

What Does it Mean When the Attorney General Thinks The False Claims Act's Qui Tam Provision is an “Abomination” and “Unconstitutional”? We May Soon Find Out.

by John Marti and Alex Hontos

President Donald Trump's nominee for Attorney General, William Barr, is in the news for a June 2018 memo to top Justice Department officials criticizing special counsel Robert Mueller's obstruction-of-justice investigation. While the June memo may create questions at his upcoming confirmation hearing, his views about the False Claims Act have received far less attention and have significant consequences for the Department's enforcement strategy and, indeed, the very viability of the FCA's *qui tam* provision.

Before serving as Attorney General under George H. W. Bush, Barr served in the Department's Office of Legal Counsel, where he provided legal advice to the President and executive branch agencies. In July 1989, Barr authored a memorandum to then Attorney General Dick Thornburgh on the “Constitutionality of the *Qui Tam* Provisions of the False Claims Act.” The [memo](#), addressing what Barr considered “the most important separation of powers question [Thornburgh would] have to address as Attorney General,” argues that the *qui tam* provisions of the False Claims Act were “patently unconstitutional” and that “this [was] not even a close question.”

The 21-page memo argues that the *qui tam* provisions violate the Appointments Clause, the Article III standing doctrine, and the doctrine of separation of powers. Barr wrote that private *qui tam* actions are a “devastating threat to the Executive's constitutional authority and to the doctrine of separation of powers,” and lamented that Congress “will have carte blanche to divest the Executive Branch of its constitutional authority to enforce the laws,” instead vesting that authority in “its own corps of private bounty hunters.” Compared to the special-prosecutor statute, which applies only in narrow circumstances, Barr viewed the *qui tam* provisions as “far more dangerous: **there is simply no way to cage this beast.**”

Whether Barr still adheres to these views is an open question. But in 2001, as part of an [interview](#) with the University of Virginia's George H. W. Bush Oral History Project, Barr doubled-down on his position: “[T]he *qui tam* statute . . . is basically a bounty hunter statute that lets private citizens sue in the name of the United States and get a bounty. I

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felt then, and feel now, that [it] is an abomination and a violation of the appointments clause under the due powers of the President as well as the standing issue of the Supreme Court.” Barr made this statement **after** the Supreme Court had held in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), that a *qui tam* relator under the FCA has Article III standing, and after numerous circuit courts upheld the constitutionality of the *qui tam* provisions under the separation of powers doctrine and Appointments Clause. See *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 758 (5th Cir. 2001) (en banc); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1155 (2d Cir. 1993); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 757 (9th Cir. 1993).

For those who handle FCA cases, 2018 was one of the most important years in recent memory—from the fallout of the Supreme Court's decision in *Escobar*, to several significant circuit splits, and to key sub-regulatory changes from the Brand Memo to the Granston Memo. But should Barr become the next Attorney General, he may again attack the constitutionality of private whistleblower actions, which have more than doubled in number since 2001. 2019—and a Department led by Barr—may be far more interesting. Stay tuned.