Order Code RL30463

Constitutional Aspects of Qui Tam Actions: Background and Analysis of Issues in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*

March 8, 2000

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ABSTRACT

This report discusses *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, where the Court of Appeals for the Second Circuit held that states are persons under the False Claims Act, and may be sued by private relators in instances where the federal government chooses not to intervene. The Second Circuit's decision, while based on historically accepted legal principles governing qui tam actions, raises significant questions in both the constitutional and statutory interpretation contexts. Given the importance of these questions as they relate to state liability under the False Claims Act, the Supreme Court granted certiorari in *Stevens*, with a decision expected this term. This report provides an overview of the Second Circuit's decision, with an emphasis on factors which are likely to be considered in the Supreme Court's analysis.

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Summary

The False Claims Act (FCA), originally enacted in 1863, serves as an important mechanism by which fraud against the federal government is combated. The Act authorizes both the Attorney General and private persons to bring civil actions for its enforcement. Under the terms of the Act, a private individual, known as a relator, may bring such an action on behalf of him or herself, and for the United States Government. These actions are known as qui tam suits, and their use dates back to the Thirteenth Century in England as well as the earliest days of the United States.

The vast majority of these suits are brought against private entities who are alleged to have committed acts of fraud upon the federal government through the submission of false claims, and their validity has been well established. However, qui tam suits have also been brought against states, raising significant constitutional and statutory questions regarding the proper scope of the Act. Specifically, it has been argued that such actions are impermissible, as states do not constitute "persons" who may be sued under the Act. More substantively, it has also been asserted that suits by private relators against a state violate the Eleventh Amendment. The Court of Appeals for the Second Circuit addressed these issues in *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, holding that states are indeed within the ambit of the False Claims Act, and that the United States is the "real party in interest" in a qui tam action, alleviating any Eleventh Amendment concerns.

Given the significance of these questions as they relate to state qui tam liability, the Supreme Court granted certiorari in *Stevens*. While the Second Circuit's decision is based on widely accepted principles supporting the historical role of qui tam actions, it is possible that the Supreme Court will reverse the decision of the Second Circuit. Depending on the factors found persuasive by the Court, a reversal could have substantial implications for qui tam litigation in general. Specifically, a ruling by the Court that states are not persons under the Act would bar any such action against a state that has committed fraud, irrespective of whether it is brought by the federal government or a private relator. A reversal on the Eleventh Amendment issue, however, would only proscribe suits brought by relators where the government chooses not to intervene. Further complicating matters, the Supreme Court, ten days prior to oral argument in *Stevens*, issued an order indicating that it would also consider whether qui tam suits violate the standing requirements of Article III of the Constitution.

While the questions being addressed by the Court have the potential to greatly impact the False Claims Act, it is unclear whether any change will occur. Indeed, in light of the centuries long history of qui tam actions and the extensive lower court precedent in its favor, it is questionable whether the Court will radically alter the qui tam landscape.

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Constitutional Aspects of Qui Tam Actions: Background and Analysis of Issues in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*

Overview of the False Claims Act

Qui tam actions arose in England in the thirteenth century as a mechanism to assist in the prosecution of fraud against the government. Specifically, as the English government lacked the resources to ferret out and prosecute instances of fraud and other criminal violations against the crown, a system was established whereby a private citizen could be empowered to sue a transgressor on behalf of the sovereign and himself, and retain a share of the fine or penalty imposed upon the offender.[1] This dynamic is embodied in the Latin phrase "qui tam pro domino rege quam pro se imposos sequiter," which means "who brings the action as well for the king as for himself."[2] The traditional acceptance of English law, coupled with a similar lack of resources, led to the employment of qui tam suits by the North American colonies, and, subsequently, the United States itself. Indeed, ten of the first fourteen statutes enacted by Congress contained qui tam provisions as enforcement mechanisms.[3]

As the federal government established more efficient law enforcement mechanisms in the nineteenth century, the need and support for qui tam suits gradually declined. Further, public support of such actions was low due to the perception that many relators were settling suits for small amounts, contrary to the interests of the government. Accordingly, statutory restrictions were imposed that limited the utility of qui tam actions.[4]

During the Civil War, however, qui tam actions were widely used to combat instances of fraud by companies supplying the Union Army. This widespread corruption lead to the formulation of the qui tam provisions in the False Claims Act

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[1] James Y. Ho, "State Sovereign Immunity and the False Claims Act: Respecting the Limitations Created by the Eleventh Amendment Upon the Federal Courts," 68 Fordham L. Rev. 189, 193-94 (1999).

[2] *Bass Anglers Sportsman's Society v. U.S. Plywood Champion Papers,* 324 F.Supp. 302, 305 (S.D. Tex. 1971).

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

[4] Kent D. Strader, "Counter Claims Against Whistleblowers: Should Counter Claims Against Qui Tam Plaintiffs be Allowed in False Claims Act Cases?," 62 U. Cin. L. Rev. 713, 727-28 (1993).

of 1863.[5] As part of an expansive enforcement scheme, private individuals were able to file suit under the Act and to share in the damages recovered, as an incentive to foster the exposure of fraud against the government.[6] Under the original terms of the Act, a citizen was able to file suit irrespective of any substantive role in exposing the fraudulent practices of a defendant. This liberal standard resulted in the filing of numerous "parasitic" qui tam actions based upon information which had already been made public.[7] In response to these parasitic suits, Congress amended the False Claims Act in 1943, imposing a strict jurisdictional bar on any qui tam suit predicated on evidence or information which was "in the possession of the United States, or any agency, officer, or employee thereof, at the time such suit was brought."[8] As a result of this language, the ability of individuals to bring suit under the False Claims Act was severely circumscribed.[9]

The use of qui tam suits declined substantially after the 1943 amendments, leading Congress to again amend the False Claims Act in 1986, in an effort to encourage private enforcement suits.[10] Since the 1986 amendments, qui tam suits have been pursued vigorously, with the recovery of over one billion dollars since 1987.[11]

In its current version, the FCA imposes liability on any "person" who knowingly makes a false claim for payment to the United States.[12] To aid in enforcement of this proscription, the FCA provides that a person may bring a civil action for substantive violations of the Act "for the person and for the United States Government. The Action shall be brought in the name of the Government."[13] Upon bringing the action, the relator must serve the government a copy of the complaint and a written disclosure of the material evidence information he or she possesses. The complaint must be filed in camera and remains sealed for a minimum of 60 days, to enable the government to investigate the allegations. However, the government may receive an extension upon a showing of good cause.[14] At the end of this investigatory period, the government must decide whether to intervene and take control of the suit, or to assume a passive role, "in which case the person bringing the action shall have the right to conduct the action."[15]

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[5] *See United States ex rel. Williams v. NEC Corp.,* 931 F.2d 1493, 1496-97 (11th Cir. 1991).

[6] *Erickson ex re. United States v. American Inst. Of Biological Sciences,* 716 F.Supp. 908, 915 (E.D. Va. 1989).

[7] *Id*. at 916.

[8] *Id.* at 916 (quoting 89 Cong.Rec. 7572 (1943)).

[9] *Id.* at 916.

[10] *Id.* at 917.

[11] Anna Burke, "Qui Tam: Blowing the Whistle For Uncle Sam," 21 NOVA L.Rev. 869, 871 (1997).

[12] 31 U.S.C. §3729(a)(1)-(7).

[13] *Id*. at §3730(b)(1).

[14] *Id*. at §3730(b)(2), (3).

[15] *Id*. at §3730(b)(4)(A), (B).

If the government intervenes, "it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action," with the relator retaining the "right to continue as a party."[16] If the government opts not to intervene, the relator "shall have the right to conduct the action."[17] Nonetheless, the relator must provide the government with copies of all pleadings and depositions. Further, the government may request the court to delay the relator's discovery for an extendable 60 day period, upon making a showing that discovery proceedings "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts."[18]

In instances where the government initially declines to intervene, a court "may nevertheless permit the Government to intervene at a later date upon a showing of good cause." In the event of such later intervention, the court may not limit the status and rights of the relator.[19] Upon the resolution of a successful suit, the Act provides a range of awards to the relator. In suits where the government has intervened, the relator is eligible to receive between 15 and 25 percent of the amount recovered. If it is determined that the relator is not the original source of the information forming the main basis of the suit, however, the award must be limited to no more than 10 percent. In situations where the government has not intervened, the relator is eligible to receive between 25 and 30 percent of the amount recovered. In addition to the award amount, the relator is entitled to reasonable attorneys' fees.[20] In cases where the government has not intervened, an unsuccessful relator may be ordered to pay reasonable attorneys' fees and costs to the defendant, if it is determined that the claim "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."[21]

Case History

In *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, an employee of the State of Vermont Agency of Natural Resources ("Agency" or "State") brought suit under the False Claims Act, asserting that the Agency misrepresented the amount of manpower it invested in federally funded projects, inducing the Environmental Protection Agency to provide the State with more grant money than its actions merited.[22] Specifically, the relator averred that a subdivision of the Agency exaggerated the amount of time its employees actually spent on certain projects in federal reports. This practice allowed the Agency to "retain funds to which

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[16] *Id*. at §3730(c)(1).

[17] *Id*. at §3730(c)(3).

[18] *Id*. at §3730(c)(4).

[19] *Id*. at §3730(c)(3).

[20] *Id*. at §3730(d)(1), (2).

[21] *Id*. at §3730(d)(4).

[22] 162 F.3d 195 (2nd Cir. 1998).

it was not entitled for a given year."[23] Further, reporting that all grant funds for a particular year had been exhausted, the Agency would submit new grant requests based on the false expenditures, enabling the Agency to "maintain or increase its funding in each succeeding fiscal year."

The relator brought suit against the Agency in May 1995, filing the complaint in camera and under seal, as required by the FCA.[24] The government filed notice that it was declining to intervene in the suit in June of 1996. In July of 1996 the complaint was unsealed and served on the State. In response to the suit, the State moved for dismissal on the grounds that a state agency is not a person under the FCA, and that the Eleventh Amendment bars suits against states by private citizens. The district court denied the motion, rejecting both arguments.

Appellate Review

A. Whether States are "Persons" Under the False Claims Act. Regarding the question of whether states are "persons" for the purposes of qui tam litigation, the Second Circuit engaged in an exhaustive textual and historical analysis of the Act, ultimately concluding that states are indeed covered under the FCA. The court first noted that treating states as persons under the Act would not violate the "plain statement" rule, which mandates that a statute not be interpreted in such a fashion as to substantially alter the federal-state balance of power unless Congress has clearly conveyed such an intent.[25] In making this determination, the court explained that the plain statement rule applies in instances where the federal statute would have the effect of intruding on traditional state authority, as opposed to situations where a statute simply imposes liability on the states.[26] Given this standard, the court stated that the FCA does not alter the traditional constitutional balance of federal and state powers so as "to require application of the plain statement rule."[27] Upon reaching this conclusion, the court began an inquiry into the proper interpretation of the FCA under accepted statutory construction standards.

Beginning this analysis, the court noted that while the term "person" does not generally refer to a sovereign entity, there is no set rule compelling exclusion.[28] Specifically, the Second Circuit cited Supreme Court precedent for the proposition that "whether the term 'person' when used in a federal statute includes a State cannot

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[23] *Id*. at 198.

[24] *Id*. at 198-199.

[25] *Id*. at 203 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)).

[26] *Id*. at 203 (discussing *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991); *Gregory v. Ashcroft*, 501 U.S. 452 (1991)).

[27] *Id*. at 203. The court further explained that the Act does not intrude into any area of traditional state power, as its goal "is simply to remedy and deter procurement of federal funds by means of fraud." *Id*.

[28] *Id*. at 204 (citing *United States v. Cooper Corp*., 312 U.S. 600, 604-05 (1941)).

be abstractly declared, but depends upon its legislative environment."[29] Further, the court noted the maxim that "the purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction," which may serve to include a state under its terms.[30]

Turning its attention to the language of the FCA, the court determined that the term "person," is used to "categorize both those who may sue, and those who may be sued, whether by the government itself or by a qui tam plaintiff."[31] The court then noted that several states have acted as qui tam relators under the FCA, indicating that they viewed themselves as meeting the requirements of §3730(b)(1), which authorizes "person[s]" to bring a civil action for fraud against the government.[32] The court also found that Congress had clearly favored the ability of states to serve as relators in the 1986 amendments to the Act.[33] The court further stated that states are clearly persons under §3730(b)(1). Next, the court noted that the term "person" was also employed in imposing liability under the Act.[34] Given this expansive usage, the court held that it should be inferred that Congress meant "person" to have the same meaning throughout the statute, "absent some indication to the contrary."[35] In light of these factors, the court determined that there was no support for the proposition that a state is a person under the FCA only for the purpose of bringing a qui tam action.[36]

Turning to the legislative history of the FCA, the court further determined that Congress intended that states be considered "persons" under the Act. Specifically, the court explained that the "impetus for enactment of the 1863 Act was 'stopping the massive frauds perpetrated by large contractors during the civil war.'"[37] Among the frauds specifically targeted by Congress were misrepresentations by state officers "in the procurement of military supplies for state troops, the costs of which where ultimately borne by the United States."[38] In conjunction with this legislative history, the Second Circuit noted the Supreme Court's determination in *United States v. Neifert-White Co.* that "debates at the time suggest that the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the

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[29] *Id*. at 204 (citing *Sims v. United States*, 359 U.S. 108, 112 (1942)).

[30] *Id*. at 204 (citing *Cooper*, 312 U.S. at 605).

[31] *Id*. at 204.

[32] *Id*. at 204.

[33] *Id*. at 205.

[34] *Id*. at 205. Specifically, the Act provides that any "person" who commits fraud upon the government is subject to a civil penalty, and that the attorney general may bring a suit against a "person" who has committed such fraud. 31 U.S.C. §3729(a), §3730(a).

[35] *Id*. at 205 (citing *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996); *Sullivan v.Stroop*, 496 U.S. 478, 484 (1990); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986)).

[36] *Id*. at 205.

[37] *Id*. at 205 (citing *United States v. Bornstein*, 423 U.S. 303, 309 (1976)).

[38] *Id*. at 206. *See also*, Government Contracts, H.R.Rep. No. 37-2, pt. ii-a (1862).

Government."[39] The Second Circuit then turned to the 1986 amendments, citing a Senate Report declaring that the FCA "reaches all parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations, and corporations...as well as States and political subdivisions thereof..."[40]

The court next addressed a portion of the1986 amendments providing for civil investigative demands (CID), that authorize "the Attorney General to issue written discovery demands as part of a 'false claims law investigation.'"[41] Noting that this investigative scheme explicitly defined "person" to include states, the court determined that Congress would probably not have authorized such investigations into potential fraud by the states unless they are indeed subject to the FCA.[42] In reaching this conclusion, the court rejected the argument that the declaration that states are persons in the civil investigative demands provision indicated that states were not included previously. The court first explained that this argument was belied by the fact that the CID provision also explicitly referenced natural persons and other entities undeniably covered by the Act. Further, the court was unwilling "to impute such a belief to Congress" in light of the legislative history of the Act. Given this, the court determined that Congress regarded states as being covered under the FCA historically, and would continue to be classified as such after the 1986 amendments.[43]

Finally, the court also rejected the argument that the treble damages and penalties provided for in the Act were punitive, a characteristic that is usually not "associated with suits against the States."[44] Specifically, the court explained that the remedies provided for in the FCA "have been held not to be punitive but remedial, multiple damages being recoverable in order 'to make sure that the government would be made completely whole,'" due to costs and delays associated with the fraud.[45] Accordingly, the court determined that there was no reason such a remedial structure could not be applied to states that commit fraud against the government.

Given all of these factors, the Second Circuit held that the language, history and intent of the False Claims Act clearly established that states fall within the ambit of the Act.[46]

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[39] 390 U.S. 228, 232 (1968).

[40] Stevens, 162 F.3d at 207 (quoting Senate Report at 8-9, reprinted in 1986 U.S.C.C.A.N. at 5273-74).

[41] *Id*. at 207 (quoting 31 U.S.C. §3733(a)(1)).

[42] *Id*. at 207.

[43] *Id*. at 207.

[44] *Id*. at 207.

[45] *Id*. at 207 (quoting *United States ex re. Marcus v. Hess*, 317 U.S. at 551-52). *See also, Bornstein*, 423 U.S. at 315.

[46] *Id*. at 207-208.

B. Eleventh Amendment and Sovereign Immunity. Regarding the question of whether states are immune from qui tam actions brought by private relators, the Second Circuit began with an exposition of basic Eleventh Amendment principles. First, the court noted that "the Eleventh Amendment provides that '[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State.'"[47] By its terms, the Eleventh Amendment's recognition of state sovereign immunity applies only to suits by individuals who are not citizens of a particular state. However, as the court noted, the Amendment has been interpreted to also bar suits against a state by its own citizens, foreign nations, and Indian tribes.[48] Despite these protections, it is well established that states do not enjoy sovereign immunity against the United States.[49] Specifically, by agreeing to the creation of a federal government, states are deemed to have permanently waived such immunity, as it would conflict with the primacy of the United States.[50]

Given this dynamic, the Second Circuit determined that the question at issue centered on whether a qui tam suit under the FCA is a private action barred by the Eleventh Amendment, or a legitimate action brought by the United States. Pointing to the interests vindicated by the FCA, as well as "the government's ability to control the conduct and duration of a qui tam suit," the court ruled that such actions are not barred by the Eleventh Amendment.[51]

The court first explained that the United States is the real party in interest in a qui tam suit. To support this conclusion, the court explained that all of the actions triggering liability under the FCA center on "the use of fraud to secure payment from the government."[52] The court distinguished the government's interest from that of the relator, declaring that while a qui tam plaintiff has an interest in the outcome of an action, the "interest is less like that of a party than that of an attorney working for a contingent fee." Further, the court stated that "qui tam claims simply do not seek the vindication of a right belonging to the private plaintiff, and if there has been no injury to the United States, the qui tam plaintiff cannot recover."[53] As such, the court

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[47] *Id*. at 201; U.S. Const. Amend. XI.

[48] *Id*. at 201. *See Hans v. Louisiana*, 134 U.S. 1, 10-11 (1890); *Monaco v. Mississippi*, 292 U.S. 313, 330-32 (1934); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991).

[49] *Id*. at 201. *See West Virginia v. United States*, 479 U.S. 305, 311 (1987); *United States v. Texas*, 143 U.S. 621, 644-46 (1892).

[50] *Id*. at 202.

[51] *Id*. at 202.

[52] *Id*. at 202. Specifically, the court noted that "it is the government that has been injured by the presentation of such claims; it is in the government's name that the action must be brought; it is the government's injury that provides the measure for the damages that are to be trebled; and it is the government that must receive the lion's share–at least 70%– of any recovery." *Id*.

[53] *Id*. at 202.

determined that while private citizens may initiate a qui tam action, the government remains the real party in interest.[54]

The court also found it significant that the government has ultimate control over any qui tam action, possessing the authority to intervene at the outset of any such action. Also, absent intervention, the government has the right "to be kept abreast of discovery in the qui tam suit and the right to prevent that discovery from interfering with its investigation or pursuit of a criminal or civil suit arising out of the same facts."[55] The court also stressed that if the government does intervene, it takes control of the suit, may limit the relator's participation, and may not be bound by any act of the relator. Furthermore, the court noted that the government can prevent a dismissal sought by the relator, and can have the action terminated upon the showing of a valid governmental purpose, irrespective of the wishes of the relator.[56]

Based upon its determination that qui tam actions serve to "remedy only wrongs done to the United States," and that the government exercises substantial control over their progression, the Second Circuit held that such suits are essentially governmental actions, and, therefore, do not offend the Eleventh Amendment.[57]

Supreme Court Review

Because of a split among the circuits, the Supreme Court granted certiorari in *Stevens*, originally limited to the issues decided by the Second Circuit. However, ten days prior to oral argument in *Stevens*, the Court issued an order indicating that it would also consider whether qui tam suits violate the standing requirements of Article III of the Constitution. With the addition of the Article III question, the Court significantly broadened the potential impact of *Stevens* on traditional qui tam litigation.

A. Statutory Construction. While a reversal on the Eleventh Amendment and Article III standing questions decided in *Stevens* would require an involved constitutional analysis, it is conceivable that the Supreme Court may merely reverse the Second Circuit's determination that states are persons for the purpose of qui tam litigation, avoiding the more substantive issues.

Specifically, it is possible that the Court will determine that the legislative history of the FCA is insufficient to overcome the "often-expressed understanding" that "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it."[58] As noted above, the

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[54] *Id*. at 202. *See also*, *Minotti v. Lensink*, 895 F.2d 100, 104 (2d Cir. 1990); *United States ex rel. Milam v. University of Texas*, 961 F.2d 46, 50 (4th Cir. 1992).

[55] *Stevens*, 162 F.3d at 202.

[56] *Id*. at 203.

[57] *Id*. at 203.

[58] *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64 (1989) (quoting *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979)(quoting *United States v. Cooper Corp.*, 312 U.S.

(continued...)

Second Circuit determined that this precept is not a set rule, but, rather, depends largely on the context and legislative history of the statute in question. It could be argued though, that the "common usage" distinction requires, at a minimum, that states are excluded absent an affirmative declaration by Congress.[59] The Court of Appeals for the District of Columbia has stressed this argument, noting that this principle is particularly appropriate where the statute would subject states to liability to which they are unaccustomed.[60] From this, it could be argued that the Second Circuit erred in finding that there was no indication that Congress meant for the term "person" to have different meanings under different portions of the Act, instead of discerning whether the Act affirmatively brought states within its remedial ambit.[61] Indeed, given that neither the current nor original version of the Act defines "person" to explicitly include the states, it is possible that the Court will determine that such an affirmative showing has not been made. Building upon this approach, it could be argued that the Second Circuit's determination that the broad usage of "persons" as including corporations and other entities supported the inclusion of states was incorrect. The D.C. Circuit, in *United States ex rel. Long v. SCS Business & Tech. Inst. Inc.*, held as such, stating that the mere fact that corporations could be held liable under the Act was unpersuasive in regards to the states, given the affirmative intent requirement.[62]

While this argument seems to undercut the Second Circuit's decision, it is important to note that there is "no per se rule prohibiting the interpretation of general liability language to include the States."[63] Rather, the practice of excluding States from such statutes is a rule of statutory construction applicable where statutory intent is ambiguous. In light of this dynamic, the maxim that a statute "can be unambiguous without addressing every interpretive theory," buttresses the textual and historical analysis of the Second Circuit.[64] Furthermore, it should be noted that a determination that states are not persons under the FCA would preclude not only qui tam actions brought by relators, but those pursued directly by the United States as well. This is particularly pertinent, as the Supreme Court has previously rejected the notion that statutory ambiguity will nullify an action by the United States. Indeed, the Court has stated that "the Constitution presents no barrier to lawsuits brought by the United States against a State," and, that for the purposes of such suits, "States are naturally just like 'any non-governmental entity.'"[65]

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[58] (...continued)
600, 604 (1941))).

[59] *See United States ex rel. Long v. SCS Business & Tech. Inst. Inc.*, 173 F.3d 870, 874 (D.C. Cir. 1999).

[60] *Id.* (citing *Will*, 491 U.S. at 604).

[61] *See* n.34, *supra.*

[62] *Long*, 173 F.3d at 875.

[63] *Hilton v. South Carolina Public Rys. Comm.*, 502 U.S. 197, 205 (1991).

[64] *Salinas v. United States*, 522 U.S. 52, 60 (1997).

[65] *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 11 (1989).

The Second Circuit's decision is also susceptible to a determination that the legislative history of the Act is not sufficiently clear to obviate the aforementioned affirmative intent requirement arguments. Specifically, in *Long*, the D.C. Circuit found it significant that examples of fraud cited in the 1863 version of the Act did not include any state transgressions. Further, the court, in *Long*, stressed that a legislative history "indicating an intent to impose liability on state officials is not evidence of an intent to subject the states themselves to liability."[66] From this, the D.C. Circuit determined that there was no basis to conclude that Congress intended to include states under the 1863 version of the Act. [67] Turning to the 1986 amendments, the *Long* court pointed to the Supreme Court's determination that such subsequent provisions are largely irrelevant, as they do not "reflect any direct focus by Congress upon the meaning of the earlier enacted provisions." [68] Finally, the D.C. Circuit also disagreed with the Second Circuit's analysis of the civil investigative demand provisions enacted in 1986, maintaining that their purpose could be to merely facilitate collection of information from a state for use in a suit against contractors or other offenders.[69]

In light of these factors, it is evident that there is substantial room for disagreement regarding the ambiguity of the FCA as it applies to the states. As such, it is possible that the Supreme Court will ultimately determine that the statutory text and legislative history of the Act are not sufficiently precise so as to bring states within the ambit of the FCA. However, it must be remembered that there is no per se rule prohibiting such inclusion. This factor, in conjunction with the remedial rights of the United States and the traditional use of the FCA by states acting as relators, seems to lend substantial support to the decision of the Second Circuit.

B. Eleventh Amendment. As noted above, the Second Circuit determined that qui tam suits brought by private relators against a state are effectively suits by the United States, and, therefore, do not violate the strictures of the Eleventh Amendment. Several other circuit courts have reached the same conclusion.[70]

In *United States ex rel. Foulds v. Texas Tech University*, however, the Fifth Circuit stated that it was "as plain as the sun" that a private relator does in fact commence and prosecute qui tam actions in which the government does not intervene, contravening the express terms of the Eleventh Amendment.[71] In reaching this conclusion, the Fifth Circuit criticized the approaches of other courts that have considered the issue, proclaiming that the "real party in interest" analysis was inappropriate. Specifically, the *Foulds* court determined that such an approach

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[66] *Long*, 173 F.3d at 876 (citing *Will*, 491 U.S. at 68-69).

[67] Long, 173 F.3d at 876.

[68] *Id.* at 877.

[69] *Id.* at 877.

[70] *See United States ex rel. Rodgers v. Arkansas*, 154 F.3d 965, 868 (8th Cir. 1998); *United States ex rel. Fine v. Chevron*, 39 F.3d 957, 963 (9th Cir. 1994), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995); *United States ex rel. Milam v. University of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 6, 48 (4th Cir. 1992).

[71] 171 F.3d 279, 289 (5th Cir. 1999).

provided no basis for equating a real party in interest "with the party who 'commences or prosecutes' the suit" for Eleventh Amendment purposes.[72] Thus, the Fifth Circuit determined that a more in-depth inquiry was required to ascertain the real actor in qui tam suits. The court determined that the question was more complex than other circuits had found, noting that Congress has not "specified the contours of the relationship between the qui tam plaintiff and the United States."[73] Indeed, the Fifth Circuit observed that the relationship could be characterized at one extreme as the government yielding complete control of the suit to the plaintiff, or, on the opposite end of the spectrum, as the deputization of each individual plaintiff to act in the government's interests.[74]

The court found that neither of these characterizations was sufficient in explaining the relationship between the relator and the government, stating that "the government retains some control over the qui tam suit commenced by the plaintiffs...but does not exercise authoritative control over the case."[75] Building upon this dynamic, the court stated that even though the government is a relevant party in suits where it has chosen to remain passive, it is not the acting party of record, limiting its ability to challenge judicial actions. Given this, the court stated that it would be contradictory to classify a passive party as commencing or prosecuting a suit under the Eleventh Amendment.[76]

The Fifth Circuit further rejected the argument that relators are effectively deputized in suits where the government assumes a passive role. First, the court declared that "Congress cannot delegate to private citizens the United States' sovereign exemption from Eleventh Amendment restrictions." In support of this statement, the court noted the Supreme Court's admonition in *Blatchford v. Native Village of Noatak* that "the consent 'inherent in the convention,'to suit by the United States–at the insistence and under the control of responsible federal officers–is not consent to suit by anyone whom the United States might select."[77] From this statement, the Fifth Circuit explained that the federalist principles at play in the Eleventh Amendment context dictate "that state sovereignty is surrendered only to another sovereign, the United States, which, of course, acts through 'responsible federal officers.'"[78]

Given this maxim, the court maintained that the historical conception of qui tam relators as "motivated primarily by prospects of monetary reward rather than the public good," undermines the possibility that they are deputized "to stand in for the 'responsible federal officers' to whom the states have surrendered their sovereign

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[72] *Id*. at 289.

[73] *Id*. at 289.

[74] *Id*. at 290.

[75] *Id*. at 290.

[76] *Id*. at 291.

[77] *Id*. at 292 (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

[78] *Id*. at 293.

rights."[79] The court also ruled that a relator is "no mere opportunistic bystander" in qui tam litigation, but, in fact, possesses significant control over the litigation process. Coupled with the "chimerical presence of the United States" in cases where it remains passive, the Fifth Circuit determined that the control enjoyed by the relator constitutes commencement and prosecution by a private citizen, in violation of the Eleventh Amendment's guarantee of sovereign immunity.[80]

This interpretation by the Fifth Circuit obviously conflicts with the Second Circuit's holding in *Stevens*, and the ultimate holding of the Supreme Court will hinge on which analysis it deems dispositive. Comparing these differing approaches, it seems that while the Fifth Circuit analysis is tenable, certain unique aspects of the False Claims Act support the Second Circuit's holding in *Stevens*.

Specifically, the Fifth Circuit's decision, in rejecting the "real party in interest" analysis applied by the other circuits, ignores the principle that the United States' status as a party to a controversy is not determined by the "nominal party on the record," but, rather, by the effect of the potential judgment or decree.[81] In relying on dicta in *Blatchford* for the proposition that the United States cannot remain passive in a qui tam action against a state, it does not seem that the Fifth Circuit gave sufficient weight to the fact that the decision was limited to the question of whether the United States had delegated to Indian tribes the right to sue the states to vindicate its interests. Specifically, the Court in *Blatchford* held that while the government may bring suit to benefit particular private parties when sovereign or quasi-sovereign interests are implicated, there was no support for the argument that the United States had delegated this authority.[82] Given this application to actions by the United States to essentially vindicate the rights of private parties, it does not seem that *Blatchford* is of any real significance in the qui tam context, since such suits vindicate an injury only to the United States.[83]

Also, it seems that the Fifth Circuit's approach minimizes the actual level of control the government possesses over passive qui tam suits. As noted by the Second Circuit, relators are required to disclose all material evidence and information at the outset of the suit, and the government retains the right to track the case and impose restrictions on discovery, prevent dismissal, and seek termination upon showing of a valid governmental purpose.[84]

Furthermore, the *Foulds* approach largely ignores the historical role of qui tam actions in vindicating the rights of the federal government. In particular, the Fifth Circuit's approach incorrectly assumes that the present federal law enforcement

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[79] *Id.* at 293.

[80] *Id.* at 293.

[81] *Kansas v. United States*, 204 U.S. 331, 341 (1907).

[82] *Blatchford*, 501 U.S. at 782; *see also, Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (per curiam).

[83] *see United States v. Niefert-White Co.*, 390 U.S. 228, 231 (1968).

[84] *See* n.54, and accompanying text, *supra.*

dynamic mirrors that of the eighteenth century. It is unlikely that, at the time of the Constitutional Convention, the Framers viewed the involvement of government attorneys as essential to a suit by the United States. Rather, it is important to note that, at the time of the Convention, qui tam relators played a substantially larger role than "responsible federal officers" in the propagation of such suits. This practice relates back to the thirteenth century, when the English Crown delegated qui tam authority to private relators due in part to the fact that the monarchy lacked a sufficient number of prosecutors to pursue all instances of fraud. This dynamic adhered to the early American experience as well, given that the Justice Department was not created until the latter part of the 19th century.[85]

Thus, while the Fifth Circuit's approach is tenable, the structure of the FCA, coupled with the historical aspects of qui tam litigation seem to support the Second Circuit's holding in *Stevens*.

C. Article III Standing. Shortly before hearing oral argument in *Stevens*, the Supreme Court issued an order expanding the scope of its inquiry to include the question of whether a private individual has standing under Article III to litigate claims of fraud upon the government. Whereas the original issues in *Steven*s were limited to a small subset of qui tam claims, namely suits against states, the standing issue raised by the Court has broad implications for the constitutionality of the False Claims Act as a whole.

Article III of the Constitution defines and limits the jurisdiction of the federal courts to adjudication of "cases and controversies"[86] The Supreme Court has established that, to satisfy the requirements of Article III, a party bringing suit must (1) establish an "injury in fact" (2) caused by the actions of the defendant (3) that is redressable via a judicial decision.[87]

Under this standard, the standing of qui tam relators is susceptible to attack under a variety of rationales. First, the "injury in fact" test requires not just an injury to some inchoate interest, but, rather, that "the party seeking review be himself among the injured."[88] As noted above a qui tam relator is not generally viewed as having suffered any particularized, personal injury from the alleged fraud, since the only harmed party is the United States itself.[89] Given this, it may be argued that the relator is merely bringing suit to vindicate a general injury to his interests as a citizen of the United States, which the Supreme Court has deemed an insufficient basis for standing.[90]

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[85] *See* n.3 and accompanying text, *supra*.

[86] *See Flast v. Cohen*, 392 U.S. 83, 94 (1968).

[87] *See, Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-103 (1998).

[88] *Lujan*, 504 U.S. at 63; *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

[89] *Minotti v. Lensink*, 895 F.2d 100, 104 (2nd Cir. 1990).

[90] *Lujan*, 504 U.S. at 575-77.

Building upon this lack of personal injury, it could also be asserted that Congress cannot confer standing on a relator by creating a financial interest in the suit, as "motivation is not a substitute for the actual injury" required for a finding of standing.[91] Furthermore, the aforementioned principles could buttress an argument that, in light of the lack of a real, personal injury, Congress cannot skirt Article III requirements by "assigning" the United States' claim to the relator for enforcement.[92]

In *Lujan v. Defenders of Wildlife*, the Supreme Court rejected the argument that Congress may confer standing by granting a procedural right to a private party who has suffered no injury, as such an assignment would interfere with the authority of the Executive Branch. Specifically, the Court explained that "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."[93] The Court of Appeals for the Fifth Circuit found this reasoning applicable in the qui tam context, determining that the False Claims Act violated the Take Care Clause of Article II.[94]

In *Riley v. St. Luke's Episcopal Hospital*, the Court of Appeals for the Fifth Circuit held that "FCA qui tam actions in which the government does not intervene encroach on two aspects of the Executive's authority: (1) the discretion to decide whether to prosecute a claim and (2) the control of litigation brought to protect the government's interests."[95] The court stressed that "when the sole injury–the only ticket to court–belongs to the government, the Executive's prosecutorial discretion must include the power to decide whether to bring suit." Given this requirement, the court found that qui tam suits in which the government remains passive encroach on executive authority. Further, the court determined that the FCA limits the ability of the Executive Branch to control the litigation, as the government may not freely dismiss or settle the action, and cannot remove the relator under any circumstances.[96]

Having made this determination, the Fifth Circuit proceeded to compare the encroachment of the FCA with the "loss of executive authority occasioned by the independent counsel provisions at issue in *Morrison v. Olson*." The court opined that this approach was proper under its view that the Supreme Court had provided a "thorough analysis of the Take Care Clause and its relationship to the separation of powers doctrine" in *Morrison*.[97] In conducting this comparison, the Fifth Circuit

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[91] *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 226 (1974).

[92] *See United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993).

[93] *Lujan*, 504 U.S. at 577.

[94] *Riley v. St. Luke's Episcopal Hospital*, 1999 WL 1034213 (5th Cir. 1999). While the Fifth Circuit in *Riley* determined that relators do indeed possess Article III standing, the court nonetheless held that the FCA violated Article II.

[95] *Id.* at 8.

[96] *Id.* at 9.

[97] *Id.* at 8,9. *See also, Morrison v. Olson*, 487 U.S. 654 (1988). It should be noted, however, (continued...)

found, contrary to the determinations of other courts, that the FCA lacks four features of the Ethics In Government Act that preserved executive control of prosecutions by the independent counsel to sufficiently alleviate separation of powers concerns.[98] First, the court asserted that, unlike an independent counsel, the Attorney General may not remove a relator for good cause. Second, the Attorney General has no control over the decision whether to initiate a qui tam suit. Third, the Attorney General, according to the Fifth Circuit, has no control over the breadth of a relator's suit. Fourth, a relator, unlike an independent counsel, "does not have to adhere to the rules and policies of the Department of Justice."[99] As such, the Fifth Circuit deemed such qui tam actions unconstitutional.

In light of these factors, there is a possibility that the Supreme Court will determine that private relators lack Article III standing. However, the aforementioned arguments again seem to ignore the unique characteristics of qui tam litigation that prevent the imposition of such arbitrary precedential templates.

Specifically, it should be noted that the three-part test established by the Supreme Court for analyzing standing issues is not necessarily dispositive. Rather, the substantive inquiry remains "whether a plaintiff" personally would benefit in a tangible way from the court's intervention.'"[100] This substantive inquiry seems to be the appropriate analysis in the qui tam context, given that the standard delineated in *Lujan* and related cases adheres to suits where parties are seeking prospective relief, necessitating an inquiry into whether the requisite interest exists on behalf of the plaintiff. This concern is absent in qui tam suits, however, which the Supreme Court has recognized as "the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff."[101] This conception of qui tam litigation also comports with the historical conception of judicial power, as such

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[97] (...continued)
that the factors deemed dispositive by the Supreme Court in *Morrison* centered on an analysis of the Appointments Clause of Article II, not the Take Care Clause, as asserted by the Fifth Circuit in *Riley*. Also, in *Morrison*, the Supreme Court determined that the for "good cause" removal requirement of the Ethics In Government Act did not offend the separation of powers doctrine, as such a requirement "provides the Executive with substantial ability to enure that the laws are 'faithfully executed.'" *Id*. at 696. Furthermore, in *Edmond v. United States*, 520 U.S. 651, 661 (1997), the Supreme Court stated that "*Morrison* did not purport to set forth a definitive test" for such constitutional inquiries. These factors, viewed in light of the significant control the FCA gives the Attorney General over all stages of a qui tam action, seem to belie the validity of the Fifth Circuit's approach in *Riley*. *See* n.103 and accompanying text, *infra*.

[98] *See Kelly*, 9 F.3d at 753.

[99] 1999 WL 1034213 at 9-10.

[100] *Steel Co.*, 523 U.S. at 103, n.5 (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

[101] *Lujan*, 504 U.S. at 572-73.

statutes have been in existence since the thirteenth century in England, and have been employed by the United States since its inception.[102]

Regarding separation of powers concerns, it does not seem that the FCA encroaches upon the power of the Executive Branch in such a fashion as to render it unconstitutional. While the Fifth Circuit's handling of the issue is logically based, it should be noted that, under the FCA, the Department of Justice does retain a fair amount of control in suits in which it chooses not to intervene, through its ability to seek dismissal, to control certain aspects of discovery, and to seek alternative remedies.[103] Based upon these various factors, the Court of Appeals for the Ninth Circuit, in *United States ex rel. Kelly v. Boeing Co.*, determined that the "FCA gives the Attorney General sufficient means of controlling or supervising relators to satisfy separation of powers concerns."[104]

Furthermore, it should be noted that the FCA does not appear to impermissibly strip the Executive Branch of prosecutorial discretion, as the Fifth Circuit contends. Rather, it would seem that a decision not to intervene in fact constitutes a delegation of prosecutorial authority to the relator, as opposed to the elimination of such discretion.[105] This nuance stems from the fact that mere non-intervention does not constitute an objection to the qui tam suit. Indeed, as noted by the dissent in *Riley*, "the government only stands to benefit from the suit's progress."[106] Finally, it must be stressed that, in addition to the aforementioned controls, the Department of Justice may prevent a relator from voluntarily dismissing a suit brought under the FCA. This fact establishes that the government possesses discretion over a suit from its inception to its resolution. Given this dynamic, it does not seem that the FCA is, as the Fifth Circuit held, an impermissible encroachment on executive power. In light of these factors it seems that the government does indeed retain substantial control over qui tam suits, obviating any separation of powers concerns.[107]

Conclusion

From the above analysis, it seems that the Second Circuit correctly determined that qui tam actions by private relators against a state comport with constitutional requirements and accepted principles of statutory interpretation. Further, the historical tradition of qui tam suits, coupled with the unique dynamics of relator standing under the FCA, seems to overcome any Article III or separation of powers concerns. At the same time, however, it is possible that the Supreme Court will circumscribe the potential liability of the states under either the statutory or Eleventh Amendment arguments discussed above, altering the traditional understanding and application of qui tam litigation.

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[102] *Marvin v. Trout*, 199 U.S. 212, 225 (1905).

[103] *See Kelly*, 9 F.3d at 753.

[104] *Id*. at 755.

[105] 1999 WL 1034213 at 35 (Stewart, J., dissenting).

[106] *Id*. at 36.

[107] *Id*. at 36; *Kelly*, 9 F.3d at 755.