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Historical Patterns Cannot Justify Contemporary Violations of Constitutional Guarantees—Renewed Constitutional Attacks on FCA Qui Tam Provisions

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The Constitutional Foundation of FCA Qui Tam Actions Under Fire

In the past year, the constitutional status of the False Claims Act's (FCA) qui tam provisions has come under unprecedented scrutiny, with a series of high-profile federal court decisions and judicial opinions casting doubt on the legitimacy of private relator enforcement. These developments are not theoretical or remote—they are unfolding now, with new district and appellate court opinions issued in 2024 and 2025, and with U.S. Supreme Court justices inviting a re-examination of the constitutional footing of some of the FCA's most unique and significant enforcement provisions—the qui tam provisions that empower private parties to prosecute civil claims on behalf of the United States in exchange for receiving a portion of the damages. The main justification for these provisions has been their historical role in policing fraud against the government, dating back to the law's enactment in the 1860s, but as Justice Clarence Thomas has stated, "historical patterns cannot justify contemporary violations of constitutional guarantees." This is a pivotal moment for defendants to raise and preserve constitutional challenges to qui tam actions.

Recent Judicial Decisions: A Rapidly Evolving and Timely Landscape

Courtesy photos

L-R: Courtney Gilligan Saleski, John M. Hillebrecht, and Jonathan Haray of DLA Piper.

U.S. District Court for the Middle District of Florida—*Gose* and *Zafirov* Decisions (2024–2025): Judge Kathryn Kimball Mizelle has twice held the FCA's qui tam mechanism unconstitutional, most recently in *Gose v. Native American Services,* (May 29, 2025), following her 2024 decision in *Zafirov v. Florida Medical Associates*. Both decisions found that FCA relators are "officers of the United States" exercising core executive power—prosecuting claims, seeking penalties, and representing the United States in federal court—without being appointed in accordance

with the appointments clause of Article II of the Constitution. Mizelle's analysis is especially timely, as it is now being cited by other federal judges and is shaping the national conversation.

U.S. Court of Appeals for the Fifth Circuit—*Montcrief v. Peripheral Vascular Associates*, (March 2025): Judge Stuart Kyle Duncan, concurring, explicitly agreed that the FCA›s qui tam device violates Article II of the Constitution. His opinion, while only a concurrence, is significant for its substance and its timing, signaling that appellate judges are increasingly willing to question the constitutional foundation of qui tam enforcement and providing a clear blueprint for future challenges.

U.S. Supreme Court—*Polansky* (2023), *Wisconsin Bell* (2025), and the Appointments Clause: Three current Supreme Court justices—Justice Clarence Thomas, Justice Brett Kavanaugh and Justice Amy Coney Barrett—have questioned the constitutionality of the FCA's qui tam provisions. Thomas, in his *Polansky* dissent and *Wisconsin Bell* concurrence, has been especially forceful, arguing that private relators exercising executive enforcement power without presidential oversight violates Article II. Kavanaugh (joined by Barrett) has repeatedly called for the court to address these unresolved structural questions. Barrett's alignment with Kavanaugh and Thomas signals a growing bloc on the court ready to revisit the issue.

The court's willingness to confront similar separation-of-powers concerns was evident in *Lucia v. SEC,* where it held that administrative law judges must be properly appointed under the appointments clause, and striking a blow to the SEC's way of conducting administrative proceedings to enforce the federal securities laws. That decision underscored the court's readiness to scrutinize arrangements that blur the lines of executive accountability—an approach that could have direct implications for the constitutionality of qui tam enforcement under the False Claims Act.

The 'Zafirov' Appeal—A National Bellwether

***Zafirov v. Florida Medical Associates,* (11th Cir. Nos. 24-13581, -13583):**

The *Zafirov* appeal has emerged as the most closely watched federal case on the constitutionality of the FCA's qui tam provisions. After Mizelle's 2024 district court ruling holding the qui tam mechanism unconstitutional, both the United States and relator Clarissa Zafirov appealed to the Eleventh Circuit. The case has attracted a remarkable array of amicus briefs from former U.S. Attorneys General, legal historians, industry groups and public interest organizations, underscoring its national significance.

- **Oral Argument:** The Eleventh Circuit has tentatively calendared oral argument for the week of Dec. 8, 2025, signaling the court's recognition of the case's importance and the need for full consideration of the constitutional issues.
- **Arguments on Appeal:** The United States and relator Zafirov argue that qui tam relators are not "officers" under the appointments clause, emphasizing the long history of qui tam statutes and the government's ongoing control over FCA litigation. In contrast, the appellees and supporting amici contend that relators exercise core executive power without proper appointment or supervision, violating the appointments, vesting, and take care clauses.
- **Potential for Circuit Split:** The Eleventh Circuit›s decision could cause or resolve an emerging split among the circuits, increasing the likelihood of Supreme Court review. Historically, every federal court of appeals to address the issue—including the Second, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits—has upheld the constitutionality of the FCA's qui tam provisions, consistently holding that relators are not "officers of the United States" and that the statute provides sufficient government oversight to satisfy Article II. However, this longstanding consensus has recently been called into question by a series of district court decisions and a Fifth Circuit concurrence expressing the view that the qui tam mechanism may violate Article II. The Third Circuit may have occasion to weigh in as well, as appellants in the *Janssen* appeal (25-1818) argued the same, citing *Zafirov* (among others). The Eleventh Circuit's forthcoming decision in *Zafirov* will therefore be especially significant: it could either reinforce the traditional consensus among the circuits or contribute to a deepening split, further increasing the likelihood of Supreme Court review.

- **Immediate Impact:** A ruling affirming the district court could invalidate the qui tam mechanism in the Eleventh Circuit, while a reversal could reinforce its constitutionality—either outcome will have immediate and far-reaching consequences for FCA litigation.

Who Is Leading the Constitutional Critique?

Justice Clarence Thomas: The court›s most senior associate justice, Thomas has authored both a dissent (*Polansky*, 2023) and a concurrence (*Wisconsin Bell*, 2025) directly challenging the constitutional legitimacy of qui tam enforcement. He argues that private relators exercise core executive power without proper appointment, and that historical practice cannot override the Constitution's structural requirements. Thomas' opinions are detailed, historically grounded and unequivocal in their call for change.

Justice Brett Kavanaugh: In both *Polansky* and *Wisconsin Bell*, Kavanaugh has written concurrences (joined by Barrett) emphasizing that the FCA's qui tam provisions "raise substantial constitutional questions under Article II." He has expressly invited the court to take up the issue in an appropriate case, highlighting the seriousness with which he views the constitutional challenge.

Justice Amy Coney Barrett: By joining Kavanaugh's concurrences in both cases, Barrett has signaled her agreement that the FCA's qui tam provisions present unresolved and significant Article II constitutional questions. Her participation strengthens the prospect of a future majority willing to reconsider the FCA's framework.

Key Legal Arguments for Defendants

- **Appointments Clause Violation:** The FCA allows private relators to wield significant executive power—initiating and prosecuting claims, determining litigation strategy, and seeking punitive sanctions—without being appointed as officers of the United States. This self-appointment bypasses the constitutional requirements for appointing individuals who exercise federal authority. As Mizelle and Judge Duncan have emphasized, this is not a mere technicality: it is a direct affront to the structure of Article II, which vests executive power in the President and those properly appointed under the appointments clause.
- **Take Care Clause Violation:** By permitting private parties to enforce federal law independently of the executive branch, the FCA undermines the President›s exclusive authority to ensure that the laws are faithfully executed. The lack of removal authority or supervisory control over relators further exacerbates this constitutional defect, as relators can pursue litigation and seek substantial penalties on behalf of the United States without any meaningful executive oversight.
- **Relators as a Continuing Office:** The *Gose* decision highlights that the relator›s role is not merely personal or temporary. When the original relator died, his son was substituted as the relator, demonstrating that the position is a statutorily defined office that survives the individual. This transferability and continuity further confirm that relators occupy a continuing office, triggering the appointments clause›s requirements.
- **Historical Practice Is Not a Defense:** The government and relators often argue that the long history of qui tam statutes, dating back to the Civil War and even earlier, should shield the FCA from constitutional scrutiny. However, as Justice Thomas has cautioned, «historical patterns cannot justify contemporary violations of constitutional guarantees.» The Supreme Court has repeatedly held that longstanding practice cannot override the structural requirements of the Constitution.

Counterarguments From the Government and Relators—and Why They May Fail

- **Historical Pedigree:** The government and relators argue that the FCA›s qui tam provisions are constitutional because similar statutes have existed since the founding era. Mizelle and Duncan both rejected this argument, noting that the Supreme Court has never held that historical practice can override explicit constitutional requirements. As Thomas wrote in his *Polansky* dissent, «"'Standing alone,' however, 'historical patterns cannot justify contemporary violations of constitutional guarantees.'"»
- **Relators Are Not Officers:** Another common argument is that relators are not «officers» of the United States because their role is personal, temporary, or lacks significant authority. The recent

Gose and *Zafirov* decisions dismantled this claim, finding that relators exercise core executive power—prosecuting claims on behalf of the United States, seeking penalties, and making strategic litigation decisions. The ability to substitute relators (as in Gose) further showed that the relator's position can be viewed as a continuing office, not a one-off assignment.

- **Government Oversight Is Sufficient:** The government contends that its ability to intervene or dismiss qui tam actions provides adequate oversight. However, as Judge Duncan›s *Montcrief* concurrence makes clear, when the government declines to intervene, relators are left to exercise executive power without any real-time supervision or accountability to the President. The Supreme Court›s recent decision in *Polansky* confirms that the government's right to intervene and dismiss is not absolute and may be subject to judicial review, further weakening this argument.
- **Practical Necessity:** Some defenders of the FCA argue that qui tam suits are necessary to uncover fraud the government would otherwise miss. While this may be a policy argument for Congress to resolve, a policy concern standing alone is unlikely to override the Constitution›s structural safeguards at issue. As the courts have emphasized, the ends do not justify the means when it comes to the separation of powers. Moreover, the force of this policy argument is unclear as the government has increasingly devised other ways to incentivize whistleblowers through DOJ whistleblower programs—none of which requires whistleblowers to litigate on behalf of the government.

Practical Implications for Defendants

- **Timely Constitutional Challenges:** Given the recent surge in judicial skepticism, defendants should move promptly to raise and preserve constitutional challenges to qui tam actions, specifically citing violations of the appointments clause and take care clause. Even in circuits where precedent currently upholds the FCA, these arguments should be preserved for appeal, as the Supreme Court has signaled a willingness to revisit the issue.
- **Circuit Splits and Supreme Court Review:** The growing divergence among federal courts—now including both district and appellate judges—makes it increasingly likely that the Supreme Court will be called upon to resolve the constitutionality of qui tam enforcement. Defendants should be aware of the circuit in which they are litigating and tailor their arguments accordingly.
- **Potential for Transformative Change:** If the Supreme Court ultimately finds the qui tam provisions unconstitutional, it could dramatically alter the landscape of FCA litigation, potentially invalidating pending actions brought by private relators and limiting future enforcement to government-initiated cases.

Conclusion

The past year has seen a dramatic escalation in judicial scrutiny of the FCA's qui tam provisions, with multiple recent decisions finding them unconstitutional and a growing number of federal judges and Supreme Court justices—Clarence Thomas, Brett Kavanaugh and Amy Coney Barrett—calling for a definitive ruling. The *Zafirov* appeal, with oral argument tentatively calendared for the week of Dec. 8, 2025, stands at the center of this national debate and may well determine the future of qui tam enforcement. Defendants should seize this moment to challenge the authority of private relators to prosecute claims on behalf of the United States. As Justice Thomas has made clear, "historical patterns cannot justify contemporary violations of constitutional guarantees." The time is ripe for defendants to press these arguments and help shape the future of FCA enforcement.

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