Points of View

Stand Down

The bell is tolling, and none too soon, for qui tam plaintiffs who lack a cognizable injury. **By Mark Koehn and Donald Kochan**

In a stunning act of judicial bell ringing just 10 days before last Monday's oral argument, the Supreme Court signaled that it will consider an important question not originally presented to it in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828: Does a private person have standing under Article III to litigate claims of fraud upon the government? The wise answer is no.

By simply posing this question, the Court set segments of the legal community astir—including Professor Charles Tiefer in these pages last week ("Scalia Surprise," Nov. 29, 1999, Page 52). At risk is Congress' power to set private persons against alleged bad actors where the private individuals' sole personal stake lies in collecting a handsome share of the government's recovered damages and penalties. The Court's answer likely will also affect such areas as environmental compliance, where citizens routinely sue based on little more personal injury than that suffered by the public at large.

The statute involved is the False Claims Act, a Civil War-era law that allows a private person to bring a *qui tam* action—i.e., a civil action "for the person and for the United States Government"—for treble damages plus penalties of up to $10,000 per false claim against the government. If successful, the person bringing the action, known as the relator, may collect up to 30 percent of the amount recovered by the government plus attorney fees.

Some may recall the False Claims Act as that dusty statute beefed up in 1986 in response to tales of overpriced hammers and toilet seats sold by military contractors. Since then, the FCA pot of gold has inspired a virtual cottage industry of plaintiffs lawyers—the relators' bar—actively prospecting for whistleblowers.

Since 1986, suits under the FCA have produced awards and settlements of nearly $3 billion with individual relators reaping approximately $443 million. Contingent fees have been reported as high as 40 percent of a relator's cut on top of the attorney fees awarded or negotiated in a settlement. So it's not surprising that the relators' bar nervously awaits resolution of the standing debate.

THE LIFE OF *RILEY*

Four days before the Supreme Court's request for additional briefing in *Stevens*, a panel of the U.S. Court of Appeals for the 5th Circuit held the *qui tam* provisions unconstitutional in *Riley v. St. Luke's Episcopal Hospital*. (The court simultaneously vacated its decision and ordered a rehearing *en banc* in January.)

The *Riley* majority held that *qui tam* violates the "take care" clause and the separation-of-powers doctrine. Judge Jerry Smith, writing for the majority, noted that *qui tam* leaves the executive branch with even less control over a relator than the executive enjoyed over an independent counsel—and the now-defunct independent counsel act was widely considered the constitutional upper limit on statutes transferring law enforcement power away from the executive. In other words, the 5th Circuit determined that Bill Clinton had more control over Kenneth Starr's actions than he does over those of *qui tam* relators! Unfortunately, it's true.

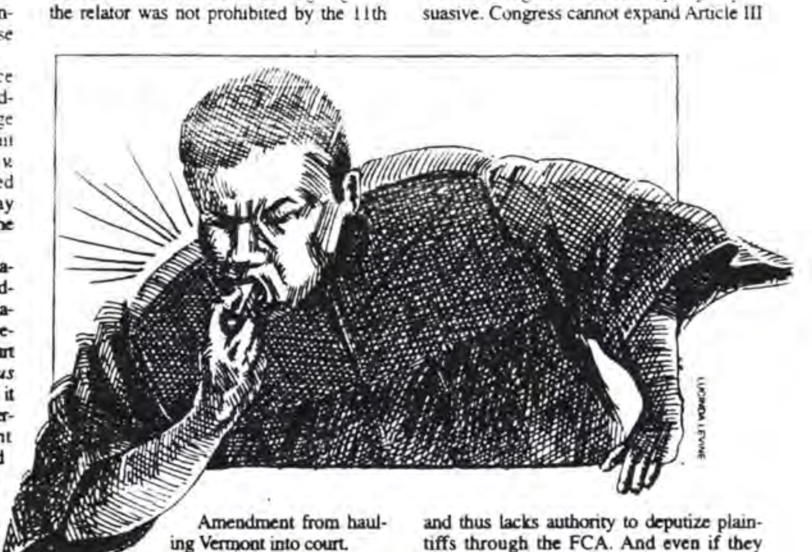
Judge Harold DeMoss in concurrence also concluded that the relator lacked standing to bring the *qui tam* action. But Judge Smith determined that a prior 5th Circuit decision, in *United States ex rel. Foulds v. Texas Tech University* (1999), precluded dismissal on standing. His analysis may explain why the Supreme Court ordered the supplemental briefing in *Stevens*.

In *Foulds*, the 5th Circuit held that a relator's suit was barred by the 11th Amendment, but also said in a footnote that the relator had standing to sue. In a heretofore largely inconsequential case, the Supreme Court had determined in *Calderon v. Ashmus* (1998) that a court must consider whether it is faced with an Article III case or controversy *prior* to ruling on 11th Amendment immunity. Thus, Judge Smith concluded that the standing footnote was essential to *Foulds* and binding on the court in *Riley*.

In light of *Calderon* and *Steel Co. v. Citizens for a Better Environment* (1998), where the justices held that a court must be sure of its jurisdiction before proceeding to the merits, the Court may have ordered supplemental briefing in *Stevens* because it has an obligation to address standing before reaching the 11th Amendment and statutory issues in the case.

The rise of the standing issue in *Stevens* may also relate to another case on the Court's docket. In *Friends of the Earth v. Laidlaw Environmental Services (TOC) Inc.*, the Court heard arguments Oct. 12 regarding whether private citizens may sue a company that allegedly harmed the environment in order to impose additional penalties beyond those already assessed by a state agency and where such additional penalties are payable only to the federal government. Plaintiffs in such "citizen suits" could not even claim they would eventually receive a cut of the penalties. Questions at the oral argument for *Laidlaw* regarding standing in *qui tam* actions make the briefing order in *Stevens* less surprising. The Court may wish to harmonize its decisions in the two cases.

That brings us to *Stevens* itself. An employee of Vermont's environmental regulatory agency sued the agency alleging that it had cheated the federal government by encouraging its employees to submit inflated work reports that were then cited in requests for federal funding. Vermont defended, in part, by pointing out that the 11th Amendment prohibits private persons from suing states. The United States declined to join the suit or disclose its view on the merits. Yet it intervened against Vermont (since the government reaps a windfall even when such plaintiffs prevail on or settle meritless claims), arguing that the relator was not prohibited by the 11th Amendment from hauling Vermont into court.



The Nov. 29 oral argument in *Stevens* largely focused on the 11th Amendment issue. The briefs on standing were not even due until the day after.

But based on their questioning, a majority of the justices seemed sympathetic to the argument that the relator lacks standing.

Some dispute appeared to exist over whether the Court must decide the standing issue prior to reaching the other questions. Resolution of that debate should be simple. The Court has made clear that it cannot exercise "hypothetical jurisdiction" simply because it wants to avoid a tough standing issue. It is time now to provide guidance to the lower courts on this question, and put an end to a system that has allowed the relators' bar to go beyond co-opting the enforcement powers of the executive to exploiting settlements in the name of the "public good."

A strong standing doctrine has emerged from this Court to rein in Congress' steady effort to expand the confines of Article III. The courts exist neither to resolve generalized grievances nor as a forum for mere profiteering. They do exist to redress wrongs suffered *by the plaintiff*, and Congress has gone too far in expanding that role under the FCA.

Standing requires that a plaintiff establish an injury in fact, causation or traceability, and redressability. Relators have simply suffered no cognizable injury. Their only interest is profit and the costs of their speculative exercise. Even with the plethora of "citizen suits" and "private attorneys general" on the books, such plaintiffs have been found constitutional only where they establish a concrete, personal injury in fact.

In 1986, the Supreme Court resolved an analogous issue. In *Diamond v. Charles*, the Court held that the award of attorney fees alone cannot create standing because it is merely a "consequence" of and "unrelated to" the litigation and, as a result, "cannot be fairly traced to" the law at issue. The Court continued, "The mere fact that continued adjudication would provide a remedy for an injury that is only a byproduct of the suit itself does not mean that the injury is cognizable."

A relator's bounty is no different. It is a mere unrelated consequence or byproduct of a *qui tam* action.

Arguments that a relator stands in the shoes of the government are equally unpersuasive. Congress cannot expand Article III and thus lacks authority to deputize plaintiffs through the FCA. And even if they could, neither the executive nor Congress has assigned any contract rights by simply bestowing on relators the right to sue with the prospect that they will receive part of the award. Correcting a fraud on the government does just that—redress a harm *to the government*.

Despite the merits of *Riley*'s challenge to *qui tam* litigation based on the "take care" clause and separation-of-powers doctrine, there is little reason to suspect the Supreme Court will consider those issues in *Stevens*. Nor should it need to. Regardless of the age or effectiveness of the *qui tam* provisions, constitutional limitations cannot be sacrificed to serve political goals. Standing alone should dispose of this case and bring the FCA in line with the Constitution.

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Go to www.legaltimes.com to read the circuit decisions in *Stevens* and *Riley*.

■ Two cases this week give the justices a chance to "clarify" recent misguided precedent by backing off the general presumption against pre-emption. **Page 50**

■ Democrats' inflammatory appeals to black fears of white racism make the Republicans' Willie Horton rhetoric of 1988 look tame by comparison. **Page 51**