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# INSIGHT: DOJ Nominee Barr Walks Back FCA Stand, But Not Entirely

**Posted Jan. 24, 2019, 3:01 AM**
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*In a follow-up Insight, Sidley Austin attorneys say DOJ Attorney General nominee William Barr's testimony at his confirmation hearing may have appeased some but leaves open the possibility that DOJ will continue moving to dismiss whistleblower cases that do not advance government interests. In addition, a new petition to the Supreme Court is again asking the question of whether the qui tam provisions are constitutional.*

In our previous Insight article, we described Attorney General nominee William Barr's 1989 memo arguing that the *qui tam* provisions of the False Claims Act are unconstitutional because relators lack Constitutional standing, and because the provisions violate the Appointments Clause and separation of powers principles.

We noted that Barr was likely to be pressed on these views at his confirmation hearing, and indeed he was. Sen. Charles Grassley (R-Iowa), considered to be the author of the modern FCA and its chief defender in Congress, asked a line of questions aimed at clarifying Barr's current views. Barr walked backed his prior statements to some extent, but did not go quite as far as the relator's bar might have hoped.

In response to Grassley's questions, Barr testified that his current view is that the FCA is *not* unconstitutional because "[i]t's been upheld by the Supreme Court," likely referring to the Supreme Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). In that case, the Supreme Court held that relators have Constitutional standing, contrary to the view Barr expressed in his 1989 memo.

Whether Barr believes that the whistleblower provisions of the False Claims Act could survive other constitutional challenges is less than clear from his response, including some challenges that are currently pending.

On Jan. 14, Intermountain Healthcare filed a cert petition asking the Supreme Court to decide whether the *qui tam* provisions of the FCA violate the Appointments Clause. The cert petition cites Barr's 1989 Office of Legal Counsel memo as support. Even if the Supreme Court declines to take up the case (or to seek DOJ's input), the cert petition is consistent with our previously expressed view that we are likely to see a renewal of constitutional challenges to the *qui tam* provisions.

Grassley also asked Barr about last year's "Granston Memo," in which DOJ provided guidelines for determining when DOJ should seek dismissal of nonintervened *qui tam* cases. In recent months, DOJ has been actively moving to dismiss cases that it believes do not serve the federal government's interests.

Grassley characterized this trend as "faceless bureaucrats" undermining efforts to enforce the FCA. When he asked about the Granston Memo and DOJ's efforts to dismiss cases to "preserve government resources," Barr avoided a substantive discussion, saying that he had not reviewed the Granston Memo.

While Barr may have softened on the constitutionality of the whistleblower provisions, nothing in his testimony suggests that he would reverse course on the Granston Memo or slow DOJ's pace of dismissals. Instead, aggressive oversight of whistleblower actions would be consistent with Barr's general views of executive power.

In all, Barr's testimony likely reassured Grassley and like-minded colleagues that Barr is not hostile to the FCA as a whole. But in our view, Barr's testimony does not foreclose the likelihood that DOJ will continue its current policy of more active oversight and, where appropriate, dismissal of nonintervened actions.

And, as the Intermountain Healthcare cert petition suggests, we are likely to see an increase in challenges to the constitutionality of the *qui tam* provisions by private litigants.

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