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Polansky decision may present a constitutional defense to qui tam cases

By John P. Elwood, Esq., Michael A. Rogoff, Esq., Tirzah S. Lollar, Esq., and Andrew Tutt, Esq., Arnold & Porter*

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In June, we at Qui Notes reported[1] on the Supreme Court decision in *U.S. ex rel. Polansky v. Executive Health Resources Inc.*, where the Supreme Court held that the government has broad discretion to seek dismissal of relators' *qui tam* actions. While important in its own right, that decision portends even more far-reaching implications: a renewed defense companies may be able to deploy against *qui tam* actions.

Private relators in qui tam *actions are not appointed as officers of the United States, raising questions about their authority to represent the government's interests.*

Justice Clarence Thomas disagreed with the eight-Justice majority that the False Claims Act (FCA) gave the government authority to dismiss a relator's *qui tam* suit. But Justice Thomas' dissenting opinion[2] went further, arguing that *qui tam* suits violate Article II.

The Constitution, Justice Thomas noted, grants the "entire 'executive Power'" to the president alone. In his view, civil litigation — including the representation of the United States' interests — is an "executive function" that can be carried out only by individuals appointed as "Officers of the United States" under the Appointments Clause (Article II, Section 2, Clause 2).

Private relators in *qui tam* actions are not appointed as officers of the United States, raising questions about their authority to represent the government's interests. He dismissed arguments that the constitutionality of *qui tam* actions was shown by the fact that early congresses had enacted provisions permitting them; he argued that "historical patterns cannot justify contemporary violations of constitutional guarantees."

Justice Brett Kavanaugh, in a one-paragraph concurrence joined by Justice Amy Coney Barrett, expressed agreement with Justice Thomas' view. He concluded that there are substantial arguments that the *qui tam* device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation.

We also note that Chief Justice John Roberts had hinted at his sympathy towards the Article II argument during oral argument in the case, but he joined neither opinion.

While the majority opinion in *Polansky* did not directly address the Article II issue, the recognition of constitutional concerns by multiple Justices indicates that Article II arguments may carry weight in future FCA litigation.

It only takes the vote of four Justices for the Supreme Court to grant review of a case; three Justices are already on the record that the Article II argument may have merit, and Chief Justice Roberts' questioning at oral argument suggests there may be a fourth.

Moreover, the support of Justices Kavanaugh and Barrett (and possibly Chief Justice Roberts) may suggest the view eventually will command a majority. They are the three Justices most often in the majority.[3]

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Despite having many supporters — in 1989, then-Assistant Attorney General Bill Barr wrote a memorandum to then-Attorney General Dick Thornburgh[4] advocating that the Justice Department take the position that the *qui tam* provisions are unconstitutional — the position has gotten very little traction in the courts of appeals, which have consistently rejected it up to this point. (Also, Barr backtracked[5] when he was questioned about the memo when he was Attorney General nominee in 2019.)

But considering the not-insubstantial odds that the Supreme Court may embrace this argument in the next few years, it may be advisable for FCA defendants to begin immediately to raise an Article II defense in *qui tam* motions to dismiss.

By challenging the authority of private relators to represent the government's interests, defendants have the opportunity to make renewed attempts to prevail on this issue in the courts of appeals — or potentially even before the Supreme Court.

Notes

[1] https://bit.ly/3pWoGPS

[2] https://bit.ly/44AxTNa

[3] https://bit.ly/3PXw5sP

[4] https://bit.ly/3K3EuaB

[5] https://bit.ly/3JZUHNK

About the authors




(L-R) **John P. Elwood**, a partner at **Arnold & Porter** in Washington, D.C., and head of the firm's appellate and Supreme Court practice, aids clients with cases regarding environmental law, the False Claims Act, government contracting and federal criminal law. He has argued before the U.S. Supreme Court and multiple federal appeals courts. He can be reached at john.elwood@arnoldporter.com. **Michael A. Rogoff**, a partner and co-chair of the firm's False Claims Act practice, guides clients through government investigations and related civil litigation. He was a federal prosecutor with the U.S. Attorney's Office for the Southern District of New York. He is based in New York and can be reached at michael.rogoff@arnoldporter.com. **Tirzah S. Lollar**, also a partner and co-chair of the firm's False Claims Act practice, concentrates on white-collar defense, internal and government investigations, procurement fraud, the Foreign Corrupt Practices Act, global anti-corruption legislation, tax fraud, and antitrust offenses. She is based in Washington, D.C., and can be reached at tirzah.lollar@arnoldporter.com. **Andrew Tutt**, a senior associate at the firm, aids clients with administrative, intellectual property and civil rights law. He is based in Washington, D.C., and can be reached at andrew.tutt@arnoldporter.com. This article was originally published June 20, 2023, on the firm's website. Republished with permission.

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