Fox Rothschild Podcast

The Presumption of Innocence

Episode 82: Is Qui Tam Unconstitutional? The False Claims Act's Constitutional Reckoning

Featuring Matt Adams, Morgan McCall Reece and Joe DeMaria of Fox Rothschild

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Matt: Welcome back to "The Presumption of Innocence," a podcast brought to you by the White Collar Criminal Defense and Government Investigations Practice at Fox Rothschild. I'm your host, Matt Adams.

Well, the False Claims Act has been a law that has, uh, been on the books since Reconstruction, following the Civil War. It is a federal law aimed at combating fraud against government programs, primarily by prohibiting knowingly submitting false claims for payment. But it also allows private individuals-- individuals we call relators or whistleblowers --to file qui tam lawsuits on behalf of the government, often earning somewhere in the range of 15-30% of the recovered funds as a financial incentive to bring these matters forward. It can also reach triple damages plus significant penalties.

In a nutshell, this federal statute is a powerful tool, but it is squarely in the spotlight these days, as the qui tam provisions of the False Claims Act are being challenged all over the country. And as of now at the United States Supreme Court.

Our guests today are two alums of "The Presumption of Innocence" podcast and my colleagues here at Fox Rothschild Morgan McCall Reece who works in our appellate section, as well as Joseph DeMaria, who really needs no introduction, a Partner out of our Miami office and a long time white collar defense lawyer and former federal prosecutor.

Well, Morgan, I want to kick it to you first because in researching the issue, I really set out to understand the percentage of cases brought under the False Claims Act provisions where the government elects to intervene. In other words, where the government elects to stay involved. Because under the False Claims Act, there is a phenomenon that can occur where the government

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says, you know what, we're not getting into this one, but the relator or whistleblower can continue on in what's called a relator-driven qui tam. And effectively, that just becomes a civil action, except the government is sort of lurking in the shadows in case there's a recovery.

And I want you to frame the issue for us a second. Because in, in researching this,

statistically speaking, the U.S. Department of Justice intervenes in a very low percentage of cases. It intervenes somewhere in the 15-25% of all qui tam cases and therefore declines somewhere in the 75-85% range.

The relator-driven qui tam cases that proceed have a very low success rate, if you extrapolate a success rate out of that remaining case. And now the provisions that allow that phenomenon to occur are being challenged. So frame out the issue for us. What is that issue?

Morgan: Yeah, absolutely. So this is all arising under Article 2 of the United States Constitution. This is where we find a couple of different clauses. One's the Appointments Clause, and the other are the Vesting and Take Care clauses. So these clauses stand for the proposition that only the executive-- i.e. the president, right, the executive branch --can appoint officers. They can appoint people who basically serve the function as prosecutors, if you want to think of them that way.

And then under the Vesting and Take Care clauses, those are kind of read together with the Appointments Clause in that the executive power has to be vested in the office of the president. And that means that only the executive branch can basically do executive things, which would be prosecute cases, represent the United States in court.

So when we have these qui tam cases in which a relator has stepped into the shoes and it is now taking control of the case, and there is no government who's really supervising it, they are serving as an individual who's not been appointed by the president and who is using core executive power without supervision, essentially, from the executive branch.

Matt: And Joe, what's the genesis of this type of challenge? Where did this really become mainstream? Because I'll, I'll just note for our audience, a lot of cases where the three of us are involved, we are making these very arguments when we're defending these relator-driven qui tam cases around the country, trying to benefit from some, some law here. But this really stems from some litigation down in your neck of the woods in South Florida, Joe, so tell us about it.

Joe: Well, let me, let me start with where it really began, the questions, and then come to the current. I think even though there's a long history of these issues under the Appointments Clause, it really began in 1976 with the Supreme Court's decision in *Buckley v. Valeo* which talked about the Appointments Clause and talked about civil litigation needs to be conducted by the government like other, every other law enforcement. And soon thereafter, in 1988, is a rather infamous case, the

Morrison case, where it was the special counsel was being challenged as violating the Appointments Clause and eight of the nine justices upheld it.

But Justice Scalia, in a now infamous dissent, kind of set the standard. And I'm going to read you some of his words 'cause you'll see how it relates to what we're talking about. Justice Scalia in his now infamous dissent said, and I quote, "if the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor, that he will pick people that he thinks he should get rather than cases that need to be prosecuted." He goes on to say, "under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected and can be removed by a president whom the people have trusted enough to elect."

And that goes to the heart of the problem with the qui tam provision, because the relator is not selected by the president. And at most, the Department of Justice can intervene, but that doesn't knock the relator out. It might change the amount of the, uh, whistleblower award, but the relator still stays in. So the relator actually picks the case, violating Justice Scalia's principle.

A year later in 1989 then-Assistant Attorney General William Barr-- future Attorney General under two presidents-- wrote an analysis, a very detailed analysis of the qui tam statute and said, among other reasons, that he believed in our view, it's not even a close question. Our conclusion rests on three grounds, one of which is the ground that, uh, that we're talking about and that Morgan talked about in the litigation now, which is the Appointments Clause. He also talked about the separation of powers.

So to answer your first question, this has been, I guess you could say percolating ever since Justice Scalia's dissent in Morrison, and then-Assistant Attorney General Barr's memorandum in 1989. But it was, it was basically ignored by the courts. Because court after court after court was upholding the constitutionality of the qui tam, until we get to 2023 when three of the current U.S. Supreme Court Justices started to ask questions about it.

And then going back to what your reference is, the Middle District of Florida, a judge, a Trump-appointed judge who was a Justice Thomas law clerk, was the first one in the *Zafirov* case to write an opinion saying, hey, I think this qui tam statute violates Article 2. And now we're off and running. Because now you not only have that opinion, which the 11th Circuit heard oral argument on in December, we're waiting for an opinion. The 3rd Circuit heard oral argument on it last month on the same issue. And more and more judges are starting to ask questions. In the 5th Circuit there are two judges who, because they're bound by circuit precedent, they couldn't really agree to find it unconstitutional. But Judge Duncan, in a case from late March of '25, wrote a very compelling concurring opinion in which Judge Duncan said, look, if it was up to me, I would find this unconstitutional under the Appointments Clause-- which Morgan can address a little bit more

deeply-- as well as under the Take Care Clause, and made some very important points. And then the last thing I will say is that Eli Lilly-- because a lot of these qui tam cases are in the health care area-- Eli Lilly just filed a petition with the Supreme Court asking them to consider it.

So this idea that started percolating in the late '80s has now come to a boil. And I think it's going to be decided at some point by the Supreme Court. It may not be in the *Lilly* case 'cause there's an argument, they may have waived that argument at the uh, 7th Circuit. But at some point this is going to have to be addressed and it's going to be squarely before the Supreme Court.

Matt: Yeah. And it has massive implications. Just to throw out a little bit more statistics: The Department of Justice reports that the FCA settlements and judgements just last year in 2025 exceeded $6.8 billion for the year 2025, and that was an all-time record. This is a highly used statute which will have significant implications if, if the ability of a private relator to proceed without government intervention is somewhat curtailed.

I find it fascinating, Morgan, the history behind the statute. Because where these qui tam provisions came from, it almost seems antithetical to what we think about from a law enforcement perspective. You're a former state and federal prosecutor. How, how did we get here? How did we get to have a provision that allows private parties to basically step in the shoes of the government?

Morgan: Yeah, so the concept of a qui tam lawsuit or litigation is something that goes back to England, right? Which, a lot of our common law and a lot of our laws derive out of England. But of course our system of governance and our system of laws is so different than England that, you know, it's hard to kind of grasp exactly how that applies here. But it's this whole concept of a private person stepping into the shoes of the government. So back in England, it would've been stepping into the shoes of the king. And the whole point back then was essentially people could get their private causes of action into a better system of courts at that point in time. And of course, unsurprisingly, these concepts followed us to America and found their way into some initial laws that we had on the books, this concept generally of qui tam, of private individuals filing suit on behalf of the government.

But specifically, as you mentioned, Matt, at the very beginning of the podcast, what we're really talking about here is a statute that came into existence following the Civil War, because there was such an abuse of widespread fraud against the government at that point in time, so in the 1860s. That's when these statutes came about. And we're talking about 31 U.S.C. §§ 3729-3733. In particular, 37-30 talks about civil actions for false claims. So it was meant to fill the void that was left by the federal government's lack of resources at that point in time. Which of course is not the case that we have today.

So we have very different circumstances. And over the course of the next a hundred years, right, England gets rid of their own qui tam in a lot of ways, because, you know, they're described oftentimes by legal scholars as parasitical actions. But in the United States, it exists for a very long time. And then in the 1980s, our own Congress sort of rehabilitates it. And they do that in the 1980s because they view the executive and the Department of Justice as being unable to go after these important issues of fraud.

So we're faced again with that same sort of question of allowing private people to see a fraud or an abuse of a system going on and serve as a whistleblower, alert the government, and the government either steps in and prosecutes the case or the government declines to do so, and then we allow a private person to do it.

So that's kind of the background.

Matt: Yeah. And, and, and when we kind of dig into this now at a granular level, Morgan, we're really talking about two separate provisions from the United States Constitution. Let, let, just frame that issue out for us a little bit.

Morgan: Absolutely. So, you know, at the very beginning we talked about, you know, this concept of Article 2.

So Article 2 is where we're kind of living and dying as we talk about this issue. Because really, Article 2 talks about the concept of executive power. And it goes to what Joe said a moment ago, which is the separation of power among our branches. So we want to make sure that each branch has its own separate authorities. And the executive has the ability to appoint officers. There are certain procedures that are found in the Appointments Clause. And it's listed very specifically. This is Article 2, Section Two, Clause Two of our United States Constitution that talks about the power of the executive to appoint individuals. And that's important. Because Joe really mentioned this, both of you mentioned this a moment ago. But at the end of the day, the theory being in having an Appointments Clause is that an elected official appoints officers. And that elected official then is accountable to the people. So that, that if those officers go off the rails or if they do something, then the elected official is held accountable for that. And that kind of goes back to this whole concept of checks and balances.

Now here, what we're talking specifically about, there are two types of officers-- and not to get into the whole nitty gritty of that-- we're really living in this world of what's an inferior officer under Article 2, that's what relators have been. Um, that's what the issue has been developed as right? These are not people... you would think of an officer as, you know, an ambassador or something like that. That would not be an inferior officer. We're dealing with inferior officers in this instance. And then of course, reading together with the Appointments Clause is the fact that as the arguments go,

relators are inferior officers and therefore there is a procedure by which they should be essentially supervised or brought in so that the executive can control their actions and the executive can be held accountable for their actions. But here that doesn't exist because relators are allowed to take over a case. They are neither hired by the Department of Justice. They are not governed by the Department of Justice. They're not an AUSA as you might see prosecuting a typical civil SCA action.

Matt: Are they an independent contractor? Are they the concept that, you know, we've learned in law school of an independent contractor versus employee?

Morgan: Right, I mean, I think that's kind of what you're thinking about. And there's some discussion in *Morrison* about, you know, inferior officers and how that, it reads together with the concept of like independent counsel. But at the bottom, at the end of the day, where this legal issue has come is essentially, the argument is, whether or not relators are inferior officers. If they are inferior officers, their existence in the FCA qui tam violates Article 2, the Appointments Clause. To determine whether someone is an inferior officer you have to do this analysis, according to Supreme Court precedent, which we can get into talking about the merits of that. But as the arguments are developing now, it's whether or not a relator has a continuing position and then exercises significant authority. And so it's this two-prong analysis that's developing. And there are some other things that we can discuss as we go through the podcast, but that's kind of basically where we are right now.

Matt: So, Joe, if we're talking about Article 2, we're talking about this paradigm between an inferior officer and a superior officer. How, how do we get there? How do we get there to determine the extent to which we have an individual that is operating in potentially an unconstitutional territory?

Joe: Well, that seems to be the big issue in both of the arguments at the 11th Circuit and the 3rd Circuit. It's almost as if the tension you could see is that the judges were all following Scalia's approach of, you know, a literal reading of the Constitution and applying the words. On the one hand, realized that that causes a problem for the qui tam statute.

So some of the judges are looking back to the history, but the history really doesn't work. Because, as has been made clear by some judges and by Bill Barr's memorandum, the difference in the old qui tam statutes is that there had to be a personal injury that was being suffered, similar to an antitrust plaintiff that can be a private attorney general because you have a personal injury.

And the difference now on the current qui tam statute, it's the exact opposite. There is no personal injury. You are basically standing in the shoes of the government. So I don't think the history is going to win for, for supporting the qui tam statute. The argument that they seem to be focusing on is this issue of officer. Because to be an officer, it has to be a continuing position. But as Judge Duncan said in his concurrence recently in the 5th Circuit case, a position is continuing if the position is not personal to a particular individual, is not transient or fleeting and the duties are more than incidental.

Let's start with the third one first. That's pretty easy. The duties are pretty darn more than incidental. You're talking about accusing somebody of fraud, seeking potential substantial damages. And let me tell you the practical effect of what happens. What happens is these qui tam relators, these whistleblowers, go on the internet and they find attorneys-- many of which are former Department of Justice attorneys --to take the case on a contingency.

The attorney investigates it, decides they think they have a case to be made and they file a qui tam complaint under seal, because the statute requires it to be put under seal. They send it to the Department of Justice, the local U.S. Attorney's Office, who has 60 days, but it can be extended to review it and decide if they're going to come in.

But what happens, and I've, I've dealt with this personally for clients, is the Department of Justice then will work in tandem behind the scenes with the qui tam relator by issuing what's known as a civil investigation demand, which is basically a subpoena. It's almost as powerful as a grand jury subpoena.

So you're getting a double barrel. You're getting the complaint under seal. And they won't even tell you that there's a complaint under seal. They won't confirm it, but you know, it's there if you've done this. So, you know there's a complaint against your client and you know, the government is now asking for discovery. And by the way, even though the False Claims Act says the government's not supposed to share that information with anybody, they funnel it out the back door to the private qui tam relator and their attorney. So it's like a conspiracy between these two, letting the qui tam relator take the lead. And then they decide to come to you and say, well, you can either settle and you can pay us these damages, and you can pay the qui tam relator's attorney's fees, or we're going to unseal the complaint and come after you. Oh, and then the government says, but by the way, we're not going to prosecute it. We're going to let the qui tam relator prosecute it.

So number one, that's much more than incidental. It's not personal, because anybody can be a relator. And if, if, if you can end up, if the relator goes out of business, they can be replaced, but it's not personal. And it's not transient. These cases go on for years. So I think the argument has been made pretty substantially that this is a continuing position. But I will tell you that in the 11th Circuit and in the 3rd Circuit arguments. There seemed to be some position by some of the judges to say, well, this doesn't violate the appointments clause because it's not a continuing position.

But then they got another problem. It still violates the Take Care Clause. One of the other things I wanted to say was that one of the arguments is, well, we need these relators. You know, the government can't do this. But as has been pointed out, when the original qui tam provisions were enacted, there was no Justice Department. There, there was only an Attorney General. The Justice Department wasn't created till many years later. They didn't have the resources to do this kind of work. And the last thing I would say is that the Trump administration has made very clear that they

intend to go after fraud. On March 30, the Secretary of Treasury issued a proposed new regulation that they're going to enhance the whistleblower. They're going to fully implement the whistleblower program. So I would dare say that the Trump administration is doing exactly what Article 2 says they should do: They're going to use the appointed officers of the government to fulfill the mandate to chase these fraud claims. And that's what should be done rather than outsourcing it to private whistleblowers who are looking for a bounty, private attorneys who are on a contingency and are looking for a bounty.

Hey, it's become big business. And there's going to be a lot of lawyers that aren't going to like it if this is found to be unconstitutional, but I think it's unconstitutional.

Matt: Morgan, Joe just got into some of the mechanics. The way that the complaint is filed, the way that it's unsealed. We have the *Polansky* decision from the U.S. Supreme Court, which basically says that DOJ can dismiss a case even after it's declined the case.

How do you square that with sort of the decision to decline? How do you square the continuing ability of the Department of Justice to step in and take on such an active role to basically end a relator-driven lawsuit if it wants to, with the idea that it declined in the first instance?

Morgan: Absolutely. But I think that the counterpoint to that, Matt, is the fact that while DOJ could step in in theory to do those things, between the time that they decline to take the case and they decline to intervene, and the time that they would in a theory intervene to take a dismissal, they're not running the litigation, right? So it's essentially-- and this is part-and-parcel with what the FCA envisions, which is another person is going to function for the government during the timeframe, right, that they're litigating the case. And then the government can pop in and dismiss the case later. But the fact remains that until such time, this private person and their attorney are serving as the government agents.

They are acting and doing everything that you might think of a civil AUSA doing. They're running through discovery, they're handling court appearances. In these cases, the government is not participating. It's just the relator. And so that really goes to the concept that Joe is talking about, which is as the analysis currently stands, as articulated by the Supreme Court over basically a hundred years of precedent that has been evolved, we're analyzing this concept of significant authority and a continuing position. So Joe touched on continuing position. And I think what Joe was, you know, suggesting, and what the courts have been grappling with, is the fact that there's really no, quote unquote, "office of the relator," right?

It's an individual person that shows up in every single case, and it's different. It could be Morgan, in case A, Joe in case B and Matt in case C. But the fact remains that by statute, this is contemplated that a private party can step up and step into the role of the government. And essentially, like I said--

and I don't mean to keep, you know, using the same phrase,-- but essentially for all intents and purposes, become a civil AUSA, which is, you know, when you look at this, really what you think about, the role of an inferior officer. Because these are people who get their appointments from the U.S. Attorneys, from the Department of Justice, from the Attorney General. And a relator fills those same shoes. Even, to your point, in case where the government ultimately ends up later intervening and dismissing.

Matt: I don't think we'd allow a civil AUSA to personally share in the recovery--

Morgan: Exactly.

Matt: --that they, that they obtain on behalf of, the government, however.

Morgan: No.

Matt: So it does, it does raise potential conflicts of interest and potential issues surrounding the way that, that, we wouldn't allow a government agent to get paid off of the work they're doing for the government. We'd put 'em in jail for God's sakes.

Joe, you've mentioned quite a bit today about some of the interpretive philosophies that have been employed by both the United States Supreme Court and other inferior courts in grappling with this particular issue and the constitutionality of relator-driven qui tam cases. What I find fairly interesting is that this administration, the administration that has for all intents and purposes beefed up its use of the False Claims Act, that has for all intents and purposes, heralded its fraud recoveries as major victories over corruption and abuses within the system, is also an administration that has argued for unitary executive authority. And under that formulation or philosophy of interpreting the executive branch and the duties and authorities thereof, it, it, it strikes me that that is in conflict with this notion that somebody can go out there and call themselves an inferior agent of the government, go make a private buck or two out of bringing these relator-driven qui tam actions. What do you think about that?

Joe: It is clearly inconsistent. So let's start with the fact that the very first current recent case that applied Article 2 benefited then-candidate Trump in 2024 when he was being prosecuted by the Special Counsel Jack Smith and the Florida judge, Judge Cannon, dismissed the case for the very same arguments that we're using now with the qui tam, finding that it violated Article 2. Secondly, the Trump administration has made it quite clear in their arguments to the Supreme Court and the variety of cases that they've been challenged on since the Trump's new second term of office started, including the uh, *Trump v. Wilcox* case where they've argued for an executive power vested in the president who oversees and wields executive power... unitary executive, that's that unitary executive theory.

So on the one hand, they're making it clear, hey, I'm the president. I control everything. I control the Department of Justice. Yet there's this carve out where they seem to be, you know, you know, basically twisting themselves into a pretzel to try to justify a qui tam provision that violates their own principles.

In the case that Morgan and I litigated in Miami, which has now been stayed waiting for the 11th Circuit to rule. The government, when they finally came in on this issue, made a pretty remarkable argument, almost acknowledging they had a problem. They said, well, you could sever the statute, you could sever a part of the statute that might be unconstitutional to try to preserve it. But they kind of ignored the fact that the case law that they were using didn't really apply to an illegal appointment. And so the government is really, I think, in a quandary. They like, they like the bounty that they're getting. And one might suppose that the reason the Secretary of Treasury has announced this rule change is they may see what's coming.

They may see that the qui tam statute will be declared unconstitutional. Let's not forget, we got four justices-- Justice Thomas, clearly, Justice Kavanaugh, clearly Justice Barrett and even Justice Gorsuch in the *Lucia* case-- you got four justices that want to hear this, and so there's a pretty-- and all you need is for to take a case. So the, I think there's a concern out there. They like that bounty, they like that money. It makes 'em look good when the Department of Justice says, we're bringing in all this money. And they may have to shift it to having government lawyers do it because the constitutionality is, is highly questionable.

Matt: Now Morgan, I know we're litigating a, a bunch of these cases now actively throughout the United States as a firm, and I'm not asking you to speak directly to any of those arguments. But we now have a good sense for what the government is saying in return, because we've filed briefs, we have the opposition. What is the government's argument faced with what-- in my view, and I think both of yours and Joe's view-- is a very powerful notion that these provisions may very well violate Article 2. How is the government responding? Joe alluded to it a moment ago in a very interesting way, in a case that we're all involved in, where the case was stayed, and the government sort of took this notion that there could be severance. But faced with the arguments that we've presented, what have we seen from the government so far?

Morgan: Yeah, so you know, it appears that the government is taking the approach of first relying on the longstanding history of qui tam. And that's a very natural place for them to go because, you know, we talked about this at the very beginning. You know, qui tam itself has a long legal history both in England and the United States. Then the FCA qui tam provisions have been in existence since immediately following the Civil War. So it's a very natural reflex of the government to go to the history. And they cite to this longstanding history. They cite to the constant use.

And of course there's also the concept that, you know, judges should, their first impulse should not be to declare a statute unconstitutional. They want to try to read a statute to find constitutionality in it. And in doing that, history is the best way for the government to get there because the argument as it goes is, how can this be unconstitutional when we've been doing it for so long?

Now, of course there's a lot of arguments to be made against that.

Matt: That's what, that's what relators counsel that I talk to on this subject say, because they've been making money off of it for a real long time.

Morgan: Right. But the problem with that is that just because something has been in existence for so long doesn't mean that it's constitutional and it shouldn't be revisited.

So that's, as Joe has mentioned, there have been a number of Supreme Court justices who are hinting --and not even hinting, but explicitly saying --the FCA qui tam should be revisited. And there's a reason for that, because people are looking at the Constitution, they're looking at the case law as it has developed about Article 2 over the past 100 years, and they're looking at the FCA qui tam provision specifically. And they're understanding now that just because something's been used so much doesn't mean that it's always legal. And so that's where the government really strongly relies on a lot of their responses to these challenges, to constitutionality.

But as Joe --

Matt: Heck, we had, we had, we had segregation in this country for a very, very long time, and it was ultimately declared unconstitutional. That, that argument failed there.

Morgan: Right? And--

Matt: For good, for good reason.

Morgan: For good reason. And so this all goes to show that we, although there are existing circuits that have addressed this issue, although they are over 20 years old, I think the, the newest one would have been from 2002 in the 10th Circuit. The 9th Circuit, the 10th Circuit, the 6th Circuit and the 5th Circuit have already addressed this question of constitutionality of the qui tam and the FCA. These cases are now obviously at least two decades old. And there is this brewing concept of the unitary executive, revisiting Article 2 and going back to basics, basically, of the constitution and making sure everything complies.

But as Joe mentioned a second ago-- to answer your question, Matt, about what other arguments the government is making-- as we've mentioned, you know, to assess whether an individual or an office or an employee, however the person qualifies as an inferior officer and therefore requires

appointment under Article 2, we do this continuing position and significant authority analysis. And at argument, that's really where the government has been hitting hard, which is what Joe hinted on a moment ago. Which is that, you know, how is this a continuing position if each case has a different relator? How is this a continuing position if, you know, cases are independently brought by people or if a relator, you know, passes away and someone, can someone step into their shoes?

So the government has been able to really hit hard on that particular point. I do think the significant authority argument that they make is less persuasive. Because when you think about it, as we've been saying, the FCA qui tam litigator relator has so much authority. I mean, they're functioning as a civil servant, as they're functioning as an AUSA, even more so because they get essentially a bounty for bringing a case and being successful at.

But those are kind of the big picture items for the appointments aspect of it. Of course, with the Vesting and Take Care Clause, in a lot of cases, that's just kind of being brought along with the Appointments Clause, because they're really, I've heard it described recently, I think it was in the 3rd Circuit oral argument. It was two sides to the same coin, right, and so the concept being they're exercising executive power. That really goes to the significant authority aspect of the Article 2 Appointments Clause analysis. But of course, Vesting and Take Care could still be violated even independently of the Appointments Clause.

Matt: There are significant real-world consequences associated with the potential declaration that relator-driven qui tam cases are unconstitutional. Joe, you alluded to it a bit ago about new proposed FinCEN rules as potentially previewing what life might be like after a declaration that these cases are unconstitutional.

Talk to our audience a little bit more about that and why you think that might be the Department of Treasury somehow looking into a, a future where we don't have these types of cases anymore.

Joe: Let me address that by broadening the aperture of the question. So really the question really is what's the practical consequence of what's going on?

And I think it's on several levels. First, as Morgan said, judges who are not justices, meaning non-Supreme Court judges, tend to look for ways to find statutes constitutional. So my feeling is from listening to the arguments in the 3rd Circuit and the 11th Circuit is both cases may end up upholding the constitutionality of the qui tam statute knowing that it's a problem, but not wanting to go that far.

But the Supreme Court has regularly been willing to step in and declare statutes unconstitutional or to overrule cases that the circuit courts and the trial courts won't. We know as criminal practitioners that it's the Supreme Court, and Justice Scalia in particular, that has upheld the rights of defendants, for example, where the lower courts won't do it. Time and again, the Supreme Court has to step in

when the lower courts... that's one practical consequence. A second practical consequence, and I don't know how it'll play out, is that on the one hand you have the Supreme Court wanting to follow the Constitution and, and really adhere to it, but there's going to be a lot of institutional pressure not to dispose of the qui tam.

As I said, it's big business. It's $6.8 billion for the Department of Justice. It's a lot of lawyers making a lot of money. A lot of big law firms make a lot of money defending these cases. So I hate to be cynical, but I think there's going to be a lot of pressure on the Supreme Court or any of these courts to say, don't upset this business. Because the qui tam is a business.

So when it gets to the Treasury Department putting this out there, yes, part of it is they want to be prepared for a post-qui tam world. But I think the argument behind the scenes-- and I'm surprised that the government hasn't made this argument explicitly-- is look, we're making $6.8 billion from fraud a year. Do you really want to allow that much fraud to go forward without being effectively prosecuted?

So that to me is the tension. I think it's clearly unconstitutional, but I wonder if the court is going to look aside to the constitutionality because it's big business and it helps the government combat fraud. I think that's the tension.

Matt: What technically does this proposed rule change do that's not already on the books?

Joe: It creates, for example, within the Department of Justice, a new fraud section, uh, to focus on this. So it's a resources allocation. It's the Treasury Department and the Justice Department. But I would dare say-- because under Trump 2 ever since he took office again, the Department of Justice has been decimated. People have left in droves-- I don't think the Department of Justice could easily replace what the qui tam relators are doing. And that's one of the problems. I think on a practical level, if the qui tam statute is unconstitutional, I think at least in the short term these challenges to fraudulent conduct are going to be vastly diminished.

So there's the tension. Do we follow the Constitution even if it puts a big dent in our ability to combat fraud? Or do we look the other way and let it go and find a way to let it go so that this business continues? That's the tension I see.

Matt: What I think you affectionately referred to as the court twisting itself into a pretzel a few moments ago.

So, in our waning time together, today, ask this question a lot on the program and I, and I want to direct it to, to both of you. And I'll, I'll start with you, Morgan. Where do you see this issue headed and why? I think the why is probably the more important part, but synthesizing what you and Joe have been talking about today already, we have a challenge in the 11th Circuit that we're all familiar

with, because it implicates a pending case at the lower court that the three of us are all involved in. We have a challenge in the 3rd Circuit, which has emerged after a monster judgment in favor of a qui tam relator there. And we have what is now a motion to certify the issue before the United States Supreme Court on behalf of a very resourced pharmaceutical company that can take an issue like this the distance. And, and that kind of dynamic can't be overlooked when you talk about the costs of litigating these issues all the way through the Supreme Court. Where do you see, if you had to take out your crystal ball and predict the future, this issue going and why?

Morgan: Yeah. I mean, this is going to head to the Supreme Court. And I, and I feel fairly confident in that statement for a couple reasons. One, I think justices on the Supreme Court are, are saying and giving very clear signals that they want to hear this issue. But the question is, what case is going to be that vehicle. Because it's not necessarily the first in time case that's going to be the appropriate vehicle.

So while *Eli Lilly v. Streck* has the petition that's pending that was filed at the end of March, I don't know-- and I think Joe hinted at that-- I don't know procedurally if that's the case the court would take to address the issue. Perhaps it would be the 11th Circuit case. The 3rd Circuit case I think also perhaps has some other procedural flaw to it as well that might limited it.

But the Supreme Court, in my view, is going to take a case, but it's going to have to be one that has the appropriate procedural posture.

Matt: And what does that look like? What does that procedural look like?

Morgan: It just, it means something that where this issue has been raised from the start, it has been appropriately addressed by both sides throughout the litigation.

So whether that was a motion to dismiss at the beginning or some other sort of motion, then deeply considered on the issues by the circuit court and then that would get it to the Supreme Court in a clean posture.

Matt: I, I've got a couple of cases I could think of where you were instrumental in writing those briefs, uh, that we worked on together. So we, we'll have to revisit that one shortly.

But Joe, the same question to you with an emphasis on the why. Where's this going and why?

Joe: So I'm going to make a prediction. I know we shouldn't always be predicting, but I'm going to predict that the 3rd Circuit is not going to find it unconstitutional because they're not going to want to dispose of a $175 million judgment, okay? So that's going to raise an interesting issue as to whether the Supreme Court would take the 3rd Circuit up when you have a defendant who's been hit

for such damages, which is a real harm that might have been caused by this unconstitutional line. But I think the 3rd Circuit is probably going to affirm the constitutionality.

The 11th Circuit is a closer call. The judges who were on that panel were kind of split. The 11th Circuit has a quite a number of Trump appointees who are very, very conservative and follow the original intent doctrine. But you could see the tension that was going on in the oral argument there.

I think there's a decent chance the 11th Circuit will find it unconstitutional, or it could go en banc and they could find unconstitutional. And if that happened, I think *Zafirov* would go up. And especially since *Zafirov* was written by a district judge who was a Justice Thomas clerk, not a bad hook to get up there. Because Thomas is really the lead justice on this issue.

So I think *Zafirov* has a shot of being unconstitutional and I think that would be a good vehicle to go up, 'cause it was properly raised on a motion to dismiss, fully litigated the way Morgan mentioned it. The 3rd Circuit I don't think is as clean of a way to go up, and I don't think the Lilly case on the 7th Circuit is a clean case because I don't think they properly preserved it. The rehearing order in the 7th Circuit denied it for failure to properly preserve the claim. So I think right now, I think the 11th Circuit is still the best shot for unconstitutionality and taking it up. And we'll see.

Matt: Will we have an answer to this question a year from now sitting in, in this--

Joe: We'll have a, we'll have an answer, I believe, from the 11th Circuit.

Now, the, the, the argument was in December, so we're already four months out and it's taken a while, and so I think we're going to get an answer from the 11th Circuit in the next few months. And now that they know the 3rd Circuit's getting ready to write on it, I wouldn't be surprised if they want to write on it first.

And so I think you're going to see the 11th Circuit decision, you know, in the next few months. And then, then it depends. If the 3rd and the 11th split, then that gives you grounds for Supreme Court review because you have a split in the circuits. Right now there's no split in the circuits. All the circuits have found it to be constitutional.

All you need is one to say it's unconstitutional, and then you've got a split.

Matt: Well, Morgan McCall Reece and Joe DeMaria my colleagues, and we are in the trenches on this particular issue. Do promise me that both of you will come back and talk about this once we have some clarity from either the 11th, the 3rd or the Supreme Court itself. Because it's a real fascinating issue with dramatic implications, for sure. That's all the time we have on this episode of "The Presumption of Innocence." Until next time, I'm your host Matt Adams. Be well, take care.