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The End of Qui Tam FCA Claims? How a Federal District Judge Might Have Just Sounded the Death Knell For Whistleblower Lawsuits

by Katherine S. Klein

A seismic shift in the world of False Claims Act ("FCA") might have occurred recently in a Middle District of Florida courtroom. On September 30, 2024, Judge Kathryn Kimball Mizelle issued her ruling in *US ex rel Zafirov v. Florida Med Associates, et al*. No. 8:19-CV-01236-KKM-SPF, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024) that qui tam relators brining suits under the FCA violate the Appointment Clause and the Take Care Clause of the United States Constitution.

The Appointment Clause under Article II of the Constitution allows the President to appoint officers of the executive branch. The Take Care Clause, also under Article II of the Constitution, imbues the Executive Branch with the authority to take care and execute the laws created by Congress. Taken in tandem, the Appointment Clause and the Take Care Clause allow the President to delegate authority to appoint officers to execute laws created by Congress. Courts have held that the same authority would also allow a President or an individual with vested executive authority to remove these appointed officers.

In *Zafirov*, Judge Mizelle found that a qui tam relator's position in an FCA case presents real constitutional challenges – these relators litigate cases in the shoes of the United States yet cannot be dismissed by a President, DOJ official, or anyone else in the Executive Branch. According to Judge Mizelle, this is an unconstitutional violation of the Appointment Clause and the Take Care Clause when read in tandem. Moreover, Judge Mizelle noted that relators have no fiduciary duty or obligation to negotiate settlements in the best interest of the United States. Finally, qui tam prosecutions in and of themselves create estoppel concerns, as it is unclear that the DOJ could pursue the same case against an entity in the event a qui tam relator's suit fails.

Interestingly, these arguments are not novel. Notably, in 1997, the Federal District Court for the Southern District of Texas issued a ruling substantially identical to the decision in *Zafirov* – holding an enforcement of FCA claims by qui tam relators violated the Appointment Clause and the Take Care Clause. *Riley v. St. Luke's Episcopal Hosp*., 982 F. Supp. 1261, 1262 (S.D. Tex. 1997). However, this ruling was overturned by the Fifth Circuit Court of Appeals, which heard the case *en banc*. *Riley v. St. Luke's Episcopal Hosp.* 252 F.3d 749 (5th Cir. 2001). The Fifth Circuit held that qui tam relators were not unconstitutional because they did not fit the definition of the word "officer" for the purposes of the Appointment Clause and did not violate the Take Care Clause as the qui tam relator's intrusion on the Executive's Article II power was "comparatively modest." *Id.*

So, what is there to indicate that this ruling by Judge Kimball Mizelle is not simply a flash in the pan decision that will be quickly overturned at appeal to the Eleventh Circuit? Simply put, since the Fifth

Circuit's ruling in *St. Luke's Episcopal Hospital* twenty-three years ago, the Supreme Court has decided several similarly situated Article II questions where the President could not easily remove an individual that wields executive power.

Recently, three justices of the Court have directly signaled that qui tam suits under the FCA may be unconstitutional. In *Polansky v. Exec. Health Res.*, Justice Thomas stated in his dissent that there are "substantial arguments that the qui tam device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation." *Polansky v. Exec. Health Res.*, 599 U.S. 419, 442 (2023) (Thomas, J., dissenting). In a concurring opinion, Justices Kavanaugh and Barrett agreed with this concern, and put forth that the Supreme Court should consider these Article II arguments in an appropriate case. Judge Kimball Mizelle might just have set that appropriate case in motion. *Id.*

Those paying attention to suits brought by private individuals on behalf of the government may have seen the writing on the wall. In the last two decades, a number of cases have been decided slowly eroding at the breadth of Article II standing for similarly situated individuals standing in the shoes of the federal government. Most notably, in *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010), the Supreme Court declared the Public Company Accounting Oversight Board, created as part of the Sarbanes-Oxley Act of 2002, violated the Appointment Clause and the Take Care Clause because the multilevel protection from removal afforded to the Board was contrary to Article II's vesting of executive power in the President. The President could not "take Care that the Laws be faithfully executed" if he could not oversee the faithfulness of the officers who execute them. Ten years later, in *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197 (2020), the Supreme Court held that the structure of the Consumer Financial Protection Board violated the constitutional doctrine of separation of powers. The President generally has unrestricted removal power, absent two exceptions: when the officer is a member of a body of non-partisan (or equally balanced partisan) experts not exercising executive power, or when an officer is an inferior officer such as an independent counsel, that has no policymaking or administrative authority. Neither of these situations was applicable to the director of the CFPB – thus, the lack of removability of the position at the will of the President made the position unconstitutional.

It is clear to see why these decisions will likely join the discussion of constitutionality concerning qui tam relators, even if it does not directly address the issue itself. But if the Supreme Court does take *Zafirov* or a similar case, the decision could impact beyond the bounds of FCA law. Other areas of law also have a mechanism by which private individuals can prosecute civil cases against other individuals or corporations (for example, citizen suits under the Clean Air Act and Clean Water Act). A definitive ruling on the constitutional standing of qui tam relators would almost certainly signal the beginning of the end for citizen suits.