NOTES

THE CONSTITUTIONALITY OF THE FALSE CLAIMS ACT'S *QUI TAM* PROVISION

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The False Claims Act[1] (sometimes referred to as the "FCA" or the "Act") is the statutory scheme that imposes liability on persons or corporations who make fraudulent demands for payment on the United States Government.[2] The FCA was originally enacted in 1863 in an effort to curb the corrupt behavior of government defense contractors during the Civil War.[3] The substantive provisions of the FCA have subsequently been amended twice—"in 1943 and 1986"—and defense contractors have remained its primary target.[4] The current version of the statute provides for treble damages, plus a civil penalty of between $5,000 and $10,000 for each violation.[5]

The FCA has always had a dual enforcement mechanism. Primary responsibility for enforcing the Act is vested in the Attorney General, who is required by the terms of the Act to investigate violations "diligently."[6] The FCA also has a *qui tam*[7] provision, however, that allows any private person with independent knowledge of a violation to bring suit in an individual capacity—as a "*qui tam* relator" or "*qui tam* plaintiff"—and

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1. 31 U.S.C. §§ 3729-33 (West Supp. 1992). Unless otherwise noted, all citations to the United States Code are to West Supp. 1992.

2. 31 U.S.C. § 3729(a).

3. United States v. Bornstein, 423 U.S. 303, 309 (1976). The original FCA is set forth at Act of March 2, 1863, ch. 67, 12 Stat. 696.

4. United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609-10 (N.D. Cal. 1989). The FCA is not limited by its terms to the defense industry; relators have brought actions under the Act against a variety of defendants. *See, e.g.*, United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991)(bringing action against county water authority); United States v. Kensington Hosp., 760 F. Supp. 1120 (E.D. Pa. 1991)(bringing action against health-care facility); United States v. First Nat'l Bank of Cicero, 736 F. Supp. 891 (N.D. Ill. 1990)(bringing action against commercial lender).

5. 31 U.S.C. § 3729(a).

6. *Id.* at § 3730(a).

7. "*Qui tam*" is short for "*qui tam pro domino rege quam pro se imposo sequitur*," which means "who brings the action as well for the king as for herself." Bass Anglers Sportsman's Society v. United States Plywood-Champion Papers, Inc., 324 F. Supp. 302, 305 (S.D. Tex. 1971).

on behalf of the United States of America.[8] If such a *qui tam* relator is successful, he receives as much as 30 percent of the total award.[9]

Despite the long history of the FCA's *qui tam* provision, questions concerning the constitutionality of the provision have surfaced only recently, prompted by a rash of *qui tam* litigation that followed the 1986 amendments to the FCA.[10] To counter these lawsuits, defendants have launched a tri-partite attack on the constitutionality of the *qui tam* provision. They argue that the provision ignores Article III's standing requirement, violates Article II's Appointments Clause, and offends the separation-of-powers principle. To date, no federal appellate court has rigorously analyzed the constitutionality of the FCA *qui tam* provision. Only a handful of federal district courts have engaged in serious discussion of the issue, and each of these has upheld the provision's constitutionality.[11] A small body of scholarly work supports their conclusions.[12] Subsequent Supreme Court cases on the issues of constitutional standing[13] and the Appointments Clause[14] cast doubt on the district courts' holdings, however, and raise anew questions about the constitutionality of the FCA's *qui tam* provision.

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8. 31 U.S.C. § 3730(b). A *qui tam* action is defined by *Black's Law Dictionary* as

> an action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution.

BLACK'S LAW DICTIONARY 1251 (6th ed. 1990).

9. 31 U.S.C. § 3730(d)(stating that the amount of award to *qui tam* plaintiff varies, depending on such factors as whether the Department of Justice intervenes in the lawsuit and how important the *qui tam* plaintiff's information is to the ultimate success of the action).

10. *See* Steve France, *The Private War on Pentagon Fraud*, 76 A.B.A. J. 46, 46 (1990)(noting that 198 *qui tam* suits had been filed under the revised law as of October 26, 1989).

11. Federal district courts have upheld the constitutionality of the FCA *qui tam* provision on all three grounds in the following cases: United States *ex rel.* Burch v. Piqua Engineering Inc., 145 F.R.D. 452 (S.D. Ohio 1992); United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084 (C.D. Cal. 1989); United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615 (C.D. Cal. 1989); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607 (N.D. Cal. 1989); Hyatt v. Northrop Corp., No. CV 87-6892 KN (Jrx)(C.D. Cal. Dec. 27, 1989); *cf.* United States *ex rel.* Kelly v. Boeing Co., No. 92-36660, 1993 WL 336,011 (9th Cir. Sept. 7, 1993).

12. *See* Evan Caminker, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341 (1989); Thomas R. Lee, Note, *The Standing of* Qui Tam *Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543 (1990).

13. *See* Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992).

14. *See* Freytag v. Commissioner of Internal Revenue, 111 S. Ct. 2631 (1991).

This Note scrutinizes the various arguments relied upon by district courts and academics to uphold the constitutionality of the *qui tam* provision and concludes that none of these arguments adequately addresses the constitutional problems that the provision presents, especially in light of recent Supreme Court cases. The first part of the Note sets the context for this analysis by describing the FCA's *qui tam* provision and by explaining the relationship that the statute creates between the rights and responsibilities of *qui tam* relators and the rights and responsibilities of the Department of Justice ("DOJ"). The second part of the Note considers the argument that the *qui tam* provision violates Article III of the United States Constitution by granting a cause of action to individuals who have suffered no "injury in fact" and thus lack constitutional standing. The third part discusses whether the *qui tam* provision violates the Appointments Clause of Article II of the Constitution by allowing individuals who are not properly appointed officers of the United States to litigate on behalf of the United States. Finally, the Note considers whether the *qui tam* provision violates the separation-of-powers principle by stripping the executive branch of its responsibility to "take Care that the Laws be faithfully executed."[15] The Note concludes that despite their long history, the FCA and its *qui tam* provision are out of step with modern constitutional jurisprudence and should be held unconstitutional.

I. The Structure Of The FCA *Qui Tam* Provision

Since the first incarnation of the FCA in 1863, the *qui tam* provision has been justified by a "whistleblower" rationale.[16] The idea was that individuals within the defense industry would always have knowledge of fraud on the government that was superior to that of the DOJ. The statute was thus designed to provide such individuals with an incentive to drag fraudulent defense contractors into court by guaranteeing these whistleblowers a percentage of the recovery. Because of the

15. U.S. Const. art. II, § 3.

16. By describing the purpose of the *qui tam* provision as a "whistleblower rationale," I do not mean to suggest that the *qui tam* provision is the functional equivalent of ordinary whistleblower statutes. Though motivated by a similar purpose, the *qui tam* provision goes far beyond these statutes. It not only provides the whistleblower with protection from retaliatory discharge, but also allows him to prosecute the action in an individual capacity and guarantees him a percentage of the recovery.

magnitude of the fraud that was perpetrated on the government by defense contractors during the Civil War,[17] it was expected that awards under the FCA would be large enough to encourage even those who had participated in fraudulent activity themselves to bring suit as *qui tam* relators.[18]

A. *Amendments to the FCA*

The FCA has been amended twice—in 1943 and 1986—and both amendments modified the *qui tam* provision. The first of these amendments narrowed the circumstances under which an individual could bring a *qui tam* action. During World War II, there was a tremendous problem with "parasitic" lawsuits. The original FCA did not explicitly require a *qui tam* relator's lawsuit to be based on information that the relator acquired independently of a governmental inquiry. Thus, *qui tam* relators often brought suit based on public information contained in criminal fraud indictments. This created the predictable and undesirable outcome that whenever a criminal indictment was issued, there was a frenzied rush to file civil suits and claim *qui tam* awards.[19] Because these suits were based on information the government already had, they did nothing to further the *qui tam* provision's purpose of bringing to light fraud that the DOJ could not discover on its own. Parasitic suits served only to decrease what the government could recover from FCA defendants and to enrich *qui tam* relators who did nothing more than learn through the news media of a criminal indictment. For this reason, Congress amended the FCA in 1943 to prohibit *qui tam* actions that were based on information that had become public.[20]

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17. A contemporary article described the problem:

> For sugar [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories.

1 F. SHANNON, THE ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY, 1861-1865 58 (1965)(quoting Tomes, *Fortunes of War*, 29 HARPER'S MONTHLY 228 (1864)).

18. A sponsor of the original FCA suggested that *qui tam* actions would

> hold out to a confederate a strong temptation to betray his coconspirator, and bring him to justice. . . . I have based . . . [the bill] upon the old-fashioned idea of holding out a temptation, and "setting a rogue to catch a rogue. . . ."

CONG. GLOBE, 37th Cong., 3d Sess. 955-56 (1863)(remarks of Sen. Howard).

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

20. *Id.* at 609. This prohibition still exists in the current FCA as a jurisdictional bar:

By thus reining in *qui tam* opportunities, however, Congress undercut a great deal of the provision's original purpose. The ban on parasitic lawsuits originally swept quite broadly and prohibited *qui tam* suits based on *any* information that had become public, even if the *qui tam* relator herself had originally supplied the information to the government. Such a stringent ban had a negative effect on criminal fraud investigations, because anyone who had knowledge of such fraud would want to conceal it from the government, in fear that a criminal indictment would be issued based on the information and would subsequently bar a *qui tam* action. It was one of the purposes of the 1986 amendments to remedy this problem by lifting the bar if the *qui tam* relator was the "original source" of information that later became public.[21] Thus, in its current form, the FCA provides greater opportunity to potential *qui tam* relators than the 1943 version did, but creates a somewhat more limited cause of action than was available under the 1863 version.

B. *The Respective Roles of the DOJ and* Qui Tam *Relators*

The FCA defines the causes of action available under the Act and delineates the respective roles of the Department of Justice and *qui tam* relators.[22] The statute is complicated because once a *qui tam* action is filed, the degree of control that the DOJ can exercise over the action varies considerably, depending on several factors.

If the DOJ becomes aware on its own of a violation of the

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

31 U.S.C. § 3730(e)(4)(A). The "original source" exception was added in 1986 and was not part of the 1943 amendment.

21. *Newsham*, 722 F. Supp. at 609 n.4. In the current FCA, the jurisdictional bar does not apply if "the person bringing the action is an original source of the information" that has been publicly disclosed. 31 U.S.C. § 3730(e)(4)(A). "Original source" is defined as

> an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4)(B).

22. 31 U.S.C. § 3130.

FCA's substantive prohibitions,[23] the situation is simple. The DOJ may simply proceed, through the Attorney General, to bring an action against the perpetrator.[24] No *qui tam* relator is involved and the DOJ need not worry about its status in regard to any other party to the lawsuit. If a *qui tam* relator brings an action under the FCA, however, the DOJ's role is much more complicated.

If a private person brings suit under FCA as a *qui tam* relator, he sues both in an individual capacity and on behalf of the United States, and the action must be brought in the name of the government.[25] In such a situation, the *qui tam* relator does not merely serve him complaint on the defendant. The FCA requires first that a copy of the complaint be sent to the DOJ—together with all material information that formed the basis for the complaint—and that the complaint be filed with the court in camera, under seal, for at least a 60-day period.[26] The purpose of this 60-day sealing requirement is to give the DOJ an opportunity to review the complaint and accompanying information and to decide whether it wishes to intervene in the action.[27] Before the expiration of the 60-day period, the DOJ must either intervene and take over the lawsuit[28] or notify the court that it will not intervene, in which case the *qui tam* relator has the right to conduct the action.[29] The FCA allows the DOJ, "on good cause shown," to petition the court for an extension of the 60-day period,[30] but the legislative history directs courts to construe "good cause" narrowly and to grant such petitions only in extreme circumstances.[31]

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23. The substantive prohibitions of the FCA and definitions relevant thereto are set forth at 31 U.S.C. § 3129(a)-(c).

24. 31 U.S.C. § 3130(a).

25. *Id.* § 3130(b)(1). For this reason, the pleadings in FCA *qui tam* cases usually list the United States as principal plaintiff "*ex rel.*" the *qui tam* relator; for example, United States *ex rel.* Newsham v. Lockheed Missiles & Space Co.

26. 31 U.S.C. § 3730(b)(2).

27. *See, e.g.*, Avco Corp. v. United States Department of Justice, 884 F.2d 621, 626 (D.C. Cir. 1989); United States *ex rel.* Kreindler & Kreindler v. United Technologies, 777 F. Supp. 195, 198 (N.D.N.Y. 1991).

28. 31 U.S.C. § 3730(b)(4)(A).

29. *Id.* § 3730(b)(4)(B).

30. *Id.* § 3730(b)(3).

31. According to the report of the Senate Judiciary Committee,

> Extensions will be granted . . . only upon a showing of "good cause." The Committee intends that courts weigh carefully any extensions on the period of time in which the Government has to decide whether to intervene and take over the litigation. The Committee feels that with the vast majority of cases, 60 days is an adequate amount of time to allow Government coordination,

The DOJ's decision whether to intervene in an action brought by a *qui tam* relator is crucial because it determines the extent of control that the DOJ will subsequently have over the lawsuit. If the DOJ elects to intervene, it assumes primary responsibility for prosecuting the action.[32] It cannot eliminate the relator's right to continue as a party to the lawsuit, but it is not bound by any of the relator's actions and can proceed with the case as it sees fit, subject to the following enumerated limitations: First, if the DOJ wants to dismiss the action over the relator's objections, it can do so only after it has notified the relator and the court has granted the relator a hearing on the motion.[33] Second, if the DOJ wants to settle with the defendant over the relator's objections, it can do so only if the court determines, after a hearing, that the settlement is "fair, adequate, and reasonable under all the circumstances."[34] Third, if the DOJ wants to restrict the relator's participation in the case—such as by limiting the number of witnesses the relator may call or limiting the length of their testimony—it must satisfy the court that unrestricted participation by the relator would "interfere with or unduly delay the government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment."[35] Thus, if the DOJ elects during the 60-day sealing period to intervene in a *qui tam* action, it can direct the action, but the limitations set forth above substantially curtail the complete discretion that the DOJ would have had if it had brought the action itself.[36]

If the DOJ initially elects *not* to intervene in a *qui tam* lawsuit,

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review and decision. Consequently, "good cause" would not be established merely upon a showing that the Government was overburdened and had not had a chance to address the complaint. . . . The Government should not, in any way, be allowed to unnecessarily delay lifting of the seal from the civil complaint or processing of the *qui tam* litigation.

S. REP. No. 345, 99th Cong., 2d Sess. 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5289-90.

32. 31 U.S.C. § 3730(c)(1).

33. *Id.* § 3730(c)(2)(A).

34. *Id.* § 3730(c)(2)(B).

35. *Id.* § 3730(c)(2)(C). The defendant in a *qui tam* case can also petition the court to limit the relator's participation in the case, based upon a similar showing. *Id.* § 3730(c)(2)(D).

36. The government's interests are further curtailed in such a situation in that the *qui tam* relator is guaranteed at least 15 percent, but not more than 25 percent, of any eventual recovery, depending upon the extent to which the relator "substantially contributed to the prosecution of the action." *Id.* § 3730(d)(1). If the DOJ had brought the action on its own, of course, the government would retain the entire award.

the *qui tam* relator has the right to conduct the action.[37] The DOJ retains only the right to receive copies of all pleadings filed in the action and all deposition transcripts, at its own expense.[38] If the DOJ subsequently desires to re-enter the action, it may intervene on a showing of "good cause."[39] It is unclear how substantial a showing the DOJ must make to satisfy the "good cause" requirement, however, and it is also unclear how much control it will have over the action if it intervenes via this route. The statutory language is very limited. It provides only that "the court, *without limiting the status and rights of the person initiating the action*, may nevertheless permit the [g]overnment to intervene at a later date upon a showing of good cause."[40] There have been very few cases in which the DOJ has tried to re-enter a *qui tam* action after it initially declined to intervene, and none of these cases explains what limitation the statute places on the DOJ's discretion. No such limitation constrains the DOJ if it intervenes in the action during the 60-day period, however, and it seems fair to conclude that it would severely "limit the status and rights" of the *qui tam* relator if the DOJ later intervened and dismissed or settled the suit. It thus appears that unless the DOJ initially intervenes during the 60-day period, it loses all power to dismiss or settle the suit, even if it can show good cause why it should be allowed to intervene at a later date.[41]

II. The Standing Argument

One of the principal arguments that defendants have made against the constitutionality of the FCA *qui tam* provision is that *qui tam* relators have not suffered sufficient "injury in fact" to satisfy Article III's requirements for standing in the federal courts. This part of the Note begins by describing the requirements of modern standing doctrine. It then explains and evaluates the various arguments that courts have advanced to support their conclusion that *qui tam* relators have standing under Article III. It concludes by comparing the FCA's *qui tam* provision with the citizen-suit provision that the Supreme

37. *Id.* § 3730(c)(3).
38. *Id.*
39. *Id.*
40. *Id.* (emphasis added).
41. The constitutional significance of this limitation on the DOJ's discretion is discussed below in the separation-of-powers section of this Note.

Court struck down in its most recent decision involving constitutional standing, *Lujan v. Defenders of Wildlife*.[42] This comparison reveals that *qui tam* relators have an even less compelling claim to constitutional standing than the did plaintiffs in *Defenders of Wildlife* and that the *qui tam* provision therefore violates Article III.

A. *Article III Standing*

Article III of the Constitution limits the federal "judicial power" to "cases" or "controversies."[43] One of the most important doctrines to grow out of this case or controversy requirement is the standing doctrine. The Supreme Court has long recognized that unless a plaintiff has "standing" to bring a lawsuit, there is no case or controversy for Article III purposes, and the federal judicial power is incapable of acting on the dispute.[44] Standing is a litmus test that "identif[ies] those disputes which are appropriately resolved through the judicial process."[45] The present Supreme Court is strongly committed to this doctrine and recently held that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."[46]

Over the years, the Supreme Court has set forth three requirements that a plaintiff must satisfy to meet Article III's standing requirement. The Court summarized these in *Defenders of Wildlife:*

> [O]ur cases have established that the *irreducible constitutional minimum* of standing contains three elements: First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized,[47] . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." . . . Third, it must be "likely," as opposed to merely "specu-

42. 112 S. Ct. 2130 (1992).
43. U.S. CONST. art. III, § 2.
44. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984).
45. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).
46. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992).
47. The Court noted that "[b]y particularized, we mean that the injury must affect the plaintiff in a *personal and individual way*." *Id.* n.1 (emphasis added)(footnote by author).

> lative," that the injury will be "redressed by a favorable decision." . . .[48]

The Supreme Court has identified these three elements—injury in fact, causation, and redressability—as Article III's core standing requirements. In the Court's view, these requirements are not merely rules of case management, but also essential elements in a government of separate powers. As the Court held in *Defenders of Wildlife*, eliminating Article III's core standing requirements "would enable the courts, with the permission of Congress, 'to assume a position of authority over the governmental acts of another and co-equal department.' "[49] The "irreducible minima" of Article III standing are the outer constitutional limits of the federal judicial power and nothing—including a Congressional statute—can authorize the federal courts to hear cases in which the plaintiff cannot meet these constitutional requirements.

B. *Prudential Standing*

Analysis of standing issues is often confusing because the term does not always implicate the weighty constitutional concepts described above. Even when a plaintiff can demonstrate the requisite injury in fact, causation, and redressability necessary to satisfy Article III, the federal courts sometimes nevertheless turn to a body of common-law standing rules that "express merely prudential considerations that are part of judicial self-government."[50] Though not grounded in the Constitution, this "prudential" standing doctrine apparently places additional limitations on the categories of cases over which the federal courts will exercise jurisdiction—limitations that go beyond the "irreducible minimum" contained in Article III. In *Warth v. Seldin*,[51] the Supreme Court discussed two standing limitations that it considered to be merely prudential and not grounded in Article III:

> First, . . . when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. . . . Second, *even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement*, . . .

48. *Id.* at 2136 (emphasis added)(citations omitted).
49. 112 S. Ct. at 2145 (quoting Frothingham v. Mellon, 262 U.S. 447, 489 (1923)).
50. *Id.*
51. 422 U.S. 490 (1975).

> the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.[52]

The distinction between prudential standing and Article III standing is crucial. Congress clearly can, by statute, waive prudential standing limitations.[53] It is equally clear, however, that no "[c]ongressional enactment . . . can lower the threshold requirement for standing under Article III"[54] and that "[i]n no event . . . may Congress abrogate the Art[icle] III minima."[55] The potential relevance of this distinction is best explained by way of example. The language in *Warth v. Seldin* seems to suggest that if an individual has suffered general harm—for example, because his tax dollars were wasted—he has suffered sufficient injury in fact to satisfy Article III, but has not suffered a sufficiently "particularized" injury to overcome prudential standing limitations. Congress can waive this prudential limitation and create a cause of action in the federal courts for generalized injury. Because of Article III, however, Congress cannot waive the requirement that the plaintiff allege even the generalized injury.

The problem with this distinction between prudential standing and Article III standing is that it does not seem to exist in practice. In case after case, the Supreme Court has stated that generalized injuries cannot constitute sufficient injury in fact to satisfy Article III's essential requirements. Far from holding that Congress can—consistently with Article III—create causes of action for generalized injury, the Supreme Court has stated repeatedly that to satisfy Article III's injury-in-fact requirement, the plaintiff must have suffered harm that is "distinct and palpable,"[56] "concrete,"[57] "particularized, . . . personal[,] and individual."[58] This language clearly suggests that the plaintiff's jurisdictional prerequisite of alleging more than merely a generalized injury flows not from "prudential" notions of standing, but from Article III itself. If this is true, then the prudential elements of the standing doctrine appear to add nothing to Ar-

52. *Id.* at 499 (emphasis added)(citations omitted).
53. *Id.* at 501.
54. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 488 n.24 (1974).
55. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979).
56. *Warth*, 422 U.S. at 501.
57. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 (1974).
58. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 n.1 (1992).

ticle III's core requirements, and it seems that Congress is constitutionally prohibited in all circumstances from creating causes of action for generalized injury in the federal courts.

To date, the Supreme Court has not gone so far as to hold explicitly that prudential standing doctrine does not exist apart from the Article III minima. Indeed, the Court has recently reaffirmed its view that there exist outside Article III some standing requirements that Congress can waive. It wrote in *Defenders of Wildlife* that "[statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must herself have suffered an injury."[59] This assertion is premised on the assumption that there are some prudential standing requirements that Congress can waive. Because the Court has repeatedly held, however, that Article III requires this injury to be concrete and particularized, Congress necessarily has very little room to broaden the category of injuries that the federal judicial power can act upon before it implicates Article III's standing requirement and violates the Constitution. If prudential standing doctrine actually exists outside the parameters of Article III, it is a very narrow doctrine indeed.

C. *Theories to Support the Standing of* Qui Tam *Relators*

In light of this narrow view of standing doctrine, it is not surprising the defendants have challenged the *qui tam* provision of the FCA as a violation of Article III's standing requirement. What is perhaps more surprising is that the provision did not come under attack until the late 1980s. The provision grants a cause of action to individuals merely because they have independent knowledge of fraud on the government. *Qui tam* relators need not have suffered any injury at all as a result of the fraud they allege. Indeed, it is difficult to conceive of circumstances in which they would have suffered such injury.[60]

Few courts have passed on the issue of whether *qui tam* rela-

59. *Id.* at 2145-46 (quoting Sierra Club v. Morton, 405 U.S. 727, 738 (1972)).

60. A *qui tam* relator may be able to allege real injury in fact in some circumstances. For example, suppose a defense contractor has a contract with the government to develop a missile system. If the contractor so flagrantly overbills the government that there are huge cost overruns and the project gets canceled, the contractor will likely have to lay off employees. Such an employee could allege a real Article III injury if he could convince the court that there were sufficient causal links between the contractor's fraudulent behavior and the project cancellation and between the project cancellation and the layoffs. *See* Lee, *supra* note 12, at 555 n.12. This would be an extremely unusual

tors have standing to sue. Fewer still have directly addressed the constitutional dimensions of the issue.[61] There is no consensus among these courts as to why *qui tam* relators have standing; however, no court has yet held against an FCA *qui tam* relator on standing grounds. Those courts that have upheld relators' standing have made a variety of highly questionable arguments to justify their holdings: these courts either ignore the constitutional basis of Article III's injury-in-fact requirement, rely excessively on the long history of *qui tam* provisions, or justify the standing of *qui tam* relators by finding that they have suffered some manner of constructive injury. These courts' conclusions, however, are severely undercut by the Supreme Court's recent restatement in *Defenders of Wildlife* of a strong Article III standing requirement. It has become clear that the legal reasoning offered thus far is insufficient to rescue the *qui tam* provision from its Article III shortcomings.

1. *The "Statutory Right" Argument*

The least persuasive argument in favor of the standing of FCA *qui tam* relators has come from those courts that analyze the issue as though standing were merely a prudential doctrine and not an irreducible constitutional requirement. These courts are apparently moved by the language in *Warth v. Seldin* that suggests that Congress can waive prudential standing requirements and create statutory causes of action that allow individuals to sue for the redress of generalized harm.[62] As a result of this notion, a few courts looked no further than the terms of the FCA itself to uphold the standing of *qui tam* relators and never reached the more troubling Article III issue. For example, the Tenth Circuit breezed past the standing issue with one short sentence: "The statute of course eliminated any standing problem."[63] The statute certainly purports to grant standing to *qui tam* relators; if standing were merely a prudential doctrine that could be manipulated at will by Congress, the

situation, however, and there is nothing in the FCA to suggest that Congress intended it to apply to the unique class of plaintiffs who could allege such actual injury.

61. See *supra* note 12 for a list of cases that have engaged in thorough constitutional analysis of the FCA *qui tam* provision.

62. Warth v. Seldin, 422 U.S. 490, 501 (1975).

63. United States *ex rel.* Woodard v. County View Care, 797 F.2d 888, 893 (10th Cir. 1986). Similarly, the Fifth Circuit held that a *qui tam* relator had standing to sue simply because the FCA "clearly accords" standing to *qui tam* relators. United States *ex rel.* Weinberger v. Equifax, 557 F.2d 456 (5th Cir. 1977).

Tenth Circuit would probably be correct. The important question, however, is not whether Congress *did* eliminate the standing problem but whether it had the constitutional authority to do so.

Taken merely at face value, the language of *Warth* can be read to authorize Congress to grant standing to FCA *qui tam* relators. When a defense contractor defrauds the government and tax dollars are wasted, all taxpayers suffer. *Warth* appears to suggest that the reason one of these taxpayers cannot sue the defense contractor is because of the prudential standing doctrine that individuals cannot sue to redress a "generalized grievance."[64] If this is merely a prudential limitation, Congress is free to authorize such an action by allowing individual taxpayers to sue under the FCA as *qui tam* relators and vindicate the general interest of taxpayers as a whole.[65] Under this view of prudential standing doctrine, the Tenth Circuit would be correct that the FCA itself eliminates the relators' standing problem.

As observed above, however, the apparent contours of prudential standing as set forth in *Warth* are misleading. The Supreme Court has often held that it is Article III, and not mere prudential limitations alone, that requires a plaintiff to allege a distinct personal injury rather than a general grievance.[66] This has been particularly true in taxpayer cases. In *Valley Forge*, for example, an organization dedicated to the separation of church and state attempted to claim standing in federal court by alleging that its members had been "deprived of the fair . . . use of [their] tax dollar."[67] This "injury" is virtually indistinguishable from that suffered by FCA *qui tam* relators when their tax dollars go to fraudulent defense contractors. In holding that the plaintiffs in *Valley Forge* lacked standing, the Supreme Court did not mention prudential limitations on standing, but flatly held that taxpayer injury was insufficiently "personal" to satisfy Article III in almost all cases.[68] The Court reached a similar conclusion in *Schlesinger* when it held that Ar-

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

65. Congress has the power to waive merely "prudential" standing limitations. *Id.*

66. *See, e.g.*, Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 n.1 (1992); *Warth*, 422 U.S. at 501; *Schlesinger*, 418 U.S. at 221.

67. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 476 (1974).

68. *Id.* at 485.

ticle III—and not mere prudential limitations—prohibited taxpayers from suing to redress injury "held in common with all members of the public."[69] These cases are direct authority for the proposition that, notwithstanding *Warth*, Article III prohibits Congress from creating statutory causes of action based on undifferentiated taxpayer injury. More recently, the Court reaffirmed this idea in *Defenders of Wildlife* by holding that Article III allowed federal courts to adjudicate "individual rights" and that " '[i]ndividual rights' . . . do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public."[70]

In light of these cases, it is clearly wrong to assert baldly that Congressional authorization of *qui tam* suits in the FCA by itself "eliminate[s] any standing problem."[71] The analysis must go deeper than the statutory language and grapple with the more difficult constitutional principles. Regardless of what the FCA purports to authorize, *qui tam* plaintiffs must be able to show injury in fact, causation, and redressability in order to claim standing under Article III.

2. *The "Assignment" Argument*

One court has advanced an argument that is somewhat similar to the "statutory right" argument, but at least recognizes standing as a constitutional requirement. In *United States* ex rel. *Stillwell v. Hughes Helicopters, Inc.*, the court held that *qui tam* relators have no standing problem because the FCA "essentially creates, by legislative fiat, a *de facto* assignment of the government's interest in the action."[72] This argument has gained the support of one commentator, who describes the theory in contract jargon: "the FCA's *qui tam* provision is an enforceable unilateral contract, the terms and conditions of which are accepted by the relator upon filing the *qui tam* suit."[73]

This argument is not substantively different from the argument that *qui tam* relators have standing simply because the FCA says they do. It hardly seems to make a constitutional difference for a court to decide that Congress has "assigned" a

69. 418 U.S. at 220.
70. 112 S. Ct. at 2145.
71. United States *ex rel.* Woodard v. County View Care, 797 F.2d 888, 893 (10th Cir. 1986).
72. 714 F. Supp. 1084, 1098 (C.D. Cal. 1989).
73. Lee, *supra* note 12, at 564.

cause of action to someone, as opposed to the court's deciding that Congress simply "granted" the cause of action. There is, however, an interesting aspect of the assignment argument that cannot be dismissed quite so easily. As Thomas Lee points out, "[f]ederal courts traditionally have allowed suits by assignees of non-personal rights of action without questioning whether the assignee has asserted a personal injury."[74] Clearly the government has suffered financial injury when the FCA is violated, and there does not, at first blush, seem to be any justification for departing from the usual rule that an assignee of a cause of action has standing to sue even if he herself has not suffered injury.

This assignment rule is an exception to the general rule that a plaintiff must demonstrate personal injury-in-fact in order to have standing; there are persuasive reasons why Congress, as opposed to private parties, should not be allowed to take advantage of this exception when it creates statutory rights. The difference lies in one of the fundamental purposes of the standing requirement. Because a strong Article III standing requirement has been deemed by the Supreme Court to be essential to the maintenance of separation of powers, it would make no sense to allow Congress to circumvent the standing requirement merely by statutorily "assigning" a governmental cause of action to ordinary individuals.[75]

If the standing requirement is essential to the American system of separate governmental powers,[76] it follows that Congress operates under unique constraints and cannot have the

74. *Id.* at 563.

75. Of course, *qui tam* relators are not "ordinary" in one potentially important sense. They are unique in that they have specific knowledge that the government values highly; so highly, in fact, that it has chosen to give away part of its FCA cause of action in order to get it. An argument can be made that the FCA raises no standing problems because *qui tam* relators possess this unique knowledge and because the FCA grants them a substantive entitlement to a portion of the FCA award so that the knowledge will be used to bring those who violate the FCA to justice. Certainly these factors set the FCA *qui tam* provision apart from the statutory provisions that have been held in other cases to violate the standing requirement. This argument, however, does not address the fact that the Supreme Court's standing cases are virtually unanimous in their insistence that the standing requirement is premised on a notion of injury-in-fact. Because FCA *qui tam* relators have suffered no such injury *before* they initiate their *qui tam* lawsuits, the mere fact that the FCA grants them a substantive entitlement *after* the *qui tam* litigation is brought to a successful conclusion does not solve the standing problem that existed at the outset. This issue will be discussed further at various points throughout the Note, especially in Sections II.C.4 and II.D and in note 81.

76. The separation-of-powers arguments against the FCA *qui tam* provision will be considered in greater depth in Part IV of this Note.

same power to create standing through assignment that private parties have. In *Defenders of Wildlife*, the Court settled this question in no uncertain terms:

> If the [standing doctrine's] concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3.[77]

This language could just as easily be directed at the False Claims Act. By putting a *qui tam* provision in the FCA, Congress essentially has converted the public's interest in the DOJ's vigorous enforcement of the FCA into an "individual right" that is "vindicable in the courts" by anyone fortunate enough to discover fraud on the government. It is true that *qui tam* plaintiffs are not "undifferentiated" members of the public to the extent that they possess information concerning fraud on the government that ordinary citizens do not. For this reason, one might argue that a *qui tam* plaintiff has standing because he occupies a fundamentally different position in the litigation than the ordinary taxpayers did in such cases as *Valley Forge* and *Schlesinger*. However, the language from *Defenders of Wildlife* quoted above speaks not of "undifferentiated plaintiffs," but of the "undifferentiated public interest." Although it is beyond question that *qui tam* plaintiffs stand apart from ordinary taxpayers by virtue of the special information that they possess, there is no reason to believe that their "interest" in seeing this information used to root out fraud on the government is greater than that of any other taxpayer. To argue otherwise is similar to suggesting that taxpayers who are aware that their tax dollars are being squandered have a greater interest in stopping the wasteful activity than those who are unaware of it. The public's "interest" in remedying violations of the FCA does not turn on any special knowledge members of the public might have concerning violations, yet the FCA *qui tam* provision transforms this "undifferentiated public interest" into a right "vindicable in the courts" by anyone who happens to be aware of a violation. *Qui tam* rela-

77. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2145 (1992).

tors have no greater interest in stopping violations of the FCA than any other taxpayer has; the provision that lets them litigate these violations is exactly the kind of Congressional overreaching that the "irreducible minimum"[78] of Article III standing is designed to prevent.

The contractarian terms of the assignment theory seem oddly out of place in constitutional law, because they do nothing to change the fundamental constitutional problem that exists under the statutory rights theory. Congress simply cannot reduce the irreducible minimum of Article III's standing requirement, whether it does so by statutory grant or by statutory assignment. Perhaps the best way to understand the problem is in the contractarian terms of the assignment theory itself. The essence of the assignment theory is that the FCA makes a *legislative* delegation of *executive* authority to private *qui tam* relators and thus ultimately to the federal courts.[79] In constitutional law as in contract law, one cannot give away what one does not possess. In *Bowsher v. Synar*, the Supreme Court held that the separation-of-powers principle prevented Congress from assigning executive authority to the Comptroller General—a legislative officer. In discussing this problem, the Court observed that "[t]he structure of the Constitution does not permit Congress to execute the laws; it follows that *Congress cannot grant to an officer under its control what it does not possess*."[80] If Congress is prohibited from granting executive authority to a properly appointed legislative officer like the Comptroller General, it follows *a fortiori* that Congress cannot grant such authority to ordinary citizens who answer to no one.[81] For this reason, the

78. *Id.* at 2136.

79. One might argue that this assignment does not offend separation-of-powers principles because the Executive Branch consented to the delegation of authority when the President signed the FCA. This consent would be irrelevant for the purpose of separation-of-powers analysis: The Supreme Court has explicitly held that the "consent" of the affected branch cannot cure a separation-of-powers problem. In *New York v. United States*, the Court observed,

> The Constitution's division of power among the three Branches is violated where one Branch invades the territory of another, *whether or not the encroached-upon Branch approves the encroachment*. . . . The constitutional authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.

112 S. Ct. 2408, 2431-32 (1992)(emphasis added).

80. 478 U.S. 714, 728 (1986)(emphasis added).

81. One might attempt to get around this argument by suggesting that the FCA does not merely grant *qui tam* relators the "executive authority" to bring suit for redress of the government's injury, but also bestows a substantive property interest. By providing

assignment theory does not solve the standing problem of FCA *qui tam* relators.

3. *The "History" Argument*

Some courts have relied heavily on the historical bases of *qui tam* provisions in upholding the constitutionality of the FCA's provision. Because the First Congress relied heavily on *qui tam* actions, these courts reason, *qui tam* relators under the FCA clearly satisfy Article III's standing requirement.[82] It is true that the First Congress authorized *qui tam* actions in numerous contexts;[83] such a factor would ordinarily have some bearing on whether a statute is constitutional. There are two reasons, however, why this "history" argument cannot save the FCA's *qui tam* provision. First, although the views of the First Congress can be a useful analytical tool to help give meaning to the Constitution, they are by no means immune from Supreme Court scrutiny. Second, even if the *qui tam* provisions passed by the First Congress satisfied Article III's standing requirement

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qui tam relators with a property interest in the outcome of the litigation—a substantive entitlement—the FCA is certainly different than the Gramm-Rudman-Hollings Act that was at issue in *Bowsher*. It is certainly true that if a statute grants welfare entitlements or veterans' benefits to individuals who meet certain criteria, there is no standing problem if such individuals sue to collect the benefits to which they are entitled under the applicable statute. If someone is denied property to which he is presently entitled under the law, he has clearly suffered an injury, and Article III's standing requirement will not keep him out of court. The FCA provides no such entitlement, however, until *after* the *qui tam* relator has brought suit and secured a recovery under the FCA. Indeed, this is the primary criterion that qualifies the *qui tam* relator for his award. Until he has successfully brought suit under the FCA, he is substantively entitled to *nothing*, not even in theory. Since he has not been denied—at the outset of the litigation—something to which he has a *present* substantive entitlement, the *qui tam* relator has not suffered a constitutionally sufficient injury to bring suit in the federal courts. Simply stated, he lacks standing to establish the essential threshold criterion that would validate his standing: a present entitlement to an FCA award. Because a *qui tam* relator can only establish this criterion by appearing standingless in court and securing an award, it is unconstitutional for him to proceed to the point where the FCA entitles him to anything. Thus, the standing problem remains. This issue is discussed further in note 75, *supra*, and in sections II.C.4 and II.D, *infra*.

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

83. *See* Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 44-45 (authorizing *qui tam* actions for discovering import duty collectors' failure to post accurate rates); Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 55, 60 (failure to register vessels properly); Act of Mar. 1, 1790, ch.2, § 3, 1 Stat. 101, 102 (marshals' misfeasance in census taking); Act of July 20, 1790, ch. 29, § 4, 1 Stat. 131, 133 (harboring runaway mariners); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137-38 (unlicensed Indian trade); Act of Aug. 4, 1790, ch. 35, § 55, 1 Stat. 145, 178 (import duty collectors' failure to post accurate rates); Act of Feb. 25, 1791, ch. 10, §§ 8, 9, 1 Stat. 191, 195-96 (unlawful loans by subscribers to Bank of United States); Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (avoidance of liquor import duties).

in the Eighteenth Century, the modern doctrine of constitutional standing has very different contours to which *qui tam* provisions do not easily conform. For these reasons, historical argument alone cannot solve the FCA *qui tam* provision's constitutional problems; the provision must satisfy the requirements of modern standing doctrine.

Because many members of the First Congress participated in the drafting of the Constitution, the Supreme Court has naturally, from time to time, taken the view that the "actions" of the First Congress give "contemporaneous and weighty evidence" of the Constitution's meaning.[84] This evidence has never meant that the actions of the First Congress automatically pass constitutional muster. Indeed, the Supreme Court has specifically held that constitutional violations are not afforded special protection solely because they have historical roots:

> It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.[85]

As one scholar has put it, the Supreme Court's occasional practice of looking to the First Congress for guidance as to the meaning of the Constitution "does not stand for any sort of 'adverse possession' of constitutionality."[86]

This view follows unavoidably from the rule of *Marbury v. Madison* that the Supreme Court has the last word on what the Constitution means.[87] In *Marbury* itself, the Supreme Court held Section 13 of the Judiciary Act, a statute passed by the First Congress, to be unconstitutional.[88] Indeed, many acts of the First Congress would undoubtedly be held unconstitutional if they came before the Court today. For example, the First Congress provided direct federal aid to sectarian schools, a practice that would certainly be struck down today.[89] As Justice Brennan notes, the First Congress passed a law requiring the public whipping of slaves, something that would be unthinkable under the Constitution as it is currently understood.[90]

84. *Bowsher*, 478 U.S. at 723-24.
85. Walz v. Tax Commission, 397 U.S. 664, 678 (1970).
86. Lee, *supra* note 12 at 549.
87. 5 U.S. (1 Cranch) 137 (1803).
88. *Id.* at 162-63 (invalidating Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80).
89. Wallace v. Jaffree, 472 U.S. 38, 100 (1985)(Rehnquist, J., dissenting).
90. Marsh v. Chambers, 463 U.S. 783, 814 n.31 (Brennan, J., dissenting). It might be

Even some of the courts that otherwise upheld the standing of FCA *qui tam* relators have been unmoved by historical arguments. As the court flatly held in *Truong*, "the fact that *qui tam* statutes date back to the time of the First Congress is not independent evidence of their constitutionality."[91]

In addition to being inconclusive, the views of the First Congress are also unpersuasive in analyzing the FCA's *qui tam* provision. For one thing, the FCA provision functions quite differently than the *qui tam* provisions authorized by the First Congress. It is true that the First Congress authorized numerous *qui tam* actions, but all of these have subsequently been repealed.[92] Indeed, because Congress has almost completely abandoned *qui tam* actions in favor of more constitutionally palatable alternatives, federal courts scholars have described *qui tam* as an "anachronistic" vestige of the past.[93] The vast majority of the *qui tam* statutes passed by the First Congress were in reality nothing more than "simple informer laws."[94] Rather than granting a cause of action, these laws merely allowed an informer to share in a recovery secured by a government official.[95] The FCA, on the other hand, unambiguously allows *qui tam* relators to seek recovery themselves; indeed, it grants them a larger percentage of the recovery if they do so.[96] For this reason, the FCA presents a standing problem that simply did not exist under most of the *qui tam* statutes passed by the First Congress.

The actions of the First Congress are further irrelevant to the issue of standing of FCA *qui tam* relators because the current interpretation of standing doctrine has emerged only re-

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argued that because the Thirteenth and Fourteenth Amendments were not ratified until after the Civil War, this example does not undermine the assertion that the Acts of the First Congress provide evidence of the Constitution's meaning. Even without the Reconstruction Amendments, however, this law would still be considered unconstitutional today under the the Fifth and Eighth Amendment.

91. 728 F. Supp. at 618; *see also* United States *ex rel.* Burch v. Piqua Engineering Inc., 145 F.R.D. 452 (S.D. Ohio 1992).

92. Lee, *supra* note 12 at 551.

93. PAUL M. BATOR ET AL. EDS., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1084 (3d ed. 1988).

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

95. Indeed, only one of the statutes passed by the First Congress appears to allow the informer to pursue a claim on him own. *See* Act of March 3, 1791, § 44, 1 Stat. 199, 209 (1791)(allowing an action for "penalty or forfeiture . . . by action of debt, in the name of the person or persons intitled [sic] thereto, or by information, in the name of the United States of America").

96. 31 U.S.C. § 3730(d).

cently.[97] Before the early Twentieth Century, justiciability turned on the form, rather than the substance, of a dispute. In looking for an Article III case or controversy, the federal courts looked only at the form of the action and did not bother to consider the relationship of the plaintiff to the subject matter of the dispute. According to this traditional rule, an action presented a justiciable case or controversy if the legal question merely "assume[d] such a *form* that the judicial power [was] capable of acting on it." Just as a court could dismiss a plaintiff's case if not brought in the form of a writ that was familiar to the court,[98] so too could the court find that an unfamiliar form of action presented no case or controversy and was thus beyond the judicial power under Article III. At that time, a *qui tam* action—whether a simple informer law or a law granting the informer a cause of action—was readily recognizable by the courts, so that fact alone was sufficient to render the action justiciable.

As the formalistic requirements of the writ system began to disappear, however, this traditional "form of action" approach to Article III's case or controversy requirement no longer provided an adequate description of the scope of federal court jurisdiction. The Supreme Court introduced the doctrine of standing in the 1922 case of *Fairchild v. Hughes*[99] and in 1939 began applying the doctrine to filter out disputes that it did not consider to be not justiciable cases or controversies under Article III.[100] Standing doctrine gradually replaced the "form of action" requirement as the touchstone of justiciability and the Supreme Court eventually concluded that historically cognizable forms of action were simply not enough to invoke federal jurisdiction:

97. The Supreme Court has from time to time stated that the modern standing doctrine has historical roots. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 101 (1968); Glidden Co. v. Zdanok, 370 U.S. 530, 563 (1962); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 128, 150 (1951)(Frankfurter, J., concurring). However, history does not bear this assertion out, and there is a fairly strong scholarly consensus that standing is a "relatively recent" doctrine. *See* William A. Fletcher, *The Structure of Standing*, 93 YALE L.J. 221, 224 (1988); Lee, *supra* note 12 at 551.

98. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 819 (1824)(emphasis added); *see also* Tutun v. United States, 270 U.S. 568, 577 (1926)("Whenever the law provides a remedy enforceable in the courts according to the *regular course of legal procedure*, and that remedy is pursued, there arises a case within the meaning of the Constitution.")(emphasis added).

99. 258 U.S. 126 (1922); Lee, *supra* note 12, at 551.

100. Winter, *supra* note 99, at 1378 & n.36 (citing Coleman v. Miller, 307 U.S. 433, 464 (1930)(Frankfurter, J., concurring)).

> The requirements of Article III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process.[101]

The Supreme Court eventually distilled the standing doctrine to the three modern requirements of injury in fact, causation, and redressability.[102]

Because standing is a modern doctrine that has been developed to protect the viability of Article III's case or controversy requirement in an increasingly less formalistic legal system, the mere fact that *qui tam* was a familiar form of action at the time of the First Congress is irrelevant to the question of whether it is constitutional today. To point at history and argue that standing doctrine cannot screen out *qui tam* actions is to ignore the fact that at one time Article III had an entirely different screening mechanism than it has now. For these reasons, the actions of the First Congress cannot save the FCA's *qui tam* provision. As one scholar has put it, "[s]tanding is a modern game, and courts that uphold *qui tam* on historical grounds are playing by archaic rules."[103]

4. *The "Statutory Bounty" Argument*

The theories discussed so far—the "statutory rights," "assignment," and "history" arguments—are attempts by courts to circumvent standing doctrine and absolve FCA *qui tam* relators of the necessity of making Article III's required showing of injury in fact, causation, and redressability. Other courts have been more willing to accept these requirements at face value and have instead focused their attention on whether it can fairly be said that *qui tam* relators really do have standing according to modern doctrine.

Some courts have argued that FCA *qui tam* relators meet modern standing requirements because of the "statutory bounty" that the FCA provides them if they are successful.[104] It seems ludicrous that any court would hold that the potential

101. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1974).

102. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992).

103. Lee, *supra* note 12, at 549.

104. The portion of the FCA governing awards to *qui tam* plaintiffs is set out at 31 U.S.C. § 3730(d).

for an enormous and highly desirable financial windfall could satisfy a constitutional requirement that is premised on personal injury. However, this argument is supported by ambiguous, misleading language in some of the Supreme Court's modern standing opinions. Those courts that have held that a statutory bounty can solve standing problems were thus not completely off the mark in their reasoning. Still, a closer reading of the Supreme Court cases in question indicates that *qui tam* relators do not have constitutionally sufficient standing merely because of the bounty that the FCA provides.

In its modern standing cases, the Supreme Court has described Article III's requirements in various ways, and it has not always explained with the utmost clarity that the essential core of Article III standing consists of injury in fact, causation, and redressability. In some cases, such as *Sierra Club v. Morton*[105] and *Baker v. Carr*,[106] the Supreme Court described the standing doctrine as requiring that the plaintiff have "a *personal stake* in the outcome of the litigation."[107] It is this unfortunately imprecise "personal stake" language that is at the center of the statutory bounty argument.

Some district courts have seized on the "personal stake" language of *Sierra Club* and *Baker* and concluded that the mere possibility of reward is a constitutionally sufficient basis for an FCA *qui tam* relator's standing. For example, the court in *Stillwell* held that "[t]o the extent that the plaintiff must have a *personal stake* in the outcome of the litigation to succeed on traditional standing theories, . . . the statute provides him one by virtue of the statutory bounty."[108] Similarly, the *Truong* court probably relied on *Stillwell* when it observed that "[t]o the extent that the relator must have a 'personal stake' in the outcome of the litigation, the bounty to which he is entitled if victorious is sufficient."[109] To these courts, the prize that the *qui tam* relator seeks validates him standing to seek it.

The problem with this approach is that it takes the "personal

105. 405 U.S. 727, 732 (1972).

106. 369 U.S. 186, 204 (1962).

107. *Sierra Club*, 405 U.S. at 732 (emphasis added).

108. United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1098 (C.D. Cal. 1989)(emphasis added).

109. United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 619 n.7 (C.D. Cal. 1989); *see also* Public Interest Bounty Hunters v. Board of Governors, 548 F. Supp. 157, 161 (N.D. Ga. 1982).

stake" language in *Sierra Club* and *Baker* out of context. These cases do *not* hold that "personal stake" is an alternative basis for standing. Rather, the "personal stake" language simply means that the plaintiff must have a personal stake in *vindicating an injury in fact*. The personal stake requirement does not replace the injury-in-fact requirement, but instead supplements it. Indeed, throughout the *Sierra Club* opinion, the Court repeatedly refers to the injury-in-fact requirement. The personal stake requirement goes beyond this reference by insisting that the injury be personal and not merely general. For example, the Court pointed out that "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires *that the party seeking review be herself among the injured.*"[110] The Court further held that "the party seeking review *must herself have suffered an injury.*"[111] It could not be more plain that the Court intended to keep the injury-in-fact requirement and did not intend to replace it with a "personal stake" test.

This conclusion becomes even more obvious when one considers how easily Congress could nullify standing doctrine if a statutory bounty were sufficient to create standing. A "personal stake" in a statutorily provided reward cannot be enough to confer standing on a plaintiff who has suffered no injury in fact. If it were, Congress would have the overwhelming power utterly to abolish Article III's standing requirements merely by providing "prizes" to private citizens who are willing to enforce the laws.[112] This Note has already discussed Congress's inability to eliminate Article III's core standing requirements merely by passing a statute. It would be incongruous to conclude that Congress can achieve the same result merely by providing a reward. Statutory bounty or not, the injury-in-fact requirement remains.

The conclusion that a statutory bounty fails to solve *qui tam*

110. *Sierra Club*, 405 U.S. at 734-35 (emphasis added).

111. *Id.* at 738 (emphasis added).

112. In *Defenders of Wildlife*, for example, Congress could have solved the standing problem with the citizen-suit provision of the Endangered Species Act simply by providing a $100 reward to anyone bringing an action pursuant to its provisions. Because it is inconceivable to think that this would have made a constitutional difference in the *Defenders of Wildlife* case, it must be true that a mere financial reward is insufficient to create standing unless it is tied to redressing an injury in fact. Indeed, the Supreme Court came close to such a holding in *Diamond v. Charles*, where it held that the potential for an award of attorney's fees is insufficient to create standing for a private person to defend a statute that criminalized the performance of an abortion in certain circumstances. 476 U.S. 54 (1986).

relators' standing problems is troubled somewhat by the fact that individuals who have been deprived of substantive entitlements guaranteed to them by acts of Congress clearly do have standing to sue for those entitlements. Numerous congressional statutes provide monetary entitlements, such as veterans' benefits and welfare benefits, to particular categories of individuals. Once granted by statute, these entitlements are a legal right[113] and individuals who qualify for such entitlements certainly have standing to sue to collect them. In this sense, Congress has created standing where it did not exist before simply by giving money to a defined class of people, such as veterans or indigents. One could argue that the FCA *qui tam* provision does the same thing. It defines a class of people—individuals who have unique knowledge of fraud on the United States and who use that knowledge to secure a judgment under the FCA—and grants them a substantive monetary entitlement—a portion of the award they have won. Because of this apparent similarity to the welfare or veterans benefits situations, one might argue that FCA *qui tam* plaintiffs clearly have standing to sue for the substantive entitlement—the statutory award—that the FCA provides them.

The problem with this argument is that it fails to distinguish for the purposes of standing analysis between a *qui tam* relator's initial suit under the FCA and any subsequent suit that the relator might bring to collect the statutory award that he earned by bringing the first suit. The latter situation is perfectly analogous to the welfare and veterans' benefits examples. Assuming for the sake of argument that there is no constitutional standing problem when a *qui tam* relator initially brings suit under the FCA, there can be no question that after the *qui tam* relator brings such a suit and secures a judgment, he becomes substantively entitled under the terms of the FCA to a statutorily prescribed portion of the judgment.[114] If the government subsequently attempts to withhold this entitlement from the *qui tam* relator, he certainly has standing to sue the government in order to collect him award, just as a veteran has standing to sue for benefits that are wrongfully withheld. In both situations, the Supreme Court's injury-in-fact requirement for constitutional standing has been satisfied. When a statute grants an individual

113. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).
114. 31 U.S.C. § 3730(d).

a present monetary entitlement and that entitlement is withheld, the individual is harmed in an obvious and palpable way. Clearly a veteran or an indigent who qualifies for a statutory entitlement has a legal right to the entitlement and suffers injury the moment that legal right is denied. Similarly, a *qui tam* relator who has taken the trouble to litigate an FCA suit and secure a judgment has a legal right to a percentage of the judgment and suffers injury the moment the government refuses to provide him with him portion of the award. This analysis proves nothing, however, about the more important question of whether the *qui tam* relator had standing to bring suit under the FCA in the first place.

At the outset of a *qui tam* lawsuit, the *qui tam* relator is not *substantively* entitled to anything under the FCA. At this point, the FCA grants the relator only the *procedural* entitlement to "bring a civil action" for a violation.[115] The substantive entitlement is merely ancillary to the exercise of this procedural right. This Note has already illustrated at length that according to numerous Supreme Court cases, Congress simply lacks the power to grant such a procedural right to plaintiffs who have suffered no constitutionally sufficient injury in fact. Prior to the exercise of a procedural right to sue, the *qui tam* relator has no substantive interest to vindicate, even in a theoretical sense. him right to receive money under the FCA turns on him initiation of a lawsuit to redress an injury that he did not suffer. The mere fact that participation in this litigation might secure a substantive reward for the *qui tam* relator cannot fairly be said to satisfy a standing requirement that turns on a notion of injury in fact. Some of the courts that have considered the constitutionality of the FCA's *qui tam* provisions agree. As the *Burch* court admits, allowing the FCA's statutory bounty to validate a *qui tam* relator's standing "puts the cart before the horse."[116] Such awards cannot replace Article III's injury-in-fact requirement.[117]

From a policy standpoint, the injury-in-fact requirement might not be the most desirable approach to standing doctrine, but it seems that in the Supreme Court's view, injury in fact is the "irreducible minimum" of Article III. Even those Justices

115. *Id.* § 3730(b).

116. United States *ex rel.* Burch v. Piqua Engineering Inc., 145 F.R.D. 452, 453 (S.D. Ohio 1992).

117. See *supra* note 81.

who criticize this approach to standing questions admit that the injury-in-fact requirement prevents Congress from "legislat[ing] in favor of certain interests by setting up a scheme of incentives for third parties."[118] This language implies unequivocally that the possibility of a statutory bounty is not enough to validate *qui tam* relators' standing.[119]

5. *The "Retaliation" Argument*

Other courts have held that FCA *qui tam* relators satisfy the injury-in-fact requirement because of the potential harm they might suffer if their employers retaliate against them. For example, the *Stillwell* court observed:

> In most cases, . . . the relator will have access to the information forming the basis of the complaint only through an employment relationship. Public disclosure of the filing of the complaint . . . will often result in termination of that relationship or in a compromised opportunity for future advancement.[120]

There are two reasons why the possibility of retaliation does not satisfy Article III's standing requirements. First, such speculative and hypothetical harm has never been considered sufficient to constitute an injury in fact for standing purposes; and second, any harm that a *qui tam* plaintiff suffers as a result of retaliatory discharge also fails the causation prong of the *Defenders of Wildlife* test.

In *Defenders of Wildlife*, the Supreme Court described Article III's injury-in-fact requirement in two parts. First, the injury must be "concrete and particularized."[121] That is, it must "affect the plaintiff in a personal and individual way."[122] This requirement has already been discussed at length in this Note.

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118. Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 64 (1976)(Brennan, J., dissenting).

119. This problem could be solved if Congress amended the FCA *qui tam* provision so that it merely allowed an individual who provided special information to the DOJ to share in the recovery if the DOJ used the information to secure a judgment. This would be akin to the simple informer laws that were so popular with the First Congress. *See supra* notes 93-94 and accompanying text. By eliminating the *qui tam* relator's ability actually to bring suit for a violation of the FCA, this measure would solve the statute's standing problem. Furthermore, the incentive function would remain because the *qui tam* relator would still be guaranteed a portion of the recovery.

120. United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1099 (C.D. Cal. 1989); *see also* United States *ex rel.* Burch v. Piqua Engineering Inc., 145 F.R.D. 452 (S.D. Ohio 1092).

121. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992).

122. *Id.* at 2136 n.1.

The Court also held. however, that Article III required the injury to be "actual or imminent, not 'conjectural' or 'hypothetical.' "[123] This language seems clearly to prevent a plaintiff from basing him claim of standing on something as speculative as the mere possibility that him employer might retaliate against him for bringing the lawsuit. Such potential harm is particularly "conjectural" in the case of FCA *qui tam* relators, because the FCA has a retaliatory discharge provision that makes it a separate violation under the FCA for an employer to retaliate against an employee for bringing a *qui tam* lawsuit.[124] This provision is extremely strict and allows the employee to seek relief including

> reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.[125]

In the face of such a severe anti-discrimination provision, one could hardly conclude that retaliatory discharge is "actual" or "imminent" whenever a *qui tam* relator brings suit against him employer. Indeed, considering the added liability that such an employer would face, the probability of retaliatory discharge seems speculative indeed. For this reason, the possibility of employer retaliation is too conjectural and hypothetical to satisfy the injury-in-fact requirement.

Furthermore, even if an employer actually did retaliate against a *qui tam* relator,[126] this harm would still not be sufficient to satisfy Article III because it fails the causation prong of the *Defenders of Wildlife* test. *Defenders of Wildlife* states that Article III not only requires a plaintiff to allege injury in fact, but also requires that the injury alleged be "fairly . . . trace[able] to the

123. *Id.* at 2136 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)); *see also* Los Angeles v. Lyons, 461 U.S. 95, 102 (1983); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 91-100 (1979); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220-22 (1974).

124. 31 U.S.C. § 3730(h).

125. *Id.*

126. There have been cases in which *qui tam* plaintiffs have been fired by their employers and have amended their complaints to allege a violation of 31 U.S.C. § 3730(h). *See, e.g.*. United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1099 (C.D. Cal. 1989). In such a case, an allegation of actual harm is at stake, and it cannot be argued that the harm is merely conjectural.

challenged action of the defendant."[127] When an employer discharges a *qui tam* relator for bringing an action under the FCA, the relator clearly suffers redressable injury. The retaliatory discharge provision of the FCA says so. Because this injury is "fairly traceable" to the defendant's violation of the retaliatory discharge provision, no one could challenge the relator's standing to bring a claim under this provision. This does *not* mean, however, that the injury is "fairly traceable" to the alleged fraud that forms the basis of the *qui tam* relator's claim under the FCA's principal liability provision.[128] The mere fact that a *qui tam* relator can allege that he was injured by retaliatory discharge does not mean he can allege that he was injured by fraud. Recognizing this limitation, the *Truong* court held that injuries to employment status cannot satisfy Article III's standing requirement because they "lack the requisite 'nexus to the substantive character of the statute.' "[129]

The "statutory right," "assignment," "history," "statutory bounty," and "retaliation," arguments represent the principal lines of reasoning that courts and commentators have used in their valiant efforts to argue the FCA *qui tam* provision into conformity with modern constitutional standing requirements.

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127. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992)(quoting Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

128. *See* 31 U.S.C. § 3729.

129. United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 619 n.5 (C.D. Cal. 1989)(quoting Diamond v. Charles, 476 U.S. 54, 70 (1976). Of course, there is a nexus between the injuries to the employment status of the *qui tam* relator and the fraudulent activities of the defendant in a strict "but for" sense. If there had been no fraud, the *qui tam* relator would have no information on which to bring suit. Thus suit would not be brought, and there would be no retaliatory discharge. This does not mean, however, that injuries to employment status are "fairly traceable" to the defendant's fraudulent behavior for the purpose of standing analysis. Such injuries are clearly more directly related to the defendant's violation of the FCA's retaliatory discharge provision, which is illegal independently of the fraud prohibitions and for which the *qui tam* plaintiff certainly has standing to sue. It is not fair to say, however, that such an injury also gives the *qui tam* relator standing to sue for the independent fraud violations.

An analogy points out how unreasonable this would be. Suppose a construction employee blew the whistle on his employer for OSHA violations and was fired for doing so. Certainly there is no standing problem if Congress makes such a retaliatory discharge illegal and allows the employee to sue his employer for wrongful termination. However, the "retaliatory discharge" theory discussed in this section also suggests that Congress could go further and give him standing to sue not only for his employment injuries, but also for *any* physical injuries that resulted from the OSHA violations he reported, regardless of who suffered them. In other words, Congress could allow him to sue him employer for his co-employees' injuries. This would be a ludicrous result, because the employee would be suing for injuries he did not suffer. Similarly, it is ludicrous to suggest that the mere fact of retaliatory discharge can give a *qui tam* relator standing to sue for fraud that has had no direct financial impact on him at all.

Though often creative, these arguments hold little water after the Supreme Court's restatement of a strong Article III standing requirement in the *Defenders of Wildlife* case. The next section of this Note compares the FCA *qui tam* provision to the citizen-suit provision that the Court struck down in *Defenders of Wildlife* and attempts to predict how the Supreme Court would now analyze the standing of *qui tam* relators.[130]

D. *A Comparison of the False Claims Act and the Endangered Species Act*

Despite the grave doubts concerning the standing of FCA *qui tam* relators, it would be premature to conclude that *Defenders of Wildlife* automatically dictates the answer to this question without first considering whether the citizen-suit provision at issue in that case was similar in form to the FCA *qui tam* provision. *Defenders of Wildlife* was not about the FCA; it was about the Endangered Species Act. In the *Defenders of Wildlife* opinion, the Court made sweeping statements about Article III and its minimum standing requirements that are obviously relevant in discussing the standing of FCA *qui tam* relators. Comparing the facts of the *Defenders of Wildlife* case to the situation of a typical FCA *qui tam* relator, however, suggests that *qui tam* relators have an even less compelling claim to constitutional standing than the plaintiffs in the *Defenders of Wildlife* case.

The *Defenders of Wildlife* case involved regulations promulgated to implement section 7(a)(2) of the Endangered Species Act of 1973 ("ESA"), which was directed at the activities of federal agencies. Section 7(a)(2) provides:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of the habitat of such

130. The Court in *Defenders of Wildlife* did not hold the citizen-suit provision in question unconstitutional on its face. Rather, the statute was only unconstitutional as applied because the plaintiffs who were proceeding under it lacked constitutional standing. Likewise, a court would not hold the FCA *qui tam* provision unconstitutional on standing grounds if the *qui tam* relator were atypical and really could demonstrate injury in fact. *See supra* note 60. This discussion assumes that the *qui tam* relator is of the more typical variety and cannot make such a showing of injury. Thus, an as-applied constitutional challenge to the *qui tam* provision on standing grounds would be appropriate.

> species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.[131]

Before 1986, the Secretaries of Commerce and the Interior interpreted this consultation requirement as applicable to actions in foreign nations as well as in the United States. In 1986, however, a revised joint regulation was promulgated reinterpreting Section 7(a)(2) as applying only to actions taken in the United States or on the high seas.[132] The Defenders of Wildlife (the "Defenders") brought an action against Manuel Lujan, then Secretary of the Interior, seeking a declaratory judgment that Section 7(a)(2) applies to actions taken in foreign nations and an injunction directing the Secretary to promulgate a new regulation restoring the pre-1986 interpretation of section 7(a)(2).[133]

The ESA has a "citizen-suit" provision that is similar in all respects to the *qui tam* provisions of the FCA. The ESA provision states that

> any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter.[134]

Very much like the FCA *qui tam* provision, this citizen-suit provision purports to grant private persons standing to enforce the ESA. Also like the *qui tam* provision, it does not require plaintiffs who proceed pursuant to its provisions to have suffered any injury at all. It is true that the ESA's citizen-suit provision is a broader grant of standing that the FCA's *qui tam* provision. The ESA provision unqualifiedly grants standing to "any person," while the FCA provision at least requires the *qui tam* plaintiff to have acquired independent knowledge of fraud on the government. As discussed below, however, this requirement has nothing to do with any injury the plaintiff may have suffered, so the two provisions are virtually identical for the purposes of standing analysis. Both authorize individuals to enforce federal statutes and neither requires the plaintiff to have been affected in any way by the violation he alleges.

The Supreme Court held in *Defenders of Wildlife* that the De-

131. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2135 (1992)(quoting 16 U.S.C. § 1536(a)(2)).
132. *Id.* (referring to 51 Fed. Reg. 19,926 (1986); 50 C.F.R. 402.01 (1991)).
133. *Id.*
134. *Id.* at 2142 (quoting 16 U.S.C. § 1540(g)).

fenders could not proceed with their action because they had not alleged sufficient injury to satisfy the standing requirements of Article III.[135] The Defenders had based their claim of standing on the affidavits of two of their members—Joyce Kelly and Amy Skilbred. Ms. Kelly stated that she had traveled to Egypt in 1986 and " 'observed the traditional habitat of the endangered nile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly,' and that she 'will suffer harm in fact as a result of [the] American . . . role . . . in overseeing the rehabilitation of the Aswan High Dam on the Nile . . . and [in] develop[ing] Egypt's . . . Master Water Plan.' "[136] Similarly, Ms. Skilbred stated that she had traveled to Sri Lanka in 1981 to observe the habitat of such endangered species as the Asian elephant and the leopard, habitats that she intended to visit again and that were allegedly threatened by development projects in Sri Lanka.[137] The Defenders thus based their claim of standing on the following argument: because the Secretary of the Interior misinterpreted the scope of section 7(a)(2) of the ESA, development projects in foreign countries that would otherwise be prohibited by the ESA were allowed to go forward. Because these projects threatened endangered habitats that the Defenders' members intended to visit and observe, their potential enjoyment of these areas was "injured" by the Secretary's allegedly erroneous interpretation of the ESA. Because of this injury, the Defenders satisfied Article III's core requirements and there was no constitutional problem if they brought an action under the ESA's citizen-suit provision.

This sounds like a fairly persuasive argument, especially in light of the fact that the Supreme Court has held that "the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for the purpose of standing."[138] Nevertheless, the Court held that Ms. Kelly's and Ms. Skilbred's professed intentions of studying the endangered species of Egypt and Sri Lanka at an undisclosed future date were insufficiently concrete to meet Article III's injury-in-fact requirement.[139]

135. *Id.* at 2137.
136. *Id.* at 2138.
137. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2138 (1992).
138. *Id.* at 2137 (paraphrasing Sierra Club v. Morton, 405 U.S. 727, 734 (1972)).
139. *Id.* at 2138.

It would seem that if these women were unable to allege sufficient injury to claim standing under Article III, then typical FCA *qui tam* relators must, *a fortiori*, lack standing as well. The affiants in *Defenders of Wildlife*, while unable to state the exact date that they intended to return to Egypt and Sri Lanka, at very least had visited these places before and could make a plausible claim that their academic and recreational interests were in fact being injured by the activities that they alleged violated the ESA. FCA *qui tam* relators cannot make even this minimal a showing of injury. They are merely private citizens who seek to enrich themselves by rooting out fraudulent activity that has had no personal financial impact on them at all. It seems clear that in light of both the broad dicta and specific facts of the *Defenders of Wildlife* case, FCA *qui tam* plaintiffs cannot satisfy Article III's minimum standing requirements.

One must observe, however, that FCA *qui tam* relators are different from the plaintiffs in the *Defenders of Wildlife* case in two ways: first, they are seeking a substantive entitlement under the FCA, and second, they have unique knowledge that the government values highly and that is potentially indispensable to a successful FCA prosecution. Such factors distinguish the FCA case factually from the *Defenders of Wildlife* case, but these differences do not appear to be relevant for the purpose of standing analysis.

This Note has already concluded that a *qui tam* relator's interest in collecting the FCA's statutorily-provided bounty cannot fairly be considered an injury in fact for standing purposes.[140] Similarly, the mere fact that a *qui tam* relator possesses unique and useful information cannot be considered an "injury" that justifies the relator's standing. When one looks behind *Defenders of Wildlife*'s rigid three-prong test at some of the purposes of the standing requirement, an argument can be made that the FCA is a special case that justifies a departure from the injury-in-fact requirement. Still, the Supreme Court's most recently articulated justification for the standing requirement does not suggest this result. The injury-in-fact requirement appears to present an insuperable barrier to FCA *qui tam* relators' standing.

The Supreme Court has from time to time asserted that one

140. *See supra* notes 75 & 81 and Section II.C.4.

of the justifications for the standing limitation is to ensure genuine adverseness of litigation in the federal courts.[141] Without such adverseness, the Supreme Court fears, the federal courts would be transformed into mere "roving commissions" that would give voice to abstract grievances.[142] If this were the only justification for the standing doctrine's injury-in-fact requirement, a strong argument could be made that the doctrine should be relaxed for the purpose of *qui tam* litigation under the FCA. Unlike the plaintiffs in the *Defenders of Wildlife* case, whose role in the ESA litigation was by no means essential or indispensable, FCA *qui tam* relators play a key role in the litigation process. As the unique source of the information that forms the basis for the complaint, the *qui tam* relator's participation in the litigation as a witness is indispensable. This special role, combined with the potential award, probably does ensure genuine adverseness in *qui tam* litigation. One might thus argue that it would be empty formalism to impose the further requirement that the *qui tam* relator allege an actual injury in fact.

In the *Defenders of Wildlife* opinion, the Supreme Court wrote very about the "adverseness" justification for the standing limitations and focused instead on the "separation-of-powers" justification. In a crucial passage, the Court observed that

> If the [standing doctrine's] concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress *to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts* is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3.[143]

If this is the justification for the standing requirement—and the Supreme Court states that it is—it would make no sense to relax the injury-in-fact requirement simply because a *qui tam* relator possesses unique knowledge that is particularly useful in the litigation. A *qui tam* relator might know more about particular violations of the FCA that any ordinary member of the public, but that special knowledge does not mean that the *qui tam*

141. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962).
142. Furman v. Georgia, 408 U.S. 238, 467 (1972).
143. *Defenders of Wildlife*, 112 S. Ct. at 2145 (emphasis added).

relator's "interest" in the prosecution of the violations is in any way "differentiated" from the interest held in common by all members of the public. If the unique knowledge of a *qui tam* relator were sufficient to set him apart from the plaintiffs in the *Defenders of Wildlife* case and validate him standing despite the fact that he has suffered no injury in fact, the same logic would dictate that it would be constitutionally permissible for Congress to allow a private citizen to prosecute a murder case simply because he was the only witness to the crime. This would clearly be out of step with the stated purpose of the standing doctrine—to prevent Congress from vesting executive authority in the federal courts via individuals who have suffered no concrete injury. Because the FCA *qui tam* provision, like the ESA citizen-suit provision, runs afoul of this consideration, the FCA situation cannot be distinguished from the facts of the *Defenders of Wildlife* case in any constitutionally meaningful way. Thus, there is no reason to relax the injury-in-fact requirement to rescue the FCA *qui tam* provision from its constitutional infirmities.

III. The Appointments Clause Argument

Although the argument that FCA *qui tam* relators lack standing illustrates the clearest constitutional defect of the *qui tam* provision, defendants have also challenged the constitutionality of the provision by arguing that it violates the Appointments Clause and the separation-of-powers principle. This section of the Note considers the Appointments Clause challenge and again concludes that recent Supreme Court authority casts serious doubts on the constitutionality of the *qui tam* provision.

A. *The Appointments Clause*

As with the standing issue,[144] the Appointments Clause challenge to the FCA *qui tam* provision relies upon the principle of separation of powers. The separation-of-powers doctrine is not embodied in any particular constitutional provision, but is nevertheless an essential structural characteristic of the Constitution and the United States government. Indeed, the Supreme Court has said of the principle that "within our constitutional scheme, the separation of governmental powers is essential to

144. *See id.* at 2145.

the preservation of liberty."[145]

The Appointments Clause of Article II of the Constitution helps preserve this principle by delineating a specific procedure for the appointment of officers of the United States:

> [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.[146]

This procedure is crucial to the separation-of-powers doctrine because it ensures that both the executive and legislative branches have a role in determining what individuals will have the authority to act on behalf of the U.S. government as "officers of the United States." As the text of the clause provides, the President nominates officers and the Senate confirms them. Even when the Senate elects to vest the appointment power over inferior officers in "the President alone, in the Courts of Law, or in the Heads of Departments," it has participated in the appointment process merely by acting to vest the appointment power in one of these sources. Nothing in the Appointments Clause, however, permits Congress to reserve to itself alone the power to appoint officers of the United States; nor does it allow Congress to vest that power in anyone other than the President, the courts, or the department heads.

B. *The Appointments Clause and the FCA*

FCA *qui tam* relators are not appointed "officers of the United States" according to the requirements of the Appointments Clause. The President does not nominate them, and the Senate does not confirm them. If anything, they appoint themselves.[147] Indeed, the very terms of the FCA prohibit many of the officers of the United States from bringing *qui tam* law-

145. Mistretta v. United States, 488 U.S. 361, 380 (1989).

146. U.S. CONST. art. II, § 2, cl. 2.

147. In *Newsham*, the court observes that "[u]nlike . . . appointed commissioners . . . , *qui tam* relators are not appointed by Congress, but have statutory authority to come forward, *motivated by patriotic duty, money, or revenge* to pursue a civil suit upon information of fraud within their possession." United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 613 (N.D. Cal. 1989)(emphasis added).

suits.[148] Nevertheless, when a *qui tam* relator brings suit under the FCA, he does so on behalf of the United States.[149] As this section demonstrates, it is fairly well settled that only properly appointed officers of the United States can conduct litigation on behalf of the United States government. Because the *qui tam* provision of the FCA grants non-officers the authority to litigate quasi-criminal fraud claims in the name of the federal government, the provision essentially ignores the Appointments Clause and violates the Constitution.

1. *Buckley v. Valeo*

The principal Supreme Court case concerning the Appointments Clause is *Buckley v. Valeo*.[150] The case involved a challenge to the Federal Election Campaign Act (the "FECA"), which empowered the Federal Election Campaign Commission (the "Commission") to investigate and prosecute violations of the FECA. The FECA provided that four of the six voting members of the Commission were to be appointed by members of Congress.[151] The Supreme Court held that these four members of the Commission could not be considered "officers of the United States" because the Appointments Clause did not give Congress the power to appoint such officers.[152] The Court then emphatically held that because the members of the Commission were not properly appointed officers of the United States, it was unconstitutional for them to enforce the FECA on behalf of the United States:

> [T]hese provisions of the [Federal Election Campaign] 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, section 2, cl. 2, of the Constitution. Such functions may be discharged *only by persons who are "Officers of the United States"* within the language of that section.[153]

This requirement that only properly appointed officers can conduct litigation on behalf of the United States certainly raises

148. 31 U.S.C. § 3730(e)(2)(A)-(B)(stating that "senior executive branch officials" are barred from bringing FCA *qui tam* suits).

149. *Id.* § 3730(b)(1)("The action shall be brought in the name of the government.").

150. 424 U.S. 1 (1976).

151. *Id.* at 113.

152. *Id.* at 127.

153. *Id.* at 140 (emphasis added).

doubts about the constitutionality of the FCA *qui tam* provisions. *Qui tam* relators have clearly not been appointed pursuant to the requirements of the Appointments Clause; by authorizing such non-officers to enforce the FCA on behalf of the United States, the *qui tam* provision seems flatly to violate the holding in *Buckley*. Indeed, some of the district courts that nevertheless upheld the *qui tam* provision against an Appointments Clause challenge conceded that *Buckley* raises serious questions about the provision's constitutionality. For example, the *Stillwell* court acknowledged that *Buckley* supports the proposition that "one must be an officer of the United States to conduct litigation on its behalf."[154] The *Truong* court went still further and admitted that "[i]f relators are not officers, the False Claims Act seems at first blush to run headlong into *Buckley v. Valeo*, and thus the Appointments Clause."[155] It is clear that this potential constitutional problem was not lost on the district courts.

Nevertheless, all the district courts to consider the issue held that the FCA *qui tam* provision did not violate the holding in *Buckley*. They held that the *Buckley* rule should be limited to only those situations in which Congress *aggrandizes* its own power by encroaching on that portion of the appointment power that the Constitution reserves to the Executive Branch.[156] These courts determined that in enacting the FCA *qui tam* provision, Congress merely granted enforcement power to private citizens. Because Congress did not arrogate any appointment power to itself in the process, the courts reasoned, the *qui tam* provision did not run afoul of *Buckley* and there was no Appointments Clause violation.

Although the language of the *Buckley* rule is not, on its face, limited to situations of Congressional aggrandizement, there is some support for the view taken by the district courts. First, the actual factual setting of *Buckley* was a situation in which Congress had aggrandized its own role in the appointment process. Congress had reserved solely for itself the power to appoint Commission members whose responsibilities could only be car-

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

155. United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 623 (C.D. Cal. 1989).

156. *See, e.g., Stillwell*, 714 F. Supp. at 1095; *Truong*, 728 F. Supp. at 623; Hyatt v. Northrop Corp., No. CV 87-6892 KN (Jrx), slip op. at 14 (C.D. Cal. Dec. 27, 1989).

ried out by properly appointed officers of the United States. Indeed, the opinion resonates with disapproval of Congress' usurpation of the appointment power. For example, the Court observed that "the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National government will *aggrandize* itself at the expense of the other two branches."[157]

Furthermore, in *Commodity Futures Trading Commission v. Schor*,[158] the Supreme Court held that when a constitutional violation by Congress has separation-of-powers implications (as an Appointments Clause violation does), the danger of the violation is minimized if it does not involve aggrandizement of Congressional power.[159] It is true that the dispute in Schor had nothing to do with the Appointments Clause. The specific question in that case was whether Congress violated Article III by empowering the Commodity Futures Trading Commission to adjudicate state-law counterclaims in administrative proceedings under the Commodity Exchange Act.[160] Nevertheless, in holding that this arrangement did not violate Article III, the court made the following observation that is potentially relevant in the Appointments Clause context as well:

> [T]his case raises no question of the *aggrandizement* of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this case is whether Congress impermissibly undermined, *without appreciable expansion of its own power*, the role of the Judicial Branch.[161]

Likewise, Congress did not, when it passed the FCA, arrogate any appointment power to itself and thus did not aggrandize its own power. Any appointment power that it took from the Executive Branch it then granted to private citizens, who can now take advantage of the *qui tam* provision and "appoint" themselves enforcers of the FCA.[162] In light of the Supreme Court's frequent emphasis on the dangers of aggrandizement, including the *Buckley* case itself, it was not entirely unreasonable for the district courts to limit *Buckley* to situations of Congressional

157. Buckley v. Valeo, 424 U.S. 129 (1976)(emphasis added).
158. 478 U.S. 833 (1986).
159. *Id.* at 856.
160. *Id.* at 835.
161. *Id.* at 856 (emphasis added).
162. *See* United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 607 (N.D. Cal. 1989).

aggrandizement and assume that the Supreme Court would treat Appointments Clause questions the same way it had treated Article III questions in *Schor*.

2. *Freytag v. Commissioner of Internal Revenue*

In light of the cases discussed above, it is clear that in 1989, when the district courts upheld the constitutionality of the FCA *qui tam* provision, there was some support for the argument that *Buckley*'s prohibition against non-officers enforcing federal law is limited to situations in which Congress has arrogated appointment power to itself. The Supreme Court has subsequently rejected that distinction. In a 1991 decision, *Freytag v. Commissioner of Internal Revenue*,[163] the Court held that an Appointments Clause violation can be established not only when Congress arrogates appointment power to itself, but also when Congress "diffuses" appointment power through legislative action:

> Our separation-of-powers jurisprudence generally focuses on the danger of one Branch's aggrandizing its power at the expense of another Branch. . . . The Appointments Clause not only guards against this encroachment but also preserves another aspect of the Constitution's structural integrity by *preventing the diffusion of the appointment power*.[164]

The Court further stated in *Freytag* that

> [t]he Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government.[165]

It thus appears that after *Freytag*, it is no longer possible to justify the FCA *qui tam* provision merely on the grounds that it does not constitute an "encroachment" by Congress on the appointment power. *Freytag* fairly unambiguously prohibits Con-

163. 111 S. Ct. 2631 (1991).

164. *Id.* at 2638 (emphasis added)(citations omitted).

165. *Id.* at 2642. The specific dispute in *Freytag* was over a federal statute that allowed the Chief Judge of the United States Tax Court—an Article I court—to appoint special trial judges and to assign them to hear tax disputes. *Id.* at 2634-35. The Supreme Court held that these special trial judges' duties were such that they could only be performed by "officers of the United States." Thus, the judges had to be appointed according the dictates of the Appointments Clause. *Id.* at 2640. Because the judges were "inferior officers," *id.* at 2641, and because the power to appoint them had been appropriately vested by Congress in a "Court of Law," *id.* at 2644, there was no Appointments Clause violation in *Freytag*.

gress from broadly diffusing the appointment power, regardless of whether Congress arrogates any of that power to itself.

Now that the Supreme Court has clarified the ambit of the *Buckley* rule, it is extremely difficult to defend the FCA *qui tam* provision against an Appointments Clause challenge. Indeed, it is hard to imagine a wider diffusion of the appointment power. The provision effectively permits all private persons in the entire world to appoint themselves special fraud prosecutors in the name of the United States government,[166] and the legislative history of the 1986 amendments clearly indicates that this outcome is exactly what Congress intended. Representative Berman seemed to be paying homage to the Wild West and its posse system of justice when he announced that the *qui tam* provision would "deputize ready and able people" to enforce U.S. policy.[167] Similarly, one district court has described *qui tam* relators as " 'private attorneys general' whom Congress has 'deputized' to enforce federal laws."[168] *Qui tam* relators have not in any sense—constructive or otherwise—been appointed officers of the United States according to the requirements of the Appointments Clause. When one combines *Buckley*'s holding that only properly appointed officers can litigate on behalf of the United States with *Freytag*'s holding that Congressional diffusion of the appointment power—and not only aggrandizement—can violate the Appointments Clause, the conclusion is simple: It is unconstitutional for *qui tam* relators to enforce the FCA on behalf of the United States government because they have not been properly appointed to do so.

3. *Auffmordt v. Hedden*

Several of the district courts that upheld the FCA *qui tam* provisions made yet another argument to get around the Appointments Clause problem. The *Stillwell* and *Truong* courts held that the FCA *qui tam* provision did not violate the Appointments Clause because *qui tam* relators are appropriately described as "agents," rather than "officers," of the United States. Because relators are not officers, these courts reasoned, they do not

166. 31 U.S.C. § 3730(b)(1).

167. 132 CONG. REC. H9388 (daily ed. Oct. 8, 1986)(statement of Rep. Berman).

168. Public Interest Bounty Hunters v. Board of Governors, 548 F. Supp. 157, 161 (N.D. Ga. 1982).

have to be appointed according to the procedure set forth in the Appointments Clause.[169] The *Stillwell* and *Truong* courts based their conclusion that *qui tam* relators are "agents" and not "officers" on the Nineteenth-Century case of *Auffmordt v. Hedden*, in which the Supreme Court held that a person whose "position is without tenure, duration, continuing emolument, or continuous duties, and [who] acts only . . . temporarily. . . . is not an 'officer,' within the meaning of [the Appointments Clause]."[170] Because this description can be applied to FCA *qui tam* relators, the *Stillwell* and *Truong* courts were certainly correct in observing that *Auffmordt* stands for the proposition that *qui tam* relators are not "officers of the United States" within the meaning of the Appointments Clause. Reasoning from this uncontroversial observation, the courts held that because *qui tam* relators are not "officers" of the United States, they must instead be considered "agents" of the United States. Therefore, because the Appointments Clause does not require any particular appointment procedure for "agents" of the United States, "*qui tam* plaintiffs need not have been 'appointed' consistent with the dictates of the clause."[171]

Prior to the Supreme Court's holding in *Freytag*, the observation that FCA *qui tam* relators might be considered mere agents of the United States might have made a difference in the Appointments Clause analysis. If, as the *Stillwell* and *Truong* courts thought before *Freytag*, *Buckley*'s prohibition against non-officers litigating on behalf of the United States were limited to circumstances in which Congress had usurped the appointment power, it might well have been correct to observe that the FCA did not raise an Appointments Clause problem. Because the FCA did not involve congressional usurpation of the appointment power, the courts held, the Appointments Clause did not prohibit FCA *qui tam* relators, as mere agents, from enforcing the FCA on behalf of the United States.[172]

169. United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1094 (C.D. Cal. 1989); United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 623 (C.D. Cal. 1989); *see also* United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 613 (N.D. Cal. 1989).

170. Auffmordt v. Hedden, 137 U.S. 310, 327 (1890). Support for this proposition can also be found in Hall v. Wisconsin, 103 U.S. (13 Otto) 5, 8-9 (1880); United States v. Germaine, 99 U.S. (9 Otto) 508, 511-12 (1879); and United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868).

171. *Stillwell*, 714 F. Supp. at 1094; *see also Truong*, 728 F. Supp. at 623.

172. *Truong*, 728 F. Supp. at 623; *Stillwell*, 714 F. Supp. at 1094.

After *Freytag*, the distinction in *Auffmordt* between "officers" and "agents" has become almost entirely irrelevant to the Appointments Clause analysis. If anything, *Auffmordt* supports the proposition that FCA *qui tam* relators indeed are not officers of the United States and thus are not permitted by the Constitution to litigate on the government's behalf. The fact that *Auffmordt* might be read to mean that *qui tam* relators are "agents" of the United States is only relevant if "agents" have some special authority to litigate in the name of the United States without being properly appointed. Neither *Buckley* nor the Appointments Clause itself, however, admits of such an exception. No matter how a court might characterize *qui tam* relators, they clearly are *not* "officers of the United States." Nevertheless, Congress has given them the authority to enforce the FCA on behalf of the United States. As *Buckley* makes quite clear, this is a function that "may be discharged only by persons who are 'Officers of the United States' within the language of [the Appointments Clause]."[173]

4. Qui Tam *Relators as Agents*

Even if *Freytag* had not been decided and it were still plausible to argue that "agents" of the United States could litigate on the government's behalf without being formally appointed, it would nevertheless be erroneous to characterize FCA *qui tam* relators as agents. This appears to have been a logical error on the part of the *Stillwell* and *Truong* courts. As discussed above, the Supreme Court held in *Auffmordt* that a person whose "position is without tenure, duration, continuing emolument, or continuous duties [and who] acts only occasionally and temporarily" is not an "officer" for the purposes of the Appointments Clause.[174] The *Stillwell* and *Truong* courts observed that FCA *qui tam* relators do not have these qualities and rightly concluded

173. Buckley v. Valeo, 424 U.S. 1, 140 (1976). It is unlikely that courts will continue to take refuge in the *Auffmordt* argument now that the Supreme Court has, in *Freytag*, broadened the scope of the Appointments Clause and the *Buckley* rule. To do so would be to engage in a glaringly obvious logical fallacy. *Buckley* holds (1) that officers must be appointed according to the requirements of the Appointments Clause and (2) that only officers can litigate in the name of the United States. The *Auffmordt* argument is that FCA *qui tam* relators are not officers of the United States and thus do not have to be properly appointed. This argument satisfies only the first of *Buckley*'s holdings. Because FCA *qui tam* relators *do* litigate on behalf of the United States, the *Auffmordt* argument does *not* satisfy *Buckley*'s second holding; in fact, it directly violates it.

174. Auffmordt v. Hedden, 137 U.S. 310, 327 (1890).

that relators therefore are not officers according to the *Auffmordt* criteria.[175] The courts then held, however, that if *qui tam* relators are not officers of the United States, then they must, *quod erat demonstrandum*, be agents of the United States.[176]

This conclusion does not follow from the *Auffmordt* case. Contrary to the *Stillwell* and *Truong* courts' assertions, *Auffmordt* does *not* stand for the proposition that anyone who does not fit the description of an officer must be considered an agent of the United States.[177] In fact, the *Auffmordt* court did not even remotely intimate as such.[178] On the contrary, the *Auffmordt* court held that the merchant appraiser at issue was *neither* an officer *nor* an agent.[179] He was merely an "expert" that the government had retained to render opinions on commerce matters.[180] Thus, even assuming *arguendo*, that the *Stillwell* and *Truong* courts were correct in holding that agents of the United States can litigate on the government's behalf without being formally appointed, these courts still were incorrect in holding that *Auffmordt* compels the conclusion that *qui tam* relators are agents. In fact, the *Auffmordt* decision has no bearing at all on that question. If FCA *qui tam* relators really are agents of the United States, then the agency relationship must have arisen from something other than the mere fact that they are not officers.

Ordinary agency law casts grave doubts on the idea that *qui tam* relators can properly be thought of as agents of the United States. One of the fundamental tenets of agency law provides that "[a]n agent is a fiduciary with respect to matters within the scope of his agency."[181] Therefore, if the United States is a principal and FCA *qui tam* relators are its agents, one would expect a fiduciary relationship to exist between them. The FCA,

175. United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1094 (C.D. Cal. 1989); United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 623 (C.D. Cal. 1989).

176. *Truong*, 728 F. Supp. 615, 623; *Stillwell*, 714 F. Supp. at 1094.

177. Indeed, this would be an absurd result. If non-officer status were alone sufficient to render an individual an agent of the United States, then all but top government officials would be U.S. agents. Certainly even the *Stillwell* and *Truong* courts would have to concede that this cannot be the case.

178. Nowhere in the *Auffmordt* opinion does the court suggest that the various characteristics that might prevent someone from being considered an officer indicate instead that the individual is an agent.

179. Auffmordt v. Hedden, 137 U.S. 310, 326 (1890).

180. *Id.*

181. RESTATEMENT (SECOND) OF AGENCY § 13 (1957).

however, creates no such relationship. The Restatement provides that a fiduciary is "a person having a duty, created by his undertaking, to act primarily for the benefit of another."[182] This provision requires the agent to subordinate him own interests to those of the principal and refrain from placing herself in position where these interests conflict. The very structure of the FCA encourages *qui tam* relators to act not for the primary benefit of the United States, but for the primary benefit of themselves. The provision in the FCA that determines what percentage of an award goes to the *qui tam* relator[183] makes the relator's recovery inversely related to the degree of the government's involvement in the case. If the DOJ declines to intervene in a case, the *qui tam* relator can receive as much as 30 percent of the award and cannot receive less than 25 percent.[184] If, however, the DOJ does intervene, the *qui tam* relator cannot receive any more than 25 percent of the award and can receive as little as 15 percent percent.[185] This structure creates a financial incentive for the *qui tam* relator to do whatever he can to keep the government out of the case. Because the DOJ decides whether to intervene on the basis of the information that the *qui tam* relator includes with him complaint,[186] it is in the relator's interest to withhold information in hopes that the DOJ will elect not to intervene, thus allowing the *qui tam* relator to pursue a larger percentage of the recovery.[187] The government's interests would be best served by full disclosure; a true agent of the United States could not have a pecuniary interest in anything less than that. Because the FCA's essential structure provides *qui tam* relators with a financial incentive to

182. *Id.* cmt. a.
183. 31 U.S.C. § 3730(d).
184. *Id.* § 3730(d)(2).
185. *Id.* § 3730(d)(1).
186. *Id.* § 3730(b)(2).
187. Technically, it would probably violate the FCA for a *qui tam* relator to withhold information in this manner. The FCA requires a *qui tam* relator to include "written disclosure of substantially all material evidence and information the person possesses" when he files him complaint *in camera*. *Id.* § 3730(b)(2). It would be easy, however, for a duplicitous *qui tam* relator to avoid this requirement by providing only sketchy information with the original complaint and later claiming that he came by the rest of the information after the complaint was filed. Indeed, even a more forthright *qui tam* relator could withhold some information and still make a good- faith argument that he had complied with the FCA because he included "substantially all"—albeit not literally all—of the information he possessed. At any rate, the mere fact that the FCA requires full disclosure by the *qui tam* plaintiff does not change the fact that at the initial stage of a *qui tam* lawsuit, there is an inherent conflict of interest between the *qui tam* relator and the United States.

subordinate the government's interests to their own, it would be wrong to call such relators "agents" of the United States. Therefore, even if the *Stillwell* and *Truong* courts were correct to assert that "agents" of the United States can litigate on the government's behalf without being properly appointed to do so, they were nonetheless incorrect to conclude that *qui tam* relators are agents.[188] The Appointments Clause problems raised by the FCA *qui tam* provision cannot be avoided this easily.

IV. The Separation-of-Powers Argument

In challenging the constitutionality of the FCA *qui tam* provision, defendants have generally advanced three arguments—the standing argument, the Appointments Clause argument, and the separation-of-powers argument.[189] Because this is how litigants and courts have chosen to present the issues, this Note addresses the issues as they have typically been discussed. It is conceptually inaccurate, however, to separate the issues this way. In essence, all of the constitutional problems with the FCA *qui tam* provision stem from the separation-of-powers principle. Part II of this Note discusses the fact that the Supreme Court considers standing to be a constitutional requirement because it helps preserve "the Constitution's central mechanism of separation of powers."[190] Similarly, Part III of this Note observes that an Appointments Clause violation is troubling primarily because "[t]he roots of the separation-of-powers concept [are] embedded in the Appointments Clause."[191] Both of these issues obviously resonate with separation-of-powers significance, and it seems odd to partition off a third "separation-of-powers argument" as though the separation-of-powers concept were irrelevant to the first two issues. Yet, this is what the district

188. Another aspect of agency law supports the same conclusion. The Restatement provides that "[a] principal has a right *to control the conduct of the agent* with respect to matters entrusted to her." Restatement (Second) of Agency § 14 (1957)(emphasis added). In many ways, the FCA fails to give the government sufficient control over *qui tam* relators for an agency relationship to exist between them. This lack of control is the gravamen of the separation-of-powers objection to the *qui tam* provision and is discussed more thoroughly in Part IV of this paper.

189. *See, e.g.*, United States *ex rel.* Burch v. Piqua Engineering Inc., 145 F.R.D. 452 (S.D. Ohio 1992); United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084 (C.D. Cal. 1989); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607 (N.D. Cal. 1989); Hyatt v. Northrop Corp., No. CV 87-6892 KN (Jrx)(C.D. Cal. Dec. 27, 1989).

190. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992).

191. Freytag v. Commissioner of Internal Revenue, 111 S. Ct. 2631, 2638 (1991).

courts have usually done. In doing so, however, the courts have really been dealing not with a separate separation-of-powers challenge to the FCA *qui tam* provision, but rather with a third, specific separation-of-powers problem that the provision raises. When litigants and courts discuss the "separation-of-powers argument," they specifically mean the assertion that the FCA *qui tam* provision divests the executive branch of its essential constitutional power to "take Care that the Laws be faithfully executed."[192]

A. *General Principles*

As discussed above, the separation-of-powers principle is not an explicit constitutional requirement but is instead a function of the Constitution's basic structure, which "divides all power conferred upon the Federal Government into 'legislative Powers,' '[t]he executive Power,' and '[t]he judicial Power.' "[193] The Supreme Court has noted that "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787."[194] Similarly, the Court has observed that the separation-of-powers principle flows from "the central judgment of the Framers that, within our constitutional scheme, the separation of governmental powers is essential to the preservation of liberty."[195] Such strong language reaffirms that the separation-of-powers principle is a crucial constitutional requirement. "The very structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers."[196]

Despite its strong adherence to this basic constitutional concept, however, the Supreme Court has never maintained that the Constitution requires the three branches of government to be entirely separate and distinct. In *Mistretta*, for example, the Court announced that the separation-of-powers principle does

192. U.S. CONST. art. II, § 3. *See, e.g.*, United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1088 (C.D. Cal. 1989); United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 620 (C.D. Cal. 1989); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 610 (N.D. Cal. 1989).

193. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992)(citing U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1).

194. Buckley v. Valeo, 424 U.S. 1, 124 (1976).

195. Mistretta v. United States, 488 U.S. 361, 380 (1989).

196. Immigration & Naturalization Service v. Chadha, 462 U.S. 919, 946 (1983).

not require a "hermetic division" between the branches.[197] The Court's reluctance to take a strict all-or-nothing approach to separation-of-powers problems has resulted in a smattering of decisions that yields few broad and consistently applicable principles. Predictably, this has created confusion, for as Justice Scalia noted in *Defenders of Wildlife*, "the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts."[198] In the absence of such "common understanding," separation-of-powers doctrine is necessarily a murky area of the law. For this reason, the "separation-of-powers" challenge to the FCA *qui tam* provision involves a constitutional principle that is far less clear-cut than the standing doctrine and even the Appointments Clause doctrine.

One of the reasons that separation-of-powers cases are so inconsistent is that congressional action can raise separation-of-powers concerns in numerous different ways. Over the years, the Supreme Court has held that Congress may not retain removal power over an officer who performs executive functions,[199] may not retain a legislative veto over administrative decisions,[200] and may not give Article I bankruptcy judges the power to hear ordinary tort and contract claims.[201] At the same time, however, the Court held that it did *not* violate the separation-of-powers principle for Congress to place the Federal Sentencing Commission within the judicial branch,[202] to grant the General Services Administration control over Richard's Nixon's presidential papers after his resignation,[203] or to grant the Commodity Futures Trading Commission jurisdiction over state-law counterclaims in administrative hearings.[204] In dealing with these issues, the Supreme Court has never elaborated a single test, or even a crucial set of factors, that can be used to determine whether a particular congressional act violates the separation-of-powers principle. This lack of clear Supreme

197. 488 U.S. at 380.
198. 112 S. Ct. at 2136.
199. Bowsher v. Synar, 478 U.S. 714 (1986).
200. *Chadha*, 462 U.S. at 919.
201. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).
202. Mistretta v. United States, 488 U.S. 361 (1989).
203. Nixon v. Administrator of General Serv., 433 U.S. 425 (1977).
204. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

Court guidance is less problematic in the standing and Appointments Clause areas. Although the standing doctrine has separation-of-powers significance, the Court was able to simplify analysis of standing problems by developing the fairly straightforward three-part analysis of injury-in-fact, causation, and redressability. Likewise, although Appointments Clause doctrine also has separation-of-powers significance, the Court was able to facilitate constitutional analysis by creating the easily-administrable *Buckley* rule that only properly appointed officers can litigate on behalf of the United States. For more fundamental separation-of-powers problems, however, the Court has taken a more ad hoc approach that makes the constitutionality of a given congressional act much less obvious. The Court vacillates unpredictably between rigid adherence to the separation-of-powers principle and lenient accommodation of congressional innovations. No single factor is dispositive and no consistent analytical approach carries the day. For this reason, any discussion of the separation-of-powers challenge to the FCA *qui tam* provision must necessarily proceed cautiously.

B. *The Executive Branch's Litigative Function*

Article II, section 3 of the Constitution provides that the President "shall take Care that the Laws be faithfully executed."[205] The Supreme Court has held that this clause gives the Executive Branch the power to enforce the laws[206] and that such power includes the authority "to investigate and litigate offenses against the United States."[207] Consistent with this power, the FCA grants the Attorney General—an executive officer—the responsibility to "diligently . . . investigate" violations of the Act and permits her to "bring civil action" pursuant to the provisions of the Act if her investigation so warrants.[208] The *qui tam* provision undermines at least some of this executive power by taking it from the hands of the Attorney General and placing it in the hands of *qui tam* relators.[209] By thus stripping the Executive Branch of a portion of its constitutionally assigned power to enforce the laws, the FCA *qui*

205. U.S. CONST. art. II, § 3.
206. Springer v. Philippine Islands, 277 U.S. 189, 202 (1928).
207. United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1088 (C.D. Cal. 1989)(citing Buckley v. Valeo, 424 U.S. 1, 138 (1976)).
208. 31 U.S.C. § 3730(a).
209. *Id.* § 3730(b).

tam provision at best raises constitutional concerns and at worst violates the separation-of-powers principle. Supreme Court cases that deal with similar Article II issues do not give perfect guidance on this question, but do suggest that in at least some phases of FCA litigation the *qui tam* provision is unconstitutional.

There are relatively few cases in which the Supreme Court discusses the particular separation-of-powers problem that is raised when an act of Congress impinges on the Executive Branch's "take care" duties. In *Schor*, the Court held that an act of Congress is unconstitutional if it "impermissibly undermine[s]" the powers of the executive.[210] This formulation begs the question, however, of what is permissible and what is not; the rest of the *Schor* case gives little further guidance on the Article II question. In *Nixon*, the Court held that an act of Congress must not disrupt "the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions."[211] This language also begs the question of what degree of congressional interference is necessary before the "proper balance" has been disrupted. Because the Court in *Nixon* held that it was not unconstitutional for Congress to grant the General Services Administration control over Mr. Nixon's presidential papers, the case gives some guidance as to what Congress can do, but very little guidance as to what it cannot do. This lack of meaningful guiding principles has the result that the constitutionality of any act of Congress that arguably impinges on the Executive Branch's "take care" function is largely an open question.

1. *Morrison v. Olson*

The Court's most thorough analysis of Article II's "take care" clause came in the recent case of *Morrison v. Olson*.[212] In *Morrison*, the Court announced that when congressional action potentially undermines the executive's litigative function, the test of constitutionality is whether the Executive Branch retains sufficient "control" over the litigation "to ensure that the Presi-

210. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986).
211. Nixon v. Administrator of General Serv., 433 U.S. 425 (1977).
212. 487 U.S. 654 (1988).

dent is able to perform his constitutionally assigned duties."[213] Although this test is in many ways no more helpful than the dicta in *Schor* and *Nixon*, it is the Supreme Court's most recent pronouncement on this kind of separation-of-powers problem, and the district courts that have considered the constitutionality of the FCA *qui tam* provision agree that the *Morrison* "control" test is the appropriate standard to apply in addressing the separation-of-powers issue.[214] To apply this rather vague "control" test, one must consider the various indicia of executive control that the *Morrison* Court found to be most essential and ask whether the FCA *qui tam* provision adequately respects them.

The *Morrison* case dealt with the "independent counsel" provision of the Ethics in Government Act ("EGA").[215] The EGA was passed by Congress in 1978,[216] in the wake of the Watergate scandal, to facilitate the investigation and prosecution of high-ranking Executive Branch officials who violated federal criminal laws.[217] The independent counsel provision of the EGA required the Attorney General to conduct a preliminary investigation upon receipt of any information that she deemed "sufficient to constitute grounds to investigate" potential violations of federal criminal laws by covered government officials.[218] Within 90 days of the completion of this investigation, the Attorney General was required to report to the "Special Division," a special court created by the EGA for the appointment of independent counsels.[219] If the Attorney General determined, as a result of her investigation, that "there [we]re no reasonable grounds to believe that further investigation [would be] warranted," she was to notify the special division of this result and no further action would be taken.[220] Indeed, in such

213. *Id.* at 696.

214. *See, e.g.*, United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 620-22 (C.D. Cal. 1989)("under *Morrison v. Olson*, for the *qui tam* provisions of the False Claims Act to pass constitutional muster, the executive branch must retain 'sufficient' . . . control over the litigation"); United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1089-90 (C.D. Cal. 1989); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 611-13 (N.D. Cal. 1989); Hyatt v. Northrop Corp., No. CV 87-6892 KN (Jrx), slip op. at 12-14 (C.D. Cal. Dec. 27, 1989).

215. Ethics in Government Act, Title VI, *codified at* 28 U.S.C. §§ 591-599 (Supp. V 1982).

216. Morrison v. Olson, 487 U.S. 654, 660 n.1. (1988).

217. *Id.* at 660.

218. *Id.*

219. *Id.* at 661 (citing 28 U.S.C. § 49 (Supp. V 1982)).

220. *Id.*

a situation, the Special Division had "no power to appoint an independent counsel."[221] If, however, the Attorney General determined that there were "reasonable grounds to believe that further investigation or prosecution [was] warranted," she must apply to the Special Division for the appointment of an independent counsel to investigate the matter further.[222] The EGA provided that the Attorney General's decision whether to recommend the appointment of an independent counsel was not reviewable "in any court."[223]

If the Attorney General applied to the Special Division for appointment of an independent counsel, the Special Division was to "appoint an appropriate independent counsel and . . . define that independent counsel's prosecutorial jurisdiction."[224] Once this was done, the EGA granted the independent counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice."[225] Thus, the independent counsel was cut loose from the direct control of the Executive Branch.

There were two ways that an independent counsel's tenure could come to an end. If the independent counsel notified the Attorney General that he completed or substantially completed any investigation or prosecution assigned to him by the Special Division—or if the Attorney General so found—the independent counsel's office was terminated.[226] Prior to the completion of his duties, however, an independent counsel could be removed from office "only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impair[ed] the performance of such independent counsel's duties."[227] If the Attorney General removed an independent counsel pursuant to this provision, she was to prepare a report setting forth the factual basis and ultimate grounds for the removal and submit a copy of the report to the Special Division and to the Judi-

221. *Id.* (quoting 28 U.S.C. § 592(b)(1)(Supp. V 1982)).
222. Morrison v. Olson, 487 U.S. 654, 661 (1988).
223. *Id.* at n.4 (citing 28 U.S.C. § 592(f)(Supp. V 1982)).
224. *Id.* at 661 (quoting 28 U.S.C. § 593(b)(Supp. V 1982)).
225. *Id.* (quoting 28 U.S.C. § 594(a)(Supp. V 1982)).
226. *Id.* at 664 (citing 28 U.S.C. §§ 596(b)(1)-(2)(Supp. V 1982)).
227. *Id.* at 663 (quoting 28 U.S.C. § 596(a)(1)(Supp. V 1982)).

ciary Committees of both houses of Congress.[228] The EGA then permitted the independent counsel to seek judicial review in the United States District Court for the District of Columbia, which was authorized to grant reinstatement or "other appropriate relief."[229] The EGA thus permitted the Attorney General to retain some measure of control over the independent counsel. Furthermore, the EGA allowed for congressional oversight of the independent counsel's activities and requires the independent counsel to cooperate with Congress in the exercise of his jurisdiction.[230]

The EGA, by vesting investigative and prosecutorial power in an independent counsel, certainly stripped the Executive Branch of some portion of its litigative function. Nevertheless, the Supreme Court upheld the independent counsel provision in the EGA against a separation-of-powers challenge. The Court noted that several aspects of the EGA allowed the Executive Branch to retain "a degree of control" over the litigative activities of the independent counsel[231] so that the President's "take care" duties were not "impermissibly undermine[d]".[232]

Similarly, the FCA provides the Attorney General with the opportunity to exercise considerable "control" over *qui tam* litigation at certain phases of the lawsuit. The district courts thus found that the FCA provides the Attorney General with sufficient control over *qui tam* relators to satisfy the *Morrison* test.[233] *Qui tam* litigation can proceed in many different ways, and it appears that at certain phases in *qui tam* lawsuits, the FCA does *not* provide the Executive Branch with sufficient control over the litigation to satisfy *Morrison* or the separation-of-powers requirement.

C. *The FCA* Qui Tam *Provision and the "Control" Test*

When analyzing the FCA *qui tam* provision according to the

228. Morrison v. Olson, 487 U.S. 654, 663 (1988)(citing 28 U.S.C. § 596(a)(2) (Supp. V 1982)).

229. *Id.* at 663-64 (citing 28 U.S.C. § 596(a)(3)(Supp. V 1982)).

230. *Id.* at 664 (citing 28 U.S.C. §§ 595(a)(1)-(2)(Supp. V 1982)).

231. *Id.* at 696.

232. *Id.* at 695 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986)).

233. *See* United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1088-93 (C.D. Cal. 1989); United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 620-22 (C.D. Cal. 1989); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 611-13 (N.D. Cal. 1989); Hyatt v. Northrop Corp., No. CV 87-6892 KN (Jrx), slip op. at 12-14 (C.D. Cal. Dec. 27, 1989).

Morrison "control" test, the *Stillwell* and *Truong* courts considered the role of the DOJ during three phases of *qui tam* litigation—initiating the suit, conducting the litigation, and terminating the litigation.[234] After discussing various aspects of the FCA, these courts determined that the FCA "grant[ed] the executive branch greater litigative control than that provided for in the Ethics in Government Act of 1978, which the Supreme Court validated in *Morrison v. Olson*."[235] Because control was the touchstone of the separation-of-powers problem, these courts concluded that because the EGA did not violate the separation-of-powers principle, then neither did the FCA.[236]

Many circumstances can arise during FCA *qui tam* litigation that the *Stillwell* and *Truong* courts do not consider. In these cases, the FCA divests the DOJ of the very aspects of litigative control that the Supreme Court considered most crucial when it upheld the EGA in *Morrison*. Unlike the *Stillwell* and *Truong* courts, this Note concludes that many aspects of the *qui tam* provision raise serious doubts about its constitutionality under the *Morrison* test.

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234. *Stillwell*, 714 F. Supp. at 1090-93; *Truong*, 728 F. Supp. at 621-22.

235. *Truong*, 728 F. Supp. at 622; *see also Stillwell*, 714 F. Supp. at 1092 ("The permissive intervention provision of the amended [FCA] is less intrusive in effect than a similar feature of the Ethics in Government Act approved in *Morrison v. Olson*").

236. Furthermore, the *Stillwell* court began its separation-of-powers analysis by announcing that it was skeptical of the argument because

> no reported decision has ever invalidated a statute because of undue intrusion on executive branch authority when the executive has expressly declined to oppose the law. Thus, the defendants ask this Court to entertain a separation of powers challenge to the amended False Claims Act without the participation of the affected branch.

714 F. Supp. at 1086-87. This observation is largely irrelevant, however, for the Supreme Court has explicitly held that the "consent" of the affected branch cannot cure a separation-of-powers problem. In *New York v. United States*, the Court observed,

> The Constitution's division of power among the three Branches is violated where one Branch invades the territory of another, *whether or not the encroached-upon Branch approves the encroachment*. . . . The constitutional authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.

112 S. Ct. 2408, 2431-32 (1992)(emphasis added). Also, although the Executive Branch has not yet formally challenged the FCA *qui tam* provision in court, officials of the DOJ have openly criticized the provision because they feel that it interferes with their ability to investigate fraud. *See generally Qui Tam Provisions of the False Claims Act: Hearing on H.R. 4563 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992)(statement of Stuart M. Gerson, Assistant Attorney General)[hereinafter Gerson Statement].

1. *Initiating the Suit*

Initially, the FCA *qui tam* provision does not appear to interfere with the DOJ's power to initiate lawsuits under the FCA. The Attorney General has an unfettered right to initiate a false claims action[237] and if she does so, *qui tam* relators are subsequently barred from suing on the underlying facts.[238] It is true that a *qui tam* relator can file a false claims action without the consent of the DOJ,[239] but the *Stillwell* and *Truong* courts both conclude that this does not interfere with the Executive Branch's function because the DOJ can subsequently intervene in the lawsuit and take over the litigation.[240]

This analysis ignores the fact that an important part of the Executive Branch's authority lies in its prosecutorial discretion. The *Stillwell* and *Truong* courts are quite right to point out that the FCA does nothing to prevent the DOJ from initiating a false claims lawsuit. These courts say little, however, about the fact that the FCA prevents the DOJ from *preventing* the initiation of a false claims lawsuit. The Supreme Court has observed that the separation-of-powers doctrine protects the Executive Branch's power not only to conduct litigation, but also to forego litigation:

> [T]he decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed."[241]

The FCA *qui tam* provision certainly invades this "special province of the Executive Branch," for there is nothing that the DOJ can do to stop an individual from filing a *qui tam* lawsuit.[242] The crucial question, then, is whether this interference with the DOJ's prosecution discretion leaves the Executive

237. 31 U.S.C. § 3730(a).

238. *Id.* § 3730(e)(3).

239. *Id.* § 3730(b)(1).

240. United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1090 (C.D. Cal. 1989); United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 620 (C.D. Cal. 1989). The DOJ may intervene within 60 days after a *qui tam* complaint is filed. 31 U.S.C. § 3730(b)(4)(A).

241. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *see also* Buckley v. Valeo, 424 U.S. 1, 138 (1976)(referring to initiation of lawsuits on behalf of the United States as part of President's "take care" function).

242. 31 U.S.C. § 3730(b)(1).

Branch with sufficient control over FCA litigation to satisfy the *Morrison* test.

It is important to note also that this particular problem was not present in the *Morrison* case. The Ethics in Government Act provided that the Special Division could appoint an independent counsel *only* upon application by the Attorney General and the Court in *Morrison* stressed that "the Attorney General's decision to apply to the Special Division for the appointment of an independent counsel is not reviewable 'in any court.' "[243] Thus, under the EGA, the Attorney General essentially has *absolute power* to determine whether an independent counsel is appointed. Under the FCA, however, the Attorney General essentially had *no power* to determine whether a false claims action is filed.

The DOJ has made no secret of the fact that its lack of control over the filing of *qui tam* lawsuits under the FCA has caused serious problems. Sometimes the potential for a false claims action becomes obvious in the early stages of a civil or criminal fraud investigation. In such a situation, it will very often be in the interest of the DOJ to proceed with its investigation slowly in order to accumulate as much evidence as possible before issuing indictments or proceeding with litigation. The potential for a private *qui tam* plaintiff to rush in and blow the DOJ's cover by filing a lawsuit makes the DOJ's job very difficult. As Assistant Attorney General Stuart Gerson has testified to Congress, "premature disclosures through the filing of *qui tam* suits will tip wrongdoers off at too early a stage and allow them to destroy evidence or otherwise to minimize potential government convictions or recoveries."[244]

In addition, undermining the DOJ's prosecutorial discretion in this manner can work a severe injustice on defendants. Certainly individuals and organizations that defraud the U.S. government are not worthy of any particular sympathy, but granting self-interested private citizens an unfettered right to bring suit under the FCA creates an enormous potential for abuse. The DOJ already has a statutory duty to investigate diligently any potential violation of the FCA[245] and granting prosecutorial authority to private parties does not appear to in-

243. Morrison v. Olson, 487 U.S. 654, 661 n.4 (1988).
244. Gerson Statement, *supra* note 236, at 8.
245. 31 U.S.C. § 3730(a).

crease significantly the likelihood that wrongdoers will be brought to justice.[246] It does, however, increase the potential for frivolous and vexatious litigation.[247] With its severe damage provisions,[248] the FCA is fearsome quasi-criminal statute. Prosecutorial discretion is a crucial component of the executive power because citizens and business people in the United States have a right to expect that such quasi-criminal statutes will be enforced by a responsible Executive Branch. Unlike private litigants, who are primarily interested in their own financial well-being, DOJ officials have an ethical responsibility to "refrain from instituting or continuing litigation that is obviously unfair."[249] The *Stillwell* court notes that various procedural provisions—such as summary judgment under Rule 56 and attorney sanctions under Rule 11 of the Federal Rules of Civil Procedure—should be sufficient to protect defendants from "loose cannon" *qui tam* plaintiffs.[250] It is little consolation, however, to tell a defendant that it can spend hundreds of thousands of dollars fighting a frivolous private lawsuit when other criminal and quasi-criminal defendants have to answer only to executive officers whose "duty is to seek justice."[251]

For these reasons, the FCA *qui tam* provision interferes with prosecutorial discretion in ways that the Ethics in government Act did not. In upholding the EGA against a separation-of-powers challenge, the *Morrison* Court emphasized that the Attorney General's decision whether to apply to the Special Division for appointment of an independent counsel was

246. Assistant Attorney General Gerson has indicated that only .0002 percent of total recoveries under the FCA have been by way of *qui tam* actions in which the DOJ declined to intervene. Gerson Statement, *supra* note 236 at 20. This statistic concededly says nothing about FCA violations that the DOJ would never have known about if not for *qui tam* relators, but it does suggest that the public interest is not particularly served by those *qui tam* relators who proceed even if the DOJ does not intervene. The anolmaly suggests that an ideal approach would be to abolish the *qui tam* provision and merely pay FCA informants if the information they provide proves useful in an FCA prosecution that the DOJ conducts. *See supra* note 119.

247. Mr. Gerson observes that anytime the government enters into a large defense contract, it is commonplace for "many generic 'kitchen sink' *qui tam* complaints" to be filed "containing every conceivable broad allegation without any specific evidence whatsoever." Gerson Statement, *supra* note 236, at 18.

248. The FCA provides the U.S. with a treble damage remedy and further imposes a $5,000 to $10,000 fine for each individual violation. 31 U.S.C. § 3729(a).

249. A.B.A. Code of Professional Responsibility, EC 7-14.

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

251. A.B.A. Code of Professional Responsibility, EC 7-13.

unreviewable.[252] It therefore does not follow from *Morrison* that the DOJ retains sufficient control over the initiation of FCA litigation to satisfy the separation-of-powers principle. Considering the serious problems that this lack of control creates for the DOJ and for potential defendants, the FCA *qui tam* provision appears to violate the Constitution.

2. *Conducting the Litigation*

a. *When the DOJ Elects to Intervene*

Once a *qui tam* relator has brought an action under the FCA, the DOJ has various options available to it concerning the conduct of the litigation. The DOJ maximizes its control over the lawsuit if it intervenes during the 60-day sealing period after the suit is filed and takes over the action.[253] If the DOJ elects to intervene in this manner, it acquires substantial control over the course of the litigation. Nevertheless, the FCA still curtails the DOJ's discretion in several ways. First, the DOJ must notify the relator if it wishes to dismiss the action over the relator's objections and the court can approve the dismissal only after granting the relator a hearing on the motion.[254] Second, if the relator objects to the DOJ's attempt to settle with the defendant, the court can approve the settlement only if it determines after a hearing that the settlement is "fair, adequate, and reasonable under all the circumstances."[255] Third, if the DOJ wants to restrict the relator's participation in the case—such as by limiting the number of witnesses the relator may call or limiting the length of their testimony—it must satisfy the court that unrestricted participation by the relator would "interfere with or unduly delay the government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment."[256] All of these requirements impinge to some extent on the Executive Branch's litigative function, for the DOJ would not have to do any of these things if it initially brought the action itself.

Despite this interference, the *Stillwell* and *Truong* courts held

252. Morrison v. Olson, 487 U.S. 654, 661 n.4 (1988).
253. 31 U.S.C. § 3730(b)(4)(A).
254. *Id.* § 3730(c)(2)(A).
255. *Id.* § 3730(c)(2)(B).
256. *Id.* § 3730(c)(2)(C). The defendant in a *qui tam* case can also petition the court to limit the relator's participation in the case, based upon a similar showing. *Id.* § 3730(c)(2)(D).

that the Executive Branch still retains sufficient control over the conduct of *qui tam* actions to satisfy the *Morrison* test.[257] With regard to situations in which the DOJ intervenes during the 60-day period, these courts are probably correct. Though the FCA does cut back on the DOJ's full range of litigative discretion in these cases, the DOJ enjoys substantially more control over the conduct of *qui tam* litigation than it did over the activities of independent counsels under the EGA. After all, the EGA almost completely restricted the DOJ's functions once an independent counsel was appointed by granting the independent counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice."[258] The DOJ was thus denied the opportunity to participate in the independent counsel's litigation in any way. Compared to this complete prohibition on DOJ involvement after the initial appointment of the independent counsel, the FCA grants the DOJ substantial control over the course of *qui tam* litigation. It therefore seems to follow that when the DOJ initially elects to intervene in a *qui tam* lawsuit, it retains sufficient control over the litigation to satisfy the separation-of-powers principle.

This conclusion must be qualified somewhat, however, because there are pragmatic justifications for limiting the Executive Branch's power under the EGA that do not exist under the FCA. The whole purpose of the EGA was to establish an impartial apparatus for the investigation and prosecution of top governmental officials who violate federal laws.[259] Because these officials were always members of the Executive Branch, it was thought to be important that the Executive Branch have less control over investigations and prosecutions under the EGA than it would generally have over other prosecutions. Corrupt executive officials would effectively be above the law if they had unqualified power to control or dismiss those responsible for enforcing it. Without the independent counsel provision of the EGA, the Attorney General and the rest of the DOJ staff would

257. United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1091-92 (C.D. Cal. 1989); United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 621-22 (C.D. Cal. 1989).

258. Morrison v. Olson, 487 U.S. 654, 661 (1988)(quoting 28 U.S.C. § 594(a)(Supp. V 1982)).

259. *Id.* at 660-61.

be responsible for investigating and prosecuting the President if he violated federal laws. Because the President has unfettered power to fire the Attorney General and her policymaking subordinates, only a President of great integrity would allow a criminal prosecution to proceed against her. A procedure whereby the President and other high-ranking executive officials could be prosecuted by individuals not under their control promoted thorough investigation of Executive Branch wrongdoing.[260] The independent counsel provision of the EGA was an ingenious solution to this important problem.

The FCA *qui tam* provision, however, is compelled by no such pragmatic imperative. There is no particular reason to expect that the Attorney General and other DOJ officers will encounter any particular obstacles or conflicts of interest as they "diligently . . . investigate"[261] fraud on the United States. Those prone to remote and paranoid speculation might fear that the DOJ would be subject to inappropriate pressure by powerful members of Congress to go easy on defense contractors who were parties to particularly important weapons contracts, but DOJ officials cannot be removed by congressional committees, so there is no particular reason to expect that they would yield to this kind of pressure. Furthermore, even if such influence peddling were a problem, limiting executive authority by vesting it in self-interested private citizens is certainly a much less responsible solution to the problem than something like the independent counsel provision in the EGA. The EGA required independent counsels to have "appropriate experience,"[262] conduct their duties in a "responsible . . . manner,"[263] and comply with established DOJ policy.[264] The FCA, on the other hand, allows virtually *anyone* to step forward as a *qui tam* relator. The only necessary qualification, it seems, is a desire for wealth.[265] Even if the DOJ could occasionally be pressured into

260. The danger of not having such a procedure in place was strikingly evident during the Watergate scandal, when President Nixon ordered Solicitor General Robert Bork to fire Special Prosecutor Archibald Cox. ROBERT H. BORK, THE TEMPTING OF AMERICA 272 (1990).

261. 31 U.S.C. § 3730(a).

262. 28 U.S.C. § 593(b)(2)(1988).

263. *Id.*

264. *Id.* § 594(f)(1988).

265. One might argue that a desire for wealth is not a "necessary" qualification for a *qui tam* relator. Certainly an individual with special knowledge of fraud on the United States might be motivated to come forward not by greed, but by a sense of patriotic duty. If such an individual had no desire for the riches that come with a successful *qui*

shirking its statutory duty to investigate FCA violations, there is no reason to think that greedy private citizens would do a better job. Thus, even though the FCA *qui tam* provision appears to yield the DOJ more control over the conduct of litigation than the EGA did, the limitation on executive authority in the FCA context seems less necessary than in the EGA context and thus more constitutionally suspect.

b. *When the DOJ Elects Not To Intervene*

The DOJ's control over the conduct of *qui tam* litigation is more limited, however, when it initially elects not to intervene during the 60-day sealing period. During the 60-day sealing period, the DOJ has an absolute right to intervene and take over the lawsuit,[266] and does not need court approval to do so. If the DOJ does not intervene during this period, however, the *qui tam* relator has the right to conduct the action on his own and the DOJ's litigative control is greatly curtailed if it subsequently attempts to reenter the lawsuit.[267] In such a situation, the DOJ retains the right to receive copies of all pleadings in the action, at its own expense,[268] but it cannot participate actively in the litigation unless it can convince the court that there is "good cause" why it should be allowed to reenter the lawsuit.[269] The *Stillwell* and *Truong* courts felt that this opportunity to reenter the lawsuit on a showing of "good cause" gave the DOJ the same level of control over the litigation that the EGA did in allowing the Attorney General to remove the independent counsel for "good cause".[270] Because of this similar language, the courts concluded that "if . . . the good cause provisions of the Ethics in Government Act do not encroach impermissibly on executive authority, it is difficult to see how analogous . . . provisions in the False Claims Act could be so construed."[271]

The mere similarity in wording between the two acts does

tam lawsuit, however, there would be nothing to prevent him simply from calling the DOJ and telling them about the information he has. It is difficult to imagine that such a person would take the trouble to become involved in a complicated litigation proceeding unless the prospect of financial gain held considerable allure.

266. *See* 31 U.S.C. § 3730(b)(4)(A).

267. *Id.* § 3730(b)(4)(B).

268. *Id.* § 3730(c)(3).

269. *Id.*

270. *See* 28 U.S.C. § 596(a)(2)(1988); United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1092 (C.D. Cal. 1989); United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 622 (C.D. Cal. 1989).

271. *Truong*, 728 F. Supp. at 622.

not mean that they have the same content. Under the EGA, the Attorney General was required by the statute to have "good cause" before she removed the independent counsel, but she did not need to seek approval from anyone before acting on this "good cause." The statute only required that she prepare a report setting forth the basis for the dismissal and submit the report to the Special Division and to the Judiciary Committees of both houses of Congress.[272] Court approval of this decision came into play only if the independent counsel sought judicial review of the Attorney General's action.[273] This structure gave the DOJ a good deal of control over the independent counsel and only subjected him decisions to judicial scrutiny after the fact. The FCA, on the other hand, does not allow the DOJ to reenter a *qui tam* lawsuit until *after* the court has passed on the issue of good cause.[274] Thus, the DOJ is much more at the mercy of the judiciary in this context than it was when it removed an independent counsel for good cause under the EGA. It appears that contrary to the assertions of the *Stillwell* and *Truong* courts, the FCA places greater limits on executive authority in this context than the EGA did.

Furthermore, it is not entirely clear from the language of the FCA how strong a showing of "good cause" the DOJ must make to reenter a *qui tam* lawsuit. The *Stillwell* and *Truong* courts both brushed this question aside, apparently assuming that this was an extremely low threshold for the DOJ to meet.[275] The legislative history suggests, however, that Congress intended the "good cause" language in the FCA to place a rather serious burden on the DOJ. The words "good cause" appear elsewhere in the FCA. One provision provides that the DOJ must show "good cause" if it seeks an extension of the 60-day period during which the *qui tam* complaint remains under seal.[276] In addressing this provision, the Senate Judiciary Committee announced its intention that courts should construe "good clause" narrowly and rarely grant extensions:

> Extensions will be granted . . . only upon a showing of "good cause". The Committee intends that courts weigh carefully any extensions on the period of time in which the Govern-

272. 28 U.S.C. § 596(a)(3)(1988).
273. *Id.*
274. 31 U.S.C. § 3730(c)(3).
275. *Stillwell*, 714 F. Supp. at 1091; *Truong*, 728 F. Supp. at 622.
276. 31 U.S.C. § 3730(b)(3).

> ment has to decide whether to intervene and take over the litigation. The Committee feels that with the vast majority of cases, 60 days is an adequate amount of time to allow Government coordination, review and decision. *Consequently, "good cause" would not be established merely upon a showing that the Government was overburdened and had not had a chance to address the complaint.* . . . The Government should not, in any way, be allowed to unnecessarily delay lifting of the seal from the civil complaint or processing of the *qui tam* litigation.[277]

This language suggests that within the statutory framework of the FCA, "good cause" has a very narrow meaning that substantially constrains the discretion of the DOJ and the Executive Branch.

Also, the "good cause" escape valve in the FCA is of a completely different character than that in the EGA. In *Morrison*, the Court held that the "good cause" language saved the EGA from a separation-of-powers challenge not merely because it gave the DOJ some control over the conduct of the independent counsel, but also because it gave the DOJ some power to *remove* the independent counsel. This power of removal was crucial to the Court's decision:

> *Most importantly*, the Attorney General *retains the power to remove the counsel* for "good cause," a power that we have already concluded provides the Executive with substantial ability to ensure that the laws are "faithfully executed" by an independent counsel.[278]

Under the FCA, however, the Executive Branch has *absolutely no authority* to remove a *qui tam* relator at any point in the litigation.[279] Even the provision that allows the DOJ to reenter a *qui tam* lawsuit upon a showing of "good cause" explicitly provides that in so doing, the DOJ must not "limit[] the status and rights" of the relator.[280] Because this utter lack of control over who can serve as a *qui tam* relator seems to interfere severely

277. S. REP. No. 345, 99th Cong., 2d Sess. 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5289-90 (emphasis added).

278. Morrison v. Olson, 487 U.S. 654, 696 (1988)(emphasis added). The Court has been equally adamant in other cases that removal power over individuals who perform executive functions is an indispensable part of the executive power. In *Bowsher*, for example, the Court held portions of the Gramm-Rudman-Hollings Act unconstitutional because Congress vested executive authority in the Comptroller General but retained the power to fire him. Bowsher v. Synar, 478 U.S. 714 (1986).

279. The FCA explicitly provides that when the DOJ intervenes in a *qui tam* lawsuit, the relator "shall have the right to continue as a party to the action." 31 U.S.C. § 3730(c)(1).

280. *Id.* § 3730(c)(3).

with the Executive Branch's ability to ensure that the laws are "faithfully executed" by the relator,[281] the FCA may well fall short of the required level of executive control contemplated by the Court in *Morrison*.

3. *Terminating the Litigation*

The FCA *qui tam* provision may impermissibly interfere with executive authority in the termination phase of the litigation as well, but this question is less clear because it seems to turn on statutory interpretation. When the DOJ intervenes in a *qui tam* lawsuit during the 60-day sealing period, it has substantial authority to conduct the action, but it is subject to certain constraints. If it chooses to dismiss the action over the objections of the relator, it can do so only with court approval after the relator has an opportunity to be heard.[282] If it chooses to settle the lawsuit over the objections of the relator, it can do so only if it can convince a court that the settlement is "fair, adequate, and reasonable under all the circumstances."[283] Although these conditions constrain the DOJ's discretion to certain extent, they seem to be less intrusive than the EGA and are thus probably constitutional under *Morrison*.

It is not clear, however, whether the FCA provides the DOJ with *any* power to terminate a *qui tam* lawsuit unless it intervenes within the 60-day period.[284] The provisions of the FCA that allow the DOJ to dismiss or settle a *qui tam* lawsuit over the objections of the relator are grouped together under the subsection that describes what happens if the DOJ initially intervenes.[285] Under the subsection that describes what happens if the DOJ initially does *not* intervene and subsequently reenters

281. *See Morrison*, 487 U.S. at 696.

282. 31 U.S.C. § 3730(c)(2)(A).

283. *Id.* § 3730(c)(2)(B).

284. It is true that the DOJ can avoid this problem by intervening during the initial 60-day period. However, given the "many generic 'kitchen sink' *qui tam* complaints . . . containing every conceivable broad allegation without any specific evidence whatsoever" that are frequently served on the DOJ, Gerson Statement, *supra* note 236, at 18, it would be very difficult for the DOJ to investigate every *qui tam* lawsuit thoroughly enough during the initial 60-day period to get a real sense of whether it would be wise to intervene. Often the DOJ will discover factors that suggest it should be involved in an FCA lawsuit only after it has initially declined to intervene. In such circumstances, it does not seem adequate merely to conclude that the DOJ should have intervened earlier.

285. 31 U.S.C. § 3730(c)(1) provides that if the DOJ initially intervenes in a *qui tam* lawsuit, it assumes "primary responsibility" for prosecuting the action, subject to the limitations set forth in § 3730(c)(2). Section 3730(c)(2) sets forth the DOJ's powers to

the lawsuit, however, there is no language suggesting that the DOJ can dismiss or settle the lawsuit over the relator's objections, regardless of court approval.[286] This subsection does provide that if the DOJ does not intervene, the relator has "the right to conduct the action."[287] It also provides that if the DOJ intervenes in the litigation at a "later date" upon a showing of "good cause," it must not "limit[] the status and rights" of the relator.[288] Because this subsection explicitly gives the relator the "right" to conduct the action, it would certainly seem to "limit" his rights if the DOJ subsequently intervened in the lawsuit and dismissed it over the relator's objections. Although there are no reported cases that deal directly with this particular question, the plain wording of Section 3730(c)(3) seems to suggest that once the DOJ has initially declined to intervene in a *qui tam* lawsuit, there is *absolutely nothing* it can do to dismiss the action, even if it successfully intervenes at a later date. In such a situation, the Executive Branch would be completely stripped of its power to terminate *qui tam* lawsuits.

Assistant Attorney General Gerson testified that because of the enormous number of frivolous *qui tam* complaints filed every year that present no evidence at all, it is crucial to the DOJ's functions that it have the power "unilaterally to dismiss" such complaints.[289] He further testified that he believed the DOJ had this power under the FCA.[290] This is not an implausible reading of the statutory language. One could assert that even though § 3730(c)(3) lacks specific provisions allowing the DOJ to dismiss or settle the lawsuit when the DOJ intervenes upon a showing of good cause, it assumes the same status it would have had if it had intervened initially and is thus governed by the more liberal provisions of Sections 3730(c)(1)-(2). This reading of the statute would accord with the principle of construing congressional statutes to avoid constitutional difficulties,[291] but it seems to fly in the face of Section 3730(c)(3)'s

dismiss or settle the lawsuit over the relator's objections if he is given an opportunity to be heard.

286. 31 U.S.C. § 3730(c)(3).

287. *Id.*

288. *Id.*

289. Gerson Statement, *supra* note 236, at 18-20.

290. *Id.*

291. *See* Siler v. Louisville & Nashville R. Co., 213 U.S. 175, 193 (1909)("Where a case in this Court can be decided without reference to questions arising under the federal Constitution, that course is usually pursued and is not departed from without important reasons.").

prohibition against limiting the status or rights of the relator.[292] Regardless of which view is correct, this potential limitation on the DOJ's authority to dismiss or settle *qui tam* lawsuits is yet another separation-of-powers problem that cannot be disposed of merely by citing the *Morrison* decision.

CONCLUSION

The False Claims Act has been part of the laws of the United States for more than 125 years and is meant to deal with a serious problem. It seems difficult to believe that such a long-standing and well-intentioned statutory scheme could be said to be unconstitutional. Despite this long history, however, the *qui tam* provision of the False Claims Act appears to violate some of the central structural components of the Constitution. Although a few district courts have upheld the constitutionality of the *qui tam* provision, more recent Supreme Court cases suggest that these courts erred in their analysis and that the *qui tam* provision cannot withstand modern Supreme Court jurisprudence.

Part I of this Note describes the original passage of the False Claims Act, discusses its subsequent amendments, and explains its *qui tam* provision. Part II discusses the argument that FCA *qui tam* relators have not suffered sufficient injury in fact to have standing under Article III of the Constitution. This part explains modern constitutional standing doctrine—as set forth in the recent Supreme Court case of *Lujan v. Defenders of Wildlife*—and concludes that the various arguments that have been advanced in support of *qui tam* relators' standing cannot survive the *Defenders of Wildlife* decision. For this reason, FCA *qui tam* relators do not have constitutionally sufficient standing to sue. Part III of this Note discussed the argument that the FCA *qui tam* provision violates the Appointments Clause by allowing private citizens to litigate on behalf of the United States. In light of the recent Supreme Court case of *Freytag v. Comissioner of Internal Revenue*, this Note concludes that the *qui tam* provision violates the Appointments Clause doctrine and is unconstitutional. Finally, Part IV of this Note considers the argument that the FCA *qui tam* provision violates the separation-of-pow-

292. Mr. Gerson admits that the statutory language is ambiguous and recommends that the FCA be amended to clarify that the DOJ does indeed have the power to dismiss these lawsuits. Gerson Statement, *supra* note 236, at 18-20.

ers doctrine by divesting the Executive Branch of its "take Care" duties. Although this is a fairly vague area of constitutional law, with fewer easily administrable principles than the standing and Appointments Clause areas, this Note concludes that during certain phases of *qui tam* litigation, the *qui tam* provision does not provide the Executive Branch with constitutionally sufficient control over the enforcement of the FCA and thus violates the separation-of-powers principle.

Considering the long history of the FCA and of *qui tam* provisions generally, it is not likely that a federal district judge will have the courage to hold the FCA *qui tam* provision unconstitutional, and the issue may never come before the U.S. Supreme Court. Some of the constitutional problems with the provision are fairly obvious, however, and have been made known to Congress. Like the justices of the Supreme Court, members of Congress are duty-bound to respect the Constitution, and it is time for them to discard the anachronistic, unconstitutional FCA *qui tam* provision and create instead a responsible, constitutionally permissible mechanism for investigating and prosecuting fraud on the United States.