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**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

CLARISSA ZAFIROV,

Plaintiff,

vs.

CASE NO. 8:19-cv-1236-KKM-SPF  
April 22, 2024  
Tampa, Florida  
1:02 - 4:56 p.m.

FLORIDA MEDICAL ASSOCIATES, LLC,  
et al.,

Defendants,

CHAMBER OF COMMERCE (Amicus)

ANTI-FRAUD COALITION (Amicus)

UNITED STATES (Statement of Interest)

Defendants.

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TRANSCRIPT OF MISCELLANEOUS HEARING  
BEFORE THE HONORABLE KATHRYN K. MIZELLE  
UNITED STATES DISTRICT JUDGE

Proceedings reported and transcribed by  
computer-aided transcription.

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**P R O C E E D I N G S**

**(Court called to order)**

THE COURT: Good afternoon. We are here for oral argument in Case 8:19-cv-1236.

Who speaks for the plaintiff in this case? Who will be arguing?

MS. ESTES: Good morning, Your Honor. My name is Jullian Estes for Relator, Clarissa Zafirov, and we'll be arguing today with Jennifer Koh for the United States.

THE COURT: Okay. That's what I was gonna ask next.

Okay. Ms. Koh, you'll be handling the United States' position?

MS. KOH: Yes, I will.

THE COURT: Okay. And who is going to be arguing on behalf of the defendants collectively? And then I'll turn to Chamber of Commerce and Anti-Fraud Coalition.

MR. KRUEGER: Good afternoon, Your Honor. I'm Matthew Krueger on behalf of Defendants Physician Partners, Florida Medical Associates, and Anion Technologies, also be speaking on behalf of the defendants.

THE COURT: Okay. And now the Chamber?

MR. ENGEL: Good afternoon, Your Honor. Steve Engel on behalf of the Chamber of Commerce.

THE COURT: Good afternoon.

1 And then Anti-Fraud Coalition?

2 MR. SINGH: Tejinder Singh, Your Honor.

3 THE COURT: Okay. Thank you.

4 Okay. I know I've allocated particular times to  
5 different individuals. I'm not wedded to those, this is not  
6 actually an (inaudible), it's more I want to address certain  
7 issues with counsel and hear the different parties and then  
8 the amicus perspective.

9 I'll tell you the three big topics that I would  
10 like addressed. Obviously, I've read all the briefing, so  
11 I'm familiar with those arguments, but to me, the three  
12 pressure points that I would appreciate clarity on.

13 The first is with regards to the Appointment  
14 Clause continuity aspect, what the standard is under case  
15 law and why that is or is not satisfied here.

16 The second has to do with the historical record  
17 and what it bears out in support of the Qui Tam provision in  
18 the FCA.

19 And obviously, quite a few questions under each of  
20 these topics, but these are the three broad ones.

21 And then the third has to do with in a  
22 post-*Polansky* world, what partial assignment of property  
23 remains under the *Stevens* standing theory, because I think  
24 there's some questions that are unresolved in light of  
25 *Polansky*.

1           So those are the three main topics I would like to  
2 discuss. I have a few other questions that I will follow up  
3 with.

4           Given that this is the defendants' motion, I guess  
5 I'll start -- unless the parties have a different order of  
6 argument that they would prefer, but I would start with the  
7 defendants. Then I would plan to turn to the Chamber of  
8 Commerce, and then I would turn it over to Ms. Zafirov's  
9 counsel, the government, and the Anti-Fraud Coalition. And  
10 like I said, I'm not wedded to particular times, I'm more  
11 interested in the answers.

12           So, Mr. Krueger, if you would like to give -- I  
13 don't want to curtail any planned remarks if you would like  
14 to give those and then I can follow up with my questions in  
15 those three buckets. That's fine.

16           MR. KRUEGER: Okay. Thank you, Your Honor. Good  
17 afternoon and may it please the Court.

18           I remind you again, I'm Matthew Krueger on behalf  
19 of Defendants Physician Partners, Florida Medical  
20 Associates, and Anion Technologies. With me at counsel  
21 table, also from Foley & Lardner, are Jason Mayden (ph),  
22 Joseph Swanson (ph), as well as (inaudible) of the  
23 defendants.

24           I'll start with some briefly prepared remarks, but  
25 then be sure to address the questions that you posed. And I

1 would like to ask if I could reserve five minutes up front  
2 for rebuttal?

3 THE COURT: Yes.

4 MR. KRUEGER: Okay. Thank you.

5 Fundamentally, the defendants' motion raises the  
6 question of accountability. The Constitution requires that  
7 the individuals who exercise the awesome power to enforce  
8 Federal law are accountable to the President and, therefore,  
9 ultimately to the people. The False Claims Act Qui Tam  
10 device is utterly opposed to accountability and it's an  
11 unconstitutional aberration.

12 As this case shows, the False Claims Act vests  
13 self-appointed private individuals with the executive's  
14 power to exercise prosecutorial discretion in deciding  
15 whether to file suit, what claims to assert, and now for the  
16 past four years in this case, to litigate as the only and  
17 primary party as the government has disclaimed being a  
18 party, having declined pursuing the government's claim  
19 without the ability for the executive to remove and replace  
20 her with another accountable officer.

21 There is no precedent that supports this, no Court  
22 of Appeals has addressed these questions in the last  
23 20 years, but you have had in these past years decision  
24 after decision by the Supreme Court that underscores the  
25 importance of accountability in Article II in the

1 Appointments Clause, as well as the requirements of the Take  
2 Care Clause with removal.

3           So I'll turn to your questions and starting first  
4 with the Appointments Clause. I think your question  
5 reflects that the first part of an Appointments Clause  
6 argument is really not in dispute here insofar as the  
7 Relator -- a Relator's clearly exercising core executive  
8 power by choosing and exercising prosecutorial discretion in  
9 bringing what is essentially a penal statute of claims under  
10 the False Claims Act. That's clear from *Buckley*, *Morrison*,  
11 *Nixon*, that you have the exercise of enforcement discretion,  
12 that under CELA law with its test of there needing to be  
13 substantial authority is clearly met here.

14           The same precedents that I just cited also answer  
15 your question as to continuity.

16           THE COURT: What is the standard? *Lucia* (ph) says  
17 that it's -- continuity is an element of officer status, but  
18 then doesn't elaborate much. And then looking back over a  
19 hundred years in the precedent, there's various  
20 articulations of what continuity consists of and I'm looking  
21 to know what that is for this case.

22           MR. KRUEGER: Right. As the Second Circuit  
23 recognized in *Donziger*, and I would point you to the Second  
24 Circuit's decision --

25           THE COURT: I was gonna ask if that's what you

1 would recommend I adopt as the continuity standard here.

2 MR. KRUEGER: I don't think you necessarily need  
3 to adopt *Donziger* straight out, I think you can simply say  
4 that under *Morrison*, under *Buckley*, under the D.C. Circuit's  
5 examples, and under *Donziger's* examples of a special counsel  
6 or an independent counsel that are exercising enforcement of  
7 the law, even if they're for a particular case, but over an  
8 extended period of time, that that clearly meets continuity  
9 without needing to necessarily articulate a test that will  
10 apply in every circumstance.

11 Because I think what you're recognizing is some of  
12 the case law is a bit messy, particularly when you go to the  
13 very old cases where you have an ad hoc, for example,  
14 engagement of a surgeon by an agent of the United States.  
15 And so I think you could tie to the particular circumstance  
16 of somebody who is given the authority to prosecute claims  
17 on behalf of the United States satisfies continuity.

18 THE COURT: Can you think of any example from any  
19 of the cases where someone is exercising significant  
20 executive power, but on a more temporary basis where that  
21 person was not deemed an officer?

22 MR. KRUEGER: I cannot think of one offhand. I  
23 think in many ways the substantial authority test gets you  
24 90 percent of the way there. CELA does articulate  
25 continuity, as another example, but I can't think of one in

1 which you would have the first requirement met, but not the  
2 second.

3           And I think that makes very good sense, because  
4 when you have an individual who is exercising short of  
5 discretion the sort of authority that is recognized as  
6 substantial under CELA. Again, this is very clear under  
7 CELA or free exercise, that -- excuse me, a free enterprise  
8 fund, situations where an individual has the authority to  
9 bring claims, to prosecute them, I can't imagine a situation  
10 in which that's not going to meet (inaudible) for an  
11 officer.

12           THE COURT: Is there any of those cases you would  
13 point me to -- I mean, I have to articulate a standard I'm  
14 applying. Which one would I use? Because they do seem to  
15 vary somewhat. Like trying to find the through lines.  
16 Frequently, they say things like created by statute, the  
17 duties are specified in the statute, they have some sort of  
18 compensation based off of the statute.

19           I think there's some more haziness around the,  
20 what does it mean to be temporary, episodic, that kind of  
21 thing. I do see in the earlier cases, especially like  
22 *Germane*, and I'm gonna ask counsel who is arguing on the  
23 other side this question:

24           Some of those distinctions have to do with almost  
25 fact determinations by subject matter experts, which seem

1 different in kind and discretionary-type decisions as to  
2 what claims to bring, what legal arguments to formulate, and  
3 such. And I didn't know if there's any basis to draw a  
4 distinction there on what it means to be continuous or not.

5 MR. KRUEGER: Yes, I do think there are several  
6 reasons. First with those older cases, you had essentially  
7 a surgeon and an appraiser who had a subject matter  
8 expertise that were hired almost as an expert consultant for  
9 a very limited discrete task that wasn't bound up in --  
10 there's two distinctions, again wasn't bound up in core  
11 executive power prosecuting a case, but also where  
12 essentially agents of an officer who is otherwise  
13 responsible for administering a Federal statute. Here you  
14 have no such other Federal officer. It is the Relator alone  
15 who is prosecuting the United States' claims here, much more  
16 like *Morrison*, like *Donziger*.

17 I think to the extent the Court does feel the need  
18 to articulate a particular test, I think *Donziger* is the  
19 best articulation that we have. And what's clear from that  
20 is that -- the fact that it's a particular case and not a  
21 sustained office for indefinite period is not dispositive.

22 And I think the way to think about this, because  
23 the other side has pointed to things like lack of salary or  
24 lack of employment, is that that can't possibly be the test.  
25 That might be an indicia of where the test is satisfied, but

1 if you think about a situation, if Congress, for example,  
2 had created an Office of Relator for this particular case  
3 and appointed Ms. Zafirov to prosecute that, you would be  
4 all fours with *Morrison* or *Donziger*. It can't be the case  
5 that just by Congress not doing that, can they do an end run  
6 around the Appointments Clause, because responsibilities  
7 being fulfilled are essentially the same.

8 I would also add that you do have a monetary  
9 interest in this case were she to prevail. And obviously,  
10 the motive for her prosecuting this is to have a share of  
11 the recovery. And so functionally there isn't really any  
12 difference between drawing a salary and having a share of  
13 the recovery.

14 THE COURT: If there is an Appointment Clause  
15 problem here, is there any way to remedy it?

16 MR. KRUEGER: In this case, the remedy must be  
17 dismissal. Whether Congress has a way to craft the statute  
18 differently, if that's -- if that's your question.

19 THE COURT: No, that's not my question. Yes, they  
20 could rewrite it. My question is, is there any way to  
21 remedy it. Front-end Appointment Clause challenges present  
22 different remedy problems than back-end removal ones  
23 sometimes, in the case law at least, so that's what I'm  
24 asking.

25 MR. KRUEGER: I don't see a way that that's

1 possible here, because it is an unappointed and, as you're  
2 indicating, an unremovable Relator, who has exercised that  
3 enforcement discretion to file this lawsuit and, since the  
4 government has declined, has now been the only party with  
5 primary responsibility to litigate it. So I see no way to  
6 remedy this other than dismissal.

7 THE COURT: Okay. I want to turn now to history.  
8 Both sides spilled a lot of ink and I understand the case  
9 law has and I think this is where the real rub of the  
10 constitutional inquiry comes to a forefront, is in the  
11 historical pedigree of Qui Tam in the United States.

12 What I didn't see in the briefing -- and I'll ask  
13 everyone this, so these aren't surprise questions going  
14 forward. In English, statutory Qui Tam, I see three  
15 buckets, you have mere bounties to informers with no cause  
16 of action attached. You have causes of action given to  
17 people who are actually aggrieved parties, who suffered  
18 something, you know, in addition to the public wrong. And  
19 then you also have what I'll term for purposes of oral  
20 argument today, true Qui Tams. So something where the  
21 person is given a cause of action, but they themselves have  
22 not suffered an individualized harm and their right to  
23 obtain a portion of the penalty and the bounty.

24 So I think the FCA Relator is in the third bucket  
25 and I'm wondering in the cases, even *Stevens*, it's not

1 always parsed in this way and whether I should be  
2 distinguishing between the three kinds of history and then  
3 what does that history bear out with regards to the true  
4 Qui Tam statistics, because I think, you know, after recent  
5 Supreme Court precedent, especially *Bruen*, like I need to be  
6 doing the proper historical analogies here and I'm not sure  
7 a bounty hunter informer is an equivalent and I certainly  
8 don't think someone who has their own individualized harm  
9 that has no res judicata preclusive effect on the government  
10 if it were to litigate its case to final judgment, that's  
11 also not the same thing. So where does that leave me?

12 MR. KRUEGER: I agree with your analytical  
13 approach of distinguishing between these and I think the  
14 bottom line answer is where that leaves you is that there is  
15 not historical precedent of situations like you have under  
16 the False Claims Act of a Qui Tam Relator with no injury of  
17 their own, but who is given authority to litigate the  
18 government's injury.

19 THE COURT: So this is -- based on my own research  
20 so far, there is -- as I've identified them and categorized  
21 them, I think the first few Congresses passed between five  
22 to ten what I'll call true Qui Tam statutes. And then as  
23 far as enforcement -- so those were on the books. But as  
24 far as enforcement and use, based on my Westlaw research,  
25 I've uncovered less than a dozen what I call true Qui Tam

1 enforcement actions in the first 70 years of the founding.

2           Is there any constitutional theory that would tell  
3 me that there's -- is there a significant difference between  
4 Congress enacting a law and then like widespread use of the  
5 law, how does that cut in favor or against Qui Tam? In  
6 specific, I mean FCA.

7           MR. KRUEGER: So you cited *Bruen* and I think *Bruen*  
8 provides for you a test for how to look at history. And so  
9 step one, even before you look at history should you ask is  
10 there a need to look at history, is Article II ambiguous on  
11 the question at hand? And I would submit to you you don't  
12 actually need to look at history, because particularly, say,  
13 under the Appointments Clause, as we just discussed, you  
14 have an individual who is exercising this authority without  
15 appointment.

16           But if you do feel the need to look at history,  
17 our research is similar where we identified, and I think we  
18 cited them in our brief, five statutes of the first Congress  
19 that did expressly authorize Qui Tam actions without their  
20 necessarily being a personal injury.

21           But as you observed, much of the discussion, much  
22 of the scholarly literature lumps those together with other  
23 statutes where you have an authorization that's only for a  
24 bounty, which is very different, in that situation, a person  
25 is not exercising Article II authority, or somebody who has

1 a personal injury. Again, very different.

2 So if you're looking at -- and I don't know that I  
3 would even call those, to use your label, true Qui Tam,  
4 because much of the literature describes them as Qui Tam  
5 in --

6 THE COURT: Right, I've used that just as a  
7 (inaudible) for today's purpose. You could say FCA-like  
8 Qui Tam.

9 MR. KRUEGER: Okay. And so I think, as you  
10 pointed out, there were relatively few FCA-type Qui Tams,  
11 but again, I'm gonna even distinguish those from what we  
12 have today.

13 And the other pertinent point, and this is -- this  
14 is discussed in *Bruen* in terms of how you handle historical  
15 analysis, is it's very important to ask whether early  
16 practice was something that the framers deliberately chose,  
17 thought about, and were recognized. And --

18 THE COURT: Where do I look to to find whether  
19 they did that deliberate thoughtful enactment versus  
20 reactionary adoption from English law?

21 MR. KRUEGER: You would expect to find statements  
22 in the Federalist papers, the Congressional discussions and  
23 deliberations around the Constitution or around the  
24 enactment of the statutes, as you do when you're talking  
25 about removal power where removal power was recognized at

1 the time as essential to Article II. You have no such  
2 consideration. Instead, you have sort of a thoughtless  
3 adoption of a practice that had been in some existence  
4 without thinking necessarily what does it mean when we've  
5 departed from the Parliamentary system that existed in  
6 England and have adopted a clear separation of powers?  
7 That's borne out by the fact that these statutes aren't  
8 actually used and fall largely into disuse.

9 THE COURT: Is there any literature, Congressional  
10 record, is there any place I can go to find this compendium  
11 of Qui Tam statutes and Qui Tam enforcement actions other  
12 than my own ability to research it? There's a Law Review  
13 article that's cited in *Stevens*, and there is a Professor  
14 Prakash article, neither of which do a fulsome compendium.  
15 So I'm just wondering where I can find this historical  
16 research.

17 MR. KRUEGER: I would also cite you to then head  
18 of OLC's memo by William Barr in which he articulated -- in  
19 which he analyzes many of these same statutes. I think he  
20 looks to some of the same underlying secondary sources. The  
21 ones that we've cited to, they're few and far between.  
22 Those were the ones that we were able to uncover from our  
23 research. And I think the takeaway from that is that you  
24 don't have the un-checked, well-established historical  
25 practice that *Bruen* suggests would be relevant.

1 THE COURT: So you think there needs to be use  
2 under the statute for it to be widespread and unbroken  
3 tradition that would inform the constitutional question, not  
4 just on the books? There's been some form of a Qui Tam  
5 action that's been passed by Congress since the founding.  
6 Does that not -- how does that bear, that's what I'm asking.  
7 Like how do I weigh those?

8 MR. KRUEGER: Right. You know, again, step one,  
9 do you even need to look at this history given the  
10 incredible body of case law that has emerged about what does  
11 Article II really mean in terms of removal power,  
12 appointments power? And I don't think you do, because you  
13 have such a clear violation here. And we know from Justice  
14 Thomas's dissent in *Polansky* and other places that  
15 historical practice, even if it were very established, can't  
16 create present power under the clear violation.

17 THE COURT: Okay. I think the hardest question  
18 then for you is like what do I do with the situation like  
19 *Marsh*, right? Like we've had parliamentary prayer under  
20 modern precedents. If it was just being applied, would that  
21 be passing constitutional muster?

22 MR. KRUEGER: I think *Marsh* is a great  
23 counterexample where there was a long and unbroken use, to  
24 your point, as well as a recognition that this is happening  
25 and discussion among the framers about whether the Bill of

1 Rights is consistent with this sort of practice. There is  
2 no similar consideration or recognition that this historical  
3 artifact of Qui Tam, which, again, even in England had  
4 mostly fallen into disuse, would pose the problem that it  
5 does today, particularly when you have to have some sort of  
6 apples-to-apples comparison. A legislative prayer isn't  
7 gonna change much from the 1780s to today.

8           This sort of Qui Tam statute that you might have  
9 had at the founding, just a factual falsity, was X delivered  
10 instead of Y, is night and day different from the modern  
11 regulatory False Claims Act in which, with the growth of the  
12 modern regulatory state, you have certifications of  
13 compliance with all manner of regulations that are bound up  
14 when you're doing business with the government. And,  
15 therefore, the False Claims Act today is not anything like  
16 that original Qui Tam, but instead, is essentially a  
17 regulatory enforcement behemoth, in which last year over 700  
18 Qui Tams were filed by self-appointed private individuals  
19 making first impression interpretations of Federal law and  
20 regulatory standards that are very different than what would  
21 have happened at the founding.

22           But again, even if you found -- and you don't  
23 have, but if you had some unbroken chain of a very  
24 simplistic Qui Tam statute, that wouldn't justify what  
25 Congress created in 1986. That's the actual historical

1 legacy, is just back to the mid '80s, which immediately drew  
2 opposition from the then-head of OLC. And so it's nothing  
3 like legislative prayer in *Marsh*.

4 THE COURT: Okay. Anything else with that or can  
5 we move on to my post-*Polansky* questions about remaining  
6 partial assignment?

7 MR. KRUEGER: Absolutely.

8 THE COURT: Okay. So *Polansky* gives the  
9 government the right to intervene at any time if they show  
10 good cause and then subjects the dismissal under Rule 41  
11 metrics.

12 What are those standards? Not so much the good  
13 cause, I'm more interested in the dismissal, because that's  
14 the visceration of a Relator's partial assignment. So  
15 *Stevens* gives the Relator standing, because in theory they  
16 have a partial assignment of the government's damages claim.  
17 So I want to unpack this a little bit.

18 The first question I have, which provision gives  
19 Congress the right to assign this to a private citizen who's  
20 not been injured?

21 MR. KRUEGER: Justice Thomas in *Polansky* flagged  
22 that as a question under Article I, whether Congress even  
23 had power to do so. It's not been articulated by Congress  
24 and so I think that is a separate constitutional challenge.

25 THE COURT: I understand, no one is bringing it

1 here. I'm just asking the question, because I think  
2 *Polansky* said, lower courts, you should consider these  
3 questions when you're faced with these challenges. And the  
4 only potential I've heard from the Relator or those in  
5 support thereof is the Property Clause.

6 MR. KRUEGER: That's right.

7 THE COURT: Why is this not other property under  
8 the Property Clause?

9 MR. KRUEGER: Look, we're not in a position where  
10 we want to defend Congress's authority to enact this, it's  
11 not the court challenge we brought here. But I think even  
12 if there were authority under the Property Clause, that  
13 wouldn't address any of the Article II questions.

14 THE COURT: Well, no. So I -- well, yes and no,  
15 sorry. I won't say no. What I'm -- I kind of wanted to  
16 think systematically through this. Does Congress have the  
17 right to assign part of the damages of a False Claims Act to  
18 a private citizen who has not been harmed? So first  
19 question is, is that other property? Is a contingent,  
20 nonspecific, monetary judgment to no particular person, it's  
21 like writ large to the public to be -- to be determined by  
22 whomever initiates the action, is that other property for  
23 purposes of the Property Clause under Article I?

24 MR. KRUEGER: I think there are real reasons to  
25 doubt that, particularly because under the False Claims Act

1 this isn't a contract dispute about a fixed amount of money  
2 or some finite property. The False Claims Act authorizes  
3 enforcement of civil monetary penalties, treble damages, or  
4 a contingent undefined amount of property that's really a  
5 penal statute of recovery. And so I wouldn't suggest to you  
6 that the Property Clause authorizes it.

7 THE COURT: Do you have any case that would say  
8 that?

9 MR. KRUEGER: I don't standing here today,  
10 because, again, it wasn't sort of the core challenge that we  
11 brought. Happy to submit additional briefing on that if the  
12 Court thinks it's important to first address the Article I  
13 question.

14 THE COURT: I think it bears in a post-*Polansky*  
15 world and here's why: So if it is property that Congress  
16 can assign, and that is what *Stevens* I think contemplated,  
17 *Polansky* significantly increased the government's  
18 termination of whatever that partial assignment is, which is  
19 why I started with the first question of what's the standard  
20 for dismissal under *Polansky*.

21 So Justice Kagan says that: The Supreme Court has  
22 never sat out a grand theory of what rule requires. She's  
23 referring to Rule 41. And the inquiry is necessarily  
24 contextual. Given that, a District Court should think  
25 several times before denying a motion to dismiss by the

1 government. If the government offers reasonable argument  
2 for why the burdens of continued litigation outweigh its  
3 benefits, the Court should grant the motion. And that is so  
4 even if the Relator presents a credible assessment to the  
5 contrary.

6 So what is that standard and has it completely  
7 eviscerated any property interest that the Relator has?  
8 Because I think the question remains if the Relator has an  
9 individualized property interest separate from just being an  
10 agent of the United States, is there a way for that Relator  
11 to proceed absent the United States?

12 MR. KRUEGER: Forgive me for fighting your premise  
13 a little bit, but I don't think that -- *Stevens* talks about  
14 assignment of an interest, but it also recognizes a  
15 proprietary interest, as well as the government's interest  
16 in regulatory and vindicating violations of law.

17 THE COURT: Uh-huh.

18 MR. KRUEGER: So that's partly what makes this  
19 such a problematic arrangement under Article II as well, is  
20 you have the Relator, who has -- even if her property  
21 interest is now even less stable because the government may  
22 dismiss, under the current statute she is exercising the  
23 government's --

24 THE COURT: Right. So I think you're getting to  
25 one of the other questions that the decent in *Polansky*

1 posed, which is it servable. Is it there a way for a  
2 Relator to vindicate whatever this partial contingent  
3 assignment of property is absent the United States as an  
4 indispensable party? And I think the answer probably is no  
5 from what you're telling me, because any contemplation of  
6 the FCA works in tandem with what you would conceive of as  
7 an Article II violation.

8 MR. KRUEGER: That's absolutely right. And I  
9 think Justice Kavanaugh's statement in *TransUnion* also bears  
10 on that that, where although he's addressing Article III  
11 standing in that context, he observes that if an unharmed  
12 plaintiff were given the ability to enforce Federal law,  
13 that would infringe upon Article II. And that's what  
14 Relators necessarily are doing under *Stevens*, is they are  
15 exercising enforcement of an injury that is only the  
16 government. They are unharmed.

17 THE COURT: Well, I think *Stevens* was  
18 contemplating that they are given something more than the  
19 agency, right? *Stevens* says it's not -- the reason they  
20 have Article III standing is because of the partial  
21 assignment, not because they're vindicating the Federal  
22 government's -- I think -- it doesn't say this explicitly,  
23 but *Stevens* doesn't say that they're only operating as an  
24 agent, because then you would run headlong into Article II  
25 problems. So the statute making them have a right to

1 proceed in their own interest and having a partial  
2 assignment of the damages claims is what gives them the  
3 individualized harm to proceed under Article III. Right?

4 So I'm wondering what that property right is and  
5 is it -- the layers of good cause to intervene and then the  
6 Rule 41 dismissal bears on whether that still exists or if  
7 it -- that's what I'm asking, what's the standard for a  
8 dismissal or thinking the government always distinguished  
9 the right and, if that's the case, then what assignment has  
10 occurred at all?

11 MR. KRUEGER: So what *Polansky* teaches us is to  
12 look to Rule 41 as sort of the bottom line of it, right? In  
13 a situation like this, where we're in Rule 41(a)(2), because  
14 there's been an answer and now the government has declined  
15 and is not in the case, then *Polansky* makes clear that the  
16 interests of the Relator come to bear. Under a  
17 Rule 41(a)(2) dismissal, the Court is required not only to  
18 take into account the movant's interests were the government  
19 to intervene and try to dismiss again, but also the  
20 defendant's.

21 And so they don't have carte blanche. And so the  
22 analogy that the opposition makes to say removal does not  
23 work, because intervening and trying to dismiss is not  
24 necessarily a given that the Court will have to dismiss.

25 THE COURT: Okay.

1 MR. KRUEGER: I'm happy to -- I absolutely want to  
2 continue engaging, I just -- I want to --

3 THE COURT: Well, I have only one question left  
4 for defendants and if there's anything else you want to tell  
5 me, please do so. But this goes to an issue that I said I  
6 don't really need you to opine on, but I'm curious your  
7 answer.

8 What additional controls, if the FCA were to be  
9 rewritten, would make this compliant for purposes of the  
10 Vesting and Take Care Clause?

11 MR. KRUEGER: There are other examples, say, under  
12 the SEC or the CFTC in which executive branch can give a  
13 bounty to a whistleblower who brings information forward for  
14 the government. And so to the extent the opposition is  
15 concerned about protecting that need to fight fraud, that's  
16 a very obvious answer. And that's what many of the other  
17 Qui Tams, as they were called at the time involved, were  
18 certain bounty statutes. So that would be one very simple  
19 and straightforward fix that align with many other Federal  
20 statutes.

21 THE COURT: Okay.

22 MR. KRUEGER: We could certainly talk about what  
23 other sort of levels of control are needed --

24 THE COURT: That's essentially erasing the right  
25 to be part of the law suit. That just makes them a

1 whistleblower for purposes of receiving a part of the  
2 judgment that's eventually secured. But that's not giving  
3 them a cause of action or any right to in any way be  
4 involved in the case. Right? That's not a partial  
5 assignment that gives them standing.

6 So what I guess I'm asking, is there any -- absent  
7 just taking that away, is there any other control here that  
8 would render it constitutional in your view under the  
9 Vesting or the Take Care Clause.

10 MR. KRUEGER: You need an absolute ability to  
11 remove, which does not exist here. That's very clear now  
12 that we know *Morrison* is the outer bounds. So you would  
13 need true removal authority. Just dismissal, and  
14 particularly a qualified dismissal that's subject to court  
15 approval for a situation, would not satisfy. So that's a  
16 major, major problem.

17 You also -- but I don't think that's gonna take  
18 care of the fact that Relators have prosecutorial discretion  
19 to file a lawsuit in the first instance and then inflict the  
20 harms that come from filing a law enforcement. And so you  
21 would also need some mechanism to not allow private  
22 individuals to be the ones who file a suit without there  
23 being a true intervention and adoption by the government.

24 THE COURT: Okay.

25 MR. KRUEGER: If I may, I reserve the five

1 minutes.

2 THE COURT: Yes, Mr. Krueger. Thank you.

3 MR. KRUEGER: Thank you very much, Your Honor.

4 THE COURT: Okay. Mr. Engel.

5 MR. ENGEL: Good afternoon, Your Honor. Steve  
6 Engel on behalf of the Chamber of Commerce.

7 Well, I think that Your Honor has hit on a number  
8 of important questions here and I'm happy to -- I agree with  
9 what the defendants have said on these issues. I'm happy to  
10 sort of fill in some of the gaps or provide some of my own  
11 thoughts on those.

12 Obviously, the backdrop of all of this is a  
13 statutory scheme that offends three separate provisions of  
14 Article II. And so I think, you know, the Court's questions  
15 focus correctly on the Appointments Clause, as well as  
16 history, because, frankly, without the history we wouldn't  
17 even be here I think. I mean, I think if there was -- if  
18 Congress were to have adopted the False Claims Act and the  
19 Qui Tam device in 1986, and if there wasn't Qui Tam at  
20 English Common Law, if there weren't versions of Qui Tam in  
21 the first Congress, it clearly would be seen as, you know,  
22 an anomalous massive violation of Article II at the time.  
23 We're here because there is Qui Tam in the English roots.

24 But I think as the Court's last questions got,  
25 there obviously are very serious Take Care and Vesting

1 Clause issues with Qui Tam as it's currently structured, in  
2 addition to the Appointments Clause.

3           So if I can take the Court's first question about  
4 what's the standard for continuity. I mean, I think that,  
5 you know, the standardized, as articulated by Justice Kagan  
6 and the Court in *Lucia*, is the traditional standard that it  
7 must be the incidents of officer status were set out in  
8 *Germane*, you know, a long time ago.

9           I think from the standpoint of is a Relator an  
10 officer, the thing to keep in mind is that the Supreme Court  
11 and the Courts of Appeals have repeatedly made clear that  
12 single-case officers, single-case prosecutors, do qualify as  
13 officer status and, indeed, it's not even to be debated.  
14 And so obviously, the Second Circuit in a number of  
15 interesting opinions wrestled with this in *Donziger*  
16 recently. But we have *Morrison*, which was a hard case,  
17 because everyone knew that the Special -- that the  
18 Independent Counsel was an officer. We also have *Nixon vs.*  
19 *United States* in which, you know, the rule-based appointed  
20 Special Prosecutor of the Attorney General was recognized to  
21 be an officer. And the D.C. Circuit addressed this with  
22 respect to Special Counsel Mueller fairly recently.

23           And so a single case officer, someone who is  
24 charged with one mission and carries it forward until the  
25 end of that mission and then goes back to the private

1 sector, clearly is an officer of the United States. And I  
2 would submit that the Relator, who has the authority to  
3 litigate on behalf of the United States, as  
4 *Buckley vs. Valeo* said very clearly, enforcing the laws in  
5 the civil fashion is a core executive authority. *Heckler*  
6 *vs. Chaney* talked about the importance also of civil  
7 enforcement. These are core executive authorities and if  
8 that is vested in an individual, that satisfies both the  
9 front end of exercising substantial authority of the United  
10 States and is sufficient for continuity.

11 THE COURT: Is there any -- it cuts against the  
12 plaintiff in other contexts, but for continuity purposes,  
13 the inability to remove the Relator, does that make the  
14 office not continuous in the way the Special Prosecutor or  
15 the Independent Counsel would be?

16 MR. ENGEL: Yeah. No, I think -- I mean, I think  
17 it obviously demonstrates that the officer -- that the  
18 Relator gets to hold onto the office, you know, even -- and  
19 a number of these provisions of Article II reinforce each  
20 other. So traditionally, when we talk about removal  
21 restrictions, we think of them as Vesting Clause issue.  
22 That's how pre-enterprise found CELA law and the like  
23 identifies it. But I think it certainly shows that the  
24 Relator has a hold on the office.

25 The other things that I think are relevant here is

1 that it's not personal to the Relator in the sense that, as  
2 the United States, you know, will tell you or has told you,  
3 the United States can intervene. The United States can step  
4 in. And what happens when the United States intervenes, the  
5 United States takes over the case and an officer of the  
6 Department of Justice, a properly appointed officer, will  
7 carry forward, you know, that litigation.

8           And the other thing is that the Relator occupies  
9 the field of the Qui Tam action related to the allegations  
10 in the complaint. So this is 31 U.S.C. 3730(b)(5). That  
11 says when a Relator like Ms. Zafirov here, Dr. Zafirov, has  
12 brought this action, nobody else can bring a similar action.  
13 And that's very different from the way any civil litigant  
14 would operate, you know, under any other statute. And  
15 that's, of course, because under the False Claims Act  
16 Congress has granted a self-appointed Relator the right to  
17 litigate on behalf of the United States and to do that  
18 subject only to the ability of the Department of Justice to  
19 come in and take over that role, a situation that's, you  
20 know, plainly not here.

21           So I think for all of these -- you know, for all  
22 of these reasons, it's clear, and Justice Thomas, you know,  
23 suggested as much in building the prima facie case in his  
24 dissent in *Polansky*, that this is someone exercising core  
25 executive power and, therefore, it's someone who must be

1 appointed consistent with the Appointments Clause. And the  
2 only -- you know, the only reason we're even talking about  
3 it, I would submit, is because of history, which unless the  
4 Court has questions on this, I'm happy to turn to.

5 THE COURT: Let's turn to history. Could you set  
6 out before we turn to what the history bears out here in  
7 terms of the types of Qui Tams and their usage versus just  
8 enactment, what is the constitutional theory for history  
9 that might seem to conflict with current Supreme Court  
10 precedent on separation of powers?

11 MR. ENGEL: Yeah. I mean, I think that the Court  
12 has been pretty clear about this, that we certainly take  
13 seriously what the framers thought about and what they did  
14 in the first Congress. But the -- you know, the framers  
15 were not -- they were not perfect interpreters of the new  
16 experiment that they had created. And so we know that the  
17 first Congress granted the Supreme Court jurisdiction that  
18 it could not exercise under the Judiciary Act of 1789,  
19 because Chief Justice Marshall, the Court, told us that in  
20 *Marbury vs. Madison*.

21 We know that the first Congress assigned  
22 responsibilities to courts to make pension decisions subject  
23 to revision by the Secretary of War or Secretary of the  
24 Treasury. And in *Hebrons* case the Court said, no, no,  
25 that's unconstitutional. And so, you know, if we fast

1 forward a few Congresses, we have the Alien and Sedition  
2 Acts, which I think the Supreme Court in *New York Times vs.*  
3 *Sullivan* and most people think, you know, were flatout  
4 violations of the First Amendment.

5 And so the fact that the first Congress did it is  
6 certainly relevant to the analysis, but it's never been  
7 dispositive. And the Court said that in *Marsh vs. Chambers*.  
8 As my friend pointed out, in the first Congress, they  
9 debated whether having a chaplain was consistent with the  
10 Establishment Clause and they came to the conclusion that  
11 the kind of chaplains that they had, you know, would rotate  
12 persons to sanctify the proceedings of the first Congress  
13 was consistent with the Establishment Clause. They made  
14 that judgment then, the Supreme Court confirmed that in  
15 *Marsh vs. Chambers*.

16 But you had *Waltz*, where the Court again said the  
17 fact that we've had tax exemptions for religious  
18 institutions from the beginning is relevant, but not  
19 dispositive if we come to the conclusion that it violates  
20 the First Amendment. And the Court in *Bruen* indicated that  
21 too to some agree with somewhat later, you know, history of  
22 statutes and the like.

23 THE COURT: So what history matters the most, that  
24 it's enacted, that it's widely used, that it's consistently  
25 used?

1 MR. ENGEL: Yeah. So I think that to the extent  
2 that the constitutional framework is unclear and to the  
3 extent that the history of the first Congress in continuing  
4 has kind of liquidated one meaning of it through an unbroken  
5 practice that was considered adopted and has become part of  
6 the framework of our laws, that's the kind of history that  
7 could be relevant. But I would submit here we have -- we  
8 don't have that for several reasons.

9 One is we have a very clear understanding, which  
10 the Court, particularly in the last 25 years, has continued  
11 to articulate of the scope of Article II. And so we have  
12 Free Enterprise Fund and we have CEJA law and we have *Lucia*  
13 and we have *Arthrex*. You know, we have a series of cases in  
14 which the Court has continually emphasized that all of the  
15 executive power is vested in the President and that Congress  
16 cannot prevent the President from having a unitary and an  
17 accountable executive. And that's really the problem with  
18 the False Claims Act.

19 THE COURT: So had there been a False Claims Act  
20 statute passed by the very first Congress and it's been  
21 widely used up until present day, where would that leave --

22 MR. ENGEL: I would submit that -- I would say  
23 that had it been widely used and understood to be consistent  
24 with Article II, and it was debated at the time and everyone  
25 said, no, this is what Article II means, and I would even

1 further submit if this were the case, then perhaps the  
2 understanding of -- in this hypothetical, the understanding  
3 of Article II would have taken a very different turn I  
4 think. I mean, I think what the history shows is -- and  
5 incidentally, I think the history of these statutes is gonna  
6 be muddy, I would submit. The Court asked where to find a  
7 list of these statutes --

8 THE COURT: Do you have any recommendations?

9 MR. ENGEL: Well, so to me, I think in Footnotes  
10 Three and Four of our brief we list a number of the  
11 statutes. I think it -- actually, sorry, it's Footnote Two  
12 of our brief I think. I'm looking it up. Three and Four of  
13 our brief, Footnote Two of the government's brief, excuse  
14 me. Sai Prakash has a good article --

15 THE COURT: The chief prosecutor?

16 MR. ENGEL: Prosecutor, he --

17 THE COURT: But he says the article that would do  
18 a full compendium has yet to be written and then I don't  
19 think it's been written since.

20 MR. ENGEL: We have to reach out to colleagues in  
21 the Academy to start putting pen to paper. But I think that  
22 there are -- I mean, I think there are -- Professor Prakash  
23 also cites a number of articles on Qui Tam and the early  
24 statute. This, you know, as the Court is aware, was a big  
25 deal in the years after 1986 and sort of in the early '90s

1 about what this all meant, you know, and after the release  
2 of Attorney General Barr's OLC opinion on the subject and  
3 the like. And so, I mean, it's there. But I guess what I  
4 would submit is it's gonna be muddy. What we don't -- the  
5 statutes are a little bit sparse --

6 THE COURT: You mentioned the Bill Barr's OLC  
7 memo. He references the SG's counter-position. Do you know  
8 if that's public? I couldn't find it.

9 MR. ENGEL: That's a good question. I thought it  
10 was, but I confess I haven't read it in some time, so --

11 THE COURT: I wondered if that had some -- he  
12 summarized it as, but the history is SG's position, and I  
13 would be curious if the SG filed something.

14 MR. ENGEL: And maybe a friend from the Department  
15 of Justice --

16 THE COURT: We have to ask that.

17 MR. ENGEL: What I do suspect is that if you want  
18 to find the Department of Justice's traditional position on  
19 this issue as reflected by the Solicitor General's office,  
20 there's a series of briefs. I think somebody may cite the  
21 brief from the Bush administration, 2003 or 2004,  
22 thereabouts, there was a Tenth Circuit brief in a case  
23 beginning with a P, I forget, but which the U.S. government  
24 filed a few years ago. And then, of course, we have the  
25 current brief from the Department of Justice.

1           Those are the kind of arguments I think that the  
2 Department -- that the litigator, Solicitor General Starr  
3 and his successors have tended to sort of use to justify,  
4 which is, you know, number one, that there's authority of  
5 the Department of Justice to step in if they want to.  
6 Number two, they repeat this analogy, which has always been  
7 unpersuasive to me, but that isn't this just like civil  
8 rights statutes and environmental statutes where injured  
9 parties may sue and in -- successfully sue and they can  
10 benefit, you know, the public as well. I mean, clearly,  
11 those --

12           THE COURT: Like citizen suit provisions, yeah.

13           MR. ENGEL: And as *Lujan* tells us and *TransUnion*  
14 tells us, they must be injured in the first place, which is  
15 a very different situation here. In no instance are those  
16 citizen suits coming on behalf of the United States.

17           And the standing doctrines that the Supreme Court  
18 has wrestled with, as in *TransUnion* and *Lujan*, are in part  
19 reflecting the Article II values that are directly before  
20 the Court, you know, on this motion, which is it's up to the  
21 President and accountable elected President to take care  
22 that the laws are faithfully executed to exercise the  
23 executive power and we can't have private parties running  
24 around and making those decisions.

25           Those private parties are not accountable. And

1 they don't have, you know, the virtues of prosecutorial  
2 discretion, you know, and the potential for, you know, the  
3 policy latent judgments and priorities that the Department  
4 of Justice does and does with the False Claims Act, which is  
5 why the vast majority of these cases the Department of  
6 Justice takes no position and just sits them out. You know,  
7 they don't have the resources, they make their own priority  
8 judgments, and they, as a result, are not accountable for  
9 the 80 percent or so of False Claims Act cases that proceed  
10 with these unappointed, unelected, unaccountable Relators  
11 and the like. But --

12 THE COURT: Okay.

13 MR. ENGEL: So --

14 THE COURT: If we could turn to the last kind of  
15 bucket of questions as to what are the standards for  
16 intervention and dismissal by the government after *Polansky*  
17 and what does that do, if anything, to the partial  
18 assignment of property that *Stevens* contemplated.

19 MR. ENGEL: Sure. Judge, I --

20 THE COURT: And I understand these are not  
21 directly raised here, some of these arguments, but I think  
22 they're important for me to think through as I'm resolving  
23 the motion. And really, because of the ultimate  
24 matriculation to the end of is there any way that a Relator  
25 can pursue the right that Congress gave it without violating

1 Article II.

2 MR. ENGEL: Again, I think these are very fair  
3 questions. And after all, you know, Justice Thomas's  
4 dissent in *Polansky* and the concurrences of Justice  
5 Kavanaugh and Justice Barrett is part of why there's renewed  
6 interest in this, because we know in addition to all the  
7 line of Article II precedents that the Court has been  
8 generating and, obviously, Justice Thomas fairly asks while  
9 making a strong prima facie case, and I submit a correct  
10 one, about the unconstitutionality of *Qui Tam*, he recognizes  
11 that there are difficulties that the Court's will need to  
12 work out. So I think it's a very fair question.

13 You know, when we're talking about the partial  
14 assignment here, I think there's two parts of it I think,  
15 one of which is the partial assignment that comes with what  
16 do we make of the conditions that if truly the Relator has a  
17 right in this action, which *Stevens* held it has Article III  
18 standing and (inaudible) in this case because of -- you  
19 know, because of this partial assignment, what do we make of  
20 the fact that the Department of Justice in the rare case,  
21 but as a theoretical matter, can just dismiss the case,  
22 intervene and dismiss? And to the extent *Polansky* says they  
23 can even do so, you know, after the initial review period,  
24 does that -- you know, what does that say? And I guess I  
25 would -- and so that's part of the partial assignment.

1           The other part of the partial assignment and I  
2 think what Justice Thomas was talking about is that since  
3 *Stevens* recognizes that the Relator has a partial assignment  
4 for standing even if the Relator cannot constitutionally  
5 speak on behalf of the United States. And so the 65 percent  
6 or 80 percent of the case that purports to be on behalf of  
7 the United States should go away, is there still a right of  
8 the Relator to litigate on her own behalf for the, you know,  
9 whatever percent of the claim that she has received as a  
10 partial assignment? And I think there's two issues there --

11           THE COURT: Because then there wouldn't be an  
12 Article II problem. I think that's where he's going with  
13 that, right?

14           MR. ENGEL: Or he's asking the question.

15           THE COURT: Right, is there -- is there a way for  
16 that person to vindicate whatever that interest is without  
17 offending Article II.

18           MR. ENGEL: Yes. Yes. And I think so --

19           THE COURT: I think that's why he asked the  
20 severability question and we know what he would say on  
21 severability, but we'll (inaudible) courts on  
22 severability --

23           MR. ENGEL: I mean, I think that the severability  
24 case, the severability issue, should be pretty clean here,  
25 because the only -- the principal reason why we have the

1 False Claims Act is that Congress thought that the DOJ  
2 wasn't doing a good enough job of seeking to pursue false  
3 claims and so they wanted to disburse executive power among  
4 financially motivated private Relators in the hope that it  
5 would spur additional enforcement to help the public fisc.

6 So the idea that Congress intended simply to  
7 incentivize, you know, private bounty hunters to go pursue  
8 their own bounties with no benefit to the public I think  
9 is -- you know, it would be a strained interpretation if one  
10 adopted the sort of --

11 THE COURT: Is it even possible, right? Like  
12 wouldn't the government be an indispensable party under like  
13 regular joinder rules?

14 MR. ENGEL: Yes. And how would it work for  
15 res judicata? We've always said that --

16 THE COURT: Right, that's another big problem.

17 MR. ENGEL: So I think if in fact the government's  
18 part of the False -- of the Qui Tam action, particularly in  
19 cases where they have not intervened, is unconstitutional.  
20 I don't think we can sever it and allow the Relator to  
21 pursue, you know, her private interest. I don't think  
22 that's a reasonable reading of the statute, I think that  
23 creates all kinds of incongruities as to how it goes. I  
24 mean, after all, the government still under *Polansky* has the  
25 ability to come in and dismiss the case.

1 I mean, so are we suggesting that if she's only,  
2 you know, operating on her partial assignment that -- I  
3 mean, presumably the government would still have the ability  
4 to dismiss? It's a unit. I mean, the idea is this is --  
5 you know, this is a system in which private bounty hunters  
6 are seeking to enforce Federal law with a benefit to the  
7 government without, you know, benefit to the public fisc. I  
8 mean, that was the plan.

9 THE COURT: What is the standard after *Polansky*  
10 for a Rule 41(a)(2) dismissal in an FCA context?

11 MR. ENGEL: Yeah. I don't know that I've seen  
12 post-*Polansky* cases. They may exist, but I don't know. I  
13 mean, so I would just stick with, I mean, Justice Kagan said  
14 that we're not gonna settle it, but that the government  
15 should, you know, be in a position, you know, that courts  
16 should generally approve it if the government has explained  
17 itself sufficiently I suppose. I mean, I think that's -- I  
18 could pull up exactly what she said.

19 THE COURT: No, she says if the government offers  
20 a reasonable argument for like why the burdens of continued  
21 litigate outweigh its benefit, the Court should grant the  
22 motion. And that so even if the Relator presents a credible  
23 assessment to the contrary.

24 One question that's posed for me, because I deal  
25 with Rule 41 all the time, is you can't come in, in the

1 Eleventh Circuit as least, and dismiss claims. You either  
2 dismiss the whole party or nothing.

3 So the workaround is Rule 15(a), but that's an  
4 even lower bar I think than Rule 41 in terms of you're  
5 completely eviscerating whatever that partial assignment of  
6 a particular claim is if the government intervenes and says,  
7 well, we just want to drop these claims and now we're gonna  
8 move to amend the complaint. So that's like another layer  
9 of -- I don't even -- yeah.

10 MR. ENGEL: No, I totally agree, it's a  
11 complexity. I also think it doesn't solve the Article II  
12 problems. It clearly doesn't solve the -- no matter how,  
13 you know, much authority the government has to come in and  
14 dismiss the case, it doesn't solve the Appointments Clause  
15 problem at all. You know, this is, I mean, similar -- this  
16 is one of the arguments raised in *Lucia*. There was an  
17 argument that, well, the SEC reviews the ALJ's decisions  
18 de novo, and so, therefore, you know, maybe it shouldn't  
19 really matter, maybe it's just kind of a recommendation to  
20 the ALJ's decision to the SEC. And the Court in the  
21 Appointments Clause context rejected that.

22 So even if the government could theoretically come  
23 in and dismiss easily, and maybe that -- I don't think it  
24 solves the Take Care Clause concerns, which I'm happy to  
25 address, but maybe it ameliorates one part of the Take Care

1 Clause concerns. It doesn't solve the Vesting and it  
2 clearly doesn't solve the Appointments Clause problems.

3 THE COURT: Again, I understand no one is raising  
4 this, but is this property that Congress has the power to  
5 dispose of under the Property Clause?

6 MR. ENGEL: So I don't think it is and that's  
7 because --

8 THE COURT: Even though Blackstone calls it an  
9 inchoate property right?

10 MR. ENGEL: So I don't think -- so Blackstone  
11 calls a cause of action an inchoate property right.

12 THE COURT: Uh-huh.

13 MR. ENGEL: So it would be -- so this is not --  
14 the way I see this is, this is Congress outsourcing an  
15 executive function to the world, disbursing executive power  
16 to enforce the laws through -- it's not just -- it would be  
17 one thing if the government has a particular claim. I mean,  
18 you know, if the government had a particular claim against a  
19 particular person, you know, it's possible that we could  
20 look at that as a property right that Congress could cut  
21 off, could decide to assign, or could give to the executive  
22 the authority to kind of assign.

23 Like if the government has a -- I just stayed at  
24 the Meridian Hotel. I mean, once that was Federal property  
25 and that's either now leased or it's been sold, you know, to

1 someone else to make a hotel. I mean, Congress or the  
2 government can take a real property right. But --

3 THE COURT: That's my question actually I was  
4 gonna ask, because it says respecting territory or other  
5 property if it's limited to real property or purtenances  
6 thereof.

7 MR. ENGEL: Well, I mean, I think it would include  
8 personal property, but I don't think that's what -- what the  
9 False Claims Act does is it says any person may pursue the  
10 quasi criminal via the civil fines forfeiture actions on  
11 behalf of the United States.

12 THE COURT: But under a theory that we've given  
13 you I guess under a contract aspect of assignment of those  
14 damages, right?

15 MR. ENGEL: But I would say I don't think that --  
16 but because of the way it's structured, which is it's not  
17 even an inchoate of a particular action, nobody's brought  
18 the action at the time at which Congress is doing the  
19 assignment.

20 THE COURT: Do they have to?

21 MR. ENGEL: I mean, I think Congress is  
22 outsourcing an executive function.

23 THE COURT: So I was trying to think of an analogy  
24 in the law to what was happening here. So say somebody  
25 is -- has terminal cancer and they write their will and say,

1 I have a medical malpractice suit against my oncologist. I  
2 haven't brought it, but I'm going to assign it to my  
3 daughter to bring on my behalf. Is that not property for  
4 her?

5 MR. ENGEL: Well, and when somebody passes, the  
6 estate steps into the shoes and to the extent that the -- a  
7 claim that a living person had survives some --

8 THE COURT: Right, if it's not a wrongful death  
9 statute.

10 MR. ENGEL: There are causes of action clearly  
11 that survive, and so the estate does typically, by operation  
12 of law, the executor can pursue those claims. That's why  
13 Humphrey's executor is, you know, Humphrey's widow, who is  
14 suing for his backpay because FDR fired him. You know, so I  
15 mean --

16 THE COURT: So why isn't that property that the  
17 government can do the same thing with, it has a cause of  
18 action against someone who defrauded it?

19 MR. ENGEL: Because at the time, in 1986, when  
20 Congress passed the False Claims Act, it had no cause of  
21 action against anyone. What it was saying is we are going  
22 to -- the traditional law enforcement -- you know,  
23 Article II enforcement authority to pursue civil claims on  
24 behalf of the United States we are gonna give to the world  
25 under the following terms and conditions and the world can

1 go out there and any person who knows of something, you  
2 know, as an unaccountable private bounty hunter can pursue  
3 these claims. And so Congress is not actually assigning  
4 a -- assigning person property, assigning real property, you  
5 know, by the False Claims Act, it is just outsourcing of  
6 Federal -- a group essential Federal function to enforce  
7 Federal law to private parties.

8 And so, again, it would be one thing if Congress  
9 knew --

10 THE COURT: There was no fraud action pre-FCA that  
11 they could have assigned?

12 MR. ENGEL: There's no -- well, but again, the  
13 distinction I'm trying to draw here is that they're not  
14 assigning a particular fraud action, they're not assigning a  
15 known property, putting aside whether Congress can do it  
16 directly, whether it has to do it through --

17 THE COURT: The problem is particularly and lack  
18 of specificity?

19 MR. ENGEL: Yeah, and the problem is it's not a  
20 claim. It is -- what is it? It's an executive function.  
21 It is the executive function of enforcing the laws --

22 THE COURT: So is *Stevens* wrong?

23 MR. ENGEL: Sorry?

24 THE COURT: Is *Stevens* wrong?

25 MR. ENGEL: Well, *Stevens* is precedent, so --

1 THE COURT: (Inaudible) for me, I'm asking you.

2 MR. ENGEL: Well, what *Stevens* said was that when  
3 we think of case or controversy under Article III, we have  
4 said in the past it's things that look like cases or  
5 controversy as of 1789. And so what I think Justice Scalia  
6 and the Court was wrestling with was the fact that *Qui Tams*  
7 were there in 1789. They were there in, you know, 1788 in  
8 England and presumably some of the states and they were  
9 there in the -- you know, some version of *Qui Tam* was there  
10 in the first Congress. And so the Court formulated a  
11 partial assignment theory that it said satisfied standing  
12 based upon the test that it had been set out for case or  
13 controversy as it existed in 1789. That test is very  
14 focused on when they said case or controversy, what did they  
15 have in mind?

16 I would submit it's different. Article II was  
17 new. Justice Thomas mentions this in citing Professor  
18 Prakash in his *Polansky* dissent. You know, Article II is  
19 new. It's different from British practice where  
20 Parliament --

21 THE COURT: Right.

22 MR. ENGEL: And the like. And so it's not  
23 entirely surprising that, you know, in 1789 when there was  
24 no Federal government to speak of and when, you know,  
25 officers were only being created, you know, at that time

1 Congress would pursue, you know, to continue this practice  
2 without thinking about it for expediency in a way in which  
3 once the executive branch was set up quickly became  
4 anomalous.

5 On the other -- on the history, you know, as we've  
6 talked about, I mean, a lot of these statues are actually  
7 criminal. Not a lot, because there aren't that many, but --

8 THE COURT: Some were, yeah, like the larceny one.

9 MR. ENGEL: Exactly. And so to some extent I  
10 would submit that history just proves too much. I mean, I  
11 assume that the Department of Justice would not take the  
12 position that a Qui Tam statute permitting private  
13 prosecutions in this day and age is consistent with  
14 Article II. At least I hope not. But, you know, certainly  
15 *Morrison vs. Olson* and *Nixon vs. United States* sound very  
16 strongly that the prosecutorial function is, you know,  
17 inherently executive. And so a lot --

18 THE COURT: Well, I'm gonna ask this, I'm not sure  
19 of the daylight here, given that the treble damages are  
20 similar to what you would get in terms of -- when you're  
21 criminally prosecuting a corporation, you're only getting  
22 fines anyway. So how is this any different subject to the  
23 Eighth Amendment excessive fines.

24 MR. ENGEL: Agreed.

25 THE COURT: I understand that you don't have a

1 grant jury subpoena power, but you do have civil discovery  
2 powers.

3 MR. ENGEL: Yeah, I totally agree. And then I  
4 would just further submit that *Buckley* and *Heckler vs.*  
5 *Chaney* make clear that civil enforcement of the laws is  
6 equally a core executive power, you know. And so, I mean, I  
7 think many people would find it, you know, surprising to  
8 think of a private prosecution in this day and age, you  
9 know. But I think the constitutional principle is the same  
10 for criminal and civil and, as the Court indicated, *Qui Tam*  
11 is quasi criminal with respect to the fines and -- and the  
12 treble damages and the attorneys' fees and the like.

13 But the key is it is a public injury to the United  
14 States. And while *Stevens* does say that there's a partial  
15 assignment, which is good enough for standing, in part  
16 because of the history, Justice Scalia and the Court dropped  
17 a footnote to say we're not addressing the Article II. And,  
18 you know, I think for the reasons that the briefs make  
19 clear, as Justice Thomas suggested in his *Polansky* dissent,  
20 there's a pretty strong prima facie case that all of the  
21 Article II decisions that have been coming from the Court  
22 over the last 40 years, including *Morrison vs. Olson*,  
23 frankly, weigh against the constitutionality of *Qui Tam*  
24 under Article II, so...

25 THE COURT: Same question I ended with defendants.

1 Is there any additional control that would make the current  
2 False Claims Act constitutional for purposes of Vesting or  
3 Take Care Clause?

4 MR. ENGEL: So again, and we're in the realm of  
5 hypotheticals, but I think because what -- under the current  
6 structure, it can't be saved, because the decision to  
7 initiate the case is made by the Relator and because the  
8 Relator is not appointed consistent with the Appointments  
9 Clause. If you told me that -- obviously, if you have a  
10 situation simply of a bounty, you know, to someone,  
11 whistleblower who brings information to the government and  
12 then the government proceeds and pursues the case, that  
13 could be consistent.

14 Another hypothetical statute, which, you know, of  
15 course, Congress would have to adopt, would be one in which  
16 if the Attorney General wants the whistleblower to pursue a  
17 claim of the United States on behalf of the United States,  
18 just like you can have --

19 THE COURT: Deputized?

20 MR. ENGEL: Yeah, the Attorney General has the  
21 power to appoint people to pursue litigation on behalf of  
22 the United States. That's the justification for, you know,  
23 the half a dozen Special Counsels we've been dealing with on  
24 the criminal side. But the Attorney General has the same  
25 authority on the civil side. And so if there was ex ante, a

1 proper -- you know, proper appointment before somebody comes  
2 into court, because I think an important thing here is that  
3 the Relator is the first mover, right? The Relator forces  
4 the government to make a decision about whether to kind of  
5 come in, whether not to come in, or whether she can pursue  
6 on her own.

7           And, you know, I think as Justice Kavanaugh spoke  
8 for the Court in *TransUnion* or as he spoke for D.C. Circuit  
9 in his *Aiken County* opinion, I think it's very -- that  
10 undermines prosecutorial discretion, which is a core  
11 Article II, you know, power there. So I think that's a  
12 problem.

13           But if you said that the whistleblower can file a  
14 report to the Department of Justice so the Department of  
15 Justice could pursue the case or it could actually say the  
16 Attorney General as the head of a department is going to  
17 appoint the whistleblower to go forward with the case, I  
18 suppose that, you know, would be consistent. But obviously,  
19 that's not what we have here. We have a highly reticulated  
20 provision in which an unappointed and unaccountable Relator  
21 is litigating on behalf of the United States. And the fact  
22 that on the back end the Department of Justice has certain  
23 rights doesn't solve the Appointments Clause problem and it  
24 certainly doesn't solve the Vesting Clause or, I submit, the  
25 Take Care Clause as well.

1 THE COURT: Okay. Thank you, Mr. Engel.

2 MR. ENGEL: Thank you, Your Honor.

3 THE COURT: Ms. Estes or Ms. Koh, whoever would  
4 like to go first.

5 MS. KOH: May it please the Court, Jennifer Koh  
6 for the United States. Good afternoon.

7 THE COURT: Good afternoon.

8 MS. KOH: Your Honor, with your indulgence, I  
9 would ask that I'll start with my Appointments Clause  
10 arguments and will quickly get into the questions that --

11 THE COURT: Okay.

12 MS. KOH: -- were posed.

13 But I did want to start off with the Supreme Court  
14 has spoken in many cases on these constitutional issues that  
15 we're discussing here today and the government's view is  
16 that those analyses that the Supreme Court has conducted in  
17 those cases is very pertinent to hear, even though they were  
18 oftentimes in Article III context or FCA statutory  
19 interpretation.

20 And so if we look at how the Supreme Court in  
21 *Stevens* and the other cases have analyzed these  
22 constitutional issues, we feel it is clear here, in regard  
23 to the Appointments Clause, as well as the Take Care Clause,  
24 that defendants' arguments are gonna fail as they have  
25 failed in the five appellate courts that have looked at

1 these issues directly.

2 First, as it relates to the Appointments Clause,  
3 it's clear Relators are not officers of the United States,  
4 nor are they acting officers. *Stevens* has clearly stated  
5 they are partial assignees of the government's claims.  
6 They, thus, have a personal stake in the outcomes of the  
7 case, which is directly at odds with any idea that they are  
8 public -- that they are Federal officers.

9 *Cochise*, when looking at the statute of  
10 limitations provision, was absolutely clear that they were  
11 not an official of the United States charged with the  
12 (inaudible) Act. And additionally, the appellate courts  
13 what have looked at this issue have found that Relators lack  
14 indicia of officers and have ruled accordingly and have  
15 held -- upheld the Relators' position with regards to the  
16 Appointments Clause that there is no violation.

17 I think one of the issues that the Court is  
18 struggling with here on the continuity standard, part of the  
19 struggle there in the government's view is it's -- you know,  
20 it's trying to stick a square peg into a round hole, because  
21 when we talk about the continuity standard, Relator's  
22 status, their status doesn't meet the initial threshold that  
23 they are operating and exercising a core executive power  
24 unfettered by supervision of the government.

25 So this idea that are they holding a continuing

1 position, there really isn't a position. They don't have a  
2 title. They don't have a role. They don't have anything  
3 that the government has recognized beyond what the False  
4 Claims Act allows, which is private parties that are --  
5 declined cases, in particular, continue to litigate on  
6 behalf of the government. And so --

7 THE COURT: Isn't their role, the Relator, and the  
8 rights the FCA provided procedural in cause of action?

9 MS. KOH: I'm sorry?

10 THE COURT: Okay. It sounds like you're first  
11 starting like the what are they doing here, right, in terms  
12 of power. The False Claims Act gives them a role, they're  
13 the Relator, and then gives them a lot of rights to initiate  
14 an action, to seek discovery, to bring claims. I mean, even  
15 when the government intervenes, my understanding is they're  
16 allowed to cross-examine at trial. I mean, they're fully a  
17 party. So they still have a role, it's just not -- it's a  
18 self-appointed role, but it's a role that's identified in  
19 the statute.

20 MS. KOH: Absolutely. And the government --

21 THE COURT: I mean, you said something earlier  
22 that they -- and I agree *Stevens* contemplated they're a  
23 personal assignee and, in that capacity, are not acting on  
24 behalf of necessarily the United States, although that  
25 doesn't deal with the preclusive effects.

1 But they are also acting as an agent. Like they  
2 bring an action in their own personal capacity, but also on  
3 behalf of the United States. So isn't that on behalf of the  
4 United States? I mean, literally, that's how the FCA is  
5 written.

6 MS. KOH: Right, yes. And the Relators are  
7 permitted through the False Claims Act to continue the  
8 litigation on behalf of the United States.

9 I would note like they're a partial assignee of  
10 the government's damages. They get that because the  
11 government so gives it to them.

12 THE COURT: Then they're acting as an agent of the  
13 United States in the entire case, not just as to the partial  
14 assignee part, right?

15 MS. KOH: They continue to take a role as pursuing  
16 the declined -- their litigation in declined cases, but I  
17 don't want to forget that there were these vast control  
18 mechanisms in place whereby the government is looking over  
19 their shoulder, keeping up with what's going on in ensuring  
20 that the government's interest is met.

21 And so I know we haven't talked a lot about the  
22 control mechanisms that the government has in place for  
23 Relators, but I don't want them to be underestimated,  
24 because they get rattled off all the time. I mean,  
25 ultimately, ultimately the government has the ability to

1 step in, intervene and dismiss a case over a Relator's  
2 objection. The government is not saying it's unfettered,  
3 certainly the statute provides limitations on that, but I  
4 think we see in *Polansky* that those limitations are  
5 relatively low.

6 THE COURT: What are those limitations?

7 MS. KOH: So the Relators are entitled to a  
8 hearing. If the government wants to dismiss the case over  
9 their objection, they're entitled to a hearing, and --

10 THE COURT: Right. But I don't have hearings just  
11 for hearing sake, right? So what happens at the hearing?  
12 Like what's the standard that the Court is supposed to be  
13 applying at the hearing?

14 MS. KOH: So I think *Polansky* is the one that --  
15 the standard that is set, which is the Court needs to assess  
16 whether the dismissal complies with Rule 41 and the  
17 government is given substantial deference. So as we've  
18 discussed already, if the government deems the benefits of  
19 the case outweigh the costs, then that is -- and the Court  
20 agrees with that, then the Court -- the case should be  
21 dismissed even if Relator's statements to the contrary are  
22 credible. It's whether the government feels the case is  
23 worth pursuing. And it's not --

24 THE COURT: If the government is moving to  
25 dismiss, obviously, they don't think the case is worth

1 pursuing, so doesn't that render the standard less standard?

2 MS. KOH: So the government has to do an analysis  
3 of whether the cost and benefits of the case ultimately --  
4 like in *Polansky*, it was an issue of the money and the  
5 resources that were going into that case. So there is a  
6 standard there, it's just *Polansky* has set that standard  
7 relatively low.

8 So the government gets kind of the gravity of the  
9 say in this because it's the government's cause of action  
10 that the Relators are pursuing on -- because the government  
11 allows them to do so.

12 THE COURT: Well, that seems like they're acting  
13 more like the agent of the government and less and less on  
14 their own behalf.

15 MS. KOH: Well, so that's the structure that the  
16 False Claims Act sets aside -- sets forth for us that's what  
17 the structure is. Whether it's an agent or not, I won't go  
18 as far as to say that the Relator is an agent of the  
19 government. The Relator is pursuing their claims that the  
20 government has given them, but not unfettered, not in a  
21 vacuum, with the government overseeing what's going on.

22 THE COURT: What about the res judicata or  
23 preclusive effect of a non-intervened case on the  
24 government?

25 MS. KOH: So if -- non-intervened case --

1 THE COURT: You don't usually allow, right, a  
2 preclusive effect to a nonparty?

3 MS. KOH: Well, so in the case where a  
4 government -- the government has declined to intervene, the  
5 case goes all the way through trial and there is a judgment,  
6 I mean, the government is bound by that judgment if it is --  
7 you know, if the judgment is for the government's claims.  
8 And so that's contemplated by the statute.

9 I think the government would say before you get to  
10 that point, all the various control mechanisms and  
11 constraints that the government had in place come into play.  
12 So in terms of the government being bound by a decision that  
13 we completely disagree with, that doesn't just happen  
14 overnight. The government as -- in its role of monitoring  
15 the Relator Qui Tam litigations out there, is keeping an eye  
16 and when it sees certain problems or if it thinks it's going  
17 in a direction that the government doesn't agree with, we  
18 have the ability to intervene. We have the ability to come  
19 in and dismiss over the Relator's objection. We have the  
20 ability to broker a settlement, whether the Relator likes it  
21 or not. And so all of those things together need to be kind  
22 of examined holistically to look at this res judicata issue.

23 THE COURT: So what if at a Rule 42 -- I'm sorry,  
24 41 dismissal motion the government says we disagree with the  
25 theory of fraud that the Relator brought. Is that

1 sufficient?

2 MS. KOH: It's hard to answer a hypothetical like  
3 that. I think if the government disagrees --

4 THE COURT: I mean, you wouldn't have brought the  
5 case, right, if you thought the theory was insufficient?  
6 But maybe the Court thinks that the theory is valid based on  
7 the -- like maybe it's a contract case, for example, and the  
8 plain meaning of the contract would support the Relator's  
9 view, but the government for a variety of reasons doesn't  
10 want to pursue that contract interpretation. Maybe it's not  
11 a term they care about, maybe it's a contractor they want to  
12 continue having good relations with, maybe it's a contract  
13 term that appears in a bunch of contracts and they don't  
14 want to litigate this case or have binding precedent. Is  
15 that a sufficient basis for a dismissal?

16 MS. KOH: Under Rule 41, in the situation of a  
17 declined Qui Tam case, yes, I think it would be. If the  
18 government could satisfy the Rule 41 standards, which is  
19 giving the government substantial deference, then, yes, it  
20 would be.

21 I think in the hypothetical, however, if the  
22 government had a problem with the theory of the case that  
23 the Relator was pursuing, there are many avenues up to that  
24 point that would have kicked in short of going to trial and  
25 presenting the case before a jury. Right? So I think

1 that's where -- if we look at the control that the executive  
2 has over the Relator's, there are many of them, and they  
3 allow the -- they allow the government to have that control.

4 Plus, the spirit of all of these controls makes  
5 Relators and the government work in tandem many times. Like  
6 oftentimes there's not -- you know, there may not be -- we  
7 don't have to invoke the rules every single time, because  
8 Relators know, right? They know if they're going to pursue  
9 a case that they think the government is not gonna agree  
10 with, they're most likely not gonna pursue the case, because  
11 they know the government could come in and dismiss it. It  
12 kind of all works together here.

13 And I think this kind of ties back to when we look  
14 at what is the power that is vested in the Relator. And  
15 this kind of goes into the Take Care Clause issues. But  
16 defendants rely on cases like *Morrison* and *Buckley*,  
17 (inaudible), all of those cases to say, look, look at  
18 these -- these officers in these roles are officers and,  
19 therefore, the Relator should be too. Vastly different.

20 In *Buckley* the Federal Election Commission, the  
21 individuals at issue were the actual commissioners of the  
22 Federal Election Commission. Vastly different kind of  
23 missions and powers that were given to them. Same with the  
24 CFPB and even the Independent Counsel, right? Even though  
25 the Independent Counsel has a similarity that it's one

1 particular investigation, they have way more authority than  
2 the Relators have, mostly --

3 THE COURT: In what way?

4 MS. KOH: In the Independent Counsel situation,  
5 the Department of Justice stops investigating. We can't  
6 also pursue what the Independent Counsel is pursuing in any  
7 investigation.

8 THE COURT: What about Special Counsel?

9 MS. KOH: Special Counsel, same way. Like once a  
10 Special Counsel is investigating, government has to be very  
11 careful, we can't be doing -- investigating two -- having  
12 two parallel investigations, criminal investigations, into  
13 one action. Whereas in the False Claims Act, the Relator  
14 can continue to pursue those claims, there's nothing that  
15 precludes the government from continuing to investigate  
16 those same claims. And so I think --

17 THE COURT: Does that ever happen?

18 MS. KOH: There are situations where it happens.  
19 There's some very practical situations where the government,  
20 you know, is forced to make an intervention decision before  
21 it's prepared to do so and it will continue to -- it will  
22 have to notify the Court that it's not intervening, but it  
23 does continue to investigate. There are -- you know, also,  
24 not just limited to the False Claims Act, the same claims if  
25 they violate other rules, regulations, like they can be

1 pursued in that front as well.

2 THE COURT: Okay. So the difference is no  
3 parallel investigations. What else?

4 MS. KOH: So with Independent Counsel, they have  
5 Independent Counsel can issue indictments, Independent  
6 Counsel can appoint its own employees, they can participate  
7 in the criminal and civil litigation, they can conduct grand  
8 jury proceedings, all things that, obviously, because they  
9 are criminal actions -- and I will take issue that I do  
10 think there is a difference when we're talking about the  
11 constitutional powers of the executive, there is a  
12 difference between criminal and civil. But, you know, they  
13 can conduct their own grand jury investigations. So  
14 Independent Counsel has this vast power that's given to  
15 them.

16 It's even more stark in the CFPB situation or the  
17 FEC or even in the Free Enterprise, the public company  
18 accounting oversight board, they are given a mission to do  
19 something, right? And with CFPB, they are given a mission  
20 to ensure consumer products are safe and transparent.  
21 Right? And then the Federal Election Commission, they're  
22 given the mandate of enforcing the Federal Election Campaign  
23 Act. Very different from Relators.

24 A single Relator handles -- brings a single case  
25 against a single -- well, whichever defendants they name, it

1 can be more than one defendant, but the scope of what  
2 Relators are handling, vastly different from those other  
3 cases.

4 And so I do think as the Court struggles with this  
5 continuity issue and some of the other indicia of officers,  
6 that's part of why it doesn't quite fit. It doesn't quite  
7 fit together, because it's just --

8 THE COURT: I hear what you're saying, like the  
9 Commission could investigate multiple different  
10 investigations, multiple, and it's all within a different --  
11 it's within a subject matter. But in some ways the FCA like  
12 authorizes a Relator to bring -- if they have knowledge,  
13 personal knowledge, and can allege that, you know, under  
14 Rule 11 and whatnot, they can allege it as to a host of  
15 different claims. It's not limited to elections, it's not  
16 limited to securities fraud, it's anything, right? It's  
17 the -- in terms of substantive law, it's any type of  
18 contract with the government, any sort of fraud on the  
19 government.

20 MS. KOH: Yeah. And I --

21 THE COURT: Isn't that a broader mandate?

22 MS. KOH: It is. So I think, again, kind of  
23 looking at this from a -- if we step back a little bit as to  
24 who Relators are, it's not a monolithic body that's out  
25 there that has this power, right? It's gonna be --

1 THE COURT: It's anyone with personal knowledge to  
2 make sufficient allegations in a complaint.

3 MS. KOH: Yes. And they can then bring any --

4 THE COURT: And who aren't involved themselves in  
5 the fraud. But, yes.

6 MS. KOH: Any potential False Claims Act violation  
7 that they see and have a basis to bring.

8 THE COURT: Isn't that a bigger mandate, though,  
9 is my point, in terms of what you're trying to enforce?

10 MS. KOH: Well, it is -- on one hand it is a  
11 bigger mandate. I do think it then comes with the control  
12 mechanisms that are in place there. Right? And I think one  
13 of them is that the Relator has to have information that  
14 they're bringing to them that really limits down what an  
15 individual Relator -- what authority and power that  
16 individual Relator has. Right? Because any individual  
17 person isn't seeing the fraud across all the government  
18 contracts and government programs out there.

19 THE COURT: Sure, they're the ones that they're  
20 aware of, right. I agree.

21 MS. KOH: So I think we have to look at Relators,  
22 we have to look at Relators as who they are, individuals out  
23 there who bring individual cases versus a Relator -- a kind  
24 of grand Relator monolith out there that has all these  
25 powers that they can exercise, right? But the way the False

1 Claims Act was written was it was very circumscribed to what  
2 the Relator knew in that particular situation. So I  
3 think --

4 THE COURT: For continuity purposes, can you give  
5 me an example of someone who exercises this sort of  
6 substantial power? And by that, I mean civil enforcement  
7 power, but who has not been deemed an officer?

8 MS. KOH: So there are situations in the other --  
9 like in the Sherman (ph) Act type case or in the Title VII  
10 cases where an individual is given the ability to bring a  
11 suit to vindicate public rights.

12 THE COURT: But that's because they have an  
13 individual injury that -- they are themselves an aggrieved  
14 party. Am I right in saying that they don't bind the United  
15 States in whatever parallel proceeding the United States may  
16 pursue?

17 MS. KOH: That's correct.

18 THE COURT: So I mean, that seems wildly different  
19 to me. Like if I have a personal claim because you hit me,  
20 I should be allowed to vindicate it even if the government  
21 wants to charge you with assault.

22 MS. KOH: Yes. Yes. So not to say that there's a  
23 one-on-one comparison there, but I think that is -- that  
24 is -- the spirit of what happens in those cases are similar  
25 to what happens in the False Claims Act.

1 To answer your direct question of whether there's  
2 a situation where there is someone who brings a suit to  
3 vindicate public harm, I -- none is coming to my mind right  
4 now.

5 THE COURT: I think that's a very important  
6 question for purposes of continuity. Right? Is there any  
7 individual exercising substantial executive power in a civil  
8 enforcement action who has been not deemed an officer?

9 MS. KOH: Well, I think where the government would  
10 take issue there is with the exercising substantial  
11 government power. And that's what -- I think we don't need  
12 to get to the continuity.

13 THE COURT: Okay. Then cut that out of my  
14 question. Anyone who has civil enforcement authority who  
15 has not been deemed an officer?

16 MS. KOH: Yeah, but I think if they're not -- if  
17 they're not exercising substantial government power, they  
18 don't need to be deemed an officer. Right? So I think  
19 that's -- the defendants' argument fails on that first --  
20 first prong, and so we don't really --

21 THE COURT: I think that's a hard argument in  
22 light of the case law, that civil enforcement authority to  
23 initiate an action to judgment where you can get treble  
24 damages that are considered punitive in nature subject to  
25 the Eighth Amendment is not a substantial executive power.

1 MS. KOH: Well, posed that way, I actually would  
2 agree with you. Definitely enforcement of the False Claims  
3 Act is definitely a core executive power, it's significant.

4 THE COURT: Enforcement of the -- you agree?

5 MS. KOH: I agree with you that enforcement of the  
6 False Claims Act is a substantial power. It is a core  
7 executive power. There's no --

8 THE COURT: Then we're really in continuity land.

9 MS. KOH: Well, so then that power is vested --  
10 the Attorney General is the one who has got the primary  
11 responsibility to enforce the False Claims Act. The False  
12 Claims Act allows for this -- this idea of a Relator to come  
13 in and where the Attorney General deems it appropriate to  
14 let the Relator move forward. That's where I think I would  
15 take issue with what the Relator has is then not, in and of  
16 itself, exercising a core executive power, because they are  
17 constrained by the government control mechanisms that are  
18 there and I think Congress has allowed for this flexibility  
19 for the executive to decide how to enforce those powers. I  
20 think courts have recognized --

21 THE COURT: Okay. So you're just saying the  
22 Relator is not the one actually enforcing it, the government  
23 is?

24 MS. KOH: The Relators are enforcing it on behalf  
25 of the government.

1 THE COURT: Okay. I think I understand that. Is  
2 there a definition you think the case law prescribes for  
3 continuity?

4 MS. KOH: I think for continuity, since we don't  
5 think we need to get there and we don't think we need to  
6 establish a standard for Relators to meet continuity that  
7 there isn't one in this context. And I think --

8 THE COURT: If I disagree, what's the standard for  
9 continuity I'm supposed to be applying?

10 MS. KOH: Well, I think in addition to continuity,  
11 one of the things that defendants raises, this removal  
12 requirement, right, that the government can't -- unlike an  
13 officer, they can't remove them, which I think ties to the  
14 continuity piece.

15 THE COURT: I think it does and that probably  
16 helps your argument on continuity, but I think it really  
17 undercuts your argument on Take Care and Vesting.

18 MS. KOH: The removal -- sorry.

19 THE COURT: The inability to remove.

20 MS. KOH: Well, I think government would say, yes,  
21 we do not have, like you see in other statutes a carte  
22 blanche ability to remove that says when the executive so  
23 decides, this officer is out. Agreed, the government does  
24 not have that in the False Claims Act. But I think, again,  
25 it's this mismatch of, first of all, there's not --

1 THE COURT: Which is a big problem, right? Like  
2 if you're the government and you don't like how your agent  
3 is prosecuting the case, you put a different agent in  
4 usually. So you reassign the case to a different line  
5 prosecutor. But that's not capable here. Right? You can  
6 kill the whole case through dismissal, but you can't replace  
7 the person who is litigating unless you wanted to take on  
8 the action yourself?

9 MS. KOH: So I think the removability talks about  
10 removing a person from a particular office, which here I  
11 think doesn't quite fit where Relators are, because there's  
12 not an office. What does fit, what kind of is an analogy  
13 there, would be the ability to dismiss the case. And I  
14 think the government has the ability to go in and dismiss a  
15 case with the constraints that are built into the False  
16 Claims Act and the *Polansky* decision. So it's not carte  
17 blanche, right? But it is -- the government has a very  
18 strong ability here to dismiss a case if it so decides to do  
19 so and then to continue to investigate whichever claims it  
20 would like to investigate.

21 THE COURT: If the Court grants your dismissal  
22 without prejudice.

23 MS. KOH: That's right, yes. That's right.

24 THE COURT: Okay. Can we turn to the history? I  
25 imagine you might have a disagreement at the threshold

1 question of what -- maybe you don't have disagreement. Can  
2 you tell me the constitutional principle I first look to  
3 before I start parsing history to see what's similar, what's  
4 dissimilar?

5 MS. KOH: Well, I think, so the *Riley* (ph) court  
6 in the -- I think *Riley* was in the --

7 THE COURT: Fifth Circuit.

8 MS. KOH: Sorry, was it the Fifth Circuit?

9 THE COURT: The Fifth, yeah.

10 MS. KOH: It said the history of the False Claims  
11 Act is certainly a touchstone illuminating the  
12 constitutionality of the False Claims Act. Just to go to  
13 the point of courts have looked at this, most importantly  
14 *Stevens*, right? But --

15 THE COURT: *Stevens* didn't look at this question,  
16 though.

17 MS. KOH: *Stevens* looked at the history of the  
18 False Claims Act in the context of Article III, but I don't  
19 think their analysis of the history -- historical basis of  
20 the False Claims Act would change whether they're looking at  
21 Article III versus Article II. I think that -- so their  
22 analysis is instructive here on how they looked at it. They  
23 clearly put great weight, right, great weight in the long  
24 history of the False Claims Act -- sorry, in *Qui Tam*  
25 provisions going back, way back, to England and to the early

1 United States and all that, that whole time period, and  
2 followed that lineage up to 2020 when it decided *Stevens*.

3           So kind of just one note is I know defendants make  
4 an argument that hasn't come up today, but that the 1986  
5 amendments of the False Claims Act kind of cut this  
6 historical tie. We would just note that *Stevens* didn't --  
7 the Supreme Court in *Stevens* didn't view it that way. But  
8 we would look at *Stevens* as instructive here as to how the  
9 Supreme Court would ultimately consider the history of the  
10 False Claims Act and they found that it was well nie  
11 conclusive that the False Claims Act, that Relators had  
12 Statutory III standing and that analysis would be same if  
13 they were looking at Article II constitutionality.

14           THE COURT: Okay. I don't think that *Stevens* -- I  
15 mean, there would be no reason to explicitly say we are not  
16 addressing the Article II question if they thought they  
17 were.

18           MS. KOH: Well, I think that they were not  
19 explicitly addressing Article II, but I think what I'm  
20 trying to say is that their analysis that they undertook  
21 would be a very similar analysis and I would expect them to  
22 come out the same way as it relates to the history of the  
23 False Claims Act.

24           THE COURT: Okay. If I disagree, what do you  
25 think about the constitutional theory argument of -- I mean,

1 and *Stevens* is, you know, early 2000s, before a lot of the  
2 more recent separation of powers opinions have come out.

3 In light of what are I think compelling arguments  
4 under Article II, what kind of history is needed here to  
5 prove that it overcomes what seems to be the import of some  
6 of those recent opinions?

7 MS. KOH: So I think -- I know you asked the  
8 question earlier is it the fact that the statutory enacted  
9 versus --

10 THE COURT: Being used and how consistently used,  
11 that sort of thing.

12 MS. KOH: Yes. And so I think the government  
13 would hang its hat on the fact that enactment portion of it,  
14 really having an issue, we don't think that at that time  
15 they were enacting laws kind of without deep thought. And  
16 so the fact --

17 THE COURT: *Contra-Marbury v. Madison, New York*  
18 *Times v. Sullivan*, I mean, contra all those opinions?

19 MS. KOH: Yes. And that the fact that they put  
20 them on the books, that is the key -- the key inquiry.

21 THE COURT: Okay. Do you have a Supreme Court  
22 case that tells me that's the key inquiry?

23 MS. KOH: I don't, other than I would point to  
24 *Stevens* in terms of how the *Stevens* court looked at this,  
25 they were looking at the enactments and focusing on the laws

1 that were enacted at that time.

2 THE COURT: Do you know if the then-Solicitor  
3 General countermemo to Bill Barr's OLC memo is public?

4 MS. KOH: I am not aware whether it's public or  
5 not.

6 THE COURT: Okay. Do you know if there's a  
7 compendium of the -- lists the enactments or prosecutions  
8 other than me doing Westlaw, Boolean searches trying to find  
9 opinions that dealt with that?

10 MS. KOH: Other than that, and I think defense  
11 cited a few things, the government is not aware of a  
12 compendium of all these early statutes. I wish I were, but  
13 unfortunately I am not.

14 THE COURT: I wish I were.

15 Okay. So the government's position is that  
16 enactment is the relevant historical touchstone, not use,  
17 whether widespread or consistent? Obviously, those would be  
18 helpful, but the key is enactment from one of the first  
19 Congresses.

20 MS. KOH: Yes.

21 THE CLERK: What do I do with the fact that not  
22 all those enactments are of the same sort and then *Bruen*,  
23 you know, tells me that I have to be looking to see if  
24 they're relevant comparators? And here, as I said, I seem  
25 to see three buckets that don't seem similar to me, bounties

1 for informers with no cause of action, causes of action,  
2 which I think are similar to antitrust and Title VII-type  
3 plaintiffs who have real injuries themselves in addition to  
4 vindicating the public wrong, and then I'll change my -- I  
5 won't call them true Qui Tams, because that's been  
6 problematic. I'll call them the FCA-like Qui Tams that have  
7 no aggrieved person, but have a cause of action.

8           What do I do with the fact that there's far  
9 less -- when you combine them altogether -- and I don't  
10 think *Stevens* was trying to do some parsing of all of the  
11 record, it was just kind of saying, yes, this is true for  
12 case in controversy purposes. What do I do about that, that  
13 there's less of them when we start looking at what's an  
14 apple and an apple?

15           MS. KOH: I think for purposes of looking back at  
16 the history in this context and the reason why I think  
17 *Stevens* kind of groups all of these together is because  
18 you're not gonna find the perfect match, right? And I think  
19 you're not gonna find the exact something that looks like  
20 the False Claims Act that was enacted in 1863 back during  
21 the early enactment statutes. So I think there is -- the  
22 Courts should be permitted to kind of lump those together  
23 and take the spirit of Qui Tam action, the spirit of an  
24 individual bringing a case to vindicate a public right that  
25 is beyond themselves, was fully entrenched back in the

1 founding of the country.

2 THE COURT: Yeah, I agree with that, right. I  
3 don't think the historical analogue -- and this is I think  
4 what the SGRU (inaudible). The wrong inquiry is to find,  
5 you know, this perfect silver coin matches this one. That's  
6 not a -- it's to find the legal rule that's consistent. And  
7 I think the legal rule that's consistent is not aggrieved,  
8 but I have a cause of action. And there were at least five  
9 to ten of those passed by the first few Congresses. So it's  
10 no unheard of, they existed. What weight do I give them?

11 MS. KOH: I think the government -- the Court,  
12 Your Honor, should give them significant weight.

13 THE COURT: Because they were enacted?

14 MS. KOH: Because they were enacted. And *Stevens*  
15 gives them significant weight.

16 THE COURT: Well, *Stevens* lumps all of it  
17 together, though. That's my point. There's not this  
18 differentiation between historical kinds of *Qui Tam*.

19 MS. KOH: So I think *Stevens* was not faced with  
20 this -- the paradigm of separating these things out. So  
21 it's hard to say what they would have said if they were  
22 faced with this, but I think the government would say, yes,  
23 even though they were no all lumped together, *Stevens* was  
24 looking at *Qui Tam* actions as a whole and whether that  
25 legacy followed through from the beginning all the way until

1 today.

2 THE COURT: What do you do with the fact that they  
3 weren't used for large swathes of America history?

4 MS. KOH: Well, I think, you know, that that is  
5 something to be considered, but that you would put more  
6 weight on the fact that these were all enacted at that time.

7 THE COURT: Even though they weren't debated the  
8 way some of the other statutes that were enacted were from  
9 the first few Congresses?

10 MS. KOH: Well, I think the fact that they were --

11 THE COURT: Is that real liquidation, is I guess  
12 the right way of saying that?

13 MS. KOH: Well, I think the fact that they were --  
14 they were considered and put on the books and enacted, like  
15 that is the primary length to which the Court should look at  
16 the history.

17 THE COURT: Wouldn't that have been dispositive in  
18 a lot of seminal cases?

19 MS. KOH: In the context of the False Claims Act  
20 or --

21 THE COURT: No, just I'm talking about like as a  
22 constitutional interpretation matter writ large. If they  
23 were enacted by the first few Congresses as almost  
24 dispositive of the history, wouldn't that render a lot of  
25 seminal cases wrong?

1 MS. KOH: Your Honor, because that was not part of  
2 what our brief addressed and what I'm prepared to speak to  
3 you today, I don't really have a good answer for you on that  
4 one.

5 THE COURT: Okay. I think the strongest argument  
6 of the constitutionality of Qui Tam is the historical  
7 pedigree, so I think it's very important how that is parsed  
8 and what weight is given to aspects of it.

9 MS. KOH: I -- sorry.

10 THE COURT: No, no, no, that's why I'm asking  
11 about it in all transparency. I think that's really the  
12 best argument the government has.

13 MS. KOH: Well, and so it may be that my colleague  
14 sitting at the table will have a good answer for you on that  
15 point, but what I did want to kind of emphasize to the Court  
16 is that I think more than the historical pedigree, which is  
17 very important and I absolutely agree that it's one of the  
18 main arguments here supporting the constitutionality, but I  
19 don't want to lose from our sight that the power, the  
20 executive power, that is being given to the Relators is not  
21 a carte blanche carving out what the Attorney General can do  
22 and, here you go, Relators, go for it. Right? It's an  
23 Attorney General considering which situations they should  
24 allow Relators to move forward in, having them do so, but  
25 with supervision of the Attorney General and the Department

1 of Justice. It's not carte blanche go at it and, you know,  
2 be -- you know, do what you will. It's constrained within  
3 the provisions of the False Claims Act that give the  
4 executive controls, and substantial controls, over the  
5 Relator.

6 And so I think that's where the government would  
7 see one of the extremely powerful arguments here as to why  
8 both in Appointments and in the Take Care and Vesting  
9 Clauses, the defendants' arguments fail. We think the  
10 Circuit Courts that have looked specifically at Article II  
11 agree that they fail. We think the Eleventh Circuit in the  
12 Race (ph) opinion, even though not about Article II  
13 constitutionality, they weren't silent about it, they spoke  
14 on -- they spoke on Article II, they cited to the other  
15 Circuit Courts that have --

16 THE COURT: They said they have significant  
17 guardrails and control over them. I agree. And then they  
18 were explicitly carved out deciding the Article II question.  
19 I think you have a stronger Vesting/Take Care Clause, but by  
20 even the way you framed it, saying that there is an  
21 enforcement, like substantial executive power through the  
22 enforcement of the FCA and the Relator is just kind of under  
23 the control of the Department of Justice, I think that leads  
24 to a big Appointments Clause problem.

25 MS. KOH: I think the Appointments Clause also

1 looks at who would need to be an officer, someone who is  
2 exercising significant authority, right? And that's just  
3 not what the Relators are doing in this situation. And so I  
4 think even for the Appointments Clause --

5 THE COURT: Well, they're acting as the agent of  
6 the government that you said the exercise of that  
7 enforcement statute is.

8 MS. KOH: Well, they are acting as -- because  
9 Congress saw fit to enact the False Claims Act and give the  
10 Relators this position, they are able to pursue cases in the  
11 government -- in the Attorney General's place. I think that  
12 that's not just -- it's not just in their place, period, I  
13 think in their place with all the control mechanisms that  
14 the Attorney General continues to have.

15 I think the Supreme Court in multiple instances  
16 identifies who the Relator is, they are a private party,  
17 right? They cite to the statute that said litigations or  
18 actions brought by private parties. There's no  
19 contemplation that Relators were --

20 THE COURT: Okay. So what's the difference  
21 between Congress saying, private party, you can prosecute  
22 anyone for larceny, which is what they did at the founding?

23 MS. KOH: Well, I think there we would -- if we  
24 envision different types of False Claims Act that would  
25 entail criminal violations, I think that's where we would

1 say that's gonna be a different analysis, because criminal  
2 prosecution goes to the heart of the executive power,  
3 whereas civil litigation there's some flexibility that is  
4 afforded the executive to allow the executive to --

5 THE COURT: I thought you said the False Claims  
6 Act enforcement, civil enforcement, is substantial executive  
7 power.

8 MS. KOH: It is substantial executive power that  
9 the Attorney General always retains responsibility for.

10 THE COURT: Okay. So if you're designating a  
11 private individual to act on behalf of the United States,  
12 which is what is happening as a Relator, why is that any  
13 different than Congress creating a statute allowing them to  
14 do that in a criminal capacity? And specifically, how do  
15 you marry up the fact that the -- one of the first Qui Tams  
16 that was passed after the founding was for criminal Qui Tam  
17 for larceny within any of the places under the sole and  
18 exclusive jurisdiction of the United States or upon the high  
19 seas or conversion of certain war materials? That's passed  
20 in 1790.

21 MS. KOH: Well, I would go back to -- I would go  
22 back to the idea that the Attorney General is passing to  
23 Relators the ability to pursue the case with those control  
24 mechanisms in place. So I would take issue with the agent  
25 argument that is -- that defendants are making, that they

1 suddenly become the agent of the government.

2 THE COURT: I think *Stevens* says they are. The  
3 statute says they are. Every Qui Tam complaint I have says  
4 they are.

5 MS. KOH: *Stevens* said that they are partial  
6 assignees, so thus they are --

7 THE COURT: And that they're agents, but the  
8 partial assignee is what gives them the Article III  
9 standing. If all you had was agency theory, I think there  
10 would not be Article III for a private person. You would  
11 have obvious Article II problems, which I think is why the  
12 Court in *Stevens* didn't talk about it.

13 MS. KOH: So I think with the control mechanisms  
14 that the executive has over the Relator kind of diminishes  
15 the level of power that is given to the Relators and  
16 sufficiently enough that it does not create an Article II  
17 constitutionality invasion of --

18 THE COURT: I think those are a little bit two  
19 different issues, thought, right? Like that might remedy  
20 some of the concerns on the Take Care/Vesting, but I don't  
21 think it remedies the Appointment Clause problem. And that  
22 is not remediable, right? Like there are different remedies  
23 for a removal back-end problem than there are from a  
24 front-end Appointments Clause problem.

25 MS. KOH: Well, I think -- I respectfully

1 disagree. I feel like in terms of the Appointments Clause,  
2 before even deciding whether an individual is an officer,  
3 the question is are they exercising sufficient authority  
4 that creates a constitutional issue here. And that's where  
5 the government -- the Relator is -- because of this  
6 constraint that the executive has upon them, they're not  
7 acting as officers, they aren't exercising the same  
8 authority that the Attorney General would exercise or one of  
9 his designees. So I think that's where --

10 THE COURT: Can you give me an example of someone  
11 who is binding the Federal government who has not been  
12 deemed an officer?

13 MS. KOH: Sure. Like myself as a trial attorney  
14 at the Department of Justice, right? Not deemed an officer  
15 and not appointed, however, binding the government.

16 THE COURT: Okay. What do you do with the early  
17 history over proving the point on criminal enforcement?

18 MS. KOH: So I think, again, going back to how we  
19 look at the history, it's not a one-to-one comparison, so to  
20 the extent that some of those early Qui Tam statutes did  
21 contemplate criminal prosecutions, I think if you then look  
22 at when the False -- the False Claims Act did not  
23 contemplate that, there's a separate statute that was --

24 THE COURT: I know. But how do you marry that up  
25 with your initial statement that the enactment is the most

1 important part of historical analysis for constitutional  
2 purposes?

3 MS. KOH: I'm sorry, I missed the enactment and --

4 THE COURT: You said that for constitutional  
5 interpretation questions, the fact of the enactment is the  
6 most important touchstone. If that's true, then what do I  
7 do with the fact that in 1790 Congress authorized criminal  
8 Qui Tam for larceny?

9 MS. KOH: I think that --

10 THE COURT: It's an Act -- like, what? What do I  
11 do with it?

12 MS. KOH: And that's where I would say that the  
13 Court should look at that not as a one-to-one. Yes, that  
14 was in place --

15 THE COURT: Is that unconstitutional?

16 MS. KOH: I don't believe it's unconstitutional.  
17 I think --

18 THE COURT: It's not unconstitutional for a  
19 private individual to criminally prosecute on behalf of the  
20 Federal government?

21 MS. KOH: I'm sorry, I thought that statute that  
22 you were referring to, whether that was unconstitutional.

23 THE COURT: Wait. I'm talking about the 1790  
24 statute. If Congress were to pass that today, is that  
25 constitutional?

1 MS. KOH: Oh, if they were to pass it today? I  
2 don't -- I don't have a good answer to that in terms of what  
3 Congress might do today. I would imagine, I would imagine,  
4 that Courts have held that criminal prosecution and civil  
5 litigation are two different things. They're of the same  
6 category, but two different things. And criminal  
7 prosecution goes to the heart of executive power, so I  
8 would -- I can't imagine that such a statute would be passed  
9 whether -- if it happened and what the analysis would be.  
10 Hard to say standing here.

11 THE COURT: Right. So my point is I think that  
12 the history would not be very instructive, because I'm  
13 getting the impression you would say it's not  
14 constitutional, which I think is probably consistent with  
15 what every Court in the country would rule.

16 So that's why I'm asking the question. Like is  
17 enactment alone really the touchstone for historical  
18 constitutional analysis?

19 MS. KOH: Well, I think enactment of the statutes  
20 of those kinds, right? And I think that's -- that's where I  
21 keep going back to, is you're not gonna find specific False  
22 Claims Act statutes back then, but you look at the kinds  
23 of --

24 THE COURT: Yes, it matters what's relevant and  
25 what's not relevant. The reason I put it in the relevant

1 bucket is because it's not the person from whom it was  
2 stolen, it's just the person who has a cause of action and  
3 who has been given a portion of the conversion proceeds that  
4 could be recovered from the criminal defendant.

5 MS. KOH: And I would point to the -- I would hope  
6 that the courts would look at all of the statutes that were  
7 passed at that time that are relevant and the vast majority  
8 of them are not criminal. And so to the extent that when  
9 you're examining the False Claims Act today and looking back  
10 at the legacy, it's not gonna be a perfect match and there  
11 is this one criminal act back then. But that doesn't --  
12 that doesn't dissuade the Court for finding that history  
13 supports the constitutionality of a Qui Tam action.

14 THE COURT: What's the difference between a civil  
15 enforcement action under the FCA against a corporation and a  
16 criminal indictment?

17 MS. KOH: So that is a tough one. And that is one  
18 that is kind of a sticking point, because the FCA clearly is  
19 a civil statute, so it's at least labeled as such. Because  
20 the False Claims Act seeks damages that the government  
21 has -- that was perpetrated on the government and that is  
22 able to do a trebles of that, plus add penalties, there  
23 is -- there have been instances where the Eighth Amendment  
24 has been invoked here. I mean, we saw it in *Yates*. But we  
25 would -- the government's position would be --

1 THE COURT: And the Supreme Court says it's  
2 punitive.

3 MS. KOH: Yes.

4 THE COURT: So it --

5 MS. KOH: But the government's position still here  
6 would be that it is damages that are -- that the government  
7 has experienced and, therefore, there is no -- it's not a  
8 criminal statute. It's not -- it doesn't have the -- the  
9 penalties may overlap and look the same as what you might --

10 THE COURT: How would it differ? Right? Like you  
11 could just charge them with wire fraud or mail fraud, but  
12 usually wire fraud given how that stuff rises.

13 MS. KOH: Well, the damages in the False Claims  
14 Act are tied specifically to the fraud, to the -- you know,  
15 tied back to the claims that are false.

16 THE COURT: Right. In some ways you get more  
17 money out of the False Claims Act then you would out of a  
18 fine at criminal sentencing. So I don't see a lot of  
19 daylight then. Is it just the ability to use the grand jury  
20 to do discovery?

21 MS. KOH: I think that's one of the facts there.  
22 I think also we would -- we at the Department of Justice  
23 wouldn't be able to invoke criminal jurisdiction. My civil  
24 frauds and U.S. Attorney's Offices that are enforcing the  
25 False Claims Act are not able to prosecute criminal actions

1 absent getting authority from high up there. So I think  
2 there is gonna be a difference between civil and criminal.  
3 I understand that the penalties or the ultimate outcome may  
4 look similar.

5 THE COURT: Or it may look worse.

6 MS. KOH: Or it may look worse. Yeah, it may look  
7 worse. Depending on the scope of the fraud, it may look  
8 worse. But the government is in the business of making  
9 itself whole and making its best effort to prevent future  
10 potential companies, individuals, businesses from  
11 contemplating fraud, to dissuade them from doing so. And so  
12 that's -- you know, Congress has enacted the False Claims  
13 Act in order to do that and deemed it a civil statute and so  
14 that's the government's view.

15 I think there is language in the Fifth Circuit  
16 that talked about criminal statutes just being different,  
17 criminal prosecution going to the heart of the executive's  
18 core constitutional powers. And so on that line we would  
19 continue to say there is a difference between a civil False  
20 Claims Act and a criminal prosecution of something.

21 THE COURT: Okay. The last bucket of questions I  
22 asked counsel on the other side, is this property under the  
23 Property Clause, the partial assignment interest that  
24 *Stevens* contemplates?

25 MS. KOH: So the Federal -- so the Federal

1 government, we -- we obviously have a property interest in  
2 our Federal fisc and the False Claims Act is enforcement of  
3 any sort of fraud upon that Federal fisc. So in that sense  
4 we would say that --

5 THE COURT: The cause of action you have against  
6 those who you allege to have defrauded you, do you think  
7 that's property?

8 MS. KOH: I think there is a Property Clause, I  
9 think that it is properly invoked here, that it ultimately,  
10 if you boil it down to what is the constitutional basis,  
11 would go back to the Property Clause.

12 THE COURT: Right. So are you saying it's  
13 property? The cause of action that is contingent on  
14 certain -- yet reduced to judgment, is that property?

15 MS. KOH: So I would note that in the *Stevens*  
16 court, in the *Stevens* case they did invoke -- they did  
17 invoke the proprietary nature of this. I am only hesitating  
18 because it was not part of what we had briefed and so I have  
19 not looked into this in depth to determine that. And so I  
20 would rely on what the *Stevens* court and what they said,  
21 that it was a proprietary interest that the government had  
22 in its Federal fisc.

23 THE COURT: And then what is that assignment now  
24 in light of *Polansky*, which gives I think the government a  
25 lot more control over the Qui Tam action? In that respect,

1 I mean, I think you would agree with me, but what is the  
2 nature? And I think it turns on the standards of  
3 intervention and dismissal under *Polansky*. Whatever has  
4 been assigned I think is that.

5 MS. KOH: I'm sorry, what has been assigned?

6 THE COURT: So the terms of the assignment are  
7 whatever the intervention and dismissal standards are in  
8 *Polansky*. And what are they? They are very deferential to  
9 the government, but what is the actual standard? Otherwise,  
10 is it illusory?

11 MS. KOH: Well, I think -- so, you know, as the  
12 Court said in *Polansky*, right, we've got to look at the  
13 facts at issue when applying Rule 41, and the Court said if  
14 the government views that the benefits of the case are  
15 outweighed by the costs, then that's sufficient to meet that  
16 standard. I don't think there's a specific standard that's  
17 out there that -- you know, that states X, Y, and Z, but I  
18 think --

19 THE COURT: And the point of that is to avoid an  
20 Article II problem, I believe. Right?

21 MS. KOH: That could be why. I don't want to  
22 opine as to the point of that.

23 THE COURT: So I'm having a hard time  
24 understanding why the government would ever move to dismiss  
25 if it didn't think it was better to dismiss than to keep the

1 case. So what's the standard?

2 MS. KOH: So the government allows -- because the  
3 Relators are permitted to pursue cases on their own with the  
4 government supervision looking over their shoulder, there is  
5 a certain -- there is -- the government does have less  
6 control over that situation versus like, for example, if  
7 I've got a case within the Department of Justice and  
8 pursuing a case.

9 So I think that's -- there is inherently built  
10 into this leeway that is provided to a Relator. It's not  
11 unfettered, and I don't want to overstate that, it's not  
12 unfettered, it's not without the controls the government's  
13 position is, the executive still maintains sufficient  
14 control in those situations. But Relators are permitted to  
15 move forward.

16 And even though the government is looking over  
17 their shoulder, they're not in their files, they're not  
18 looking at everything that the Relator is doing. Right?  
19 So --

20 THE COURT: Am I to imply like from a criminal  
21 rule like 48 the superstrong presumption of good faith if  
22 the government moves to dismiss, I have to dismiss? Is that  
23 the same rule I should be applying on the Rule 41 civil  
24 context?

25 MS. KOH: I think it should be the substantial

1 deference rule that the Supreme Court laid out.

2 THE COURT: Does that leave any assignment of  
3 property to the Relator?

4 MS. KOH: I think during the course of the False  
5 Claims Act litigation there is assignment of the claims --

6 THE COURT: I don't think it vests, right? Under  
7 this theory of *Polansky*, nothing vests until you have a  
8 judgment. If the government can always intervene and  
9 dismiss without any backstop, then you have no vesting  
10 property right. I think that what saves the partial  
11 assignment is the fact there are some standard of review for  
12 intervention and dismissal. That's why I'm fixated on what  
13 that standard is.

14 MS. KOH: And I think the standard of review would  
15 be the standard of review that's using Rule 41 and that the  
16 Supreme Court has articulated in *Polansky*. It's contextual,  
17 you've got to look at the facts, and if the Court agrees  
18 with the government's position that it should be dismissed,  
19 if the Court agrees with that, even where Relator's  
20 arguments may be credible, then the Court needs to dismiss  
21 the case. I think that's how *Polansky* plays out.

22 THE COURT: I think that's what *Polansky* says, I'm  
23 just wondering what is left to the assignment to the  
24 Relator.

25 MS. KOH: Well, the Relator then -- the Relator --

1 THE COURT: What is the -- yeah, I think I  
2 understand. I'm just -- I'm trying to think of a context in  
3 which the government cannot extinguish whatever assignment  
4 has been contingently granted to the Relator.

5 MS. KOH: Yeah. I think in the False Claims Act  
6 context, once the government decides and is successful in  
7 dismissing, then that assignment is gone.

8 THE COURT: Well, of course, after they dismiss  
9 it. But I mean, with the decision to dismiss, is that what  
10 you're saying?

11 MS. KOH: With the decision to dismiss, yes.

12 THE COURT: The decision to move to dismiss, you  
13 think that that terminates the partial assignment?

14 MS. KOH: No, I think the statute requires that  
15 the Court -- that the Relator is entitled to a hearing, so I  
16 think we've got to cross that hurdle first. Right? And  
17 then once the Court orders the dismissal, then, yes, then  
18 the Relator's interests have been dismissed.

19 THE COURT: Right. So their interests, whatever  
20 the assignment is that *Stevens* says gives them standing is  
21 whatever they have to avoid a dismissal under Rule 41?

22 MS. KOH: I think that's one way -- I think we can  
23 look at it that way. I think we're -- I'm in agreement with  
24 that.

25 THE COURT: Okay.

1 MS. KOH: I would like to just real quick -- I  
2 think I have addressed many of the issues. I would --

3 THE COURT: Well, actually, I have a couple of  
4 questions. These are one-offs. I'll ask other counsel this  
5 too.

6 So the False Claims Act says any person can sue.  
7 Does that mean noncitizens and foreign nationals could be  
8 Relators under the False Claims Act?

9 MS. KOH: The government would -- again, because  
10 that was not part of our briefing, so -- but I would -- I  
11 think the government's position is that it would include any  
12 persons, so including foreign citizens.

13 THE COURT: Do you think the Article II issue is  
14 in any way more complicated in light of the Eleventh Circuit  
15 precedent that authorizes a Relator to reassign portions of  
16 the False Claims Act if they're party litigation funds?

17 MS. KOH: I think it probably is made more  
18 complicated, but I don't think it changes the analysis. I  
19 don't think it changes the analysis.

20 THE COURT: Okay. Then my last question, but I  
21 can ask Ms. Zafirov's counsel this too. There's a  
22 timeliness objection to this motion. Do you have a view of  
23 that or should I just defer that --

24 MS. KOH: I would defer to my co-counsel here.

25 THE COURT: Okay.

1 MS. KOH: But I would note that, yeah, the  
2 government has also noted that the case has been pending for  
3 many, many years and it's just --

4 THE COURT: I'm aware. It's on my CJA list every  
5 six months, so --

6 MS. KOH: And this is the first time that it's  
7 been raised. I will leave that to Ms. Zafirov's counsel  
8 too.

9 THE COURT: Okay. Thank you.

10 Let's take a 15-minute break. Just a comfort  
11 break. So we'll resume at 3:15.

12 (A brief recess was taken, after which the  
13 following proceedings continued in open court.)

14 THE COURT: Okay. Ms. Estes.

15 MS. ESTES: Good afternoon, Your Honor.

16 THE COURT: Good afternoon.

17 MS. ESTES: I'm mindful of the fact that we're  
18 sharing our time with the government, so I'll try not to  
19 retread all the ground that was covered, but I certainly  
20 want to answer the questions that Your Honor has posed  
21 starting with the very last one. I think you had a question  
22 as to timeliness. I can begin there --

23 THE COURT: Yes.

24 MS. ESTES: -- and then go back a little bit.

25 The timeliness is very a foundational argument

1 here. The defendants bring this argument years into this  
2 case, when nothing substantive has changed in the case.  
3 There's not something new that came up, a factual basis that  
4 brought it. And I think the defendants conceded that it was  
5 Justice Thomas's dissent in *Polansky* that kind of renewed  
6 this interest of, hey, maybe we have this argument.

7 THE COURT: Uh-huh.

8 MS. ESTES: But the defendants never brought it.  
9 It's not in their affirmative defenses, it wasn't brought at  
10 any point in the years of this litigation, and certainly to  
11 the extent that they're --

12 THE COURT: You think if they didn't bring the  
13 constitutional challenges and affirmative defense, it's  
14 waived?

15 MS. ESTES: I do believe it would be waived at  
16 this point, with the exception of if it were --

17 THE COURT: What do you mean at this point?

18 MS. ESTES: Well into the case, past the  
19 opportunity to amend pleadings, past the opportunity to  
20 raise --

21 THE COURT: I don't think any amendment would cure  
22 what they're alleging is a constitutional violation.

23 Here's my real question: Constitutional  
24 challenges get brought at summary judgment all the time and  
25 we haven't yet passed the dispositive motion deadline. So

1 why is a motion for judgment on the pleadings, which can be  
2 interpreted as a Rule 12(b)(6) or as a summary judgment,  
3 inappropriate at this juncture where it's preceding the  
4 deadline for dispositive motions?

5 MS. ESTES: Again, because nothing factually is  
6 different here that the defendants didn't already know at  
7 the time that we were briefing motions to dismiss. The  
8 first time around we've done 12(b)(6) motions, we've passed  
9 those motions. We've gotten all the way to this phase where  
10 it hasn't been identified or addressed as an issue and  
11 there's nothing new that was brought to the Court that  
12 would -- or, excuse me, to the parties that would change  
13 whether there is a constitutional issue here or not. If it  
14 has, it's been there since the beginning, the opportunities  
15 to bring it have been plenty, we've been --

16 THE COURT: Did it need to be raised as an  
17 affirmative defense?

18 MS. ESTES: We assert that it would need to be  
19 raised as an affirmative defense, unless it was a  
20 jurisdictional issue, which is how the -- excuse me, how the  
21 defendants articulate getting around that in their issue.  
22 They kind of draft a footnote passing mention at this time  
23 on this issue and say, but where it's a subject matter  
24 jurisdiction question, then we can bring it at any point.

25 But if it was a subject matter jurisdiction, then

1 the Courts had an obligation in something like *Yates* to  
2 address early on that Article II is a subject matter  
3 jurisdictional question. And it didn't do that. And in  
4 fact, *Stevens* also didn't address that this is not a  
5 jurisdiction issue we need to address in this case. So  
6 Article II can't be a matter of jurisdiction. It's -- they  
7 can raise it as a 12(b)(6) argument, but that has been  
8 waived at this point.

9           So if they're going to make a subject matter  
10 jurisdiction argument, then the Courts do speak to the fact  
11 that this -- there is jurisdiction, *Yates* by not addressing  
12 it. And there's very clear Eleventh Circuit case law saying  
13 even if the parties don't raise jurisdiction as a defense,  
14 the Court has to do it.

15           THE COURT: Right. Okay. So assuming I agree  
16 with you that it's not subject matter jurisdiction, what is  
17 the standard for timeliness in this context?

18           MS. ESTES: I don't have an articulated standard,  
19 Your Honor, but it would be at a time reasonable to the  
20 beginning of the case. I mean, when the motions to dismiss  
21 were originally briefed. They don't have the opportunity to  
22 just continually bring motions to dismiss in the midst of a  
23 case. There was an opportunity for that, it wasn't  
24 articulated as a defense where we could have had a motion to  
25 dismiss on that at the beginning of the case and it's now

1 years into litigation and it hasn't come up and --

2 THE COURT: So it's waived?

3 MS. ESTES: That's our argument, yes.

4 THE COURT: Okay. Let's go to the substance.

5 MS. ESTES: Certainly. Is there any spot you  
6 prefer to start?

7 THE COURT: Well, actually, one of the last  
8 questions I asked the government, can noncitizens and  
9 foreign nationals me Relators under the False Claims Act  
10 since it just says person?

11 MS. ESTES: I believe that they can be and I  
12 believe there are instances where they have and that's  
13 because the government's level of control doesn't change  
14 with respect to where the person bringing the case is  
15 situated or where they're from. The interest of the  
16 government in overseeing the litigation is maintained  
17 regardless of whether the person is a citizen or not, is a  
18 foreign national or not.

19 THE COURT: Do you agree with the government that  
20 the enforcement of the civil -- I'm sorry, the False Claims  
21 Act is a substantial executive power?

22 MS. ESTES: I agree that the government has  
23 primary authority when they're exercising it. Their  
24 exercise of it is a substantial executive power that the  
25 United States allows the Relator to participate in. I don't

1 believe that the Relator's authority and rights granted  
2 under the False Claims Act is a core executive power.

3 THE COURT: Any person in the world can be a  
4 Relator because they meet that definition? Is there no  
5 heightened Article II problem with a foreign national  
6 prosecuting something on behalf of the United States?

7 MS. ESTES: So I want to walk back a little bit  
8 that any person in the world can be a relator, because --

9 THE COURT: Well, not from involving a fraud, I  
10 don't mean the statutory exceptions, I just mean anyone who  
11 doesn't otherwise meet them.

12 MS. ESTES: So anyone who has knowledge that would  
13 underlie a False Claims Act case, which would be someone  
14 who's working in contracting, for example, and has knowledge  
15 of the way the government funds are being misused, would  
16 fall into that category. And by virtue of having that  
17 knowledge, it would empower them to become a False Claims  
18 Act Relator when they're under that umbrella, because  
19 they're always under the substantial authority of the United  
20 States. Regardless of where they live, where they were  
21 born, any of those things, the government's authority to  
22 oversee that and all the safeguards that are in place to  
23 ensure that the government's interests are protected do not  
24 change regardless of what that person's basis is, where  
25 they're from.

1 THE COURT: So that, coupled with the ability to  
2 reassign your False Claims Act, third-party litigation  
3 funder, does that not pose heightened problems? So say  
4 there's a military contractor and the Relator is someone who  
5 is in a foreign sphere of war and witnesses what they think  
6 is fraud, they can bring a Qui Tam action against a military  
7 contractor and then assign all of their interest, say, to a  
8 foreign government to fund -- or, I'm sorry, not all the  
9 interest, a substantial portion of their interest as the  
10 Relator to a foreign government, who is then the one with  
11 the financial incentive behind the Qui Tam action and that  
12 doesn't violate Article II?

13 MS. ESTES: So I think it would depend on the  
14 circumstances of that specific case and the relationship  
15 between the parties that, you know, is conceived Relator in  
16 this situation and what role they have with the government  
17 and how is that working. But nevertheless, the controls  
18 that the government have would still be in place and that is  
19 something that the government inquires to, as to the role of  
20 any third-party funder from, you know, the inception of the  
21 case. So if that was something that the relationship  
22 between the Relator and whoever the funding source was, be  
23 it --

24 THE COURT: How would the government know?

25 MS. ESTES: The Relator has an obligation to

1 disclose that information, it's a question that's asked at  
2 the inception of a case.

3 THE COURT: What if it's taken on halfway through  
4 the case, the Relator runs out of funds and needs more  
5 financial backing to continue prosecuting?

6 MS. ESTES: In that hypothetical, that situation  
7 wouldn't be disclosed at the beginning, then there would not  
8 be I guess an affirmative obligation to bring it forward.

9 THE COURT: So the government could in theory have  
10 a foreign government bringing a Qui Tam action on behalf of  
11 the United States that is feasible without an affirmative  
12 obligation by the Relator to relate that information to the  
13 Federal government?

14 MS. ESTES: In that instance, there is not an  
15 affirmative obligation that I know of, but all the controls  
16 would still protect any foreign interests that are anti --  
17 or, excuse me, inconsistent with the United States'  
18 interests from seeping through to the False Claims Act.

19 THE COURT: How? If they don't even know that the  
20 foreign government has the financial stake in the  
21 litigation?

22 MS. ESTES: Because they know of the litigation  
23 itself. So all the ways that they're overseeing, the  
24 ability to see discovery and to see depositions. So if  
25 there was an interest contrary to the United States that

1 came up at any point, whether it was from the Relator at the  
2 beginning --

3 THE COURT: Yeah, but the government might not be  
4 on heightened awareness if that you're subpoenaing these  
5 documents when it's a private American citizen and they  
6 might be if it's a country that they believe to have suspect  
7 motives in wanting that discovery. They might have  
8 different protective orders, for example. I mean, like  
9 there are a lot of discovery issues here that, you know,  
10 we're not gonna ferret out all that stuff today. But I'm  
11 just thinking of context, which the Article II problems seem  
12 particularly problematic.

13 MS. ESTES: I don't agree that they're  
14 particularly problematic, because that authority stays with  
15 the government all the way through. And in particular, we  
16 see when the United States doesn't intervene in a case, the  
17 things that they ask for are to be part of the pleadings.  
18 And to see the deposition transcripts, they can request to  
19 see the discovery that's coming in in that case.

20 And so at any point that there is a sign, whether  
21 it's from the Relator or from a third party who is kind of  
22 puppet stringing a Relator that the government didn't know  
23 about, that those interests were no longer aligned with the  
24 United States, the United States has the ability to  
25 interject and to resolve that situation.

1 That's not something to my knowledge that we've  
2 seen play out in any proceedings before. I think it would  
3 certainly get to, you know, the good cause standard for  
4 dismissing. But the process is in place to protect against  
5 that.

6 THE COURT: Okay. And then is Ms. Zafirov  
7 currently a U.S. citizen nor a foreign national? I saw that  
8 she is now a resident of Canada.

9 MS. ESTES: Dr. Zafirov is -- she is currently  
10 residing in Canada and I believe she is a U.S. citizen.

11 THE COURT: Okay. Would you like to turn to the  
12 three issues that I have been talking with the other  
13 counsel? Continuity is the first problem.

14 MS. ESTES: Certainly. So when we talk  
15 continuity, I reiterate the United States' position that  
16 this is a bit of a square peg/round hole kind of situation,  
17 because these cases -- excuse me, the Relator's involvement  
18 with the United States is specifically limited to the case  
19 in which they bring. So there's not a position from which  
20 they can be removed specific to each case. So their  
21 authority that's granted by the False Claims Act lives and  
22 dies with that case. The government has --

23 THE COURT: Isn't that true with the Independent  
24 Counsel and Special Counsel?

25 MS. ESTES: Not entirely, no, because there were

1 certain ones where the United States didn't have the  
2 authority to bring. It's a bit similar to what we see in  
3 *Morrison*, but even in *Morrison* the standards of who that  
4 actor was were very, very different than the authority and  
5 the role that the Relator has. Those cases -- these are  
6 limited only to the one that they have knowledge.

7           So a Special Counsel starting from the beginning  
8 has the ability to investigate a case, which is something  
9 that the Relator does independently, they don't have that  
10 longstanding authority where the Special Counsel has been  
11 investigating and choosing different cases to bring along  
12 the way. Relator has the knowledge related to the case that  
13 it's bringing and it's siloed to that space.

14           THE COURT: The Special Counsel is also assigned  
15 to a particular investigation, although might produce  
16 multiple indictments, but I don't see how that's different.

17           MS. ESTES: So --

18           THE COURT: Just the pre-investigatory filing  
19 powers?

20           MS. ESTES: Well, the prefiling investigatory  
21 powers I think are very significant in making an assessment  
22 as to what cases it's going with to bring, because the  
23 Special Counsel is brought in for a concern, an issue rather  
24 than necessarily for a specific case and it evaluates and it  
25 determines each of the cases that need to spawn out of that

1 situation. So like you said, it may be a series of  
2 different indictments, however that they choose to proceed  
3 with that. They're beginning with an issue and then  
4 expanding that into their investigation, which has a whole  
5 bunch of resources that the United States does not grant to  
6 Relators in --

7 THE COURT: And that makes it continuous?

8 MS. ESTES: It changes the framework of the  
9 evaluation. They're doing a much longer project with a  
10 bigger focus than what the Relator is doing, which is  
11 specific only to the case for which they have knowledge.

12 THE COURT: Maybe. I mean, this case is longer  
13 than the current Special Counsel's are.

14 MS. ESTES: False Claims Act cases can take a  
15 really long time and I certainly live in that space and  
16 understand that. But it will still end at the end of this  
17 case.

18 THE COURT: What's the standard for continuity?

19 MS. ESTES: I think the standard for continuity is  
20 insofar as the Relator has been assigned, that interest has  
21 been assigned. So the partial assignment that *Stevens* talks  
22 about, the continuity is as long as that assignment exists,  
23 and that assignment exists from the time that the Relator  
24 brings a False Claims Act case until the case is dismissed.

25 THE COURT: No, sorry. What's the constitutional

1 standard for continuity that makes someone an officer and  
2 not an officer?

3 MS. ESTES: Oh, I'm sorry. So backing up, I think  
4 before we even get to that question, I don't think that's  
5 singularly what makes someone an officer or not an officer.

6 THE COURT: No, I agree, but I think the first  
7 question is less difficult. I think the second of  
8 continuity is hard, which is why I'm asking what's the  
9 standard. I hear different standards in different Supreme  
10 Court cases over the last 125 years. So what's the  
11 standard?

12 MS. ESTES: I think the question might be that  
13 there is not a clear one and it's context specific. So in  
14 the context of the False Claims Act case, it's cabined to  
15 just that case. That's why that none of the Courts who have  
16 evaluated whether a relator is an officer so far have come  
17 to the conclusion that they are.

18 Using that same continuity discussion that  
19 sometimes comes up --

20 THE COURT: Those discussions are very short, they  
21 usually say it's this case and not -- doesn't satisfy  
22 continuity. I have yet to see -- or maybe tell me, which of  
23 those cases have the most extended discussion of continuity  
24 as a constitutional element of officer?

25 MS. ESTES: So I agree that there's not a lot of

1 depth into it, because I think when they apply the standard  
2 of what that assignment really is, which is limited to the  
3 life of the case of this person, it has --

4 THE COURT: What about *Donziger*? That came up  
5 with defense counsel.

6 MS. ESTES: So *Donziger* I think is a completely  
7 different animal and it's a little bit of apples-to-oranges  
8 discussion that we were having earlier, because they're  
9 talking about that special prosecutor again who has roles  
10 far beyond and preexisting that a Relator gets. So they  
11 talk -- and I think they use term machinery of the United  
12 States, which exists in that case, and that's actually a  
13 really good example of what a Relator doesn't have and what  
14 separates them from the discussion of someone who is just  
15 presumed to be an officer, which is what happens in a lot of  
16 these cases when they go in and they have this ability to do  
17 all of this investigative work and the subpoena power and  
18 the grand jury power that never comes to a Relator. That's  
19 never focused on us.

20 And so that line is drawn well before the  
21 continuity aspect and I think that's why the discussion  
22 isn't there, it's sort of secondary to say, in addition to  
23 not having all of the responsibility and the authority that  
24 comes with an officer that they would have if they were in  
25 fact officers of the Court, it just exists for the life of

1 this case. So it just stops there and I don't think a  
2 separate standard has been articulated because of that. But  
3 that really frames why getting to an in-depth standard on  
4 that is not necessary, because we never cross that bridge.

5 THE COURT: I asked this to opposing counsel and I  
6 guess the government too. Any example of an individual  
7 exercising -- and for sake of argument assume that this is  
8 substantial executive power, but not deemed an officer.

9 MS. ESTES: I actually completely echo counsel's  
10 argument that, for example, Federal prosecutors are not.  
11 And I would point to the significance of that line of a  
12 Federal prosecutor as something we see in *Morrison*, because  
13 when *Morrison* got to the end, it determined that it didn't  
14 violate separation of powers, but recognized that that  
15 person had more responsibility than a Federal prosecutor.

16 So if a Federal prosecutor is sort of the line,  
17 *Morrison* didn't violate Article II being on the far side of  
18 that. Relator is on the other side of that line, we have  
19 way less than a Federal prosecutor has.

20 THE COURT: Ms. Koh took an oath to the  
21 Constitution and is paid by the Department of Justice. I  
22 used to be in that role, so I was fully accountable. That's  
23 very different than a private citizen.

24 MS. ESTES: I agree, she is fully accountable and  
25 we're fully accountable to her, because that's the way the

1 statute lays out. So those people who still have that  
2 authority and who are still in that oversight position,  
3 they --

4 THE COURT: You're saying your client is fully  
5 accountable to the executive branch?

6 MS. ESTES: I think the way that the False Claims  
7 Act is laid out provides the government such substantial  
8 controls and authorities to hold Relators accountable to the  
9 positions of the United States, yes.

10 THE COURT: Okay. So other than an individual who  
11 is litigating as a DOJ lawyer, can you give me a different  
12 example?

13 MS. ESTES: I'm not sure that there are places --  
14 I fully won't presume to know the rules of all the people in  
15 all the capacities of the United States. You're asking for  
16 someone else who's litigating in the name of the United  
17 States?

18 THE COURT: Or just exercising substantial  
19 executive power who has not been deemed an officer. They  
20 seem to go hand in hand, right? Like someone is exercising  
21 substantial executive power and they're deemed to have a  
22 continuous office or neither. But give me example of one  
23 without the other.

24 MS. ESTES: So perhaps -- and I'm --

25 THE COURT: Like bank receivers, they're deemed

1 officers, right? And they have limited one-case purview.  
2 How is that different?

3 MS. ESTES: The bank receivers, to be clear, I've  
4 never worked in that area, so I don't know a lot of the  
5 authority that is invested in them or not.

6 THE COURT: That doesn't have to do the  
7 continuity, does it?

8 MS. ESTES: No, I don't think that it does. But  
9 I'm -- to answer your question about a specific example, I  
10 may go perhaps to a defense contractor who are bringing in  
11 employed civilians and bringing them in to work in war  
12 spaces. And so we're coming in, if they, you know, have  
13 weapons on them, if they are entitled to use that weapon to  
14 protect the safety of the space that they're working in,  
15 that would certainly be something that's important as an  
16 executive function, you know, using deadly force as a  
17 citizen to protect the space of the Federal government.

18 And where they're not officers, they're employees,  
19 or they're contractors, however their relationship is billed  
20 out, and we've given them the authority to execute a  
21 necessary function, which in that case would be, you know,  
22 deadly force to protect a military space. But those people  
23 are not officers.

24 THE COURT: This is a question we discussed with  
25 government counsel. Could Congress authorize a private

1 person to bring a criminal prosecution if the partial  
2 assignment theory is just that you're gonna get the fine  
3 aspect?

4 MS. ESTES: So I think this ties back maybe to the  
5 question -- the historical question, right? So we're going  
6 back to the larceny statutes and was it allowed back then,  
7 would it be allowed now. Again, I would posit this is very  
8 context specific. So at the time when the first Congress  
9 allowed those, that was necessary to protect the interest of  
10 the United States.

11 The way that the country has developed and the  
12 government has developed and all of that, I don't think that  
13 that is --

14 THE COURT: You're making a necessary and proper  
15 argument that -- like, somehow Congress could infringe  
16 Article II powers because it was necessary and proper at the  
17 time, but they couldn't now?

18 MS. ESTES: No, I'm not saying that it was  
19 infringing on Article II at any point, because I don't  
20 know --

21 THE COURT: Okay. So even today Congress could  
22 create a criminal prosecution by a private person?

23 MS. ESTES: It would be completely specific as to  
24 how that worked and what the oversight rule was.

25 THE COURT: It's the exact same as the False

1 Claims Act.

2 MS. ESTES: If it was the exact same as the False  
3 Claims Act, this -- case law protects the enforcement of  
4 criminal statutes differently than it protects the  
5 enforcement of civil statutes. So I don't know that -- if it  
6 was written exactly the same, but the standards of things  
7 that could be brought were also criminal that it would --  
8 that it would fit within the same box that the False Claims  
9 Act does. But that's not the situation that we have, and in  
10 fact, that's --

11 THE COURT: Well, I think this is what we were  
12 trying to explore with the government counsel. In some ways  
13 the False Claims Act imposes or can impose a much stiffer  
14 punitive fine on a corporate defendant than criminal  
15 prosecutions do.

16 MS. ESTES: Financially, it might be. And that's  
17 part of the incentive of avoiding --

18 THE COURT: Well, that's all you can do to a  
19 corporate entity, right?

20 MS. ESTES: Right -- well, not necessarily,  
21 because the implication of having a criminal judgment has a  
22 lot more than just the payment of that, right? It could --

23 THE COURT: Reputational harms, you mean?

24 MS. ESTES: Reputational harm, the ability to get  
25 a contract, for insurance purposes, there's all sorts of

1 other things that trickle down with a criminal indictment or  
2 a conviction that don't necessarily come from a civil  
3 penalty. So that's not -- they're not an equal consequence.

4 THE COURT: With regards to the historical record  
5 and kind of the constitutional unitive theory for how to  
6 deal with the different types of Qui Tams, what is your  
7 position? I know you've heard me kind of categorize them,  
8 but like how do I go about parsing the history, what's  
9 similar, what's not similar, what's relevant, what's not  
10 relevant?

11 MS. ESTES: So I think you're right that there are  
12 similarities and they've changed over time, and what seems  
13 like such a small number, there was five to ten back then,  
14 was proportionally a lot different than if five to ten  
15 existed now. There wasn't that many statutes. So that  
16 actually was quite a lot that went into those what we call  
17 the False Claims Act-like bucket back then.

18 I would go, again, to looking at what the  
19 comparator is, because I think that *Marsh* does speak to the  
20 reality that a statute being passed by the first Congress  
21 is -- I think they call weighty.

22 THE COURT: When it's well within (inaudible) or  
23 debated, the constitutionality unbroken tradition.

24 MS. ESTES: Right.

25 THE COURT: Do we have that here?

1 MS. ESTES: We have it in ways, yes. Because the  
2 False Claims Act, some version has existed, you know -- or  
3 Qui Tam statutes across history, and we have the United  
4 States history, I won't say on the larger scale. We have  
5 from those early days the use of them. And then how to use  
6 them has been considered all the way along the way. And  
7 it's gone up and down with the needs of the country and the  
8 concerns that came from them. You know, we see how it was  
9 supported and then less.

10 And I think *Yates* actually speaks directly to this  
11 when it talks about the idea of an outmanned -- the  
12 government was outmanned by corporate defendants. And that  
13 was the same thing that was existing from those early days.

14 So the statutes that were created, the early False  
15 Claims Act statutes, even the early Qui Tam statutes, was  
16 not as *the Chamber* puts it, because the government wasn't  
17 doing a good job. The government was doing the best it  
18 could, it needs more, because there's so much issue out  
19 there. So these early statutes came in. The same as the  
20 '86 amendments came in, because the government finds itself  
21 once again outmanned by the amount of fraud.

22 And that really speaks to -- it was a very timely  
23 report, but it came out I think about six days ago where the  
24 GAO looked at the amount of fraud being spent across the  
25 United States and it's somewhere between about 320 to

1 \$530 billion a year, annually, for the past five years. I  
2 mean, that -- those numbers are mind boggling, but that's  
3 what's going out the door in fraud. It's almost impossible  
4 to imagine a level of the Department of Justice that could  
5 equally match that.

6 And so the idea that *Yates* is supported, but they  
7 use the Qui Tam statutes, is to level that playing field, to  
8 give the Department of Justice more tools in its toolbox, so  
9 more people to be able to help in governing that is exactly  
10 consistent with what they were looking at when they framed  
11 those early statutes.

12 THE COURT: The purposes are, but the procedures  
13 by which they're effectuated were not all the same. That's  
14 why I'm asking do -- I look at bounty statutes the same as I  
15 do as people who had individualized aggrieved harms who are  
16 also given causes of action and then what we've been calling  
17 the FCA-type Qui Tams where you have no aggrieved person  
18 standing, but you've been given a cause of action and a  
19 purported partial assignment.

20 MS. ESTES: When we're looking at the relationship  
21 between the reporter, or whatever way they call them,  
22 informers or reporters in some things versus what is a  
23 Qui Tam --

24 THE COURT: Why are the pure informer bounty  
25 statutes, like a whistleblower statute today, why is that a

1 good analogy?

2 MS. ESTES: Well, that's -- I'm sorry, that's what  
3 I was gonna say. They're different. It's maybe two  
4 different types of apples rather than apples to oranges.

5 THE COURT: Right. So how does that support an  
6 historical record -- or, sorry, historical tradition for the  
7 FCA-type Qui Tam at issue here? Because I don't think  
8 anyone, I don't hear the defendants or (inaudible) arguing  
9 that a bounty statute is unconstitutional.

10 MS. ESTES: Well, the bounty statutes aren't in  
11 front of us and I posit they might argue that those aren't  
12 constitutional given the opportunity. But the --

13 THE COURT: Right. But I don't think -- they're  
14 not historically as relevant to me as the ones that are more  
15 like the FCA, which gave somebody a cause of action to  
16 recover something that they don't personally have an injury  
17 against, it's an assignment.

18 MS. ESTES: Those are certainly a closer  
19 comparative. I don't think the other ones are out of the  
20 discussion, because it also goes to the relationship between  
21 the United States empowering private citizens to effectuate  
22 something to the benefit of the United States.

23 THE COURT: Then those fall in great destitute,  
24 (ph) right? Like I mean, the False Claims Act has a much  
25 better longevity because of the Civil War, whereas those

1 don't as much. But they raise very different Article II  
2 problems.

3 MS. ESTES: Which is why I don't think they're as  
4 directly related. I don't think they're completely excluded  
5 from the conversation of the original framers considering  
6 that the idea of bringing in a private citizen to, you know,  
7 remedy some sort of harm to the government was considered.  
8 The ones that are more FCA-like are the closer comparison.

9 THE COURT: Does it matter that the recent Supreme  
10 Court opinions articulate a much more robust unitive  
11 executive -- I mean, comparatively, like this is not the  
12 same state of precedent that the Courts of Appeals had when  
13 they were rendering their decisions. And I think a lot of  
14 those decisions rested heavily on the historical idea that  
15 this Qui Tam type of action had been unbroken from the  
16 founding without parsing the different kinds, without really  
17 dealing with the facts, but there were a large swath, I mean  
18 50 years at times, where it wasn't being used at all and  
19 without the benefit really of the last decade of separation  
20 of powers precedents.

21 MS. ESTES: I don't think it changes the ultimate  
22 outcome. It might change the analysis in getting to some of  
23 the different parts of it, but nothing about the Act has  
24 changed in that passage of time, nothing about the  
25 implementation of the Act has changed other than it's

1 consistently threatened the government's oversight. But  
2 it's never walked closer to the separation of powers line  
3 all the way along that way, even with the benefit of more  
4 recent precedent.

5 THE COURT: I think the more recent precedent is  
6 what says it gets closer, not the -- I agree, the FCA hasn't  
7 meaningfully been amended since 1986. There's been tweaks,  
8 but not meaningful amendments. But the case law I think  
9 puts it in greater tension today than it did, say, even in  
10 2000.

11 MS. ESTES: I don't agree that it's in greater  
12 tension. One, because I think well before we get to the  
13 things that might be perceived to be putting it in tension  
14 and certainly the arguments that the defendants make that we  
15 have to cross that barrier of are we even at an Appointments  
16 Clause discussion and is there anything that the United  
17 States is not able to protect its rights that would, you  
18 know, raise a Take Care Clause question.

19 THE COURT: Right. But I mean, that assumes  
20 there's no -- the Take Care Clause question is remediable,  
21 right, in some ways? The Appointments Clause is not, which  
22 is why I start with the continuity problem.

23 MS. ESTES: But before we even get to the  
24 continuity problem, I think we -- we don't agree that  
25 it's -- that we're even getting to that, because we're not

1 getting to the substantial authority part of it. That part  
2 has been addressed.

3 And I did want to specifically raise, because the  
4 defendants and Mr. Engel both spent a lot of time talking  
5 about the '89 Bill Barr Office of Legal Counsel opinion,  
6 which talks about that, not favorably, of course --

7 THE COURT: It was a memo.

8 MS. ESTES: A memo. I'm sorry, I apologize.

9 THE COURT: Well, that matters, because it wasn't  
10 the official position of the Department.

11 MS. ESTES: It does. But it's also been walked  
12 back completely, specifically with respect to the  
13 Appointments Clause. So the '96 Office of Legal Counsel  
14 memo disavowed that conclusion completely, the conclusions  
15 that it came to about the Appointments Clause in *Buckley*,  
16 and says there's not an issue here with respect to  
17 Article II and, in fact, they don't get to an Appointments  
18 Clause discussion. So reliance upon that.

19 And I would actually point to the '96 memo for  
20 some of the historical context that you were asking about.  
21 It's not that compendium that you were looking for, but --

22 THE COURT: Is there a compendium anywhere, slash,  
23 do you know the SG's office (inaudible) memo to the Barr OLC  
24 memo?

25 MS. ESTES: I don't. I would be more than happy

1 to find out --

2 THE COURT: Okay.

3 MS. ESTES: -- that. And to the extent that  
4 briefing on that part of it would be instructive to Your  
5 Honor, we are, of course, prepared and willing to do that.

6 THE COURT: That's a big lift if you really mean  
7 that.

8 MS. ESTES: I really mean it if it would help with  
9 your decision. I don't think that it changes the outcome of  
10 where we are now and I think the historical background that  
11 exists in so many of the discussions resolves the question.  
12 But to the extent that Your Honor feels otherwise, we would,  
13 of course, provide any --

14 THE COURT: I think the history is the hardest  
15 part of this case.

16 MS. ESTES: I think it's a hard part and I think  
17 it has a singular outcome of constitutionality.

18 THE COURT: Okay. Third question: Post *Polansky*,  
19 what is the partial assignment of property that remains that  
20 was contemplated in *Stevens*?

21 MS. ESTES: The partial assignment is what it has  
22 always been, and I'm not sure whether it was the Chamber or  
23 defense counsel who referred to sort of this percentage  
24 that's allocated and that's just not how it works.

25 The partial assignment has always been a role

1 that's given and it's a role that is, you know, within the  
2 oversight of the United States to move litigation forward  
3 for a False Claims Act case. That didn't change. That  
4 exists. And it's always been the right of the United States  
5 to --

6 THE COURT: Let me just be clear. You think the  
7 assignment is the granting of a cause of action divorced  
8 from the proprietary interest of a recovery?

9 MS. ESTES: I don't think they're divorced, I  
10 think the proprietary interest in -- the United States'  
11 proprietary interest in the cause of action partial -- part  
12 of that is what they have assigned to the Relator.

13 THE COURT: Right. So I think they have to go  
14 together to give them standing, right? Like you -- it's  
15 almost like the partial assignment -- yeah, I think they  
16 have to go together.

17 MS. ESTES: I agree, because the remedy travels  
18 with the cause, right? We don't come to a financial  
19 interest in anything if there is not a successful cause of  
20 action, so that part has always traveled --

21 THE COURT: Yeah, that's the wager problem.

22 MS. ESTES: Of course. But I don't think that  
23 that has changed at all, that's been the way all the way  
24 through and from pre-*Stevens* decisions that there was always  
25 a role for the government to have oversight and to, you

1 know, remove cases that they didn't think should be there,  
2 to dismiss those cases.

3           You know, there were some Courts that came to this  
4 like absolute discussion thing, but the standard that  
5 *Polansky* came to articulates that it's extreme deference to  
6 the government. And I think this is where sort of rubber  
7 meets the road a little bit, in that this issue that you  
8 raise before of what happens if we get to trial and, you  
9 know, we have just -- the government doesn't agree with the  
10 theory. It's not happening because of all of the steps  
11 along the way.

12           So defendants don't cite to any cases where there  
13 has been an outcome contrary to the United States' stated  
14 position. And *Yates* speaks specifically to this. So *Yates*  
15 tells us that the False Claims Act is built with  
16 consideration --

17           THE COURT: When does your partial assignment  
18 vest, and has it vested?

19           MS. ESTES: Yeah, I think when you file the case  
20 that partial assignment is there and it begins and that it  
21 takes on a different nature if the government intervenes or  
22 doesn't intervene. But it's always a partial assignment.  
23 It's never our case, you know, it's always the government's  
24 remedy that we're pursuing in their name. It's never hers,  
25 it's always the government's.

1 THE COURT: Well, then it's not an assignment.  
2 That's what I'm saying, it doesn't vest. That's a  
3 contingent assignment. When does your partial assignment  
4 vest?

5 MS. ESTES: I guess I don't distinguish the  
6 difference in the contingent, because it's not contingent,  
7 the assignment is there at the ability to file that case.  
8 But it, like any partial assignment, ends at some point.  
9 That's the end of it. So if the case is dismissed, her  
10 interest -- there's nothing to have an interest in anymore,  
11 it ends at that point.

12 THE COURT: What argument would you think you  
13 could raise to defeat the government if they intervened and  
14 moved to dismiss under Rule 41? What's the standard?

15 MS. ESTES: So the standard, I do agree with the  
16 government, is a substantial deference. But I believe the  
17 reason that it was worded that way -- and I think you're  
18 right, it gives the government a considerable amount of  
19 power. But it was really meant to protect situations that  
20 we haven't seen. But, for example, if the agent working  
21 that case had an improper relationship, say, with a  
22 defendant, that there was some sort of sweetheart deal being  
23 cut because of a, you know, shareholding issue or something  
24 that wasn't public, and that agent who happened to be  
25 assigned to that case was pushing a deal that was improper,

1 that -- it gives the opportunity for there to be an  
2 explanation to say this isn't the right time, the right time  
3 to settle in or to intervene and let this be dismissed.  
4 There's a reason why.

5           Yates, again, I would go back to, talks about all  
6 the things that are appropriate considerations and it talks  
7 about public policy and the lack of wanting a bad appellate  
8 decision and other things like that that are reasonable.  
9 But there are occasions where even --

10           THE COURT: Those are the conditions of your  
11 partial assignment, but there's not like an improper  
12 relationship procuring a settlement with the defendant, that  
13 kind of thing?

14           MS. ESTES: I don't think it's a condition, but  
15 you asked of an occasion in which that might be invoked and  
16 I can certainly see a world where that happens. We're not  
17 seeing it happen, because I think of the life and the  
18 realities of Qui Tam litigation is that that's not how it  
19 works in practice. But there are occasions in which  
20 something like that could. And I believe the government's  
21 point in preserving some sort of access, you know, some  
22 position for the Relator to be able to articulate by carte  
23 blanche dismissal authority is to protect in those rare  
24 cases. But I concede they're rare, that's why they're not  
25 happening very often.

1 THE COURT: *Braxton* (ph) called the cause of  
2 action an inchoate right. Do you agree?

3 MS. ESTES: I do agree that a person, and in this  
4 case the United States, is right and the cause of action  
5 is --

6 THE COURT: Well, I'm talking about the Relator.

7 MS. ESTES: Oh, excuse me.

8 THE COURT: Do you agree that it's an inchoate  
9 right?

10 MS. ESTES: The Relator's right to participate in  
11 the False Claims Act?

12 THE COURT: And to recover.

13 MS. ESTES: I believe it's a right given to them  
14 by the False Claims Act. I don't know that it's either the  
15 same sort of right that we would see in an individual  
16 holding their own property right.

17 THE COURT: Okay. Then that leads to my next  
18 question. Is it property under the Property Clause?

19 MS. ESTES: I do believe that a cause of action,  
20 in this case the United States' cause of action, is property  
21 and that it's within -- well within their limits to decide  
22 how to divest of that property. And one of the ways that  
23 they've chosen to do is to work with the Relator.

24 And I think this is actually a really important  
25 point, because the distinction here that makes that

1 relationship different and this discussion of the separation  
2 of powers from all of the other discussions of separation of  
3 powers is that the purpose of all that is to protect  
4 Congress from something it would usurp or aggrandize the  
5 executive's control in their role in this. The executive is  
6 saying it doesn't usurp our role, we're good, this is  
7 actually exactly the way that this works and the way we want  
8 to do this and we have all the right controls in place.

9           And that is different from every other case that's  
10 been presented by the defendants. There isn't an  
11 opportunity where -- in any of the readings or anything that  
12 I've seen, and I've tried to go back to the underlying  
13 discussions in these cases, to say this right is being  
14 handled exactly how we want it to be, there is no --  
15 basically to say that there is separation of powers here  
16 would be overruling the United States saying they're not  
17 usurping your authority, it's being handled the way we want  
18 to handle it.

19           Congress wrote it out in a way that's exactly the  
20 way that we want to deal with it and it's working. It's  
21 working for us to recover billion and billions of dollars.  
22 So I do think it's a completely different situation than  
23 anything else we've seen.

24           THE COURT: I'm not sure the executive branch can  
25 be -- gets to make the determination of whether there's a

1 separation of powers termination just because it's working  
2 well for them.

3 MS. ESTES: I don't think that they're --  
4 obviously, that we have, you know, a judicial branch also  
5 that weighs in on these things, but they are a factor in it.  
6 There's not a question -- when *Morrison* tells us this and we  
7 get actually (inaudible). The question is the usurpation of  
8 power between the two parties and does the rights that  
9 Congress has created in the Relator usurp the executive  
10 branch's authority. And --

11 THE COURT: Does it delegate executive power to a  
12 private individual?

13 MS. ESTES: I'm sorry, I couldn't -- the last part  
14 I didn't hear.

15 THE COURT: I think the question is does the False  
16 Claims Act delegate executive power to a private individual.  
17 I think that's the problem that they're raising, the  
18 defendants, as a challenge.

19 MS. ESTES: And if it --

20 THE COURT: And I think that's the way to think  
21 about it too, is a delegation problem. And I don't care if  
22 Congress and the executive agree that it's a good  
23 delegation. That might not matter for purposes of  
24 constitutional interpretation.

25 MS. ESTES: I don't know that it's outcome

1 determinative, but I do think it matters, because if the  
2 idea behind the separation of powers is to ensure that the  
3 branches have separate authority to handle their own, you  
4 know, kind of towers of information that they're on and they  
5 are doing it in a way that they believe fits within their  
6 own structure, that they're not saying this is over -- you  
7 know, overstepping our line. In fact, they're saying the  
8 opposite, that we are -- that we have controls that is  
9 working for us to maintain the authority that is bestowed  
10 upon the executive, that that is significant and different  
11 than other cases.

12 THE COURT: Okay. I think I have everything, but  
13 if there's anything else you would like to bring to my  
14 attention, please do so.

15 MS. ESTES: No, Your Honor, I think that covers  
16 everything for Relator.

17 THE COURT: Okay.

18 MS. ESTES: Thank you.

19 THE COURT: Thank you.

20 Okay. Mr. Singh. Good afternoon.

21 MR. SINGH: Good afternoon, Your Honor. It's a  
22 pleasure to be here with you. I would like to address some  
23 of the things that just came out in the previous discussion  
24 and then go through the questions that you've been asking  
25 everybody.

1           The first question you raised, Your Honor, that I  
2 want to clue in on was this question -- this hypothetical  
3 you gave about a foreign government pursuing a False Claims  
4 Act action. I don't think it's -- I don't think it's  
5 possible for the simple reason that governments aren't  
6 regarded as persons and couldn't bring one.

7           THE COURT: No, I don't think they could be the  
8 person, but my question is whether a Relator could assign  
9 their interest to, say, a government, the same way that the  
10 Eleventh Circuit says they can assign it to a litigation  
11 finance fund.

12           MR. SINGH: Yeah. And so I think part of what's  
13 going on here is that the Relator is not assigning their  
14 interest per se to a litigation funder in litigation funding  
15 agreements, they're making a separate deal. It's usually  
16 structured quite differently. That doesn't directly answer  
17 your question.

18           Could it happen? The answer is that's completely  
19 untested. It's never happened to anybody's knowledge. And  
20 of course, it's a situation that can happen in any civil  
21 litigation by defendants, by plaintiffs, they can always  
22 funnel information to third parties in violation of  
23 protective orders and other restrictions.

24           Ms. Estes was quite right to note that there are a  
25 lot of restrictions in False Claims Act cases that prevent

1 information from leaking out. This is true even with  
2 respect to litigation funders. So, for example, while the  
3 case is under seal, information just isn't handed out to  
4 third parties, including litigation funders who may have an  
5 interest in the case. The same would, of course, be true  
6 vis-a-vis any other third party. Once the litigation comes  
7 out from under seal, there will invariably be protective  
8 orders and other mechanisms, and those apply here just like  
9 they do in any other civil litigation.

10 THE COURT: And to be clear, I'm not thinking that  
11 this is happening in any particular case, I'm just trying to  
12 take the logical like follow-on position of if there are  
13 Article II implications that the -- with a private  
14 Relator -- or private citizen being a Relator and the  
15 government said enforcement of the False Claims Act is  
16 substantial executive power, under -- I understand subject  
17 to all these oversights by the Department, is it possible  
18 that somehow a foreign government is really the one with the  
19 financial interest motivating the litigation? And I have  
20 no -- I don't know that that's happened, I'm just trying to  
21 think of the most offensive Article II hypo. You know?

22 MR. SINGH: Sure. I don't actually think it  
23 creates a unique Article II concern, however. And I would  
24 just think about it like this: Because the executive  
25 branch -- and this is -- now I'm just rereading Ms. Estes's

1 answer and so I'll move on. But because the government  
2 maintains all of its supervisory control over these cases,  
3 because it has the power to say we're dismissing this,  
4 surely that would be one of the grounds on which the motion  
5 would be granted. I'll talk happily about the standard for  
6 dismissals in a moment, but surely --

7 THE COURT: If they know about it, right?

8 MR. SINGH: Yeah. But I think the idea -- look,  
9 if the hypothesis is what about Relators who just deceive  
10 the government about everything and break all the rules and  
11 aren't litigating in good faith, you can always imagine such  
12 offensive hypotheticals I suppose. But the False Claims Act  
13 really gives the government a lot of power to deal with even  
14 really, really bad actors.

15 And look, can everything be circumvented at some  
16 point? Maybe. But that is also true in all other kinds of  
17 litigation. You know, there are lots of sorts of litigation  
18 we've talked about where the government has an interest --

19 THE COURT: One distinguishing hallmark which we  
20 haven't discussed this afternoon is, under the Appointments  
21 Clause the officer takes an oath and that's what  
22 distinguishes somebody from assuming their role. You know,  
23 I was not a judge until I took the oath. The President is  
24 not the President until he takes the oath. There is  
25 something significant and a demarcation between being a

1 private citizen and being an officer of the United States  
2 because you've taken an oath of loyalty to the Constitution.

3           So I think there is something there that even all  
4 the oversight in the world of looking at interrogatory  
5 requests and whatnot are different, the allegiances are  
6 different, the consequences are different, as in you can't  
7 remove the Relator.

8           And I think that cuts both ways, right? Like you  
9 can't remove the Relator, it helps and hurts your side.

10           MR. SINGH: I think that -- well, two things. So  
11 first, if we're doing scary hypos, you can always imagine  
12 someone who breaks their oath on purpose. And I agree that  
13 the oath is significant. It matters that people take it, we  
14 love that people take it. But of course, if we're doing  
15 scary hypotheticals, someone can always break it and they  
16 can do so secretly. And again, it's subject to what the  
17 government and the supervisory authorities in the government  
18 learn.

19           I actually don't think for purposes of Article II  
20 it changes the outcome materially in terms of whether  
21 there's sufficient control in place. If you look at the  
22 cases about removal power, for example, they're not gonna  
23 turn too much on the specific content of an oath. Right?

24           THE COURT: Well, that's because it's not an  
25 Appointment Clause.

1 MR. SINGH: Right.

2 THE COURT: Removal is different.

3 MR. SINGH: Yeah. Well, removal I think  
4 implicates both Appointments and Take Care. I've read the  
5 Supreme Court's precedents on the matter.

6 But in any event, Your Honor, my point is that  
7 while I understand the gravity of the oath, I don't think it  
8 actually necessarily changes the constitutional calculus.

9 I do want to -- on the point of removal, you say  
10 you can't remove a Relator, but I think --

11 THE COURT: Can you?

12 MR. SINGH: Functionally, I think the answer is  
13 yes. I think dismissal of the action is tantamount to  
14 removal of the Relator.

15 THE COURT: That's terminating the action, that's  
16 not replacing the person who's acting as your agent.

17 MR. SINGH: Well, but the government could bring  
18 it's own action. There's no reason that the government  
19 couldn't do both, that is say we're terminating this action,  
20 we're bringing a parallel action. My colleague for the  
21 Chamber mentioned 3730(b)(5) when he said the Relator  
22 occupies the field.

23 THE COURT: (Inaudible) the other private  
24 individual.

25 MR. SINGH: Exactly, not the government. And so

1 the government is always free to bring a related action.

2 Now, it's true the government can't conscript  
3 another private party to come be the Relator. But that --  
4 you know, we understand why that's not true. They can pick  
5 anyone who works for them to come and proceed with the  
6 same -- functionally the same action alleging the same  
7 violations. And I think that is essentially the same as  
8 complete removal power. If they were to dismiss a Relator's  
9 case and bring their own action, it gets them to the exact  
10 same spot. And so I think that functionally the government  
11 has that removal power.

12 The government also, of course, has supervisory  
13 power. Short of that, they come very close to removal.  
14 When they intervene in a case, then the Relator's actions  
15 can no longer bind the government. So although it's true  
16 that the Relator gets to stay in the case and participate as  
17 a party, they're not binding the government anymore. I  
18 would say that that's pretty --

19 THE COURT: You think they have no preclusive  
20 effect even though they are allowed to participate?

21 MR. SINGH: So the statute provides, Your Honor,  
22 that when the government intervenes, the actions of the  
23 Relator do not bind the government. It says so in the  
24 terms. That's in Section 3730. And so --

25 THE COURT: So all preclusive effect falls away as

1 soon as it's intervened?

2 MR. SINGH: Well, the government's own actions  
3 will have preclusive effect --

4 THE COURT: On it.

5 MR. SINGH: Yes.

6 THE COURT: Right.

7 MR. SINGH: But the Relator's actions no longer  
8 bind the government in litigation. Right? And of course,  
9 the outcome would still be res judicata and they have  
10 collateral estoppel effects as normal, because the  
11 government is now a full party to the case.

12 So, you know, the piece that I -- a piece that I  
13 really wanted to emphasize that also came up in the previous  
14 conversation and I want to double down a little bit on  
15 Ms. Estes's answer, because you've asked every lawyer here  
16 if they can identify an example of somebody who exercises  
17 what you call significant executive power, but wouldn't be  
18 deemed an officer. And the government contractors answer is  
19 the answer.

20 There are contractors everywhere, thousands and  
21 thousands of them, taking home hundreds of billions of  
22 Federal dollars and performing mission-critical functions.  
23 Ms. Estes mentioned battle field contractors. That's an  
24 obvious example. We rely on contractors to protect the  
25 border along the south. We rely on contractors to parse

1 incredibly sensitive national security information, signals,  
2 intercepts. Even the Department of Homeland Security uses  
3 contractors for all their cyber security initiatives as  
4 well, it's another huge area where they play a role. And I  
5 can go on and on.

6 In fact, this case is a good illustration.  
7 Medicare Part C is when private health plans basically step  
8 entirely into the shoes of Medicare. Unlike Medicare, which  
9 previously and also used contractors to decide which claims  
10 to approve or not, they now write the plans, make the  
11 coverage determinations, and give the money to providers or  
12 not based on their say-so, of course, subject to some  
13 Federal oversight.

14 I think there are so many situations. If you  
15 think about modern government and if you take the defense  
16 arguments to their logical extreme, where you land is that  
17 modern government cannot work anymore, because there are  
18 many, many, many functions that are being performed by  
19 private parties to help the government.

20 And I want to be clear. Our position on this is  
21 that's okay. That's okay for them, it's okay for the other  
22 contractors I've described, and it's okay for Relators who  
23 are performing essentially the same role. Now, sure,  
24 they're not getting a contract handed to them in the  
25 beginning, but that's for a very straightforward practical

1 reason that I think has no constitutional significance.

2           The reason is that the government doesn't know who  
3 they are in the beginning. It doesn't know which  
4 individuals out there in the world have information about  
5 hidden frauds and can bring it forward to help resolve those  
6 frauds. It has to rely on those individuals coming forward.  
7 And to do so, it has to have an incentive for them which  
8 will protect them from retaliation and provide them with  
9 some recompense for the ordeal they'll go through.

10           I'll tell you, I also heard from the other side so  
11 much talk about unaccountable self-appointed Relators. I  
12 represent Relators and seven out of ten, eight out of ten  
13 times, once we're done telling them what the litigation is  
14 going to be like, they get scared and don't want to do it,  
15 because they know they'll be blacklisted in their community,  
16 they know that if -- they'll have to shoulder years of costs  
17 all on their own. None of it's coming from the government,  
18 they are going to do that personally with their private  
19 resources. And so when we have these conversations, Your  
20 Honor, about, you know, Relators are really officers,  
21 they're exercising government power --

22           THE COURT: They're not usually taken on  
23 contingency fees?

24           MR. SINGH: If they can find someone to do it on  
25 contingency fee, that is an option available to them. But

1 again, they have to do that themselves. And if they can't  
2 find someone, they have to pay someone or find someone to do  
3 it pro bono. The point is that's on the Relator. They get  
4 no help from the government when it comes to investigating  
5 their case, putting it together, and filing it. They get no  
6 help from the government then when it comes to taking it --  
7 to dealing with what they have to deal with, whatever  
8 obligations they have going forward.

9           The government handles its end of things. It may  
10 be grateful for the help that it gets from Relators. It  
11 often is and that's great, we love that public-private  
12 partnership, just as all contractors love their partnerships  
13 with the government. But this is not a situation where the  
14 Relator files a case, you know, the government hands them a  
15 windbreaker, a gun, and a salary, and says, okay, welcome to  
16 the team, let's do this, you're now an officer. Nothing  
17 like that.

18           Throughout the entire life of the litigation, the  
19 Relator is essentially on their own playing this adjunct  
20 second banana role to the government, providing information,  
21 helping the government make decisions, helping it make sense  
22 of information it gets that it may lack the expertise  
23 in-house to figure out, but that doesn't make the -- it's  
24 not exercising power. Right? The government is exercising  
25 the power, the Relator is helping --

1 THE COURT: Is litigation authority not a power?

2 MR. SINGH: So I want to be clear about when that  
3 kicks in. And just it may be helpful to just walk through  
4 the process of these cases.

5 So the first thing that happens is that the  
6 Relator conducts whatever investigation or knowledge  
7 gathering they need, they find counsel, they put together a  
8 complaint, they file it. All of that totally on their own,  
9 right?

10 At that point, the lawsuit is filed and it goes --  
11 it's filed under seal, it doesn't go to the defendant, it  
12 only goes --

13 THE COURT: I get the -- and then they ask for an  
14 extension of time, it's usually a year, year and a half,  
15 until the government decides that they want to intervene.

16 MR. SINGH: Music to my ears, Your Honor. I like  
17 hearing that.

18 THE COURT: And I always grant the extension of  
19 time.

20 MR. SINGH: Oh, please stop, just once just slow  
21 the -- okay. But --

22 THE COURT: I'm just saying I'm familiar with the  
23 initiation.

24 MR. SINGH: Great. But while that's happening,  
25 Your Honor, the Relator doesn't have litigation authority in

1 the sense that they can do anything. The case is under seal  
2 and until --

3 THE COURT: Right. But in most cases, the  
4 government doesn't intervene and when they have litigation  
5 authority, they're the only person or party in the court on  
6 one side.

7 MR. SINGH: And so I want to get us in that moment  
8 in time and understand what's happening at that moment.

9 The government has three choices. It has the  
10 choice to intervene and take over the case. It has the  
11 choice to move to dismiss the case and kill it. And it has  
12 the choice to decline to intervene, which gives the Relator  
13 the right to conduct the action going forward subject to  
14 ongoing oversight by the government.

15 And I think that what we need to understand is  
16 that in that moment, you know, again, it's the government's  
17 decision making, the executive branch's decision making  
18 specifically that vests the Relator with the right to  
19 continue the action. Because the government could just as  
20 easily say this action is over as it could decline to  
21 intervene at that moment.

22 THE COURT: And presumably that dismissal would be  
23 without prejudice?

24 MR. SINGH: Yeah. So if Rule 41 is the standard,  
25 Rule 41 --

1 THE COURT: Right, this is pre-answer, obviously.

2 MR. SINGH: Yeah, it's before answer, before the  
3 complaint is even served.

4 THE COURT: Right. Could have statute of  
5 limitations aspects.

6 MR. SINGH: There might be a relation back, the  
7 debate or something like that if the government wanted to,  
8 you know, dismiss the action and then bring a separate  
9 action. But it can also intervene and put the Relator in  
10 the back seat, it has that -- it can weigh those options and  
11 make a call.

12 And so what I -- but the point I want to emphasize  
13 is -- and the Court said this almost verbatim in *Yates*. In  
14 situations where the Relator has primary responsibility for  
15 conducting the action, it is only because the executive  
16 branch decided that it should be so.

17 And so I think when we talk about, again, their  
18 premise, what they want you to look at --

19 THE COURT: Can the executive branch do that,  
20 though?

21 MR. SINGH: Sorry?

22 THE COURT: What significance does that have, that  
23 the executive branch has decided that a private individual  
24 gets to litigate on its behalf?

25 MR. SINGH: Because it means that if you believe

1 that what's going on here is the exercise of some executive  
2 power and I really want an officer of the United States to  
3 be the one who decides to exercise that power, that is  
4 happening at that moment. By declining --

5 THE COURT: You're telling a private individual to  
6 go do it, is what you're saying? That decision point of  
7 intervene, not intervene, dismiss, they're now making the  
8 Relator their mercenary.

9 MR. SINGH: In a manner of speaking, it's not so  
10 different from any contracting situation.

11 THE COURT: But there's no contract.

12 MR. SINGH: Right. I said it's not so different.  
13 It's a little bit different, but because there's a statutory  
14 mechanism you don't need a contract, the terms are spelled  
15 out. And I think the terms work. They work for all parties  
16 involved, as you've seen, the executive branch is happy with  
17 this. And while I understand the perspective that they  
18 can't waive away constitutional violations, I do think that  
19 when the gravamen of the violation is that the executive  
20 branch's ox is being gored, for the executive branch to say  
21 our ox is fine is one factor that ought to loom --

22 THE COURT: (Inaudible) how the Supreme Court  
23 deals with non-delegation issues in the legislative context?

24 MR. SINGH: So again, I don't think that  
25 non-delegation doctrine -- it hasn't come up that often, but

1 when it has come up, I don't think the issue there is that  
2 the executive branch has insufficient --

3 THE COURT: No, I mean like Congress is perfectly  
4 happy to tell an Article II agency to regulate. Right, the  
5 court doesn't usually give sort of credence to like -- what  
6 I'm trying to say is the separation of powers question is  
7 one that is not susceptible to the branch saying we would  
8 prefer not to exercise these powers, we're gonna give it  
9 away, or are fine giving it away, right? Or then tell me  
10 where the case law supports that view.

11 MR. SINGH: I would just think of it entirely  
12 differently and I think that *Yates* actually, again, has the  
13 language. And this is binding precedent in this Circuit and  
14 it's clear on this. It says what the False Claims Act does  
15 is the government retains the function of protecting the  
16 public fisc. But what the False Claims Act does is give it  
17 the flexibility to do so through an avatar in the  
18 litigation. That's the word from *Yates*.

19 THE COURT: Is that a helpful phrasing?

20 MR. SINGH: It's a weird phrasing, but I think  
21 that it is helpful, because I think what it shows, Your  
22 Honor, is that just as the government has flexibility to  
23 carry out a lot of its functions through contractors or  
24 private third parties, so too here. And not in a way that I  
25 think anyone --

1 THE COURT: Can I ask -- can I ask a different  
2 question? Because you gave me good examples. I agree, the  
3 government contracting national security, that sort of  
4 thing. But those are all contractors in that they are  
5 operating subject to the terms of a contract, which you  
6 admitted.

7 Is there anyone who operates in like a litigation  
8 function who is not deemed an officer?

9 MR. SINGH: So I don't know. Certainly I have not  
10 seen case law about this. This is not the type of situation  
11 that comes up frequently. And so --

12 THE COURT: Which is why it's called an avatar I  
13 think. I mean, or -- it's like every time we talk about it,  
14 it's like unusual. But I'm trying to square it with the  
15 continuity and other Appointment Clause requirements.

16 MR. SINGH: It's unusual today, but I do think  
17 that it's perhaps conspicuous that the other side is -- we  
18 have discussed that historically there were many Qui Tam  
19 statutes, including some of what you've described as the  
20 true Qui Tam statutes. The most clearly analogous uninjured  
21 plaintiff pursuing public injury on the government's behalf  
22 and keeping a piece of the reward. And no one said those  
23 were unconstitutional back then. And I don't think that  
24 there is -- and so, you know, those, I would hold them all  
25 up as potential examples that might satisfy Your Honor.

1 That's why the history is relevant. Right? And I think  
2 that there is --

3 THE COURT: Sorry. You're saying all of them, not  
4 just the FCA similar ones?

5 MR. SINGH: Oh, no, I'm saying look at the similar  
6 ones where --

7 THE COURT: And they're sufficient regardless of  
8 how many prosecutions were brought under anything?

9 MR. SINGH: I do think so, Your Honor. The way I  
10 read *March vs. Chambers* and the cases that came thereafter,  
11 they say that the -- *March vs. Chambers* distinguished  
12 between mere historical practice and the acts of the first  
13 Congress and placed particularly strong weight on the acts  
14 of the first Congress on the premise that the men who  
15 drafted the Constitution would not have enacted laws that  
16 conflicted with those same provisions.

17 And so if you want my -- actually, my favorite  
18 historic example, there's a -- and actually, let me circle  
19 back to one of the questions you've asked. I am also not  
20 aware of a compendium. I do think, however, that Westlaw  
21 searching is unlikely to be fruitful, precisely because when  
22 so many of the sources are so old and likely to be in trial  
23 level courts, it's not gonna be where they are. But the one  
24 I'm gonna talk to you about you can find a little bit about  
25 it -- and if you want more briefing on this, you know, I

1 know it's a heavy left, but we can go lift it.

2           There was this Slave Trade Act. It was first  
3 enacted --

4           THE COURT: Yes, this is the one -- the Rhode  
5 Island?

6           MR. SINGH: Yeah.

7           THE COURT: Yes. Okay. Yes, I'm familiar with  
8 that. That's the only deep dive I've seen.

9           MR. SINGH: Yeah, me too.

10           THE COURT: One particular Qui Tam, right. So I  
11 am familiar with that, yes.

12           MR. SINGH: But it's a lovely statute, right? It  
13 said at first that the --

14           THE COURT: Does it matter there that the District  
15 Attorney was often the lawyer representing the person who is  
16 like the Relator?

17           MR. SINGH: I don't think it matters, because it  
18 was a smaller country and it's not surprising that there  
19 were those people, but I think that --

20           THE COURT: But if the person is a government  
21 officer who is the one litigating on behalf of the  
22 Relator --

23           MR. SINGH: It was not a Federal officer I don't  
24 think.

25           THE COURT: Yeah, I don't --

1 MR. SINGH: Yeah, I don't think that matters. You  
2 can have a cop do a False Claims Act case and it would be  
3 fine. And so I think -- I think that statute provides a  
4 really good illustration, a very analogous statute. So  
5 George Washington signs it into law. It says at first the  
6 informer can keep half the bounty of the law suit. Then it  
7 gives them the whole bounty. I think they amended it in  
8 1800 or --

9 THE COURT: Uh-huh.

10 MR. SINGH: -- (inaudible) to do that. That was  
11 cool. And so, yeah, I think there are great historical  
12 examples that show that this type of statute was amended --  
13 was enacted and then amended to strengthen it. And so the  
14 idea they just did this unthinkingly, they had no idea what  
15 a Qui Tam was. It's not true. It's evidently not true.

16 Now, when you have such older historic records and  
17 a lot of action going on in the trial level courts, I think  
18 deep dives like that are going to be elusive. And so the  
19 question then becomes, well, what follows from that? Do we  
20 just get to say, okay, well, now we're going to ignore  
21 history or we're going to presume that the history doesn't  
22 exist? I think that's unfair. I think to presume --

23 THE COURT: I think we have to do the historical  
24 research.

25 MR. SINGH: Yeah. But I think that if the

1 historical research doesn't turn up that much, I think to  
2 presume that nobody cared is the wrong conclusion. Because  
3 I think this Court should not lightly be striking down acts  
4 of Congress that have existed since the 1860s substantially  
5 unchanged except that the government has become more  
6 empowered to supervise.

7           And I don't think that the Court -- and so I think  
8 that when you think about just where the judicial role is, I  
9 agree originalism and history have a tremendously important  
10 role to play, but to put the thumb on the scale and say  
11 unless you can prove that the history conclusively  
12 establishes the constitutionality of this thing and I find  
13 the record to be robust and complete, you know, I'm gonna  
14 strike down a Federal statute that's been around for 180  
15 years, I think that's a lot. And so I would be very  
16 cautious about it.

17           I think the right answer is --

18           THE COURT: One, I'm very cautious about it and,  
19 two, I don't strike down statutes.

20           MR. SINGH: Sure. Well --

21           THE COURT: One case. But I hear your point.

22           MR. SINGH: Understood.

23           THE COURT: I'm not -- I think the aspect that  
24 you're missing to the argument, or at least rhetorically  
25 leaving out, is that the recent Supreme Court precedent is

1 very much opposed to these separation of powers arguments.  
2 And I think that if we were in a vacuum and they passed the  
3 False Claims Act as it looked in 1986 today for the first  
4 time, I don't think this would be a very close question in  
5 Article II given the current precedent.

6 MR. SINGH: So maybe I can address that.

7 THE COURT: That's why I said I think that this --  
8 I agree the history is really hard and I'm looking for help  
9 on it.

10 MR. SINGH: Sure. I want to give as much as I  
11 can. You've got my best shot so far and, as I say, if  
12 supplemental briefing would be helpful, we can try and put  
13 it together.

14 I'll candidly admit I don't know what that  
15 historical inquiry will show. We've looked at the statutes  
16 I think probably about the similar depth as Your Honor has  
17 and, you know, we think that what's there establishes the  
18 constitutionality of this mechanism, that is, the specific  
19 mechanism of a private plaintiff suing despite no personal  
20 injury on behalf of the government. And so we think that's  
21 a clear historical record. But we can do more on that.

22 On the question of the modern precedents, I think  
23 the issue is that they are fundamentally addressed to a  
24 different set of questions, that is, they are largely about  
25 this unitary executive idea, how much control must the

1 President have over folks who are already in the executive  
2 branch, the officers. And --

3 THE COURT: I mean, what do you do about the  
4 Appointments Clause cases?

5 MR. SINGH: So I think that the --

6 THE COURT: *Polansky* certainly helps on that  
7 question, I agree. There's more control given to the  
8 government. But I don't think it remedies any of the  
9 Appointment Clause problems.

10 MR. SINGH: Well, I think the Appointments Clause  
11 question is -- the simple way to put it is, are these  
12 Relators exercising such powers that they must be officers  
13 who are subject to the Appointments Clause. That's how I  
14 would put it, right? Because I think everyone agrees  
15 they're not actually officers. And so the question is, do  
16 they need to be. And there's I would say precious little  
17 law about that. I don't think any of the recent Supreme  
18 Court precedents are addressed to that question. Instead --  
19 and I don't think any case is considered somebody in the  
20 Relator's position. Let me expound a little on what I mean.

21 So there are two pieces to being an officer, you  
22 have to have the continuing office established by law and  
23 you have to exercise significant powers under the law of the  
24 United States. That's how *Lucia* phrased the test.

25 On the continuity point, I think I agree with

1 everybody in the room that the law is unclear about what  
2 (inaudible). I will say, for the reasons I gave earlier,  
3 the scope of the Relator's involvement is narrower even than  
4 the Special Counsel's, because the Relator has no government  
5 office during the prefiling investigation. And it would be  
6 wrong to downplay the significance of that, because that's  
7 really where the government flexes its power, when it goes  
8 out and issues search warrants, when it gets records from  
9 third parties using the full weight of the United States to  
10 gain that information. That is quite a different story.

11           When the people who are doing that work for months  
12 or years get paid by the government to do that work as  
13 opposed to Relators who have to shoulder all of that  
14 expense on their own, that's a big deal. A very big deal.

15           And so when you talk about continuing obligation,  
16 you know, it's not even just one case, in the sense that  
17 those cases might also be one case, it's like a part of one  
18 case for which the Relator is playing any role where they're  
19 doing something directly for the government.

20           Now, are they -- I also think that the continuity  
21 piece ought to incorporate the fact that the Relator status  
22 is contingent on the government's continued forbearance,  
23 that is, the government's dismissal power makes the Relator  
24 status quite tenuous. They have no civil service  
25 protections, they have very minimal protections from being

1 removed from the case. And so I think that's relevant as  
2 well to the continuity question as you think about it.

3 I also think that these two prongs, although  
4 they're talked about as independent inquiries, are probably  
5 at least functionally in the cases mashed together a little  
6 bit in some sort of sliding scale, that is to say, if  
7 someone is not exercising a lot of power --

8 THE COURT: I think that's a fair assessment.

9 MR. SINGH: Yeah. And so there are I think --  
10 again, everything I said before about how limited the  
11 Relator's powers are -- and here I really do want to  
12 distinguish between power -- and I want to be super clear  
13 about this, the Relator has no power that a private civil  
14 litigant in a different type of case wouldn't have. If they  
15 were a plaintiff in any other civil --

16 THE COURT: Except res judicata against the  
17 Federal government.

18 MR. SINGH: But that's not a power for the  
19 Relator, that's a consequence of judgments that I think  
20 courts could, if they felt like it, waive. That's not a --  
21 that's a judicial doctrine that's not in the statute. And  
22 so I don't think that the -- I don't think they're granted a  
23 power that way. And so my sense for it, Your Honor, is that  
24 the Relator is not exercising power different from what a  
25 private civil litigant would exercise in an antitrust case,

1 a securities fraud case, any other number of cases that also  
2 implicate governmental interests where the government might  
3 bring a criminal action based on the same conduct. Those  
4 cases all exist throughout the U.S. Code -- or those causes  
5 of action exist throughout the U.S. Code. The Relator here  
6 has no special powers. What they actually have is less  
7 power because of all the supervisory controls that the  
8 government has.

9 THE COURT: So let me go back to when you said  
10 that you think the judicial doctrine of res judicata could  
11 be waived such that a second FCA claim could have been  
12 brought by the government if -- how would this work? Say,  
13 you reduced the judgment a final number and the Relator is  
14 awarded 30 percent of that and then the government says,  
15 well, we can get more. Now what?

16 MR. SINGH: I think a judgment in the government's  
17 favor would likely be preclusive. But to that situation --

18 THE COURT: What about a dismissal with prejudice?

19 MR. SINGH: So, yeah, I think the government, if  
20 it brought a later action, could make arguments. But I'll  
21 tell what the government actually does, which resolves this  
22 issue before it happens, is they frequently will file a  
23 statement of interest like the ones you've seen in this case  
24 and they will say, if you're going to dismiss the Relator's  
25 actions, we ask that any dismissal be without prejudice to

1 the government. And frequently that relief is granted. And  
2 so the government retains the right to bring its own action  
3 if a declined Qui Tam case is dismissed. And courts  
4 frequently grant that relief. So that's how it works out in  
5 practice. And it obviates the need to have a debate about  
6 whether res judicata would apply if a declined case is  
7 dismissed.

8 But I think that even if you were to have that  
9 debate, it's not a guarantee that the government's  
10 subsequent action would be dismissed. You know, I think  
11 estoppel doctrines work a little differently against the  
12 government and so I think there is room there. Now, I'm  
13 sure the other side will disagree about that, but my point  
14 is it's not set in stone, so I don't think the Relator has  
15 been granted any power to bind the government.

16 THE COURT: And you don't think -- well, I don't  
17 know. Is there any double jeopardy concern given the  
18 punitive nature of the fines imposed?

19 MR. SINGH: I have not seen double jeopardy ever  
20 applied in the False Claims Act context and I don't believe  
21 it would apply. I believe it applies in the --

22 THE COURT: Wouldn't it arise if you give  
23 preclusive effect to the earlier judgment, like is the  
24 government gonna bring it again. But if it did, would there  
25 be double jeopardy?

1 MR. SINGH: I don't think so, Your Honor. I don't  
2 think -- I think double jeopardy does not apply in this  
3 context.

4 THE COURT: Because of the designation as civil?

5 MR. SINGH: Yes, Your Honor, I think that's right.  
6 And there may be other reasons as well. I'll admit I have  
7 not run that issue to ground, so don't -- you know, I know  
8 less about that than I think.

9 I will say the one reason double jeopardy stands  
10 out to me is it does strike me as there's a familiar  
11 historical analogue to what we're going through now. I  
12 think everyone understands that this motion was precipitated  
13 by Justice Thomas's dissent saying, hey, I think there are  
14 constitutional questions about the False Claims Act.  
15 Justice Thomas, of course, did the same thing joined by  
16 Justice Ginsburg in the context of the double jeopardy --

17 THE COURT: I'm very familiar with *Gamble*.

18 MR. SINGH: And then ultimately determined, you  
19 know, my --

20 THE COURT: But then history didn't bear it out,  
21 which is why I care about the history.

22 MR. SINGH: But I think so to here, I think that,  
23 you know, one should not overread the dissent in *Polansky* as  
24 an opinion that the statute actually is unconstitutional. I  
25 think --

1 THE COURT: I agree. I agree. I think *Polansky*  
2 is telling lower courts to give it consideration, which is  
3 what I'm trying to do. And I think that's why Justice  
4 Kavanaugh wrote his opinion saying I also would like this to  
5 be given due consideration.

6 MR. SINGH: Yes, Your Honor. I would be happy to  
7 answer any other questions the Court has, but I know this  
8 has been --

9 THE COURT: Longer than anyone anticipated. No, I  
10 don't think I have any other particular questions, unless  
11 you want to address whether this is property.

12 MR. SINGH: So I think you saw the Relator say  
13 this is covered by the Property Clause. You saw the  
14 defendants effectively wave a white flag over that argument.  
15 I think that you should -- in whatever decision you write,  
16 the right thing to do would be to assume it arguendo as  
17 opposed to -- because the parties seem to be in agreement.  
18 And I think that that's correct.

19 Now, there may -- we didn't brief this question,  
20 there may be other constitutional bases for the assignment  
21 as well.

22 THE COURT: What would they be?

23 MR. SINGH: So you could imagine, for example, it  
24 being an outgrowth of the necessary and proper clause  
25 coupled to the authority to enact the False Claims Act in

1 the first instance, that is, if Congress has the authority  
2 to enact the False Claims Act, it has the authority --

3 THE COURT: But what's the basis for enacting the  
4 False Claims Act?

5 MR. SINGH: The Commerce Clause power likely. And  
6 I believe the spending power may be as well, since it  
7 protects Federal funds. So there are a number of sources of  
8 power that allow Congress to enact statutes like this. And  
9 I would view the Qui Tam provisions as sort of an adjunct to  
10 those. So I think the Property Clause is sufficient, but I  
11 think there may be more there. And that's why I don't think  
12 it would be necessarily the best idea to get into it given  
13 that the parties haven't really fought over it in this case.

14 I did want to leave you with like one final  
15 thought, and that is I think the history is supportive of  
16 our side and one of the ways that the other side wants to  
17 brush the history aside is to say the modern regulatory  
18 state is different. You know, government has gotten bigger,  
19 enforcement has gotten bigger, and so on and so forth. But  
20 similar arguments could always be made. I mean, we've heard  
21 time and again, people say today's guns are different than  
22 the guns that existed at the time of the founding and,  
23 therefore, we interpret the Second Amendment -- we all  
24 interpret it differently. But the Supreme Court has been  
25 quite clear, no, you --

1 THE COURT: I agree, I think I agree with where  
2 you're going, the legal principle needs to run true  
3 throughout, right, regardless of the --

4 MR. SINGH: Yes, Your Honor.

5 THE COURT: -- iteration of how it looks today?  
6 So I'm just trying to figure out what the principle was that  
7 I can glean from the historical record to apply to Qui Tam  
8 as it was enacted in 1986.

9 MR. SINGH: Thank you, Your Honor. I think the  
10 historical principle is it's totally fine for the  
11 government to -- for Congress to permit private persons to  
12 sue on the government's behalf and keep a portion of the  
13 recovery.

14 THE COURT: Okay. Thank you, sir.

15 I did say that, Mr. Krueger, you could have five  
16 minutes, right? I realize this all went much longer than  
17 counsel anticipated.

18 MR. DRAKE: Judge, Scott Drake for Freedom. In  
19 light of that, I was going to ask if I could sneak out?

20 THE COURT: Yes. Anyone is free to leave. I  
21 understand --

22 MR. DRAKE: Normally I wouldn't do that, but I'm  
23 told if I don't make my 5:30, I'm not able to get home.

24 THE COURT: Go home, then.

25 MR. DRAKE: So I appreciate the Court's time and

1 sorry to leave. Thank you.

2 THE COURT: No, it's okay. If anyone needs to  
3 leave, I understand. This went much longer.

4 Yes, sir.

5 MR. KRUEGER: Thank you, Your Honor. I want to  
6 pick up on a handful of points.

7 First, there's been a lot of discussion about  
8 whether there are any examples of somebody who exercises  
9 what has been conceded to be core executive power in  
10 prosecuting and enforcing Federal law where that individual  
11 does not also amount to be an officer. And I think the  
12 answer is no, is what you've been told today, that there's  
13 not an example of that. That's critically important.

14 And to the extent that there's been examples given  
15 of like a Federal --

16 THE COURT: Would you like to actually address I  
17 think what Ms. Estes's point was about the pre-initiation of  
18 the lawsuit being a part of the case that Relators are cut  
19 out of and, thus, it's more narrow in scope?

20 MR. KRUEGER: Sure. And before I do that --

21 THE COURT: That was Mr. Singh's argument too I  
22 think.

23 MR. KRUEGER: And right before I address that, let  
24 me point out there's been some discussion that perhaps the  
25 Federal prosecutor is an example of that, and I think the

1 answer is clearly no. If you look at the government's brief  
2 here, it wasn't signed just by Ms. Koh, it's signed by an  
3 officer. Indictments of Federal law suits are always signed  
4 by an officer, a U.S. Attorney, an Assistant Attorney  
5 General. Line prosecutors don't get to file lawsuits in the  
6 first instance like a Relator can.

7 As to your point about the pre-commencement  
8 powers, although they may not have governmental powers at  
9 that point, it's not nearly as significant as they're  
10 suggesting, because once a suit is filed, then the Relator  
11 files suit in ways that are far more than any private  
12 individual could. They can file claims that are only the  
13 government's. They can seek discovery that would be much,  
14 much broader than they would be able to assert if discovery  
15 was limited only to their own private interests.

16 And this case is an example. The relator was a  
17 physician and worked on a handful of particular cases, but  
18 her complaint sweeps far, far more broadly to claims on  
19 behalf of the entire United States. And so it's now  
20 subjecting defendants to discovery related to physicians  
21 that are far beyond any work that she saw beyond her  
22 particular claims. Once filing that suit and then engaging  
23 in this much broader discovery that only the government  
24 would otherwise be able to do, she could have amended her  
25 complaint to broaden it. And as the case goes on she will

1 be seeking damages that are far beyond damage related to  
2 claims that she actually worked on individually. She is  
3 stepping into the government's shoes and seeking to impose a  
4 judgment that is far, far broader. So I don't think that  
5 the fact that she doesn't have investigative powers should  
6 distinguish her.

7           Cases like *Buckley*, like *Donziger*, all point to  
8 the fact that if the -- that when you have prosecutorial  
9 power that's going forward in filing the suit, deciding  
10 whether to file the suit, what claims to assert, and  
11 implementing it, that's executive power.

12           And we don't have any contrary examples other than  
13 what Relator -- excuse me, what Mr. Singh pointed to when  
14 asked for an example was to try to point back to the very  
15 earliest statutes, to history.

16           Before I go to history, though, I want to just  
17 point out the reality of today, because there's been a lot  
18 of emphasis in hearing the government in that position try  
19 to puff up what they call the substantial supervision over  
20 the case. But it just doesn't align with the reality of  
21 these cases.

22           Once the government declined -- and you could look  
23 at Docket 120, for example. The government's statement of  
24 interest in this case is that it's not the party and that it  
25 takes no position on the merits of the factual allegations

1 in this case.

2           Who's prosecuting this case? To the extent that  
3 there are controls that point to hypotheticals like the  
4 government could intervene later and at that point, now that  
5 it's declined, the Relator would remain a party and could  
6 not reduce the Relator's participation in the case.

7           THE COURT: Well, I don't know what to do with  
8 that language in light of *Polansky*.

9           MR. KRUEGER: *Polansky* goes to a dismissal, right?

10           THE COURT: Right. Yes, that is true. But if you  
11 can rid the Relator of the entire case, I'm not sure how  
12 that's not reducing the rights.

13           MR. KRUEGER: Agreed if you were successful in  
14 that, but you can't dismiss a Relator without the Court's  
15 approval. And so if we're going to -- that sort of connects  
16 up to the removal and how this is not a removable Relator in  
17 the way the executive power speaks to.

18           But the point is, the supervisory controls are  
19 convoluted at best. The government, in order to apparently  
20 be able to effectuate that, would have to intervene and  
21 dismiss a case. At that point, the closer we get to trial  
22 there's real risk of a dismissal with prejudice. There's no  
23 right to dismissal without prejudice. And they may have  
24 blown the statute of limitations as opposed to being able to  
25 prosecute the case themselves, as opposed to being able to

1 replace Relator with somebody that they actually want in the  
2 position.

3 THE COURT: You sort of touched on something I  
4 didn't ask in your opening, the timeliness argument. I  
5 don't think it's a subject matter jurisdiction issue or I  
6 don't think it can be standing, right, because of *Stevens*?  
7 So in light of the fact that *Polansky* leaves some partial  
8 assignment, it has not abrogated *Stevens*, so it can't be  
9 subject matter jurisdiction, right?

10 MR. KRUEGER: Our subject matter jurisdiction is  
11 the argument that if there is no valid Article II -- valid  
12 under Article II cause of action, then the Relator would be  
13 without a cause of action, without standing to sue. But  
14 even if --

15 THE COURT: But isn't that different, though, a  
16 cause of action is different than -- or is that how that  
17 works, I guess is what I'm trying to say? Like they might  
18 still have standing, but not be in the zone of interest. I  
19 don't know. I'm just trying to figure out like if I don't  
20 agree that it's a subject matter jurisdiction issue, then  
21 what?

22 MR. KRUEGER: Then I think you're still absolutely  
23 free to address this question. As you pointed out, it's  
24 very, very common that constitutional challenges are raised  
25 at summary judgment. We are --

1 THE COURT: Just an abuse of discretion whether I  
2 think it's timely and unfair to the parties. What's the  
3 standard for raising a constitutional claim? I've certainly  
4 not seen it always raised as like an affirmative defense, it  
5 could just be raised as a 12(b)(6), but --

6 MR. KRUEGER: You know, the case law is mixed on  
7 this. We did a deep dive case law looking at this question  
8 and I did not find a single case in which a Court refused to  
9 address a pure legal issue, a constitutional challenge,  
10 because it wasn't pleaded in the answer. I'm not aware of  
11 any. Instead, cases like *Exactek* (ph) in this Circuit, the  
12 Court went ahead and reached it noting in particular the  
13 lack of any prejudice to the other side.

14 When the opposition was talking about it being  
15 untimely under Rule 12, that's just clearly not true,  
16 because Rule 12(c) allows this motion. It's not a 12(b)  
17 motion, Rule 12(c) motions can be brought -- whenever. So  
18 there's no statement in Rule 12 that says this is untimely.  
19 And there's -- and so the Court absolutely has discretion to  
20 address it, particularly when there's no prejudice to the  
21 other side.

22 When we had a significant discussion about do we  
23 have officers here, because I think, as you pointed out,  
24 this is a really clearcut case if Relators are exercising  
25 the power of officers, because there's no appointment, done

1 deal. And so --

2 THE COURT: Well, I think it's an open question  
3 whether they're in a continuous office. I think that's the  
4 hard part of officer.

5 MR. KRUEGER: Right. And I think when you have  
6 cases like *Morrison*, like *Donziger*, I don't know how you  
7 would distinguish those cases from Relators who are  
8 executing executive power on a continuous basis. This case  
9 has been going for four years now. The fact that it's a  
10 discrete particular case, *Donziger* points out isn't  
11 dispositive. And that sets it apart from some of these very  
12 older cases where, again, you might have a surgeon or an  
13 appraiser who is asked by a Federal officer to lend their  
14 subject matter expertise as to a very finite task that's  
15 part of a broader task being done by that officer.

16 THE COURT: Do you have a response to the  
17 government contractors example?

18 MR. KRUEGER: Yes, I wrote that one down too,  
19 because it's not the answer to the situation here for a  
20 couple of reasons.

21 First, and I think you asked my friend about that,  
22 that there's no examples of a government contractor being  
23 vested with the enforcement of Federal law as a power, like  
24 a prosecutor. He's give an example --

25 THE COURT: Litigation authority, is that the

1 divining line, litigation authority?

2 MR. KRUEGER: I'm gonna give you a couple of  
3 distinctions and that's one. And that's a really important  
4 one, because it has core executive power to bring an  
5 enforcement action and to exercise the enforcement  
6 discretion in the first instance to file a suit. So that  
7 would be different than, for example, if the government --  
8 if DOJ had picked a particular case and decided that it  
9 would be litigated and then went and hired a law firm to  
10 carry out the litigation under their supervision. This is  
11 more like Congress saying we hereby allow anybody to be a  
12 contractor to the government and file suit however they  
13 want.

14 So that gets to the second distinction. So first,  
15 enforcement of Federal law, but second --

16 THE COURT: Well, I think enforcement is a  
17 broad -- you mean litigation enforcement, right? Like if  
18 you have someone who is a contract worker at the border and  
19 they're arresting people or detaining people or whatever  
20 they're doing to help DHS, they're enforcing Federal law.  
21 In a discretionary capacity too, right? Like they're not  
22 just reevaluating the customs value of the goods that came  
23 in. That's a very fact determination. It's discretionary,  
24 is what I'm saying. So I don't think that gets you there, I  
25 think it has to be a litigation distinction, right?

1 MR. KRUEGER: I think it's part of it, but I  
2 want -- and with it you look at cases like *Nixon*, again,  
3 like *Buckley*, where the choice of bringing that suit,  
4 discretionary, but it's a significant thing to bring charges  
5 and then to be litigating. But with that, in a government  
6 contractor situation, those government contractors are  
7 always hired by an Article II officer under their close  
8 supervision and subject to removal or termination of the  
9 contract. Totally different than here, where anybody in the  
10 world can self-appoint without Article II having anything to  
11 do with it.

12 In fact, here, part of the problem is that  
13 Congress didn't like how Article II was doing False Claims  
14 Act work. Congress didn't like that DOJ wasn't more  
15 aggressive or whatever they thought. And so it goes right  
16 to the heart of separation of powers, that Congress here  
17 allowed anybody to self-appoint without an officer of  
18 Article II having a contract with that person or being able  
19 to terminate the contract. So I really think it's an apples  
20 and oranges.

21 So when, again, you asked opposing counsel for an  
22 example that had to do with prosecution, the best that he  
23 could point to was, well, some of these things existed at  
24 history. And so it gets to your history question again,  
25 which you have pointed out is perhaps what you think is the

1 hardest question here.

2           And I think there's a few points that we need to  
3 come back to. You've been asking what is the standard to  
4 assess it. And I think you should feel some level of  
5 comfort that a lot of research has been done here. Between  
6 what you've seen in all of our briefs, in *Stevens*, and the  
7 OLC memo, I won't call it an opinion, in the Law Review  
8 article by Prakash and other ones that he cites, there's  
9 been a lot of work and attention put into this. And what  
10 has been found is that the history is very uneven, very  
11 checkered, as to what you would deem as those not aggrieved,  
12 but cause of action *Qui Tams*.

13           So I don't think you should act as though we don't  
14 know the historical record here. We do. And the historical  
15 record is that what happened in England is not particularly  
16 pertinent, because we adopted a different separation of  
17 powers.

18           THE COURT: Wouldn't it be important, though, if  
19 there's 300 cases brought in the first decade of the  
20 enactment of those FCA-like case -- statutes and we just --  
21 they're all at the trial level and the record of them and no  
22 one contested them, wouldn't that be important? I feel like  
23 that would be important.

24           MR. KRUEGER: With all due respect, that's sheer  
25 speculation by opposing counsel that that was the situation.

1 You do have, again, all of the work that has been put into  
2 this, including by Professor Prakash and others. And nobody  
3 has come forward with an example -- or of a history of that.  
4 We know how to do historical research, people have put  
5 efforts into it.

6 And the answer is that the Qui Tams were not  
7 regularly used. In fact, the research is that they fell  
8 into disuse. And in fact, we know that there are lots of  
9 examples of abuse of them and a dislike of them, which led  
10 to the 1943 enactment of the False Claims Act pulling it  
11 back.

12 So again, I think what you have here is a  
13 situation that's so different than *Marsh*, with a long  
14 unbroken chain, point one. Point two, a situation where you  
15 don't have considered adoption of Qui Tams at the time of  
16 the framing. You have considered adopt -- you have  
17 consideration of the Appointments Clause, of the importance  
18 of removal, but you have no evidence of a thoughtfulness  
19 around allowing private individuals, 700 of them last year  
20 alone, under the False Claims Act self-appointing to execute  
21 for the executive branch.

22 I think, if anything, again, the historical  
23 record, as my colleague Mr. Engel pointed out, it may prove  
24 too much, because you have these examples of criminal  
25 statutes, larceny like you pointed out, at the time of the

1 framing.

2           If we're going to say that that historical record  
3 justifies what can happen today, because this decision or  
4 the principles articulating need to address what Congress  
5 can do in all manner of suits, it would be opening the door  
6 to things that I think everybody in the room would think are  
7 unthinkable, that you would allow private individuals to  
8 bring suit in the name of the United States or a criminal  
9 prosecution in the name of the United States, for example,  
10 larceny.

11           So your historical record is there. And the way  
12 to approach it is not, again, what my opposing counsel  
13 suggested of an absence of history means you grant judgment  
14 for the defendants here. It's the opposite, it's what you  
15 said, that we have this not even being a close case under  
16 the Appointments Clause or the Take Care Clause or the  
17 Vesting Clause given the Supreme Court's guidance in the  
18 last 20 years. And so when you have private individuals  
19 exercising core executive power who are not removable, who  
20 are not appointed, then you would need to have a very robust  
21 historical record to overcome what is a pretty clear  
22 constitutional violation.

23           The answer that you hear is, well, dismissal is  
24 equivalent to removal. That, of course, doesn't solve the  
25 Appointments Clause problem, but let me point for a moment

1 to why removal is not -- or dismissal is not the same as  
2 removal.

3           You pointed this out yourself, that dismissal ends  
4 an action. It's not the same as allowing the government to  
5 put its preferred actor in place. Accountability requires  
6 the President to be able to have the person that it wants  
7 litigating the lawsuit. Dismissal does not do that. To the  
8 contrary, dismissal comes, again, as far -- the litigant in  
9 the case comes with risks of the statute of limitations  
10 being blown, risks of a with-prejudice dismissal. And so if  
11 today the government became displeased with how the Relator  
12 is handling this case and wanted to intervene and dismiss  
13 today, it would face all of those risks. And what it can't  
14 do today is have a different person that it prefers  
15 litigating this case. Nor is it --

16           THE COURT: Except itself.

17           MR. KRUEGER: Except itself. But what would  
18 happen if that were the case? Then the Relator would get to  
19 remain as a party and not have her rights diminished. So,  
20 for example, we could get to trial and the Relator could  
21 take opposing positions on a motion in limine. The Relator  
22 could, for example, seek to examine a government witness  
23 more than the government would want that to happen at trial.  
24 That puts into view how absurd the statute is. In what  
25 other situation can a private individual litigate alongside

1 the government to enforce Federal law and take different  
2 positions than the government is taking?

3 THE COURT: Do you agree, though, that once  
4 intervened the Relator doesn't have preclusive effect on the  
5 government's positions? I wasn't aware of that until it was  
6 brought out, so I'm curious. What's your position on it?

7 MR. KRUEGER: Well, I think it depends on what we  
8 mean by preclusive effect. What the statute says is that  
9 the Relator's positions are not binding, but I think all  
10 that means is, for example, in my motion in limine --

11 THE COURT: So they can disagree.

12 MR. KRUEGER: Yeah. How does that help  
13 accountability? How does that help the government being  
14 able to have its person in place? It's the exact opposite  
15 of that.

16 And so when we talk about preclusion, to your  
17 point, if you don't have the government intervene, as in  
18 here, then the Relator will in fact bind the government by  
19 the preclusive effect of any decision on the merits in this  
20 case, again, without actually having a Federal officer  
21 litigating this case.

22 I'm taking a moment to see my notes. You've been  
23 very, very patient with all the counsel here today and we  
24 appreciate your time.

25 THE COURT: Ms. Estes, is there gonna be any

1 desire for surrebuttal on your part, just given that you're  
2 the other party? You're the only other party. I'm just  
3 asking.

4 MS. ESTES: The desire certainly, but I'll  
5 refrain, Your Honor, given the time we've spent already  
6 today.

7 THE COURT: Okay. Well, if there's anything else,  
8 let me know. I realize this is very lengthy, but I don't  
9 intend on having a subsequent oral argument on it, so...

10 MR. KRUEGER: I appreciate it, Your Honor. I'll  
11 wrap up here just with a last point, to come back to the  
12 Appointments Clause, because I think, as you said, that may  
13 be the most straightforward way to approach this case.

14 After *Morrison* I don't know how you could find  
15 that the Relator is not an officer. And *Morrison* has been  
16 already understood to be probably more lenient towards  
17 infringements on the separation of powers.

18 THE COURT: Outer limit.

19 MR. KRUEGER: The outer limit, that's right. As  
20 you pointed out, the Relator has an even broader mandate  
21 than the Independent Counsel in *Morrison*, who is confined to  
22 look only at a certain set of facts, was appointed by the  
23 Attorney General, and then was investigating just that  
24 circumscribed set of facts. Whereas here, again,  
25 self-appointed, able to litigated for four years plus, and

1 when doing so used the broad discovery powers that civil  
2 litigation entitles, including discovery far beyond what  
3 she'd be able to do if it were just her own injury, seeking  
4 a judgment that is remedied in the government's injuries,  
5 bringing essentially punitive treble damages, civil monetary  
6 penalties that, let's face it, basically exert settlements  
7 out of defendants in the vast majority of cases.

8           The False Claims Act has become of behemoth and it  
9 is not sufficiently accountable when over 700 people last  
10 year could self-appoint to litigate on behalf of the United  
11 States.

12           We appreciate the time. If you have any other  
13 questions, I would be happy to answer them.

14           THE COURT: No further questions.

15           MR. KRUEGER: Thank you, Your Honor.

16           MR. ENGEL: Your Honor, may I?

17           THE COURT: Yes. That applies if anyone else  
18 wants two more minutes or five minutes or whatever.

19           MR. ENGEL: I'll try to -- Mr. Singh had said that  
20 there was a white flag on the Property Clause and I just  
21 wanted to make sure that the record is clear here. What we  
22 see the False Claims Act's doing here is outsourcing a  
23 government function, a function that *Buckley* recognized is  
24 the civil enforcement of the laws. That's different from  
25 the hypothetical of whether the government in a particular

1 instance, whether Congress could transfer a particular  
2 chosen action, identifiable personal property to one person  
3 or the other.

4 THE COURT: If Congress had a -- right, an  
5 identifiable cause of action, they could reassign that.

6 MR. ENGEL: Yeah, I mean --

7 THE COURT: Similar to what happens in bankruptcy,  
8 right?

9 MR. ENGEL: I would say we would have the  
10 bankruptcy -- Congress sometimes will legislate against the  
11 backdrop of pending litigation. There are Supreme Court  
12 cases on this too, about whether and when they can kind of  
13 address these things. And so, you know, if Congress wanted  
14 to legislate under the Property Clause with respect to  
15 identifiable personal property, that would be a very  
16 different interest than what we're talking about here, which  
17 is essentially we are concerned that the executive branch is  
18 not doing enough to enforce Federal law and so we are, for  
19 all time to all comers, be they foreign or domestic,  
20 outsourcing to persons to litigate on behalf of the United  
21 States. And *Buckley* could not have been clearer to say that  
22 the civil litigation remedy is a core executive authority  
23 there.

24 Then the only other -- the other point, and I  
25 think the Court understands this. There's a question about,

1 well, here the government is saying save the False Claims  
2 Act, save the Qui Tam Relators. We're not involved, we're  
3 not taking a position on the merits, but we're okay with  
4 what -- how things are going here.

5           There is a list of Supreme Court cases in which  
6 the Solicitor General stood up at the Supreme Court and said  
7 the executive is okay with this, we're okay in Free  
8 Enterprise Fund with the PCAOB, we're okay in Arthrex with  
9 way the ALJ -- the patent ALJs handled this matter. And in  
10 both of those cases, and there's others out there, the  
11 Supreme Court said, no, that's not enough, because the  
12 purpose of the separation of powers is to ultimately ensure  
13 the liberty of the people --

14           THE COURT: The people, right.

15           MR. ENGEL: -- by ensuring that there's an  
16 accountable President who is making these decisions on  
17 behalf of the people and he can be held accountable. And  
18 the Qui Tam provisions of the False Claims Act are run  
19 directly opposite to that structure, where here the  
20 Department of Justice takes no position on the merits of  
21 this litigation and, yet, a private party is purporting to  
22 execute the laws. And so it's -- DOJ, can they be held  
23 accountable, is the President directing this litigation, is  
24 he not? Well, they said we heard about it and we decided  
25 not it intervene, we decided not to step in and now we take

1 no position. And this is the antithesis of accountability  
2 under the Constitution, not something that the executive  
3 branch can give up.

4 I very much appreciate your time this afternoon.

5 THE COURT: Thank you, Counsel.

6 Yes, ma'am.

7 MS. ESTES: If I may have one minute, Your Honor?

8 THE COURT: Yes. That's why I offered, because I  
9 realize --

10 MS. ESTES: One minute to confer --

11 THE COURT: Whomever.

12 MS. ESTES: I want to summarize only on one point,  
13 Your Honor. And I promise this will be less than a minute.

14 The realities of the case, and I want in  
15 particular to point to the instance in this case that  
16 counsel raised about the Court taking no position on the  
17 merits. It is not viewed in a silo.

18 THE COURT: The government, sorry?

19 MS. ESTES: Excuse me, the government.

20 THE COURT: I also have no position on the merits.

21 MS. ESTES: The government in its pleadings when  
22 it does a statement of interest say it has no position on  
23 the merits and counsel pointing to that as it not having  
24 oversight on the merits. But those are not viewed in a  
25 silo, that statement, and I want to make sure that that's

1 not viewed as some perception that when the government says  
2 that that it at writ large has no position on --

3 THE COURT: It's abandoned false supervisory  
4 powers.

5 MS. ESTES: All of it comes together.

6 THE COURT: I understood. I took it in context.

7 MS. ESTES: Okay. Thank you. That's our only  
8 last position, Your Honor. Thank you.

9 THE COURT: Okay. Thank you all. I realize this  
10 was much more lengthy than the docket indicated, but I  
11 appreciate everyone's argument and preparedness and I am  
12 considering not a mandatory, but maybe an invitation if  
13 there's any party that wants to do supplemental briefing on  
14 the historical question. I'm considering it. I understand  
15 that there has been much done, but my impression of the lift  
16 would be much more than perhaps counsel would want to do  
17 given economic realities of the case. So I'm just thinking  
18 through it.

19 Okay. If there's nothing further, then we're  
20 adjourned. Thank you.

21 (Proceedings adjourned.)

22

23

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25

1 UNITED STATES DISTRICT COURT )  
2 MIDDLE DISTRICT OF FLORIDA )

3  
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18 United States District Court  
19 Middle District of Florida  
20 Tampa Division  
21 Date: 5/8/2024

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