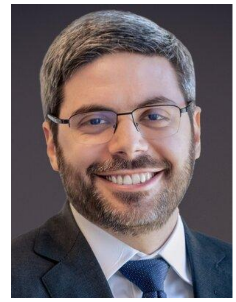
Justices' FTC Ruling Weakens Qui Tam's Constitutional Base

By **Daniel Passeser** (August 6, 2026, 5:41 PM EDT)



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The U.S. Supreme Court's June 29 decision in Trump v. Slaughter held that the Federal Trade Commission "unquestionably exercises executive power, and must therefore be controlled by the Chief Executive, in whom such power is vested." The court therefore concluded that the president may remove FTC commissioners at will.

The decision has sweeping implications for the FTC and expands presidential control over independent agencies. But Slaughter may also revive, and perhaps validate, long-standing doubts about the constitutionality of the False Claims Act's qui tam provisions — doubts some may have thought to be largely resolved.

Since President Abraham Lincoln signed it into law in 1863, the FCA has been the government's primary tool for combating fraud involving federal funds. In addition to allowing the government to investigate and litigate on its own behalf, the statute permits whistleblowers, referred to as relators, to file qui tam suits on behalf of the U.S. and, if successful, to receive a portion of the government's recovery.

The qui tam mechanism is not merely a supplement to government enforcement; it is the dominant vehicle for FCA actions. In fiscal year 2025 alone, 1,297 qui tam cases were filed, dwarfing the 401 investigations the government initiated on its own. Much of FCA enforcement therefore depends on the continued validity of provisions now facing renewed constitutional scrutiny.

The government has the option to intervene and take over litigating a qui tam action, even as the relator retains the right to a share of any proceeds as a whistleblower, or it can allow the relator to proceed on their own — and collect a slightly larger share of the proceeds if they are successful. A declination to intervene, however, is not necessarily the result of the government's assessment that the case lacks merit.

A May 27 memorandum from Assistant Attorney General Brett Shumate announced a new policy for qui tam actions related to benefits fraud. The DOJ will review benefits fraud qui tams on an expedited basis, and, assuming no further governmental investigation is required at the conclusion of the review, will either permit the relator to proceed with the action and assume primary responsibility "subject to the government's ongoing supervision and ultimate control of the matter," or "determine the qui tam should be dismissed."

Intervening and taking responsibility for litigating the action is apparently no longer an option in benefits fraud qui tam suits. This policy essentially deputizes relators to litigate meritorious benefits fraud cases on the government's behalf, though subject government supervision and control, allowing "the government to concentrate its efforts on dismantling and holding accountable sophisticated actors that are responsible for the largest, most complex, and harmful fraud schemes."

For 160 years, challenges to the qui tam provisions were uniformly rejected, and the constitutionality of the qui tam mechanism seemed unassailable. But that consensus began to fracture with the U.S. Supreme Court's 2023 decision in U.S. ex rel. Polansky v. Executive Health Resources Inc., in which Justices Clarence Thomas, Amy Coney Barrett and Brett Kavanaugh openly questioned whether the qui tam provisions are consistent with Article II.

Justice Thomas, dissenting, wrote that the "FCA's qui tam provisions have long inhabited something of a constitutional twilight zone. 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."

Justices Kavanaugh and Barrett noted in a separate concurrence that they agreed with Justice Thomas, and said that "the Court should consider the competing arguments on the Article II issue in an appropriate case."

Polansky sparked a renewed wave of constitutional challenges to the qui tam provisions, but most were unsuccessful. District courts rejected arguments that the provisions impermissibly vest executive authority in relators, over whom the president lacks power to oversee or remove.

In October 2024, in U.S. ex rel. Zafirov v. Florida Medical Associates LLC, the U.S. District Court for the Middle District of Florida dismissed an action, holding that the FCA's qui tam provisions violate the appointments clause of the U.S. Constitution — which was not at issue in Slaughter — because relators exercise significant authority pursuant to the laws of the U.S. That decision is currently on appeal before the U.S. Court of Appeals for the Eleventh Circuit, and its reasoning has been rejected by every other district court to have addressed the issue.

Most FCA practitioners have assumed that Zafirov was an outlier destined to be reversed, and that the qui tam provisions would continue to anchor FCA enforcement. But the rationale in Slaughter — adopted not only by the three justices who expressed concern, but by a majority of the court in Polansky — casts that prevailing wisdom into serious doubt.

The Article II case against the qui tam provisions resembles the Article II case against FTC independence. As Chief Justice John Roberts put it in his 2020 opinion in Seila Law LLC v. Consumer Financial Protection Bureau, Article II provides that "'the executive Power' — all of it — 'is vested in a President,' who must 'take Care that the Laws be faithfully executed;'" to do so, the president must retain "the ability to supervise and remove the agents who wield executive power in his stead."

Under the Supreme Court's 2010 decision in Free Enterprise Fund v. Public Company Accounting Oversight Board, the "President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them," and remove "those for whom he cannot continue to be responsible."

As far back as Buckley v. Valeo, a 1976 decision involving the constitutionality of the Federal Election Campaign Act, the Supreme Court has held that bringing enforcement actions in court is fundamental to executive power because "a lawsuit is the ultimate remedy for a breach of the law."

Because the president's power to oversee or remove relators in qui tam cases is circumscribed and subject to court approval, challengers argue that relators exercise executive power without being answerable to the president, in violation of Article II.

These arguments have not been successful in the False Claims Act context — yet.

The four circuit courts that have addressed the issue — the U.S. Court of Appeals for the Ninth Circuit, the U.S. Court of Appeals for the Sixth Circuit, the U.S. Court of Appeals for the Fifth Circuit and the U.S. Court of Appeals for the Tenth Circuit — upheld the provisions. However, their decisions predated Polansky, Seila Law, Free Enterprise Fund and Slaughter.

The decisions analogized relators to independent counsel and relied on the Supreme Court's 1988 decision in Morrison v. Olson, which upheld the independent counsel provisions of the Ethics in Government Act. But Morrison, in turn, relied on the Supreme Court's 1935 decision on Humphrey's Executor v. U.S., which Slaughter explicitly overruled.

The doctrinal foundation on which the circuit courts built their qui tam holdings has therefore been substantially weakened.

The Supreme Court's Slaughter decision focused on three features of the Federal Trade Commission that place it "within the heartland of executive power:" (1) the "power to promulgate substantive rules that carry the force of law … to flesh out … statutory regimes — and to do so through discretionary actions, largely outside the remit of courts;" (2) the power to investigate "businesses to ensure they comply with its statutes and rules" and enforce those statutes and rules through in-house adjudications; and (3) the power to file "civil suits on behalf of the United States in federal court" and "select its remedies freely."

The third feature received particular emphasis. The court reiterated that "the discretionary power to seek judicial relief lies at the very core of executive authority" and that "quintessentially executive power may not be cleaved off from the Executive Branch."

The court also emphasized that nonenforcement decisions are executive in nature, stating, "it is up to the Executive to decide how to prioritize and how aggressively to pursue legal actions against defendants who violate the law."

That definition of executive power is nothing new. Even before Polansky, few, if any, courts doubted that relators exercise executive authority when they bring lawsuits on behalf of the U.S. Rather, courts upholding the constitutionality of the qui tam provisions relied on the degree of control the executive branch retained over relators.

For example, in 1993, in U.S. ex rel. Kelly v. Boeing Co., the Ninth Circuit held that while "the government's power to end the qui tam litigation is qualified, so is the government's power to remove an independent counsel; thus, these aspects of the two Acts are not meaningfully distinguishable for the purposes of a separation of powers analysis."

But in light of the court's recent executive-power jurisprudence, including the Slaughter decision, the government's qualified ability to end a qui tam action may no longer satisfy the Supreme Court.

In Slaughter, the court's concern about the president's lack of removal power over those exercising executive authority was that they must "be controlled by the Chief Executive, in whom such power is vested." Control means more than the power to terminate litigation; it means the power to direct how that litigation is conducted and to remove those who fail to follow executive direction.

Relators are not directly subject to either of those forms of accountability. In nonintervened cases, the relator conducts the litigation without executive oversight; and to the extent the government seeks to control the relator during the litigation, it must obtain judicial approval to do so.

Nor can the government remove the relator by dismissing the case outright without judicial approval. The government may intervene and move to dismiss a case it believes lacks merit, but only after notice to the relator and an opportunity for a hearing. Even when the government intervenes, the relator remains a party to the action.

Those mechanisms leave relators with a degree of autonomy from the executive branch, and give the courts discretion to limit executive oversight. As U.S.District Judge Kathryn Kimball Mizelle wrote in Zafirov, the relator:

Enjoys unfettered discretion to decide whom to investigate, whom to charge in the complaint, which claims to pursue and which legal authorities to employ ... [and determines] whether to appeal and which arguments to preserve, thereby shaping the broader legal landscape for the federal government. In that way, a relator acts with greater independence than a Senate-confirmed United States Attorney or Assistant Attorney General, who must obtain the approval of the Solicitor General to appeal.

Under Slaughter's framework, the Supreme Court may decide that this level of independence is forbidden by Article II.

Now that a majority of the Supreme Court has held that the president has discretion to remove those exercising executive authority, lower courts may be more receptive to Article II challenges to the qui tam provisions.

At the same time, the DOJ is increasingly reliant on relators to litigate FCA cases, even those it deems meritorious, enabling it to focus on more complex forms of fraud. But this delegation of executive power to parties that are not subject to direct control raises the same concerns that troubled the court in Slaughter.

Practitioners, relators and defendants alike should prepare for the possibility that the landscape of FCA enforcement may soon change. If the issue reaches the Supreme Court, Slaughter suggests that the three justices who expressed skepticism in Polansky may not be alone. With six justices having embraced a robust vision of presidential control over those exercising executive power, the constitutional foundations of the qui tam mechanism appear more vulnerable than at any point in its 160-year history.

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