

10-1-2011

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Recommended Citation

2 Am. U. Lab. & Emp. L. F. 1 (2011).

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BOUNTY HUNTERS AND WHISTLEBLOWERS: CONSTITUTIONAL CONCERNS FOR FALSE CLAIMS ACTIONS AFTER PASSAGE OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010

A.G. HARMON, J.D., PH.D.*

INTRODUCTION

It is an old story, oft-related, that the False Claims Act (FCA) arose in response to fraud perpetrated against the government in the Civil War by the Union military.¹ Acknowledging the fact that the Federal Treasury was being depleted by unscrupulous profiteers submitting claims for work either never done or only partially done, Congress took advantage of an age-old motivator:

* Clinical Associate Professor at the Columbus School of Law at the Catholic University of America. The author would like to thank his colleagues for their assistance with this article: Kathryn Kelly, Mary Leary, Sarah Duggin, Lisa Everhart, Marshall Breger, Robert Destro, Mark Rienzi, Suzette Malveaux, Megan LaBelle, Leah Wortham, and Dean George Garvey. He would also like to thank James M. Becker, Esquire, of Buchanan, Ingersoll & Rooney, for his insights.

1. 31 U.S.C. §§ 3729-3733 (2006); e.g. J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 555-56 (2000) (explaining that the FCA was enacted during the Civil War in response to procurement fraud by the Union military).

bounty.² Regardless of the motivation, be it profiteering, revenge, or otherwise, as long as the government was alerted to fraud, the whistleblower could participate in the recovery.

Whistleblowing has a long and storied history in Anglo-American jurisprudence, stretching back to medieval times, and it has found both friends and foes along the way.³ Attempts to reign in its powers, followed by attempts to expand its reach, are characteristically part of the story.⁴

Recently, the FCA was amended by an even more contentious Act: the Patient Protection and Affordable Care Act of 2010 (PPACA). In a five-word alteration, the PPACA has greatly expanded the reach of the statute, in terms of how a case must be proven, who has to prove it, and what circumstances, if any, will bar the proceeding from going forward.⁵ Additionally, new constitutional and policy concerns stem from the increased governmental discretion in deciding which suits can and cannot proceed.⁶ The problems resulting from the government's expanded discretion go to the very nature of *qui tam* actions themselves.⁷

This article will address the constitutionality of the PPACA's expansion of the FCA and will argue that the FCA, which was one of the latest informer statutes in Anglo-American jurisprudence, is no longer an informer statute at all. It will include a historical discussion of the constitutionality of the FCA in Part II,⁸ and an in-depth discussion of the PPACA amendments to the FCA in Part III.⁹ Part IV explains why the PPACA changes to the FCA have transformed the nature of the act from an informer's statute, a type of legislation granted Article III standing by the Supreme Court, to a private attorney general statute,

2. See §§ 3729-3733 (explaining that the FCA originally imposed a \$2,000 penalty for each violation, plus a penalty equivalent to the double the government's damages, to which the informer was entitled to half of the recovery).

3. See, e.g., Jon Knight, *Patrolling the Unfriendly Skies: Patrolling Whistleblowers Through Expanded Jurisdiction*, 20 FED. CIR. L. REV. 281 (2010).

4. *Id.*

5. Patient Protection and Affordable Health Care Act of 2010 (PPACA), Pub. L. No. 111-148, 124 Stat. 782 (2010) (codified as amended in scattered sections of 42 U.S.C.). See Beverly Cohen, *Kaboom! The Explosion of Qui Tam False Claims Under the Health Reform Law*, 116 PENN ST. L. REV. 77 (2011); Brian Santo, *The False Claims Act: Analysis of the Recently Expanded Legislation on Qui Tam Actions and Related Impact on Whistleblowers* (Jul. 2010), http://www.americanbar.org/newsletter/publications/aba_health_resource_home/Volume6_SE2_Santo.html#_ftnref2.

6. See 42 U.S.C. § 1303(j)(2), 124 Stat. 901-02 (2010) (codified at 31 U.S.C. § 3730(e)(4)).

7. See Cohen, *supra* note 5.

8. See *infra* Part II.

9. See *infra* Part III.

which is not.¹⁰ Part V sets forth the Article II Appointments clause argument against the newly-amended FCA,¹¹ and Part VI sets out the final Take Care Clause argument that arises after the aforementioned changes.¹² Lastly, Part VII explores the policy problems that raise grave concerns regarding the PPACA amendments to the FCA.¹³

II. HISTORY OF QUI TAM ACTIONS

A. *Great Britain: For King and Self*

The essence of *qui tam* actions was captured in King Wihtred of Kent's late seventh-century statute: "If a freeman works during the forbidden time [between sunset on Saturday evening and sunset on Sunday evening], he shall forfeit his healsfang, and the man who informs against him shall have half the fine, and [the profits arising from] the labour."¹⁴ This declaration, and countless others, derive their power not so much from the force of sovereign declaration, but from the worth of the information provided.¹⁵ Indeed, the entire point of the *qui tam* action is to enhance enforcement, which is accomplished by incentivizing third parties to report legal transgressions.¹⁶ Historically, the informer was only required to bring the kind of news that the law deemed worthy of reward.¹⁷ The power of the bounty insured the force of the law, giving it teeth.

10. See *infra* Part IV.

11. See *infra* Part V (building upon the traditional arguments based on the same and explains how they have been exacerbated by the PPACA changes).

12. See *infra* Part VI.

13. See *infra* Part VII (including a potential for increased "parasitic actions," i.e., those that seek part of the reward without earning part of its victory; incentives and disincentives to bringing FCA actions; inherent procedural problems for both the FCA relator and FCA defendant that will likely present themselves due to the unpredictability of how the public disclosure bar will be employed; negative impacts on resources and recoveries; and unintended equitable and professional consequences).

14. Beck, *supra* note 1, at 567 (citing THE LAWS OF THE EARLIEST ENGLISH KINGS 3, 27 (F.L. Attenborough ed. & trans., 1963)). "Healsfang" was a fine to avoid punishment. *Id.* Professor Beck explains that English *qui tam* law had its predecessors in Roman law, where informers were given a right to a portion of recoveries made despite their own personal lack of injury. *Id.* at 565, n.124.

15. See CHARLES DOYLE, CONG. RESEARCH SERV. R. 40785, *QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 2* (2009) (describing how a *qui tam* statute could be seen as a way to make money either by reward or blackmail).

16. *Id.*

17. See generally Beck, *supra* note 1, at 565-74 (detailing the various *qui tam* regulations that were enforced using informer provisions).

Informer statutes affected a number of areas of commerce, ranging from wool exports to silk imports, from wage hikes to beer production, from silver gilding to hide tanning.¹⁸ They even affected the practice of law.¹⁹ Although the power of informer statutes proved destructive to communal bonds, turning neighbor against neighbor, this problem did not quell the passage of such legislation.²⁰ Worse, Professional informers cropped up to take advantage of the practice, venturing so far as to regulate clerical orthodoxy and to enforce ecclesiastical strictures.²¹ While the informer himself was typically held in low estate, lawmakers kept the statutes on the books to use the power of greed as a means to catch scofflaws. Professor J. Randy Beck describes the general opinion of informers, characterized by no less eminent a source than Sir Edward Coke:

In his *Institutes of the Laws of England*, Sir Coke listed ‘the vexatious informer’ as one among several ‘viperous Vermin’ preying upon the Church and the Commonwealth. Indeed, informers harassed and impoverished citizens, particularly those in the lower classes, ‘for malice or private ends, [but] never for love of Justice.’

Sir Coke’s attitude toward informers was similar to the opinion expressed by the Court of Star Chamber.²² Sir John Stafford initiated an action as a common informer, perhaps lured by the potential for easy money.²³ Sir Stafford ‘was greatly blamed by the court that [despite] being so worthy a gentleman . . . he would stoop to so base an office as to

18. See *id.* at 565, n.151-56.

19. *Id.* at 565 n.151.

20. *Id.* at 574 n.172. See also DOYLE, *supra* note 15, at 2 (quoting IV Holdsworth, A History of English Law 356 (1903): “[*Qui tam* Actions] brought with them . . . unintended consequences. They gave rise to a class of bounty hunters who unscrupulously exploited weaknesses in the system. ‘Old Statutes which had been forgotten were unearthed and used as means to gratify ill-will. Litigation was stirred up simply in order that the informer might compound [i.e., settle] for a sum of money. Threats to sue were easy means of levying blackmail.’”).

21. See Beck, *supra* note 1, at 576-77 (2000) (pointing out that *qui tam* statutes during Henry VIII’s reign aimed to regulate the clergy).

22. *Id.*

23. *Id.*

be an informer, who albeit they be necessary in every well-governed state, yet for the most part they are of the meaner and worst [sort].²⁴

Indeed, the informer was notoriously powerful in demanding unlicensed settlements, procuring inconvenient venues, and casting wide nets to capture defendants for the most technical of offenses.²⁵ After a long run, reforms in the area beginning during the reign of the Tudors gradually curbed the abuses,²⁶ and the actions were ultimately abolished centuries later, under the Common Informers Act of 1951.²⁷

B. *American Actions*

Although the *qui tam* story has ended in England, it is far from over here in America. In fact, the action's trajectory has taken a parallel path to that of Great Britain.²⁸ Colonial laws were rife with rewards for informers who reported on street peddling, illegal oyster gathering, out-of-season mackerel fishing, and fraudulent bread trading, among other prohibited acts.²⁹ Informer statutes were just as common after independence had been won from Great Britain, as evidenced by such cases as *United States v. Simms*³⁰ and *Brown v. United States*.³¹

In response to fraud perpetrated against the Union Army, including the sale and resale of the same string of horses and the delivery of boxes full of sawdust instead of muskets,³² Senator Jacob M. Howard stated the logic behind the FCA:

24. *Id.* (citations omitted). It is said that "Coke's influence causes a marked decline in the statutory recognition and encouragement of common informers." Gerald Hurst, *The Common Informer*, 147 CONTEMP. REV. 189-90 (1935). In words that resonate with the Appointments Clause argument traditionally leveled against *qui tam* actions in this country, Coke also said: "The King cannot commit the sword of his justice or the oil of his mercy concerning any penal statute to any subject." *Id.*

25. *Id.*

26. The reign of George III saw a resurgence in the popularity of informer actions, which had fallen into disfavor, particularly with regard to Sunday observances, as required by the Lord's Day Observance Act. See W. W. HARDWICKE, SUNDAY OBSERVANCE: IT'S ORIGIN AND MEANING 51 (1906).

27. 14 & 15 Geo. VI, ch. 39, sched. (1951).

28. See *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1085 (C.D. Cal.1989) (stating that the *qui tam* traditions of England have followed the law's development in the United States).

29. DOYLE, *supra* note 15, at nn.5, 14.

30. 5 U.S. (1 Cranch) 252 (1803).

31. 12 U.S. (8 Cranch) 110 (1814).

32. 33 *Cong. Globe* 952-960 (1863).

The effect of them is simply to hold out to a confederate a strong temptation to betray his coconspirator, and bring him to justice. The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator, if he be such; but it is not confined to that class In short, sir, I have based the fourth, fifth, sixth, and seventh sections upon the old-fashion idea of hold 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.³³

The action remained unchanged from that time until 1943, when an attempt to repeal the FCA was instituted at the urging of then Attorney General, Francis Biddle.³⁴ The same kind of mischief that was at the heart of medieval and renaissance criticisms of informer statutes can be heard in Biddle’s call for an abolition of an informer’s claim: “[i]nformers’ suits have become mere parasitical actions, occasionally brought only after law-enforcement officers have investigated and prosecuted persons guilty of violations of law and solely because of the hope of large rewards.”³⁵

Although both the House and Senate were sympathetic to the Attorney General Biddle’s plea and passed bills to repeal the statute, the movement came to a sudden and unexpected halt in 1943.³⁶ This change of events was due to the Supreme Court’s decision in *United States ex rel. Marcus v. Hess*.³⁷ An FCA action concerning a collusive bidding scheme, *Hess* was ruled upon within five short months of Attorney General Biddle’s plea. One of the respondent’s primary arguments was that the petitioner should be barred from bringing the action because he had based his information solely on the respondent’s previous indictment, and therefore had contributed no new information by way of his own investigation.³⁸ *Marcus* involved exactly the kind of “parasitical” action Biddle had complained of in his letter.

33. DOYLE, *supra* note 15, at 5 (quoting remarks of Senator Howard, 33 *Cong. Globe* 952-960 (1863)). In another famous iteration of the theory behind the act, Justice Deady of the U.S. District Court for the District of Oregon said: “[O]ne of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.” *U.S. v. Griswold*, 24 F. 361, 365 (D.Or. 1885).

34. See Beck, *supra* note 1, at 558 (informing that Attorney General Biddle sent a letter to Congress and that, in response, Congress voted to repeal FCA *qui tam* provisions).

35. S. Rep. No. 77-1708, at 2 (1942); H. Rep. No. 78-263 at 2 (1943).

36. Beck, *supra* note 1, at 558 (describing how the bill aiming to eliminate FCA *qui tam* provisions met with strong opposition and eventually was discarded for a compromise legislation that narrowed but did not eliminate *qui tam* provisions).

37. 317 U.S. 537 (1943) (reversing the lower court’s holding as the narrow interpretation disallows any criminal proceeding to be brought against respondents, thus immaterializing *qui tam* actions).

38. *Id.* (“the force of these considerations is entirely directed at what the government thinks Congress should have done rather than at what it did”).

However, in delivering the opinion of the Court, Justice Black frustrated Biddle's objective and found that the contentions of the respondents and the government lacked support in both statute's language and legislative history.³⁹ Justice Black justified his decision to ignore Attorney General Biddle's plea on the grounds that "[t]he Senate sponsor of the bill explicitly pointed out that he was not offering a plan aimed solely at rewarding the conspirator who betrays his fellows, but that even a district attorney, who would presumably gain all knowledge of a fraud from his official position, might sue as the informer."⁴⁰ Further, Congress could have required a specific amount of "new information" to be produced by the informant but did not do so.⁴¹ Therefore, the respondent's complaints about bad policy were being made before the wrong forum. Although conditions were different after the Act was passed in 1863, the statute remained unchanged⁴² and the Court would not presume to change it for the legislature. In a worrisome aside, Justice Black even seemed to include the expense that the petitioner had risked in maintaining the suit as a justification for his right to bring the action, regardless of whether he had provided new information or not.⁴³

The idea that the informer statute allowed a petitioner to bring an action regardless of whether he contributed anything to the case inspired a full-throated dissent from Justice Jackson. He argued that:

[T]here is nothing in the text or history of this statute which indicates to me that Congress intended to enrich a mere busybody who copies a Government's indictment as his own complaint and who brings to light no frauds not already disclosed and no injury the Treasury not already in the process of vindication.⁴⁴

39. *Id.* at 547 (quoting CONG. GLOBE, 37th Cong., 3d Sess. 955-56 (1863) (alteration in original)).

40. *Id.*

41. *Id.* at n.9 (interpreting that the lack of language requiring a large amount of information essentially mean that Congress did not intend to negate rewards to those informants who offered only a small amount of information).

42. *Id.* (suggesting that Congress' decision not to set forth the required amount of new information necessary in order to receive a reward allows the simplest of informants to earn a reward).

43. *Id.* at 545-46. See James T. Blanch, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 HARV. J.L. & PUB. POL'Y 701, 713-14 (1993). The argument that the *qui tam* relator has standing because he has invested an interest in the outcome has been roundly dismissed. The Supreme Court rejected it in *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 765 (2000). 529 U.S. at 765 (holding that the United States' injury conferred standing on relator to bring *qui tam* civil action under FCA and the state was not a "person" under *qui tam* liability). See discussion in Part III *infra*.

44. *Hess*, 317 U.S. at 558.

Justice Jackson was sure that it was never Congress' intent to authorize this misuse of the statute. If that statute had, in fact, authorized this abusive proceeding ever since 1863, then "the legal profession of the United States has been strangely unresponsive to a Congressional proffer of windfall income."⁴⁵ Justice Jackson called upon Congress to intervene and stop the apparent abuse and corruption created by the statute's misuse.⁴⁶ Justice Jackson went on to make several other points contradicting the majority's logic, and he proved prescient in his remark that only Congress could intervene to prevent the consequences that the *Marcus* decision would bring about.⁴⁷ Congress quickly passed the 1943 amendments to the FCA, which instituted the public disclosure bar and effectively overruled the case.⁴⁸

In addition to Justice Jackson's stated arguments against the majority's view in *Marcus*, other arguments highlight the problem created by permitting informer statutes to require no information. First, Justice Black's explanation of Senator Howard's remarks from the floor debate in 1863 does not take the statement in the proper context. Senator Howard is not using his "district attorney" example to contend that "new" information is unnecessary, but to make it clear that the class of those who may be informers is not limited to co-conspirators that are in league with the defendant. Rather, Senator Howard's point is that someone outside the class of conspirators—such as the district attorney—could bring the suit.⁴⁹ However, that *some* kind of useful information must be brought by the petitioner—district attorney or not—is understood as a condition to that suit.

45. *Id.* at 559.

46. *Id.* at 559 (stating that Congress should be clearer with regard to about its legislative intent).

47. Justice Jackson feared the government's loss of control over prosecution and the possibility of collusion between a relator and the defendant. *Id.* at 561. The latter possibility has always been a problem with *qui tam* actions. See Beck, *supra* note 1, at 551–52, 574 (explaining how potential *qui tam* defendants learned how to turn the system of private prosecution to their advantage as the outcome in a *qui tam* suit was binding on the government).

48. See Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (1943) (codified as amended at 31 U.S.C. § 3730 (2006)). After the *Marcus* decision, some opposition arose to an outright repeal of the action. See DOYLE, *supra* note 15 at 2; Beck, *supra* note 1, at 7. The compromise required the relator to disclose his evidence to the government and wait sixty days for an intervention decision, forbade claims based on information already possessed by the government, and reduced the relator's share of the recovery. Beck, *supra* note 1, at 357 & nn.45–47.

49. That the district attorney could do such a thing at the time is only a reflection of the state of the justice system in the nineteenth century. Justice Jackson complained along these lines, criticizing Justice Black's interpretation of Senator Howard's words. Justice Jackson said the senator's remarks about the district attorney had to be placed in the context of a nation that did not yet have a Department of Justice, FBI, etc. See *Marcus v. Hess*, 317 U.S. 537, 560 (1943).

The second point against Justice Black's interpretation follows from the first: that there can be no meaningful distinction between "information" and "new information" in an informer statute. For the informer statute to incentivize reports of legal transgressions, the petitioner must bring useful information; otherwise, the word "information" is meaningless, as the relation of old news informs the government of nothing. As Jackson implies, without useful information that enhances what the government already knows, the law ceases to be a reformer statute altogether and becomes a private attorney general statute entitling the relator to a windfall profit. In so doing, it runs into the Appointments Clause problems that have historically been part of the *qui tam* criticisms, which will be discussed below.

The history of informer statutes from England to America and down to *Marcus* was based on the *qui tam* relator relaying information, not repeating information already possessed. If that were the case, *qui tam* actions would not be "informer" statutes, but "repeater" statutes. This is an important point, as it goes to the very nature of how informer statutes have been understood. In fact, the 1943 Amendments to the FCA, as well as the subsequent 1986 Amendments, both focused on enhancing the statute's power by way of making sure that useful information is provided.⁵⁰ While the 1943 amendments excluded parasitic information, the 1986 amendments reinvigorated the statute by expanding the definition of false claims and refining the jurisdictional bar, along with other changes.⁵¹ However, the law was intended as, and has been applied as, an informer statute—a means to gain information about legal transgressions that might not otherwise be known.⁵² The tenuous

50. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (1943) (codified as amended at 31 U.S.C. § 3730 (2006)); False Claims Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified as amended at 31 U.S.C. §§ 3729-3733 (2006)). The Fraud Enforcement and Recovery Act of 2009 ("FERA") also amended the FCA in a variety of ways that expanded liability and enforcement provisions, but not in ways directly relevant to the constitutional concerns discussed in this part. For a discussion of FERA's impact on the FCA, see generally 1 JOHN T. BOESE, CIVIL FALSE CLAIMS AND *QUI TAM* ACTIONS § 1.09 (4th ed. 2009).

51. See *supra*, Part II. The legislative history of the 1986 amendments reveal that the knowledge of fraud provides a constructive role to the action, and serves as the reason behind the *qui tam* actions. The law was meant to "deputize ready and able people who have knowledge of fraud against the government to play an active and constructive role through their counsel to bring to justice those contractors who overcharge the government." 132 CONG. REC. H9388 (daily ed. Oct. 8, 1986) (statement of Rep. Berman); the 1986 Amendments' legislative history also includes this statement, relative to relator information: "Detecting fraud is usually very difficult without the cooperation of individuals who are either *close observers* or otherwise involved in the fraudulent activity." S. REP. NO. 99-345 (2d Sess. 1986) reprinted in 1986 U.S.C.C.A.N. § 5266 (1986) (emphasis added).

52. See DOYLE, *supra* note 15; Beck *supra* note 1, at 567 (indicating that numerous *qui tam* statutes were enforced if the informer provided information to the authorities about the specific crime indicated in the statute).

constitutionality of the amendments has rested on this “informer” nature, which stretches back to Roman times.⁵³

The “informer” nature is precisely what the PPACA has fundamentally changed about the FCA. These changes open the statute up to new arguments based on Article III standing, the Article II Appointments Clause, and the Article II “Take Care” clause.

III. PPACA CHANGES TO THE PUBLIC DISCLOSURE BAR

Prior to passage of the PPACA, a *qui tam* relator could be jurisdictionally barred from bringing an FCA action under certain circumstances, a result of changes made through the 1986 amendments. Up until the last year, the statute read as follows:

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, “original source” means 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.⁵⁴

In short, the section barred suits brought by what Attorney General Biddle described as “parasitic plaintiffs,” individuals who provide information already disclosed through an enumerated outlet and cannot show that they are an original source of that information.⁵⁵ Subsequent to this latest iteration of the statute was a long history of litigation over the issues of whether an actual disclosure occurred, whether the relator’s information was “based upon”

53. See Beck, *supra* note 1, at 566 (offering historical background and nature of the statutes at that time indicating that *qui tam* statutes arose from the Roman criminal law system which offered a portion of the defendant’s property as a reward for successful prosecution of the crime).

54. 31 U.S.C. § 3730(e)(4)(A)-(B) (2) (2006), amended by Pub. L. No. 11-148, 124 Stat. 119 § 10104(j)(2)(4)(A)).

55. See Beck, *supra* note 1, at 558 (motivaing both the House of Representatives and the Senate to vote to repeal the FCA *qui tam* provisions).

previously disclosed matter, and whether the depth of the relator's knowledge was "direct and independent."⁵⁶

However, the PPACA changed the focus of subsequent litigation when it amended the above stated language. The pertinent part of the statute now reads as follows:

(4)(A) *The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—*

(i) in a *Federal* criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either

(i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or

(ii) who has knowledge that is *independent of and materially adds to the publicly disclosed allegations or transactions*, and who has voluntarily provided the information to the Government before filing an action under this section.⁵⁷

The revision of the statute is of great procedural importance, as it reforms the public disclosure bar from jurisdictional challenge to an affirmative defense.⁵⁸ Also, the significance of the addition of the phrase "materially adds to the publicly disclosed allegations or transactions," is unclear. Further, the elimination of state and local administrative, reports, audits and investigations as sources that could activate the public disclosure bar effectively overruled a Supreme Court decision handed down contemporaneously with the passage

56. See Boese, *supra* note 50 at § 4.02. An examination of the public disclosure bar's effect on "unworthy whistleblowers" prior to the PPACA amendments to the FCA, is the subject of Robert Salcido's article: *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 PUB. CONT. L.J. 237, 242-43, 260 (1995).

57. 31 U.S.C § 3730(e)(4)(A)-(B) (2010) (emphasis added), *amended by* Pub. L. No. 111-148, 124 Stat. 119 § 10104 (j)(2)(4)(A)).

58. The defendant now will bear the proof of whether the information is publicly disclosed and that the plaintiff does not qualify as an original source, a great sea change in responsibility.

of the PPACA.⁵⁹ However, the focus of this article is on the first highlighted addition: “unless opposed by the Government.”⁶⁰

For with that five word alteration, which gives the government a veto over the public disclosure bar, regardless of the subsequent language in the statute relating to that bar’s administration, Congress has unintentionally strengthened the constitutional arguments that have traditionally been leveled at the FCA. A discussion of each will follow.

IV. ARTICLE III STANDING

Fairchild v. Hughes,⁶¹ a 1922 decision by the Supreme Court, introduced the standing doctrine. Under this doctrine, actions that did not rise to the level of Article III “cases and controversies” were thereafter dismissed as non-justiciable.⁶² As time passed, a party would no longer be entitled to a hearing just because it had requested “a court of the United States to declare its legal rights, and . . . couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process.”⁶³

The doctrine came to have three requirements:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations omitted).⁶⁴

59. PPACA, Pub. L. 111-148, 124 Stat. 119 § 10104 (j)(2)(4)(A) (2010); see *Graham Cnty. Soil & Water Cons. Dist. v. United States ex rel. Wilson*, 130 S.Ct. 1396 (2010).

60. The legislative history of the amendment is nonexistent. The record simply reads the amended language into the day’s events without comment or discussion. See PPACA, Pub. L. 111-148, 124 Stat. 119 § 10104 (j)(2)(4)(A) (2010).

61. 258 U.S. 126 (1922).

62. See *id.*

63. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1974).

64. The shorthand reference to these requirements is injury in fact, causation, and redressability.

Arguments passed back and forth for years over whether a *qui tam* relator, who has not been injured in fact, deserves Article III standing.⁶⁵ Then the Supreme Court handed down its decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.⁶⁶

In *Stevens*, the relator was a former employee of the Vermont Agency of Natural Resources, whom the relator alleged had submitted false claims to the Environmental Protection Agency in violation of the FCA.⁶⁷ The agency moved to dismiss the claim on the grounds that a state and/or state agency is not a “person” under the statute.⁶⁸

In addressing the issue of whether the relator had Article III standing to bring the suit, Justice Antonin Scalia, delivering the opinion, rehearsed the traditional Article III standing doctrine.⁶⁹ He then pointed out that while the government had undoubtedly suffered injury itself, “Art. III judicial power exists only to redress or otherwise to protect against injury *to the complaining party*.”⁷⁰ He then dismissed a set of arguments traditionally made in favor of *qui tam* relator standing.⁷¹

65. Modern analysis of the constitutional arguments for and against *qui tam* standing, as well as arguments on other grounds, are included in the following articles: Blanch, *supra* note 43; John D. Bressler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511 (1994); Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L. J. 341 (1989); Sean Hamera, *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); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine is Looking for Answers in all the Wrong Places*, 97 MICH. L. REV. 2239 (1999); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

66. 529 U.S. 765 (2000). Scholarship analyzing standing in the *qui tam* area post-*Stevens* includes: Heather Elliot, *Congress’s Inability To Solve Standing Problems*, 91 B.U. L. REV. 159 (2011); Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023 (2009); Pamela H. Bucy, *Private Justice and the Constitution*, 69 TENN. L. REV. 939 (2002); Steven L. Winter, *What if Justice Scalia Took History and the Rule of Law Seriously?*, 12 DUKE ENVTL. L. & POL’Y F. 155 (2001).

67. *Stevens*, 529 U.S. at 769.

68. *See id.* at 772–73.

69. *See id.* 771–73 (citing *Steel Co. v. Citizens for a Better Environ.*, 523 U.S. 83, 93–102 (1998); *Friends of Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976); *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560 (1992)).

70. *Id.* at 771–72 (citing *Warth v. Seldin*, 422 U.S. 490 (1975)) (emphasis added).

71. *Id.* 772–73 (citing *Valley Forge Christ. College v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 (1982); *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972)).

First, the argument that the relator is an agent of the United States, entitled to a bounty, did not suffice to establish an “injury in fact” for Article III standing purposes.⁷² The relator has more than the mere right to retain a fee out of the recovery, but also has an interest in the lawsuit by means of the statute.⁷³

[I]t provides that “[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government,” § 3730(b) (emphasis added); gives the relator “the right to continue as a party to the action” even when the Government itself has assumed “primary responsibility” for prosecuting it, § 3730(c)(1); entitles the relator to a hearing before the Government’s voluntary dismissal of the suit, § 3730(c)(2)(A); and prohibits the Government from settling the suit over the relator’s objection without a judicial determination of “fair[ness], adequa[cy] and reasonable[ness],” § 3730(c)(2)(B).⁷⁴

Indeed, some explanation of standing other than status as a Government agency is necessary for the relator to retain a portion of the recovery.

Justice Scalia also dismissed the argument referred to obliquely in *Marcus*, that the relator has a “concrete private interest in the outcome of [the] suit” by way of his interest in the potential bounty.⁷⁵ This interest cannot give rise to Article III standing either, said the Court, as it is merely a byproduct of the suit and is not a cognizable injury in fact.⁷⁶ Although these arguments were insufficient to establish Article III standing for the *qui tam* relator, the Court went on to find an “adequate basis” for standing based on two distinct arguments: 1) “representational standing,” in that the relator serves as the assignee of the government’s claim⁷⁷; and 2) the “long tradition of *qui tam* actions in England and the American Colonies.”⁷⁸

The PPACA amendments to the FCA most directly impact the second argument for constitutional standing—the one based on historical grounds. That is because Justice Scalia draws upon early English cases from the thirteenth century to establish the legacy for the actions, stating that the most relevant aspect of the analysis before the Court were statutes “that allowed *informers to obtain a portion of the penalty as a bounty for their information*,

72. *Id.*

73. *Id.*

74. *Id.*

75. *Marcus* at 545–46; *Stevens* at 772 (citing *Lujan v. Def. of Wildlife*, 504 U.S. 555, 573 (1992)).

76. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000) (citing *Steel Co. v. Citizens for a Better Environ.*, 523 U.S. 83, 102 (2001)).

77. *Stevens* at 773–74 (clarifying that the *qui tam* relator sues as a “partial assignee” of the United States).

78. *Id.*

even if they had not suffered an injury themselves.”⁷⁹ The Court went on to speak of the prevalence of *qui tam* actions in America around the time of the Constitution’s framing, particularly characterizing all of them as “informer” statutes.⁸⁰ This history, Justice Scalia said:

[was] 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.” When combined with the theoretical justification for relator standing discussed earlier, it leaves no room for doubt that a *qui tam* relator under the FCA has Article III standing.”⁸¹

The importance of the Court’s understanding of the long litany of English and American *qui tam* actions as “informer” statutes is central to the standing argument because the PPACA amendment has fundamentally changed the nature of the FCA. In short, the FCA, which was one of the latest informer statutes in Anglo-American jurisprudence, is no longer an informer statute at all.

As the newly codified government veto over the public disclosure bar:

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed . . .⁸²

79. *Id.* at 775 (emphasis added) (citing Statute Prohibiting the Sale of Wares After the Close of Fair, 5 Edw. III, ch. 5 (1331); Common Informers Act, 14 & 15 Geo. VI, ch. 39, sched. (1951) (listing informer statutes)). The Court also took note of the many abuses of the informer statutes that plagued English law.

80. *Stevens* at 776-77 (citing, among others, “Act for the Restraining and Punishing of Privateers and Pirates, 1st Assembly, 4th Sess. (N.Y. 1692), reprinted in 1 Colonial Laws of New York 279, 281 (1894) (allowing informers to sue for, and receive share of, fine imposed upon officers who neglect their duty to pursue privateers and pirates); “Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 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, 133 (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. 137-138 (allowing private individual to sue for, and receive half of goods forfeited for, unlicensed trading with Indian tribes); Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 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 Apr. 30, 1790, ch. 9, §§ 16, 17, 1 Stat. 116 (allowing informer to conduct prosecution, and receive half of fine, for criminal larceny or receipt of stolen goods))”.

81. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 777-78 (2000).

82. 31 U.S.C § 3730(e)(4)(A)-(B) (2006) (emphasis added), amended by Pub. L. No. 111-148, 124 Stat. 119 § 10104 (j)(2)(4)(A)).

makes entirely optional, at the government's instance, the conditions that have traditionally barred a claim on the grounds that the relator is not the original source of information already publicly disclosed. In other words, one of the bases upon which the *Stevens* Court found Article III standing in an FCA claim—that it is an informer statute, of the type which has been afforded standing throughout Anglo-American history—is not applicable to actions brought under a statute that is no longer, in fact, an informer statute.⁸³ The revised FCA does not require that a relator either provide information or suffer the dismissal of his action—as will be the case whenever the government objects to the workings of the public disclosure bar in the FCA. This need not always be so, as in instances when the government does not choose to intervene. Nevertheless, the change makes the FCA, at best, only a “quasi-informer” statute. To emphasize this point by way of its effect, when a petitioner who would have been barred jurisdictionally is not in fact barred, the statute rewards a repeater of information, not a provider of it.⁸⁴

In short, the government veto over the public disclosure bar turns any plaintiff whose FCA action has been saved from dismissal into a private attorney general, a bounty hunter whose investment in the outcome is his only tie to the disposition of the matter. And as Justice Scalia stated in *Stevens*, a party's interest in the recovery that might be won is no different from that of one who has placed a wager upon the outcome.⁸⁵ Neither is a basis for Article III standing.⁸⁶ Indeed, the PPACA amendment to the FCA is precedent for any claimant—either with the most tenuous ties to the subject matter or with none at all—to claim that his willingness to finance an action permits him a right to bring a suit, as long as the government consents.⁸⁷

The second argument by the Court in *Stevens* for finding constitutional standing set out in *Stevens*—that the relator acts as an “assignee” of the United States—is also affected by PPACA.⁸⁸ While the Court's opinion anticipated circumstances in which the government allows all *qui tam* relators to be assignees, it did not anticipate circumstances in which the assignment is made through a member of the Department of Justice (DOJ), and is then passed on—at the DOJ's sole discretion—to a *qui tam* plaintiff chosen by way of unstated, unspecified criteria. A situation in which DOJ members could select assignees according to unstated procedures was not a scenario before the Court when it considered *Stevens*.⁸⁹

83. See *supra* pp. 13–16.

84. See *supra* pp. 13–17.

85. *Stevens* at 772–774.

86. See *supra* pp. 13–17.

87. See *supra* pp. 13–17.

88. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 774–75 (2000).

89. See *supra* pp. 13–16.

Therefore, both arguments for Article III standing in FCA *qui tam* actions have been compromised and are subject to challenge in a post-PPACA landscape.

V. ARTICLE II APPOINTMENTS CLAUSE

The new constitutional concerns raised by the PPACA amendment based on the Appointments Clause follow closely from the concerns related to Article III standing discussed in the immediately preceding section. For the government veto not only changes the nature of the FCA from an informer statute into a private attorney general statute, but also vests the power by which the transformation takes place solely in the DOJ.⁹⁰ According to the language of the amendment, that power is exercised at its sole discretion.⁹¹ In other words, standing may “spring” based upon governmental fiat. Consequently, problems arise with regard to both the separation of powers doctrine and the doctrine of non-delegable duties.⁹²

Article II of the Constitution states that the President:

“[S]hall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme [C]ourt, 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.”

U.S. CONST. art. II, § 2, cl. 2 .

The constitutional argument against *qui tam* actions based on this clause stems from the fact that relators are not nominated by the President and are not approved by the Senate.⁹³

90. See William B. Rubenstein, *On What a “Private Attorney General” Is—And Why it Matters*, 57 VAND. L. REV. 2129, 2145–46 (2004).

91. 31 U.S.C § 3730(e)(4)(A)-(B) (2010), amended by Pub. L. No. 111-148, 124 Stat. 119 § 10104 (j)(2)(4)(A)).

92. See *infra* pp. 19–20.

93. See Blanch, *supra* note 21, at 737–38. But see, Caminker, *supra* note 65, at 374–80.

For a time, it was argued that in the FCA, Congress had aggrandized its powers at the expense of the Executive.⁹⁴ This was arguably a violation of the rule established in *Buckley v. Valeo*.⁹⁵ Although the Federal District Courts were not responsive to the suggestion that Congress had increased its powers through the enactment of the FCA,⁹⁶ this argument is not the only critical approach parties have taken based on the clause.

In *Freytag v. Commissioner of Internal Revenue*,⁹⁷ the petitioners contended that a statute allowing the Chief Judge of the United States Tax Court to appoint special trial judges was in violation of the Appointments Clause.⁹⁸ The petitioner claimed that a special trial judge is an “inferior Office[r]” that has to be appointed by the Executive and does not fall within one of the Constitution’s three repositories of the appointment power: the President, the courts of law, or the heads of departments.⁹⁹ The Court held that the Appointments Clause could be violated not only by Congress’ arrogation of powers, but also by its diffusion of powers.¹⁰⁰

The Appointments Clause prevents Congress from dispensing power too freely, as it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive’s interests. For example, the Clause forbids Congress to grant the appointment power to inappropriate members of the Executive Branch. Neither Congress nor the Executive can agree to waive this structural protection. “The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review.”¹⁰¹

94. See, e.g., *Ryder v. U.S.*, 515 U.S. 177 (1995).

95. 424 U.S. 1, 1 (1976).

96. E.g. *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1094 (C.D. Cal.1989).

97. 501 U.S. 868, 877–78 (1991).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* (citing *INS v. Chadha*, 462 U.S. 919, 942 (1983)) (“The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review”).

The Court went on to hold that a “tax court” is a “Court of Law” in the sense contemplated by Article III.¹⁰² Still, the rationale regarding diffusion of powers speaks directly to the PPACA amendments to the FCA.¹⁰³ As stated above, in the amended FCA, Congress has delegated to the DOJ, at its fiat, the ability to create standing—or not—using criteria unstated in the statute.¹⁰⁴

In addition, one of the permissible repositories of appointment power, “Heads of Departments,” has been interpreted to mean the Secretary of Labor,¹⁰⁵ the Chief Justice of the Tax Court,¹⁰⁶ and cabinet members, not “mere bureau heads.”¹⁰⁷ Whether a multitude of district attorneys in charge of the government’s interests in an array of FCA actions can be construed as synonymous with “Heads of Departments” has yet to be determined.

Furthermore, even if Congress has the power to confer such standing, and even if it could allow the Executive branch to exercise the kind of authority that the amended FCA provides, Congress has delegated this standing-creating power without providing an intelligible principle to guide the Department of Justice’s actions.¹⁰⁸

In *Mistretta v. United States*,¹⁰⁹ the Supreme Court permitted the delegation of Congressional power, but only up to a point.¹¹⁰ The Court said: “so long as Congress ‘shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.’”¹¹¹

However, in the amended FCA, it is not simply a matter of no *intelligible* standard provided to the DOJ for applying its veto over the public disclosure bar, there is no standard provided whatsoever. Justice Scalia’s dissent in *Mistretta* speaks even more forcefully to this current set of circumstances than it did to the case before the Court in 1989:

102. 501 U.S. 868, 891–93 (1991).

103. *See supra* pp. 10–12.

104. *See supra* pp. 10–17.

105. *See Varnadore v. Sec’y of Labor*, 141 F.3d 625, 631 (6th Cir. 1998).

106. *See Samuels, Kramer & Co. v. Comm’r of Internal Rev.*, 930 F.2d 975, 993–94 (2d Cir. 1991).

107. *See Brooks v. U.S.*, 33 F. Supp. 68, 69 (E.D.N.Y. 1939); *see also Surowitz v. U.S.*, 80 F. Supp. 716, 719 (S.D.N.Y. 1948) (considering whether a war department attorney prosecuting war crimes is an “inferior officer” under Article II).

108. *See supra* pp. 10–17.

109. 488 U.S. 361, 372 (1989).

110. *Id.*

111. *Id.* at 372 (quoting *J.W. Hampton, Jr., & Co. v. U.S.*, 276 U.S. 394, 409 (1928)).

As John Locke [stated] almost 300 years ago, '[t]he power of the legislative being derived from the people by a positive voluntary grant and institution, can be no other, than what the positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.' J. Locke, *Second Treatise of Government* 87 (R. Cox ed.1982) (emphasis added) . . . Or as we have less epigrammatically said: '[t]hat Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.' *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (emphasis added).

Mistretta v. U.S., 488 U.S. 361, 419–20 (1988).

Whatever criteria the DOJ were to use in determining when to apply the veto would arguably be legislative in nature, and therefore in violation of the Appointments Clause under Article II.

VI. ARTICLE II "TAKE CARE" CLAUSE

The third argument traditionally leveled at the constitutionality of *qui tam* actions is also based on the separation of powers doctrine.¹¹² In Article II, the Constitution requires that the President "shall take Care that the laws [are] faithfully executed."¹¹³ The argument has been that a relator's semi-prosecutorial action on behalf of the government takes away the Executive's branch's control over the litigation, which is in violation of the separation of powers doctrine.¹¹⁴

112. Each of the three arguments is a different aspect of one "separation of powers" argument, says James T. Blanch. See Blanch, *supra* note 21, at 747–50. The Lujan Court correlated the standing and the Take Care arguments: "[i]f the [standing doctrine's] concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable [sic] in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to take Care that the Laws be faithfully executed." Art. II, § 3. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992).

113. U.S. CONST.. art. II, § 3.

114. See, e.g., *Caminker*, *supra* note 65, at 356 (citing *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976)).

Of the three different arguments, this line of criticism seems to have been somewhat attenuated by the PPACA, in that the government veto gives the DOJ a new level of control—albeit mysterious in its criteria—at least insofar as the workings of the public disclosure bar are concerned.¹¹⁵ This means that the government now has the power to decide when to allow a suit and when not to allow it.

However, the indeterminate nature of this application is itself problematic. As stated above, the PPACA has created: 1) the new Article III standing problem based on the changed nature of the FCA from an informer statute to a private attorney general statute; and 2) the new Article II Appointments Clause problem based on the separation of powers and non-delegable duties doctrines.¹¹⁶ When taken in conjunction with these two issues, a decision allowing an action to proceed by means of unstated criteria, written and applied not by Congress, but by the DOJ, is arguably an abdication of the government's duty to take care that the laws are faithfully executed.

This is similar to the rationale employed in *Freytag*, which found that Congress could violate the Appointments Clause not only by arrogation of its powers, but also by diffusion of them.¹¹⁷ Here the argument proceeds that the Executive is diffusing, and obfuscating, its powers in favor of a private individual whose only stake in the suit is in the possible recovery he may enjoy.¹¹⁸ In this scenario, the specter of the undeserving parasitic plaintiff returns, but alongside him is a complicit Executive branch.

VII. POLICY PROBLEMS

In addition to the constitutional problems raised by the PPACA amendments to the FCA, new policy concerns also arise. The impact of the government veto over the public disclosure bar will likely affect the kinds of plaintiffs attracted to the actions, the FCA's first-to file bar, the amount of recoveries received, and the judicial resources spent. Notions of equity and professional propriety are likely to occur as well.

115. See 31 U.S.C § 3730(e)(4)(A)–(B) (2011), amended by Pub. L. No. 111-148, 124 Stat. 119 § 10104 (j)(2)(4)(A)); *supra* pp.10–11 (describing PPACA's alterations to the FCA statute, including the addition of language that provides for a government veto of a court dismissal).

116. See *supra* pp. 12–19.

117. 501 U.S. 868, 877–78 (1991). See *supra* pp.17–18.

118. *Id.*

A. *Parasitic Actions*

Since the institution of informer statutes, the public disclosure arena has been plagued with what former Attorney General Biddle called “parasitic actions.”¹¹⁹ In these cases, the plaintiff has made no contribution of information and performs no purpose except to fund the expenses of the lawsuit in the event that the government does not intervene.¹²⁰

Obviously, the notion behind informer statutes is that otherwise undetectable fraud will be brought to light by those closest to its connivance—whether a confederate to the scheme or an innocent witness.¹²¹ However, a case in which the plaintiff brings no new information to the government frustrates the entire enterprise.¹²² In the worst cases, such plaintiffs perpetrate their own type of fraud in the pursuit of fraudulent perpetrators, demanding a bounty that they have not earned.¹²³ Even when the plaintiff earnestly believes he has made a contribution to the case, the particularities of the public disclosure bar have excluded his participation in the recovery when he cannot show that he is the original source of the information.¹²⁴ As has been argued here, this saves the informer statute from becoming a repeater’s statute.

Now that the PPACA amendment has made that bar conditional upon the government’s fiat, the likelihood of parasitic actions equivalent to the pre-1943 state of affairs—the very type of action outlined in Attorney General Biddle’s letter to Congress—has increased.¹²⁵ The only thing stopping such a turn of events is the government’s refusal to exercise the veto, but how and when and why that should occur is an open question.¹²⁶

119. S. Rept. No. 77-1708, at 2; H. Rept. No. 78-263 at 2. *See also* Beck, *supra* note 1.

120. *Id.*

121. *See* Beck, *supra* note 1, at 565-74.

122. *See supra* pp. 5-7.

123. *See supra* p. 10.

124. *See supra* p. 10.

125. *See* Cohen, *supra* note 5.

126. An interesting type of abuse to which informer statutes were prone in the past was the possibility of collusion between an “informer” who was friendly to the defendant. By bringing a useless action at the instance of the defendant, the informer could be rewarded by his confederate after the suit was dismissed. Beck, *supra* note 1, at 574. As stated above, Justice Jackson feared the problem arising again when the relator had no ties to the information of the suit. *Id.* This is yet another example of how creative abuses may become when there is no effective means by which to screen out parasitic plaintiffs.

B. Incentives and Disincentives

Another consequence, however unintended, of the new government veto relates to the whistleblower's incentive to come forward with real information—that is, useful news of fraud. Under the FCA, “[w]hen a person brings an action under this subsection, no person other than the Government can intervene or bring a related action based on the facts underlying the pending action.”¹²⁷

Since there is no longer an outright bar to suits that would have been dismissed in the past on the grounds that the relator is not the original source of disclosed information, the race to the courthouse will likely become fierce.¹²⁸ That is because a tie to the subject matter is not a definitive prerequisite to the action. In fact, it might be in the government's interest to allow the action to proceed, as in cases where the plaintiff has the financial resources to fund the suit himself. The government could encourage the “useless” repeater to file the action. Unfortunately, the true informant, i.e., one with useful news of fraud, will be barred by the first-to-file bar in section 3730 if he is late to the filing office and his information overlaps in some respect with the first filer—resulting in a potential loss of valuable information.¹²⁹

Perversely, the PPACA government veto amendment to the FCA prejudices those with real contributions who are not fast enough to the game. This kind of unseemliness was one of the points in former Attorney General Biddle's letter that prompted the 1943 Amendments.¹³⁰ With the passage of PPACA, the stage is set for a similar contortion of affairs.

Even the arguments of those who have championed the constitutionality of *qui tam* provisions are undone by these policy considerations. For example, one supportive scholar wrote that the *qui tam* authorization could not be successfully replaced by a reward incentive regime:

None of these purposes served by *qui tam* authorization would similarly be served by replacing it with a reward incentive regime authorizing the DOJ to offer informers a monetary reward for disclosing their knowledge of fraudulent activities if and when the DOJ successfully litigated an action based on their information. Congress determined that . . . many potential informers are reluctant to come forward because they refuse to accept the “personal and financial risk”. . . . Second, such a reward regime would not utilize the resources of the private citizenry to supplement the limited public resources with which the DOJ can enforce the Act. Finally, such a regime would not discourage executive complacency.¹³¹

127. 31 U.S.C. § 3730(b)(5) (2006).

128. See Cohen, *supra* note 5.

129. 31 U.S.C. § 3730(b)(5) (2006).

130. S. Rept. No. 77-1708, at 2; H. Rept. No. 78-263 at 2. See also Beck, *supra* note 1.

131. Caminker, *supra* note 65, at 352 (finding that a reward incentive regime “would not discourage executive complacency”).

But with the effect of the government veto, not only is the sole incentive the monetary reward, the sole requirement is the willingness to fund the litigation. To the extent that the executive complacency feared in the quoted passage exists, it can only be exacerbated by a plethora of *qui tam* plaintiffs who are willing to fund the enterprise and use the considerable power of the action, made even more powerful—especially with its newly enhanced status—to bring defendants to the settlement table.

In addition, the lack of any standard for applying the government veto of the public disclosure bar could itself incentivize abuse. This possibility is over and above the constitutional concerns in the context of the Appointments Clause.¹³² For without any standard for guidance in its application, the exercise or non-exercise of the veto could be motivated by political concerns. There is nothing to stop the veto from being employed to save those relators who bring claims friendly to a particular administration's goals, neither is there anything to stop it from being foregone when relators bring claims that are hostile to those goals. However unintended such a consequence might be, the potential for this abuse has been introduced along with the vagaries of the amendment.

C. Procedural Concerns

In addition, without guidance as to when a relator is to be definitively barred, i.e., such as when the defendant has proven that he is not the original source of publically disclosed information—neither the *qui tam* plaintiff nor the *qui tam* defendant can predict how the action will proceed.¹³³ The FCA plaintiff will be unsure as to when the veto will be exercised or not, and on what grounds the government might save his action from dismissal or refuse to do so.¹³⁴ On the other hand, when an FCA defendant must continue to litigate an action that would otherwise have been barred, but was saved by the governmental veto, he may insist on his right to be informed of the grounds that saved the action from dismissal despite the proof that he has put forth determining it to be deserving of such an order.¹³⁵

132. See *supra* pp.16–19.

133. See Nathan Sturycz, Comment, *The King and I?: An Examination of the Interest Qui Tam Relators Represent and the Future of False Claims Litigation*, 28 ST. LOUIS U. PUB. L. REV. 459, 475–86 (2009).

134. *Id.*

135. *Id.*

Guidance in this area may be found in the law surrounding the government's right to move for dismissal of the action, whether or not it has intervened in the suit.¹³⁶ The statute requires that a party whose action is being dismissed over his objection be "notified by the Government . . . [and be given] an opportunity for a hearing on the motion."¹³⁷ However, the section gives no guidelines to the court in determining the propriety of the motion to dismiss.¹³⁸

In *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*,¹³⁹ the government sought dismissal of an action into which it had not intervened. The court, mindful of the Executive's need for prosecutorial discretion, stated:

Although courts are reluctant to scrutinize prosecutorial charging decisions, which involve many practical considerations outside the purview of judicial review, review of a decision to dismiss an FCA case is limited to determining whether the government has a legitimate government interest that will be achieved by dismissal, which is not arbitrary or otherwise illegal. Historically courts have made such determinations of the lawfulness of executive function under a rational-basis standard¹⁴⁰. . . "The court's limited review of the motion to dismiss does not permit the court 'to infringe on prosecutorial authority to a degree beyond the bounds established by *Morrison*' and therefore does not violate the separation of powers."¹⁴¹

The court held that the defendant has the right to seek dismissal, regardless of its lack of intervention, but that the plaintiff had a right to judicial review of the motion.¹⁴²

136. 31 U.S.C. § 3730(c)(2)(A) (2006).

137. *Id.*

138. *Id.*

139. 151 F.3d 1139, 1145 (9th Cir.1998).

140. The Court applied a two-part rational basis standard: 1) whether the challenged action has a legitimate purpose; and 2) whether there is a reasonable fit between the governmental purpose and the agency action. *Id.* See also *United States ex rel. Ridenour v. Kaiser-Hill, Co.*, 174 F. Supp. 2d 1147 (D. Colo. 2001) (applying the Sequoia test and holding that the government need not prove conclusively that its interest would be adversely affected if the motion was not granted).

141. *Id.* at 1325 (E.D. Cal. 1995) (quoting *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 757 (9th Cir.1993)).

142. *Id.* at 1145.

In contrast, the D.C. Circuit Court of Appeals disagreed with *Sequoia* in *Swift v. United States*, holding that the plaintiff was only statutorily entitled to “a formal opportunity to convince the government not to end the case.”¹⁴³ The *Sequoia* restriction on governmental discretion impacted the government’s prerogative “to take care that the laws be faithfully executed” under Article II.¹⁴⁴ The plaintiff was not entitled to discovery with regard to why the government moved to dismiss unless it could make a substantial threshold showing.¹⁴⁵

Questions raised about the application of the government veto could concern some of these same matters: whether or not the government must intervene prior to using the veto, and whether or not the defendant is entitled to any type of challenge concerning the grounds upon which the government used its veto—provided they were stated. If the defendant is deemed to have such a right, the inquiry would likely relate to whether the reasons for using the veto were “arbitrary or otherwise illegal.” And a court would also have to determine what type of standard the defendant must meet to be entitled to discovery.

D. Recoveries and Resources

Another troublesome aspect of the newly-amended FCA is its likely impact on resources and recoveries. First, as has been argued here, one of the presuppositions to informer statutes is that the petitioner will earn his reward by providing information.¹⁴⁶ The government is willing to forego part of its recovery—a considerable sum, as reflected by the recent reporting of FCA settlement hauls—in favor of the relator.¹⁴⁷ The logic is that the information would not have become known were it not for the whistleblower coming forward, so the share of the recovery is a cost well worth the spending.

But on what grounds does a relator who would ordinarily be barred, but is not in fact barred because of the government’s use of its veto, deserve the reward carved out of the recovery? On what grounds is the public to be so substantially deprived of monies that would ordinarily go back into the

143. 318 F.3d 250, 253 (D.C. Cir. 2003) (referring to *Morrison v. Olson*, 487 U.S. 654 (1988)).

144. *Id.* at 253. The only exception would be if there was an allegation that fraud was perpetrated on the court. *Id.* The court also held that even if the government was required to intervene prior to its motion for dismissal, the court “could construe the government’s motion to dismiss as including a motion to intervene.” *Id.* at 252.

145. *Id.* at 254 (quoting *U.S. v. Armstrong*, 517 U.S. 456, 470 (1996) where the Supreme Court held that the Defendant was not entitled to recovery absent a substantial threshold of dissimilar treatment from similarly situated parties).

146. *See supra* pp. 3–10.

147. According to the DEPARTMENT OF JUSTICE, approximately \$3 billion in civil False Claims Act settlements were recovered in fiscal year 2010, and \$2.5 billion were in health care fraud recoveries. That is the largest health care fraud recovery in history for a fiscal year. The total of recoveries since 1986 is estimated at 26 billion. UNITED STATES DEPARTMENT OF JUSTICE, DEPARTMENT OF JUSTICE RECOVERS \$3 BILLION IN FALSE CLAIMS CASES IN FISCAL YEAR 2010 (November 22, 2010), <http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html>.

treasury?¹⁴⁸ In the case of the parasitic plaintiff, the argument can be made that he has risked his own personal resources and deserves some of the recovery, but the constitutional objections raised above challenge his right to participate at all. The workings of the veto can make the government complicit in its own deprivation of an earned recovery—funds that belong to the U.S. taxpayer, not to a particular individual who has decided to underwrite an action.

Another concern arises with regard to judicial resources. With the power of the government veto, the courts will be required to hear suits that would ordinarily be barred.¹⁴⁹ What the Department of Justice saves in resources by allowing a suit to proceed at the petitioner's expense (when that petitioner would have ordinarily been barred), the courts will have to spend in hearing cases that would otherwise have to be brought by the government or not at all. This is an unquantifiable cost.

Settlements are more likely as well, not necessarily because a defendant has no case, but because the exposure to prolonged litigation is increased by way of the government veto of the public disclosure bar.¹⁵⁰ In this way, increased power rests in the hands of the *qui tam* relator who has brought nothing to the case except his enthusiasm to finance it. And since the defendant cannot know when the government will intervene to save a suit that would have otherwise been barred in the past, the defendant must raise and prove the affirmative defense of the Public Disclosure Bar. Only after that expense is paid will the defendant know if it was futile.

A great deal of the cost of the public disclosure bar defense will of course depend on when the veto is exercised. Presumably, the government veto must be exercised sometime after the pleadings stage but prior to judgment on the application of the bar. Although the most thorough study of what it costs to

148. A recovery made by the government must be deposited into the treasury as per the Miscellaneous Receipts Act. 31 U.S.C. § 3302(b). *See* U.S. v. Northrop Corp., 59 F.3d 953, 968 (9th Cir. 1995) (stating that “relator’s right to recovery exists solely as a mechanism for deterring fraud and returning funds to the federal treasury”); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 760 (9th Cir.1993) (stating that FCA is meant to remedy harms done to the U.S. treasury).

149. *See* 31 U.S.C § 3730(e)(4)(A)–(B) (2006), *amended by* Pub. L. No. 111-148, 124 Stat. 119 § 10104 (j)(2)(4)(A) (2011)); *supra* pp.10–11 (describing PPACA’s alterations to the FCA statute, including the addition of language that provides for a government veto of a court dismissal).

150. *See* 31 U.S.C § 3730(e)(4)(A)–(B) (2006), *amended by* Pub. L. No. 111-148, 124 Stat. 119 § 10104 (j)(2)(4)(A) (2011)); *supra* pp.10–11 (describing PPACA’s alterations to the FCA statute, including the addition of language that provides for a government veto of a court dismissal).

defend an FCA action is more than twenty years old, the figures amount to a heavy toll, particularly when the government has not intervened.¹⁵¹

In a survey of defense contractors conducted in the early 1990s, out-of-pocket legal costs ranged from \$250,000 to \$500,000 in the simplest of cases, when there was no parallel criminal inquiry taking place and the time frame for the litigation was short.¹⁵² In more intricate cases, the figures rose to between \$1,000,000 and \$10,000,000.¹⁵³ In neither scenario do these figures take into account any internal costs incurred by the defendant in responding to the allegations. When the government did not intervene, the costs were particularly alarming relative to the recovery.

Out-of-pocket defense costs greatly exceed recoveries to the government in such matters.¹⁵⁴ The survey participants were defendants in thirty-eight FCA suits in which: (a) a relator initiated the case; (b) the DOJ declined to participate; and (c) the matter had been disposed of either by a settlement or by a decision of a court.¹⁵⁵ To defend themselves in these thirty-eight completed matters, the survey respondents spent approximately \$53,403,000 on external legal costs.¹⁵⁶ The total amount of FCA recoveries obtained in these matters

Average expenditure in outside legal fees by defendants in these cases was \$1,431,660, and the average FCA recovery was \$97,223.¹⁵⁷

Judging by these twenty year-old figures, the new powers of the FCA relator, especially now that the government veto may prolong a case that would have been jurisdictionally barred prior to passage of the PPACA amendments, are likely to make the costs to defend these suits worthy of another study.

E. Equitable and Professional Concerns

Even more policy concerns arise—or resurrect, as the case may be—with regard to equitable and professional objections to *qui tam* actions.

Other types of plaintiffs who act on behalf of the public at large must go through qualification procedures. For instance, in order for a class action

151. See William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201 (1998). The study that was the subject of the Kovacic article was conducted by COOPERS & LYBRAND and THE ANALYTICAL SCIENCES CORPORATION. Ten defense suppliers were surveyed as part of commission to determine the regulatory premium associated with existing procurement policies. *Id.* at 223. See also Daniel C. Lumm, *The 2009 'Clarifications' to the False Claims Act Of 1863: The All-Purpose Antifraud Statute with the Fun Qui Tam Twist*, 45 WAKE FOREST L. REV. 527 (2010).

152. Kovacic, *supra* note 151, at 225.

153. *Id.*

154. *Id.* at 226.

155. *Id.*

156. *Id.*

157. *Id.*

plaintiff to be appointed lead plaintiff, he must meet a distinct set of criteria.¹⁵⁸ This is a process required even of a party who *can* claim injury in fact, entitling him Article III standing as a matter of right.¹⁵⁹ With regard to securities actions under the Private Securities Litigation Reform Act of 1995,¹⁶⁰ the Plaintiff's appointment largely hinges upon how great that injury has been relative to the class itself—so, in effect, the party with the greatest claim to standing in terms of the “injury in fact” requirement. In addition, he must prove his commitment to the action and that his interests are aligned with those of the other plaintiffs.¹⁶¹

More generally speaking, no class action can proceed until the class is defined, which requires that members must join the class within a certain time frame.¹⁶² This ensures that every member plaintiff in the class show injury in fact, not just prospective injury. In other words, the requirement guarantees an immediacy with relation to the injury that resonates with the Article II standing requirement for actual, not conjectural, harm.¹⁶³ The portrait of the class action member plaintiff in general, let alone the lead plaintiff, can be characterized as a party with “standing plus.”¹⁶⁴

In contrast, with regard to the *qui tam* relator whose suit has been saved by way of the government veto, there are practically no qualifications at all to his status.¹⁶⁵ On top of a lack of injury in fact, the ties to the subject matter of the suit are no longer a qualifying pre-requisite, and the relator may proceed—when the government consents—regardless of that fact.¹⁶⁶ In this way, although she is ostensibly acting on behalf of the public—having blown the whistle on fraud—she may well have done nothing of the kind. The requirements that plaintiffs in other actions must go through are not applied at all in the *qui tam* action. The tenuousness of standing in these circumstances shows in greater relief when put in contrast with the standing of the class action plaintiff. And the difference is not only between the *qui tam* relator and class action plaintiffs;

158. FED. R. CIV. P. 23(a)(4) states that “one or more members of a class may sue or be sued as representative parties on behalf of all members only if the representative parties will fairly and adequately protect the interests of the class.”

159. *Id.*

160. *See* 15 U.S.C. § 78-u4 (2006).

161. *See* Tanne v. Autobyte, Inc. 226 F.R.D. 659 (C.D. Cal., 2005) (setting out factors used to determine lead plaintiff in class action suit).

162. FED. R. CIV. P. 23(c)(1)(B).

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

164. *Id.*

165. *See supra* pp. 23–25.

166. *See supra* pp. 23–25.

a similar contrast exists between FCA *qui tam* relators and antitrust litigants,¹⁶⁷ as well as RICO plaintiffs suing under a private right of action.¹⁶⁸

Finally, a troublesome professional concern may also arise. One of the earliest forms of abuse was by way of lawyers seeking to piggyback actions onto information that had already been made public.¹⁶⁹ Without a means to screen out such parasitic actions by way of a conclusive, rather than an open-ended, public disclosure bar, the professional bounty hunter lawyer could return from the precincts to which he has been banished in this country for nearly seventy years. A client with some relationship to the suit might be sought, one who can finance the suit for the chance at a recovery that will be all the more likely to come about through settlement, especially now that the ties to the subject matter need not be dispositive of the right to bring the action. Direct attorney involvement in the whistleblowing area is not uncommon.¹⁷⁰

CONCLUSION

The five word alteration to the FCA wrought by PPACA has issued in a new set of concerns with regard to the constitutionality of FCA. These concerns have lain on a quieter plain for many years. The constitutionality of the FCA, which had at least won approval from the Supreme Court on the issue of standing, is now compromised, not only on the standing question, but also with regard to the Appointments Clause and Take Care Clause. Finally, the policy concerns that are likely to follow only heighten the debate that will unfold in the future.

167. See Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 16 (1995) (explaining standing of antitrust litigants); Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: the Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281, 331(2007)(contrasting *qui tam* relators and various other types of plaintiffs

168. See 18 U.S.C. § 1964 (2006).

169. See, e.g., *U.S. v. Burmah Oil Co., Ltd.*, 558 F.2d 43, 46 & n.1 (2d Cir. 1977).

170. See *Fair Laboratory Practices Assoc. v. Quest Diagnostics, Inc.*, S.D.N.Y. No. 05 Civ. 5393 (RPP) (Apr. 5, 2011) (dismissing an FCA action brought by a former general counsel of the defendant, reasoning that the ethical duties to an attorney's clients were held to trump all FCA concerns).