Note

The Uninjured Plaintiff: Constitutional Standing of Qui Tam Plaintiffs After *Vermont Agency of Natural Resources v. United States ex rel. Stevens*

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ARTICLE III OF the United States Constitution allows the judiciary to try only "Cases [and] . . . Controversies,"[1] a phrase that is used to describe when a case is justiciable, or "fit for judicial disposition."[2] One of the essential elements of justiciability is constitutional standing to sue, developed in depth in *Lujan v. Defenders of Wildlife*.[3] Standing "is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'"[4] If a party has no standing to sue, he has not presented the court with a case or controversy as required by the Constitution. In particular, the standing doctrine in *Lujan* requires that the plaintiff personally suffer an actual harm.[5]

The constitutional standing requirement is at odds with a form of enforcement known as the qui tam suit.[6] A qui tam suit allows a private whistleblower to bring a suit for fraud on behalf of the federal government and recover a bounty. For example, assume a hypotheti-

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* Class of 2003. The author would like to dedicate this Note to the memory of her grandfather, Alfred LeRoy Gausewitz, first Dean of the University of New Mexico School of Law.

1. U. S. CONST. art. III, § 2.

2. Robert J. Pushaw Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994).

3. 504 U.S. 555 (1992).

4. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881–82 (1983).

5. *See Lujan*, 504 U.S. at 560.

6. "Qui tam" (pronounced *key tam*) is short for the Latin phrase, "qui tam pro domino rege quam pro si ipso in hac parte sequitur," which means "[w]ho sues on behalf of the King as well as for himself." BLACK'S LAW DICTIONARY 1251 (7th ed. 1999).

cal clinical technician, Leslie, works at a medical laboratory that performs testing procedures paid for by Medicare. She believes, rightly or wrongly, that her employer is classifying the procedures incorrectly in an attempt to get a higher reimbursement from Medicare, thereby bilking the government. Although Leslie has suffered no injury (since the United States is the victim of this fraud), she can file a qui tam suit on behalf of the government, and collect a percentage of the government's recovery for doing so.[7]

Clearly, the "[c]urrent standing doctrine and . . . qui tam practice [were] on a collision course."[8] This collision occurred when the Supreme Court decided *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,[9] with the standing doctrine suffering the casualties. The Court's ruling that the government's injury had been assigned to Mr. Stevens bypassed the standing doctrine.[10] This Note discusses the holding of *Stevens*, both in light of the standing doctrine, and in light of what the standing doctrine implies about constitutional separation of powers. Part I provides the background for qui tam enforcement procedures and the standing doctrine. Part II discusses specifics of the *Stevens* case. Finally, Part III analyzes and criticizes the *Stevens* decision for allowing a private, uninjured plaintiff to bring suit for an injury suffered by the government, even if the government has concluded that the suit is without merit. In allowing self-appointment by the whistleblower (generally called the "relator"), the Court has tampered with the separation of powers and sidestepped the prosecutorial procedures of the Executive Branch, which work to advance public policy rather than to achieve personal pecuniary gain. Specifically, Congress has allowed a private citizen to "take Care that the Laws be faithfully executed,"[11] a duty of the Executive Branch. Furthermore, the Legislative Branch has allowed a private citizen to appoint himself,[12] although appointment is another responsibility reserved by the

7. The statute that provides the basis for filing the suit is the False Claims Act (FCA) of 1986, 31 U.S.C. § 3729 (1994), described at length in the Background section of this Note, *infra* Section I.

8. Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2243 (1999).

9. 529 U.S. 765 (2000).

10. *See id.* at 773.

11. U. S. CONST. art. II, § 3.

12. The whistleblower/relator takes the complaint to the government and can proceed without government intervention. See 31 U.S.C. § 3730(b)(4) (1994). Thus, in the example, Leslie has decided to appoint herself to prosecute her employer. The government has no hand in her appointment.

Constitution to the Executive Branch.[13] Violation of the separation of powers is troublesome, given that "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers."[14]

I. Background

A. The False Claims Act and Qui Tam Suits

In 1986, Congress passed major changes to the Civil War era False Claims Act ("FCA").[15] The FCA gives a cause of action to the United States to sue any person who knowingly presents a fraudulent claim to the government.[16] The FCA has frequently been used to prosecute defense contractors[17] for excessive charges and health care providers for Medicare violations.[18] The 1986 amendments to the FCA strengthened it by adding the qui tam suit,[19] enabling a whistleblower to bring the suit and collect a bounty.[20] These amendments were made largely in response to scandals at the Department of Defense, notably the infamous $640 toilet seat cover.[21]

The hypothetical laboratory technician, Leslie, is the relator. She begins her suit by filing an action and providing any supporting evidence. The Department of Justice ("DOJ") then has sixty days in which to investigate the charges[22] and decide whether or not to intervene and take partial control of the suit. If the DOJ finds that there is not enough merit to the claims for it to join in the suit, Leslie has the option of continuing the suit on her own.[23] She may very well decide to do so, given that her reward could be as high as thirty percent of any proceeds that the government collects against her employer.[24] The statute encourages her qui tam suit by guaranteeing her costs,

13. *See* U. S. CONST. art. II, § 2.

14. Clinton v. New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

15. False Claims Act of 1986, 31 U.S.C. §§ 3729–3733 (1994).

16. 31 U.S.C. § 3729(a).

17. *See, e.g.*, United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743 (9th Cir. 1993).

18. *See, e.g.*, Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514 (5th Cir. 1999).

19. 31 U.S.C. § 3729(a).

20. 31 U.S.C. § 3730(d)(2).

21. *See, e.g.*, James Gerstenzang, *Admiral Removed over High-Priced Ashtrays*, L.A. TIMES, May 31, 1985, § 1 at 4.

22. 31 U.S.C. § 3730(b)(2) (1994).

23. 31 U.S.C. § 3730(b)(4) (1994).

24. 31 U.S.C. § 3730(d)(1) (1994).

expenses, and attorneys' fees.[25] If the DOJ later decides to intervene, Leslie will still retain partial control over the course of the litigation.[26]

B. The Standing Requirement

The Supreme Court has ruled that before a suit can be litigated, the plaintiff must have standing to bring the suit.[27] In *Lujan*, the Court delineated the requirements a plaintiff must meet in order to have standing: he must have suffered an injury in fact that was both caused by the violation and is redressable by the suit.[28] The injury must be concrete and particularized in the sense that it "affects the plaintiff in a personal and individual way."[29] Essentially, *Lujan* requires that only a party who has suffered an actual injury can bring a suit. As a result, *Lujan* found an environmental group lacked sufficient standing to challenge the legality of government action, because an increase in the rate of extinction of particular species is not a sufficiently particularized injury.[30]

If Leslie pursues her qui tam action against her employer, she will be suing for an injury to a third party, namely the United States government. She has suffered no injury personally, since excessive Medicare charges are not "[an] invasion of a legally protected interest"[31] held by Leslie. While arguably as a citizen, she suffers an injury when the government is defrauded, the Supreme Court rejected this line of reasoning, insisting that the injury must consist of more than "every citizen's interest in the proper application of the Constitution and laws . . . ."[32] Attempts to reconcile constitutional standing with qui tam suits have required both courts and scholars to scramble to find a basis for allowing an uninjured plaintiff to bring suit.

Prior to the Supreme Court decision in *Stevens*, the circuit courts based their findings of standing on a variety of theories. The Second Circuit concluded that a relator's interest in receiving the bounty was a sufficient interest to give standing.[33] Other circuit courts have

25. Leslie will receive, in addition to the bounty, "reasonable expenses, which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs." 31 U.S.C. § 3730(d)(2).

26. 31 U.S.C. § 3730(c)(1) (1994).

27. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

28. *See id.* at 560–61.

29. *Id.* at 560 n.1.

30. *See id.* at 562–63.

31. *Id.* at 560.

32. *Id.* at 573.

33. *See* United States *ex rel.* Kreindler v. United Techs. Corp., 985 F.2d 1148, 1153–55 (2d Cir. 1993).

pointed out that qui tam suits have a long history,[34] including informer statutes passed by the First Congress,[35] as evidence that they are presumptively constitutional. Both circuit courts[36] and legal scholars[37] have argued that the United States assigns its injury to the relator. Justice Scalia, in *Stevens*, concluded that the long history of qui tam actions combined with the notion that the United States has assigned its injury were sufficient to find standing.[38]

II. The Case: *Vermont Agency of Natural Resources v. United States ex rel. Stevens*

A. The Parties

Jonathan Stevens, the relator, brought this qui tam action against his former employer, the Vermont Agency of Natural Resources (the "Agency"), alleging that it had submitted false claims to the Environmental Protection Agency ("EPA"). The Agency received grants from the EPA which provided a substantial amount of the budget of an Agency subdivision.[39] Stevens claimed that the Agency failed to report accurately the time employees spent in connection with the grants, submitted excessive salary claims, and as a result received more funding then it was entitled to.[40]

B. Procedural History

In May 1995, Stevens filed a copy of his complaint and supporting evidence with the United States, which allowed the government to investigate and decide whether to intervene and take part in the action.[41] After investigating, the United States chose not to intervene in Stevens's action.[42] In March 1997, the Agency moved to dismiss the

34. *See, e.g.*, United States *ex rel.* Milam v. Univ. of Tex., 961 F.2d 46, 49 (4th Cir. 1992); United States *ex rel.* Hall v. Tribal Dev. Corp., 49 F.3d 1208, 1212 (7th Cir. 1995).

35. *See* J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 541 (2000).

36. *See, e.g.*, United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743 (9th Cir. 1993); United States *ex rel.* Kreindler v. United Techs. Corp., 985 F.2d 1148 (2d Cir. 1993).

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

38. *See* Vt. Agency of Natural Res. v. United States *ex rel* Stevens, 529 U.S. 765, 777–78 (2000).

39. *See* United States *ex rel.* Stevens v. Vt. Agency of Natural Res., 162 F.3d 195, 198 (2d Cir. 1998).

40. *See id.*

41. *See id.* at 199.

42. *See id.*

action, arguing the Eleventh Amendment barred the action against a state.[43] In May 1997, the district court denied the motion to dismiss, and the Agency filed an interlocutory appeal. The proceedings were stayed, pending the outcome of the appeal.[44] The United States then intervened in the appeal "to support the decision of the district court."[45] The Second Circuit affirmed the denial of the Agency's motion[46] and the Supreme Court granted certiorari in 1999.[47]

C. The Parties' Contentions

The Supreme Court addressed two issues in *Stevens*: first, whether "a private individual may bring suit in federal court on behalf of the United States,"[48] and second, whether such an action may be brought against a state.[49]

The Agency argued that Jonathan Stevens, as an uninjured party, lacked the constitutional standing required to bring a suit.[50] As the circuit court noted, "it is the government that has been injured . . . ."[51] Stevens, the Agency argued, suffered no apparent *injury in fact*, an essential element of standing.[52]

Stevens, on the other hand, "contend[ed] that he [was] suing to remedy an injury in fact suffered by the United States."[53] Although the injury suffered is to the United States, Stevens maintained that he could legitimately bring suit on behalf of the government's injury and not his own.

The Court concluded that a lack of standing did not bar the suit, because the history of qui tam and assignment of the government's injury were sufficient to establish constitutional standing.[54] Ultimately,

43. *See id.*

44. *See id.*

45. *Id.*

46. *See id.* at 198.

47. *See* United States *ex rel* Stevens v. Vt. Agency of Natural Res., 162 F.3d 195 (2d Cir. 1998), cert. granted, 527 U.S. 1034 (U.S. Jun. 24, 1999) (No. 98-1828).

48. Vt. Agency of Natural Res. v. United States *ex rel* Stevens, 529 U.S. 765, 768 (2000).

49. *See id.* This Note is concerned only with the first of these issues, and does not analyze the Eleventh Amendment issue.

50. *See* Brief of Amicus Curiae Chamber of Commerce of the United States at 7, Vt. Agency of Natural Res. v. United States. *ex rel.* Stevens, 529 U.S. 765 (2000) (No. 98-1828); *see also* 162 F.3d at 220–21 (Weinstein, J., dissenting).

51. United States *ex rel* Stevens v. Vt. Agency of Natural Res., 162 F.3d 195, 202 (2d Cir. 1998).

52. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

53. Vt. Agency of Natural Res. V. United States *ex. rel.* Stevens, 529 U.S. 765, 771 (2000).

54. *See id.* at 778–79.

the Court held that the Eleventh Amendment prevented the suit against a government agency.

D. The Court's Rationale

1. The Historical Basis of Qui Tam Actions

The Court concluded that the United States' injury in fact conferred standing on Mr. Stevens in large part because of "the long tradition of qui tam actions in England and the American Colonies."[55] The decision pointed out that "history is particularly relevant to the constitutional standing inquiry"[56] because "cases and controversies" has been interpreted to mean the type of disputes traditionally solved by the courts.[57]

Tradition, by definition, is best examined through the lens of history, because traditions develop over time. The *Stevens* decision contains a lengthy description of the history of qui tam actions,[58] noting that statutes allowing uninjured informants to sue on behalf of the king existed as early as 1331.[59] The Court found that qui tam actions were common in colonial America, and that the First Congress passed "a considerable number of informer statutes."[60] Clearly, if the authors of the Constitution—many of whom were members of the First Congress—passed informer statutes with qui tam-like provisions, such provisions must pass constitutional muster. The Court concluded that the history of qui tam actions is "well nigh conclusive"[61] with respect to the question of whether qui tam actions constitute cases and controversies to be solved by the judicial process.

2. Assignment of the Government's Injury

The Supreme Court in *Stevens* found "adequate basis for the relator's suit for his bounty . . . in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor."[62] The rationales for "representational standing" are that such suits have

55. *Id.* at 774.
56. *Id.*
57. *See id.*
58. The *Stevens* decision includes six long paragraphs on the history of qui tam actions, and one paragraph of less than half a page on the assignment of the government's injury. *See id.* at 774–78.
59. *See id.* at 775.
60. *Id.* at 776.
61. *Id.* at 777.
62. *Id.* at 773.

been entertained in the past and that they are similar to suits brought by subrogees.[63]

3. *Stevens* Expresses No View on Separation of Powers Issues

After finding that "a qui tam relator under the FCA has Article III standing[,]"[64] the Court added a footnote, "express[ing] no view on the question whether qui tam suits violate Article II, in particular the Appointments clause of § 2 and the "take Care" clause of § 3."[65] Although a circuit court decision held,[66] and an amicus brief argued,[67] that a finding of legitimate standing implies a violation of Article II, the Court chose not to address this issue.

III. Analysis/Criticism

Finding that qui tam suits are constitutional rests, like a colonial-era footstool, on three legs. The first two legs are the historical and theoretical justifications for finding standing where, in the traditional sense, none exists. The third leg requires that a qui tam statute be in accord with the Appointments and "take Care" clauses of Article II of the Constitution. Although *Stevens* found the first two legs exist, this Note argues that they are, at best, shaky, and the third leg is simply nonexistent. If a qui tam relator, such as Mr. Stevens, can merely appoint himself prosecutor for the purposes of enforcing federal legislation, the Article II duties of the Executive Branch have been bypassed.

A. Qui Tam, Standing, and *Stevens*

While qui tam suits may have a lengthy history,

> [i]t is revolting to have no better reason for a rule than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down vanished long since, and the rule simply persists from imitation of the past.[68]

As the Court in *Stevens* noted, the earliest English qui tam statutes arose roughly around the time of Henry IV (1366–1413) and were

63. *See id.* at 773–74.

64. *Id* at 778.

65. *Id.* at 778 n.8.

66. *See* Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514 (5th Cir. 1999).

67. *See* Brief of Amicus Curiae Chamber of Commerce, *Stevens* (No. 98-1828), 1999 WL 1128265, at 6.

68. Oliver Wendell Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 469 (1897), *reprinted in* 110 HARV. L. REV. 991 (1997).

transplanted from England to the colonies in the New World.[69] Although qui tam actions existed at the time the Framers wrote the Constitution, "the grounds upon which [qui tam] was laid down have vanished long since."[70]

Unlike modern day America, fourteenth century England had no formalized law enforcement branch of the government. "England relied heavily upon qui tam informers to perform the many tasks that today are the work of . . . prosecutors."[71] In the days before the modern regulatory state, there were no public prosecutors, district attorneys, or police departments in either England or America. These prosecutorial resources did not develop until well into the nineteenth century.[72] Consequently, if private individuals did not enforce the laws, no one did. Any historical reliance of colonial governments on private enforcement of the laws was more likely a product of the times than an indication that the Framers originally intended qui tam statutes to be constitutional.

Not only have the times changed, but the historical pedigree of qui tam actions is not as pure as the *Stevens* opinion implies. Although, as the Court points out, the First Congress passed qui tam legislation,[73] the "early statutes granting bounties were simply informer laws that granted informers a reward but no right to sue on behalf of the government."[74] Additionally, of the statutes that did authorize private actions, "most redressed injuries suffered by private individuals—not by the government exclusively."[75] In *Stevens*, as in all FCA qui tam actions, the private action redresses injuries suffered only by the government.

It is not sufficient to merely point out that current legislation mirrors legislation passed by the Framers. In *Marbury v. Madison*,[76] Chief Justice Marshall's opinion struck down the constitutionality of an act of the First Congress, which James Madison, an author of the Constitution, was one of the parties.[77] The First Congress also passed a statute requiring the public whipping of thieves,[78] something that would

69. *See Stevens*, 529 U.S. at 774. Regarding the origins of qui tam actions, *see also* Beck, *supra* note 35 at 565–75.

70. Holmes, *supra* note 68, at 469.

71. Beck, *supra* note 35, at 566.

72. *See id.* at 601.

73. *See Stevens*, 529 U.S. at 776.

74. Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514, 519 (5th Cir. 1999).

75. *Id.*

76. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

77. *See id.* at 173–174.

78. Marsh v. Chambers, 463 U.S. 783, 814 n.30 (1983) (Brennan, J., dissenting).

certainly be considered cruel and unusual punishment today, and thus forbidden by the Eighth Amendment.[79]

Moreover, as the *Riley* court noted, traditionally "[w]hen the Supreme Court has deferred to history to validate the constitutionality of a practice, the practice has been one that was extensively debated by the adopting Congress . . . . "[80] For example, when the Supreme Court held that the appointment of paid chaplains to open legislative proceedings did not violate the First Amendment, they reviewed "extensive debates" by the Framers regarding the constitutionality of the practice.[81] Nothing suggests the First Congress debated the adoption of qui tam actions, or considered their constitutionality at all. In short, "[q]ui tam actions that are brought by uninjured relators and in which the government does not intervene simply do not possess historical credentials worthy of blind deference."[82]

The *Stevens* decision ignores a crucial aspect of the history of both qui tam and constitutional standing. While qui tam has historical roots in fourteenth century England, standing is a twentieth century doctrine.[83] The Framers, even if they had considered the constitutionality of qui tam actions, could not have considered the more modern doctrine of standing. "Standing is a modern game, and courts that uphold qui tam on historical grounds are playing by archaic rules."[84]

At the time the Constitution was written, a justiciable case or controversy was thought to be any form of action "so long as it was known to the common law in the era of the Framers."[85] Qui tam, as has been discussed, was part of the common law of that time, and would have presented no difficulty to the Framers as an acceptable case or controversy. "But the modern standing doctrine replaces attention to the forms of action with new requirements—particularly the requirement that the plaintiff allege injury in fact."[86] In other words, qui tam actions were constitutional when the Constitution was written, because they met the eighteenth century definition of a "case or controversy".

79. *See* U.S. CONST. amend. VIII (prohibiting "cruel and unusual punishments").

80. *Riley*, 196 F.3d at 519.

81. *See id.* at 519 n.10.

82. *Id.* at 519.

83. *See* Edward A. Harnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine is Looking For Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2241 (1990) (showing that "insistence on a personal injury in fact as a requirement of Article III is a relatively recent invention").

84. Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543, 549 (1990).

85. *Id.*

86. *Id.*

However, this does not address the issue of whether qui tam meets the elements of the modern definition of a "case or controversy," particularly the element of standing.

Modern constitutional doctrines must be applied to all statutes in an evaluation of constitutionality, even if the statutes have distinguished historical roots. For example, enforcement of racial inequality has a long history in American traditions and in American law.[87] This creed has been soundly trumped by the twentieth century doctrine of racial integration.[88] To argue that history outweighs modern requirements, such as constitutional standing, is to toss out a number of recent constitutional decisions.

B. Assignment of Injury

The *Stevens* decision holds that the relator is an assignee who "has standing to assert the injury in fact suffered by the assignor."[89] This is in keeping with the holding of the Ninth Circuit that "the FCA effectively assigns the government's claims to the qui tam plaintiffs" who are then free to sue for the injury suffered by the government.[90] Under the theory of assigned injury, "the FCA's qui tam provisions operate as an enforceable unilateral contract."[91] There are several weaknesses with this assignment theory.

First, there is no mention of assignment in the FCA, and "[c]ourts may not simply rewrite statutes in order to make them constitutional."[92] In *Stevens,* the Court reads an assignment of injury into the FCA in order to find standing where none exists, since Congress did not include it. "Congress cannot circumvent the standing requirement by conferring standing, even if it does so using the assignment mechanism."[93] The Supreme Court has held that no "congressional enactment . . . can lower the threshold requirement for standing under Article III."[94] In short, standing is a requirement of the Constitution, and Congress may not override the requirement via legislative

87. *See, e.g.,* Plessey v. Ferguson,163 U.S. 537, 543 (1896).

88. *See, e.g.,* Brown v. Board of Educ., 347 U.S. 483, 493–94 (1954).

89. Vt. Agency of Natural Res. v. United States *ex. rel.* Stevens, 529 U.S. 765, 773 (2000).

90. United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 748 (9th Cir. 1994).

91. *Id.*

92. Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514, 540 (1999) (DeMoss, J., concurring).

93. *Id.*

94. Valley Forge Christian College v. Am. United for Separation of Church and State, Inc., 454 U.S. 464, 488 n.24 (1981).

means. It is dubious practice for the Court to add what Congress left out so a statute might be found constitutional.

Moreover, if the Court's assignment theory treats the qui tam provisions as a contract, it does so incorrectly. Assignment, under contract law "extinguishes the assignor's right"[95] and an assignment is not considered effective if the assignor maintains any control over that which he assigned.[96] Not only does the government, as assignor, maintain a right to collect against a defendant, it receives no less than seventy percent of any recovery.[97] Additionally, the government maintains at least some control over the course of the litigation.[98]

In short, "[t]here are simply too many differences between a valid assignment and the FCA's qui tam provisions to conclude that the FCA's qui tam provisions set out a valid Congressional assignment of the Executive right to prosecute a case for injury to the government."[99]

C. Separation of Powers

The doctrine of separation of powers is an essential element of both the Constitution and the government of the United States. While not explicitly written into the Constitution, the idea that the three branches of government may not infringe upon one another's powers is a vital part of our government. Indeed, the Supreme Court has said "within our constitutional scheme, the separation of governmental powers is essential to the preservation of liberty."[100] Although the separation of powers doctrine is not absolute,[101] the Constitution delineates specific duties to be performed by specific branches of government.

The requirement that a litigant have standing to bring a suit is constitutional in nature, in part because it helps preserve "the Constitution's central mechanism of separation of powers."[102] When, as in *Stevens*, qui tam relators are found to have constitutional standing, two other powers of the Executive Branch are invaded by the Legislative Branch: namely, the power to appoint and the power to see that the

95. E. ALLEN FARNSWORTH, CONTRACTS 709 (1999).
96. *See id.* at 709 n.6.
97. 31 U.S.C. § 3730(d)(1)–(2) (1994).
98. 31 U.S.C. § 3730(c) (1994).
99. Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514, 540 (5th Cir. 1999).
100. Mistretta v. United States, 488 U.S. 361, 380 (1988).
101. For example, although the Legislative Branch has the power to pass laws, the Executive has the power to veto them. *See* U.S. CONST. art. I, § 7.
102. *See* Lujan v. Defenders of Wildlife, 540 U.S. 555, 559 (1992).

laws are faithfully executed.[103] While *Stevens* holds qui tam relators have standing and thus do not breach the separation of powers doctrine, a violation of both the Appointments and the take Care clauses logically flows from such a holding. It is worth noting again that the *Stevens* Court specifically chose to "express no view" on these two issues,[104] leaving the door open to further constitutional challenges to FCA qui tam actions.

1. The Appointments Clause

The Executive Branch of the government has the power to appoint "superior officers of the United States," while the Legislative Branch can vest the appointment power of "inferior officers" in "the President alone, in the Courts of Law, or in the Heads of Departments . . . ."[105] Qui tam relators, however, are not appointed by Congress or by the President. The qui tam provisions permit relators to appoint themselves as prosecutors for the United States. A similar attempt to evade the Appointments Clause was recently rejected by the Supreme Court in *Printz v. United States*,[106] a case involving the Brady Handgun Violence Prevention Act (the "Brady Bill").[107]

The Brady Bill required the chief law enforcement officer ("CLEO") of each state to set up a means for performing background checks on potential gun buyers. The Court held the appointment of state officials by Congress to execute federal laws violated the Appointments Clause.[108] If the Legislative Branch is prohibited from appointing state officers to carry out federal laws, private individuals who appoint themselves are even further removed. Congress, in the FCA, has vested appointment power in private citizens, who appoint themselves as prosecutors, removing this power from the Executive and placing it in private hands. This is particularly obvious in cases like

103. *See* U.S. Const. art. II, §§ 2, 3.

104. Vt. Agency of Natural Res. v. United States *ex. rel.* Stevens, 529 U.S. 765, 778 n.8 (2000).

105. U.S. CONST. art. II, § 2. The "appointments clause" reads in relevant part:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Id.

106. 521 U.S. 898 (1997).

107. 18 U.S.C. § 922 (1994).

108. *See Printz*, 521 U.S. at 923.

Stevens where, when given the opportunity, "[t]he United States declined to intervene in the action."[109] Although the Appointments Clause allows Congress to vest an appointment of an inferior officer "in the Heads of Departments[,]"[110] no head of a department appointed Stevens. Instead, by declining Stevens' invitation to join in the prosecution, the government effectively disowned him.

While the argument could be made that the Appointments Clause is irrelevant because relators are not officers and therefore need not be appointed, the reasoning is circular. If relators are not appointed, they cannot prosecute. The Supreme Court has clearly mandated that litigation on behalf of the United States "may be discharged only by persons who are 'Officers of the United States.'"[111] Thus, Stevens must be properly appointed or he has no authority to litigate on behalf of the United States.

2. The Take Care Clause

The Constitution provides that the President "shall take Care that the Laws be faithfully executed."[112] The Supreme Court of the United States has held that not only does this clause give the Executive Branch the power to enforce the laws, but that this power includes the authority "to investigate and litigate offenses against the United States."[113] The FCA does this by granting the Attorney General the right and the responsibility to "diligently . . . investigate" violations of the FCA and bring a legal action when investigation warrants it.[114] The qui tam provision undermines this executive power by taking it away from the Attorney General and placing it in private hands.[115]

In *Stevens*, the Attorney General decided there was no merit to the claimed violation of the FCA.[116] However, allowing a private, self-appointed prosecutor to proceed with the litigation and "take Care" that the law was being faithfully executed removed the power from the Executive Branch and violated the doctrine of separation of powers. As the *Riley* court noted, when the government refuses to intervene in a suit and a private citizen then sues on behalf of the

109. *Stevens*, 529 U.S. at 770.
110. U.S. CONST. art. II, § 2.
111. Buckley v. Valeo, 424 U.S. 1, 140 (1976).
112. U.S. CONST. art. II, § 3.
113. *Buckley*, 424 U.S. at 138.
114. *See* 31 U.S.C. § 3730(a) (1994).
115. *See* 31 U.S.C. § 3730(b) (1994).
116. *See* Vt. Agency of Natural Res. v. United States *ex. rel.* Stevens, 529 U.S. 765, 770 (2000) (the United States "declined to intervene in the action").

government anyway, it "removes from the Executive Branch the prosecutorial discretion that is at the heart of the President's power to execute the laws."[117]

3. Policy Issues: Public Good Versus Private Profit

As the *Stevens* decision noted, "the informer statutes [in England] were highly subject to abuse . . . ."[118] Informer statutes in England were abolished in 1951, largely because they had been supplanted by public police and prosecutors and little remained but the abuses.[119] Similar problems have occurred with qui tam legislation in the United States.

First, allowing private individuals to bring suits for the government eliminates prosecutorial discretion. "Ideally, a public prosecutor exercises discretion in choosing prosecution targets in order to avoid applying a statute in ways that undermine the public interest."[120] A qui tam relator may have many motivations, but will be inclined to weigh the possibility of a lucrative bounty more heavily than any broader issues of public policy raised by a particular prosecution, such as fundamental fairness and the overall impact on the treasury. "The result is that informers pursue litigation that disinterested prosecutors would consider contrary to the public good."[121]

This is not merely a theoretical quibble. Relators have pursued cases on behalf of the United States even when the government viewed the case as directly *adverse* to the government's interests. In 1997, the Supreme Court heard a case where the relator filed a suit against a defense contractor based on allegations of mischarging.[122] The government, during the course of the investigation, determined that the defendant actually saved the government money, but the relator proceeded unsuccessfully with the case in an attempt to disprove the findings.[123] Additionally, qui tam relators suffer from a clear conflict of interest between their own financial gain and the public good. Returning to the hypothetical, Leslie can pursue her claim against her employer without considering "the public impact of the litigation, the

117. Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514, 526 (5th Cir. 1999).

118. *Stevens*, 529 U.S. at 775.

119. *See* Beck, *supra* note 35, at 607–08.

120. *Id.* at 583.

121. *Id.*

122. *See* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 943 (1997) (relator alleged a $50 million overcharge, in spite of the Government's determination that the defendant's action saved money).

123. *See id.* at 943 n.1.

culpability of the defendants, the fairness of a particular litigation strategy, or similar matters that might influence a public prosecutor."[124] If Leslie becomes aware that in qui tam cases where there has been a recovery, "the average amount paid to the informer has been $987,000,"[125] her interest in any other aspects of the litigation is likely to be minimal. A prosecutor might look at Leslie's claims and decide the violation is primarily technical, and her employer is not particularly culpable; further, vigorous prosecution could cause the business to fail, harming the community and causing a net loss to the treasury in lost tax revenue. The DOJ might well conclude that prosecutorial discretion demands the case not be pursued. Since Leslie's interest is primarily financial and personal, she will be tempted to continue the action in hope of a healthy payoff. "The financially motivated informer will be relatively insensitive both to the goals of a regulatory regime and the social costs imposed by enforcement because neither directly impacts the collection of bounties."[126] The blatant conflict of interest between the good of the public and the benefit of the relator creates a serious public policy problem.

Conclusion

The *Stevens* decision left the door open for future qui tam defendants to make strong arguments that the FCA's qui tam statutes are unconstitutional because they allow the appointment of private prosecutors who take enforcement of the law into their own hands, particularly in pursuing a case the DOJ has declined. The congressional removal of law enforcement power from the Executive Branch in these cases presents a high constitutional hurdle for qui tam suits to clear. Were Congress to modify the FCA so that relators could not pursue cases without the consent of the DOJ, many of the constitutional and policy problems with the statute would disappear, since the government would sue as the injured party and allow the DOJ to exercise the requisite prosecutorial discretion. Relators could still come forward with legitimate claims of fraud because they would still be eligible for a bounty. Until such statutory changes take place, the separation of powers issues should stymie future qui tam prosecutions in which the government has declined to join.

124. Beck, *supra* note 35, at 616.
125. *Id.* at 624.
126. *Id.* at 622.