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INSIGHT: Trump Pick for AG to Be Scrutinized for Views on False Claims Act Enforcement

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By Scott Stein, Doreen Rachal, and Naomi Igra

President Donald Trump's nominee for Attorney General, William Barr, has called the qui tam provisions of the False Claim Act that allow individuals to file suit on behalf of the government "patently unconstitutional." Sidley Austin attorneys Scott Stein, Doreen Rachal, and Naomi Igra say this could be a hot topic during confirmation hearings and explore his views, which suggest a Barr Justice Department would maintain, if not amplify, DOJ's recent efforts to move for dismissal of qui tam cases that do not serve the federal government's interests.

Recent news reports have indicated that the relator's bar is exerting pressure on Sen. Chuck Grassley (R-Iowa) to closely scrutinize President Trump's nominee for Attorney General, William Barr, for his views on False Claims Act enforcement, and that Barr will be pressured to "walk back" his criticisms of the qui tam provisions during the confirmation process.

Given that Barr has been nominated to head the department charged with False Claims Act enforcement, his current views on these issues are likely to be a hot topic in his upcoming confirmation hearing Jan. 15.

Barr holds long-standing views on executive power which suggest a Barr Justice Department would maintain, if not amplify, DOJ's recent efforts to more vigorously oversee qui tam actions pursuant to the "Granston Memo," which urged DOJ to move for dismissal of qui tam cases that do not serve the federal government's interests.

Barr said in a 1989 memorandum he authored while serving in DOJ's Office of Legal Counsel that the qui tam provisions of the FCA are "patently unconstitutional." The provisions were significantly expanded in 1986, and Grassley was the primary sponsor.

Barr's memo characterized the FCA's qui tam provisions as reflecting Congressional distrust "in the executive's willingness or ability to enforce the law properly," and argued that the expanded qui tam provisions "interfered" with DOJ's enforcement activities.

Relators Yield Significant Power

Barr's 1989 memo argued that the FCA's qui tam provisions are unconstitutional for three reasons.

First, it argued that they violate the Constitution's Appointments Clause, which provides that the President "shall" appoint all "Officers of the United States." Barr argued that relators essentially act as "officers" even though they are not appointed by the President and are instead "self-selected private bounty hunters."

In his view, relators yield significant power because they can initiate and control litigation in the name of the United States. They are not accountable to the federal government yet their actions may bind the United States by application of res judicata principles.

The grant of such power to private citizens runs counter to the Appointments Clause, according to Barr.

Second, Barr argued that the qui tam provisions violate separation of powers principles because they amount to a Congressional transfer of power away from the President. Decisions about whether and how to prosecute cases on behalf of the United States are generally committed to the executive branch, yet qui tam plaintiffs decide whether and how to litigate their FCA cases.

Because the qui tam provisions effectively allow relators to override the discretionary decision-making of the Attorney General, Barr contended that they impermissibly encroach on executive power.

Third, Barr argued that relators lack standing because they cannot establish an injury-in-fact. The qui tam provisions only allow relators to sue on behalf of the United States and do not grant relators any substantive legal rights.

Barr argued that Congress should not be permitted to grant "universal standing" by simply attaching penalties to a legal infraction, and then allowing private individuals the chance to take a cut of those penalties.

Since Barr's memo, the U.S. Supreme Court has essentially rejected Barr's position on standing. It has held that the FCA can be read as a partial assignment of the Government's damages claim to the relator. Relators, therefore, have standing according to the general principle that assignees can assert the claims of assignors.

Appointments Clause and Separation of Powers Challenges

The Supreme Court has not addressed the other constitutional infirmities Barr identified, but several courts of appeal have rejected Appointments Clause challenges to the qui tam provisions.

The Sixth and Ninth Circuits have concluded that qui tam actions do not violate the Appointments Clause because relators are not vested with governmental power, and because the government has discretion to take control of the cases. The Second Circuit reached a similar

conclusion, observing that relators only litigate a single case and do not have primary responsibility for enforcing the FCA.

The Tenth and Fifth Circuits ruled that relators do not meet the definition of an "Officer," in part because they do not receive a government salary or benefits.

Several courts of appeal have also largely rejected Barr's separation of powers argument because they view the executive branch as retaining constitutionally sufficient control over qui tam litigation.

However, they differ in their view of DOJ's authority to dismiss qui tam actions over a relator's objection.

The D.C. Circuit has held that to comport with separation of powers principles, the FCA must be construed as giving the executive an "unfettered right to dismiss" qui tam cases. The Fifth Circuit has indicated that it shares a similar view.

In contrast, the Ninth and Tenth Circuits have held that courts can require DOJ to establish a valid purpose for dismissal without impermissibly encroaching on executive authority.

'Unfettered Right'

A Barr Justice Department is likely to support an "unfettered right" standard when the government seeks to dismiss qui tam cases. In light of the current circuit split, that issue could warrant Supreme Court review in the near future.

In the meantime, defendants in qui tam cases should preserve potential constitutional claims for appeal. If Barr is at the helm, defendants may find DOJ support for constitutional challenges to qui tam litigation.

And given the views of executive power among many of President Trump's judicial nominees, Barr's separation of powers arguments may soon find a more receptive audience in the federal courts.

Author Information

Scott Stein is a partner in Sidley's Chicago office and has extensive experience representing clients in the life sciences and healthcare industries in government investigations and litigation arising under the False Claims Act (FCA).

Doreen Rachal is counsel in Sidley's Boston office where she has significant experience advising on qui tam actions and healthcare fraud matters involving potential FCA violations.

Naomi Igra is an associate in Sidley's San Francisco office where has advised on a diverse range of civil and criminal matters, including white collar criminal proceedings and FCA claims.

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