COMMENTS

BAD HABITS: THE QUI TAM PROVISIONS OF THE FALSE CLAIMS ACT ARE UNCONSTITUTIONAL UNDER ARTICLE II

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"Bad habits are like a comfortable bed, easy to get into, but hard to get out of."

INTRODUCTION

Born out of the intrinsic need to bolster an unsophisticated and developing government,1 the False Claims Act2 ("FCA") is the primary statute used by the government3 to prosecute and recoup money from any person who submits false or fraudulent claims for reimbursement.4 A key component of the FCA is its qui tam provisions,5 which offers an

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2. See United States ex rel. v. Schwartz, 546 F. Supp. 422, 424 (N.D. Cal. 1982) ("[t]he original False Claims Act was passed in 1863 to aid the Government during the Civil War. At that time there was not yet a Federal Bureau of Investigation and the United States Attorney General’s staff was quite modest.").


4. Richard Bales, A Constitutional Defense of Qui Tam, 2001 Wis. L. REV. 381, 381-82 (2001) (focusing on the government’s initial right to intervene in the litigation, not the issues that are raised when it does not).

5. 31 U.S.C. § 3729 (2000). The FCA provides liability for any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government of a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1) (2000). See also United States ex rel. Marcus v. Hess, 317 U.S. 537, 551 (1943) (the Supreme Court stated the purpose of the FCA “[i]s to provide for restitution to the government of money taken from it by fraud.”).

6. Qui tam is the abbreviation for the Latin phrase “qui tam pro domino rege quam pro se imposo sequitur,” which literally means “who brings the action as well
innovative method for Congress to employ the aid of private citizens in administering federal statutory schemes.\(^7\)

Under the FCA \textit{qui tam} provisions private individuals, or relators,\(^8\) may bring suit on behalf of the Government\(^9\) against an individual or entity who has allegedly defrauded the Government.\(^10\) From Congress' perspective, \textit{qui tam} statutes are designed to encourage private citizens to help the Executive Branch deter and redress violations of federal law.\(^11\) As an incentive for bringing these suits, the individual is awarded a percentage of the monetary recovery from the United States Treasury.\(^12\) Not surprisingly, \textit{qui tam} relators generate the majority of civil fraud recoveries under the FCA.\(^3\)

The health care industry has given the FCA a high degree of visibility.\(^14\) In fact, FCA \textit{qui tam} actions have been touted as the Government's main arsenal against fraud in the health care industry.\(^15\) To date, health care

\(^7\) Evan Caminker, Comment, \textit{The Constitutionality of Qui tam Actions}, 99 Yale L.J. 341 (1989) [hereinafter \textit{The Constitutionality of Qui tam Actions}].


\(^10\) \textit{Id.} See discussion infra Part I for a further description of the FCA \textit{qui tam} provisions and requirements.

\(^11\) \textit{The Constitutionality of Qui tam Actions, supra note 7, at 344.}


\(^13\) \textit{Reducing Health Care Fraud, supra note 8, at 34.}

\(^14\) \textit{Id.} at 18. Health care fraud became an important issue after the Medicare and Medicaid programs were enacted in 1965. \textit{LINDA A. BAUMANN, HEALTH CARE FRAUD AND ABUSE: PRACTICAL PERSPECTIVES} 199 (2000). When these programs were enacted, federal and state governments became purchasers of health care services. \textit{Id.}

\(^15\) The constitutional issues surrounding the \textit{qui tam} provisions of the FCA allowing a private individual to litigate a federal statute are critical to the health care industry. Unlike government contractors who may submit several bills over the course of a year, health care providers generally submit a large number of small bills. For example, hospitals and other health systems file, in aggregate, approximately 200,000 Medicare claims a day. \textit{See} 144 CONG. REC. S 434 (daily ed. March 19, 1998) (statement of Rep. McCollum). Under the Act, practitioners stand to lose $5,000 to $10,000 per claim, plus three times the amount of damages.
related FCA cases have accounted for nearly half—approximately forty-one percent—of the total civil fraud recoveries by the Government. In fiscal year 2000 alone, the Government recovered $1.5 billion, comprising over half of the total recoveries from health-related FCA cases.

Americans have a vested interest in protecting the national treasury against fraud. However, some constitutional issues surrounding the current FCA quī tam provisions remain unsettled. Among the most controversial quī tam provisions are those that allow private parties to litigate without any government participation or guidance. Similar arguments have arisen regarding the quī tam provisions that allow the judiciary to prevent the Executive Branch from intervening in quī tam litigation.

The constitutional issues surrounding FCA quī tam litigation can be classified into three categories: 1) whether vesting relators with the power to prosecute quī tam actions violates Article II's Appointments Clause; 2) whether delegating prosecutorial functions to private persons violates Article II's Take Care Clause; and 3) whether quī tam relators meet Article III's standing requirement to bring suit in federal court.

sustained by the government. 31 U.S.C. § 3729(a) (2000). The pure number of claims multiplied by the damages can easily amount to financial devastation.

16. Reducing Health Care Fraud, supra note 8, at 11.
17. Id. at 9.
18. See United States ex rel. Friedman v. Rite Aid Corp., 152 F. Supp. 2d 766, 770 (E.D. Pa. 2001) (noting the constitutional issues regarding the FCA have not yet been resolved although to date they have withstood scrutiny).
20. Id.
21. 31 U.S.C. § 3730(c)(3) (2000) ("If the Government elects not to proceed with the action . . . the court . . . may nevertheless permit the Government to intervene at a later date upon a showing of good cause."). See also discussion infra at 7.
22. A new constitutional challenge to the FCA has recently gained momentum. In United States v. Mackaby, 261 F.3d 821, 830-31 (9th Cir. 2001), the Ninth Circuit ruled that FCA civil penalties and treble damages have punitive, not just remedial, purposes. As a result, these fines must be examined under the Eighth Amendment's ban on excessive fines.
These three issues arose following the 1986 amendments to the FCA, which significantly revitalized the *qui tam* provisions of the Act. Nonetheless, prior to 1999, all circuit courts that addressed the issue upheld the constitutionality of the FCA *qui tam* provisions under Article II challenges. It was not until late 1999, when a three-judge panel in the Fifth Circuit issued an unprecedented decision in United States *ex rel. Riley v. St. Luke's Episcopal Hospital*, creating a split among the circuits.

In *Riley*, the Fifth Circuit panel highly scrutinized the FCA and held that *qui tam* provisions violate the Take Care Clause of Article II. The *Riley* opinion was the first to hold the FCA *qui tam* provisions, giving private individuals the right to conduct litigation without federal intervention, unconstitutional. Prior to *Riley*, a majority of the circuits analyzing Article II arguments followed the lead of the Ninth Circuit's decision in United States *ex rel. Kelly v. Boeing Co.*, which upheld the *qui tam* provisions based on Article II challenges.


27. *Id.*


32. *Riley*, 196 F.3d at 517. Riley, a nurse at St. Luke's brought her suit against the hospital, under the *qui tam* provisions of the FCA. The federal government declined to intervene. Pursuant to 31 U.S.C. § 3730(c)(3) Riley proceeded with the suit on her own. The court found it unnecessary to address the Appointments Clause issue based on its holding that the FCA *qui tam* provisions violate the Take Care Clause. *Riley*, 196 F.3d at 531.


34. 9 F.3d 743 (9th Cir. 1993). For a detailed discussion of the *Kelly* holding, see infra p. 16. See also Vt. Agency of Natural Res. v. Stevens, 529 U.S 765 (2000) (Shortly after the controversial *Riley* decision, the Supreme Court addressed
This Comment addresses the constitutional infirmity of the FCA qui tam provisions under Article II. Specifically, this Comment examines whether the FCA violates the Appointments Clause and Take Care Clause to the extent that the qui tam provisions vest prosecutorial discretion in private citizens.

Part I provides an overview of the history of the False Claims Act, reviews the specific FCA qui tam provisions and the significant amendments to those provisions since the Act's inception. Part II looks at the Article II separation of powers issues raised by the FCA qui tam provisions. Part III examines the two most frequently raised violations under the Take Care Clause and the Appointments Clause. Both of these issues are examined in light of Kelly, which was one of the first cases to address these issues under the FCA. This section criticizes the Kelly court's analysis of Supreme Court precedent addressing the Take Care Clause and the Appointments Clause. Part IV concludes that amending the FCA to remove the unconstitutional provisions remains consistent with the purpose behind the Act and will not dilute the benefits realized by the federal treasury.

I. THE FALSE CLAIMS ACT

A. Historical Background

The significant monetary recoveries acquired under the FCA often overshadow the simple fact that it was created long before any type of health care industry developed. Qui tam actions originated in England around the end of the thirteenth century to allow private individuals who had suffered injury to bring actions "in the royal courts on both their own and whether qui tam relators have Article III standing under the FCA. It held that private relators have standing under Article III, however, the Court declined to address the issue of whether these suits violate Article II's Appointments Clause or the Take Care Clause).  

35. 9 F.3d 743 (9th Cir. 1993).

on the Crown's behalf." 37 These legal actions were created at a time when the legal machinery of the English government was still fairly primordial. 38

Naturally, "the concept of qui tam [actions] migrated to this side of the Atlantic along with other elements of English law and custom." 39 In the time period surrounding the framing of the Constitution, "qui tam actions [were] prevalent in America" 40 and were utilized "as a crucial buttress to the government's ability to enforce the laws." 41 As a result, the First Congress enacted several statutes incorporating qui tam provisions. 42

B. Rights of the Parties in Qui Tam Actions

There are three interested parties in every qui tam case: (1) the United States, (2) the qui tam relator(s), and (3) the defendant(s). 43 Under the FCA, virtually anyone can be a qui tam relator. 44 To initiate a qui tam lawsuit, the relator must file a complaint in camera and under seal with the court. 45 The complaint remains under seal for sixty days in order to allow the Government to evaluate the merits of the suit and determine "whether it is in the Government's interest to intervene and take over the civil action." 46 At the close of the sixty-day period, the Attorney General must notify the court as to whether the Government will proceed with the action. 47

If the Government intervenes and proceeds with the case, it has the primary responsibility for, and full control of the litigation, but the relator

37. See Vt. Agency Natural Res., 529 U.S. at 774 (citations omitted).
38. See Riley, 196 F.3d at 545 (5th Cir. 1999). Many of the early statutes were simply informer laws that granted informers a reward but not a right to sue on behalf of the government. Id. at 519.
39. Id. at 545.
40. Vt, Agency Natural Res., 529 U.S. at 775.
41. Riley, 196 F.3d at 546. See discussion infra at p. 7. The issue of using qui tam statutes to buttress government enforcement is critical to future analysis of present qui tam statutes. "As the federal government began to expand . . . the need for private prosecution of law naturally waned." Riley, 196 F.3d at 546.
42. Riley, 196 F.3d at 518 n.7.
43. JOHN BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 4-7 (1999) [hereinafter FALSE CLAIMS AND QUI TAM ACTIONS].
44. A person may bring a civil action for a violation under section 3729 on behalf of him or herself and on behalf of the United States Government. 31 U.S.C. § 3730(b) (2000).
continues as a party to the litigation.\textsuperscript{49} If the Government declines to intervene, the relator has the right to proceed and conduct the litigation alone.\textsuperscript{49} In this scenario, the relator maintains full control over admissions, discovery and presentation of evidence, with very few limitations.\textsuperscript{50} Once the Government has declined to intervene, it may intervene at a later point only upon a showing of "good cause."\textsuperscript{51} However, whether or not the Government chooses to intervene, the United States must be a named party to every \textit{qui tam} case.\textsuperscript{52}

1. Historical Perspective: \textit{Qui Tam} Provisions in the Original Act

Congress initially enacted the FCA, also known as the Lincoln Law,\textsuperscript{53} or the Informers Act,\textsuperscript{54} in 1863 to combat defense contractors who were defrauding the Union Army during the Civil War.\textsuperscript{55} The bill’s sponsor, Senator Howard, articulated the main purpose of the \textit{qui tam} provisions:

[t]o hold out to a confederate a strong temptation to betray his coconspirator, and bring him to justice . . . [i]n short, . . . I have based the . . . [\textit{qui tam} provisions of the Bill] upon the old-fashioned idea of holding out a temptation, and "setting a rogue to catch a rogue," which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.\textsuperscript{56}

\textsuperscript{48} Id. § 3730(c)(1).
\textsuperscript{49} Id. § 3730(b)(4)(B) (The person bringing the action shall have the right to conduct the action).
\textsuperscript{50} Riley, 196 F.3d at 517.
\textsuperscript{51} 31 U.S.C. § 3730(c)(3)(2000) (emphasis added). This later intervention may not limit "the status and rights of the person initiating the action" and the relator retains primary control over the case, despite the governments' subsequent intervention. \textit{Id.}
\textsuperscript{52} "A person must bring a civil action for a violation of Section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. § 3730(b)(1) (2000). The government will only be considered an active party to the litigation if it exercises its right to assume control of the litigation.
\textsuperscript{53} \textit{Reducing Health Care Fraud}, supra note 8, at 26.
\textsuperscript{54} \textit{Health Care Providers and the Public FISC}, supra note 36, at 129.
\textsuperscript{56} \textit{CONG. GLOBE}, 37th Cong., 3rd Sess. 955-56 (1863).
The *qui tam* provisions of the Act were intended to encourage persons to report information about fraud against the Government.\(^{57}\) As an incentive, the Act originally provided that a successful relator would be entitled to one-half of any amount awarded and collected as a result of the suit, plus costs.\(^{58}\)

In 1870, not long after the creation of the Act, the Department of Justice ("DOJ") was established.\(^{59}\) The DOJ unified and strengthened the growing government's prosecutorial resources.\(^{60}\) Accordingly, "as the federal government began to expand . . . its regulatory and law-enforcement mechanisms became firmly established and the need for private prosecution of the law naturally waned."\(^{61}\) As a result, there were few reported cases under the *qui tam* provisions of the FCA during the first three decades of the twentieth century.\(^{62}\)

2. Significant Amendments To The FCA *Qui Tam* Provisions

Congress has enacted two significant amendments to the FCA *qui tam* provisions. The first of these amendments did not occur until 1943, and the second in 1986. The 1943 amendments were initiated in response to a plethora of "parasitic" *qui tam* suits,\(^{63}\) brought by citizens who merely copied criminal indictments in hopes of recovering a windfall bounty.\(^{64}\) To
correct this weakness, Congress limited a relator’s ability to bring a case based on information already known to the Government. These amendments also reduced the relator’s permissible recovery to twenty-five percent if the Government did not intervene and ten percent if it did.

By the late 1980s the Federal Government was firmly involved in regulating the health care industry. In response to rising concerns over fraud and abuse in the health care arena, Congress made several dramatic changes to the FCA in 1986. Unlike the 1943 amendments, which were designed to reign in money-hungry relators, the purpose of the 1986 amendments was to encourage private reporting of fraud against the Government. As a result, the amendments extensively revised and liberalized the provisions governing qui tam lawsuits.

Specifically, the 1986 amendments increased the relator’s percentage of recovery in successful FCA prosecutions and guaranteed the relator at least a set proportion of the recovery. In actions where the Government intervenes, the relator recovers “at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim.” If the government does not intervene in the action, the relator’s recovery is “not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement.” The 1986 amendments also significantly increased

(1944)(describing three civil actions under the False Claims Act resulting from an indictment; one by the Government and two by different relators in different district courts). One court referred to the practice as the unseemly race to the courthouse. United States ex rel. Bayarsky v. Brooks, 110 F. Supp. 175, 179-80 (D.N.J. 1953), aff’d 210 F.2d (3d Cir. 1954).

65. Reducing Health Care Fraud, supra note 8, at 27-28. This decision was based on the Supreme Court’s decision in United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) (holding that qui tam suits could be based on information already known to the government).

66. Reducing Health Care Fraud, supra note 8, at 27.


68. Baumann, supra note 14, at 205.


71. See Reducing Health Care Fraud, supra note 8, at 1-23.

72. Id. at 1-24.


74. Id. § 3730(d)(2). Interestingly, the relator’s recovery will potentially be more if the government chooses not to intervene. Commenting on the pre-1986 statute, the Senate Report states:
the penalty for filing false claims from $2,000 per claim to $5,000 - $10,000 per claim.\textsuperscript{75}

The 1986 amendments were intended to revive the Civil War era statute\textsuperscript{76} and thus create a watershed in enforcement and recovery under the Act.\textsuperscript{77} The effect was dramatic.\textsuperscript{78} For example, in 1987 only thirty-three \textit{qui tam} cases were filed.\textsuperscript{79} In 1988, the number of \textit{qui tam} cases rose to sixty.\textsuperscript{80} Nine years later, in 1997, the number increased to five hundred thirty-three.\textsuperscript{81}

\section*{II. CONSTITUTIONALITY OF THE RELATOR'S ROLE}

The FCA's \textit{qui tam} enforcement provision has existed in some form since 1863.\textsuperscript{82} Serious arguments, however, questioning the constitutionality of the FCA \textit{qui tam} provisions were not advanced until the 1986 amendments were enacted.\textsuperscript{83} Primarily, this is because prior to 1986, \textit{qui tam} actions were seldom used and presented few opportunities to challenge its provisions.\textsuperscript{84} Since 1986, numerous defendants have argued that, in empowering private persons to bring suit on behalf of the United States, the FCA \textit{qui tam} provisions violate principles fundamental to the scheme of government established by the United States Constitution.\textsuperscript{85}

\begin{itemize}
\item If a potential plaintiff reads the present statute and understands that in a successful case the court may arbitrarily decide to award only a tiny fraction of the proceeds to the person who brought the action, the potential plaintiff may decide it is too risky to proceed in the face of a totally unpredictable recovery.
\item 31 U.S.C. § 3729(a) (2000). In August 1999, this was increased from $5,500 to $11,000 per claim. See 64 Fed. Reg. 47,099 (Aug. 30, 1999).
\item Health Care Providers and the Public FISC, supra note 36, at 133.
\item Reducing Health Care Fraud, supra note 8, at 1-18.
\item Health Care Providers and the Public FISC, supra note 36, at 134.
\item Id.
\item Id.
\item Id.
\item Id.
\item See Rainwater, 356 U.S. at 592-94 (discussing the evolution of the FCA since 1863).
\item Fight for Your Right, supra note 69, at 859.
\item Id.
A. Constitutionality of the FCA Qui Tam Provisions Under Article II

Article II challenges levied against *qui tam* suits generally arise when the Government chooses not to intervene.96 Authorizing *qui tam* relators to enforce a federal law "for the United States Government" raises serious questions as to whether Congress has granted "executive power in a self-appointed agent who answers to no one." An analysis of the FCA *qui tam* provisions under Article II requires examination of two distinct clauses: the Take Care Clause and the Appointments Clause. Both of these clauses fall under the umbrella of the Separation of Powers Doctrine. The constitutionality of the FCA *qui tam* provisions under Article II is supported by the following two theories: 1) the benefits to the government outweigh the drawbacks of diminishing executive power, and 2) the government's "right" to intervene and control the litigation.

These theories, however, fail for two reasons. First, the Supreme Court has clearly held that the benefit of legislation is not sufficient to pass constitutional muster alone. Therefore, the FCA provisions that unconstitutionally diminish executive power, based on a benefit to the government, must be eliminated. Second, arguments that the FCA *qui tam* provisions are unconstitutional under Article II typically arise when the government chooses not to intervene in the litigation. The idea that the


86. *See Riley*, 196 F.3d at 529 n.43 (noting that the court's decision applies only to the limited number of cases where the government does not intervene).


89. U.S. CONST. art. II, § 2, cl. 2.

90. *Id.*

91. Bales, supra note 4, at 430.

92. *Id.* at 428. The government’s absolute "right" to intervene only occurs at the initiation of the suit, when the government is given the opportunity to evaluate the suit. 31 U.S.C. § 3730(b)(2) (2000). This "right" is relinquished if the government elects not to intervene. Any later attempts to intervene in the "relator's litigation" is subject to the government's ability to show "good cause." 31 U.S.C. § 3730 (c)(3) (2000).


94. *See supra* note 87; *see also* United States *ex rel.* Rockwell Int'l Corp. v. Boeing North Am. Inc., 282 F.3d 787, 806 n.6 (2002) (holding the Take Care clause
government has a qualified “right” to intervene and elects not to exercise that right does not mend constitutional violations that result when private relators exert unchecked executive authority.

Furthermore, recent government statistics on FCA *qui tam* litigation support the conclusion that removing the arguably unconstitutional provisions will not affect the government’s ability to root out fraud.95 Indeed, as of September 2001, ninety-five percent of the total recoveries in all such cases were a result of cases in which the government intervened.96

**B. Separation of Powers**

Separation of powers distinguishes our Constitutional system from all other forms of government.97 “The principle of separation of powers was not simply an abstract generalization in the minds of the Framers.”98 The Framers introduced this fundamental principle because of their belief “that concentration of power breeds tyranny.”99 Accordingly, they created the checks and balances implicit in the separation of powers as a “self-executing safe-guard against the encroachment or aggrandizement of one branch at the expense of the other.”100 When one branch within the tripartite government impermissibly undercuts or interferes with the constitutionally authorized powers of another, the doctrine of separation of powers is violated.101

The fundamental philosophy underlying our governmental structure is simply stated “[w]hen the legislative and executive powers are united in the same person or body, . . . there can be no liberty, because apprehensions may arise lest THE SAME monarch or senate should ENACT tyrannical laws to EXECUTE them in a tyrannical manner.”102 Accordingly, the Framers separated the Executive’s responsibilities from those of the Legislature. Under our tripartite government, “Congress

is not violated when the government chooses to intervene in the FCA litigation but expressing no opinion as to whether that provision is violated in circumstances when the government seeks permission to intervene and is denied).

95. See discussion infra at p. 25 - 26.
96. Reducing Health Care Fraud, supra note 8, at 36.
100. Buckley, 424 U.S. at 122.
defines legal interests and corresponding obligations based upon its view of wise social policy, and the executive branch implements those obligations in specific cases.\footnote{103}

The Supreme Court has described three principal ways in which unconstitutional congressional "encroachment" or "aggrandizement" on another branch takes place: 1) by removing a constitutionally authorized role of another branch,\footnote{104} 2) by involving the Legislative branch in appointing or removing individuals who carry out executive functions,\footnote{105} and 3) by vesting another branch's powers in individuals who, although chosen without congressional involvement, are still not within the class of persons authorized under the Constitution to carry out such powers.\footnote{106}

Under the principle of separation of powers each branch should remain free from the control or coercive influence of the other,\footnote{107} however, this rule is not completely inflexible. The Framers did not design each separate power "to operate with absolute independence."\footnote{108} Consequently, in deciding whether an act disrupts the appropriate balance between the three branches, courts should focus on the extent to which the Executive Branch is prevented from accomplishing its constitutionally assigned functions.\footnote{109} If a potential disruption exists, it must be justified by a significant need.\footnote{110}

\begin{footnotes}
\footnote{103. The Constitutionality of Oui tam Actions, supra note 7, at 357.}
\footnote{104. Riley, 196 F.3d at 524. See also Clinton, 520 U.S. at 701 (stating that "the separation of powers doctrine requires that a branch not impair another in the performance of its constitutional duties") (quoting Loving v. United States, 517 U.S. 748 (1996); See also INS v. Chadha, 634 U.S. 408, 436 (9th Cir. 1980), aff'd, 462 U.S. 919 (1983) (holding a one-house veto provision eliminates the Executive's role in clear conflict with the express grant of constitutional authority)).}
\footnote{105. See Buckley, 424 U.S. at 1.}
\footnote{106. See Northern Pipeline Construction Co., 458 U.S. at 87.}
\footnote{107. Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935).}
\footnote{108. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).}
\footnote{110. See id.}
\end{footnotes}
III. ARTICLE II PROVISIONS

A. The TAKE CARE CLAUSE: Civil enforcement of Federal Law is the Quintessential Executive Function

Of the powers that the Constitution delegates to the Executive, none is more fundamental than the duty to enforce federal laws.111 The Take Care Clause of Article II functions as a critical foundation for the doctrine of separation of powers.112 The Clause requires the Executive to “take care that the Laws be faithfully executed.”113 It further provides the Executive Branch with the power to enforce these laws.114 Embodied in this power is the authority to “investigate and litigate offenses against the United States.”115

Even before Congress created the FCA, the Take Care Clause has been at the heart of “one of the oldest debates in American constitutional law.”116 The Supreme Court has held that a separation of powers violation may occur when an act fails to provide the Executive branch “sufficient control”117 over the act’s enforcement powers, thereby failing “to ensure that the President is able to perform his constitutionally assigned duties.”118 The provisions of the FCA that limit the Executive’s ability to commence litigation, after previously declining to intervene, lacks the “sufficient control” contemplated by the Supreme Court. This is because the FCA qui tam provisions lack the keystone Executive involvement necessary in making the initial decision to prosecute.119

112. Riley, 252 F.3d at 760.
113. U.S. CONST. art. II, § 3.
116. Bales, supra note 4, at 410.
118. Id.
119. The majority opinion in Riley attempts to differentiate between the Executive duty to enforce criminal versus civil statutes such as the FCA. 252 F.3d at 752. The Supreme Court’s holding in Buckley specifically looks at the importance of the Executive’s ability to enforce civil statutes, thus there arguably is no difference in the Executives duties under Article II. See Buckley, 424 U.S. at 140 - 141 (holding that the provisions of the Act that vest civil enforcement powers with the Commission violates Article II).
Allowing *qui tam* relators to initiate litigation conflicts with the Framers' intent to vest the President with the duty of enforcing the law. Similar to the intentions behind the creation of the DOJ, the office of the Attorney General was created to centralize law enforcement in the Executive Branch. Thus, the Attorney General acts to advance the President's faithful execution of the laws. Under this arrangement, the President oversees prosecutorial authority in a unified manner.

In contrast, by enacting the FCA, Congress has not only invoked its own power to create legislation, but has also usurped the President's power to control enforcement of those laws. Accordingly, when the government does not intervene, the FCA's private civil prosecution

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120. The Department of Justice was created to assist the Executive with the "legal business of the United States." Department of Justice Selected Bibliography (Jan. 2001) at http://www.usdoj.gov/jmd/ls/dojbib2000.htm.

121. United States v. Providence Journal Co., 485 U.S. 693, 706 (1988) Among the reasons for reserving [authority] ... to the Attorney General. . . is the concern that the United States usually should speak with one voice . . . and with a voice that reflects not the parochial interests of a particular agency, but the common interests of the Government and therefore all the people.

122. United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965).

123. See Bruce Ledewitz, *The Uncertain Power of the President to Execute the Laws*, 47 TENN. L. REV. 757, 770-71 (1979). Initially, the Department of Justice was not prepared to defend the constitutionality of the FCA *qui tam* provisions. See 139 CONG. REC. S. 4398 (daily ed. Apr. 2, 1993) (statement of Sen. Mitchell). Indeed, it was the Senate that vigorously defended the law. See id. See also 139 CONG. REC. S 875 (daily ed. Jan. 28, 1993) (Statement of Sen. Grassley): Hopefully, whoever President Clinton sends up here as the next nominee for Attorney General will be able to openly support *qui tam*. The executive branch should help guarantee that we will be able to use it in the future, and make sure that everything connected with it is carried out and fully used. I think even in the bowels of the bureaucracy of the Justice Department . . . there are people who do not like this because, as a practical matter, every time an individual citizen [brings a suit] it is a clear signal that the Justice Department is not doing its job. Senator Grassley does not explain, however, why he believes it is constitutional for a private citizen, who has not been assigned any private rights, to do the Justice Department's job. Mr. Grassley's statements seem to take the position that the FCA *qui tam* provisions should be upheld as constitutional because he wants them to be. See also infra note 200.

124. Riley, 252 F.3d at 761.
authority encroaches on the Executive’s authority to initiate and control litigation brought to protect the government’s interests.\textsuperscript{125}

\textbf{B. Historical Precedent: The Ninth Circuit’s Analysis Begins a Bad Habit}

When analyzing Article II Take Care issues raised under the \textit{qui tam} provisions of the FCA, most courts follow the Ninth Circuit’s precedent, established in \textit{United States ex rel. Kelly v. Boeing Co.}\textsuperscript{126} Although it was one of the first circuit cases to address the issue, \textit{Kelly} remains the most acclaimed opinion in continuing to sustain the FCA’s \textit{qui tam} provisions under Article II separation of powers challenges.\textsuperscript{127} Despite its wide following, the reasoning presented in \textit{Kelly} is inherently flawed.

\textit{1. Facts of Kelly}

\textit{Kelly} put forward classic dual Article II constitutional arguments over executive involvement in the initiation of the FCA litigation under the Take Care Clause and the ability to appoint or remove a relator under the Appointments clause. In \textit{Kelly}, a former Boeing employee filed a \textit{qui tam} complaint. The plaintiff alleged that Boeing submitted improper facility lease costs to the government while working on the government’s Advanced Tactical Fighter programs.\textsuperscript{128} After completing its investigation,

\begin{itemize}
\item \textsuperscript{125} Riley, 196 F.3d at 525-26.
\item \textsuperscript{126} United States \textit{ex rel.} Kelly v. Boeing Co., 9 F.3d 743, 751-52 (9th Cir. 1993).
\item \textsuperscript{128} Kelly, 9 F.3d at 745.
\end{itemize}
the government declined to intervene in the case. Pursuant to the Act, Kelly elected to proceed with the action on his own. After being served with Kelly's complaint, Boeing moved to dismiss the action based on the following four constitutional violations: (1) Article III's standing doctrine; (2) Article II's Appointments Clause; (3) the Fifth Amendment's Due Process Clause; and (4) the principle of separation of powers.

Boeing asserted that the qui tam provisions allowing a relator to proceed with an action where the government elects not to intervene violate the Executive's authority under Article II by giving the relator primary authority to conduct the action. The Western District of Washington upheld the qui tam provisions, but certified an interlocutory appeal of its rulings on the constitutional challenges. The Ninth Circuit granted Boeing's petition for appeal.

2. Ninth Circuit Analysis

In addressing whether the FCA qui tam provisions violate separation of powers principles, the Ninth Circuit was faced with a unique question. The Ninth Circuit had to ascertain "the degree to which Congress may assign prosecutorial powers to persons not under the direct control of the Executive Branch." Prior to Kelly, the Supreme Court addressed separation of powers problems raised when one branch of government encroaches on the power of another. The Supreme Court, however, "never considered a situation [like the FCA] where Congress has sought to disperse some quantum of executive authority amongst the general public." Accordingly, the Ninth Circuit determined that the appropriate issue was whether the FCA qui tam provisions "disrupt[] the proper balance between the coordinate branches [by] prevent[ing] the Executive

129. Id.
130. Id.
131. Id. at 745.
132. Id. at 747.
133. Id. at 745.
134. Kelly, 9 F.3d at 747.
135. Id. at 751. Congress assigned prosecutorial discretion to private citizens under "citizen suits." These statutes are fundamentally different than the FCA because each of these statutes contains an unqualified right for the government to intervene in the litigation.
136. Kelly, 9 F.3d at 750 (citing Mistretta v. United States, 488 U.S. 361, 382 (1989)).
137. Id. at 750.
Branch from accomplishing its constitutionally assigned functions. In light of this, the court looked to the most analogous Supreme Court authority in *Morrison v. Olson*. *Morrison* provided a comprehensive baseline to assess the degree of prosecutorial powers that Congress may assign to persons not under direct executive branch control.

3. *Morrison Precedent*

In *Morrison*, the Supreme Court addressed constitutional issues created by the Ethics in Government Act ("EGA") of 1978. The EGA authorized the Attorney General to appoint an independent counsel to investigate and prosecute high-level government officials for federal criminal offenses. The purpose of the Act was to ensure that executive officials were held accountable when they break the law.

One of the primary issues in *Morrison* involved the provision of the Act that allowed the removal of the independent counsel only for "good cause." The "good cause" removal power presented a constitutional concern because "the functions performed by the independent counsel [were] executive." These functions consisted of "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice." In considering

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138. *Id.* at 750-51 (citing *Morrison v. Olson*, 487 U.S. 654, 695 (1988)).
140. *Kelly*, 9 F.3d at 751.
142. *Morrison*, 487 U.S. at 660 (under 28 U.S.C. § 591(a) the statute applies to violations of "any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.").
144. 28 U.S.C. § 595(a)(1) (2000) provides:
   [A]n independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.
145. *Morrison*, 487 U.S. at 691. See discussion infra at p. 18. (This issue only arises after the Attorney General makes the decision to appoint an independent counsel).
146. *Id.* at 662. The functions of the independent counsel "include initiating and conducting prosecutions in any court of competent jurisdiction, framing and
whether these features were invalid under the principle of separation of powers, the Court addressed two related issues: First, whether the “good cause” removal provision, taken by itself, impermissibly interferes with the President’s constitutionally assigned functions and second, whether the Act, as a whole, reduced the President’s ability to control the independent counsel’s prosecutorial powers.

In examining the EGA’s “good cause” removal provision the Court held that the President’s power to oversee and control the independent counsel was not impermissibly burdened because the President, not congress, retained removal power. Next, in addressing the Act as a whole, the Court outlined four factors that allowed the Attorney General to supervise or control the independent counsel’s prosecutorial powers. The two most important considerations were 1) the fact that an Independent Counsel could not be appointed “without a specific request by the Attorney General,” a decision that was “committed to his unreviewable discretion,” and 2) the Attorney General’s “good cause” removal power. Under these provisions, the executive retained sufficient

signing indictments, filing informations, and handling all aspects of any case, in the name of the United States.” Additional functions included conducting grand jury proceedings and other investigations, participating in civil and criminal court proceedings and litigation, and appealing any decision in any case in which the counsel participates in an official capacity. 28 U.S.C. § 594(a)(1)-(3) (2000).

147. Morrison, 487 U.S. at 685.
148. Id.
149. The Court did not define “good cause” but noted that based on the legislative history, “misconduct” was enough for removal. Id. at 692.
150. Id. at 693. In making this decision the court looked to previous decisions where a statute authorized an executive official to be removed only by congress. See, e.g., Bowsher v. Synar, 487 U.S. 714, 730 (1986), Meyers v. United States, 272 U.S. 52 (1972). It also looked to decisions that restricted the President’s power to remove officials. See, e.g., Humphrey’s Executor v. United States, 252 U.S. 602 (1935); Weiner v. United States, 357 U.S. 349 (1958).
151. Morrisson, 487 U.S. at 695–96. The court noted that these factors were sufficient in light of the circumstances for which the act was created. “It is undeniable that the Act reduces the amount of control or supervision that . . . the President exercises over the investigation and prosecution of a certain class of alleged criminal activity.” Id. at 696.
152. Id. The Attorney General did not get to appoint the individual of his choice however, the Attorney General was the only executive officer entitled to make the decision to appoint an independent prosecutor. Id. (emphasis added).
153. Id.
control over the *power to initiate and supervise* the independent counsel investigation.\(^{154}\)

The remaining two factors were: 1) the jurisdiction of the independent counsel was based on the facts submitted by the Attorney General, and 2) the requirement that, once appointed, the independent counsel must abide by Justice Department policy unless it is not "possible" to do so.\(^{155}\) In sum, the Court found all four features sufficient to ensure that the President is capable of performing his constitutionally assigned duties.\(^{156}\)

The result of the *Morrison* decision was essentially the establishment of a balancing test. Because of the unique circumstances presented\(^{157}\) the Court carefully weighed the interest of maintaining an accountable executive branch against the need for the statute.\(^{158}\) Based on *Morrison*, Congress may limit the inherent Presidential control over prosecutions only in cases where there is an overriding need that merits reducing executive accountability.\(^{159}\)

\section*{4. Kelly's Application of Morrison}

Applying the *Morrison* analysis to the FCA, the *Kelly* court faced a significant question: did the Supreme Court intend to articulate a test that must be applied point by point\(^{160}\) to acts that potentially undermine the Executive's function? Alternatively, did *Morrison* create a balancing test, which looks to the act as a whole in assessing its level of encroachment on the Executive Branch?\(^{161}\) In *Kelly*, the defendant, Boeing, argued that *Morrison* represented the outer limits of restricting executive duties.\(^{162}\) Boeing urged the court to look at the means of control deemed sufficient in *Morrison* and to formulate a decision based on the presence or absence of those means in the FCA *qui tam* provisions.\(^{163}\) Conversely, *Kelly* argued that the court should identify all possible means of executive control in

\begin{footnotesize}
\begin{enumerate}
\item[154.] *Id.* (emphasis added).
\item[155.] *Morrison*, 487 U.S. at 696.
\item[156.] *Id.*
\item[157.] If *Morrison* had not allowed these provisions, the President would essentially be investigating himself.
\item[158.] See *id.* at 695-96.
\item[159.] See *Mistretta*, 488 U.S. at 386.
\item[160.] *Kelly*, 9 F.3d at 751-52.
\item[161.] *Id.*
\item[162.] *Id.*
\item[163.] *Id.* at 752.
\end{enumerate}
\end{footnotesize}
the FCA *qui tam* provisions and compare them as a whole to the means of control identified in *Morrison*.164

Ultimately, the Ninth Circuit determined *Kelly’s* approach was correct because “[t]wice in *Morrison*, the Court stated that the proper inquiry is whether the Act ‘taken as a whole’ violates the principle of separation of powers.”165 The court concluded that “[t]aken as a whole . . . the FCA affords the Executive Branch a degree of control over *qui tam* relators that is not distinguishable from the degree of control the *Morrison* court found the Executive Branch exercises over independent counsels.”166

In support of its decision, the court relied on two specific aspects of the FCA. First, under the FCA, the government can elect to intervene and take the lead in prosecuting the action.167 Second, in the situation where the government does not intervene, it can move to dismiss a case that it believes has no merit, but only after the relator is notified and provided an opportunity for a hearing.168

5. *Qui Tam* Power has a Pernicious Impact on the President’s Duty to Faithfully Execute the Law

Examining the FCA as a whole, the *Kelly* court concluded that even with the Executive Branch’s qualified power to end *qui tam* litigation it

164. *Id.*
165. *Id.*
166. *Kelly*, 9 F. 3d at 757.
167. *Id.* at 753.
168. *Id.* It is important to understand that the government may or may not win on this issue. If the government loses its motion to dismiss, the relator is still entitled to proceed in the name of the government, without any sufficient government involvement or control. 31 U.S.C. § 3730 (b)(4)(B) & (c)(3) (2000). The *Kelly* court recognized this distinction in a footnote, stating that “[I]t is not clear whether in practice this notice and hearing requirement has amounted to much of a hurdle for the government.” *Kelly*, 9 F.3d at 754, n.11. Remarkably, the court admitted that the Government has greater authority to prevent the initiation of prosecution by an independent counsel than by a *qui tam* relator. However, instead of thoroughly analyzing the issue, the court, without much analysis simply went on to conclude:

[O]nce prosecution has been initiated, the government has greater authority to limit the conduct of the prosecutor and ultimately end the litigation in a *qui tam* action than it does in an independent counsel’s action. We conclude that because the Executive Branch has power, albeit somewhat qualified, to end *qui tam* litigation, it is not significant that it cannot prevent its start.

9 F.3d at 754.
was “not significant that it can not prevent [the litigation’s] start.” The Ninth Circuit was correct in noting that *Morrison* examined the EGA as a whole, however, *Kelly*’s comparison of the FCA as a whole is flawed because it missed an integral part of the *Morrison* analysis.

In *Morrison*, the Supreme Court essentially took a two-step approach to address the separation of powers issues raised by the EGA. First, the court examined the provision of the Act that presented the closest constitutional question in isolation; whether the “good cause” removal provisions of the act “taken by itself impermissibly interfered with the President’s exercise of his constitutionally appointed functions.” Second, the Court looked to how the act as a whole reduced the President’s ability to manage the prosecutorial powers held by the independent counsel.

The *Morrison* court did not explicitly say that completing both steps was a bright line rule. In focusing on the FCA as a whole, however, the *Kelly* court underestimated constitutional implications that arise under the provisions of the FCA that require the government to show “good cause” to intervene in litigation once it has initially declined. When examined in isolation, the FCA *qui tam* provisions that prevent the executive branch from entering litigation it has initially declined to pursue (except upon a showing of good cause) are beyond the type of intrusion contemplated by *Morrison*.

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169. *Kelly*, 9 F.3d at 754.


171. *Id.*

172. See *id.*

173. *Id* (noting “[t]wo related issues must be addressed: The first is whether the provision of the Act restricting the Attorney General’s power to remove the independent counsel to only those instances in which he can show ‘good cause,’ taken by itself, impermissibly interferes with the President’s exercise of his constitutionally appointed functions. The second is whether, taken as a whole, the Act violates the separation of powers by reducing the President’s ability to control the prosecutorial powers wielded by the independent counsel.”).

174. There is a fundamental difference in the executive control authorized in the EGA and the executive control authorized in the FCA. Under the EGA, *no action* takes place until after the Attorney General investigates the matter and determines there is “reasonable grounds to believe that further investigation or prosecution is warranted.” *Morrison*, 487 U.S. at 661. In *Morrison*, the Supreme Court found executive powers remained intact because an independent counsel may only be appointed upon the Attorney General’s request and are “specifically prevented from reviewing the Attorney General’s decision not to seek appointment. *Id.* at 695 (citing § 592(f) of the Act). Conversely, under the FCA
C. Kelly's Analysis Critiqued

If the Ninth Circuit followed a true *Morrison* analysis, it first should have looked solely to the FCA provisions that raise the most serious threat of intrusion into matters more properly within Executive authority. Then the court should have looked to the Act as a whole. Unlike the EGA, the FCA provisions that present the most serious threat to the Executive branch are not the provisions that allow the government to limit the realtors role, which occurs when the government has taken primary responsibility for the litigation.\textsuperscript{175} Rather, it is the FCA *qui tam* provisions that allow the relator to proceed in the name of the government, even when the government has declined to intervene. Moreover, the government’s authority is further limited by the provisions that allow a court to determine whether the Executive will be able to intervene at a later date if it wishes.\textsuperscript{176}

1. Private Enforcement: *Qui Tam* Relators are Enforcing a Federal Law

The President, as Chief Executive Officer, is constitutionally charged with executing federal law.\textsuperscript{177} The Supreme Court has made clear that a major element of the Executive’s exercise of prosecutorial discretion is determining whether and how to proceed in the enforcement of federal law.\textsuperscript{178} The FCA *qui tam* provisions specifically authorize private relators to make prosecutorial decisions to initiate and enforce federal law, unaided by the Attorney General.\textsuperscript{179} These provisions conclusively curtail the action may still move forward even if the government declines to intervene.

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\textsuperscript{177} Id.
\textsuperscript{178} U.S. CONST. art. II, § 3.
\textsuperscript{179} See Nixon v. United States, 418 U.S. 683, 693 (1974) (stating “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.”). See also Marshall v. Jerrico, Inc., 446 U.S. 238, 249–250 (1980) (“[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision...”). Although these statements are essentially dicta, it is not inappropriate for a court to give great weight to Supreme Court dicta. See United States v. Caro, 260 F.3d 1209, 1210 (10th Cir. 2001). The Attorney General has also been found to have non-reviewable discretion to initiate a lawsuit in United States v. Cox, 342 F.2d 167, 171-72 (5th Cir.), *cert denied*, 381 U.S. 935 (1965).
the Attorney General's powers, raising valid questions as to the degree of encroachment on the Executive's authority to initiate lawsuits.\footnote{180}

Some courts have argued that the FCA *qui tam* provisions authorizing private enforcement are no different than "citizen suits,"\footnote{181} which have been held constitutional. These statutes allow a similar intrusion on the executive function of initiating prosecution.\footnote{182} Careful examination of the citizen suit provisions, prove these arguments are less than convincing.

There are three fundamental differences between citizen suit statutes and the FCA. First, the "citizen suit" statutes provide the government with an *unqualified right* to intervene once a private citizen has commenced litigation.\footnote{183} Second, these statutes allow citizens to sue on their "own behalf." Thus, they have been assigned a private right, whereas the FCA only allows relators to sue "in the name of the government."\footnote{184} FCA relators are not suing to redress a private injury.\footnote{185} They are essentially acting as the government's agents.\footnote{186} Suing in the name of the

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180. "The vesting of the executive power in the President was essentially a grant of the power to execute the laws." Myers v. United States, 272 U.S. 52, 117 (1926).
181. Citizen suits are also civil actions brought by private parties for violation of federal statutes. Examples of these types of suits include the Water Pollution Prevention and Control Act, 33 U.S.C. § 1365(a) (2000), The Toxic Substance Control Act, 15 U.S.C. § 2619(a) (2000), The Endangered Species Act, 16 U.S.C. § 1540(a) (2000), and The Clean Air Act, 42 U.S.C § 7401–7671 (2000). Similar Article II Take Care and Appointments Clause arguments have been made regarding Citizen suits. For a comprehensive analysis of the Article II issues presented with citizen suits, see generally Craig, supra note 127.
185. See United States *ex rel.* Milam v. The Univ. of Texas M.D. Anderson Cancer Ctr., 961 F.2d 46, 49 (4th Cir. 1992) (noting "[a] *qui tam* relator is essentially a self-appointed attorney general, and his recovery is analogous to a lawyer's contingent fee."). See also 139 CONG. REC. S 875 (daily ed. Jan. 28, 1993) (statement of Sen. Grassley) (stating that the FCA *qui tam* provisions "deputize private citizens to act as prosecutors."). See also Vermont Agency of Nat. Resources v. United States *ex rel.* Stevens, 529 U.S. 765, 773–74 (2000) (resting its Article III standing decision on an assignment theory because there the relator is redressing a government injury only).
186. United States *ex rel.* Purcess v. MWI Corp., 209 F.R.D. 21, 26 (D.D.C. 2002) ("[b]y allowing the relator to bring the action 'in the name of the
government is equivalent to enforcing a public right, and enforcing a public right is considered a core executive function.\textsuperscript{187} Third, individuals enforcing citizen suits have no incentive to bring the suit other than to protect the health and welfare of similarly situated persons.\textsuperscript{188} Unlike the FCA’s “bounty”\textsuperscript{189} provisions, citizen suits do not explicitly provide damages to be awarded to the individual. Since the FCA does not contain the same type of safeguards to government involvement as citizen suits provide, the comparison is inappropriate.


Perhaps the greatest threat to the Executive Branch’s ability to exercise its constitutional functions under Article II arises under the provision that vests the judicial branch with the power to choose whether the executive will participate in federal litigation. Under the FCA, if the government initially elects not to intervene in the litigation, it must show the court “good cause” if it later wishes to be involved.\textsuperscript{190} It is this “good cause” requirement that further usurps traditional Executive prosecutorial discretion.

The Supreme Court has stated that “executive or administrative duties of a non-judicial nature may not be imposed on judges holding office under Article III of the Constitution.”\textsuperscript{191} Article III limits judicial power to the resolution of cases and controversies.\textsuperscript{192} Based on both Supreme Court precedent and the doctrine of separation of powers, it is not appropriate for judges to trespass on the Executive’s constitutional duty to “take care that the laws be faithfully executed.” This exercise of judgment and government’ and by allowing the relator to receive a percentage of the proceeds that the government recovers, the legislature left no doubt that the relator is acting on behalf of the government.”) (citation omitted).

187. Craig, \textit{supra} note 127, at 160. \textit{See also} United States ex rel. Truong v. Northrop Corp., 728 F. Supp. 615, 621 n.9 (D. Cal. 1989) (“[t]he relator’s authority to sue in the name of the government distinguishes the False Claims Act from most private attorneys general statutes where citizen plaintiffs must commence suits on their own behalf.”).


191. Buckley, 424 U.S. 1, 123 (1976)(citing United States v. Ferreira, 13 How. 40 (1852)).

discretion is inherent in the Executive branch. Moreover, the decision to allow Executive participation in litigation does not amount to a decision regarding a case or controversy.

Thus, the FCA's grant of authority to the judiciary raises difficult and fundamental separation of powers questions. Indeed, at the time of its ruling, the Kelly court noted that it was unclear whether the "good cause" requirement interferes with the government's prosecutorial authority when the government declines to intervene. However, in July 2000, in United States ex rel. Fender v. Tenet Healthcare Corp., the Northern District of Alabama held that a relator could dismiss or settle an action without the Attorney General's consent when the Government did not initially intervene. This decision is in clear contravention of the FCA's plain language, which states that a realtor may only settle or dismiss a case with the written consent of the Attorney General. Such disregard further supports the tenet that the Executive's authority is usurped because the judiciary made a decision that falls squarely within the Executive Branch's authority.

Based on a tighter analysis of the rationale in Morrison, the Ninth Circuit's failure to adequately address the separation of powers issues raised by the FCA's significant displacement of executive authority is inappropriate. This is particularly true because most of the "control" provisions touted as balancing the FCA as a whole are only available

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193. See Springer v. Philippine Islands, 277 U.S. 189, 202 (1928) (noting it is the Executive's discretionary ability to seek judicial relief is squarely a constitutional authority).

194. Kelly, 9 F.3d at 756 (9th Cir. 1993).

195. 105 F. Supp. 2d 1228, 1231 (N.D. Al. 2000) (stating "[t]he Justice Department has no right to nullify a settlement agreement in a case in which it is not a party."). There is some disagreement among the circuits on this issue. Compare United States ex rel. Pratt v. Alliant Techsystems, Inc., 50 F. Supp. 2d 942, 947-951 (C.D. Cal.) (approving a settlement agreement despite the government's objections) with United States ex rel. doyle v. Health Possibilities, P.S.C., 207 F.3d 335, 339-340(6th Cir. 2000)(refusing to allow the relator to settle the case without the Attorney General's consent even though the government did not intervene).

196. See Caminetti v. United States, 242 U.S. 470, 485 (1917)(stating that if the statute provides a clear answer, "the sole function of the courts is to enforce it according to its terms.").

Bad Habits

when the government intervenes and has taken primary control over the litigation.198

Furthermore, unlike the circumstances in Morrison, congressional interest in FCA qui tam procedures does not justify the extreme intrusion into the Executive Branch allowed by the statute.199 Indeed, as of September 2000, an overwhelming ninety-five percent of total recoveries received by the government under the FCA qui tam provisions have come directly from cases where the government has intervened.200

198. See Kelly, 9 F.3d at 753-54. Specifically, the court mentions that the government can seek to limit the relator's participation, which occurs when the government has elected to intervene. See 31 U.S.C. § 3730 (c)(C)-(D) (2000). The statute does not provide the government with the same ability to limit the relator's participation if it does not intervene. It only allows the government to potentially intervene at a later date if it is able to show the court "good cause." 31 U.S.C. § 3730 (c)(3) (2000).

If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. . . . When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause. Id. 199. Nonetheless, it appears that there is great pressure from Congress to maintain the constitutionality of the qui tam provisions of the FCA, regardless of the merit arguments against it. In January 2001, during the Senate Judiciary hearings for John Ashcroft's nomination for attorney general, Senator Grassley raised the topic of the current debate over the constitutionality of the FCA. Nomination for Attorney General, Hearing of the S. Judiciary Comm., Jan. 17, 2001. During this Hearing, Senator Grassley alerted Mr. Ashcroft to the issues and stated, "I'm concerned that the key people that you will include on your team . . . have a positive attitude towards the False Claims Act." Senator Grassley noted that he has asked all previous nominees if they would defend the constitutionality of the Act and noted that he felt his message got through. Id. Following this statement, the Senator specifically asked that if the constitutionality of the Act were raised that Mr. Ashcroft "simply see that your people don't do any destructive action to what is already constitutional." Mr. Ashcroft agreed. Senator Grassley's questioning of Mr. Ashcroft and his clear and strong suggestion of what the executive branch, under Mr. Ashcroft should do, is a classic illustration of the type of encroachment feared by the Framers. If Congress is placing such pressures on the executive branch, surely those pressures also flow to the judiciary. In light of these pressures, there is undeniable pressure on two branches of government to maintain the status quo.

Some courts have argued that invalidating the FCA *qui tam* provisions will hurt the federal treasury. Realistically, these concerns are not significant. Thirteen years of recovery statistics demonstrate that the FCA *qui tam* provisions that seriously encroach on executive law enforcement duties only affect the five percent of cases where the government does not intervene. There can be no dispute that invalidating these provisions poses no threat to the effectiveness of the statute. The purpose of enacting the FCA was to aid the government by encouraging citizens to report fraud. Recovery statistics support the fact that this purpose is not furthered by the FCA’s unconstitutional provisions.

The constitutional flaw in authorizing the judiciary to take part in traditional Executive decisions is not simply a technical oversight. It clearly contravenes the Constitution’s vesting of Executive power. This power effectively voids the constitutional protections of the Executive power envisioned by the Framers. In *Kelly*, the Ninth Circuit inappropriately focused its attention on the Executive’s control over relators in situations where the government intervenes, rather than the greater issue of the Judiciary’s ability to completely block out the Executive Branch when the government initially elects not to intervene in the litigation.

3. The Appointments Clause: *Qui Tam* Relators Given Authority to Prosecute a Federal Act are Neither Appointed, Nor Officers.

In conjunction with their intent to establish an independent Executive Branch, the Framers realized the power and duty to faithfully administer the laws could only be accomplished by vesting the Executive with the right to choose subordinate officers to carry out that responsibility. In this manner, the Framers envisioned that the President would be less

201. *Riley*, 196, F.3d at 514, (5th Cir. 2001) (en banc) (Smith, J. dissenting).


203. See discussion *supra* at p.7.

204. See U.S. CONST. art. II, § 2, cl. 2 (“the president is charged to take care that the laws be faithfully executed.”). See also Buckley, 424 U.S. at 135-36 (noting with respect to Article II, a “reasonable implication, even in the absence of express words, was that as a part of his executive power he should select those who were to act for him under his direction in the execution of those laws”).
susceptible to interest-group pressure and favoritism than a collective body such as Congress. Furthermore, authorizing the President with the power to select officers of the United States under the Appointments Clause prevents congressional intrusion on the Executive and Judicial Branches.

Many separation of powers arguments surrounding the Take Care Clause also involve appointment issues such as the appointment or removal of federal officials or, as in the case of FCA qui tam litigation, non-appointment of persons enforcing federal laws. Appointments clause issues generally arise in conjunction with Take Care Clause issues because this clause sets forth the exclusive procedure for selecting and authorizing those persons who may execute the laws on behalf of the United States.

In addition to the power to appoint under Article II, the President also has the power to remove Officers from their positions except where Congress avails itself of impeachment remedies. These Article II constraints serve an important purpose. As the Supreme Court noted in Meyers v. United States, the President may need to "supervise and guide" those who execute the laws "in order to secure that unitary and uniform execution of the laws which Article II of the constitution evidently contemplated in vesting the general executive power in the President alone." Resolution of separation of powers questions raised under the Appointments clause must look at the extent to which Congress has

208. "Congress' power . . . is inevitably bounded by the express language of Article II, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be 'Officers of the United States.'" *Buckley*, 424 U.S. at 138-39 (discussing Congress' power under the Necessary and Proper Clause).

209. The Appointments Clause provides:

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

U.S. CONST. art § 2, cl 2.
211. 272 U.S. 52 (1926).
thwarted the Executive Branch’s constitutional law enforcement role by supplanting the power to ‘appoint’ persons who can appropriately ‘enforce’ federal law.

D. Appointments Clause and Qui tam Relators

The Appointments Clause creates two kinds of officers: principal officers, who must be appointed by the President and confirmed by the Senate, and inferior officers, who can be appointed by the President alone, by a Court of Law or by the Head of a Department. The Appointments Clause raises two potential issues when applied to a qui tam relator: first, whether the person is an officer of the United States, and if he is, what kind of officer? If the relator meets the definition of an officer of the United States, either principal or inferior, then the Appointments Clause must be followed.

Under the FCA, relators undertake statutory responsibilities by exercising significant authority pursuant to the laws of the United States. They exercise the full authority of a department head, but unlike an independent counsel or special prosecutors, they have not been appointed under Article II. Further they are not employees of the federal government. Therefore, the key question is whether qui tam relators qualify as officers or, if they are not officers based on the powers authorized to them, whether they should be classified as such.

E. Appointments Clause: Supreme Court Guidance

Under the Appointments Clause, the term “Officer” is not defined, nor is any guidance provided to distinguish between a principal and inferior officer. The Supreme Court, however, has addressed this issue in two cases: Buckley v. Valeo and Morrison v. Olson. In Buckley, the Supreme Court examined whether Congressionally appointed members of the Federal Election Commission were officers of the United States for

213. U.S. CONST. art. II, cl. 2.
214. Craig, supra note 127, at 31-32.
216. Id.
217. See Riley, 252 F.3d at 758 (5th Cir. 2001) (en banc) (noting that qui tam plaintiffs are not government employees and do not draw a government salary).
218. See Edmonds, 520 U.S. at 661.
the purposes of the Appointments Clause. The Supreme Court struck down the provisions of the Federal Election Campaign Act of 1971 because the Act vested primary responsibility for conducting civil litigation to vindicate public rights in violation of Article II, section two, clause two of the Constitution. In *Buckley*, the Court held that "[s]uch functions may be discharged only by persons who are 'Officers of the United States' within the language of that section."  

The *Buckley* court viewed the Appointments Clause as a device to keep Congress from usurping more than its constitutionally permissible share of government authority. In analyzing the meaning of the term "officer," the Court was clear:

"Officers of the United States"... is a term intended to have substantive meaning. We think its fair import is that *any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States,"* and must, therefore, be appointed in the manner prescribed by §2, cl. 2 of [Article I].

This conclusion is buttressed by previous Supreme Court decisions in which the Court has said: "[n]ot having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a [private person], since that would usurp the power of appointment by indirection."

Similarly, in *Morrison v. Olson*, the Supreme Court articulated the difference between inferior and principal officers. In *Morrison*, the Court relied on several factors to make this distinction regarding the EGA's independent counsel provisions. First, the independent counsel was subject to removal by the Attorney General. Second, the independent counsel performed limited duties under a limited tenure.

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221. *See Buckley*, 424 U.S. at 144.
222. *Id.* at 140. *See also* Riley, 252 F.3d at 755 (5th Cir. 2001) (attempting to distinguish the enforcement authority of private relators under the FCA based on the fact that they are "simply civil litigants."). In light of *Buckley's* thorough discussion of enforcement of a civil statute, this distinction must fail.
224. *Id.* at 125-26 (emphasis added).
227. *Id.*
228. *Id.*
229. *Id.* at 671-72.
Some years later, in *Edmond v. United States*, the Supreme Court clarified both *Buckley* and *Morrison*. With respect to *Buckley*, the Court determined that the "exercise of significant authority pursuant to the laws of the United States" denotes the line between officer and non-officer rather than principal and inferior officer for Appointment Clause purposes. The Court continued to clarify its distinction in *Morrison* by noting that the difference between principal and inferior officers was marked by supervision by someone who was appointed by Presidential nomination. The resulting test as to whether someone is an officer is two-fold. Under *Buckley*, an officer of the United States exercises significant authority, and under *Morrison*, principal and inferior officers have a hierarchical relationship.

**F. Critique of the Kelly Analysis of the Appointments Clause**

The Ninth Circuit's analysis of the Take Care Clause in *Kelly v. Boeing Co.* decisively colored its Appointments Clause analysis. Here again, the court looked to Supreme Court precedent for guidance to determine whether "qui tam relators wield[ed] so much governmental power that they must be appointed in conformity with the Appointments Clause." The *Kelly* Court turned to the "significant authority" test from *Buckley v.*

231. *Id.* at 662 (1997) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).
232. *Id.* (noting "[g]enerally speaking, the term "inferior officer" connotes a relationship with some higher ranking officer or officers below the President: Whether one is an "inferior officer" depends on whether he has a superior."). Justice Souter in his concurrence felt the need to clarify his opinion that the "mere existence of a 'superior' is not dispositive." *Id.* at 668.
233. 9 F.3d 743 (9th Cir. 1993). The *Kelly* court stated the following: [qui tam relators] conduct litigation under the FCA with only the resources of private plaintiffs. Furthermore, relators have no greater authority to enforce the FCA than does the Attorney General, and under the terms of the statute must yield to the government's assumption of 'primary responsibility' when it elects to intervene in a *qui tam* action. When the government does not intervene, a relator retains primary responsibility for the litigation, thus presenting what may seem a close question under *Buckley*; but even in that situation, the relator's responsibility only extends to a single case, and the relator's activities can still be limited by the court upon a request of either the government or the defendant.

*Id.* at 758 (citations and footnote omitted).
235. *Kelly*, 9 F.3d at 757 (emphasis in original).
Valeo\textsuperscript{236} for its analysis of the FCA \textit{qui tam} provisions under the Appointments clause. However, instead of conducting a thorough analysis under the guidelines pronounced in \textit{Buckley},\textsuperscript{237} or subsequent Supreme Court interpretations of the Appointments Clause such as in \textit{Morrison},\textsuperscript{238} the court simply made an extrinsic mental leap from its Take Care Analysis to an Appointments Clause conclusion. Consequently, without any detailed analysis, the court simply found it "impossible" that the powers exercised by relators are so "significant" that they can only be exercised by officers appointed in a manner consistent with Article II.\textsuperscript{239}

In brushing over the \textit{Buckley} rational, The Ninth Circuit concluded that \textit{Buckley}'s holding regarding the exercise of prosecutorial authority was not an "unequivocal rule."\textsuperscript{240} Instead, the court found that \textit{Buckley} should be interpreted to mean that only persons who have "primary responsibility" and "significant authority" to enforce a law through litigation should be deemed officers.\textsuperscript{241} This statement is in complete contravention of the plain language of the FCA, which states without limitation: "[I]f the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action."\textsuperscript{242}

Nonetheless, the \textit{Kelly} court concluded that a single relator does not have "primary responsibility" and "significant authority" to meet the definition of officer because: (1) he must yield when the government elects to intervene; (2) his participation in the case may be further limited by the

\begin{itemize}
\item \textsuperscript{236} 424 U.S. 1 (1976).
\item \textsuperscript{237} \textit{See Buckley}, 424 U.S. at 124 – 140 (discussing the appointments clause).
\item \textsuperscript{238} \textit{See Morrison}, 654 U.S. at 670 - 678 (discussing the appointments clause).
\item \textsuperscript{239} \textit{Kelly}, 9 F.3d at 758
\begin{quote}
We have concluded that the Executive Branch retains "sufficient control" of relators such that their exercise of authority to sue on behalf of the United States does not "impermissibly undermine" executive functions. In keeping with that conclusion, we find it impossible to characterize the authority exercised by relators as so "significant" that it must only be exercised by officers appointed in the manner which Article II, § 2, cl. 2 prescribes.
\end{quote}
\item \textsuperscript{240} \textit{Buckley}, 424 U.S. at 142-43.
\item \textsuperscript{241} \textit{Kelly}, 9 F.3d at 758 (citing \textit{Buckley v. Valeo}, 424 U.S. at 126, 140).
\item \textsuperscript{242} 31 U.S.C. § 3730(c)(3) (2000).
\end{itemize}
government after it intervenes; and (3) the relator's limited authority extends only to one case.243

The court further bolstered this conclusion by noting "the fact that relator's sue in the name of the government does not vest them with any governmental powers." The court did recognize that cases where the government does not intervene might present an ostensibly close question under Buckley, however, it completely dismissed the issue because "the relator's responsibility only extends to a single case."245

Again, the court missed the issue. Every argument made surrounding the Appointments Clause, like the Take Care Clause, arises in cases where the government has elected not to intervene.246 Thus, the Ninth Circuit's time spent theorizing that the relator must yield when the government elects to intervene does not squarely address the issue raised.

When the government does not intervene, relators effectively appoint themselves to enforce a civil statute.247 Consequently, they can easily be compared to the members of the Federal Election Commission who were enforcing a civil statute in Buckley.248 In Buckley, the Supreme Court

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243. Id. (citation omitted). Courts examining this issue prior to Kelly, have undertaken a similar analysis. In United States ex rel. Turong v. Northrop Corp., 728 F. Supp. 615, 623-24 (D. Cal. 1989), the District Court found Buckley inapplicable to private parties. In Turong, the court looked to two district court cases, Chesapeake Bay Foundation, Inc. v. Bethlehem Steel Corp., 652 F. Supp. 620, 626 (D. Md. 1987) and National Resources Defense Council, Inc. v. Outboard Marine Corp., 692 F. Supp. 801, 817 (N.D. Ill. 1988), both of which held that the citizen suit provisions of the Clean Air Act did not violate the doctrine of separation of powers. This reasoning is not applicable to the FCA. Unlike citizen suits, under the FCA, relators are not provided a statutory private right of action. As the court in Natural Resources correctly noted it is perfectly appropriate for Congress to establish and confer statutory rights on private parties. See 692 F. Supp. at 816. Congress has not conferred any such private right on FCA relators.

244. Kelly, 9 F.3d at 758. This is an illogical conclusion. While relators may not possess "government powers," relators are statutorily granted full prosecutorial authority. See 31 U.S.C. § 3730(c)(3) (2000); See also United States ex rel. Fallon v. Accudyne Corp., 921 F. Supp. 611, 623 (W.D. Wis. 1995) (discussing how the government can "control" the relators prosecutorial powers).

245. Kelly, 9 F.3d at 758.


247. See Buckley, 424 U.S. at 111.

248. Id. at 138 ("[t]he Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of congress.").
stated that "there is no provision of the Constitution remotely providing any alternative means for the selection of the members of the Commission or for anybody like them." 249

It follows, based on the Supreme Court's analysis in Buckley that if Congress could not reserve appointment power for itself, Congress cannot take that a step further in reserving that power to a private citizen. 250 The Buckley court was clear that it considered the Federal Election Commission's "enforcement power, exemplified by its discretionary power to seek judicial relief, as authority that cannot possibly be regarded as merely in aid of the legislative function of Congress." 251 Like the Commission members in Buckley, FCA qui tam relators who make discretionary decisions to enforce the law are wielding enforcement power of the kind contemplated in Buckley. 252

Most courts following the Kelly analysis of the Take Care Clause and Appointments Clause do nothing more than complete a cursory analysis of both issues. 253 These courts basically come to the conclusion that Kelly has adequately addressed the issue and does not need to be re-addressed in detail. These decisions do not take into account a complete analysis of Supreme Court precedent. It appears that everyone follows Kelly for fear of breaking rank with the circuits and perhaps forcing this issue to be addressed further. 254

249. Id. at 127 (emphasis added).
250. This argument goes against the previous discussion regarding citizen suits, supra p. 23. It is worth re-emphasizing that in all citizen suits mentioned, the Government has an unqualified power to intervene in the suit. Thus, while the initial argument of reserving the decision to enforce the law in a private citizen are the same, the governments unqualified right to intervene may be a saving factor.
251. Buckley, 424 U.S. at 138.
252. Id. at 140
We hold that these provisions of the Act vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Art. II, § 2, cl.2, of the Constitution. Such functions may be discharged only by persons who are 'officers of the United States' within the language of this section.

Id.
254. See supra note 199 (discussing congressional pressure from Senator Grassley on the executive branch to uphold the constitutionality of the qui tam provisions of the FCA).
IV. CONCLUSION: AMENDING THE FCA TO CURE THE UNCONSTITUTIONAL PROVISIONS WILL NOT DEFEAT THE PURPOSE OR THE EFFECTIVENESS OF THE ACT

Supreme Court jurisprudence has established the importance of Executive prosecutorial discretion and appointment power. The FCA *qui tam* provisions that authorize a private citizen to make prosecutorial decisions and carry out law enforcement unduly alters the powers vested in the Executive Branch. The enforcement of federal laws for the protection of the public is among the most basic functions that the Constitution bestows upon the Executive. Accordingly, the Supreme Court has previously stuck down many federal acts, which have similar provisions to the FCA on the basis of separation of powers. 255

Many courts have chosen to follow the Ninth Circuit's analysis of the FCA *qui tam* provisions under Article II because it was the first circuit to make a pronouncement on the issues. However, because it was the first does not make it the best. Furthermore, some of the issues, such as the reality of the Judiciary's ability to encroach on the Executive Branch's ability to intervene have clearly presented themselves. A more careful analysis of the FCA *qui tam* provisions cannot evade the clear constitutional implications. Remedy ing these provisions will not alter the effectiveness of the Act and will result in a more equal balance of power among the branches.

The fact that a given law or procedure is efficient, convenient and useful in facilitating functions of government, standing alone, will not save it if it is in violation of the Constitution. 256 Department of Justice statistics clearly show that the useful provisions of the FCA will not be threatened or reduced by amending the FCA to eliminate the unconstitutional provisions.

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