

The Cost of Qui Tam: Assessing the Constitutional Challenges to the False Claims Act

Jonathan Coleman*

The federal government's most powerful tool for combating fraud is the False Claims Act (FCA). The statute targets individuals and entities that submit fraudulent claims for government funds, particularly in healthcare—where it addresses Medicare and Medicaid fraud—and in government contracting, including defense industry overpayments. FCA violators must repay up to three times the government's losses, along with additional penalties. A key feature of the FCA is its qui tam provision, which allows private citizens, known as relators, to sue violators on behalf of the United States. The statute incentivizes whistleblowing by granting relators 15% to 30% of any successful recovery. However, FCA relators have faced constitutional challenges that threaten the statute's most significant enforcement mechanism. The FCA's critics, many of whom are motivated by the unitary executive theory, argue that relators wield such significant authority that they qualify as "Officers of the United States" under Article II of the Constitution. If relators are deemed officers, they must be formally appointed, which would render the FCA's qui tam provisions unconstitutional. One interpretive principle is the canon of constitutional avoidance, which guides the Court to construe statutes to comport with the Constitution unless they are incompatible. This comment argues that there are plausible interpretations across interpretive modalities to harmonize the FCA and Article II. First, the FCA's purpose was to incentivize private whistleblowers to assist the government with combating fraud. The FCA does not transform a relator into a government official, so relators cannot be "Officers of the United States" as established in the Supreme Court's modern case law. A line of cases interprets "Officers of the United States" as government officials with "significant decision-making authority." While the FCA affords relators some decision-making authority throughout a given proceeding, such as whether to initiate the suit, the Executive maintains sufficient control of the case to direct it according to its policy goals. This includes intervening as the plaintiff in the case and vetoing any settlement offer. Second, recent scholarship uncovering the original public meaning of "Officers of the United States" calls the Supreme Court's jurisprudence on the issue into question and supports the position that FCA relators are not officers in need of appointment. Many of the FCA's fiercest critics are originalists. Given that there are plausible, constitutional interpretations of the FCA, courts should construe the FCA to avoid striking it down. The FCA remains

* J.D., 2025, University of Chicago Law School; B.A., 2018, James Madison University. I am grateful to Professor Jennifer Nou for inspiring my interest in constitutional law through her teaching and for providing invaluable guidance in refining my research. I also thank the staff of the *University of Chicago Business Law Review* for their thoughtful feedback and steadfast editorial support.

constitutionally sound, and its relators should continue serving as a crucial tool in protecting the federal government from fraud. Preserving the FCA's qui tam provisions is essential to maintaining a robust anti-fraud enforcement mechanism that safeguards public funds and deters misconduct.

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I. INTRODUCTION

In 2019, Dr. Clarissa Zafirov, a board-certified physician, sued her employer in federal court for allegedly lying to the

United States government.¹ Dr. Zafirov alleged that her healthcare practice, its sibling entities, and two private insurance companies defrauded the government by exaggerating their patients' "risk scores."² That scheme resulted in inflated payments to the defendants through Medicare Advantage, a government program that subsidizes healthcare costs.³ The higher the patients' risk scores, the more the doctors and insurance companies were paid. According to Dr. Zafirov, the defendants pressured her and other doctors to falsely increase patients' risk scores when submitting bills for reimbursement.⁴ Some risk scores were adjusted despite doctors providing no additional services, and some services that were needed were not provided.⁵ According to Dr. Zafirov, her employer swindled the federal government.

Dr. Zafirov pursued her claim under the False Claims Act (FCA).⁶ Any request to the government for payment is a "claim." A request premised on anything other than the truth is a "false claim." The United States Government uses the FCA to combat false claims.⁷ The FCA establishes liability for anyone who knowingly submits a false claim or knowingly uses a false record or statement that is material to a false claim.⁸

The FCA poses an acute risk for businesses because it enables private citizens—often disgruntled employees—to file claims against their employers or other entities they suspect have violated the law.⁹ The FCA presents strong financial incentives to whistleblowers by offering between 15–30% of a successful recovery.¹⁰ Inspired by ancient *qui tam* law,¹¹ these whistleblowers, referred to in the statute as "relators," sue "for the person and for the United States Government."¹² Relators have played a significant role in false claims prosecution: out of the \$75 billion that the government has recovered since 1986 through FCA litigation,

¹ United States v. Fla. Med. Assocs. LLC, No. 8:19-CV-1236-KKM-SPF, 2022 WL 4134611, at *3 (M.D. Fla. Sept. 12, 2022).

² *Id.* at *2.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ 31 U.S.C. § 3729 et seq. (1986).

⁷ Most states also have their own false claims statute. *See, e.g., State False Claims Acts*, THE ANTI-FRAUD COAL., <https://perma.cc/Z7BF-8PBN> (last visited May 4, 2025).

⁸ 31 U.S.C. § 3729(a)(1)(A)-(B).

⁹ 31 U.S.C. § 3730(b)(1).

¹⁰ 31 U.S.C. § 3730(d)(1)-(2).

¹¹ *See, e.g., Qui Tam Action*, Legal Information Institute, <https://perma.cc/3UY3-UMG5> ("qui tam" is short for a Latin phrase meaning "Who sues on behalf of the King as well as for himself.>").

¹² 31 U.S.C. § 3730(b)(1).

whistleblower-initiated actions accounted for nearly \$53 billion, or more than 70%.¹³

While constitutional critiques of the FCA have been developing for some time, those arguments have now reached the federal judiciary. FCA skeptics argue that FCA relators are incompatible with Article II. At issue is whether a relator's ability to sue on the United States Government's behalf qualifies the relator as an "officer." If it does, the relator provision clashes with the Constitution's Appointments Clause, which requires principal "officers" to undergo presidential appointment and Senate confirmation.¹⁴ It could also clash with other parts of Article II that vest executive authority in the President and bestow upon the President the responsibility of enforcing the law. However, those clauses say nothing about Congress's ability to assign an interest to a private actor who can sue to enforce federal law in the government's name.

On September 30, 2024, a federal judge dismissed an FCA case, holding, for the first time, that FCA relator provisions are unconstitutional. That ruling was reached despite decades of precedent to the contrary. That case was Dr. Clarissa Zafirov's.¹⁵

This Comment argues that the FCA's constitutionality should be upheld. Part II of this Comment explains the history of the *qui tam* device and how it came into modern use. Part III has multiple sections. First, it introduces the unitary executive theory as the ideological basis for opposition to *qui tam* provisions. Second, it demonstrates how proponents of the unitary executive theory root their critique of the FCA in the Appointments Clause. It then concludes with a close reading of the arguments made in Justice Thomas's dissent in *Polansky* and Judge Mizelle's opinion in *Zafirov*. Part IV discusses interpretive methods and the canon of constitutional avoidance. Part V identifies plausible, constitutional interpretations of the FCA based on the FCA's purpose, revealed through both history and the text. Part VI examines more

¹³ Michael Hiltzik, *Column: A Trump Judge Just Overturned the Government's Most Effective Anti-Fraud Tool, Which Has Stood for 160 Years*, L.A. TIMES (Oct. 25, 2024), <https://perma.cc/5DP7-2J75>.

¹⁴ U.S. CONST. art. II, § 2.

¹⁵ *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, 751 F. Supp. 3d 1293 (M.D. Fla. 2024). The judge who decided the case, Judge Kathryn Mizzelle, served as a law clerk for Justice Clarence Thomas. See Jordan Rubin, *Former Thomas Clerk Cites Old Boss to Kneecap Civil War-Era Legal Tool*, MSNBC (Oct. 1, 2024), <https://perma.cc/4UD7-2GPM>. In a 2023 dissent, Justice Thomas had expressed his suspicions of the FCA, referring to the statute as a "constitutional twilight zone" in need of further analysis. *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 449 (2023) (Thomas, J., dissenting). Justices Kavanaugh and Barrett agreed. *Id.* at 442 (Kavanaugh, J., concurring).

recent scholarship on Article II's original public meaning and argues that FCA relators do not fall under Article II's requirements under an originalist interpretation—the interpretive method used by those most likely to question the FCA's constitutionality. This Comment concludes that a court reviewing a case like *Zafirov* on appeal would have abundant interpretations that harmonize Article II and the FCA.

II. THE HISTORY OF THE FALSE CLAIMS ACT'S QUI TAM PROVISION.

A. The Qui Tam Device in England

The False Claims Act was a Civil War-era reaction to fraud committed by defense contractors,¹⁶ but its qui tam provision, which enables private citizens to sue for both “the person” and the federal government, has roots in English antiquity.¹⁷ In 695 A.D., Wihtred, King of Kent, issued a law prohibiting Sabbath work. A seventh-century whistleblower could inform authorities of this forbidden work and receive a portion of both the fine and payment for the labor.¹⁸ By the thirteenth century, qui tam laws started to resemble the FCA in that the laws fused a King's interests with his citizens' by allowing citizens to sue on the King's behalf and their own.¹⁹ Primarily motivated by a lack of public policing, medieval English lawmakers learned that qui tam laws both punish and deter crime by empowering citizens—often informers and bounty hunters—to initiate lawsuits with the chance of sharing in the potential recovery even if they had not been injured themselves.²⁰

As the centuries wore on, a number of abuses emerged, including collusion between wrongdoers and overly zealous informants prosecuting obscure laws.²¹ In the early modern period, English lawmakers reformed the qui tam device by raising the pleading standards and enforcing strict venue requirements.²² Those reforms, coupled with the development of England's public police force, saw qui tam use substantially wane by the time of

¹⁶ Francis E. Purcell, Jr., *Qui Tam Suits Under the False Claims Amendments Act of 1986: The Need for Clear Legislative Expression*, 42 CATH. U. L. REV. 935, 940 (1993).

¹⁷ J. R. Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 567 (2000).

¹⁸ *Id.*

¹⁹ Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 83 (1972).

²⁰ *Id.* at 89.

²¹ *Id.* at 90.

²² *Id.* at 93.

transatlantic exploration.²³ The last qui tam laws allowing informer-initiated suits were repealed in England by 1951.²⁴

B. Using the Qui Tam Device to Combat Fraud in the New Nation

The proliferation of the qui tam device in early America shows that the practice was embedded in the new nation's legal consciousness. Drawing on its medieval roots, America's colonies and earliest states adopted many qui tam statutes identical to those in England.²⁵ Many colonies explicitly adopted some English statutes that could be enforced through a qui tam procedure.²⁶ The first Continental Congress—which included several drafters of the Constitution—enacted numerous penalty statutes with a qui tam provision.²⁷

Immediately after the Constitution was ratified, the First Congress enacted fourteen penalty statutes, and at least ten had clear qui tam provisions.²⁸ An individual could sue someone for unlicensed trading with Native American tribes and receive half the goods forfeited, if successful.²⁹ An author could sue for copyright infringement and receive half of the statutory penalty.³⁰ A census taker could sue someone who refused to participate in census collection and receive half the penalty,³¹ and an informer could sue someone who failed to return their census documents.³² An informer could also sue someone for violating conflict-of-interest and bribery rules in the act establishing the Treasury Department.³³ Another statute allowed a private citizen to sue an agent of the Bank of the United States for improper trading or lending and receive from one fifth to one half of the penalty.³⁴ Qui tam actions were so pervasive by 1805 that the Supreme Court observed “[a]lmost every fine or forfeiture under a penal statute, may be recovered by an action of debt [i.e., by a qui tam relator]

²³ Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into A Modern Weapon*, 65 TENN. L. REV. 455, 458 (1998).

²⁴ *The History and Development of Qui Tam*, *supra* note 19, at 90.

²⁵ *Id.*

²⁶ *Id.* at 94.

²⁷ See James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1263 (2013).

²⁸ *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 776 (2000).

²⁹ Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137–38.

³⁰ Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124–25.

³¹ Act of Mar. 1, 1790, ch. 2, § 6, 1 Stat. 103.

³² Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 102.

³³ Act of Sep. 2, 1789, ch. 12, § 8, 1 Stat. 67.

³⁴ Act of Feb. 25, 1791, ch. 10, §§ 8, 9, 1 Stat. 195, 196.

as well as by information [by a public prosecutor].”³⁵ Even *McCulloch v. Maryland*, a landmark case adored by constitutional law students, was premised on a *qui tam* action.³⁶

C. The Rise and Fall of the *Qui Tam* after the Civil War

Eventually, all the First Congress’s *qui tam* statutes were repealed, but a spark of life for the *qui tam* in America reemerged during the Civil War. In 1863, the False Claims Act and its accompanying *qui tam* device were enacted to combat defense contracting fraud against the Union.³⁷ Some of the fraudulent transactions included: (1) the repeated sale of the same mule, (2) ships with rotted hulls concealed by fresh paint, (3) flimsy boots made of cardboard, and (4) uniforms made from recycled rags, which fell apart when wet.³⁸

Introducing Senate Bill 467 on January 16, 1863, Senator Harry Wilson of Massachusetts summarized the situation’s urgency:

The Government is doing what it can to stop these frauds and punish the persons who commit them. The Government finds however, that it has no law adequate to punish them . . . [T]he War Department says there is now no law adequate to meet these cases of fraud upon the Government. This bill is reported for the purpose of ferreting out and punishing these enormous frauds upon our Government; and, for one, my sympathies are with the Government, and not with the men who are committing these frauds.³⁹

The FCA relied on the private citizen for help, who could either have a financial incentive or a personal vendetta against the individual or entity the citizen prosecutes. It rewarded an informer who “comes into court and betrays a coconspirator” by “setting a rogue to catch a rogue.”⁴⁰

A contemporary district court opinion, commenting on the FCA’s legislative history, made this explicit:

[The FCA] was passed upon the theory . . . that one of the least expensive and most effective means of preventing

³⁵ *Adams v. Woods*, 6 U.S. 336, 341 (1805).

³⁶ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

³⁷ Act of Mar. 2, 1863, ch. 67, 12 Stat. 696.

³⁸ See Helmer, Jr., *supra* note 27, at 1264 (“Brooks Brothers glued together shredded, often decaying rags . . . which would literally melt on soldiers wearing them in the first rainstorm.”)

³⁹ CONG. GLOBE, 37th Cong., 3d Sess. 955, 956 (1863).

⁴⁰ *Id.*

frauds is to make the perpetrators 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.⁴¹

The financial incentive, half the recovery and attorneys' fees, was presumably strong.⁴² Unlike the modern FCA, the Civil War's iteration did not provide for government intervention or dismissal after the suit was filed.⁴³ The private relator only needed to receive the government's consent to settle.⁴⁴

The FCA was significantly weakened in 1943 when Attorney General Francis Biddle campaigned to overhaul the FCA because of "parasitical" legal actions.⁴⁵ These were brought by citizens who hunted the rare FCA case by watching for indictments against government contractors and then suing them under the FCA.⁴⁶ After unsuccessfully attempting to persuade the Supreme Court that the FCA was unconstitutional, Attorney General Biddle convinced the House to pass a resolution abolishing all qui tam actions.⁴⁷

While the 1943 FCA amendments signed into law did not abolish qui tam legally, they did so practically. Lincoln's FCA guaranteed half the recovery to successful relators; Roosevelt's left the relator payout—if there was one—to the government's discretion.⁴⁸ Courts were also required to dismiss qui tam actions if anyone in the government had any knowledge of the alleged fraud.⁴⁹ This was true even if the relator had tipped off the government before bringing their own claim.⁵⁰ Consequently, the federal government retained complete control of fraud claims for nearly forty years—until Congress determined that the federal government needed help again.

⁴¹ See *United States v. Griswold*, 24 F. 361, 366 (D. Ore. 1885).

⁴² An Act to Prevent and Punish Frauds § 6, 12 Stat at 698.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Eliminating Private Suits for Penalties and Damages Arising out of Frauds Against the United States*, S. REP. NO. 77-1708, at 2 (1942).

⁴⁶ See Helmer, Jr., *supra* note 27, at 1267.

⁴⁷ *Id.*

⁴⁸ An Act to Limit Private Suits for Penalties and Damages, ch. 144, § 1, 57 Stat. 609.

⁴⁹ 31 U.S.C. § 232(c) (1943).

⁵⁰ See, e.g., *Safir v. Blackwell*, 579 F.2d 742, 746 (2d Cir. 1978), cert. denied, 441 U.S. 943 (1979).

D. The 1986 Amendments

The government spent heavily in the 1980s, especially on defense.⁵¹ The federal government was skewered in the press over reports of excessive spending on items like \$660 ashtrays, \$600 toilet seats, and \$7,000 coffee pots.⁵² Almost half of the top 100 highest-earning defense contractors were under fraud investigation, and four of the largest had already been convicted.⁵³ After prolonged hearings in 1985, Congress found that, despite the DOJ following up on at least some FCA allegations, the DOJ was simply overwhelmed.⁵⁴ Even the General Accounting Office conceded that an individual or entity actually caught committing fraud was unlikely to ever face criminal or civil penalties.⁵⁵ Concluding that it was overburdened in policing fraud, like medieval England and the Union's war effort, the United States Government would once again call on relator assistance via the qui tam device.⁵⁶ Congress would substantially strengthen the FCA, leading to its current iteration and surrounding controversy.⁵⁷

In 1985, James Helmer, Jr., whose detailed history of the FCA is cited in this Comment, testified before Congress.⁵⁸ Coincidentally, at the same time Congress was dealing with a reinvigorated wave of fraud related to defense contracting, Helmer had filed the only pending FCA action.⁵⁹ Helmer rediscovered the FCA in federal banking regulation while providing legal counsel for a General Electric employee who had been fired for refusing to falsify timecards while working on a government project.⁶⁰ When subpoenaed to testify, Helmer made numerous recommendations to Congress for strengthening the FCA, and President Reagan signed all of Helmer's recommendations into law.⁶¹ In Helmer's words: "The 1986 amendments recognize that the magnitude of the fraud problem is such that a solid partnership needs to be forged between government prosecutors and private

⁵¹ See Purcell, Jr., *supra* note 16, at 942; see also Helmer, Jr., *supra* note 27, at 1271.

⁵² See Helmer, Jr., *supra* note 27, at 1271–72.

⁵³ *Id.* at 1272; see also S. REP. NO. 99-345, at 2–3 (1986) (reprinted in 1986 U.S.C.C.A.N. 5266, 5267).

⁵⁴ See Helmer, Jr., *supra* note 27, at 1272.

⁵⁵ GAO Report to Congress, "Fraud in Government Programs: How Extensive Is It? How can it be Controlled?" (1981).

⁵⁶ Purcell, Jr., *supra* note 16, at 942.

⁵⁷ False Claims Amendments Act of 1986, HR 4827, 99th Cong. (May 15, 1986); see Meador & Warren, *supra* note 23, at 460.

⁵⁸ See Helmer, Jr., *supra* note 27, at 1273.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

whistleblowers and their counsel. To that end, the 1986 amendments encourage, incentivize, and protect relators in numerous ways.”⁶²

E. The Modern False Claim Act’s Power is in its Qui Tam Provisions

At the heart of the 1986 amendments were its qui tam provisions, which would enable the government to combat fraud in the modern age without “adding one more person to the Federal payroll.”⁶³ To incentivize whistleblowers, the 1986 amendments again offered relators costs, fees, and up to 15 to 30 percent of recovered damages.⁶⁴ It also incentivized compliance. Now, the FCA imposes treble damages and additional penalties.⁶⁵ During a sixty-day period after filing, the DOJ investigates the claim and determines whether the government should intervene and control the case or remain on the periphery, allowing the plaintiff to continue litigating on its own (though still on the government’s behalf).⁶⁶ For employers, this means that an unhappy employee with intimate knowledge of a business’s operations could participate in a secret government investigation for sixty days or more. Even if the government does not intervene during the sixty-day period, the government can later intervene with good cause⁶⁷ or even seek the case’s dismissal.⁶⁸

The FCA has proved a massive success, allowing the government to reap more than \$75 billion in recovery since 1986.⁶⁹ In the 2023 fiscal year alone, the government recovered over \$2.68 billion in settlements and judgments through the FCA.⁷⁰ The government has recovered more than \$2 billion for fifteen consecutive years.⁷¹ Congress’s attempt to recruit whistleblowers also worked. By one estimate, the DOJ received six qui tam cases per

⁶² *Id.*

⁶³ *False Claims Act Amendments: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 99th Cong., 2d Sess. 417 (1986) (statement of John Phillips, Center for Law in the Public Interest).

⁶⁴ 31 U.S.C. § 3729(a)(1).

⁶⁵ *Id.*

⁶⁶ 31 U.S.C. § 3730(b)(4)(A), (c)(1).

⁶⁷ 31 U.S.C. § 3730(c)(3).

⁶⁸ 31 U.S.C. § 3730(c)(2)(A).

⁶⁹ Press Release, U.S. Dep’t. of Just., *False Claims Act Settlements and Judgments Exceed \$2.68 Billion in Fiscal Year 2023* (Feb. 22, 2024), <https://perma.cc/3AE4-ZGKY>.

⁷⁰ *Id.*

⁷¹ *Fraud Statistics – Overview*, U.S. DEPT OF JUST., <https://perma.cc/WSX5-DQKU>.

year until 1985.⁷² After the 1986 FCA amendments, it averaged hundreds. Out of the 1,112 new FCA matters in 2023, 712 were the product of qui tam suits by whistleblowers. In the 2021, 2022, and 2023 fiscal years, relators earned \$263 million, \$496 million, and \$349 million, respectively.⁷³ One relator took home a record-setting \$900 million in 2022.⁷⁴ The role played by both the FCA and those who act as relators in our federal government is undeniable. The important question is whether it is constitutional.

III. LITIGATING THE FALSE CLAIMS ACT'S CONSTITUTIONALITY

This section discusses the theoretical underpinnings of the challenges to the FCA. Critics argue that the FCA's relator provision violates Article II because it impermissibly delegates executive prosecutorial power to a private citizen, the FCA whistleblower. This section first introduces the unitary executive theory, which is the view that executive power should concentrate solely in the President. This section then turns to judicial opinions to illustrate the unitary executive theorist's critique of the FCA. This section concludes with an overview of the district court's *Zafirov* opinion, which dismissed an FCA case on the ground that FCA relators violate Article II by wielding significant government power without having undergone presidential appointment.

Despite several federal courts of appeals upholding the FCA's constitutionality,⁷⁵ scholars,⁷⁶ practitioners,⁷⁷ and now at least one member of the federal judiciary has argued that the FCA is unconstitutional. But this debate is just a subset of a larger flashpoint in modern jurisprudence: the extent of the President's power relative to the other branches of government. There are a few constitutional provisions at issue, all in Article II. First, the Vesting Clause states that "[t]he Executive Power shall be vested

⁷² Steve France, *The Private War on Pentagon Fraud*, 76 A.B.A. J. 46, 48 (1990).

⁷³ DOJ-Initiated False Claims Act Cases Reached Record High in Fiscal Year 2023, PERKINS COIE (Feb. 23, 2024), <https://perma.cc/ZJ5Q-S4WX>.

⁷⁴ *Id.*

⁷⁵ See, e.g., *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) (en banc); *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994).

⁷⁶ See, e.g., Kathryn Feola, *Bad Habits: The Qui Tam Provisions of the False Claims Act Are Unconstitutional Under Article II*, 19 J. CONTEMP. HEALTH L. & POL'Y 151, 186 (2003) ("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.").

⁷⁷ Robert S. Salcido & Emily I. Gerry, *Courts Should Finally Rule that the False Claims Act Qui Tam Provisions Are Unconstitutional*, AKIN GUMP (Mar. 15, 2024), <https://perma.cc/UEG2-7DRR>.

in a President of the United States of America.”⁷⁸ Second, the Take Care Clause states that the President “shall take Care that the Laws be faithfully executed.”⁷⁹ Third, the Appointments Clause requires that the President “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.”⁸⁰

Under a strong view of presidential power, the FCA’s relator provisions conflict with Article II. The anti-FCA argument relies on the following propositions. First, the executive power—all of it—is vested in the President. Therefore, FCA relators improperly exercise executive power by litigating in the name of the United States. Second, by initiating litigation, the FCA relator forces the Executive to assess the relator’s case. Congress has improperly interfered with Executive’s mandate to execute the laws because the FCA relator forces the Executive to realign its enforcement strategy. The President must have discretion in how and whom it prosecutes. Third, and most important to the recent decisions, FCA relators are illegally operating as “Officers of the United States” because (1) they wield significant authority, and (2) have not been appointed by the President and confirmed by the Senate. Of course, this is a matter of interpretation. One school of thought necessary to understand this conflict is the “unitary executive theory,” which advocates for an expansive, muscular view of presidential power.⁸¹

A. The Unitary Executive Theory and Article II

Referred to by some as an “extreme” view,⁸² the theory of the unitary executive made national headlines as commentators tried to describe the flurry of actions taken by President Trump at the beginning of his second term.⁸³ While it is undisputed that the President wields some significant, even exclusive power, some argue that this executive policymaking authority is plenary and

⁷⁸ U.S. CONST. art. II, § 1.

⁷⁹ U.S. CONST. art. II, § 3.

⁸⁰ U.S. CONST. art. II, § 2.

⁸¹ See *Unitary Executive Theory (UET)*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, <https://perma.cc/GXX7-F5N6>.

⁸² See, e.g., Michael Waldeman, *The Extreme Legal Theory Behind Trump’s First Month in Office*, BRENNAN CENT. FOR JUST. (Feb. 19, 2025), <https://perma.cc/C8DX-5MM2>.

⁸³ See, e.g., John Kruzal, *‘Unitary Executive’ Theory May Reach Supreme Court as Trump Wields Sweeping Power*, REUTERS (Feb. 14, 2025), <https://perma.cc/3QN9-KEV6>.

cannot be constrained by Congress or the Judiciary.⁸⁴ A similar but more nuanced view is that the President must have the ability to remove principal officers.⁸⁵ In that view, the executive power is concentrated in the President, who has the unrestricted ability to remove the heads of agencies at will, including agencies structured to be independent from the President, and to direct how executive agencies and officers enforce the law.⁸⁶

Unitary executive proponents have argued against relator provisions before. In 1989, then-Assistant Attorney General William Barr authored a DOJ memo arguing that the FCA qui tam provision is unconstitutional.⁸⁷ Barr asserted that Congress's transfer of executive power away from the President and to the FCA relator is impermissible under the Constitution's separation of powers principle.⁸⁸ According to Barr, the Executive must have the discretion to decide whether to enforce the law or initiate prosecution. This is because "only a unitary executive properly can balance the competing interests at stake, including law enforcement, foreign affairs, national security, and the overriding interest in just administration of the laws."⁸⁹

Justice Scalia is credited by many with bringing the unitary executive into the contemporary mainstream in his 1988 *Morrison v. Olson* dissent.⁹⁰ In that case, Olson asserted that the Ethics in Government Act was unconstitutional because it provided a process for investigating government officials via a court-appointed special prosecutor who could only be fired "for cause." First, Olson argued that the special counsel in the case was a "principal officer" and was acting without proper appointment procedures.⁹¹ Second, Olson argued that the Act interfered with the President's

⁸⁴ Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 88 (2021) ("In a sense, everyone agrees that the Constitution creates a 'unitary executive.' There is one President, not an executive council, and the President is broadly in charge of the executive branch. But reasonable people strenuously disagree about what a unitary President entails.").

⁸⁵ *Morrison v. Olson*, 487 U.S. 654, 724 n.4 (1988) (Scalia, J., dissenting) ("[Article II] requires that [the President] have plenary power to remove principal officers such as the independent counsel, but it does not require that he have plenary power to remove inferior officers.").

⁸⁶ See generally Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323 (2016).

⁸⁷ William P. Barr, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 OP. OFF. LEGAL COUNSEL 207, 210 (1989).

⁸⁸ *Id.*

⁸⁹ *Id.* at 231.

⁹⁰ *Morrison*, 487 U.S. at 724.

⁹¹ *Id.* at 673.

duty to enforce the law, which necessarily requires hiring and firing officials.⁹²

The majority upheld the law on the ground that the independent counsel's work was limited and terminated upon completion.⁹³ Further, the judges who appoint the independent counsel do not themselves supervise their appointees, meaning that the judiciary was not retaining for itself any executive power.⁹⁴ Congress was also not enriching itself at the Executive's expense: the Appointments Clause permits Congress to vest inferior officer-appointment power in the President, the heads of departments, or the Judiciary. Critically, in *Morrison*, the Executive still maintained "several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel."⁹⁵

In the sole dissent, Justice Scalia argued that the statute violated separation of powers principles because the legislative branch directed an officer to perform a purely executive function.⁹⁶ Further, he said that granting an official who is outside of the President's full supervision with purely executive functions marks a "revolution" in the Court's jurisprudence.⁹⁷ According to Justice Scalia, Congress was encroaching on the Executive when it enlisted a judicially appointed independent counsel, who possessed a removal restriction, to investigate and possibly prosecute high-ranking government officials.⁹⁸

Recent cases, with conservative justices in the majority, have solidified the unitary executive theory as a mainstay view on the Roberts Court. In *Seila Law*, the Court struck down a law restricting the President's ability to remove the head of the Consumer Financial Protection Bureau at will.⁹⁹ Prior to that case, it was generally understood that Congress had the ability to create removal restrictions for heads of independent agencies, at least under some conditions.¹⁰⁰ Those restrictions meant that the President could only fire independent agency heads for cause. Others have argued that *Trump v. United States* also reflects a

⁹² *Id.* at 677.

⁹³ *Id.* at 692–93.

⁹⁴ *Id.* at 677 (“[W]e do not think that appointment of the independent counsel by the court runs afoul of the constitutional limitation on ‘incongruous’ interbranch appointments.”).

⁹⁵ *Id.* at 696.

⁹⁶ *Id.* at 705.

⁹⁷ *Id.* at 708.

⁹⁸ *See id.*

⁹⁹ *Seila L. LLC v. CFPB*, 591 U.S. 197, 220 (2020).

¹⁰⁰ *See, e.g., Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

“maximalist theory of executive power.”¹⁰¹ The Court held that separation of powers entitles a former President to (1) absolute immunity from criminal prosecution for actions taken within his constitutional authority, and (2) at least presumptive immunity from prosecution for all his official acts.¹⁰²

Against the backdrop of a Court that appears to be bolstering and consolidating executive power, it becomes clear why the FCA will become a target: Congress appears to have invited private whistleblowers to assist the executive in executing the law. While the cases challenging the FCA do not explicitly refer to the unitary executive theory, they undeniably echo Justice Scalia’s contention that the Vesting clause “does not mean some of the executive power [belongs to the President], but *all* of the executive [power].”¹⁰³

While the *Zafirov* district court decided the case on the Appointments Clause issue, the President’s power—and its improper delegation—is undoubtedly in the background. Indeed, one of the hallmarks of the unitary executive theory is the President’s ability to hire and fire (at least) principal officers as he wishes. If FCA relators are in fact unappointed, or “self-appointed” “Officers of the United States,” then they have fractured the Executive by running rogue with core executive power. Under this view, FCA relators shape executive enforcement priorities and enforce federal law as nothing more than private bounty hunters.

B. The Appointments Clause

The FCA’s challengers assert that FCA relators impermissibly wield sufficient executive power to fit the description of an “officer” under Article II of the Constitution. Article II requires that principal officers are appointed by the President and confirmed by the senate.¹⁰⁴ Inferior officers may be appointed by department heads.¹⁰⁵ If FCA relators are officers, they are improperly wielding the authority and responsibility of that title because they are not appointed. If anything, they are self-appointed. In cases determining whether a government official is an “Officer of the United States,” Courts have typically asked whether the

¹⁰¹ See Jack Goldsmith, *The President’s Favorite Decision: The Influence of Trump v. U.S. in Trump 2.0*, LAWFARE (Feb. 10, 2025), <https://perma.cc/HN68-2K7F>.

¹⁰² *Trump v. United States*, 603 U.S. 593, 642 (2024).

¹⁰³ *Morrison*, 487 U.S. at 705.

¹⁰⁴ U.S. CONST. art. I, § 2, cl. 2.

¹⁰⁵ *Id.*

government official possesses “significant authority” and a position of “continuing duration.” However, that inquiry is not explicitly supported by Article II’s text.

Article II, Clause II, states:

“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he 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.”¹⁰⁶

The Appointments Clause makes two important distinctions between categories of government officials.¹⁰⁷ First, it separates “principal officers” from “inferior officers.” The President alone may appoint principal officers, and the Senate confirms them. Inferior officers may be appointed by the President, Courts of Law, or Department Heads if congressionally directed through statute. Another category, implied from Article II and developed by case law, is that of “employee.” Employees, who do not require appointment, are “lesser functionaries subordinate to officers of the United States.”¹⁰⁸

Despite Article II’s impact on day-to-day governmental operations, Article II does not draw a clear line between officers, in need of presidential appointment, and employees, who are simply hired. The Framers provided little guidance.¹⁰⁹ The Framers did think “it would be ‘impossible[le]’ for ‘one man’ to ‘perform all the great business of the State,’”¹¹⁰ so the President would need to appoint lower-ranking officials to conduct the State’s business. By requiring an appointment process, the Framers sought to

¹⁰⁶ *Id.*

¹⁰⁷ See generally, John T. Plecnik, *Officers Under the Appointments Clause*, 11 PITT. TAX REV. 201 (2014).

¹⁰⁸ *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

¹⁰⁹ *Morrison v. Olson*, 487 U.S. 654, 671 (1988).

¹¹⁰ THE FEDERALIST NO. 70, at 475 (Alexander Hamilton) (J. Cooke ed. 1961).

establish accountability in a single person.¹¹¹ The identity of the nominating person would be clear.¹¹²

C. Modern Jurisprudence for Determining Who Is an “Officer”

To determine whether an official is an officer in need of appointment, the Supreme Court has based its decision on what kind of power the official wields and for how long she wields it. In *Buckley v. Valeo*, the first in this modern line of case law, the Court held 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 that Article.”¹¹³ Another important factor is whether the official has a “continuing position established by law.”¹¹⁴ An important determination for who has “significant authority” is whether the official has “day-to-day” supervision.¹¹⁵ If not, their authority is significant. Another case in this line, *Freytag*, affirmed this factor and added “final decision-making authority” and duration of service to the Court’s considerations.¹¹⁶ Consequently, the Supreme Court has held that several officials wielding significant authority qualify as officers, including administrative judges¹¹⁷ and the Director of the Consumer Financial Protection Bureau.¹¹⁸

In 2018, the Supreme Court heard *Lucia v. Securities and Exchange Commission*, and it used the occasion to resolve a circuit split by fleshing out the definition of an “officer” with slightly more detail.¹¹⁹ In that case, the SEC charged Lucia, an investment advisor, with using misleading presentations when pitching to potential investors.¹²⁰ Lucia’s case was assigned to one of the SEC’s five Administrative Law Judges, or ALJs. ALJs are powerful: “An SEC ALJ exercises authority comparable to that of a federal district judge conducting a bench trial.”¹²¹ The ALJ found Lucia

¹¹¹ Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 765–66 (2008).

¹¹² Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 444, 447 (2018).

¹¹³ *Buckley*, 424 U.S. at 125–26.

¹¹⁴ *Lucia v. SEC*, 585 U.S. 237, 245 (2018).

¹¹⁵ *Buckley*, 424 U.S. at 140.

¹¹⁶ *Freytag v. Comm’r*, 501 U.S. 868, 881–82 (1991).

¹¹⁷ *United States v. Arthrex*, 594 U.S. 1, 13 (2021).

¹¹⁸ *Seila L. LLC v. CFPB*, 591 U.S. 197, 219–20 (2020).

¹¹⁹ 585 U.S. 237.

¹²⁰ *Lucia*, 585 U.S. at 242. Lucia marketed a retirement savings strategy called “Buckets of Money.”

¹²¹ *Id.* at 241–42.

liable and imposed hundreds of thousands of dollars in sanctions.¹²² On appeal to the SEC, Lucia argued that the sanctions are invalid because the ALJ is an “Officer of the United States” and had not been appointed by either the President, a Court of Law, or a Head of a Department under Article II. The SEC rejected that argument, finding that ALJ’s, despite the power they wield, are mere federal employees.¹²³

The Supreme Court held that ALJs are “officers of the United States.”¹²⁴ Relying on *Freytag*, the Court held that to qualify as an officer, and not a mere employee, an individual must hold a “continuing position established by law,” and “must exercise significant authority pursuant to the laws of the United States.”¹²⁵ First, the Court ruled that ALJs “hold a continuing position established by law.”¹²⁶ ALJs “receive a career appointment [under 5 C.F.R. § 930.204(a) (2018)], [a]nd that appointment is to a position created by statute, down to its duties, salary, and means of appointment.”¹²⁷ ALJs also wield significant authority. They issue initial decisions containing factual findings, legal conclusions, and appropriate remedies.¹²⁸ The SEC can choose not to review the ALJ’s decision, giving the ALJ final decision-making authority.¹²⁹

To summarize, the two factors the Court considers when determining whether an official is an “officer of the United States,” in need of Article II appointment, are “duration of service” and “significant authority.” As Justice Sotomayor pointed out in *Lucia*, “The first requirement is relatively easy to grasp; the second, less so.”¹³⁰ And as Justice Sotomayor predicted, the ambiguity in determining whether an official has enough “significant authority” to be an “officer” can strain the courts. That ambiguity makes it difficult for both Congress and the Executive Branch, both in knowing how to draft laws and in whether officials should be properly appointed. This uncertainty has the potential to unravel decades of precedent and norms about separation of powers.

¹²² *Id.*

¹²³ *Id.* at 243.

¹²⁴ *Id.*

¹²⁵ *Id.* at 237–38 (citations omitted).

¹²⁶ *Id.*

¹²⁷ *Id.* at 238 (citations omitted).

¹²⁸ *Id.* at 239.

¹²⁹ *Id.*

¹³⁰ *Id.* at 269.

D. Judicial Challenges to the FCA's Constitutionality

With the Appointments Clause's text and its modern jurisprudence in view, this Comment now turns to two recent judicial opinions in which the Appointments Clause's stringent requirements and the FCA relator's alleged "significant authority" came into conflict. The first sign of trouble for the FCA was Justice Clarence Thomas's dissent and Justices Kavanaugh's and Barrett's concurrences in 2023's *Polansky* decision.¹³¹ A relator filed an FCA claim, alleging that his employer, which helped hospitals bill the government for Medicare services, was committing fraud by allowing hospitals to bill inpatient charges for outpatient services.¹³² The primary issue was whether the government could dismiss a relator's *qui tam* action over the relator's objection even if the government did not intervene during the initial period in which the complaint was under seal.¹³³ After engaging in complex statutory construction, the Court held that the government retains the right to dismiss after it intervenes at any point, even if it did not intervene during the initial seal period, because the government retains an interest in the relator's action.¹³⁴

Dissenting, Justice Thomas used the opportunity to express his concerns with the FCA. According to Justice Thomas, the authority wielded by a relator and the responsibility entrusted to her may well qualify the relator as an "officer" needing formal presidential appointment. Justice Thomas acknowledged that there are "substantial arguments" that the *qui tam* is inconsistent with Article II because "[t]he entire 'executive Power' belongs to the President alone,"¹³⁵ and can only be exercised by the President and those acting under him. This assumes that enforcement authority, which is typically exercised by the executive, may *only* be exercised by the executive. Under this view, because the FCA relator looks like someone who is an "officer of the United States," but has not gone through the Article II appointment process, Congress may not authorize a relator to wield executive authority to represent the United States' interests in litigation.¹³⁶ Justice Thomas noted that the primary argument in favor of the FCA's

¹³¹ United States ex rel. *Polansky* v. Exec. Health Res., Inc., 599 U.S. 419 (2023).

¹³² *Id.* at 428.

¹³³ *Id.* at 426.

¹³⁴ *Id.* at 435.

¹³⁵ *Id.* at 449 (Thomas, J., dissenting) (quoting *Seila L. LLC v. CFPB*, 591 U. S. 197, 213 (2020)).

¹³⁶ *Polansky*, 599 U.S. at 450.

qui tam device is its historical pedigree.¹³⁷ Still, he argued that “historical patterns cannot justify contemporary violations of constitutional guarantees.”¹³⁸ Further, reliance on early American practices is suspect when legal mechanisms, such as qui tam, are derived from the English system of parliamentary supremacy—something that Article II clearly departed from.¹³⁹

E. A District Court Judge Found the FCA’s Qui Tam Provision Unconstitutional

Another departure from precedent occurred on September 30, 2024, when Judge Kathryn Mizelle, of the Middle District of Florida, dismissed Dr. Clarissa Zafirov’s FCA lawsuit against her employer.¹⁴⁰ Judge Mizelle was the first federal judge to rule that the FCA’s qui tam provisions are inconsistent with Article II.¹⁴¹ Judge Mizelle held that a relator possesses the characteristics of an “officer of the United States,” subject to Presidential appointment. Specifically, FCA relators have “significant authority” and occupy “continuing positions established by law.”¹⁴² By the time the case was dismissed in September 2024, Zafirov had been litigating for over five years.¹⁴³ Though the government initially declined to intervene, its position changed when the defendants argued against the FCA’s constitutionality.¹⁴⁴

Judge Mizelle concluded that an FCA relator is an “officer” under Article II.¹⁴⁵ The opinion relied heavily on *Buckley*, which held that Federal Election Commission officials were officers because (1) they conducted civil litigation in order to vindicate public rights, and (2) the FEC officials possessed “broad administrative powers” that “represented the performance of a significant governmental duty exercised pursuant to public law.”¹⁴⁶

Like Justice Thomas, Judge Mizelle took issue with a non-appointed party wielding prosecutorial discretion.¹⁴⁷ Citing several Supreme Court cases, the district court’s *Zafirov* opinion

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, 751 F. Supp. 3d 1293 (M.D. Fla. 2024).

¹⁴¹ Daniel Wilson, *Novel FCA Decision Amplifies Voices of Whistleblower Critics*, LAW 360 (Oct. 1, 2024), <https://perma.cc/JV3K-S7YQ>.

¹⁴² *Zafirov*, 751 F. Supp. at 1307.

¹⁴³ *Id.* at 1300.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Buckley v. Valeo*, 424 U.S. 1, 126, 140 (1976).

¹⁴⁷ *Zafirov*, 751 F. Supp. at 1308.

marched through holdings indicating that prosecution is a core executive power belonging to the President. The court ruled that the FCA's relator provisions are misaligned with these holdings because the Constitution entrusts only to the President the responsibility to "take Care that the Laws be faithfully executed."¹⁴⁸ Judge Mizelle, quoting many of the same cases as Justice Thomas's *Polansky* dissent, expressed concern that FCA relators exercise power that belongs to the President and those he appoints because the "the executive power—all of it—is vested in the President."¹⁴⁹

Judge Mizelle then discussed a litany of the FCA relator's characteristics that liken it to the FEC officials in *Buckley*.¹⁵⁰ First, the relator files a complaint "without ex ante oversight" to initiate a lawsuit on behalf of the United States.¹⁵¹ Only the Attorney General can intervene or bring a related action.¹⁵² The sixty-day period, in which the complaint is under seal, "forces the Executive branch to align its investigative priorities with those of a self-interested third party."¹⁵³ Even if the government does intervene, the relator remains a party in the action.¹⁵⁴ If the government does not intervene, the relator continues litigating until final judgement, "however she chooses," and her choices can bind the federal government.¹⁵⁵ According to the opinion, this is "textbook" significant authority.

Finally, Judge Mizelle rejected the arguments pertaining to qui tam's historical pedigree.¹⁵⁶ Zafirov's historical arguments were premised on the fact that early Congresses enacted qui tam statutes. Zafirov argued that early qui tam statutes insulate the FCA from Article II challenges. On the contrary, Judge Mizelle asserted that a focus on early enactments is overbroad: "enactment by the First Congress is not a guarantee of a statute's constitutionality."¹⁵⁷

Further, early qui tam statutes "reveal a complicated relationship between founding-era relators and properly appointed

¹⁴⁸ *Id.* (quoting U.S. CONST. art. II, § 3).

¹⁴⁹ *Zafirov*, 751 F. Supp. at 1300 (quoting *Seila L. LLC v. CFPB*, 591 U. S. 197, 203, (2020)).

¹⁵⁰ *Zafirov*, 751 F. Supp. at 1307.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1318.

¹⁵⁷ *Id.* at 1319–20.

officers,” often involving only nominally private enforcement actions, allowing the government to retain control over the relator’s litigation decisions.¹⁵⁸ According to Judge Mizelle, the argument that any early qui tam statute supports the FCA’s case for constitutionality is misguided because there were three distinct types of early qui tam provisions: (1) those that provided a bounty and an express cause of action, (2) those that provided a bounty only, and (3) those that allowed injured parties to sue in vindication of their own interests and the government’s.¹⁵⁹

The argument continued that ordinary bounty statutes offering informers rewards do not bestow powers of the executive branch by permitting the informer to bind the U.S. government through litigation.¹⁶⁰ Likewise, statutes that establish a cause of action related to an injury that is both public and private is analogous to an environmental citizen-suit.¹⁶¹ Only the category of early qui tam provisions that included a bounty and a cause of action to informers resembles the FCA.¹⁶² While Zafirov had not identified a constitutional challenge to the FCA throughout the nation’s history, this was only because use of the FCA’s current qui tam device was a relatively new phenomenon.¹⁶³ There has only been a proliferation of qui tam suits over the last forty years, since the law was amended. In conclusion, Judge Mizelle held that the proper remedy for the FCA’s unconstitutional qui tam provision is dismissal.

IV. INTERPRETING THE FALSE CLAIMS ACT

Judicial decision making, including the choice to declare a law unconstitutional, depends on judicial interpretation. Two dominant interpretive methods, purposivism and originalism, offer different approaches to statutory interpretation. Purposivism focuses on Congress’s broader policy goals; originalism seeks to apply the original public meaning of a legal text at the time of its enactment. When difficult interpretive issues arise, judges resort to various tools to aid in understanding and applying the text. One tool, the constitutional avoidance canon, is a principle that guides courts to interpret statutes as compatible with the Constitution, whenever possible. Based on a longstanding tradition of

¹⁵⁸ *Id.* at 1320.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

judicial restraint in respecting Congress's lawmaking authority, the constitutional avoidance canon has been adopted by purposivist and originalist jurists. Ultimately, it reflects the principle that courts should invalidate legislation only in cases of clear constitutional conflict.

A. Interpretive Methods

Judicial decisions are a matter of interpretation.¹⁶⁴ When reaching decisions, judges interpret statutes to fulfill their duty of saying "what the law is."¹⁶⁵ While judges interpret laws, it is Congress that enacts laws. Indeed, "[a]ll approaches to statutory interpretation are framed by the constitutional truism that the judicial will must bend to the legislative command."¹⁶⁶ In other words, Congress passes laws, and courts, as Congress's "faithful agents," ensure the laws are implemented. Much controversy arises when courts engage in "judicial activism," which includes exceeding their duty of interpreting law and venturing into making law. Judicial lawmaking would violate the "separation of powers" doctrine, which is rooted in the text and structure of the Constitution.¹⁶⁷ It reflects the Framers' intent to delineate the boundaries of each branch's power.¹⁶⁸

Two dominant theories of interpretation today are purposivism and textualism.¹⁶⁹ While adherents of both methods endeavor to implement the law as Congress passed it, each case is different, and differences of opinion arise when both sides apply the law in specific cases before the Court. The Court then must ask how Congress intended for the law to apply in *this* case. While it is usually impossible for courts to know what Congress "actually" meant when it passed a law, purposivists and textualists both try to develop a workable objective intent.¹⁷⁰

Purposivists generally consider the problem that Congress was trying to solve when it passed legislation.¹⁷¹ This is often accomplished by determining the law's "policy context" through examining both the text and any reliable materials produced

¹⁶⁴ See generally Orin S. Kerr, *How to Read a Legal Opinion: A Guide for New Law Students*, 11 GREEN BAG 2d 51 (2007).

¹⁶⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁶⁶ See Abner J. Mikva & Eric Lane, *Legislative Process*, at 102 (2d ed. 2002).

¹⁶⁷ See VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS (2023).

¹⁶⁸ *Id.* at 4-5.

¹⁶⁹ *Id.* at 2.

¹⁷⁰ *Id.* at 11.

¹⁷¹ *Id.*

through the legislative process.¹⁷² Critics argue that judges lack the “institutional competence” to understand all that goes into lawmaking, a complex, political process that often involves much compromise.¹⁷³ Thus, finding a shared intent is impossible and can often lead courts to ignore the text in favor of personal policy preferences.¹⁷⁴

Textualists argue that courts respect Congress when they look to the text alone to determine its meaning.¹⁷⁵ It is the text—not legislative materials—that survived the highly complex political maneuvering.¹⁷⁶ Textualists try to ascertain how a reasonable person familiar with the “relevant social and linguistic practices” would have understood the text.¹⁷⁷ That is the text’s meaning, and that is what judges should apply.

Originalism shares much with textualism, especially in its focus on the public meaning of legal texts. While textualism typically applies to statutes, originalism extends this method to constitutional interpretation. Adherents of originalism,¹⁷⁸ the interpretive method typically used by most members of the current Supreme Court,¹⁷⁹ tend to look to a text’s original public meaning when determining its application. Proponents argue that textualism guides Congress in making laws; if Congress intends a particular outcome, it needs to ensure that intention makes it into the text.¹⁸⁰ Critics argue that originalism is overly formalistic and overlooks the inherently interpretive nature of judicial power. Further, Congress may already legislate with the background assumption that courts would consider the broader policy context when implementing the law.¹⁸¹

B. Constitutional Avoidance

The constitutional avoidance canon is one guiding principle used by both purposivists and textualists on the Supreme Court when interpreting texts. This canon requires the Court to

¹⁷² *Id.* at 12.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 14.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See generally Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory* (2011), GEORGETOWN L. FACULTY PUBLICATIONS AND OTHER WORKS, 1353 (2011).

¹⁷⁹ See Jonathan Gienapp, *Why Is the Supreme Court Obsessed with Originalism?*, YALE UNIV. PRESS (Oct. 21, 2024), <https://perma.cc/B3CF-X6E9>.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

consider whether there are other interpretations of the sources before arriving at one that renders a statute unconstitutional: “When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is possible by which the question may be avoided.”¹⁸²

The constitutional avoidance canon is premised on the idea that respect for the separation of powers requires the Court to only declare an act of Congress unconstitutional when it plainly violates the Constitution. Indeed, when confronted with a constitutional challenge that is not a plain violation, the Court can practice “passive virtues” by sending unsettled constitutional problems to the political realm for resolution.¹⁸³ First, deciding not to decide a case with a constitutional issue keeps the Court out of spirited political debates and will largely shield the Court from political backlash.¹⁸⁴ Second, by not deciding constitutional issues in hard cases, the Court demonstrates to the other branches and the American public that it is truly the arbiter of firmly established Constitutional principles.¹⁸⁵ Third, by not deciding a hard case, the Court incentivizes dialogue among the other branches and “allows the Court to better gauge what is the appropriate constitutional principle animating a particular issue.”¹⁸⁶ Exercising passive virtues may be the Court’s optimal decision in an era of hyper-partisan politics and the Court’s waning approval among the public. Of course, there is often debate about what threshold determines how “plain” an alleged violation must be to trigger a constructive canon, but this canon encourages judicial restraint.¹⁸⁷

Constitutional avoidance is also as old as the founding. Alexander Hamilton invoked the avoidance canons in Federalist 81, arguing that where there is “evident opposition” between statutes and the Constitution, the Constitution must prevail.¹⁸⁸ But in

¹⁸² *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

¹⁸³ See BRANNON, *supra* note 169, at 6.

¹⁸⁴ *Id.* at 7.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See, e.g., *Muscarello v. United States*, 524 U.S. 125, 138–39 (1998) (holding that a statute was not vague enough to invoke the rule of lenity, which would have provoked the court to rule for a criminal defendant).

¹⁸⁸ See THE FEDERALIST NO. 81 (Alexander Hamilton) (J. Cooke ed. 1961).

Federalist 78, Hamilton argued that only an “irreconcilable variance” should invalidate a statute as unconstitutional.¹⁸⁹

Some of the most committed originalists and textualists have advocated for avoidance canons in some fashion despite its extra-textual premise. Justice Scalia, who viewed the avoidance canon as a tiebreaking mechanism, presupposed that between two interpretive options, “Congress did not intend the alternative [interpretation] which raises serious constitutional doubts.”¹⁹⁰ The current Roberts court has had no issue with the avoidance canon, and on one occasion made known that it was taking the less plausible interpretation of the Affordable Care Act to avoid striking it down: “it is only because we have a duty to construe a statute to save it, if fairly possible, that [the mandate] can be interpreted as a tax [instead of insurance].”¹⁹¹

V. APPLYING THE INTERPRETIVE METHODS TO THE FALSE CLAIMS ACT AND ARTICLE II

This section offers interpretations from a purposivist perspective, demonstrating that the Supreme Court would have ample grounds to construe the FCA in a way that avoids finding it unconstitutional. Specifically, the purpose of the FCA’s relator provisions was to empower whistleblowers to assist the government in uncovering and prosecuting fraud. It was not to create “Officers of the United States” with significant decision-making authority. This understanding is reinforced by the text of the FCA, which includes multiple safeguards to ensure that the Executive Branch retains control over relator-initiated litigation.

When Congress enacted and amended the FCA, it did not intend to diffuse executive power nor transform a whistleblower into a member of the executive branch. Rather, Congress was trying to address “one of the crying evils of the period,” that the “Treasury is plundered from day to day by bands of conspirators, who are knotted together [. . .] for the purpose of defrauding and

¹⁸⁹ THE FEDERALIST NO. 78 (Alexander Hamilton) (J. Cooke ed. 1961) (emphasis added). For an extensive treatment of Hamilton and constitutional avoidance, see Brian Taylor Goldman, *The Classical Canon as a Principle of Good-Faith Construction*, 43 J. LEGIS. 170 (2016) (“Moreover, Hamilton’s argument evokes the classical avoidance canon, which instructs judges to disregard even the most natural reading of a statute if such reading would violate the constitution and there exists another reasonable alternative reading.”).

¹⁹⁰ *Clark v. Martinez*, 543 U.S. 371, 381–82 (2005); see also *INS v. St. Cyr*, 533 U.S. 289, 336 (2001) (Scalia, J., dissenting).

¹⁹¹ *National Federation of Independent Business v. Sebelius*, 132 S. Ct. at 2600–01 (opinion of Roberts, C.J.).

plundering the government.”¹⁹² That was equally true in both 1863 and 1986, when a report discussing the proposed amendments conceded that “Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity.”¹⁹³ Senator Chuck Grassley, the 1986 Senate bill’s primary author, said that the “basic, essential purpose of the Act,” was to “empower private citizens to help the government fight fraud.”¹⁹⁴ Thus, the practical effect of the 1986 amendments was that it “increases incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government.”¹⁹⁵

First, the purpose of the 1986 amendments was to empower private citizens, not to transform private whistleblowers into officials, officers, or employees of the United States. The text of the statute reveals that a whistleblower retains her private interest and identity: “A person may 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.”¹⁹⁶ Bringing a lawsuit “for” oneself and on behalf of the United States does not change the lawsuit’s private nature, nor does it eliminate the relator’s private interest in the case’s outcome so essential to the Act’s legislative history.

Second, the purpose of the FCA was for relators to have an interest in the outcome of litigation to which the United States may become a party, not for relators to assume the responsibility of “executing” federal law in the Article II sense. Even the Supreme Court has maintained that the relator has standing, not because she has been entrusted with significant prosecutorial authority or responsibility for vindicating federal rights, but because she has a private, assigned interest in the outcome of the suit.¹⁹⁷ Justice Scalia, writing for the majority, made explicit that the FCA “can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.”¹⁹⁸ A relator has not assumed the responsibility of taking care that laws be faithfully executed, nor does the relator’s presence in the lawsuit make the

¹⁹² CONG. GLOBE, 37th Cong., 3d Sess. 955 (1863).

¹⁹³ *The False Claims Reform Act of 1985*, S. REP. NO. 99-345, 99th Cong., 2d Sess. 4 (1986).

¹⁹⁴ Press Release, *False Claims Act Is Our Most Important Tool to Fight Fraud Against Taxpayers*, Senator Grassley (Apr. 28, 2016), <https://perma.cc/5KZM-W79G>.

¹⁹⁵ *Id.* at 2.

¹⁹⁶ 31 U.S.C. § 3730(b)(1).

¹⁹⁷ *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000).

¹⁹⁸ *Id.* at 773.

Executive any less unitary—the relator is pursuing a private interest for personal gain that Congress has full authority to establish. In this sense, they are much like citizen suits. Remarkably, Justice Scalia supported this conclusion by reciting a key piece of evidence dismissed in *Zafirov*: “the long tradition of qui tam actions in England and the American Colonies, which conclusively demonstrates that such actions were ‘cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.’”¹⁹⁹

Neither the Constitution nor the case law addresses the restraints and limits on a private individual prosecuting on the government’s behalf. While both *Polansky* and *Zafirov* speak of relators as if they hold “positions” within the federal government, that reasoning is not supported by the statute or its legislative history. FCA relators do not even occupy a hired, “continuing position” like the officials in the Supreme Court case law. A relator is distinguishable from an official like the administrative law judge in *Freytag*, whose responsibility continued without a designated end point. There is also no indication that the Framers intended to prevent private whistleblowers from aiding the Executive in an enforcement proceeding when they drafted Article II. Indeed, one of the appellate courts to hear the issue held that Article II does not apply to private whistleblowers, nor does it preclude them from assisting federal law enforcement.²⁰⁰ The Ninth Circuit observed that the *Morrison* opinion referred to the independent counsels’ functions as “executive” in the sense that they are law enforcement functions that *typically* have been undertaken by officials within the Executive Branch.”²⁰¹ That court interpreted “typically” to indicate that prosecutorial functions need not always be undertaken by executive officials.²⁰²

Third, the FCA’s purpose was to assist the executive in rooting out fraud that it is unlikely to uncover on its own, not to empower Congress or the Judiciary at the Executive’s expense. Recall that in *Morrison*, the Court upheld a statute in which it was “undeniable” that the law reduced the President’s and the Attorney General’s supervision over a judicially appointed independent counsel. The Court conceded that under the EGA, the AG could not appoint the individual of his choice, determine the counsel’s jurisdiction, or remove the counsel at will. However, the act gave

¹⁹⁹ *Id.* at 776.

the AG “several means of supervising or controlling the prosecutorial powers that may be wielded,” including for cause removal, which the Court held was sufficient to ensure the laws are “faithfully executed by an independent counsel.

The district court in *Zafirov* overstated the relator’s power.²⁰³ Assuming Article II applies to private citizens, it seems that Congress intended for the Executive, through the Attorney General, to maintain substantial control over FCA litigation. This easily exceeds the standard set in *Morrison*. Under 31 U.S.C. 3730, the following requirements ensure Executive control:

- Upon a relator filing, the Government must receive a copy of the complaint and a written disclosure of all material evidence.²⁰⁴
- The complaint is sealed for at least 60 days, with possible extensions, while the government reviews the evidence in camera.²⁰⁵
- The Government may proceed with the action and assumes the right to conduct the action.²⁰⁶
- When the Government brings an action itself, no other party may join.²⁰⁷
- When the Government assumes the action, “it shall have the primary responsibility for prosecuting the action and shall not be bound by an act of the person bringing the action,” even though that person may remain as a party.²⁰⁸
- The Government may dismiss the action over the relator’s objection if the relator is provided a hearing.²⁰⁹
- The Government may settle with the defendant over the relator’s objections provided the court determines the settlement is fair.²¹⁰
- The relator must provide the Government with copies of filings and transcripts if the Government requests.²¹¹

²⁰³ See Brief for Petitioner-Appellant at 28, *United States ex rel. Zafirov v. Florida Medical Associates, LLC*, Nos. 24-13581 (11th Cir. Jan 6, 2025) (“A relator’s filing of a qui tam suit, subject to this upfront review by the government, is thus nothing like the government’s filing of a criminal indictment.”).

²⁰⁴ 31 U.S.C. § 3730(b)(2).

²⁰⁵ *Id.*

²⁰⁶ 31 U.S.C. § 3730(b)(4)(a).

²⁰⁷ 31 U.S.C. § 3730(b)(5).

²⁰⁸ 31 U.S.C. § 3730(c)(1).

²⁰⁹ 31 U.S.C. § 3730(c)(2)(A).

²¹⁰ 31 U.S.C. § 3730(c)(2)(B).

²¹¹ 31 U.S.C. § 3730(c)(3).

- The Government may later choose to intervene and then has the authority to move to dismiss at any time.²¹²

It is difficult to reconcile the restrictions placed on the relator with the district court's statement in *Zafirov* that an FCA relator "enjoys unfettered discretion to decide whom to investigate, whom to charge in the complaint, which claims to pursue, and which legal theories to employ."²¹³ These provisions demonstrate that Congress left in place numerous opportunities for the Executive to ensure that a relator's action remains consistent with executive enforcement policies. Indeed, if the Supreme Court were confronted with the issue of whether the FCA's relator provisions violate the separation of powers principles, the Court would have a strong textual and historical basis to support the conclusion that the FCA does not vest a relator with "significant authority," nor that it is a tacit form of congressional aggrandizement. Rather than diminishing the Executive's core power or taking on a prosecutorial role for itself, Congress made a policy decision in the FCA's amendments about the laws the Executive must carry out. Aware of both Article II and the rampant fraud plaguing the Government, Congress bolstered the Executive's power by enlisting highly motivated Americans to serve their country. That interpretation of the FCA's purpose is not only plausible, but also the most reasonable.

VI. AN ORIGINALIST INTERPRETATION OF ARTICLE II AND THE FALSE CLAIMS ACT

The FCA does not violate Article II because Article II does not regulate private actors who do not hold a position within the federal government. The FCA relator provisions do not create an "office" for the whistleblower.²¹⁴ And while Article II does not define "Officer," Professor Jennifer Mascott has revealed that the original public meaning of the term "officer" was "any official responsible for an ongoing statutory duty."²¹⁵ Applying this framework to the FCA, relators do not qualify as Article II officers because their role is voluntary and lacks an ongoing statutory duty. From

²¹² *Polansky*, 599 U.S. at 438–39.

²¹³ *Zafirov*, 751 F. Supp at 1301.

²¹⁴ *Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 805 (10th Cir. 2002).

²¹⁵ Professor Jennifer Mascott is an associate professor of law at the Catholic University of America. Like Judge Mizelle, Professor Mascott served as a law clerk for Justice Clarence Thomas. See *Jennifer Mascott*, the Catholic University of America: Columbus School of Law, <https://perma.cc/RW34-8WNK>.

an originalist perspective, this undermines recent constitutional challenges to the FCA's relator provisions, which tend to be advanced by originalists. This understanding of Article II reveals another plausible constitutional interpretation that would preserve the FCA's relator provisions.

A. Who are "Officers of the United States"?

Professor Mascott's work substantially advanced the originalist scholarship of Article II by showing that, at the founding, "officers of the United States" would have been understood to mean any government official with responsibility for an ongoing duty created by law. This finding means that the Supreme Court's modern "significant authority" jurisprudence in determining who qualifies as an Article II officer is misguided.²¹⁶

In *Who are "Officers of the United States"?*, Professor Mascott analyzed how those in the founding era would have distinguished "officers" subject to the Appointments Clause from non-Article II "employees" common under modern administrative hiring practices.²¹⁷ Mascott argued that the "significant authority test" used in modern jurisprudence is rooted in nineteenth-century sources and is both underinclusive and overinclusive of how the term was used in the eighteenth century.²¹⁸ Relying on "key-Word-in-Context" analysis based on corpus linguistics,²¹⁹ Mascott analyzed how the term "officer" was used in context before and after ratification in sources such as the Constitution's drafting history, founding-era debates, Continental Congress-era uses, newspapers, dictionaries, and federalist and anti-federalist essays. The evidence Mascott uncovered indicates that Article II did not create a new, technical meaning for "Officer" such that it became a term of art.

B. The First "Officers" According to the First Congress

Some of the strongest evidence that an "officer" was anyone with a responsibility for an ongoing duty comes from the First Congress. Jennifer Mascott was able to identify who the First

²¹⁶ Mascott, *supra* note 112, at 447.

²¹⁷ *Id.* at 452.

²¹⁸ *Id.* at 453.

²¹⁹ *Id.* at 467 ("[C]orpus linguistics is the study of language function and use by means of an electronic collection of naturally occurring language called a corpus . . . The core idea underlying [Key-Word-in-Context] analysis is to examine the context surrounding uses of the term or phrase under review as the term was actually employed in spoken or written English during the relevant time period.").

Congress considered an Article II officer by (1) examining every statute enacted by the First Congress to determine the appointment procedures established by these statutes, and (2) cross-referencing those positions with each personnel expenditure identified by Secretary of the Treasury Alexander Hamilton in his reports to Congress. From there, Mascott could deduce who received federal funds either without undergoing appointment by an Article II procedure or without serving in a position established by law. Because Article II requires “Officers” to be both appointed and fulfill a position “established by law,” any official who did not meet one of these requirements suggests that Congress did not view them as an Article II officer.²²⁰

Perhaps anticlimactically, the dividing line between “Officer” and non-officer from the First Congress and the earliest payroll was between departmental clerks and nonofficer messengers.²²¹ Departmental rank-and-file clerks were subject to appointment, meaning that Congress considered the clerks to be Article II officers.²²² Hamilton’s payrolls also had the positions of “copyist” and “messenger/office-keeper,” which were not established by statute.²²³ Accordingly, Congress must not have believed that those government employees were officers. Indeed, several early employees who were appointed under Article II, on the payroll, and fulfilling a position created by statute wielded very little authority and did not affect the rights of third parties.²²⁴ Therefore, it is highly unlikely that the First Congress viewed a position’s “significance” as the dividing line between an Article II “officer” and a mere employee. The better explanation is that rank-and-file department clerks performed tasks created by statute, and the messengers did not.²²⁵ To reiterate, the original public meaning of “officer” under Article II likely has nothing to do with the significance of an official’s authority, but whether they have responsibility for a federal statutory duty. This led Jennifer Mascott to conclude that a vast portion of modern government employees who are not subject to Article II appointment probably should be.²²⁶ This also means that the “significant authority” benchmark

²²⁰ *Id.* at 510.

²²¹ *Id.* at 512.

²²² *Id.* at 512.

²²³ *Id.*

²²⁴ *Id.* at 513.

²²⁵ *Id.* at 514.

²²⁶ *Id.* at 561 (though this proposal is “far-reaching,” “[t]he text of Article II, early practice, and previous executive branch interpretations thus suggest that even if a large

used in cases like *Buckley* and *Freytag* almost certainly deviate from Framers' intent.

C. The Appointments Clause's Original Public Meaning and the False Claims Act

Not only is the Appointments Clause inapplicable to FCA relators, but it has nothing to do with any private citizen. Even if, from an originalist perspective, the FCA raised genuine constitutional concerns, the Appointments Clause is simply the wrong pathway to address those concerns. If the original public meaning of "Officers of the United States" referred only to officials with statutorily created responsibilities, it could not apply to private whistleblowers who sue under the False Claims Act. Instead, "the Appointments Clause performs an extremely important function within its sphere—defining the roles of, and procedures to be followed by, the President and Congress in filling the most important positions within the federal government—but that sphere is limited and does not encompass assignments of authority to private actors."²²⁷

A collection of federal appeals cases affirms the relator's private status.²²⁸ First, an FCA relator remains a "private person" who is not "employed" by the United States.²²⁹ Second, Congress did not create an "office" for the informer under the FCA.²³⁰ Third, Congress has not "vested the relator with any governmental power."²³¹ Taken together, federal courts have held—until *Zafirov*—that relators could not be subject to the Appointments Clause because relators are not government officials.

A plausible, robust originalist interpretation of Article II matters not only to invoke the constitutional avoidance canon, but also because several of the FCA's sharpest critics are originalists. In his concurrence in *Lucia*, Justice Thomas argued that ALJs fit the description of officers based on how "the founders" would have

percentage of civil service employees were classified as officers, their appointment could be accomplished by the final signoff of a department head.").

²²⁷ Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 374 (1998).

²²⁸ See Brief for Appellant United States of America at 23, *United States ex rel. Clarisa Zafirov v. Florida Medical Associates, LLC, et al* (11th Cir. January 6, 2025).

²²⁹ See *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 587 U.S. 262, 272 (2019).

²³⁰ *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 805 (10th Cir. 2002).

²³¹ *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994).

understood the term.²³² Citing Jennifer Mascott on several occasions, Justice Thomas observed that ALJs “easily qualify” as officers under the Appointments Clause’s original public meaning because they have “responsibility for an ongoing statutory duty.”²³³ Taken together, concerns about separation of powers principles and encroachment upon the Executive “simply are not implicated” by FCA relators.²³⁴ Accordingly, an originalist adjudicating *Zafirov* on appeal would need to reconcile how the Framers would have defined an “Officer of the United States” with the fact that FCA relators are private citizens pursuing private interests, and they remain so throughout any proceeding.

VII. CONCLUSION

The FCA’s relator provisions have been challenged before. In August 1942, U.S. Attorney General Francis Biddle, concerned that too many relators were acting on information already possessed by the government, wrote to a senator recommending that Congress repeal the FCA’s relator provisions.²³⁵ Concerned that FCA relators wielded too much power over false claims enforcement, Biddle also argued that the government “should have sufficient time in which carefully to consider the advisability of bringing such suits and the nature and contents of the pleading to be filed, instead of being forced to proceed in the hasty manner which alone is now available.”²³⁶

Francis Biddle was ultimately successful in challenging what he considered significant deficiencies in the FCA. But it was not by arguing that the Appointments Clause applied to private actors; it was through an Act of Congress.²³⁷ While it is the Executive who must execute the laws, it is Congress who was vested with federal lawmaking power. Sincere policy disagreements over a law’s effectiveness and the procedure for executing it are normal. Respecting the will of the People requires respecting the laws enacted by their representatives. Laws are subject to change, through the proper channels. If the FCA’s relator provisions do not reflect the Executive’s policy interests, the political

²³² *Lucia*, 585 U.S. 237, 253 (J. Thomas concurring).

²³³ *Id.* at 253–55.

²³⁴ *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 759 (9th Cir. 1993).

²³⁵ S. REP. NO. 77-1708, at 2 (1942) (reprinting Attorney General Biddle’s letter to Senator Van Nuys, dated August 28, 1942).

²³⁶ See 89 CONG. REC. 7571 (1943) (reprinting Attorney General Biddle’s letter to Senator Van Nuys, dated March 22, 1943).

²³⁷ Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (1943).

branches—not the courts—have the power to make necessary changes. Just as qui tam provisions have ebbed and flowed with society’s ability to provide an effective police force, Congress may once again decide that relators are unnecessary. Until then, it is the Court’s duty to say what the law is. And that law remains the Government’s strongest means of combating fraud and protecting American taxpayers.

Whatever policy disagreements exist regarding the private enforcement of a public right, the FCA’s relator provisions are consistent with Article II. The canon of constitutional avoidance counsels the Court to preserve the statute when plausible interpretations render it constitutional. Relator statutes have deep historical roots, appearing in some of the Nation’s earliest laws. Congress enacted the FCA to address a pressing problem: the government’s inability to effectively police fraud. To remedy this, it created a framework that incentivizes private citizens to assist the government in enforcing the law. Although a relator sues in the name of the United States, the Executive retains meaningful control over the litigation’s course and outcome. Moreover, Article II’s Appointments Clause applies only to officers of the United States—individuals who occupy ongoing federal positions and exercise significant authority. Private citizens acting as relators do not fall within this category. A court reviewing *Zafirov* on appeal should conclude that the FCA’s qui tam provisions reflect a valid exercise of Congress’s power to structure enforcement mechanisms consistent with the Constitution’s separation of powers.

