component of the knowledge element. A court might conclude that the purpose of Section 3729(a)(1)(E)’s explicit intent-to-defraud language is to override Section 3739(b)(1)(B), but that the purpose of Section 3729(a)(1)(E)’s without-completely-knowing statement is to incorporate the alternative knowledge standards of Section 3729(b)(1)(A) (actual knowledge, deliberate ignorance, or reckless disregard).

Section 3729(a)(1)(E) makes no mention of materiality. However, the courts have generally assumed that Congress did not mean to envelop inconsequential untrue statements within its fraud and false statement prohibitions.

Unlawful purchase of government property: “Any person who . . . (F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property . . . is liable”

To date, there are no federal reported cases construing Section 3729(a)(1)(F). The section (once Section 3729(a)(6)) on its face creates civil liability for those who purchase government property, or who accept government property as security, from a government officer or employee or member of the armed forces who has no authority to sell or pledge the property. The prior, similarly-worded section required the relator to show that the defendant acted with guilty knowledge under the same knowledge standards now found in Section 3729(b)(1).

Reverse false claims: “Any person who . . . (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government . . . is liable . . .”

The 2009 Act rewrote and substantially changed the scope of Section 3729(a)(1)(G) (once Section 3729(a)(7)), the so-called reverse false claims section. It is “described as a ‘reverse false claims’ provision because the financial obligation that is the subject of the fraud flows in the opposite of the usual direction.” Instead of fraudulently attempting to obtain money or property *from* the government, the misconduct is designed to fraudulently avoid providing money or property to the government. In its present state, the section covers two forms of misconduct: (1) making or using a false statement or record material to an obligation to provide the government with money or property, and (2) knowingly concealing or improperly avoiding or decreasing an obligation to provide the government with money or property. The first prong is the traditional form; the 2009 Act added the second.

The elements of a violation under the first prong of the reverse-FCA provisions are that (1) a record or statement was false, (2) the defendant had knowledge of the falsity, (3) the defendant made or used (or caused to be made or used) the false record or statement, (4) the defendant’s purpose was to conceal, avoid, or decrease an obligation to pay the government, and (5) the false record or statement was material.

The elements of a violation under the second prong of the reverse-FCA provision is that the defendant (1) concealed or improperly avoided or decreased an obligation to pay the government and (2) did so knowingly. There is no requirement under the second prong to show that the defendant used a false record or statement or that a record or statement was material.

The Committee report accompanying passage of the 2009 Act explained that the second prong was designed for greater symmetry with Section 3729(a)(1)(A) and Section 3729(a)(1)(B). Where those sections speak of misconduct calculated to induce excessive payments by the government, Section 3729(a)(1)(G) speaks of misconduct calculated to avoid full payment to the government. Sections 3729(a)(1)(B) and (A) condemn making false statements and submitting false claims to induce payment by the government; Section 3729(a)(1)(G) was crafted to condemn making false statements and engaging in other improper conduct calculated to avoid full payment of the government. Until passage of the 2009 Act, Section 3729(a)(1)(G) (then styled Section 3729(a)(7)) only covered false statements, but had no false presentation counterpart. The section was amended in hopes of filling the gap:

Any person who . . . (G) knowingly makes, uses, or causes to be made or used, a false record or statement *material* to an obligation to pay or transmit money or property to the Government, or *knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government* is liable. . . . 31 U.S.C. § 3729(a)(1)(G) (language added by the 2009 Act in italics).

The new language does more than fill gaps. Unlike Section 3729(a)(1)(A), it creates civil liability for not only false or fraudulent claims, but for “any knowing and improper conduct.” Moreover, unlike Section 3729(a)(1)(A), it establishes liability without insisting on either direct or indirect

presentation. Nor need the misconduct involve a false or fraudulent statement or record; conscious or recklessly improper conduct will suffice.

Although the term “improper” is not defined, the 2009 Act added a new definition of “obligation” that considerably enlarges the scope of the false statement and the improper avoidance prongs of Section 3729(a)(1)(G). Parsed to its constituent parts, the definition states:

Obligation means

1. an established duty
2. whether fixed or not fixed
3. arising from
 - a. an express or implied
 - i. contractual,
 - ii. grantor-grantee, or
 - iii. licensor-licensee relationship
 - b. a fee-based or similar relationship
 - c. statute or regulation, or
 - d. the retention of any overpayment.

Earlier courts, operating without the benefit an explicit definition, had often construed the term “obligation” narrowly. Some courts had found that the reverse false claims section did not “extend to the potential or contingent obligations to pay the government fines or penalties which [had] not been levied or assessed . . . and which [did] not arise out of an economic relationship between the government and the defendant (such as a lease or a contract or the like).” Although a few had held that the obligation need not always be fixed, most had “held that in order to create liability under (a)(7), the obligations must be fixed and definite at the time of the false claim.” The 2009 Act codified a more expansive view:

The term ‘obligation’ is now defined under new Section 3729(b)(3) and includes fixed and contingent duties owed to the Government – including fixed liquidated obligations such as judgments, and fixed, unliquidated obligations such as tariffs on imported goods. . . . By including contingent obligations such as, ‘imposed contractual, quasi-contractual, grant-or-grantee, licensor-licensee, fee-based, or similar relationships, this new section reflects the Committee’s view, . . . that an ‘obligation’ arises across the spectrum of possibilities from the fixed amount debt obligation where all particulars are defined to the instance where there is a relationship between the Government and a person that results in a duty to pay the Government money, whether or not the amount owed is yet fixed.

Nevertheless, the reference in the definition to an “established duty” seems to place a limitation on contingent or unfixed obligations to pay.

Retaliatory actions: “Relief From Retaliatory Actions.- (1) In general.-Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.”

Section 3730(h) is an inside whistleblower protection provision. On its face, a claim of retaliation under Section 3730(h) must involve:

1. a victim who is an “employee, contractor, or agent;”
2. who suffers, or is threatened with, some form of adverse employment action (“is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment”);
3. “because of;”
4. the conduct of the victim or an associate (“lawful acts done by employee, contractor, agent or associated others”);
5. relating to a protected activity (“lawful acts ... in furtherance of an action under this section [*i.e.*, a qui tam action] or other efforts to stop 1 or more violations of this subchapter [*i.e.*, the False Claims Act].”).

The courts have not always agreed on the elements’ individual requirements and Congress has not always agreed with the courts’ interpretations. Until passage of the 2009 Act, the False Claims Act condemned retaliation by employers against employees and mentioned some of the protected forms of assistance. Some courts concluded that only employees might claim the section’s protection and that it exposed only employers to liability. The 2009 Act expanded Section 3730(h) to specifically include employees, contractors, and agents, and eliminated references to employers and specific examples of protected assistance.

The lower federal appellate courts have yet to reach consensus over the appropriate “because of” interpretation. Some favor a “but-for” reading and others a “motivating factor” standard.

“In general, proving a violation of Section 3729 is not an element of a Section 3730(h) cause of action,” and does not require a prior filing of a False Claims Act action.

“In order to qualify as protected activity under the FCA’s anti-retaliation provision, the employer’s conduct: (1) ‘must have been in furtherance of an FCA activity,’ and (2) ‘must be aimed at matters which are calculated, or reasonably could lead, to a viable FCA action, meaning the employee in good faith believes and a reasonable employee in the same circumstances might believe that the employer is possibly committing fraud against the government.’”

Section 3730(h) retaliation claims may face a shifting standard of proof. If a claimant alleges sufficient facts to prevail, the burden shifts to the defendant to demonstrate an innocent justification for the adverse action taken against the claimant. Then the burden shifts again and compels the claimant to show that the defendant’s justification is a pretext.

Section 3730(h), however, does not trigger a Rule 9(b) heightened pleading requirement, because a False Claims Act retaliation claim is not an accusation of fraud.

Penalties and Awards

A court may order a defendant liable under Section 3729 to pay treble damages; a statutory penalty ranging from \$5,000 to \$10,000 (adjusted for inflation); the government’s litigation costs; and a relator’s expenses, attorneys’ fees, and costs. The court may reduce its damage award to no less than double the damages if it finds that a defendant made prompt disclosure and provided full cooperation before judicial or administrative proceedings began.

A court may order a defendant liable for retaliation in violation of Section 3730(h) to pay the whistleblower’s attorneys’ fees, litigation costs, and twice the amount of “back pay, interest on back pay, and compensation for special damages sustained as a consequence” of the retaliation.

When the False Claims Act action succeeds, relators are entitled to a share in the proceeds of up to 30%. If the government has not participated in the litigation, they are entitled to an award of from 25% to 30%. If the government took over the litigation, relators are entitled to a finder's fee of from 15% to 25%, reduced to no more than 10% when their claim was based primarily on public information. In any case, they are also entitled to attorneys' fees, expenses, and costs, but may be denied any award if they participated in the underlying fraud.

In contrast, if the defendant prevails in a False Claims Act action in which only a private relator has taken part, the court may award the defendant attorneys' fees and expenses, should it conclude that the action was clearly frivolous, vexatious, or brought to harass. The test for whether attorneys' fees and expenses are appropriate is said to be analogous to that used for prevailing defendants under 42 U.S.C. § 1988 and other federal fee-shifting statutes. Such awards are thought to be appropriate only under "rare and special circumstances," when the relator's action is meritless, groundless, or without foundation; when allegations are bereft of factual support or when there is no reasonable chance of success; or when brought or pursued for an improper motive.

Questions have arisen over relators' rights and options when the government pursues one of the alternate remedies mentioned in False Claims Act. Issues include: (1) whether criminal proceedings constitute "alternate remedies" for purposes of Section 3730(c)(5); (2) whether relators have standing to intervene in such proceedings; (3) whether federal laws governing those proceedings preclude intervention; (4) whether a relator's qui tam action constitutes the exclusive means of securing a relator's rights under Section 3730(c)(5); and (5) the extent to which relators may share in the judgments or settlements in alternative remedy proceedings relating involving a mixture of claims, some traceable to a relator's qui tam action, others not so.

Procedure

Section 3731(b)(1) states that a civil action for a violation of Section 3729 must begin within six years of the violation, but Section 3731(b)(2) provides an extension for undiscovered fraud which extends the deadline to 10 years as long as the action is brought within three years of official discovery or notice. The lower federal courts were initially divided over the question of whether the (b)(2) discovery extension was available only to actions by the government or to actions by private parties in which the government intervened. The Supreme Court resolved the dispute in *Cochise Consultancy, Inc. v. United States ex rel. Hunt* where it held that the False Claims Act's discovery extension applies regardless of whether the government elects to intervene.

In the case of litigation for retaliatory misconduct under Section 3730(h) (rather than one of Section 3729's proscriptions), the Dodd-Frank Wall Street Reform Act established a 3-year statute of limitations. Previously, parties were required to look to the most closely analogous statute of limitations under state law, since the sole explicit False Claims Act provision applied only to causes of action under Section 3729.

For private litigants, the False Claims Act process begins with a complaint filed under seal with the federal court in the district in which a violation occurred or in which any of the defendants is found, resides, or does business. Thereafter, relators must deliver all their material evidence and information to the government. The government has 60 days, or until the end of a longer period of any extensions granted by the court for cause, in which to decide whether intervene. The government has at its disposal civil investigative demand authority which allows it to compel the production of material and testimony in its investigations.

After the government has made its initial determination of whether to intervene, the defendants are served and have 20 days in which to respond. The government must prove damages and all of

the elements of the asserted violation by a preponderance of the evidence. A civil defendant, however, may not contest the presence of any elements of any violation which has been established or conceded against him in parallel criminal proceedings. Although they sue in the name of the United States, relators are bound by the 30-day deadline for appellate review rather than the 60-day deadline available to the government.

Until recently, some courts had held that the statute of limitations barred government intervention in a privately initiated case after the 6-year/3-year time period had run. That is, the government's action would not be thought to relate back to the private litigant's filing within the statute of limitations. The 2009 Act added a new subsection to Section 3731 to afford the government the advantage of the date of the relator's complaint as a cut-off date for statute of limitations purposes. Thus, a complaint that would be time barred as of the date of the government's intervention survives if it would not be time barred on the date of the relator's earlier original complaint and relates to that complaint. The government's related-back action may include new claims, but only if they are "tied to a common core of operative facts" found in the relator's timely complaint.

The Wartime Statute of Limitations Act applies only to criminal cases and not to False Claims Act qui tam cases.

Indian Protection (25 U.S.C. § 201)

All penalties which shall accrue under Title 28 of the Revised Statutes shall be sued for and recovered in an action in the nature of an action of debt, in the name of the United States, before any court having jurisdiction of the same, in any State or Territory in which the defendant shall be arrested or found, the one half to the use of the informer and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

Section 201 dates from 1834 and authorizes qui tam actions for violations of five separate statutes: (1) unlawful purchase of land from an Indian nation or tribe; (2) driving livestock to feed on Indian land; (3) settling on or surveying Indian land; (4) setting up a distillery in Indian country; and (5) trading in Indian country without a license.

Qui tam actions under Section 201 are relatively rare and appear to have arisen most often under the unlicensed trading and grazing (livestock on Indian land) provisions. In the *Hall* unlicensed trader case, the relators' action survived a standing challenge, but was dismissed for failure to join an indispensable party—the tribe, which had contracted for gambling equipment and services from the unlicensed supplier. In *Keith*, the relator's action was dismissed after the court concluded that "bureaucratic nonfeasance" made it impossible to obtain the required trader's license. Relators were somewhat more successful in *Hornell*, where the court upheld recovery of the monetary penalty, but declined to affirm confiscation of the station wagon that was the object of the unlicensed sale.

Section 179 prohibits grazing horses, mules, or cattle on Indian land without permission and sets the penalty at \$1 per head. The circuits are divided over the question of whether the Secretary of the Interior may by regulation set the penalty at \$1 per head for each day of violation. Federal district courts have jurisdiction exclusive of the states for enforcement of the penalties under Section 179, but they may abstain from exercising jurisdiction in favor of enforcement in a tribal court of jurisdiction.

There may be some question whether the monetary penalty established in Section 177 may be enforced by a qui tam action under §201. Section 201, however, applies to "penalties which shall

accrue under Title 28 of the Revised Statutes,” *i.e.*, Rev. Stat. §§ 2039-2157. Section 177 appears in Title 28 of the Revised Statutes as Section 2116. Thus, on its face, Section 201 permits a qui tam action to recover the penalties accruing under Section 177.

In *Harlan*, however, the Eighth Circuit stated in dicta that “25 U.S.C. § 177 appears to deal directly with cases where, as here, a person attempts to lease tribal lands without express approval of the federal government. . . . The statute makes violators subject to a fine of \$1,000, *but has no provision entitling relators to bring actions under it.* See *James v. Watt*, 716 F.2d 71 (1st Cir. 1983).” The issue in *Harlan* was whether the qui tam provisions, then found in 25 U.S.C. § 81, relating to contracts for services which required government approval, extended to sharecrop agreements. The court referred to Section 177 “simply . . . to demonstrate that a broad and general policy to oversee all contracts by Indians need not be accomplished through 25 U.S.C. § 81 alone.” The *James* case, which the court cites, held that an individual tribal member, suing as a victim of a violation of Section 177, may only do so as a representative of his tribe and not on his own behalf. It says nothing of whether he may do so on behalf of the United States qui tam.

The application of Section 201 to the penalties under Section 177 seems clear on its face, but the contrary statement in *Harlan* seems equally clear.

Constitutional Concerns

Qui tam evokes two classes of constitutional issues. First, to what extent may qui tam defendants claim the constitutional protections available to defendants in criminal cases? Second, is qui tam compatible with the Constitution’s allocation of powers among the three branches of government? At first glance, the first question seems the least troubling. The rights available in criminal proceedings exist precisely because the proceedings are criminal. The Sixth Amendment rights—the right to counsel, to call and confront witnesses, to be informed of the nature of the charges, to trial in the place where the offense occurred, and to a speedy and public trial before an impartial jury—apply only to “the accused” in criminal proceedings. Thus, they are inapplicable to federal qui tam proceedings, which are civil in nature. Rights found elsewhere in the Constitution, however, often turn upon whether the government’s action may be or must be considered punitive. Here the answers are bit less clear.

Double Jeopardy

For example, in the context of the False Claims Act, it was once thought that the Fifth Amendment’s double jeopardy clause applied to “actions intended to authorize criminal punishment to vindicate public justice” but not to “civil, remedial actions brought primarily to protect the government from financial loss.” It was further thought that a legislatively established civil remedy should not be considered a criminal penalty for double jeopardy purposes unless its purpose or effect was so excessive as to belie its civil designation.

But then the Court seemed to make a rule of the exception when it declared in *United States v. Halper* that, “under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.” Nine years later, however, in *Hudson v. United States*, the Court withdrew from the broad implications of *Halper*, whose analysis it characterized as “ill considered.” The appropriate test, the Court declared, is one exemplified in its pre-*Halper* case law:

Whether Congress, in establishing the penalizing mechanism, indicate[] either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an

intention to establish a civil penalty, [was] the statutory scheme . . . so punitive either in purpose or effect as to negate that intention. In regard to this latter inquiry, we have noted that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.

The Court has looked to the due process standards listed in *Kennedy v. Mendoza-Martinez* when defendants seek to satisfy the daunting “clearest proof” test. Although *Hudson* was not a qui tam case, later lower federal court qui tam cases consider it dispositive, and held that False Claims Act damages are not punishment for Double Jeopardy Clause purposes.

Excessive Fines

The Supreme Court implied in *Hudson* that the problems which drove its *Halper* analysis might more appropriately be judged by Eighth Amendment excessive fines standards. The Eighth Amendment states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” In other contexts, the Supreme Court has determined that the excessive fines clause “does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.” The clause does, however, apply to “the government’s power to extract payments . . . as punishment for some offense.” The critical question is not whether the procedure for extracting the payment is classified as civil or criminal or whether it serves some additional remedial purposes; if the payment constitutes punishment, it is a “fine” and as a general matter may not be excessive. A fine is excessive, in the eyes of the Court, “if it is grossly disproportionate to the gravity of the defendant’s offense.”

In the qui tam context, some lower courts treat False Claims Act qui tam penalties as punishment and consequently subject to excessive fines clause analysis. They have generally concluded, however, that the fines imposed in the cases before them were not excessive for Eighth Amendment purposes.

Due Process

Two Supreme Court cases suggest that permitting individuals with a personal interest to prosecute in the name of the United States may present due process issues. In *Marshall v. Jerrico, Inc.*, the Court rejected the argument that an administrative agency’s receipt of civil penalties which it assessed and collected posed a due process risk of biased prosecution. In the course of its opinion, however, the Court noted that it “need not say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function. In particular, we need not say whether different considerations might be held to apply if the alleged biasing influence contributed to prosecutions against particular persons, rather than to a general zealotry in the enforcement process.” That fact pattern surfaced in *Young v. United States ex rel. Vuitton et Fils S.A.*, but the issue splintered the Court.

Young and Vuitton were engaged in trademark litigation which had resulted in the issuance of an order enjoining Young from manufacturing or distributing counterfeit versions of Vuitton’s product line. Upon a showing of probable cause to believe that Young had violated the injunction, the court appointed Vuitton’s lawyers to prosecute the criminal contempt. Five members of the Supreme Court agreed that Young’s subsequent conviction should be overturned because, “counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order.” Four members of the Court felt this was so because the appointment of an interested prosecutor constituted error which undermined confidence in the integrity of the criminal proceeding. One of the four went so far as to assert that the failure to appoint a disinterested prosecutor constituted a due process violation. A fifth Justice

merely concurred in the result, because he felt that the lower court's appointment of a prosecutor—disinterested or not—was invalid on separation of powers grounds.

Lower federal courts thereafter confronted with due-process-disinterested-prosecutor challenges to qui tam have rejected them based on the fact that relators press their claims as private civil litigants and thus do not exercise government power subject to due process clause restrictions on criminal prosecutions.

“[T]he Due Process Clause imposes limits on ‘grossly excessive’ monetary penalties...” “The Supreme Court has instructed courts to consider three guideposts when reviewing punitive damages awards under the Due Process Clause.” Those three are: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.”

Other due process challenges have occasionally arisen over the retroactive amendments to qui tam legislation, sometimes in conjunction with an ex post facto challenge. Ex post facto challenges have failed because the courts considered the statute insufficiently penal to trigger such concerns. Due Process retroactivity challenges have failed because the courts concluded that rational legislative purposes justified retroactive application.

Separation of Powers

Is qui tam legislation compatible with the Constitution’s allocation of powers among the three branches? The Constitution allocates federal governmental authority among three coordinated branches. It vests all legislative powers in Congress, executive power in the President, and the judicial power of the United States in the federal courts. It declares that Congress shall have the power to make all laws, necessary and proper, for carrying into execution its own powers and those of the executive and judicial branches. It empowers Congress to remove by impeachment the President, the Vice President, and any civil officer of the United States for treason, bribery, or other high crimes and misdemeanors. It requires the advice and consent of the Senate for the appointment of ambassadors, public ministers and consuls, judges of the Supreme Court, and all other officers of the United States (except for those inferior officers whose appointment has been otherwise provided for by law). It instructs the President “to take care that the laws be faithfully executed.”

The Constitution authorizes the President to recommend legislation to Congress and to call Congress into extraordinary session. Legislation may not become law until presented to the President for his approval, or in the case of his disapproval only upon the vote of a super majority in each House. The Constitution says little about how the President may or must exercise the executive authority of the United States. It names the President commander-in-chief of the armed forces. It empowers the President to nominate, and with Senate advice and consent to appoint, ambassadors, public ministers, consuls, judges of the Supreme Court, and all other officers of the United States (except for those inferior officers whose appointment has been otherwise provided for by law). It permits the President to grant pardons and reprieves with respect to offenses against the United States and to require executive department heads to provide him with written opinions on matters relevant to their duties. It authorizes the President to receive ambassadors and other public ministers. Finally, the Constitution defines those cases and controversies to which the judicial power of the United States extends.

This “system of separation of powers and checks and balances . . . was regarded by the Framers as a self-executing safeguard against the encroachment or aggrandizement of one branch at the

expense of the other[s].” Yet, in this interwoven fabric of governmental authority, the Framers realized that, “[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”

Commentators and litigants have questioned whether qui tam is at odds with these basic constitutional principles. Their concerns are three. First, the Constitution grants the federal courts the judicial power over “cases and controversies.” This is thought to require at least two parties with conflicting interests, presented in a context suitable for judicial resolution, *i.e.*, standing in a case or controversy. Yet, relators come to court with no interest of their own, only a contingent personal interest. Second, the Constitution instructs the President to see that the laws are faithfully executed. Yet, without his approval or unrestricted control, relators may initiate and prosecute litigation. Third, the President is vested with the authority to appoint officers of the United States and, with the courts and heads of departments, to appoint inferior officers. Yet, relators, who engage in activities otherwise reserved to officers and inferior officers of the United States, are appointed neither by the President, the courts, nor by the head of any department.

Each of the constitutional challenges to the False Claims Act’s qui tam provisions faces an obvious hurdle. Qui tam statutes were fairly common at the time of the drafting of the Constitution. Qui tam statutes were enacted by the early Congresses, populated by the men responsible for drafting and ratifying the new Constitution. Although enactment in an early Congress is hardly a sure mark of constitutionality, action there “provides contemporaneous and weighty evidence of the Constitution’s meaning.” Thus, critics face the problem of explaining how a process, which the Framers did not consider unconstitutional, should now be so construed.

Standing: History plays a significant role in determining whether standing exists. Standing requires (1) a concrete injury to the plaintiff’s interest, (2) attributable to the defendant, (3) and amenable to judicial relief. When it put qui tam standing challenges to rest in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the Supreme Court observed that:

[T]he long tradition of *qui tam* actions in England and the American colonies . . . is particularly relevant to the constitutional standing inquiry since . . . Article III’s restriction of the judicial power to “Cases” and “Controversies” is properly understood to mean “cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.”

On the more perplexing matter of the relator’s injury, the *Stevens* Court found the injury to the United States sufficient to establish False Claims Act relator standing. With respect to the government’s share of the fruits of successful litigation, the Court found standing in the relator as an agent of the defrauded United States.² With respect to the relator’s share, it considered him the assignee of that portion of the interest of the United States, and a relator does not close his status as a government assignee when he further assigns a small portion of his possible recovery in a litigation financing agreement under which the relator relinquishes no control over the litigation.

The *Stevens* Court resolved the issue of qui tam standing, but it “express[ed] no view on the question of whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the ‘Take Care’ Clause of § 3.”

² *Stevens*, 529 U.S. at 771-72 (“It is beyond doubt that the complaint asserts any injury to the United States. . . . It would perhaps suffice to say that the relator here is simply the statutorily designated agent of the United States, in whose name . . . the suit is brought—and that the relator’s bounty is simply the fee he receives *out of the United States’* recovery. . . . This analysis is precluded, however, by the fact that the statute gives the relator himself an interest *in the lawsuit*. . . . For the portion of the recovery retained by the relator, therefore, some explanation of standing other than agency for the Government must be identified.”).

Appointments Clause: “[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . 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.”

The Appointments Clause issue in qui tam cases flows from apparently contradictory language in two Supreme Court cases. In the more recent, *Buckley v. Valeo*, the Court seemed to conclude that only officers appointed under Article II could be entrusted with conducting civil litigation on behalf of the United States:

We hold that these provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Art. II, §2, cl. 2, of the Constitution. Such functions may be discharged only by persons who are “Officers of the United States” within the language of that section.

Yet, earlier Court decisions suggested that the Appointments Clause applied only to those purported to hold an “office of the United States,” and that Congress might authorize the performance of services in the name of the United States by those who did so without the attributes of office, selected other than under Article II. The line begins with *United States v. Hartwell*, which held that a Treasury Department clerk was an officer of the United States for purposes of an embezzlement statute. The Court noted that the defendant had been appointed in a manner consistent with Article II to a position that “embraced the ideas of tenure, duration, emolument, and duties” and for which the duties were continuing and permanent rather than occasional or temporary.

The second case, *United States v. Germaine*, likewise involved a penal statute applicable to “officers of the United States.” The Court concluded that the defendant, a surgeon paid to conduct and report on the results of examinations of applicants and recipients of federal pensions, was not an officer of the United States. The Court supported its view by noting that the defendant filled no office; his duties were occasional and intermittent; he kept no place of business for public use; he gave no bond; he took no oath; he was but an agent employed by the Commissioner of Pensions to obtain information needed for the performance of the Commissioner’s duties.

The Court used the same mode of analysis in *Auffmordt v. Heden*, when it concluded that appraisers called upon in the event of a customs dispute were not officers of the United States and consequently their selection other than under the Article II formula did not invalidate their efforts.

The Court in *Buckley* distinguished rather than repudiated *Germaine* and *Auffmordt*, but it did so in manner that does not necessarily resolve the qui tam issue:

[The term] “Officers of the United States” does not include all employees of the United States, but there is no claim made that the Commissioners are employees of the United States rather than officers. Employees are lesser functionaries subordinate to officers of the United States, see *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890); *United States v. Germaine*, *supra*, whereas the Commissioners, appointed for a statutory term, are not subject to the control or direction of any other executive, judicial, or legislative authority.

In *Freytag*, the Court later affirmed the *Buckley* assertion that only officers appointed in conformity with Article II could “exercis[e] significant authority pursuant to the laws of the United States.”

Yet in *Freytag*, the Court acknowledged the existence of various classes empowered other than by Article II appointment who performed services in the name of the United States. There, it distinguished Tax Court special trial judges (inferior officers) from special masters (not officers)

along the lines suggested in *Germaine*, rather than based on a relative degree of independence mentioned in *Buckley*:

The office of special trial judge is established by Law, and the duties, salary, and means of appointment for that office are specified by statute. These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute. Furthermore, special trial judges perform more than ministerial tasks. . . . [T]he special trial judges exercise significant discretion.

Although the Court has thus far “express[ed] no view on the question whether *qui tam* suits violate Article II, in particular the Appointment Clause of § 2,” the lower federal courts generally see no Appointments Clause impediments, because they do not consider *qui tam* relators “officers of the United States.” As the Tenth Circuit has explained:

The procedural requirements of the Appointments Clause only apply to the appointment of officers. Thus, the threshold question that we face is whether *qui tam* relators are “officers” for purposes of Article II. We conclude that they are not; *qui tam* relators do not serve in any office of the United States. There is no legislatively created office of informer or relator under the FCA. Relators are not entitled to the benefits of officeholders, such as drawing a government salary. And they are not subject to the requirement, noted long ago by the Supreme Court, that the definition of an officer “embraces the ideas of tenure, duration, emolument, and duties, and the latter were continuing and permanent, not occasional or temporary. *United States v. Germaine*, 99 U.S. 508, 511-12 (1878); *see also Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890).

Take Care: Unlike the Appointments Clause, the Take Care Clause does not explicitly vest authority in the President. Instead, it imposes a responsibility upon him. The Framers, however, allocated powers among the branches so as to prevent Congress or the courts from undermining or unduly interfering with the President’s ability to perform his constitutional duties, including the duty to take care to see that the laws are faithfully executed. *Morrison v. Olson* presents a question perhaps most closely analogous to the one of whether *qui tam* statutes undermine or unduly interfere with the President’s ability to fulfill his responsibilities under the Take Care Clause. The case involved the constitutionality of the independent counsel provisions of the Ethics in Government Act. The statute permitted judicial appointment of a special prosecutor (independent counsel) under limited circumstances to investigate and in some instances to criminally prosecute senior executive branch officials.

Defendants argued that the Act impermissibly “reduc[ed] the President’s ability to control the prosecutorial powers wielded by the independent counsel,” both specifically when it precluded removal of the special prosecutor except for cause and as a general matter. The Court disagreed. It began by noting that the Constitution’s “system of separation of powers and checks and balances” was crafted “as a self-executing safe-guard against the encroachment or aggrandizement of one branch at the expense of the other.” It found that the Act presented no such threat. The Court then ran through an abbreviated check list of features which might be said to restrict the Executive’s prosecutorial control as well as those which appeared to re-enforce his control.

It acknowledged that under the Act the President’s agent, the Attorney General: (1) did not select the special prosecutor; (2) did not define the scope of the special prosecutor’s inquiry; and (3) could not remove the special prosecutor without cause. On the other hand, (1) a special prosecutor could be selected only upon the Attorney General’s unreviewable request; (2) the court defined the special prosecutor’s scope of authority based upon the facts contained in that request; and (3) the Attorney General might remove the special prosecutor for cause. All of which indicated to the Court that “the Act give[s] the Executive Branch sufficient control over the

independent counsel to ensure that the President is able to perform his constitutionally assigned duties.”

Lower court False Claims Act qui tam cases decided in *Morrison*’s wake generally reached the comparable conclusion—the False Claims Act affords the Executive Branch sufficient control to turn aside a Take Care Clause challenge, *see e.g.*, *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 757 (9th Cir. 1993) (“Taken as a whole, and considering the removal issue in particular, the FCA affords the Executive Branch a degree of control over qui tam relators that is not distinguishable from the degree of control the *Morrison* Court found the Executive Branch exercises over independent counsels.”).

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