

Weak Reasoning Underlies Fla. Judge's Bold Qui Tam Ruling

By **Ethan Greenberg** (November 21, 2024)

On Sept. 30, U.S. District Judge Kathryn Kimball Mizelle dismissed U.S. ex rel. Zafirov v. Florida Medical Associates LLC,[1] holding that the qui tam provisions of the False Claims Act[2] are unconstitutional because they violate the appointments clause of the U.S. Constitution.[3]

The decision from the U.S. District Court for the Middle District of Florida is a remarkably bold one, both in that it sets aside a frequently used federal statute and rejects a substantial body of precedent.



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Precedent Upholding Constitutionality of FCA Qui Tam

The Zafirov defendants' challenge to the constitutionality of the FCA's qui tam provisions has been made previously before dozens of courts, and — until Zafirov — every court to rule upon the argument has rejected it.

Notably, the U.S. Court of Appeals for the Tenth Circuit, the U.S. Court of Appeals for the Fifth Circuit, the U.S. Court of Appeals for the Sixth Circuit and the U.S. Court of Appeals for the Ninth Circuit have concluded that the FCA's qui tam provisions are constitutionally sound.

For example, in a 2002 decision in U.S. v. Rockwell International Corp.,[4] the Tenth Circuit held that a qui tam relator is not an "officer" within the meaning of the appointments clause:

The procedural requirements of the Appointments Clause only apply to the appointment of officers. ... [Q]ui tam relators do not serve in any office of the United States. There is no legislatively created office of informer or relator under the FCA. Relators are not entitled to the benefits of officeholders, such as drawing a government salary. And they are not subject to the requirement, noted long ago by the Supreme Court, that the definition of an officer 'embraces the ideas of tenure, duration, emolument, and duties, and the latter were continuing and permanent, not occasional or temporary.'[5]

Supreme Court Justices Hint at Different View

In 2023, however, Justices Clarence Thomas, Brett Kavanaugh and Amy Coney Barrett indicated a willingness to seriously consider a constitutional challenge to the FCA's qui tam provisions.

In U.S. ex rel. Polansky v. Executive Health Resources Inc.,[6] the U.S. Supreme Court confirmed that, pursuant to the FCA, even after a relator had spent years pursuing a qui tam action, the government was still entitled to move to dismiss the case.

Justice Thomas alone dissented, based on his contrary reading of the FCA statute. He also introduced a constitutional issue into the discussion.

He suggested the case should be remanded to the U.S. Court of Appeals for the Third Circuit to consider whether the FCA's qui tam provisions were unconstitutional because (1) a relator is an officer of the U.S. who has not been appointed in the manner required by the appointments clause; and (2) a relator exercises executive power that can only be properly exercised by the president and his subordinates in the executive branch of the government.[7]

Justices Kavanaugh and Coney Barrett issued a brief concurrence in which they said the constitutional arguments raised by Justice Thomas should be considered in the future when presented in an appropriate case.[8]

Original Understanding

The very first U.S. Congress — which included many of the framers of the Constitution — passed more than a half dozen federal statutes authorizing qui tam proceedings in different contexts.

And that qui tam legislation was either drafted by or included significant input from U.S. Department of the Treasury Secretary Alexander Hamilton, and was ultimately signed into law by President George Washington — each of whom played prominent roles at the Constitutional Convention.

None of these framers, nor anyone else in public life at that time, expressed concern that qui tam legislation conflicted with the Constitution's appointments clause, or with any other part of the Constitution. Thus, there is a strong argument that under the framers' original understanding of the Constitution qui tam legislation is perfectly proper.

It is therefore somewhat surprising to find that conservative judges like Justice Thomas — who ordinarily champion "original understanding" jurisprudence — are expressing the view that the FCA's qui tam provisions may be unconstitutional.

On the other hand, in recent years, a number of judges have placed increased emphasis on the Constitution's appointments clause and the limits it places on the delegation of executive authority.

Perhaps the most noteworthy recent example is the controversial decision earlier this year from the U.S. District Court for the Southern District of Florida in *U.S. v. Trump*, in the federal criminal prosecution of President-elect Donald Trump for allegedly improperly retaining classified documents.[9]

In that case, U.S. District Judge Aileen Cannon set aside substantial contrary precedent and dismissed the indictment on the ground that special counsel Jack Smith had not been appointed in a manner consistent with the appointments clause.

Zafirov Decision Analyzed

In *Zafirov*, the relator Clarissa Zafirov, a physician, initiated a qui tam action against her employer, Florida Medical Associates, claiming it had misrepresented patients' medical conditions in order to overbill Medicare.

The defendant moved to dismiss the case, arguing that the FCA's qui tam provisions violated the Constitution because the Zafirov was an "officer" of the U.S., and yet had not been appointed in accordance with the appointments clause.

Judge Mizelle agreed with the defendants, holding: "First, an FCA relator is an officer of the United States. Second, historical examples of qui tam provisions do not exempt an FCA relator from the Appointments Clause. Third, because Zafirov is not constitutionally appointed, dismissal is the only permissible remedy." [10]

Notably, the Zafirov opinion nowhere acknowledges that every other court to rule upon the appointments clause argument has rejected it and upheld the statute's constitutionality. That is a rather glaring omission.

Even more remarkably, the Zafirov opinion discounts the four prior circuit court decisions rejecting that same argument. In that connection, Judge Mizelle wrote that none "of those circuits examined, much less reconciled, the long line of Supreme Court precedents explaining that enforcement authority and charging discretion are core executive power, especially when coupled with the authority to impose a punitive sanction." [11]

Thus, in essence, Judge Mizelle asserted that none of the four circuit courts correctly identified or considered the relevant precedents. That is a remarkably brash position for a district judge to take.

Similarly, the opinion makes quick work of the historical evidence demonstrating that qui tam legislation is consistent with the framers' original understanding of the Constitution:

Zafirov argues that the FCA's qui tam structure survives constitutional scrutiny because early Congresses enacted some analogous statutes. But no Supreme Court or Eleventh Circuit precedent blesses Zafirov's theory of historical exceptionalism when the enactments directly contradict the Constitution. Simply put, the Constitution prevails over practice, especially when the text is clear and the practice is neither continuous nor challenged. [12]

The flaws in this reasoning are fairly obvious. Of course, the fact that a statute was passed by the first Congress does not by itself prove that the statute is constitutional. Nevertheless, the fact that none of the framers took issue with the constitutionality of qui tam legislation is strong evidence of its constitutionality. [13]

Judge Mizelle is also obviously correct when she asserts that even a statute that has been in place for many years cannot withstand a constitutional challenge if the Constitution's text is clear and the statute directly contradicts the Constitution.

But that is plainly not the case with the appointments clause and the FCA. The text of the appointments clause does not provide a definition — let alone a clear definition — of who is or is not an officer of the U.S.

Moreover, the FCA does not characterize a relator as an officer of the U.S., and, until Zafirov, no court had ever held that a relator is an officer of the U.S.

It is thus simply false to suggest, as the Zafirov opinion does, that the FCA's qui tam provisions directly contradict the Constitution's clear text.

Rather, the constitutional text does not define who is an officer of the U.S., and that is precisely why the framers' original understanding should be an important consideration.

In any event, the heart of the Zafirov opinion is its discussion of whether a relator is indeed an officer of the U.S., reasoning that:

Because a relator possesses civil enforcement authority on behalf of the United States, a relator exercises significant executive authority. And because the FCA prescribes a relator's duties, powers, and emoluments, and the position mirrors the role of a bank receiver or special prosecutor in its duration and non-personal nature, a relator occupies a continuing position. Thus, Zafirov is subject to the Appointments Clause.[14]

Thus, Zafirov identifies two key components of the status of an "officer": (1) executive authority; and (2) prescribed duties, powers and emoluments.

As to executive authority, Zafirov places great weight on the fact that, under the FCA, a relator makes the initial decision whether to bring a qui tam suit. The opinion equates this decision with the power of a federal prosecutor — who clearly is an officer of the U.S. — to institute and prosecute a criminal case.

Thus, Judge Mizelle writes that the "ability to initiate an FCA enforcement action for 'daunting monetary penalties against private parties on behalf of the United States ... is indistinguishable from the Executive Branch's exclusive authority and absolute discretion to decide whether to prosecute a case.'"[15]

This is very doubtful reasoning. An FCA qui tam relator's authority is readily distinguishable from a prosecutor's "exclusive authority and absolute discretion" to prosecute a criminal case.

To begin with, a relator's authority is not exclusive. It is, at best, shared, because the government can intervene and take a qui tam case over from the relator at any time.

Nor does an FCA relator have the absolute discretion to prosecute. Rather, the government can dismiss a case over the relator's objection at any time, and a relator cannot settle a qui tam action without the government's approval.[16]

In other words, an FCA relator cannot begin, continue or conclude a qui tam action without approval from the government. It is thus obvious that an FCA relator does not possess — as Judge Mizelle argues — the "exclusive authority and absolute discretion" that a federal prosecutor has over a criminal case.

Similarly, the Zafirov decision finds that the position of FCA relator involves prescribed tenure, duration, continuing emolument and continuous duties, sufficient to make a relator an officer of the U.S. This too seems a very doubtful proposition.

To begin with, the FCA does not impose any duty on a relator to do anything, at least as the word "duty" is ordinarily used in legal parlance.

But the Zafirov opinion nevertheless finds that the FCA does impose duties on a relator by not too subtly recharacterizing the statute's procedural requirements as "duties" that a relator must perform.

Thus, Judge Mizelle writes:

When a relator initiates an enforcement action, she must comply with several standard duties. She must file the initial complaint in camera, serve '[a] copy of the complaint and written disclosure of substantially all material evidence ... [she] possesses' on the government, and wait at least sixty days before serving the defendant so that the government may investigate and decide whether to intervene.[17]

To describe the procedural requirements of filing and serving pleadings, and providing discovery as "duties," is a strained and illogical use of the word "duty."

After all, any litigant in any federal case must comply with various similar requirements, yet no one conceives of those requirements as official duties, or of those litigants as government officers.

In the same vein, it makes little sense to characterize a relator's right to receive a percentage of damages recovered in an FCA case as a "continuing emolument."

To suggest — as the Zafirov opinion does — that the relator's right to receive a portion of the damages recovered when the relator wins a qui tam case constitutes an emolument — making, or helping to make, the winning relator into an officer of the U.S. — is also to suggest the converse: that a relator who loses a qui tam case and thus receives no money is not an officer.

The Zafirov opinion thus leads to a logical absurdity: Relators who ultimately win their case are officers of the U.S. who must first be constitutionally appointed, but relators who ultimately lose their case are not officers and need never be appointed.

Conclusion

In sum, the Zafirov opinion is quite lengthy and full of marginally relevant citations. However, its logic is weak.

The opinion does very little to dissuade the reader from adhering to the same common sense conclusion drawn by every other court that has ruled on the issue.

A relator such as Zafirov — a private citizen who decides to blow the whistle on her allegedly corrupt employer, and who holds no official title, draws no government salary, takes no oath of office, has no prescribed duties, litigates a single case for an undefined period, and whose purported power to pursue her qui tam action can be taken away by the government at any point — is not an officer within the meaning of the appointments clause, or indeed within any ordinary understanding of the term "officer."

Prior to Zafirov, every court that ruled upon the question upheld the FCA's constitutionality. As Justice Thomas' dissent in *Polansky* indicates, there is a serious argument to be made that the FCA's qui tam provisions may violate the appointments clause. But the reasoning given by Judge Mizelle in *Zafirov* in support of that argument is far from persuasive.

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[1] U.S. ex rel. Zafirov v. Florida Medical Associates, LLC, Case No. 8: 19-CV-1236, 2024 WL4349242 (M.D. Fla. Sept. 30, 2024).

[2] 31 U.S.C. §§3729-3733.

[3] U.S. Const. Art. II, Sec. 2., Clause 2.

[4] 282 F.3d 787 at 804-807 (10th Cir. 2002).

[5] Stone, 282 F.3d at 805 (Citations omitted).

[6] 599 U.S. 419 (2023).

[7] Polansky, 599 U.S. at 449-51 (Thomas, J., dissenting).

[8] Polansky, 599 U.S. at 448 (Kavanaugh, J. and Barrett, J. concurring).

[9] 2024 WL 3404555 Case No. 23-80101-ER (S.D. Fla. July 15, 2024).

[10] Zafirov at *4.

[11] Zafirov at *6.

[12] Zafirov at *15.

[13] See Marsh v. Chambers, 463 U.S. 783, 789 (1983) ("An act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument ... is contemporaneous and weighty evidence of its [the Constitution's] true meaning'" (citations omitted)).

[14] Zafirov at *6.

[15] Zafirov at *8.

[16] See generally U.S. ex rel. Polansky, 599 U.S. 419 at 423 and 425-26 (2023).

[17] Zafirov at *11.