A CONSTITUTIONAL DEFENSE OF *QUI TAM*

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I. INTRODUCTION

The False Claims Act (FCA),[1] which Congress originally enacted in 1863,[2] is the government's primary litigative tool for combating fraud

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1. Act of March 2, 1863, ch. 67, 12 Stat. 696, *reenacted* Rev. Stat. §§ 3490-3494, 5438 (1875 ed.) (codified at 31 U.S.C. §§ 231-235, recodified at 31 U.S.C. §§ 3729-3731 (1982)).

2. S. JUDICIARY COMM., FALSE CLAIMS AMENDMENTS ACT OF 1986, S. REP. No. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266.

against the federal government.[3] Among other things, the FCA permits a private individual (an "informer"[4]) to bring suit under the FCA in the

3. *Id.* For scholarly discussion of constitutional issues involving the FCA, see Sean Hamer, *Lincoln's Law: Constitutional and Policy Issues Posed by the* Qui Tam *Provisions of the False Claims Act*, 6 KAN. J.L. & PUB. POL'Y 89 (1997); Peter M. Shane, *Returning Separation-of-Powers Analysis to Its Normative Roots: The Constitutionality of* Qui Tam *Actions and Other Private Suits to Enforce Civil Fines*, 30 ENV. L. REP. 11081 (2000); James T. Blanch, Note, *The Constitutionality of the False Claims Act's* Qui Tam *Provision*, 16 HARV. J.L. & PUB. POL'Y 701 (1993); Evan Caminker, Comment, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341 (1989); Frank A. Edgar, Jr., Comment, *"Missing the Analytical Boat": The Unconstitutionality of the* Qui Tam *Provisions of the False Claims Act*, 27 IDAHO L. REV. 319 (1990); Robert E. Johnston, Note, *1001 Attorneys General: Executive-Employee* Qui Tam *Suits and the Constitution*, 62 GEO. WASH. L. REV. 609 (1994); Thomas R. Lee, Comment, *The Standing of* Qui Tam *Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543 (1990); Ara Lovitt, Note, *Fight for Your Right to Litigate:* Qui Tam, *Article II, and the President*, 49 STAN. L. REV. 853 (1997); John P. Robertson, Comment, *The False Claims Act*, 26 ARIZ. ST. L.J. 899 (1994).

For scholarly discussion of other issues raised by the FCA, see J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. REV. 539 (2000); John T. Boese, *When Angry Patients Become Angry Prosecutors: Medical Necessity Determinations, Quality of Care and the* Qui Tam *Law*, 43 ST. LOUIS U. L.J. 53 (1999); Anna Mae Walsh Burke, Qui Tam*: Blowing the Whistle for Uncle Sam*, 21 NOVA L. REV. 869 (1997); Elletta Sangrey Callahan, *Double Dippers or Bureaucracy Busters? False Claims Act Suits by Government Employees*, 49 WASH. U. J. URB. & CONTEMP. L. 97 (1996); Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273 (1992); Anthony L. DeWitt, *Badges? We Don't Need No Stinking Badges! Citizen Attorney Generals and the False Claims Act*, 65 UMKC L. REV. 30 (1996); Jill E. Fisch, *Class Action Reform,* Qui Tam*, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167 (1997); Patrick W. Hanifin, Qui Tam *Suits by Federal Government Employees Based on Government Information*, 20 PUB. CONT. L.J. 556 (1991); James B. Helmer, Jr., *How Great is Thy Bounty: Relator's Share Calculations Pursuant to the False Claims Act*, 68 U. CIN. L. REV. 737 (2000); James B. Helmer, Jr. & Robert Clark Neff, Jr., *War Stories: A History of the* Qui Tam *Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the* United States *ex rel.* Gravitt v. General Electric Co. *Litigation*, 18 OHIO N.U. L. REV. 35 (1991); Major John C. Kunich, Qui Tam: *White Knight or Trojan Horse*, 33 A.F. L. REV. 31 (1990); Ann M. Lininger, *The False Claims Act and Environmental Law Enforcement*, 16 VA. ENVTL. L.J. 577 (1997); Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 TENN. L. REV. 455 (1998); Frederick M. Morgan, Jr. & Julie Webster Popham, *The Last Privateers Encounter Sloppy Seas: Inconsistent Original-Source Jurisprudence Under the Federal False Claims Act*, 24 OHIO N.U. L. REV. 163 (1998); John R. Munich & Elizabeth W. Lane, *When Neglect Becomes Fraud: Quality of Care and False Claims*, 43 ST. LOUIS U. L.J. 27 (1999); Dan D. Pitzer, *The* Qui Tam *Doctrine: A Comparative Analysis of Its Application in the United States and the British* Commonwealth, 7 TEX. INT'L L.J. 415 (1972); Marc S. Raspanti & David M. Laigaie, *Current Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act*, 71 TEMP. L. REV. 23 (1998); Adam G. Snyder, *The False Claims Act Applied to Health Care Institutions: Gearing Up for Corporate Compliance*, 1 DEPAUL J. HEALTH CARE L. 1 (1996); Gary W. Thompson, *A Critical Analysis of Restrictive Interpretations Under the False Claims Act's Public Disclosure Bar: Reopening the* Qui Tam *Door*, 27 PUB. CONT. L.J. 669 (1998); Major David Wallace, *Government Employees as* Qui Tam

name of the United States government against an individual or entity (a "defendant") who the informer believes has defrauded the government.[5] This type of suit is known as a "*qui tam*" suit—from a Latin phrase meaning "one who brings the action as well for the king as for himself."[6]

Relators, ARMY LAW., Aug. 1996, at 14; Harvinder S. Anand, Note, *Competing Relators and Competing Objectives under the False Claims Act: Barring Subsequent Claims Should Look Beyond the Plain Language of Section 3730(b)(5)*, 28 PUB. CONT. L.J. 89 (1998); Edmund C. Baird, III, Note, *The Use of* Qui Tam *Actions to Enforce Federal Grazing Permits*, 72 WASH. U. L.Q. 1407 (1994); Troy D. Chandler, Comment, *Lawyer Turned Plaintiff: Law Firms and Lawyers as Relators Under the False Claims Act*, 35 HOUS. L. REV. 541 (1998); Lisa Estrada, Note, *An Assessment of* Qui Tam *Suits by Corporate Counsel Under the False Claims Act:* United States *ex rel.* Doe v. X Corp., 7 GEO. MASON L. REV. 163 (1998); Susan G. Fentin, Note, *The False Claims Act—Finding Middle Ground Between Opportunity and Opportunism: The "Original Source" Provision of 31 U.S.C. § 3730(e)(4)*, 17 W. NEW ENG. L. REV. 255 (1995); Gretchen L. Forney, Note, Qui Tam *Suits: Defining the Rights and Roles of the Government and the Relator Under the False Claims Act*, 82 MINN. L. REV. 1357 (1998); Christopher C. Frieden, Comment, *Protecting the Government's Interest:* Qui Tam *Actions Under the False Claims Act and the Government's Right to Veto Settlements of Those Actions*, 47 EMORY L.J. 1041 (1998); Kaz Kikkawa, Note, *Medicare Fraud and Abuse and* Qui Tam: *The Dynamic Duo or the Odd Couple?*, 8 HEALTH MATRIX 83 (1998); Michael Lawrence Kolis, Comment, *Settling for Less: The Department of Justice's Command Performance Under the 1986 False Claims Amendments Act*, 7 ADMIN. L.J. AM. U. 409 (1993); Mary DuBois Krohn, Comment, *The False Claims Act and Managed Care: Blowing the Whistle on Underutilization*, 28 CUMB. L. REV. 443 (1997); Frank LaSalle, Comment, *The Civil False Claims Act: The Need for a Heightened Burden of Proof as a Prerequisite for Forfeiture*, 28 AKRON L. REV. 497 (1995); Paul W. Morenberg, Comment, *Environmental Fraud by Government Contractors: A New Application of the False Claims Act*, 22 B.C. ENVTL. AFF. L. REV. 623 (1995); Valerie R. Park, Note, *The False Claims Act,* Qui Tam *Relators, and the Government: Which Is the Real Party to the Action?*, 43 STAN. L. REV. 1061 (1991); Carolyn J. Paschke, Note, *The* Qui Tam *Provision of the Federal False Claims Act: The Statute in Current Form, its History and its Unique Position to Influence the Health Care Industry*, 9 J.L. & HEALTH 163 (1994-95); Christopher P. Perzan, Note, *Research and Relators: The False Claims Act and Scientific Misconduct*, 70 WASH. U. L.Q. 639 (1992); Lisa Michelle Phelps, Note, *Calling off the Bounty Hunters: Discrediting the Use of Alleged Anti-Kickback Violations to Support Civil False Claims Actions*, 51 VAND. L. REV. 1003 (1998); Francis E. Purcell, Jr., Comment, Qui Tam *Suits Under the False Claims Amendments Act of 1986: The Need for Clear Legislative Expression*, 42 CATH. U. L. REV. 935 (1993); Kära Nicole Schmidt, Note, *Privatizing Environmental Enforcement: The Bounty Incentives of the False Claims Act*, 9 GEO. INT'L ENVTL. L. REV. 663 (1997); Kent D. Strader, Comment, *Counterclaims Against Whistleblowers: Should Counterclaims Against* Qui Tam *Plaintiffs Be Allowed in False Claims Act Cases?*, 62 U. CIN. L. REV. 713 (1993); Virginia C. Theis, Note, *Government Employees as* Qui Tam *Plaintiffs: Subverting the Purposes of the False Claims Act*, 28 PUB. CONT. L.J. 225 (1999); Note, *The History and Development of* Qui Tam, 1972 WASH. U. L.Q. 81 [hereinafter *History and Development*].

4. A *qui tam* plaintiff is frequently referred to as a "relator."

5. 31 U.S.C. § 3730(b)(1) (1994).

6. The full phrase in Latin is "*qui tam pro domino rege quam pro se imposo sequitur.*" 3 WILLIAM BLACKSTONE, COMMENTARIES 160-61 (1st ed. 1768); United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 746 n.3 (9th Cir. 1993); Bass Anglers Sportsman's Soc'y of Am. v. U.S. Plywood-Champion Papers, Inc., 324 F. Supp. 302, 305 (S.D. Tex.

Once the suit is filed, the government then has the option of intervening in the suit, which it may exercise within sixty days.[7] If the government intervenes, it takes control of the suit from the informer;[8] if the government declines to intervene, the informer may continue to prosecute the suit with her own resources.[9] After sixty days, the government may intervene only if it shows the court "good cause."[10] If the suit is successful (regardless of whether it ultimately was prosecuted by the government or the informer), the informer is entitled to an award of up to thirty percent of the proceeds or settlement, plus costs and attorneys' fees.[11]

Despite the FCA's long history, its constitutionality is still open to question.[12] Because the *qui tam* informer herself suffers no injury, she would appear at first blush to lack the "injury in fact"[13] required to create Article III standing.[14] The statute raises separation of powers issues by effectively redistributing prosecution and enforcement powers from the executive branch to informers. The "good cause" requirement, and limitations on the government's ability to dismiss or settle a *qui tam* action, arguably permit the judicial branch to encroach on executive authority by giving federal courts control over whether the government may intervene in, and terminate, a *qui tam* action. The prosecutorial powers exercised by informers in pursuing *qui tam* actions raise the issue of whether informers must be appointed in conformity with the Appointments Clause.

The Supreme Court, in a 2000 opinion, resolved the standing issue by holding that the FCA effectively makes a partial assignment of the federal government's claim to the informer, giving the informer a sufficient stake in the outcome to create Article III standing.[15] In doing so, however, the Court expressly left the other issues open.[16] Recent

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1971).

7. 31 U.S.C. § 3730(b)(2).

8. *Id.* § 3730(c)(1).

9. *Id.* § 3730(c)(3).

10. *Id.*

11. *Id.* § 3730(d)(1)-(2).

12. Because the FCA was seldom used prior to the 1986 Amendments, *infra* notes 49 and 57 and accompanying text, it was not subjected to serious constitutional challenge until that time. Lovitt, *supra* note 3, at 859.

13. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

14. *See, e.g.*, Blaneh, *supra* note 3, at 767 (concluding that FCA *qui tam* informers lack Article III standing to sue).

15. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 777-78 (2000).

16. *Id.* at 1865 n.8. While most courts to date have held the FCA constitutional, a Fifth Circuit panel recently created a split in the circuits by holding that the FCA violates separation of power principles by unconstitutionally encroaching on executive authority. The Fifth Circuit's panel decision has been vacated pending en banc review. Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514 (5th Cir. 1999), *reh'g en banc granted*, 196 F.3d

scholarship has argued that the *qui tam* provisions of the FCA are unconstitutional.[17] The importance of the constitutional issues raised by *qui tam* goes far beyond the significance of the *qui tam* action itself; the issues go to the heart of how power is allocated among the three branches of the federal government.

This Article provides a constitutional defense of the FCA *qui tam* action. Part II discusses the history of *qui tam* actions and describes the FCA statutory scheme in detail. Part III examines the Article III standing issue, first sketching the general contours of the standing doctrine, then applying that doctrine to the FCA *qui tam* action. Part IV analyzes the Article II issues. It first discusses the three Article II provisions that have been used to challenge FCA *qui tam* actions: the separation of powers doctrine, the Take Care Clause, and the Appointments Clause. It then applies these provisions to the three characteristics of *qui tam* that have come under Article II attack: the restrictions on the executive branch's prosecutorial powers, the delegation of prosecutorial powers to unappointed citizens, and the delegation of other prosecutorial powers to the judicial branch. Part V steps beyond the doctrinal analysis and argues that two unique features of *qui tam* give especially strong weight to the argument for constitutionality: its dispersal of power among the citizenry rather than among other branches of government, and its existence at the time the Constitution was framed.

II. THE NATURE OF *QUI TAM* SUITS

A. History

The history of *qui tam* has been extensively chronicled,[18] so its history will be only briefly recounted here. *Qui tam* actions had their genesis in Roman criminal law, which permitted prosecution by private citizens and offered, as a reward for successful prosecution, a portion of the defendant's property.[19] Early English laws containing *qui tam* provisions included an A.D. 695 law that prohibited labor on the Sabbath[20] and the 1318 Statute of York, which established price controls for certain consumer goods.[21]

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561 (5th Cir. 1999).

17. *See, e.g.*, Blanch, *supra* note 3; Lovitt, *supra* note 3.

18. *See, e.g.*, Beck, *supra* note 3, at 549-608; Pitzer, *supra* note 3; *History and Development*, *supra* note 3.

19. Beck, *supra* note 3, at 566; O.F. ROBINSIN, THE CRIMINAL LAW OF ANCIENT ROME 100 (1995); 10 THE CAMBRIDGE ANCIENT HISTORY 402 n.19 (2d ed. 1996).

20. THE LAWS OF THE EARLIEST ENGLISH KINGS 3, 27 (F.L. Attenborough ed. & trans., 1963).

21. Beck, *supra* note 3, at 567-68.

The latter statute illustrates why *qui tam* provisions were particularly popular with Parliament and the Crown at this point in English history. Merchandise affected by the statute often was sold by local government officials, who then had a financial disincentive to enforce the statute.[22] Moreover, there was no police force or other public entity that could be relied upon to enforce the statute.[23] The statute therefore provided that merchandise sold in violation of the statute was to be confiscated, permitted private citizens to sue for enforcement, and rewarded successful claimants with a third of the confiscated merchandise.[24]

By the early 1400s, *qui tam* provisions were appearing in a wide variety of statutes.[25] Many of these statutes regulated labor[26] and commercial activity.[27] Others regulated the performance of public functions.[28] For example, some statutes authorized private suits against public officials who accepted bribes.[29]

Qui tam legislation fell into disfavor in the early 1600s.[30] This was due in large part to abuses by the informers, such as fraudulent prosecutions[31] and extortion.[32] *Qui tam* legislation experienced a

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22. *Id.*

23. 4 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 355 (1924); 2 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 33-167 (1956).

24. Beck, *supra* note 3, at 568.

25. *Id.* at 570-73.

26. *See, e.g.*, Statute of Labourers, 23 Edw. 3 (1349) (Eng.); Statute of Labourers, 25 Edw. 3 (1350) (Eng.). Collectively, these two statutes attempted to reverse the wage inflation that had resulted from labor shortages caused by the plague.

27. *See, e.g.*, 34 Hen. 6, c. 7 (1455) (Eng.) (limiting the number of attorneys in certain counties and cities); 22 Edw. 4, c. 3 (1482) (Eng.) (restricting the import of silk); 22 Edw. 4, c. 4 (1482) (Eng.) (restricting the price of bows). For a more extensive list of statutes, see Beck, *supra* note 3, at 571-72 n.156.

28. *See, e.g.*, 15 Rich. 2, c. 4 (1391) (Eng.) (permitting suit against public officials who failed to enforce a rule concerning measurement of grain); 20 Hen. 6, c. 5 (1442) (Eng.) (permitting suit against certain public officials who engaged in business related to their public duties).

29. *See, e.g.*, 34 Edw. 3, c. 8 (1360) (Eng.) (permitting suit against jurors who accepted bribes).

30. Beck, *supra* note 3, at 587-90.

31. *Id.* at 581-83; *see also* 22 ACTS OF THE PRIVY COUNCIL OF ENGLAND 1591-92 at 404, 404-05 (John Roche Dasent, C.B., ed., Mackie & Co. 1901) (authorizing continued imprisonment of informer for having given false information in an entry dated Apr. 25, 1592).

32. *See* 4 HOLDSWORTH, *supra* note 23, at 356. Often, an informer and a defendant would reach a settlement between themselves without informing the government or giving the government any share of the settlement. Beck, *supra* note 3, at 580-81.

resurgence in the 1700s and early 1800s,[33] but fell off in the late 1800s.[34] In 1951, Parliament abolished the *qui tam* action entirely.[35]

In the meantime, however, the *qui tam* concept had been introduced to America. Prior to the American Revolution, several colonies passed statutes authorizing *qui tam* suits.[36] Immediately after the framing of the Constitution, the First Congress enacted several statutes containing *qui tam* provisions.[37] Over the next hundred years, Congress enacted seven *qui tam* statutes.[38] Today, four *qui tam* statutes, all enacted more than a hundred years ago,[39] remain on the books.[40]

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33. Beck, *supra* note 3, at 591.

34. *Id.* at 601.

35. Common Informers Act, 1951, 14 & 15 Geo. 6, c. 39 (Eng.); 480 PARL. DEB., H.C. (5th ser.) (1950) 2041. *But see* Beck, *supra* note 3, at 605 n.353 (noting that the abolition of the *qui tam* action in England was not completely effectuated until 1957).

36. *See, e.g.*, Act for the Restraining and Punishing of Privateers and Pirates, 1st Assemb., 4th Sess. (N.Y. 1692), *reprinted in* 1 LAWS OF THE COLONY OF NEW YORK 279, 281 (1894) (permitting informers to sue for, and receive share of, fine imposed on officers who neglect their duty to pursue smugglers and pirates).

37. *See* Act of March 1, 1790, ch. 2, § 3, 1 Stat. 101, 102 (allowing informer to sue for, and receive half of fine for, failure to file census return); Act of July 5, 1790, ch. 25, § 1, 1 Stat. 129 (extending same to Rhode Island); Act of July 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131, 131-33 (allowing private individual to sue for, and receive half of fine for, carriage of seamen without contract or illegal harboring of runaway seamen); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137-38 (allowing private individual to sue for, and receive half of goods forfeited for, unlicensed trading with Indian tribes); Act of March 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (allowing person who discovers violation of spirits duties, or officer who seizes contraband spirits, to sue for and receive half of penalty and forfeiture, along with costs, in action of debt); *cf.* Act of April 30, 1790, ch. 9, §§ 16, 17, 1 Stat. 112, 116 (allowing informer to conduct prosecution, and receive half of fine, for criminal larceny or receipt of stolen goods).

In addition, several statutes provided a bounty but did not expressly provide a cause of action. *See, e.g.*, Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 44-45 (giving informer full penalty paid by customs official for failing to post fee schedule); Act of August 4, 1790, ch. 35, § 55, 1 Stat. 145, 173 (same); Act of July 31, 1789, ch. 5, § 38, 1 Stat. 48 (giving informer quarter of penalties, fines, and forfeitures authorized under a customs law); Act of September 1, 1789, ch. 11, § 21, 1 Stat. 55, 60 (same under a maritime law); Act of August 4, 1790, ch. 35, § 69, 1 Stat. 145, 177 (same under another customs law); Act of September 2, 1789, ch. 12, § 8, 1 Stat. 65, 67 (providing informer half of penalty upon conviction for violation of conflict-of-interest and bribery provisions in Act establishing Treasury Department); Act of March 3, 1791, ch. 18, § 1, 1 Stat. 215, 215 (extending same to additional Treasury employees); Act of February 25, 1791, ch. 10, §§ 8, 9, 1 Stat. 191, 195-96 (providing informer half or fifth of fines resulting from improper trading or lending by agents of Bank of United States); *cf.* Act of August 4, 1790, ch. 35, § 4, 1 Stat. 145, 153 (apportioning half of penalty for failing to deposit ship manifest to official who should have received manifest, and half to collector in port of destination). The Supreme Court has suggested, in dictum, that "[s]tatutes 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." United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n.4 (1943).

38. These statutes, in chronological order, are: (1) Act of February 20, 1792, ch. 7, § 25, 1 Stat. 232, 239 (providing that informer could sue for penalties under postal

The most notable American *qui tam* statute, the FCA, was enacted in 1863 to "stop[] the massive frauds perpetrated [against the Union Army] by large [defense] contractors during the Civil War."[41] The rationale for adding a *qui tam* provision to the statute would have sounded familiar to a fifteenth-century member of Parliament: Congress believed that many public officials were active participants in the corruption and therefore were unlikely to enforce the law diligently.[42] Congress wanted to give defense industry functionaries a strong incentive to inform on fraudulent defense contractors,[43] and create an enforcement mechanism that was

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statute and keep half), *reenacted* Act of March 3, 1845, ch. 43, § 17, 5 Stat. 732, 738; (2) Act of March 22, 1794, ch. 11, §§ 2, 4, 1 Stat. 347, 349 (providing that individual could prosecute on government's behalf for slave trading), *reenacted* Act of March 26, 1804, ch. 38, § 10, 2 Stat. 283, 286; Act of March 2, 1807, ch. 22, § 3, 2 Stat. 426, 426; Act of March 4, 1909, ch. 321, §§ 254-57, 35 Stat. 1088, 1138-40; (3) Act of July 6, 1797, ch. 11, § 20, 1 Stat. 527, 532 (providing that informer received half of penalties related to duties on paper products--unclear whether informer could sue), *adopted* Act of February 28, 1799, ch. 17, § 5, 1 Stat. 622, 623 (same for penalties involving altering stamp duties); (4) Act of May 3, 1802, ch. 48, § 4, 2 Stat. 189, 191 (providing that individual could prosecute on government's behalf for employment of other than a "free white person" in postal service); (5) Act of August 5, 1861, ch. 45, § 11, 12 Stat. 292, 296-97 (providing that individual could sue import assessor acting without taking oath, and keep half the fine); (6) Act of July 8, 1870, ch. 230, § 39, 16 Stat. 198, 203 (providing that individual could sue on government's behalf for unlawful contracting with Indians), *reenacted* Act of May 21, 1872, ch. 177, § 3, 17 Stat. 136, 137. The First Congress's statute regarding unlawful trading with Indians was also reenacted. Act of March 1, 1793, ch. 19, § 12, 1 Stat. 329, 331; Act of May 19, 1796, ch. 30, § 18, 1 Stat. 469, 474; Act of March 30, 1802, ch. 13, § 18, 2 Stat. 139, 145; Act of June 30, 1834, ch. 161, § 27, 4 Stat. 729, 733-34.

39. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000).

40. In addition to the FCA, see 25 U.S.C. § 81 (1994) (providing cause of action and share of recovery against a person contracting with Indians in an unlawful manner); *id.* § 201 (providing cause of action and share of recovery against a person violating Indian protection laws); 35 U.S.C. § 292(b) (1994) (providing cause of action and share of recovery against a person falsely marking patented articles). In addition, several statutes provide a bounty, but not an express cause of action. *See, e.g.*, 18 U.S.C. § 962 (1994) (providing for forfeiture to informer of share of vessels privately armed against friendly nations); 46 U.S.C. § 723 (1994) (providing for forfeiture to informer of share of vessels removing undersea treasure from the Florida coast to foreign nations).

41. United States v. Bornstein, 423 U.S. 303, 309 (1976); *see also* United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1497 (11th Cir. 1991); H.R. REP. No. 37-2, 2d Sess., pt. ii-a at XXXVIII-XXXIX (1862); 1 FRED SHANNON, THE ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY 1861-1865, at 54-55 (1965) (quoting Tomes, *Fortunes of War*, 29 HARPER'S MONTHLY 228 (1864)) ("For sugar [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories.").

42. *See* Note, Qui Tam *Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions*, 67 NW. U. L. REV. 446, 453 n.32 (1972).

43. Blanch, *supra* note 3, at 703-04; *see also* CONG. GLOBE, 37th Cong., 3d Sess. 956 (1863) (remarks of Sen. Howard) ("I have based the [enforcement provisions of the

independent of the Department of Justice officials who often were part of the problem.

The FCA prohibits the submission of false claims to the United States government.[44] In its original form, it provided for double damages,[45] imposed a $2,000 mandatory civil penalty for each false claim submitted,[46] and entitled informers to one-half of the damages and penalties awarded as the result of a successful suit.[47] It required the informer to bear all of the costs of bringing the lawsuit, and permitted the government to take over the suit at any time and for any reason.[48]

Very few individuals prosecuted FCA cases between 1863 and 1930, largely because of the decline in military spending following the Civil War and the obscurity of the FCA in general.[49] Beginning in the 1930s, however, the New Deal and World War II greatly expanded the role of the federal government in the national economy, and commensurately expanded the opportunities for unscrupulous contractors to defraud the government.[50] Unfortunately, some FCA informers, like their English predecessors from the 1600s, abused the statute. The FCA's language did not require an informer's suit to be based on independently-acquired information,[51] and in 1943 the Supreme Court ruled that an informer could sue based on information contained in public criminal indictments.[52] As a result, whenever a criminal indictment was issued, informers who had heard of the indictment through the news media would rush to file suits and claim *qui tam* awards.[53] These "parasitic" suits did nothing to encourage meritorious suits, and only served to decrease the proceeds that the government otherwise could recover on its own.[54]

In 1943, Congress responded by amending the FCA. One change prohibited *qui tam* actions based on public information.[55] Another change

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FCA] upon the old-fashioned 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.").

44. 31 U.S.C. § 3730(a) (1998). A "false claim" involves presenting to the government a "false or fraudulent claim for payment or approval." *Id.* § 3729(a)(1).

45. False Claims Act, ch. 67, § 3, 12 Stat. 696, 698 (1863).

46. *Id.*

47. *Id.* § 6. Awards available to *qui tam* plaintiffs today are codified as amended at 31 U.S.C. § 3730(d) (1998).

48. *Id.*

49. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 1-9 to 1-10 (1993).

50. *Id.* at 1-10; Lovitt, *supra* note 3, at 856-57.

51. Blanch, *supra* note 3, at 704.

52. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 545-46 (1943).

53. United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 n.3 (N.D. Cal. 1989).

54. *See generally* United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100, 1103-06 (7th Cir. 1984); Blanch, *supra* note 3, at 704.

55. *Newsham*, 722 F. Supp. at 609; S. REP. No. 99-345, at 12 (1986), *reprinted in*

reduced the award that an informer could recover to up to ten percent of any judgment obtained when the government took over an action and up to twenty-five percent when it did not.[56] Collectively, these changes all but eliminated the use of the FCA *qui tam*.[57]

In the mid-1980s, however, as in the 1930s, the defense budget was rising, and the public was outraged by reports of $400 hammers and $600 toilet seats.[58] Congress, finding that procurement fraud was "on a steady rise,"[59] again turned to the *qui tam* action as a mechanism for inducing persons involved in the procurement process to "blow the whistle" on fraud.[60]

The response, in 1986, was a new set of amendments to the *qui tam* provisions of the FCA.[61] These amendments, which immediately and significantly increased the number of *qui tam* suits filed,[62] made four important changes.[63] First, Congress increased the financial incentive for informers to bring suit, and increased the financial penalties imposed on successfully prosecuted defendants. An informer's share of the judgment was raised to a range between fifteen and thirty percent, plus reasonable expenses and attorney's fees.[64] The mandatory penalty was raised to between $5000 and $10,000 per claim, and damages were increased from double to triple the actual losses.[65]

Second, the 1986 Amendments removed the bar against *qui tam* actions based on information already known by the government, and replaced it with prohibition of actions based on "publicly disclosed" information.[66] The 1943 ban on parasitic suits was very broad; it

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1986 U.S.C.C.A.N. 5266, 5277.

56. S. REP. No. 99-345, at 12 (1986).

57. *See* BOESE, *supra* note 49, at 11-12.

58. Michael Waldman, *Time to Blow the Whistle?*, NAT'L L.J., Mar. 25, 1991, at 13; Lovitt, *supra* note 3, at 857.

59. S. REP. No. 99-345, at 2.

60. *Id.* at 5-6.

61. *See* False Claims Amendments Act of 1986, 31 U.S.C.A. §§ 3729-3731 (West Supp. 2000).

62. *See* Hamer, *supra* note 3, at 91 ("The 1986 Amendments caused a massive increase in qui tam lawsuits."); Lovitt, *supra* note 3, at 854, 859. Nearly 3000 *qui tam* suits were filed between 1986 and 2000, and the United States recovered more than $3.5 billion pursuant to those cases. Press Release, Justice Department Recovers Over $3 Billion in Whistleblower False Claims Act Awards and Settlements, Feb. 24, 2000, *available at* http://www.usdoj.gov/opa/pr/2000/February/079civ.htm.

63. The 1986 amendments also made several changes to the FCA that did not directly affect the qui tam provisions. For example, Congress changed the requisite mental state for violating the FCA from knowledge to recklessness. 31 U.S.C. § 3729(b)(3) (1998). Similarly, Congress changed the burden of persuasion in a *qui tam* case from "clear and convincing evidence" to "preponderance of the evidence." *See* S. REP. No. 345, at 6-7.

64. 31 U.S.C. § 3730(d)(1)-(2).

65. *Id.* § 3729(a).

66. *Id.* §§ 3730(e)(4)(A)-(B); *see also* Robertson, *supra* note 3, at 908-11

prohibited *qui tam* suits based on any public information, even if the original source of the information was the *qui tam* informer herself.[67] This made it difficult for the government to investigate criminal fraud, because anyone with knowledge of fraud had an incentive to hide that knowledge from the government for fear that a public criminal indictment would erase a prospective *qui tam* action.[68] Congress therefore created an exception that lifted the prohibition entirely if the *qui tam* informer was the "original source" of the information that later became public.[69]

Third, Congress in the 1986 Amendments added a whistleblower protection provision to prevent discharge or discrimination against employees who bring *qui tam* actions against their employers.[70] Fourth, Congress decreased the authority of the executive branch to take over a *qui tam* suit, and commensurately increased the informer's control of the suit.[71] The relative authority of the executive branch and the informer over a *qui tam* suit will be discussed in more detail in the next section.

B. The FCA Statutory Scheme

The FCA authorizes both the attorney general and private persons to bring civil actions to enforce the Act.[72] The roles of these parties vary considerably depending on how the suit is initially filed and how the Department of Justice (DOJ) responds (or does not respond) shortly after suit is filed.

If the DOJ learns on its own of an FCA violation, the DOJ may sue the violator.[73] This does not implicate the *qui tam* provisions of the statute. No *qui tam* informer is involved, and the DOJ can conduct the litigation as it sees fit.[74] Moreover, once the DOJ files suit, a would-be

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(discussing the "publicly disclosed" restriction).

67. Blanch, *supra* note 3, at 705.

68. *Id.*

69. 31 U.S.C. § 3730(e)(4)(A); *see also* United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 n.4 (N.D. Cal. 1989); Robertson, *supra* note 3, at 908-11 (discussing the "original source" exception). The statute defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B).

70. *Id.* § 3730(h).

71. Lovitt, *supra* note 3, at 858; *see also* S. REP. No. 99-345, at 25-26 (noting that the amendments give the informer a "more direct role not only in keeping abreast of the Government's efforts and protecting his financial stake, but also in acting as a check that the Government does not neglect evidence, cause unduly [sic] delay, or drop the false claims case without legitimate reason"). *See generally* 31 U.S.C. §§ 3730(b), (c).

72. 31 U.S.C. § 3730.

73. *Id.* § 3730(a).

74. Blanch, *supra* note 3, at 706.

informer may not later bring an action based on the same underlying facts.[75]

If the suit is brought by a private person, however, things are more complicated. The statute provides that any person may bring a civil action "for the person and for the United States Government" to recover damages and penalties.[76] Though initiated by a private person—the informer—a *qui tam* action is "brought in the name of the Government."[77] The United States is considered the real party in interest,[78] with the informer functioning as the government's attorney.[79] Thus, *qui tam* suits are brought "for the person" only in the sense that the informer may earn, as a reward, the statutory bounty.[80]

To initiate a *qui tam* action, the informer files a complaint with a federal district court. This complaint is filed *in camera*, and is kept under seal by the court for at least sixty days.[81] The informer also must send a copy of the complaint to the DOJ, and must include all material information that formed the basis of the complaint.[82] Within that sixty-day window, the DOJ then must decide, and so inform the court, whether it wants to intervene and take over the suit,[83] or whether it will not intervene, in which case the informer may conduct the suit on her own.[84] The DOJ may, "for good cause shown," move the court for an extension

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75. 31 U.S.C. § 3730(e)(3).

76. *Id.* § 3730(b)(1).

77. *Id.*

78. *See, e.g.*, United States *ex rel.* Hall v. Tribal Dev. Corp., 49 F.3d 1208, 1212 (7th Cir. 1995) ("[I]t is the government, and not the individual relator, who is the real plaintiff in a *qui tam* suit."); United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d 715, 720 (9th Cir. 1994) ("It is clear . . . that in a *qui tam* action, the government is the real party in interest."); United States *ex rel.* Kreindler v. United Techs. Corp., 985 F.2d 1148, 1154 (2d Cir.) ("The government remains the real party in interest . . . in the [*qui tam*] suit."), *cert. denied*, 508 U.S. 973 (1993); United States *ex rel.* Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr., 961 F.2d 46, 48 (5th Cir. 1992) (noting "the United States must be the real plaintiff in this suit").

79. *See, e.g.*, United States v. B.F. Goodrich, 41 F. Supp. 574, 575 (S.D.N.Y. 1941); Minotti v. Wheaton, 630 F. Supp. 280, 282-83 (D. Conn. 1986); United States *ex rel.* La Valley v. First Nat'l Bank of Boston, 625 F. Supp. 591, 594 (D.N.H. 1985). This is why the pleadings in FCA *qui tam* cases usually list the United States as plaintiff "ex rel." the *qui tam* informer. Blanch, *supra* note 3, at 706 n.25.

80. Caminker, *supra* note 3, at 353; *see also* 132 CONG. REC. H6482 (daily ed. Sept. 9, 1986) (noting the bounty "is a critical incentive and reward for persons who come forward with information, putting themselves at risk on behalf of the Federal Treasury and American taxpayers").

81. 31 U.S.C. § 3730(b)(2).

82. *Id.*

83. *Id.* § 3730(b)(4)(A).

84. *Id.* § 3730(b)(4)(B).

of the sixty-day examination period,[85] but the legislative history of the statute indicates that courts should not liberally grant such an extension.[86]

If the DOJ elects to intervene, the DOJ has "primary responsibility for prosecuting the action."[87] This includes the right to control discovery, admissions, and the presentation of evidence.[88] The informer, however, retains the right to "continue as a party to the action."[89] She may, for example, participate fully at trial, calling and cross-examining witnesses.[90]

The DOJ, once it has intervened, may end the litigation or limit the participation of the informer in several ways. First, the DOJ may dismiss the action "notwithstanding the objections of the person initiating the action," but only after the informer has received notice and an opportunity for a hearing on the dismissal motion.[91] Second, the DOJ may settle with the defendant, again "notwithstanding the objections of the person initiating the action," but only "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances."[92] Third, the DOJ may request that the court limit the informer's participation if the DOJ shows that unrestricted participation "would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment."[93] Fourth, the defendant may request that the court limit the informer's participation, upon a showing that unrestricted participation "would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense."[94] Thus, if the DOJ elects to intervene during the sixty-day examination period, it assumes primary

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85. *Id.* § 3730(b)(3).

86. The report of the Senate Judiciary Committee provides:

> Extensions will be granted . . . only upon a showing of "good cause". The Committee intends that courts weigh carefully any extensions on the period of time in which the Government has to decide whether to intervene and take over the litigation. The Committee feels that with the vast majority of cases, 60 days is an adequate amount of time to allow Government coordination, review and decision. Consequently, "good cause" would not be established merely upon a showing that the Government was overburdened and had not had a chance to address the complaint . . . .
>
> . . . . The Government should not, in any way, be allowed to unnecessarily delay lifting of the seal from the civil complaint or processing of the *qui tam* litigation.

S. REP. No. 99-345, at 24-25.

87. 31 U.S.C. § 3730(c)(1).

88. *See* Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514, 518, *reh'g en banc granted*, 196 F.3d 561 (5th Cir. 1999).

89. 31 U.S.C. § 3730(e)(1).

90. *Riley*, 196 F.3d at 518.

91. 31 U.S.C. § 3730(c)(2)(A).

92. *Id.* § 3730(c)(2)(B).

93. *Id.* § 3730(c)(2)(C).

94. *Id.* § 3730(c)(2)(D).

control of the case, but it does not get the degree of control that it would have had if it had originally filed the case itself.[95]

If within the sixty-day examination period the DOJ elects not to proceed with the action, or does nothing at all, then "the person bringing the action shall have the right to conduct the action."[96] The DOJ's involvement is very limited. First, it may receive, at its own expense, all pleadings and deposition transcripts.[97] Second, the DOJ may ask the court to stay discovery for an extendable sixty-day period upon a showing that discovery "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts."[98] Third, the attorney general's written consent is required before the informer voluntarily dismisses the action.[99]

In cases where the DOJ initially elects not to take over the action, the DOJ may subsequently re-enter the action upon a showing to the court of "good cause."[100] However, this intervention may not limit "the status and rights of the person initiating the action."[101] These provisions have given rise to three unresolved issues. First, how heavy is the DOJ's burden to show good cause? Most courts interpret the statute as imposing a relatively light burden; this interpretation avoids or minimizes the constitutional problem of judicial interference with executive prosecutorial authority.[102] Second, once the DOJ has intervened, does it control the litigation in the same way as if it had intervened within the sixty-day examination period, or is its role more limited?[103] Third, once the DOJ has intervened, under what circumstances, if any, may the DOJ dismiss the action?[104]

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95. Blanch, *supra* note 3, at 707.

96. 31 U.S.C. § 3730(b)(4)(B).

97. *Id.* § 3730(c)(3).

98. *Id.* § 3730(c)(4). This stay is available whether or not the DOJ intervenes. *Id.*

99. *Id.* § 3730(b)(1); Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 159 (5th Cir. 1997).

100. 31 U.S.C. § 3730(c)(3).

101. *Id.*

102. *See, e.g.*, United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 756 (9th Cir. 1993).

103. *Compare Kelly*, 9 F.3d at 752 (noting "when the government intervenes late in the action, a fair interpretation of the statute is that the government has a similar degree of control over the litigation as if it had intervened at the start"), *with* Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514, 518 (noting if the government intervenes late, the informer "retains primary control over the case, despite the government's intervention"), *reh'g en banc granted*, 196 F.3d 561 (5th Cir. 1999).

104. *See* Juliano v. Fed. Asset Disposition Ass'n, 736 F. Supp. 348, 349-51 (D.D.C. 1990) (government may move for dismissal of a *qui tam* action without actually intervening in the case), *aff'd*, 959 F.2d 1101 (D.C. Cir. 1992); *Kelly*, 9 F.3d at 753 n.10 (expressing approval of the *Juliano* approach); Blanch, *supra* note 3, at 708:

> [I]t seems fair to conclude that it would severely 'limit the status and rights' of the *qui tam* relator if the DOJ later intervened and dismissed or settled the suit. It thus appears that unless the DOJ initially intervenes during the 60-day

Whether the DOJ elects to intervene in the action determines not only the relative authority of the executive branch and the informer over how the action is litigated, but also how the award or settlement is divided. If the DOJ has intervened, the informer receives between fifteen and twenty-five percent of the proceeds. However, if the court finds that the action was based primarily on information of which the informer was not the original source, the informer's award is limited to no more than ten percent.[105] In actions in which the DOJ has not intervened, the informer receives between twenty-five and thirty percent of the proceeds.[106] Regardless of whether the DOJ has intervened, the informer also receives an amount for reasonable expenses, attorneys' fees, and costs, awarded against the defendant rather than taken out of the proceeds.[107] However, an unsuccessful informer in a case in which the government has not intervened may be ordered to pay the defendant its reasonable attorneys' fees and expenses if the court finds that the informer's claim "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."[108] If the government decides to pursue its claim in some forum other than an FCA suit, such as an administrative action, the informer has the same rights in that action as she would have in a judicial FCA suit.[109]

III. THE ARTICLE III STANDING OF *QUI TAM* INFORMERS

The *qui tam* provisions of the FCA implicate four constitutional provisions or doctrines: the standing doctrine, the separation of powers doctrine, the Take Care Clause, and the Appointments Clause. As one commentator has noted, these disparate constitutional doctrines are "merely different doctrinal lenses through which commentators and courts look at the central problem with qui tam: Someone other than the executive branch is litigating in the name of the United States."[110] This structure has led to considerable doctrinal confusion of the Article II issues.[111]

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period, it loses all power to dismiss or settle the suit, even if it can show good cause why it should be allowed to intervene at a later date.

Id.; see also United States *ex rel.* Sequoia Orange Co. v. Sunland Packing House Co., 912 F. Supp. 1325 (E.D. Cal. 1995) (holding government may move to dismiss for good cause).

105. 31 U.S.C. § 3730(d)(1).

106. *Id.* § 3730(d)(2).

107. *Id.* § 3730(d)(1), (2).

108. *Id.* § 3730(d)(4).

109. *Id.* § 3730(c)(5).

110. Lovitt, *supra* note 3, at 859 n.51.

111. *See infra* Part IV.

While the Article III standing doctrine has separation of powers overtones,[112] it also functions as an independent doctrine in its own right. This, together with the fact that it is the only constitutional issue regarding *qui tam* that the Supreme Court has resolved to date, justifies its separate analysis. The basic issue is whether the informer, who herself has not been injured by the defendant, has a sufficient stake in the litigation to create Article III standing.

A. General Contours of the Standing Requirement[113]

Article III of the United States Constitution limits federal judicial power to "cases or controversies."[114] The standing doctrine emanates from this case or controversy requirement.[115] Unless a plaintiff has standing, there is no Article III case or controversy, and federal courts are incapable of acting on the dispute.[116]

The Supreme Court has articulated three purposes for the standing doctrine. The first is the assurance of truly adverse litigants,[117] so that "legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[118] The second is separation of powers: the standing doctrine

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112. *See infra* note 119 and accompanying text.

113. *See generally* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999); Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing As a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988) [hereinafter Sunstein, *Standing and the Privatization of Public Law*]; Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992) [hereinafter Sunstein, *What's Standing After* Lujan*?*]; Eric R. Claeys, Note, *The Article III, Section 2 Standing Games: A Game-Theoretic Account of Standing and Other Justiciability Doctrines*, 67 S. CAL. L. REV. 1321 (1994); Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063 (1994); Christopher J. Sprigman, Comment, *Standing on Firmer Ground: Separation of Powers and Deference to Congressional Findings in the Standing Analysis*, 59 U. CHI. L. REV. 1645 (1992); Note, *Standing in the Way of Separation of Powers: The Consequences of* Raines v. Byrd, 112 HARV. L. REV. 1741 (1999).

114. U.S. CONST. art. III, § 2.

115. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

116. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984).

117. *See, e.g.*, Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 772 (2000); Baker v. Carr, 369 U.S. 186, 204 (1962); *see also* Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1706 (1980).

118. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

prevents the judicial aggrandizement of power at the expense of the other branches of government.[119] The third is federalism: standing requirements keep federal courts from meddling in areas of law that should be left to state or local governments.[120]

The Supreme Court has articulated a three-part test for Article III standing.[121] First, there must be an "injury in fact" that is both (a) concrete and particularized and (b) actual and imminent rather than conjectural or hypothetical.[122] Second, there must be a causal connection between the injury and the defendant's (not a third party's) conduct.[123] Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a decision favorable to the plaintiff.[124]

In addition to this three-part test, the Court has identified two "prudential" limitations to standing which, though not required by Article III, nonetheless limit the types of cases over which federal courts will exercise jurisdiction. The first is when the injury is a "generalized grievance" shared in equal measure by all or a large class of citizens,[125] such as when a taxpayer sues to redress an injury to the U.S. Treasury.[126]

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119. *Vt. Agency of Natural Res.*, 529 U.S. at 771 (noting the Article III standing requirement is "a key factor in dividing the power of government between the courts and the two political branches"); *Allen*, 468 U.S. at 760 (recognizing without standing, judges would become "virtually continuing monitors of the wisdom and soundness of Executive action") (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)); *Lujan*, 504 U.S. at 577 (eliminating Article III's standing requirement "would enable the courts, with the permission of Congress, 'to assume a position of authority over the governmental acts of another and co-equal department'") (quoting Massachusetts v. Mellon, 262 U.S. 447, 489 (1923)); Flast v. Cohen, 392 U.S. 83, 95 (1968) ("[The standing doctrine defines] the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."). *But see* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 n.4 (1998) ("[O]ur standing jurisprudence, . . . though it may sometimes have an impact on Presidential powers, derives from Article III and not Article II.").

120. *See, e.g.*, City of L.A. v. Lyons, 461 U.S. 95, 112 (1983) (noting equitable relief must be limited by federalism concerns); Rizzo v. Goode, 423 U.S. 362, 379 (1976) (same); O'Shea v. Littleton, 414 U.S. 488, 499-502 (1974) (indicating federalism counsels refusal to interfere with state court proceedings); *see also* Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 652 (1985) (characterizing these three cases as "federalism decisions masquerading under the standing heading").

121. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180-81 (2000).

122. *Vt. Agency of Natural Res.*, 529 U.S. at 771; *Lujan*, 504 U.S. at 560; Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

123. *Vt. Agency of Natural Res.*, 529 U.S. at 771; *Lujan*, 504 U.S. at 560; Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976).

124. *Vt. Agency of Natural Res.*, 529 U.S. at 771; *Lujan*, 504 U.S. at 561.

125. Warth v. Seldin, 422 U.S. 490, 499 (1975).

126. *Valley Forge Christian Coll.*, 454 U.S. at 485 n.20 (holding taxpayer injury is insufficiently personal to satisfy Article III standing); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974) (Article III prohibits taxpayers from suing to

The second is when the plaintiff rests her claim to relief on the legal rights of a third party, as opposed to asserting her own legal rights.[127]

The Court has stated that Congress may, by statute, waive the prudential standing limitations,[128] but not the Article III standing limitations.[129] However, the Court also has repeatedly stated that generalized injuries do not satisfy the Article III injury in fact requirement.[130] This has blurred the distinction between Article III and prudential standing requirements, and left some commentators wondering whether the prudential requirements are really just Article III requirements in drag.[131]

B. Application to Qui Tam

The Article III standing problem with *qui tam* suits is that informers have not suffered any "injury in fact."[132] The only injuries raised in *qui tam* suits are injuries to the federal treasury resulting from false claims against the United States.[133] *Qui tam* informers do not suffer harm, at least not beyond the generalized type of harm suffered by all other

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redress injury "held in common with all members of the public.").

127. *Valley Forge Christian Coll.*, 454 U.S. at 474; *Warth*, 422 U.S. at 499; McGowan v. Maryland, 366 U.S. 420, 429-30 (1961) (holding that defendants, convicted of selling products in violation of state Sunday closing laws, lack standing to assert religious freedom rights of customers); Tileston v. Ullman, 318 U.S. 44, 46 (1943) (per curiam) (denying a physician the right to assert the claims of his patients when the physician claimed that a statute forbidding him from advising patients regarding contraception would endanger their lives). The Court has articulated a two-part test for when litigants may assert the claims of third parties. First, the litigant must have a sufficiently close relationship to the person whose rights she seeks to assert. Singleton v. Wulff, 428 U.S. 106, 114-16 (1976). Second, the third party must be unable to assert her own rights. *Id.* at 115-16. *See generally* Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984).

128. *Warth*, 422 U.S. at 501.

129. *Valley Forge Christian Coll.*, 454 U.S. at 488 n.24.

130. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1 (1992) (indicating injury must be "particularized, . . . [meaning] personal and individual"); *Warth*, 422 U.S. at 501 (noting injury must be "distinct and palpable"); *Schlesinger*, 418 U.S. at 221 (stating injury must be "concrete").

131. *See, e.g.*, Blanch, *supra* note 3, at 711-12.

132. United States *ex rel.* Riley v. St. Luke's Episcopal Hosp., 982 F. Supp. 1261, 1268 (S.D. Tex. 1997) (holding that *qui tam* informers lacked standing), *rev'd in pertinent part and aff'd on other grounds*, 196 F.3d 514, *reh'g en banc granted*, 196 F.3d 561 (5th Cir. 1999); Caminker, *supra* note 3, at 380 ("The Article III challenge to the *qui tam* concept contends that *qui tam* plaintiffs lack standing because they have not suffered an injury in fact sufficiently 'distinct and palpable' to be judicially cognizable."); Blanch, *supra* note 3, at 712 ("[I]t is difficult to conceive of circumstances in which [*qui tam* informers] would have suffered [an injury].").

133. *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771 (2000) ("It is beyond doubt that the [*qui tam*] complaint asserts an injury to the United States.").

taxpayers. Therefore, the argument goes, *qui tam* informers lack Article III standing, and the FCA's *qui tam* provisions, by granting standing to uninjured parties, are unconstitutional.[134]

Prior to the Supreme Court's 2000 ruling that *qui tam* informers have standing to sue under the FCA,[135] courts and commentators had advanced four arguments as to why standing of *qui tam* informers was proper. The first was that *qui tam* informers have standing simply because Congress, through the FCA, said so.[136] Just as Congress may authorize the Department of Justice or another executive or independent agency to act on behalf of the United States,[137] Congress may authorize a citizen to accomplish the same result.[138] The problem with this argument, however, is that the Court has held that Article III does not permit Congress to grant standing to persons who have not suffered particularized injury.[139]

The second argument favoring *qui tam* standing is conceptually very similar to the first: that the FCA creates an assignment to the informer of the government's interest in the action.[140] Under this theory, the FCA's *qui tam* provisions operate as "an enforceable unilateral contract, the

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134. *See* United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 748 (9th Cir. 1993) (holding that *qui tam* informers have Article III standing, but discussing the argument *contra*).

135. *Vt. Agency of Natural Res.*, 529 U.S. at 774.

136. United States *ex rel.* Woodard v. County View Care Ctr., 797 F.2d 888, 893 (10th Cir. 1986) ("The statute of course eliminated any standing problem."); United States *ex rel.* Weinberger v. Equifax, Inc., 557 F.2d 456 (5th Cir. 1977) (concluding a *qui tam* informer has standing simply because the FCA "clearly accords" such standing); Caminker, *supra* note 3, at 382.

137. *See* Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1057 (1978) (noting that thirty-one administrative agencies are authorized to litigate on behalf of the United States).

138. United States *ex rel.* Hall v. Tribal Dev. Corp., 49 F.3d 1208, 1213 (7th Cir. 1995):

> When [the United States government] acts in a prosecutorial fashion, it usually does so through attorneys within the Department of Justice, or one of its executive agencies . . . . That Congress should enlist a private party, instead of one of the government's more common representatives, to champion the government's case should not change [the fact] that the United States, as the represented party, has been injured.

Id.; Caminker, *supra* note 3, at 382.

139. Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) ("'Individual rights' . . . do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public."); *see also* Blanch, *supra* note 3, at 715 ("[I]t is clearly wrong to assert baldly that Congressional authorization of *qui tam* suits in the FCA by itself 'eliminate[s] any standing problem.'") (quoting *Woodard*, 797 F.2d at 893). Of course, this begs the question of why DOJ attorneys have more of a "personal stake" in the outcome of FCA litigation than a *qui tam* informer. Caminker, *supra* note 3, at 382-83.

140. *See, e.g.*, United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1098 (C.D. Cal. 1989) ("The [FCA] essentially creates, by legislative fiat, a *de facto* assignment of a portion of the government's interest in the action.").

terms and conditions of which are accepted by the [informer] upon filing the qui tam suit."[141] If the government declines to intervene in the suit, the informer "effectively stands in the shoes of the government."[142] Since the government clearly has been injured by the defendant's alleged fraud, the informer, through the government, has standing.[143]

The conceptual distinction between an impermissible *grant* of Article III standing and a permissible *assignment* of such standing seems a distinction worthy of Thomas Aquinas, particularly since it has become so well-established that Congress may create enforceable legal rights where none existed before.[144] Nonetheless, there is Supreme Court precedent for "representational standing" on the part of assignees.[145] Moreover, lower federal courts routinely find that fraud claims are assignable,[146] and many courts have held that the assignment theory gives *qui tam* informers standing to sue under the FCA.[147]

The third argument advanced as to why *qui tam* informers should have standing was that the informer's statutory entitlement to a share of the recovery (the informer's "bounty") gives the informer a concrete personal stake in the litigation.[148] The problem with this argument,

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141. Lee, *supra* note 3, at 564.

142. United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 748 (9th Cir. 1993).

143. *Id.*

144. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

145. Poller v. Columbia Broad. Sys., 368 U.S. 464, 465 (1962); Automatic Radio Mfg. Co. v. Hazeltine Research, 339 U.S. 827, 829 (1950); Hubbard v. Tod, 171 U.S. 474, 475 (1898); *see also* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 531 (1995) (ruling on suits by subrogee); Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286, 288 (1993) (same).

146. *See, e.g.*, AmeriFirst Bank v. Bomar, 757 F. Supp. 1365, 1370-71 (S.D. Fla. 1991) (finding 10b-5 claims assignable); Fed. Deposit Ins. Corp. v. Main Hurdman, 655 F. Supp. 259, 266-68 (E.D. Cal. 1987) (finding bank's actions for fraud and malpractice assignable to FDIC); *In re* Nat'l Mortgage Equity Corp., 636 F. Supp. 1138, 1152-56 (C.D. Cal. 1986) (finding RICO treble damage claims assignable). *But see* Small v. Sussman, No. 94-C-5200, 1995 WL 153327, at *10 (N.D. Ill. Apr. 5, 1995) (finding 10b-5 claims not assignable).

147. *See, e.g.*, United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 748 (9th Cir. 1993); United States *ex rel.* Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148 (2d Cir.), *cert. denied*, 508 U.S. 973 (1993); United States *ex rel.* Bustamante v. United Way/Crusade of Mercy, Inc., No. 98-C-5551, 2000 WL 690250, at *4 (N.D. Ill. May 25, 2000); Wilkins *ex rel.* United States v. Ohio, 885 F. Supp. 1055, 1058 (S.D. Ohio 1995); United States *ex rel.* Givler v. Smith, 775 F. Supp. 172, 180-81 (E.D. Pa. 1991); United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 618-20 (C.D. Cal. 1989).

148. *See, e.g.*, United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1098 (C.D. Cal. 1989) ("To the extent that the plaintiff must have a personal stake in the outcome of the litigation to succeed on traditional standing theories, . . . the statute provides him one by virtue of the statutory bounty."); *Truong*, 728 F. Supp. at 619 n.7 ("To the extent that the relator must have a 'personal stake' in the outcome of the litigation, the bounty to which he is entitled if victorious is sufficient."). This seemed to be precisely what the *Lujan* Court had in mind when it stated: "Nor, finally, is [this] the unusual case in which Congress has created a concrete private interest in the outcome of a

however, is that the informer's interest in the litigation arises not from the defendant's misconduct, but rather from the structure of the litigation itself.[149] The argument also begs the question of whether a concrete personal stake in the litigation suffices to establish Article III standing when the informer is not among those injured by the defendant.[150]

The fourth argument for *qui tam* standing was a historical one, and can be divided into three sub-arguments. The first is that because *qui tam* actions were authorized in several statutes enacted by the First Congress,[151] and because many members of the First Congress participated in drafting the Constitution,[152] the Framers must not have perceived any Article III violation by *qui tam* actions.[153] However, the Supreme Court, on other occasions, has invalidated statutes passed by the First Congress.[154] The second historical argument points to Supreme Court dicta that has seemed to indicate that *qui tam* actions present no standing problems.[155] But this dicta antedates the development of the

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suit against a private party for the Government's benefit, by providing a cash bounty for the victorious plaintiff." *Lujan*, 504 U.S. at 572-73; *see also* Sunstein, *What's Standing After* Lujan*?*, *supra* note 113, at 232 ("Standing seems perfectly appropriate [when Congress has provided] a financial bounty to victorious citizen litigants."). *But see* Blanch, *supra* note 3, at 723-24 ("It seems ludicrous that any court would hold that the potential for an enormous and highly desirable financial windfall could satisfy a constitutional requirement that is premised on personal injury.").

149. *See* Diamond v. Charles, 476 U.S. 54, 70 (1986) (deciding where an intervenor sought to appeal a decision on the merits in effort to avoid paying the opponents' attorneys' fees; standing was improper because "[t]he fee award is wholly unrelated to the subject matter of the litigation").

150. *See* Sierra Club v. Morton, 405 U.S. 727, 734 ("[T]the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."); *id.* at 738 ("[T]the party seeking review must himself have suffered an injury.").

151. *See supra* note 37 and accompanying text.

152. *See* Bowsher v. Synar, 478 U.S. 714, 723-24 (1986) (stating that because many members of the First Congress had taken part in framing the Constitution, that body's legislative decisions inform the meaning of the Constitution).

153. *See, e.g.*, United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 615 (N.D. Cal. 1989).

154. *See, e.g.*, Marbury v. Madison, 5 U.S. 137 (1803) (holding that section 13 of the Judiciary Act, a statute passed by the First Congress, was unconstitutional); Wallace v. Jaffree, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting) (finding federal aid to sectarian schools is unconstitutional despite fact that First Congress granted similar aid); Marsh v. Chambers, 463 U.S. 783, 814 n.30 (1983) (Brennan, J., dissenting) (cautioning reliance on historical arguments and referring, by way of example, to First Congressional statute requiring public whipping of slaves).

155. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting); Priebe & Sons, Inc. v. United States, 332 U.S. 407, 418 (1947) (Frankfurter, J., dissenting); United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 (1943) (stating that *qui tam* actions "have been frequently permitted by legislative action, and have not been without defense by the courts") (footnotes omitted); Marvin v. Trout, 199 U.S. 212, 225 (1905) (opining that "[s]tatutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in

modern standing doctrine,[156] and therefore is of dubious authority.[157] The third historical argument is simply that "the long history of the FCA is probative of the fact that courts have had ample opportunity to invalidate the FCA."[158] But the Court has stated on previous occasion that a long history does not, by itself, make a statute constitutional.[159]

In *Vermont Agency of Natural Resources v. United States* ex rel. *Stevens*,[160] the Supreme Court held that *qui tam* informers have Article III standing.[161] The Court rejected the argument that *qui tam* informers have standing as the statutorily authorized agent of the United States government. The Court pointed out that the FCA gives an informer more than a mere right to retain a fee out of the recovery; the informer also is a party in her own right, may remain a party even after the government intervenes, and is entitled to a hearing before the government dismisses or settles the case.[162] The Court also rejected the argument that standing was conferred through the statutory bounty.[163] While this created a "concrete private interest in the outcome of [the] suit,"[164] it was insufficient to create Article III standing because it was unrelated to the injury in fact that had been suffered only by the United States government.[165] As the Court pointed out, a bystander who has bet on the outcome of *qui tam* litigation has a stake in the outcome, but clearly has no Article III standing.[166]

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existence for hundreds of years in England, and in this country ever since the foundation of our Government").

156. For a thorough discussion of the development of modern standing doctrine, see Sunstein, *Standing and the Privatization of Public Law*, *supra* note 113.

157. United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 618-20 (C.D. Cal. 1989); Blanch, *supra* note 3, at 719-20; Lee, *supra* note 3, at 549.

158. United States *ex rel.* Burch v. Piqua Eng'g, Inc., 803 F. Supp. 115, 117 n.2 (S.D. Ohio 1992); *see also* United States v. Gen. Contractors, Inc., Nos. C-89-397-RJM, 1990 WL 455191, at *4 (E.D. Wash. Dec. 4, 1990) ("The concept of qui tam is so deeply rooted in the nation's history that it is most improbable that any court today could divine some infirmity of constitutional magnitude which would not have been equally apparent many decades, if not centuries, ago.").

159. Marsh v. Chambers, 463 U.S. 783, 790 (1983) ("Standing alone, historical patterns cannot justify contemporary violations [of the Constitution.]"); Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970) ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."); *see also Truong*, 728 F. Supp. at 618 ("[T]he fact that *qui tam* statutes date back to the time of the First Congress is not independent evidence of their constitutionality.").

160. 529 U.S. 765 (2000).

161. *Id.* at 775.

162. *Id.* at 771-72.

163. *Id.* at 772-73.

164. *Id.* at 772 (quoting *Lujan*, 504 U.S. at 573).

165. *Id.*

166. *Id.*

The Court relied instead on the assignment and history theories of *qui tam* standing. The Court interpreted the FCA as creating a partial assignment of the government's damages claim.[167] Assignors, the Court held, have "representational standing" to assert claims resulting from the assignor's injury in fact.[168] The injury in fact suffered by the government—the fraud alleged as the basis of the FCA suit—therefore suffices to confer standing on the *qui tam* informer.[169]

The Court next recounted a brief history of *qui tam* actions, beginning with a discussion of English *qui tam* statutes, and ending with a discussion of American statutes passed by the colonies and the First Congress.[170] The fact that the Court ended its historical discussion with the First Congress indicates that it was persuaded by the first historical argument in favor of standing discussed above.[171] The Court concluded its discussion of standing by finding that the history of the *qui tam* action, "[w]hen combined with the theoretical justification for [informer] standing . . . leaves no room for doubt that a *qui tam* [informer] under the FCA has Article III standing."[172]

The Court cautioned, however, that "[i]n so concluding, we express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3."[173] Justices Stevens and Souter, dissenting from the majority's holding that the FCA does not subject a state or state agency to liability, argued that this history also is "sufficient to resolve the Article II question."[174]

IV. *QUI TAM* AND ARTICLE II

Doctrinal analysis of the application of Article II to *qui tam* is an awful mess. This is because courts and commentators have attempted to organize their opinions and articles by reference to specific constitutional provisions. Most analyses of Article II and *qui tam* are, therefore, divided into two or three parts: separation of powers, Appointments Clause, and perhaps the Take Care Clause.[175]

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167. *Id.* at 773 & n.4.

168. *Id.* at 773.

169. *Id.* at 774.

170. *Id.* at 774-78.

171. *Id.* at 777-78 ("We think this 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.'") (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998)).

172. *Id.* at 778.

173. *Id.* at 778 n.8.

174. *Id.* at 801 (Stevens, J., dissenting).

175. *See, e.g.*, Burch *ex rel.* United States v. Piqua Eng'g, Inc., 145 F.R.D. 452 (S.D. Ohio 1992); United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp.

There are two problems with this approach. First, there is no single constitutional provision that provides for the separation of powers. Instead, the Constitution separates powers through its basic structure,[176] which "divides all power conferred upon the Federal Government into 'legislative Powers,' '[t]he executive Power, and '[t]he judicial Power.'"[177] Second, *all* of the Article II arguments that relate to the constitutionality of *qui tam* are separation of powers arguments.[178] These arguments are simply subsets of the broader argument that *qui tam* unconstitutionally takes power away from the executive branch and gives it to the judicial branch and to unappointed citizens.

This Article takes a different approach. First, this Article will discuss the constitutional provisions implicated by *qui tam* under the umbrella of a separation of powers analysis. Then, it will discuss the ways that *qui tam* arguably runs afoul of these provisions. It concludes, however, that the *qui tam* provisions of the FCA are constitutional.

1084 (C.D. Cal. 1989); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607 (N.D. Cal. 1989).

176. INS v. Chadha, 462 U.S. 919, 946 (1983); Blanch, *supra* note 3, at 748.

177. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992) (citing U.S. CONST. art. I, § 1, art. II, § 1, art. III, § 1).

178. Blanch, *supra* note 3, at 747-48; Lovitt, *supra* note 3, at 859 n.51. Moreover, as discussed *supra* note 119 and accompanying text, the Article III standing doctrine is at least partly grounded in the separation of powers.

A. Separation of Powers[179]

1. GENERALLY

The framers of the Constitution separated powers among three governmental branches because they feared the tyrannical power of a strong executive such as a king.[180] The Supreme Court has repeatedly stressed the importance of the separation of powers principle. For example, in *Mistretta v. United States*, the Court stated that "[t]his Court consistently has given voice to, and has reaffirmed, the central judgment of the framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."[181]

At the same time, however, the Court also has consistently recognized that "the Constitution by no means contemplates total separation" of the three branches of government.[182] This has yielded

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179. *See generally* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991); Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51 (1994); Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045 (1994); Stephen L. Carter, *From* Sick Chicken *to* Synar*: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 BYU L. REV. 719, 720-25, 775-80; William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21 (1998); Michael A. Fitts, *The Foibles of Formalism: Applying A Political "Transaction Cost" Analysis to Separation of Powers*, 47 CASE W. RES. L. REV. 1643 (1997); Bruce Ledewitz, *The Uncertain Power of the President to Execute the Laws*, 46 TENN. L. REV. 757, 804-06 (1979); Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993); Burt Neuborne, *Formalsim, Functionalism, and the Separation of Powers*, 22 HARV. J. L. & PUB. POL'Y 45 (1998); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996); Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991); Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361 (1993); Timothy T. Hui, Note, *A "Tier-ful" Revelation: A Principled Approach to Separation of Powers*, 34 WM. & MARY L. REV. 1403 (1993); Matthew Thomas Kline, Comment, *The Line Item Veto Case and the Separation of Powers*, 88 CAL. L. REV. 181, 195-210 (2000).

180. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 at 521 (1969).

181. 488 U.S. 361, 380 (1989); *see also* Freytag v. Comm'r, 501 U.S. 868 (1991); Morrison v. Olson, 487 U.S. 654, 693 (1988) ("Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches."); Buckley v. Valco, 424 U.S. 1, 124 (1976) ("'The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.").

182. *Buckley*, 424 U.S. at 121; *see also Mistretta*, 488 U.S. at 380 (noting the separation of powers principle does not require a "hermetic division" among the

decisions that seem both unpredictable and unprincipled.[183] As Justice Scalia noted in *Lujan*, "separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts."[184] The problem, of course, is that in the hard cases that reach the Supreme Court, there often is no such common understanding. For example, the Court has held that Congress may not retain sole removal power over an officer who performs executive functions,[185] may not limit the president's authority to remove principal executive officers,[186] may not place its members on boards and commissions that exercise executive powers,[187] may not retain a legislative veto over administrative decisions,[188] may not give Article I bankruptcy judges the power to hear tort and contract claims,[189] and may not encroach on the Supreme Court's power to interpret the Constitution.[190] On the other hand, the Court has held that Congress may place the Federal Sentencing Commission within the judicial branch,[191] may vest considerable prosecutorial discretion over criminal proceedings against high-ranking executive officers in a court-appointed independent counsel,[192] may grant the General Services Administration control over Richard Nixon's presidential papers,[193] and may grant the Commodity Futures Trading Commission jurisdiction over state-law counterclaims in administrative hearings.[194]

Commentators have described the Court's schizophrenic decisions as a product of its vacillation between two fundamentally different

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branches); *Morrison*, 487 U.S. at 693-94 (stating the Court has "never held that the Constitution requires that the three branches of Government 'operate with absolute independence'") (quoting United States v. Nixon, 418 U.S. 683, 707 (1974)).

183. CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 158-70 (1991); Carter, *supra* note 179, at 720-25, 775-80; Kline, *supra* note 179, at 195-96; *see also Mistretta*, 488 U.S. at 426 (Scalia, J., dissenting):

> Today's decision follows the regrettable tendency of our recent separation-of-powers jurisprudence to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much is to be determined, case-by-case, by this Court.

Id. (citation omitted).

184. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992).

185. Bowsher v. Synar, 478 U.S. 714 (1986).

186. Myers v. United States, 272 U.S. 52 (1926).

187. *Buckley*, 424 U.S. 1; Metro. Wash. Airports Auth. v. Citizens for the Abatement of Airport Noise, Inc., 501 U.S. 252 (1991).

188. INS v. Chadha, 462 U.S. 919 (1983).

189. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

190. City of Boerne v. Flores, 521 U.S. 507 (1997).

191. *Mistretta*, 488 U.S. 361.

192. *Morrison*, 487 U.S. at 693.

193. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977).

194. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

approaches to the separation of powers issue.[195] The "formalist" approach, favored by Justice Scalia, focuses almost exclusivcly on constitutional text and on an "original understanding"[196] of what the constitutional framers intended by the text.[197] Formalists favor a strict separation of powers; powers are not shared and do not overlap among thc branches unless the Constitution so specifies.[198]

Functionalists, on the other hand, believe that "'formalistic and unbending rules' in the area of separation of powers may 'unduly constrict Congress' ability to take needed and innovative action.'"[199] Changing conditions, such as the rise of the administrative state,[200] create the need for a more flexible approach to the structure of government.[201]

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195. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987) (coining the terms "formalism" and "functionalism"). *See generally* Brown, *supra* note 179, at 1522-31; Eskridge, *supra* note 179; Fitts, *supra* note 179; Neuborne, *supra* note 179; Redish & Cisar, *supra* note 179.

196. For a discussion of why a conclusive description of the Framers' "original understanding" of the Constitution often is elusive, see Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 38-70 (1994).

197. Commentators sympathetic to the formalist position include FRIED, *supra* note 183, at 132-71; Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Stephen L. Carter, Comment, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988).

198. *Morrison*, 487 U.S. at 697 (Scalia, J., dissenting) (arguing the Framers "viewed the principle of separation of powers as the absolutely central guarantee of a just Government"); Lovitt, *supra* note 3, at 864.

199. *Bowsher*, 478 U.S. at 763 (White, J., dissenting) (quoting *Schor*, 478 U.S. at 851); *see also Bowsher*, 478 U.S. at 774, 776 (White, J., dissenting):

> Realistic consideration . . . reveals that the threat to separation of powers conjured up by the majority is wholly chimerical . . . . The majority's [reliance] on rigid dogma . . . [and] unyielding principle to strike down a statute posing no real danger of aggrandizement of congressional power is extremely misguided and insensitive to our constitutional role.

Id. (citation omitted).

200. *See, e.g.*, Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759 (1997); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1 (1994); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989).

201. *See Chadha*, 462 U.S. at 1002-03 (White, J., dissenting) (arguing that in striking down the legislative veto in the context of the administrative state that the Court has sanctioned, the Court has made it more difficult to insure that fundamental policy decisions would be made by elected officials rather than appointed administrative officials).

Functionalists are much less likely than formalists to find that separation of powers principles have been violated.[202]

Despite this Janus-like approach to the separation of powers doctrine, there are two circumstances under which the Court is likely to find that separation of powers principles have been violated. The first is when one branch of government "aggrandizes" power, either by exceeding its constitutionally defined power[203] or by enlarging its power at the expense of another branch that has a better constitutional claim to that power.[204] An example is *INS v. Chadha*,[205] where the Court invalidated a statute giving the House of Representatives a legislative veto over decisions made by the executive branch. This veto, the Court ruled, violated the Bicameralism and Presentment Clauses[206] by treating a resolution passed by one house as if it were a bill that had been passed by both houses and signed by the president.[207]

The second circumstance under which the Court may find that separation of powers principles have been violated is when one branch of government diminishes the powers assigned to another branch, even if the first branch does not assume any of those powers itself.[208] For example, in *Myers v. United States*, the Court held that, pursuant to the Appointments Clause, Congress could not limit the president's authority to remove a postmaster.[209] The anti-diminution principle, however, is less developed and less stringent than the anti-aggrandizement principle, and thus aggrandizement presents the strongest argument in favor of a separation of powers violation.[210] For example in *Mistretta*, the Court

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202. Kline, *supra* note 179, at 201.

203. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding that the president did not have the power to seize the nation's steel mills, even during a wartime emergency).

204. A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1368 (1994) ("[I]n *Myers*, *Buckley*, *Chadha*, *Bowsher*, and *Metropolitan Airports*, separation of powers was violated by Congress seeking to reserve an executive power for itself.").

205. 462 U.S. 919 (1986).

206. U.S. CONST. art. 1, § 7.

207. *Chadha*, 462 U.S. at 956-58.

208. Clinton v. Jones, 520 U.S. 681, 701 (1997) (stating that "the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties") (quoting Loving v. United States, 517 U.S. 748, 757 (1996)); Mistretta v. United States, 488 U.S. 361, 382 (1989) (noting the separation of powers doctrine can be violated by "provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch").

209. 272 U.S. 52 (1926).

210. *See* Morrison v. Olson, 487 U.S. 654, 694 (1988) ("We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."); Commodities Futures Trading Comm'n v. Schor, 478 U.S. 833, 856-57 (1986) (finding the case raised no question of congressional aggrandizement but instead raised question of whether Congress impermissibly undermined role of judicial

explained that "[i]t is th[e] concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.'"[211]

2. TAKE CARE[212]

Article II, Section 3 of the Constitution provides that the president "shall take Care that the Laws be faithfully executed."[213] Commentators generally agree[214] that at least one purpose of the clause was to make it clear the president cannot arbitrarily suspend the enforcement of laws enacted by Congress.[215] Beyond this, however, relatively little is known

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branch).

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

212. *See generally* Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 582-85, 616-22 (1994); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1792-94 (1996); Froomkin, *supra* note 204; A. Michael Froomkin, *Still Naked After All These Words*, 88 NW. U. L. REV. 1420 (1994); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 145 n.75 (1994); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Lessig & Sunstein, *supra* note 196; Robert J. Reinstein, *An Early View of Executive Powers And Privilege: The Trial of Smith and Ogden*, 2 HASTINGS CONST. L.Q. 309, 320-21 n.50 (1975); Peter M. Shane, *The Separation of Powers and the Rule of Law: The Virtues of "Seeing the Trees"*, 30 WM. & MARY L. REV. 375, 380 (1989); John R. Martin, Note, Morrison v. Olson *and Executive Power*, 4 TEX. REV. L. & POL. 511, 518-20 (2000).

213. U.S. CONST. art. II, § 3.

214. There is less agreement on the issue of whether, and if so under what circumstances, a President may refuse to enforce laws that arguably violate the Constitution or usurp Constitutionally-delegated Executive authority. *See* Calabresi & Prakash, *supra* note 212, at 621-22; Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990); Lawson & Moore, *supra* note 212, at 1286-88; Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 267 (1994).

215. Calabresi & Prakash, *supra* note 212, at 583-84; Lawson & Moore, *supra* note 212, at 1313 ("[T]he most important, if not the sole, aspect of this [the Take Care Clause's] limitation is to make clear that 'the executive Power' does not include a power analogous to a royal prerogative of suspension."). Calabresi & Prakash explain:

> One can well imagine why the Framers might have wanted to forbid the President from exercising the ancient English royal power to suspend laws. Such a power is much more potent than even an absolute veto over laws recently passed by Congress. An absolute veto, i.e., one incapable of being overridden, provides only the sitting President the opportunity to block legislation from becoming law. A suspending power, on the other hand, permits any President to nullify laws enacted during and prior to his taking office.

Calabresi & Prakash, *supra* note 212, at 584 n.161. The Founders had to counter not only centuries of English history, but also the writings of John Locke. *See* JOHN LOCKE,

about the original meaning of the Take Care Clause,[216] and there similarly are relatively few cases in which the Supreme Court has discussed its breadth.[217]

The clause is at the center of "[o]ne of the oldest debates in American constitutional law":[218] whether Congress has the power to structure much of the executive branch, or whether a "unitary executive" is in charge of all administration of federal law. One view is that the Take Care Clause, in conjunction with the Vesting Clause, gives the president exclusive authority over all executive powers.[219] It is the president, and no one else, who is given the authority to execute the laws.[220] Moreover, this duty implies (or assumes) that the president has the *power* to perform his constitutional obligation to execute the law.[221]

The other view[222] envisions a much more limited role for the president. Advocates of this view point out that, unlike the other power clauses of Article II, the Take Care Clause is expressed as a duty rather than a power.[223] The clause "(as originally understood) obliges the president to follow the full range of laws that Congress enacts, both (a) laws regulating conduct outside the executive branch, and (b) laws

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SECOND TREATISE ON CIVIL GOVERNMENT § 160 (1689) (noting the executive power includes a prerogative "to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it").

216. JOHN R. LABOVITZ, PRESIDENTIAL IMPEACHMENT 133-34 (1978). For thorough discussions of the clause's meager history, see Lessig & Sunstein, *supra* note 196, at 61-70; Calabresi & Prakash, *supra* note 212, at 582-85, 589-90, 616-22.

217. Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514, 524, *reh'g en banc granted*, 196 F.3d 561 (5th Cir. 1999).

218. Calabresi & Prakash, *supra* note 212, at 544.

219. *See generally* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19; Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 72-82 (1990); Lawson, *supra* note 200; Lee S. Liberman, Morrison v. Olson: *A Formalist Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313 (1989); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225 (1991); Miller, *supra* note 197; Redish & Cisar, *supra* note 179; Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 3, 16 (1993); Carter, *supra* note 197; Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991 (1992).

220. Calabresi & Prakash, *supra* note 212, at 582.

221. *Id.* at 583 ("[T]he duty-imposing language of the Take Care Clause makes sense if the President has already been given a grant of the executive power by the [Vesting] Clause.").

222. *See generally* Froomkin, *supra* note 204; Ledewitz, *supra* note 179; Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627 (1989); A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787 (1987).

223. *See, e.g.*, Lessig & Sunstein, *supra* note 196, at 62.

regulating execution by regulating conduct within the executive branch."[224] Congressional authority for (b) derives, under this reading, from the Necessary and Proper Clause.[225]

The Supreme Court decisions interpreting the Take Care Clause generally seem to follow the functionalist approach.[226] In *Nixon v. Administrator of General Services*,[227] Congress had directed an executive branch official—the administrator of general services (AGS)—to take custody of and archive President Nixon's presidential papers and tape recordings.[228] In rejecting a constitutional challenge to Congress' direction, the Court held that the limited screening undertaken by the AGS did not violate the president's expectation of confidentiality and privacy and thus did not constitute anything other than "a very limited intrusion" into the domain of the executive branch.[229] The closest the Court came to articulating a standard that might guide future cases was its pronouncement that Congress may not disrupt "the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions."[230] This, of course, begs the question of what degree of congressional disruption is necessary before the "proper balance" is disrupted. Because the Court held that Congress's action was constitutional,[231] the opinion sheds some light on what Congress can do, but provides little guidance on what Congress cannot do.[232]

Similarly, in *Commodity Futures Trading Commission v. Schor*,[233] the Court rejected a constitutional challenge to Congress's authorization of the CFTC to entertain state law counterclaims in reparation proceedings.[234] The Court stated that an act of Congress is unconstitutional if it "impermissibly undermines" the powers of the Executive.[235] This, as in *Nixon*, begs the question of what is permissible and what is not, and the rest of the *Schor* opinion offers little guidance on this issue.

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224. *Id.* at 69.

225. *Id.* at 68-69.

226. *But see* Printz v. United States, 521 U.S. 898 (1997) (diseussed *infra* at notes 236-38 and accompanying text). *Printz*, though decided on federalism rather than separation of powers or Take Care Clause grounds, takes a formalist approach to the Take Care Clause.

227. 433 U.S. 425 (1977).

228. *Id.* at 433-34.

229. *Id.* at 451.

230. *Id.* at 443.

231. *Id.*

232. Blanch, *supra* note 3, at 751.

233. 478 U.S. 833, (1986).

234. *Id.* at 858-59.

235. *Id.* at 856-57.

Printz v. United States,[236] though decided on federalism rather than separation of powers or Take Care Clause grounds,[237] may provide some guidance. The Court, in an opinion authored by Justice Scalia, struck down Brady Act provisions that required state officials to execute federal law by conducting background checks on gun purchasers. In doing so, the Court stated:

> The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," Art. II, § 3, personally and through officers whom he appoints . . . . The Brady Act effectively transfers this responsibility to thousands of [state law enforcement officers] in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential eontrol is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive—to insure both vigor and accountability—is well-known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.[238]

Morrison v. Olson[239] is the Court's most thorough analysis of the Take Care Clause and its relationship to the separation of powers doctrine. *Morrison* is also the case most closely applicable to constitutional issues raised by *qui tam* statutes. In *Morrison*, the Court considered a constitutional challenge to the Ethics in Government Act (EGA) of 1978.[240] This statute was enacted in the wake of Watergate to facilitate the investigation and prosecution of high-ranking executive branch officials who violated federal criminal laws.[241] The EGA required the attorney general, upon receipt of information "sufficient to constitute grounds to investigate"[242] potential violations of these laws, to conduct a preliminary investigation, after which she would report to a "Special

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236. 521 U.S. 898 (1997).

237. *Id.* at 935 ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

238. *Id.* at 922 (citations omitted).

239. 487 U.S. 654 (1988).

240. Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified as amended in scattered sections of 2, 5, 18, 28, and 29 U.S.C.).

241. *Morrison*, 487 U.S. at 660.

242. *Id.*

Division" of the U.S. Court Appeals for the District of Columbia.[243] If the attorney general found that there were "reasonable grounds to believe that further investigation or prosecution [was] warranted," then her report would be accompanied by an application for the appointment of an independent counsel to investigate the matter further.[244] The Special Division then would appoint an independent counsel and define the independent counsel's prosecutorial jurisdiction.[245] Once this was done, the EGA granted the independent counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice."[246]

The EGA provided three different circumstances under which an independent counsel's tenure would end. First, if the independent counsel notified the attorney general that the investigation or prosecution was complete, the independent counsel's office would terminate.[247] Second, if the attorney general found that the independent counsel's investigation or prosecution was complete, the independent counsel's office would terminate.[248]

The constitutional rub lies in the third circumstance under which an independent counsel's tenure would end. Prior to the completion of the investigation and prosecution, the independent counsel could be removed "only by the personal action of the Attorney General and only for good cause, physical disability [or] mental incapacity."[249] If the attorney general removed an independent counsel prior to the completion of the investigation and prosecution, the attorney general was to submit a report to the Special Division and to the Judiciary Committees of both houses of Congress, specifying the factual basis and ultimate grounds for removal.[250] The independent counsel then could seek judicial review in the United States District Court for the District of Columbia, which was authorized to reinstate the independent counsel or to grant "other appropriate relief."[251]

In the suit, Theodore Olson, the subject of an independent counsel's investigation and prosecution, claimed that the investigatory and prosecutorial powers given pursuant to the EGA to Alexia Morrison, the independent counsel, were executive, and therefore vested in the president alone. Justice Scalia, dissenting, agreed. From Scalia's formalist

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243. *Id.* at 661.
244. *Id.*
245. *Id.*
246. *Id.* at 662 (quoting 28 U.S.C. § 594(a)).
247. *Id.* at 664.
248. *Id.*
249. *Id.* at 663 (quoting 28 U.S.C. § 596(a)(1)).
250. *Id.*
251. *Id.* at 663-64 (quoting 28 U.S.C. § 596(a)(3)).

perspective, the issue was an easy one: the Constitution gives executive power only to the president; the independent counsel exercises executive power; the president lacks control over the independent counsel; therefore, the statute creating the independent counsel must bc unconstitutional.[252]

The majority, in an opinion authored by Justice Rehnquist, agreed that the independent counsel exercised executive[253] functions largely independent of the executive branch.[254] Nonetheless, the Court rejected the constitutional challenge. First, the Court held that the independent counsel is an inferior officer under the Constitution, and, thus, the appointment by the judicial branch is not "incongruous" with the normal functions of the judiciary.[255] Second, the Court found that the duties conferred by thc EGA on the Special Division were within the purview of the judiciary's Article III jurisdiction.[256] Finally, the Court held that, despite the limits on the president's removal power, the president retained "sufficient control" over the independent counsel to ensure that the president is able to pcrform his constitutionally-assigned duties.[257] This final holding is the most important one for present purposes.

The Court pointed to six circumstances that warranted a finding that the president, through the attorney general, retained sufficient control over the independent counsel. First, the attorney general controls the initiation of litigation, since an independent counsel is not appointed unless and until the attorney general requests one.[258] Seeond, the attorney general can remove the indcpendent counsel upon a showing of good cause.[259] Third, the independent counsel's jurisdiction is fixed by a special court based on facts submitted by the attorney general.[260] Fourth, the independent counsel is required to follow Justice Department policies whenever possible.[261] Fifth, there is no danger of congressional aggrandizement of power since Congress retains no control or supervision of the independent counsel.[262] Sixth, the judicial branch does not encroach on executive power since the Special Division's power to appoint the counsel and define the counsel's jurisdiction "are not

252. *Id.* at 697-715 (Scalia, J., dissenting); Lessig & Sunstein, *supra* note 196, at 14-15.

253. *Morrison*, 487 U.S. at 691.

254. *Id.* at 696.

255. *Id.* at 670-77. This Appointments Clause issue will be discussed in more detail in the next section. *See infra* Part IV.A.3.b.

256. *Morrison*, 487 U.S. at 677-85.

257. *Id.* at 685-96.

258. *Id.* at 696.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 694.

supervisory or administrative, nor are they functions that the Constitution requires be performed by officials within the Executive Branch."[263]

The test that comes out of *Morrison*, then, is whether the executive branch retains "sufficient control" over executive functions such that it is able to perform its duties under the Take Care and Vesting Clauses. Lower courts considering the constitutionality of *qui tam* analyze the Take Care Clause issue by comparing the *qui tam* incursions on executive power to the EGA incursions on executive power that the Court upheld in *Morrison*.[264] Before turning to that analysis, however, there is one further constitutional provision implicated by *qui tam*: the Appointments Clause.

3. THE APPOINTMENTS CLAUSE[265]

The Appointments Clause provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[266]

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263. *Id.* at 695.

264. *See, e.g.*, United States *ex rel.* Truong v. Northrup Corp., 728 F. Supp. 615, 621 (C.D. Cal. 1989).

265. *See generally* Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Seance*, 60 TENN. L. REV. 841, 844-53 (1993); Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467 (1998); Michael J. Gerhardt, *Putting Presidential Performance in the Federal Appointments Process in Perspective*, 47 CASE W. RES. L. REV. 1359 (1997); Ronald C. Kahn, *Presidential Power and the Appointments Process: Structuralism, Legal Scholarship, and the New Historical Institutionalism*, 47 CASE W. RES. L. REV. 1419 (1997); Eric J. Konecke, *The Appointments Clause and Military Judges: Inferior Appointment to a Principal Office*, 5 SETON HALL CONST. L.J. 489, 493-511 (1995); John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT 87, 96-117 (1998); Nick Bravin, Note, *Is* Morrison v. Olson *Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103 (1998); Andrew Owen, Note, *Toward A New Functional Methodology in Appointments Clause Analysis*, 60 GEO. WASH. L. REV. 536 (1992); Edward Susolik, Note, *Separation of Powers and Liberty: The Appointments Clause,* Morrison v. Olson, *and Rule of Law*, 63 S. CAL. L. REV. 1515 (1990).

266. U.S. CONST. art. II, § 2, cl. 2.

This bifurcated approach to appointments gives the president (with the advice and consent of the Senate) the power to appoint "officers," and gives Congress apparent[267] plenary power to allocate the appointment of "inferior officers." This division of the appointments power serves two purposes.

First, it helps effectuate the much broader separation of powers scheme discussed above.[268] The framers viewed the appointment power as "the most insidious and powerful weapon of eighteenth-century despotism."[269] Similarly, the Supreme Court has noted that "[t]he Clause is a bulwark against one branch aggrandizing its power at the expense of another branch, but it is more: it 'preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.'"[270] The requirement that two branches cooperate in the appointment of principal officers limits the opportunity for one branch to capture an important office and imposes caution and deliberation before appointment.[271]

The second purpose served by the division of the appointments power is that the division fosters political accountability in the appointment process. Alexander Hamilton explained:

> The blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate, aggravated by the consideration of their having counteracted the good intentions of the executive. If an ill appointment should be made, the executive, for nominating, and the Senate, for approving, would participate, though in different degrees, in the opprobrium and disgrace.[272]

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267. *See infra* notes 330-45 and accompanying text.

268. Bravin, *supra* note 265, at 1110.

269. WOOD, *supra* note 180, at 79, 143; *see also* Freytag v. Comm'r, 501 U.S. 868, 883 (1991).

270. Ryder v. United States, 515 U.S. 177, 182 (1995) (quoting *Freytag*, 501 U.S. at 878); *see also* Buckley v. Valeo, 424 U.S. 1, 125-26 (1976):

> The Appointments Clause could, of course, be read as merely dealing with etiquette or protocol in describing 'Officers of the United States,' but the drafters had a less frivolous purpose in mind . . . . We think that the term 'Officers of the United States' as used in Art. II . . . is a term intended to have substantive meaning.

Id.

271. Bravin, *supra* note 265, at 1110.

272. THE FEDERALIST NO. 77, at 461 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 562 (Ronald D. Rotunda & John E. Nowak eds., 1987) ("If [the president] should . . . surrender the public patronage into the hands of profligate men, or low adventurers, it will be impossible for him long to retain public favour.").

While there was vigorous debate at the Constitutional Convention over the wording of the Appointments Clause,[273] the framers were concerned primarily with the dispersal of power[274] and with whether Congress or the president would have the authority to appoint.[275] The paucity of debate over the meaning of the clause as it was adopted has given rise to disagreement as to how the clause should be interpreted. As with the separation of powers doctrine generally, there is both a formalist and a functionalist camp.[276] Formalists tend to look at the appointee and ask whether the particular mode of appointment violates the overall structure of a strictly-applied separation of powers.[277] Functionalists tend to ask whether there are countervailing checks and balances that can be used to justify and permit the appointment at issue.[278]

Two interpretive issues[279] have dominated the Appointments Clause cases. The first is the distinction between principal officers, inferior officers, and non-officers. The second is whether, with regard to inferior officers, there are any implicit limitations on

> whether Congress has absolute discretion to choose the entity to whom it should give the appointment power, as a literal reading of the constitutional text would seem to indicate, or whether there is an 'implicit' constitutional limitation on its choice, which is premised on the 'congruity,' from a separation of powers perspective, between the designated appointor and the purported appointee.[280]

a. Principal officers, inferior officers, and non-officers

The Constitution itself offers no guidance on how to distinguish principal officers, inferior officers, and non-officers. As the *Morrison* Court pointed out, "[t]he line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn."[281] Until recently, Supreme Court precedent was not much help either.[282]

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273. THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 125-27 (Ralph Ketcham ed., 1986).

274. *See supra* notes 269-72 and accompanying text.

275. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 28-29 (1985).

276. Susolik, *supra* note 265, at 1545.

277. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 703-15 (1988) (Scalia, J., dissenting).

278. *See, e.g., id.* at 685-96.

279. Susolik, *supra* note 265, at 1539.

280. *Id.*

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

282. Bravin, *supra* note 265, at 1114 ("Until recently, the Court determined officer

In the 1867 case of *United States v. Hartwell*,[283] the Court held, on two grounds, that a treasury clerk was an officer. First, the Court reasoned that because the clerk had been appointed in conformity with Article II, he must be an officer.[284] Second, the Court concluded that he was an officer because his position contained the "tenure, duration, emolument, and duties" consistent with officer status.[285]

Eleven years later, the Court held in *United States v. Germaine* that a surgeon appointed by the United States Commissioner of Pensions was not an officer.[286] Again, the Court proceeded along two lines of reasoning. First, the Court reasoned that since the surgeon had not been appointed in conformity with *either* part of the Appointments Clause, he was neither a principal nor an inferior officer, but instead an "agent."[287] Of course, using this logic, no congressionally authorized appointment would ever be struck as unconstitutional.[288] In its second line of reasoning, the Court concluded that the surgeon was not an officer because of the "occasional" and "intermittent" nature of his employment;[289] "ideas of tenure, duration . . . and duties" were important to deciding officer status.[290]

At issue in the 1890 case of *Auffmordt v. Hedden*[291] was a statute that provided that an importer dissatisfied with a custom official's valuation of imported goods could get a second opinion from a merchant appraiser, who was a private businessperson selected for the particular re-appraisal.[292] The second opinion was final and binding on the importer as well as the United States.[293] The Court reasoned that because the merchant appraiser's "position [wa]s without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily," he was not an "officer" under either part of the Appointments Clause.[294]

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status by circular reasoning, analogy, and ad hoc balancing."); Owen, *supra* note 265, at 537 (arguing that the lack of concrete criteria in Appointments Clause cases leads to *ad hoc* classifications).

283. 73 U.S. (6 Wall.) 385 (1867). At issue in the case was whether the clerk could be prosecuted under a statute that pertained only to officers.

284. *Id.* at 393-94.

285. *Id.* at 393.

286. 99 U.S. 508, 511 (1878). At issue in the case was whether the surgeon could be prosecuted under a statute that pertained only to officers.

287. *Id.* at 510-12.

288. Bravin, *supra* note 265, at 1115.

289. *Germaine*, 99 U.S. at 512.

290. *Id.* at 511.

291. 137 U.S. 310 (1890).

292. *Id.* at 312.

293. *Id.*

294. *Id.* at 327.

In the 1898 case of *United States v. Eaton*, the Court considered the status of a Bangkok missionary who had been assigned to take charge of the local American consulate until the new consul general arrived.[295] The Court held that a subordinate officer who is "charged with the performance of the duty of [a] superior for a limited time and under special and temporary conditions . . . is not thereby transformed into the superior and permanent official."[296]

In *Buckley v. Valeo*,[297] one issue before the Court was the constitutionality of Congress's decision, in the Federal Election Campaign Act (FECA),[298] to retain for itself the power to appoint members of the Federal Election Commission (FEC).[299] The duties of FEC members included the filing and prosecution of civil suits to enforce the FECA.[300] Because the appointments conformed to neither the Principal nor the Inferior Officer Clauses,[301] the only way the appointments would be constitutional would be if the FEC members were not officers at all, but instead were merely employees or agents.[302] The Court stated that an officer is "any appointee exercising significant authority pursuant to the laws of the United States."[303] The Court held that the FEC's enforcement powers satisfied this test:

> 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.[304]

The Court therefore held that the FEC members had been appointed unconstitutionally.[305]

As discussed above,[306] one of the holdings of *Morrison v. Olson*[307] was that an independent counsel is an inferior officer. If the Court had found that the independent counsel was a principal officer, it almost

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295. 169 U.S. 331, 331-32 (1898).
296. *Id.* at 343.
297. 424 U.S. 1 (1976).
298. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), *amended by* Pub. L. No. 93-443, 88 Stat. 1263 (1974).
299. *Buckley*, 424 U.S. at 126-27.
300. *Id.* at 109-11.
301. *Id.* at 126-27.
302. *Id.* at 126 n.162, 137.
303. *Id.* at 126.
304. *Id.* at 140.
305. *Id.*
306. *See supra* note 255 and accompanying text.
307. 487 U.S. 654 (1988).

certainly would have found the statute unconstitutional because of the counsel's appointment by the judiciary.[308] In holding that the counsel was an inferior officer, the Court articulated four factors to consider when distinguishing principal from inferior officers.[309] The first was the executive branch's ability to remove the appointee. While the independent counsel was not "subordinate" to the attorney general (and thereby to the president) because of the discretion given her by the EGA, nonetheless "the fact that she can be removed [(albeit only for cause)] by the Attorney General indicates that she is to some degree 'inferior' in rank and authority."[310]

The second factor that the Court used to determine that the independent counsel was an inferior officer was the limited scope of her duties (though she could exercise all the powers of the Department of Justice and the attorney general).[311] Third, the Court characterized the independent counsel's jurisdiction as "limited," despite the EGA's provision for the expansion of that jurisdiction.[312] Fourth, the Court characterized the tenure of the independent counsel as "limited" and "temporary," even though the EGA permits investigations and prosecutions to run to the indefinite date of completion.[313]

Freytag v. Commissioner[314] arose out of a tax shelter case that was tried before a special trial judge. The taxpayers argued that the appointment of special trial judges by the chief judge of the tax court violated the Appointments Clause. A threshold issue was whether special trial judges were "officers" who must be appointed in conformance with the Appointments Clause. Holding that trial judges are inferior officers,[315] the Court distinguished trial judges from special masters "who are hired by Article III courts on a temporary, episodic basis."[316]

The tax commissioner argued that the tax court is a "department" of which the chief judge is "head," such that the chief judge is empowered to make the appointments pursuant to the inferior officer part of the Appointments Clause. The Supreme Court rejected this argument, ruling that executive "department heads" within the meaning of the Appointments Clause should be confined essentially to cabinet-level positions.[317] Otherwise, the Court reasoned, the appointment power would be too widely diffused within the executive branch:

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308. Susolik, *supra* note 265, at 1553.
309. *Morrison*, 487 U.S. at 671-72; Bravin, *supra* note 265, at 1116.
310. *Morrison*, 487 U.S. at 671.
311. *Id.*
312. *Id.* at 672.
313. *Id.*
314. 501 U.S. 868 (1991).
315. *Id.* at 882.
316. *Id.* at 881.
317. *Id.* at 888.

> The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government .... The Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power.[318]

Nonetheless, the Court upheld the method by which the trial judges were appointed, finding that the tax court, as an Article 1 legislative court, is a "court of law" within the meaning of the Appointments Clause.[319]

In the 1997 decision of *Edmond v. United States*,[320] Justice Scalia, who had dissented in *Morrison*, wrote the majority opinion. At issue was the validity of the appointment of two civilian members of the Coast Guard Court of Criminal Appeals by the secretary of transportation.[321] If they were principal officers, then their appointment would violate the Appointments Clause because they had not been appointed by the president and confirmed by the Senate.[322]

Stating that *Morrison*'s four-factor balancing test had failed to "set forth a definitive test for whether an office is 'inferior' under the Appointments Clause,"[323] the Court articulated a new test:

> Whether one is an "inferior" officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase "lesser officer." Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[324]

Applying the test to the Coast Guard civilian judges, the Court noted that they could be removed without cause, that their decisions were reversible, and that they were supervised by both the judge advocate

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318. *Id.* at 885.
319. *Id.* at 890-92.
320. 520 U.S. 651 (1997).
321. *Id.* at 653.
322. *Id.* at 655-56.
323. *Id.* at 661.
324. *Id.* at 662-63.

general and the Court of Appeals for the Armed Forces.[325] Based on this, the Court concluded that the civilian judges "ha[d] no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers,"[326] and that, therefore, the civilian judges were "inferior" officers. The fact that the judges were limited neither in tenure nor jurisdiction were irrelevant to the Court's decision.[327]

Thus, following *Edmond*, the test for distinguishing principal from inferior officers appears to be whether the appointee is supervised by a higher-ranking officer, and whether that supervision is a function of removability and reversability. The test for distinguishing inferior officers from non-officers seems to be the *Buckley* test of whether the appointee "exercis[es] significant authority pursuant to the laws of the United States"[328] and the *Germaine/Auffmordt* examination of whether the position is permanent and salaried.

b. Congress's power to vest the appointment of inferior officers

The second issue that frequently arises under the Appointments Clause is whether, with regard to inferior officers, there are any implicit limitations on Congress's power to decide who will exercise the appointment power. The constitutional text contains no such limitation.[329] However, the Court has on occasion indicated that there is an implied constitutional requirement that Congress vest the appointment power in the governmental branch most appropriate for the particular appointment.

The Court first encountered this issue in the 1839 case of *Ex Parte Hennan*.[330] In that case, the Court upheld Congress's decision to vest the appointment of judicial clerks in the federal courts. Along the way, the Court stated that "[t]he appointing power here designated . . . was, no doubt, intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged. The appointment of clerks of courts properly belongs to the courts of law."[331] This language indicates the Court's approval of Congress's decision to vest the appointment in the most appropriate branch, but does not indicate whether it is a constitutional requirement.

Forty years later, in *Ex Parte Siebold*,[332] the Court seemed to reverse course. At issue was a federal statute that required circuit court judges to

325. *Id.* at 664-65.
326. *Id.* at 665.
327. *See id.* at 666.
328. Buckley v. Valeo, 424 U.S. 1, 126 (1975).
329. Susolik, *supra* note 265, at 1546-47.
330. 38 U.S. (13 Pet.) 133 (1839).
331. *Id.* at 137.
332. 100 U.S. 371 (1879).

appoint "purely executive" supervisors of elections.[333] The Court upheld the delegation of the appointment power to the judicial branch. Even though it might be "usual and proper to vest the appointment of inferior officers in that department . . . to which the duties of such officers appertain," the Court nonetheless concluded that there was "no absolute requirement to this effect in the Constitution."[334] The Court also recognized that "it would bc difficult in many cases to determine to which department an office properly belonged."[335]

Nearly a hundred years later, in *Buckley v. Valeo*,[336] the Court appeared to reverse course yet again. *Buckley* struck down a statute that allowed Congress to appoint FEC officials. Finding that these officials wcrc executive officers, the Court stated that since the president "is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication, even in the abscnce of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws."[337]

Finally, in *Morrison*, the Court ignored *Buckley* and instead followcd *Siebold*. Holding, as discussed above, that Congress acted constitutionally when it vested in the judicial branch the power to appoint special prosecutors,[338] the Court found that the Appointments Clause contemplated "no limitation on interbranch appointments."[339] Quoting the language from *Siebold* discussed above,[340] the Court stated that neither the text nor the history of the Appointments Clause provided any support for the position that interbranch delegation was to be prohibited.[341] But then the Court backpedaled a bit, stating that Congress's power to make interbranch appointments is not "unlimited";[342] that Congress cannot make an interbranch appointment if that appointment "ha[s] the potential to impair the constitutional functions assigned to one of the branches."[343]

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333. *Id.* at 377. The issue arose when former supervisors of elections challenged their convictions for criminal election fraud violations under statutes whose violations depended on the supervisors' status as federal officers; the defendants challenged their convictions on the ground that because their appointments were unconstitutional, the defendants were not federal officers. *Id.*

334. *Id.* at 397; *see also* Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 613 (1998).

335. Ex Parte *Siebold*, 100 U.S. at 397.

336. 424 U.S. 1 (1976).

337. *Id.* at 135 (quoting Myers v. United States, 272 U.S. 52, 117 (1926)).

338. *See supra* note 255 and accompanying text.

339. Morrison v. Olson, 487 U.S. 654, 673 (1988).

340. *Id.* at 674; *see supra* notes 332-35 and accompanying text.

341. *Morrison*, 487 U.S. at 674-75.

342. *Id.* at 675.

343. *Id.* at 675-76.

The only thing consistent about the Supreme Court's case law on this issue is the Court's inconsistency. Of the four cases on point, two seem to indicate that Congress may vest the appointment of inferior officers in any branch it wishes; the other two seem to indicate that Congress is under a constitutional obligation to vest the appointment in the branch the function of which is most commensurate with the appointee's duties. The cases provide little analysis and suggest no meaningful way to distinguish them; there is no discernable trend in either reasoning or outcome. In short, the issue is "unsettled and indeterminate."[344]

B. Application to Qui Tam

Constitutional challenges to the *qui tam* action have focused on three characteristics of the action. The first is the restriction on the executive branch's prosecutorial powers. The second is the redistribution of these prosecutorial powers to private, unelected, unappointed citizens. The third is the power given to the judicial branch to permit executive branch intervention in a *qui tam* action only for "good cause" when intervention is sought more than sixty days after the action is filed. Each of these will be discussed in turn.

1. RESTRICTIONS ON THE EXECUTIVE BRANCH'S PROSECUTORIAL POWERS

Qui tam imposes three restrictions on the executive branch's power to control the prosecution of a *qui tam* case.[345] First, it divests from the executive branch the power to control whether the case is filed at all. Second, it cedes much control over the litigation from the executive branch to the *qui tam* informer. Third, it restricts the executive branch's ability to terminate the litigation.

a. Prosecutorial discretion

The *qui tam* action compromises the executive branch's power over prosecutorial discretion because the *qui tam* informer has the power unilaterally to decide to initiate suit.[346] This transfer of power is mitigated somewhat by the executive branch's concurrent power to initiate suit;[347] its absolute right, within sixty days, to intervene and take over the suit;[348] and its conditional right (upon a showing of good cause) to intervene after

344. Susolik, *supra* note 265, at 1549.

345. United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 621 (C.D. Cal. 1989).

346. 31 U.S.C. § 3730(b) (1998).

347. *Id.* § 3730(a).

348. *Id.* § 3730(b)(4)(A).

sixty days.[349] Nonetheless, the bottom line is that the *qui tam* statute divests the executive branch of the absolute right to control the initiation of litigation.

Supreme Court cases such as *Buckley v. Valeo*[350] have intimated that prosecutorial discretion may be an "inherently executive" function, and that divesting the executive branch of this power could be an unconstitutional violation of the separation of powers doctrine, the Take Care Clause, or the Vesting Clause.[351] Recently, pointing to evidence that prosecutiorial duties may have been performed outside the executive branch in the late 1700s, some scholars have questioned whether the founders considered prosecution to be a purely executive function.[352] Other scholars, however, have reached the opposite conclusion.[353]

Commentators have identified two policy reasons that might justify the executive branch's retention of absolute discretion over prosecutorial matters. The first is that the executive branch, as a politically accountable entity, is in a better position than private citizens to assess whether prosecution of a particular suit is in the overall best interests of the government.[354] The government might, for example, wish to delay prosecution of one case until it has established a favorable precedent with another case; it might believe that prosecution would interfere with important national security or foreign policy interests;[355] or it might conclude that a technical violation of the FCA does not warrant suit, as when the defendant has taken steps to remedy the situation.[356] However, Congress, by enacting the *qui tam* statute, has already made the policy judgement that the government's interest in vigorous prosccution of fraud outweighs the practical pitfalls of dispersing control over the initiation of

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349. *Id.* § 3730(c)(3).

350. 424 U.S. 1, 138 (1976); *supra* notes 297-305, 336-37 and accompanying text (referring to initiation of lawsuits on behalf of the United States as part of the President's "take care" duties).

351. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("[T]he decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed."); United States v. Nixon, 418 U.S. 683, 693 (1974) (stating, in dicta, that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); The Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1869) ("Public prosecutions . . . are within the exclusive direction of the district attorney."). Many of these cases, however, involved criminal rather than civil prosecutions.

352. *See, e.g.*, Lessig & Sunstein, *supra* note 196, at 14-23; Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function?* Morrison v. Olson *and the Framers' Intent*, 99 YALE L.J. 1069 (1990).

353. *See, e.g.*, Calabresi & Prakash, *supra* note 212, at 658-62.

354. *See* Caminker, *supra* note 3, at 359-67; Lovitt, *supra* note 3, at 869-76.

355. Caminker, supra note 3, at 360-61, 365; Lovitt, *supra* note 3, at 874.

356. *See* Lovitt, *supra* note 3, at 874.

suit.[357] Moreover, the same could be said of other statutes with citizen-suit provisions.[358]

A second policy reason for consolidating prosecutorial power in the executive branch is to protect defendants from frivolous prosecutions.[359] Political accountability constrains executive branch officials from overzealous or oppressive prosecutions;[360] internal constraints have a similar effect.[361] One commentator has warned that "granting self-interested private citizens an unfettered right to bring suit under the FCA creates an enormous potential for abuse."[362] But the potential for abuse in *qui tam* actions is no greater than in other private civil actions;[363] in both situations, our judicial system assumes that the cost of bringing suit,[364] and the existence of various procedural devices designed to weed out frivolous suits,[365] adequately protects defendants.

Morrison v. Olson[366] is helpful but not dispositive on the issue of whether FCA *qui tam* provisions unconstitutionally deprive the executive branch of the right to control the initiation of litigation. In *Morrison*, the independent prosecutor had unilateral authority, once appointed, to initiate prosecution[367] (and the Court conceded this authority as a core executive function);[368] the attorney general had no control over the decision to initiate litigation. In this sense, the attorney general has far more control over the initiation of FCA *qui tam* litigation than she does over EGA litigation, since with the former she has (1) a concurrent power,

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357. Caminker, *supra* note 3, at 365-66.

358. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2619 (1998); Endangered Species Act Amendments of 1982, 16 U.S.C. § 1540(g) (1998); Clean Water Act, 33 U.S.C. § 1365 (1998).

359. Blanch, *supra* note 3, at 757-58; Caminker, *supra* note 3, at 368-74.

360. Caminker, *supra* note 3, at 368.

361. *Id.* ("Resource scarcity discourages the initiation of frivolous proceedings; requirements of personal disinterest discourage the malevolent or self-interested use of power; and the repetitive nature of discretionary decisions builds experience, both for each prosecutor and within her community.").

362. Blanch, *supra* note 3, at 757.

363. Caminker, *supra* note 3, at 367.

364. In a *qui tam* action brought under the FCA in which the government chooses not to intervene, the informer is responsible for the costs of prosecuting the litigation. 31 U.S.C. § 3730(b)(4)(B) (1998); *see also* United States *ex rel.* Givler v. Smith, 775 F. Supp. 172, 178 (E.D. Pa. 1991). Moreover, at the end of litigation, the court may award the defendant attorneys fees if the defendant prevails and the action "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." 31 U.S.C. § 3730(d)(4).

365. *See, e.g.*, United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084 (C.D. Cal. 1989) (suggesting summary judgment under Rule 56 and attorney sanctions under Rule 11 should suffice to protect defendants from "loose cannon" *qui tam* plaintiffs).

366. 487 U.S. 654 (1988); *supra* notes 239-64, 306-13 and accompanying text.

367. 28 U.S.C. §§ 594(a), 594(a)(9) (1998).

368. 487 U.S. at 691.

with the informer, to initiate litigation; (2) an absolute right, within sixty days, to intervene and take over the suit; and (3) a conditional right to intervene after sixty days. Since the *Morrison* Court upheld EGA provisions that imposed greater restrictions on prosecutorial initiation than those imposed by the FCA, this would tend to indicate that the FCA restrictions pass constitutional muster.

There is, however, one sense in which the attorney general has more control over the initiation of EGA litigation than she does over the initiation of FCA *qui tam* litigation. The EGA provides that an independent prosecutor may only be appointed upon the recommendation of the attorney general.[369] This gives the executive branch absolute formal (if not practical)[370] control over the process that might eventually lead to prosecution.[371] On the whole, the similarities between *Morrison* and *qui tam*, together with the attorney general's right to intervene in a *qui tam* action, augur for a conclusion that no constitutional violation exists.

b. Control over litigation

In addition to constricting the executive branch's power to control the initiation of a case, *qui tam* also imposes limitations on the executive branch's power to conduct the litigation as the executive branch sees fit. There are three such limitations.[372] First, if the attorney general elects not to intervene, the *qui tam* informer directs the prosecution, which nonetheless proceeds in the government's name.[373] Second, if the government, after sixty days, decides to intervene, it may do so only upon showing the court "good cause."[374] Third, if a dispute arises at any time between the government and the informer as to the conduct of the suit, the government must ask the court to limit the informer's participation;[375] the government lacks the authority to do so unilaterally.

These limitations pale in comparison to the limitations at issue in *Morrison*. The Ethics in Government Act, once the independent counsel was appointed, gave that independent counsel plenary authority to

369. *See id.* at 696 ("No independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request appointment if he finds 'no reasonable grounds to believe that further investigation is warranted' is committed to his unreviewable discretion.").

370. *See id.* at 701-02 (Scalia, J., dissenting) (arguing that political pressures often would force the attorney general to recommend an independent counsel).

371. Blanch, *supra* note 3, at 757; Lovitt, *supra* note 3, at 870.

372. United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 621 (C.D. Cal. 1989).

373. *See supra* notes 76-79, 96 and accompanying text.

374. 31 U.S.C. § 3730(c)(3) (1998).

375. *Id.* §§ 3730(c)(2)(C), (D).

conduct the litigation;[376] the DOJ was denied the opportunity to participate in the litigation in any way.[377] By contrast, the FCA gives the government a sixty-day absolute right to intervene and take over the litigation, a qualificd right to intervene after that, and an opportunity (upon judicial approval) to limit the informer's participation in the litigation. If *Morrison* set the benehmark, then it is difficult to see how the FCA could fail to pass constitutional muster.[378]

An argument can be made that the good-cause limitation on intervention in the FCA is more onerous than the EGA requirement that the attorney general have good cause before removing the independent counsel.[379] The FCA, for example, requires a showing of good cause to a court before intervention; under the EGA, the good cause showing only had to be made after the independent counsel had been removed, if she sought judicial review. Likewise, there is some indication that the good cause requirement may be a heavier burden under the FCA than it is under the EGA.[380] Upon a showing of good cause, the independent counsel could be removed; the FCA gives the government no commensurate power to remove a *qui tam* informer.[381]

On the other hand, under the EGA, good cause was necessary *any time* the attorney general wished to remove the independent counsel; under the FCA, the right to intervene is absolute for the first sixty days of litigation. Moreover, once an independent counsel is removed, the judicial branch has the authority to appoint a replacement, and the attorney general has no right to participate in the appointment.[382] In light of the government's right to intervene and control FCA litigation, contrasted with the inability of the government to participate in an independent counsel prosecution in any way, it seems reasonable to conclude that the FCA restrictions on the executive branch's ability to control the prosecution of *qui tam* litigation is constitutional.

c. Termination of litigation

FCA *qui tam* provisions restrict the executive branch's control of *qui tam* suits in a third way: by limiting the government's ability to settle or dismiss a suit. If the government intervenes, it can only dismiss the suit over the objection of the informer following a hearing and the approval of

376. 28 U.S.C. § 594(a) (1998).

377. Blanch, *supra* note 3, at 760.

378. *But see id.* at 760-62 (distinguishing *Morrison* on the basis that under the EGA, there was a "pragmatic imperative" that independent counsels not be subject to the control of the very officials they were responsible for investigating and prosecuting).

379. *Id.* at 762-65.

380. *See supra* note 86 and accompanying text.

381. 31 U.S.C. § 3730(c)(1) (1998).

382. *See Truong*, 728 F. Supp. at 622.

the court,[383] and it can only settle the suit over the objection of the informer if it can convince the court that the settlement is fair and reasonable.[384] These restrictions are significantly less onerous than the restrictions placed on the attorney general by the EGA.[385] Moreover, other statutes similarly constrain the executive Branch's ability to dismiss suits.[386]

If the government does not intervene, then it is unclear whether, and if so under what circumstances, the government may dismiss the suit.[387] By one view, the government would have no authority whatever to terminate the suit.[388] This is similar to, and perhaps slightly more onerous than, the EGA statute, which gave the attorney general the power to remove (with good cause) the independent counsel, even though this removal would not affect any pending suits and the judicial branch could thereafter appoint a replacement.[389] Most courts, albeit in dicta, have interpreted the FCA as giving the government the right to move for dismissal even if the government has not intervened in the case.[390] This interpretation would give the government far more control over the termination of litigation in an FCA *qui tam* case than the EGA gave the government in the termination of litigation initiated by independent counsels.

The FCA imposes significant constraints on the authority of the executive branch to litigate *qui tam* suits. It limits prosecutorial discretion; it gives, under some circumstances, control over the litigation to *qui tam* informers; and it restricts the ability of the executive branch to end the litigation. Nonetheless, these restrictions are on the whole less onerous than the EGA restrictions that passed constitutional muster in *Morrison*. The restrictions imposed by the FCA on the executive

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383. 31 U.S.C. § 3730(c)(2)(A).

384. *Id.* § 3730(c)(2)(B).

385. Blanch, *supra* note 3, at 765.

386. *See, e.g.*, FED. R. CRIM. P. 48(a) (allowing the government to file dismissal of indictment, information, or complaint only with leave of court); 15 U.S.C. § 16(e) (allowing the court to enter a consent judgment proposed by the government in an antitrust action only if it is in the public interest). *But see* Lovitt, *supra* note 3, at 883:

> [These] provisions allow for judicial review only *after* the government has initially decided that a case has sufficient merit to proceed, and so the government has already exercised its prosecutorial discretion to initiate suit. Under the FCA, however, a court must review the government's dismissal *before* the government has decided that the relator's case is worthy.

Id. (footnote omitted).

387. *See supra* note 104 and accompanying text.

388. *See, e.g.*, Blanch, *supra* note 3, at 766.

389. *See supra* notes 249-51 and accompanying text.

390. *See, e.g.*, United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 753 n.10 (9th Cir. 1993); Juliano v. Fed. Asset Disposition Ass'n, 736 F. Supp. 348, 349-51 (D.D.C. 1990), *aff'd*, 959 F.2d 1101 (D.C. Cir. 1992).

branch's ability to litigate *qui tam* suits therefore does not create a constitutional violation.

2. DELEGATION OF PROSECUTORIAL POWERS TO CITIZENS

FCA *qui tam* informers are not appointed in conformance with the Appointments Clause. They are not nominated by the president and confirmed by the Senate, as the Appointments Clause requires of principal officers; nor has Congress vested their appointment in the president, courts, or cabinet heads, as the Appointment Clause requires of inferior officers. Nonetheless, when a *qui tam* informer files suit, she does so in the name and on behalf of the United States.[391] The constitutional issue, therefore, is whether unappointed *qui tam* informers wield so much governmental power that they must be appointed in accordance with the Appointments Clause.

Some commentators who have argued that *qui tam* violates the Appointments Clause have focused[392] on the holding in *Buckley v. Valeo*[393] that the FEC members had been unconstitutionally appointed because only persons who are "Officers of the United States" can have "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights."[394] Other commentators have focused on the policy implications of giving prosecutorial powers to citizens who are not politically accountable and who have a direct financial stake in the outcome of the litigation.[395]

The latter argument is easy to answer: Congress made the policy choice, when it passed the FCA, that the benefits of vigorous enforcement of laws prohibiting fraud against the government outweigh the drawbacks of dispersing prosecutorial power among the public. The former argument is more difficult to rebut because of the seemingly straightforward language of *Buckley*. Nonetheless, courts and commentators have found three grounds upon which to distinguish *Buckley* from FCA *qui tam* suits.

The first is that the primary concern of the *Buckley* Court was that Congress had aggrandized its own power, at the expense of the executive branch, by retaining for itself the power to appoint FEC members.[396] There is no shortage of language in *Buckley* disapproving of Congress' aggrandizement of the appointment power.[397] Because *qui tam* informers

391. *See supra* notes 76-80 and accompanying text.

392. *See, e.g.*, Blanch, *supra* note 3, at 737-47.

393. 424 U.S. 1 (1976).

394. *Id.* at 140.

395. *See, e.g.*, Lovitt, *supra* note 3, at 876-79.

396. *See supra* note 204 and accompanying text.

397. *See, e.g., Buckley*, 424 U.S. at 129 ("[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the

are essentially self-appointed rather than appointed by Congress,[398] the argument goes, the anti-aggrandizement principle does not apply, and *Buckley* does not prohibit *qui tam*.[399]

There are two problems with this approach. First, this is not the only way to interpret *Buckley*.[400] There is also plenty of language in *Buckley* indicating that the FEC members were unconstitutionally appointed simply because they wielded too much power to be classified as non-officers.[401] Second, *Myers*[402] and *Freytag*[403] indicate, respectively, that the Court is as concerned with the diminution and dispersal of the appointment power as it is with the aggrandizement of that power.[404]

A second basis upon which *Buckley* has been distinguished is closely related to the first. The argument is that *Buckley* is primarily concerned with the allocation of the appointment power among the three branches, and that the *Buckley* rationale therefore does not apply when power is given to private parties.[405] On this rationale, lower courts consistently have upheld the constitutionality of citizen-suit provisions in the face of

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Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches."); *id.* at 139 (noting that Congress may not "'enforee [the laws] or appoint the agents charged with the duty of such enforcement'") (quoting Springer v. Gov't of the Phil. Islands, 277 U.S. 189, 202 (1928)); *id.* at 124-31 (discussing congressional aggrandizement).

398. *See* United States *ex rel.* Newsham v. Lockheed Missiles & Spaee Co., 722 F. Supp. 607, 613 (N.D. Cal. 1989); Blanch, *supra* note 3, at 737; Lovitt, *supra* note 3, at 878.

399. *See, e.g.*, United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 759 (9th Cir. 1993); United States *ex rel.* Givler v. Smith, 775 F. Supp. 172, 179 (E.D. Pa. 1991); United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 623 (C.D. Cal. 1989); *cf.* Morrison v. Olson, 487 U.S. 654, 693-94 (1988) (noting that despite Congress' power to request that attorney general apply for appointment of independent counsel, "Congress retained for itself no powers of control or supervision over an independent counsel" and therefore the statute "simply does not pose a 'dange[r] of congressional usurpation of Exeeutive Branch functions'") (quoting Bowsher v. Synar, 478 U.S. 714, 727 (1986)).

400. *See, e.g.*, Blanch, *supra* note 3, at 738-42.

401. *See supra* notes 303-05 and accompanying text.

402. 272 U.S. 52 (1926) (discussed *supra* at note 209 and accompanying text).

403. 501 U.S. 868 (1991) (discussed *supra* at notes 314-19 and aceompanying text).

404. *See* Blanch, *supra* note 3, at 741-42.

405. *See, e.g.*, United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 623-24 (C.D. Cal. 1989); *see also* Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 373-74 (1998) ("If *Buckley* discovered the applicability of the Appointments Clause to assignments to nonfederal actors, the Court quickly forgot about it. Since deciding *Buckley*, the Court has reviewed and upheld still more federal assignments of significant authority to nonfederal actors without mentioning the Appointments Clause."); *cf.* Lovitt, *supra* note 3, at 877 ("The case law is sparse, but some authority argues that private citizens cannot exercise executive power."); *id.* at 876-79 (reviewing case law).

Appointments Clause challenges.[406] However, this basis for distinguishing *Buckley* has the same limitations as the first: it is far from settled whether this is a fair reading of *Buckley*, and *Myers* and *Freytag* indicate that the Court may be equally concerned with the dispersal of the appointment power.

The third basis upon which *Buckley* has been distinguished is that the FEC members at issue in *Buckley* were appointed to an established office with "primary responsibility"[407] for enforcing the Ethics in Government Act.[408] *Qui tam* informers, on the other hand, hold no established position,[409] have no formal duties,[410] receive no federal salary,[411] serve for no specified term,[412] litigate with their own resources (absent government intervention),[413] and their enforcement authority extends only to the fraud case of which they have unique[414] knowledge.[415] Some lower courts have concluded from this that *qui tam* informers are not "officers" under the Appointments Clause, but instead are better classified as "agents" of the United States,[416] as suggested by the *Germaine*[417] and *Auffmordt*[418] cases.

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406. *See, e.g.*, Del. Valley Toxics Coalition v. Kurz-Hastings, Inc., 813 F. Supp. 1132 (E.D. Pa. 1993) (upholding constitutionality of citizen suit provisions of Emergeney Planning and Community Right-To-Know Act); Atl. States Legal Found., Inc. v. Whiting Roll-Up Door Mfg. Corp., No. 90-CV-1109S, 1993 WL 114676, at *9-11 (W.D.N.Y. Mar. 31, 1993) (same); Atl. States Legal Found. v. Universal Tool & Stamping Co., 735 F. Supp. 1404, 1419-20 (N.D. Ind. 1990) (upholding the constitutionality of citizen suit provisions of Clean Water Act); Natural Res. Def. Council v. Outboard Marine Corp., 692 F. Supp. 801, 815 (N.D. Ill. 1988) (same); Chesapeake Bay Found. v. Bethlehem Steel Corp., 652 F. Supp. 620 (D. Md. 1987) (same); *see also The Constitutional Separation of Powers Between the President and Congress*, Memorandum for the General Counsels of the Federal Government from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice 26-27 (May 7, 1996) (concluding that enforcement of federal laws by private individuals under the citizen suit provisions of the Clean Water Act does not violate the Appointments Clause), *available at* http://www.usdoj.gov/olc/mem_ops.html; Caminker, *supra* note 3, at 375 (noting *qui tam* informers are "like citizens litigating conventional private rights of action").

407. *Buckley*, 424 U.S. at 140.

408. Caminker, *supra* note 3, at 375.

409. *Truong*, 728 F. Supp. at 623.

410. *Id.*

411. United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 759 n.21 (9th Cir. 1993); *Truong*, 728 F. Supp. at 623.

412. *Kelly*, 9 F.3d at 759 n.21; *Truong*, 728 F. Supp. at 623.

413. 31 U.S.C. § 3730(b)(4)(B) (1998).

414. *Id.* §§ 3730(e)(4)(A)-(B).

415. *Kelly*, 9 F.3d at 755 n.15 ("The 'jurisdiction' of a relator seems necessarily limited by the terms of the False Claims Act and the facts of the particular case."); *id.* at 758 ("[T]he relator's responsibility only extends to a single case.").

416. United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1094 (C.D. Cal. 1989); *Truong*, 728 F. Supp. at 623; *see also Kelly*, 9 F.3d at 759 n.21 ("[A] relator 'is not appointed by Congress, receives no federal salary, and serves for no specified term.' These faetors distinguish relators from 'officers.'") (citation omitted); Caminker, *supra* note 3, at 375-76 ("*[Q]ui tam* plaintiffs ought to be considered executive agents and not officers subject to the dictates of the appointments clause.").

Regardless of whether *qui tam* informers are properly classified as agents,[419] the basic point of *Germaine* and *Auffmordt* seems to be that if there is no position, there need be no appointment.[420] This seems a legitimate basis upon which to distinguish *Buckley*: FEC members held a specified position, with statutorily-specified duties, general jurisdiction over a specified subject, and a federal salary. *Qui tam* informers have none of these.

Moreover, it seems inaccurate to characterize *qui tam* informers as having "primary responsibility" for enforcement of the FCA, even if informers are viewed collectively rather than individually. The attorney general has concurrent power to initiate suit under the FCA and, by doing so, jurisdictionally bars an informer from bringing an action based on the same underlying facts.[421] Even if the informer files suit first, the government has the unconditional right, within sixty days, to intervene and take control of the suit, and a conditional right to intervene after that.[422] A better interpretation of the statute would be that the *attorney general* has "primary responsibility" for enforcing the FCA, and that informers play a supplemental, albeit important, role.

3. DELEGATION OF PROSECUTORIAL POWER TO JUDICIAL BRANCH

The third characteristic of the *qui tam* action that has attracted constitutional challenge is its distribution of some executive functions to the judicial branch. There are two mechanisms through which the FCA does this. The first is by permitting the executive branch to intervene in a *qui tam* action, after sixty days and a judicial finding of good cause.[423] The second[424] is by permitting the executive branch to dismiss a *qui tam* action only following a hearing and the approval of the court,[425] and by permitting the executive branch to settle a *qui tam* action over the objection of the informer only if it can convince the court that the settlement is fair and reasonable.[426] The issue is whether these

417. 99 U.S. 508 (1878); *supra* notes 287-91 and accompanying text.

418. 137 U.S. 310 (1890); *supra* notes 292-95 and accompanying text.

419. For an argument that *qui tam* informers are not properly classified as agents, see Blanch, *supra* note 3, at 742-44.

420. *See* Caminker, *supra* note 3, at 375 ("[I]ndividual *qui tam* litigants are merely one-shot actors rather than tenured repeat players involved in the ongoing implementation of Federal law.").

421. 31 U.S.C. § 3730(e)(3) (1998).

422. *See supra* notes 81-104 and accompanying text.

423. *See* United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 756 (9th Cir. 1993).

424. *See* Lovitt, *supra* note 3, at 879-83.

425. 31 U.S.C. § 3730(c)(2)(A).

426. *Id.* § 3730(c)(2)(B).

mechanisms unconstitutionally permit the judicial branch to encroach on executive branch authority.[427]

The issue is basically a variation on the theme discussed above:[428] whether these mechanisms trammel on the executive branch's power to exercise prosecutorial authority.[429] Here, however, the argument is not just that an arguably "inherently executive" power is being taken away from the executive branch, but also that that power is being given to the judicial branch. In the words of one commentator, "Is it consistent with the constitutional separation of powers for Article III judges—judges who must sit as neutral umpires in FCA cases—to exercise the inherently executive power of deciding" when the government may intervene late and when the government should be permitted to dismiss the action?[430]

In one sense, the issue is analogous to the line of cases in which the Court has considered whether the Appointments Clause imposes any implicit limits on Congress's power to authorize interbranch appointments of inferior officers. This line of cases is not directly applicable, however, because, as discussed above, *qui tam* informers are not appointed in conformance with the inferior officer part of the Appointments Clause.[431] Another semi-analogous line of cases is the line of separation of powers cases in which one branch of government (usually Congress) aggrandizes power at the expense of another branch. Again, the analogy is not perfect. In the *qui tam* context, Congress is not seeking to retain any power for itself; it instead is taking power away from the executive branch and giving it to the judicial branch (and the "non-branch" of private citizens).[432]

There are several reasons why these *qui tam* provisions do not necessarily violate separation of powers principles. First, as noted above, there is some question as to whether the retention of absolute prosecutorial powers is "inherently executive."[433] Second, courts have interpreted the FCA judicial oversight provisions, such as the good cause requirement, narrowly in order to minimize or avoid the constitutional issue (though there is some question as to whether these interpretations are correct).[434] Third, other statutes similarly constrain the executive branch's ability to dismiss suits.[435]

Fourth, and perhaps most persuasive, the extent of judicial branch involvement in a *qui tam* action is no greater than that in the special

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427. *Kelly*, 9 F.3d at 755-56.
428 *See supra* Part IV.B.1.
429. *Id.* at 756.
430. Lovitt, *supra* note 3, at 879.
431. *See supra* note 391 and accompanying text.
432. *Kelly*, 9 F.3d at 750.
433. *See supra* notes 352-53 and accompanying text.
434. *See supra* notes 86, 102 and accompanying text.
435. *See supra* note 387 and accompanying text.

counsel provisions approved by *Morrison*.[436] In *Morrison*, the Court held that Congress did not encroach on executive power by vesting power in a special federal court to decide whom to appoint as an independent counsel, by giving the special court the power to define the independent counsel's jurisdiction, by giving the special court the power to terminate the office of independent counsel, or by giving the special court the power to review the attorney general's decision to remove an independent counsel.[437] In contrast, in a *qui tam* action, the judicial branch plays no role in the selection of *qui tam* informers or the definition of their jurisdiction, and the judicial branch has no independent authority to remove a *qui tam* informer (though either the executive branch or the defendant may ask that the court limit the informer's involvement).[438] Moreover, in *Morrison*, the attorney general could remove the independent counsel only for good cause, and even that would not terminate the investigation or prosecution.[439] In contrast, under the FCA, the government's power to intervene is absolute for sixty days, and only thereafter subject to the good cause requirement.[440] Comparing the *qui tam* provisions of the FCA to the independent counsel provisions upheld in *Morrison* presents the strongest argument as to why judicial branch involvement in *qui tam* actions does not violate separation of powers principles.

V. BEYOND THE DOCTRINAL MOLD

The above analysis suggests that there is a firm doctrinal justification for upholding the constitutionality of the FCA *qui tam* provisions. The doctrinal justification distinguishes cases like *Morrison* and *Buckley*, and demonstrates that *qui tam* actions pose less of a threat to the constitutional structure than did the congressional actions struck down or upheld in those cases. However, there are two unique features of *qui tam* actions that justify treating them differently than the other constitutional cases. First, because *qui tam* disperses power among the citizens rather than concentrating it in the hands of a single political branch, the principles underlying the separation of powers doctrine are not threatened as they are when, for example, Congress seeks to retain the power constitutionally apportioned to another branch. Second, *qui tam* actions are different because they have a unique and extensive history.

436. *Kelly*, 9 F.3d at 756.
437. *See supra* notes 239-64 and accompanying text.
438. *See supra* notes 93-94 and accompanying text.
439. *See supra* notes 249-51 and accompanying text.
440. *See supra* notes 81-104 and accompanying text.

A. Power to the People

Nearly all of the Article II cases discussed in Part IV involved efforts by Congress either to aggrandize power for itself or to vest power inappropriately in another branch of government. For example, in *Morrison*, Congress gave the judicial branch significant authority related to the independent counsel;[441] in *Buckley*, Congress retained for itself the power to appoint members of the FEC.[442] Even in *Freytag*, in whieh the Court cautioned against the dispersal of the appointment power, the constitutional issue was which branch would wield the power to appoint trial judges for tax cases.[443]

Instead of vesting primary or concurrent responsibility for the enforcement of a statute in one of the three branches of government,[444] *qui tam* provisions disperse that responsibility among the citizens. Some commentators have argued that this is a bad idca because it decreases political accountability for actions taken in the name of the government:[445] the president must stand for election, whereas *qui tam* informers do not. While this argument is not without merit, it overlooks the fact that political accountability is neithcr the only nor the most important value served by the separation of powers doctrine.

The primary purpose of the separation of powers doctrine was to preserve liberty[446] by dispersing federal power among the three branches. James Madison wrote that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[447] Similarly, Justice Brandeis, dissenting in *Myers v. United States*,[448] wrote:

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the

441. *See supra* notes 239-64 and accompanying text.

442. *See supra* notes 297-99 and accompanying text.

443. *See supra* notes 314-19 and accompanying text.

444. As discussed above, *see supra* Part IV.B.3, the FCA does give some power that ordinarily would be exercised by the executive branch to the judicial branch. Nonetheless, the primary transfer of power is from the executive branch to *qui tam* informers.

445. *See, e.g.*, Harold J. Kent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1820-21 (1993); Lovitt, *supra* note 3, at 874-75.

446. *See, e.g.*, Susolik, *supra* note 265, at 1536, 1560, 1564.

447. THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

448. 272 U.S. 52 (1926).

> distribution of the governmental powers among three departments, to save the people from autocracy.[449]

While this purpose may be subverted by the aggrandizement of or misallocation of power to one of the governmental branches, it is not seriously threatened by a dispersal of power among the citizens. In a *qui tam* action, the true party in interest is the citizenry—we are, after all, a "government of the people, by the people, [and] for the people."[450] The executive officials who would be exclusively responsible for prosecuting FCA actions absent the *qui tam* provisions are merely the representatives of the people. The FCA empowers citizens to enforce the FCA directly, rather than indirectly through their executive branch representatives. This dispersal of power among the citizens is not only consistent with, but affirmatively promotes, the purpose of the separation of powers doctrine.

Myers and *Freytag*, of course, cautioned against the diminution and diffusion of the appointment power. Implicit in the *Freytag* Court's analysis was the fear that Congress would weaken the executive branch by diffusing executive powers within the executive branch; if power is too diffuse, then it is not effectively wielded. In *Myers*, the diminution of executive power was more direct. In both cases, the Court was concerned that by weakening the executive branch, Congress would upset the balance of powers among the branches.

The *qui tam* action, rather than limiting executive power, as in *Myers*, or diffusing power within the executive branch, as in *Freytag*, instead allocates power from the executive branch to the citizenry. The net effect, as in both *Myers* and *Freytag*, is to weaken somewhat the power of the executive branch. However, *Myers* and *Freytag* should be understood as standing for the proposition that Congress' ability to diffuse power should not be unlimited; if Congress were to attempt to privatize all federal law enforcement, for example, that certainly would be cause for constitutional concern. Transferring power from a branch of government to the citizenry raises fewer constitutional concerns, and should receive less judicial scrutiny, than transfers of power from one branch to another.

The *qui tam* action, therefore, should be analogized to citizen suit provisions,[451] private suits,[452] and corporate shareholder derivatives. It

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449. *Id.* at 293 (Brandeis, J., dissenting).

450. President Abraham Lincoln, Address at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), *in* THE NORTON ANTHOLOGY OF AMERICAN LITERATURE 1579 (Nina Baym et al. eds., 4th ed. 1994).

451. Sunstein, *What's Standing After* Lujan*?*, *supra* note 113, at 175-77. There are, of course, two key differences between *qui tam* suits and citizen suits. First, the defendant in a *qui tam* suit is a private defendant, while the defendant in a citizens' suit usually is the government. Second, a *qui tam* informer whose suit is successful is entitled to money paid to himself, while the plaintiff in a citizens' suit is not. These distinctions, however, should

disperses power instead of concentrating it. While *Freytag* cautions against such a dispersal of power, dispersal *to the citizenry* should receive less constitutional scrutiny than interbranch transfers of power. Viewed through this lens, particularly in light of the conclusion in Part IV that the power transferred by *qui tam* is far from absolute, *qui tam* should easily pass constitutional muster.

B. History

As discussed previously, *qui tam* has a long history. It existed at the time the Constitution was framed, and was incorporated into several statutes enacted by the First Congress. As Cass Sunstein has pointed out, "there is no evidence that anyone at the time of the framing believed that a *qui tam* . . . action produced a constitutional doubt."[453] This is likely due to the fact that the framers primarily were concerned with preventing the aggregation of power into a single person or branch of government; a statutory provision that dispersed power among the citizenry simply did not pose the kind of threat to individual liberty that the unchecked power of a monarchy did. The existence of *qui tam* at the time the Constitution was framed, and its use by the First Congress, is powerful evidence that the framers did not believe that *qui tam* violated separation of powers principles.

VI. CONCLUSION

Qui tam is over seven centuries old. It existed in the American colonies prior to the Revolution, and was part of several statutes enacted by the First Congress. It has been an integral part of the FCA for nearly a hundred and forty years. Despite its impressive pedigree, it now is being subject to serious constitutional challenge.

This challenge has come under Articles II and III. The Article III challenge concerns the standing doctrine, and the issue has been whether *qui tam* informers, who themselves suffer no injury, have standing to sue under the statute. The Supreme Court recently resolved this issue by holding that *qui tam* informers have such standing.

In doing so, however, the Court expressly reserved the Article II issues. These issues involve the restriction of some of the executive branch's prosecutorial powers, the delegation of some of these powers to unappointed citizens, and the delegation of other such powers to the

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make no constitutional differenee. *Id.* at 176-77.

452. *Id.* at 231 n.300.

453. *Id.* at 176. Sunstein's argument is that the framers' assumption that *qui tam* was constitutional is an indication that the Court's rcquirement for an "injury in fact" to create Article III standing is incorrect. *Id.*

judicial branch. These issues go to the heart of the division of powers within our Constitutional scheme. They do not, however, warrant the conclusion that the *qui tam* provisions of the FCA are unconstitutional.

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