

**THE FALSE CLAIMS ACT CORRECTION ACT
(S. 2041): STRENGTHENING THE GOVERNMENT'S
MOST EFFECTIVE TOOL AGAINST FRAUD FOR
THE 21ST CENTURY**

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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WEDNESDAY, FEBRUARY 27, 2008

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, Pursuant to notice, at 10:05 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Durbin, Specter, and Grassley.

**OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S.
SENATOR FROM THE STATE OF VERMONT**

Chairman LEAHY. Nearly a century and a half ago, President Lincoln pushed through the False Claims Act. He wanted to stop the rampant fraud and war profiteering we saw during the Civil War. It is fitting that we hold this hearing on legislation to strengthen "Lincoln's law" the same month we celebrate President Lincoln's birth.

We are in the midst of war, and we are facing reports of billions lost to fraud and waste in Iraq and Afghanistan. And so we are considering important new improvements to the False Claims Act—not only to punish and deter those who seek to defraud our Nation, but also, importantly, to recover billions in taxpayer dollars that were stolen from the public trust.

In recent years, the False Claims Act has become the Government's most effective tool against fraud. Since 1986, it has been used to recover more than \$20 billion lost to fraud, half of that just in the past 5 years. It has been used to punish contractors selling defective body armor to our police, to recover hundreds of millions from oil and gas companies bilking the Government on valuable leases on Federal land, to punish health care and drug companies for defrauding billions from Medicaid and Medicare, and to uncover massive fraud by insurance companies illegally shifting their losses from Hurricane Katrina to the Federal Government.

But these recent successes do not tell the full story. The False Claims Act has yet to fulfill its true potential for combating fraud. In 1986, Senator Grassley led the effort to reinvigorate the False Claims Act by amending the law to encourage citizens to report fraud against the Government. I want to take this moment to publicly commend Senator Grassley for doing that.

Senator GRASSLEY. Thank you, Mr. Chairman.

Chairman LEAHY. It was one of the most important pieces of legislation passed during that time.

Senator GRASSLEY. Thank you.

Chairman LEAHY. Since then, citizen whistleblowers have become the greatest source for uncovering complex frauds against the Government. Their cases now account for about 70 percent of all the money recovered under the False Claims Act. Yet opponents of the False Claims Act, those who defend the major defense contractors and big drug companies, have worked hard to undermine the original intent of these amendments. A series of recent court decisions have placed new, technical impediments on false claims cases, and these court cases threaten to weaken the law. Not only would they weaken the law, they would undo the successes of these past few years.

So we are considering bipartisan legislation—the False Claims Act Correction Act of 2007—that is going to correct these judicial interpretation problems and strengthen the False Claims Act for the 21st century. In doing so, I will recognize the longstanding leadership of my friend Senator Chuck Grassley. He introduced this bill recently in order to restore the original intent of the 1986 amendments. He has worked tirelessly over the years in defense of the False Claims Act, and I am proud to join with him, as well as Senator Specter, of course, and Senator Durbin and Senator Whitehouse, in support of this bill. I look forward to working with these Senators and the Committee to make the False Claims Act even more effective and to provide important, new protections for the citizen whistleblowers, who are so vital to uncovering these frauds.

So we will ask some important questions of the Justice Department about its failure to dedicate sufficient lawyers and investigators to pursue these fraud cases. The Justice Department has a backlog of more than 1,000 false claims cases. Now, assuming no new cases were brought, at the current pace that would take 10 years to resolve. That is assuming no new cases. Now, when one considers that a recent study found that for every dollar spent enforcing the law in health care cases, the Government recovered \$15 on behalf of the American taxpayers, there is no excuse for failing to pursue these cases aggressively. That is a pretty good investment.

In light of the politicization of the Justice Department, many wonder whether it has resisted pursuing certain false claims cases for political reasons—most notably those involving contracting fraud related to the war in Iraq and Afghanistan. Over the past 5 years, the Justice Department has participated in more than 600 false claims settlements nationwide and recovered more than \$10 billion. And I commend them for that. But during that same time, the Justice Department participated in only five settlements involving contracting fraud in Iraq and Afghanistan, recovered a mere \$16 million—less than two tenths of 1 percent of the overall total. We certainly know from the press that there has been a lot more fraud than that. And since 2002, our Government has spent nearly \$500 billion on the wars in Iraq and Afghanistan, and billions of taxpayers' dollars have been lost to fraud, waste, and

abuse. They ought to be recovering that, not protecting favorite contractors or politically connected people who are bilking the taxpayers. The False Claims Act was designed to attack such rampant war profiteering. It was necessary during the Civil War, and it is necessary today.

The administration has apparently decided that pursuing unscrupulous defense contractors would be embarrassing, and aggressively pursuing these frauds is not their priority.

We will hear from a courageous citizen whistleblower, Tina Gonter, who will tell us how she used the False Claims Act not only to hold our Nation's largest defense contractors to account, but also to keep the Justice Department honest. She risked her job, she was retaliated against, but she took on the powerful and the moneyed defense contractors anyway. It is people like that who Senator Grassley and I and others want to protect when they raise these issues. The whistleblowers should be recognized as "citizen soldiers," as President Lincoln called them when the False Claims Act was first passed so many years ago. Her story demonstrates how the False Claims Act works for all Americans and why the new protections for citizen whistleblowers in the bill we consider today are necessary to encourage them to come forward and tell their stories. So I hope all Senators will join us to honor the legacy of Lincoln's law and take action now to strengthen and improve the False Claims Act for the next century.

Before I yield to Senator Specter, I should note that because of our duties on the Appropriations Committee, we both will have to leave, and I have asked Senator Grassley when we leave if he would chair this hearing, and he has graciously offered to do so, and I appreciate that.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator Specter?

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman.

The subject of the False Claims Act is a very important one. I was fascinated by the subject in law school, and the criminal law textbook had the Supreme Court decision of *ex rel. Marcus v. Hess*, a 1942 decision, and it motivated me to do extensive research and write an article for the law review, law journal on private prosecutions. And over the years, I have followed this Act, and it has enormous potential to collect money for the Federal Government, but only if people are encouraged to follow that.

I was disappointed to see the decision of the Supreme Court of the United States in the *Rockwell International Corporation* case, which said that if the factual basis for recovery or conviction was not what the whistleblower had started with, there could not be a recovery.

Well, the texture of a case frequently changes during the course of discovery and litigation. And if the whistleblower is going to find that his claim can be dislodged that easily, he is not going to be inclined to follow it. Also, the Totten case, where the relator whistleblower was denied recovery because it was Amtrak, not the Gov-

ernment but a grantee. And grantees get most of the money or a great deal of the money from the Government.

And then in the *Custer Battles* case, to deny a claim because it was the Coalition Provisional Authority in Iraq, an international entity that got so much of the money from the United States, those are really Federal dollars, and there really ought to be a way to encourage this kind of action. But private action and citizen action is really the cornerstone of initiative, and it has been very successful on treble damage cases and many, many other lines.

I am sorry that my schedule precludes my staying. It is a very distinguished list of witness. Mr. Hertz has a phenomenal record, 30 years in the Federal Government. As I see him sitting at the witness table with packs of materials on each side, I am going to be fascinated to see how he can handle it in 5 minutes.

Chairman LEAHY. Trust me, Mr. Hertz knows what is in—I know Mr. Hertz. He knows what is in every bit of that material, too.

Senator SPECTER. That is a lot of material, but that is an occupational hazard, which Senator Grassley does not have. Senator Grassley brings to this Committee a fresh view. He is not encumbered with a law degree.

[Laughter.]

Senator SPECTER. He is a very, very practical man. And as I said on the floor 1 day, when I got carried away, Senator Grassley is in the mold of Harry Truman. I hope President Truman did not mind my making that reference. But Senator Grassley brings a unique practicality to his work here. And I have a special fondness for Senator Grassley. I have still got a little time, so I am going to use it to reminisce a bit.

Senator Grassley and I were elected in 1980 together. We came with a total of 16 Republican Senators, and two Senators were elected as Democrats. One was Senator Chris Dodd of Connecticut. I saw Chris this morning. We were reminiscing about how 50 percent of his class has remained and only 12.5 percent of the Republican class, 2 out of 16. And the only thing that has really befallen Senator Grassley of a problemsome nature during his distinguished career is that with some frequency he has been mistaken for me.

[Laughter.]

Senator SPECTER. And that is grounds for a defamation suit. But Senator Grassley does not like dealing with lawyers, so he has never brought the suit. But he was after Attorney General William French Smith, so, Mr. Hertz, if he is tough on you today, he goes after Attorneys General as well.

One day I was at the White House, in 1984, and Attorney General Smith said, "Why are you after me?" And I finally realized that he thought I was Chuck Grassley.

[Laughter.]

Senator SPECTER. Senator Grassley tells a story—well, you tell the story about what happened, people remonstrated you for your terrible questioning of Professor Anita Hill.

Senator GRASSLEY. Yes, and, you know, the practice then when we had Anita Hill and other people before the Committee at the Thomas hearing, there were two Republicans and two Democrats that were scheduled to ask questions. None of the rest of us asked questions. That was a bipartisan agreement at that time. And so

he was asking the questions for the Republicans. We each made a statement for maybe 2 or 3 minutes, is all our participation. But for the next 6 months, because he asked such tough questions of the witnesses, everybody would come up to me and say, "I don't see how you could have been so mean to those witnesses."

[Laughter.]

Senator GRASSLEY. And I was innocent. I did not ask a single question, nor did most of the other Republicans.

Senator SPECTER. One addendum to that. In 1999, 8 years after those hearings were over, Senator Grassley and Justice Thomas were having breakfast in the Senate dining room. And I walked over to the two of them sitting there, and I said, "Justice Thomas, I want to tell you two things. I want to tell you how hard it was for me to get Grassley to vote for you." They both about fell off their chairs, this diehard Republican. "And one other thing I want to tell you, Justice Thomas. You know all those questions I asked Professor Hill? Grassley fed them to me."

[Laughter.]

Senator SPECTER. But on the subject, this is—

Chairman LEAHY. And what was his answer?

Senator SPECTER. He laughed. Justice Thomas has a laugh which originates in the lower part of his abdomen. He really explodes with his laugh. But those were complex hearings, really historic hearings.

Senator Leahy and I have been around, as has Senator Grassley, to participate in a lot of historic hearings, and this is a very important one. And I will work hard with Senator Grassley and Senator Leahy to see if we cannot get this legislation. And we are amenable to your suggestions, Mr. Hertz, as to where you think it ought to go, as long as we can get the bill passed.

Senator GRASSLEY. Senator Leahy, if I could delay my opening statement, because I would like to make sure as Chairman of the Committee, I think it is very important to the legitimacy of my legislation if you would ask your questions before you go?

Chairman LEAHY. I will, and I appreciate that.

Mr. Hertz, if you would stand, please, to be sworn. Do you solemnly swear that the testimony you will give in this matter will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. HERTZ. I do.

Chairman LEAHY. Thank you.

Michael Hertz is the Deputy Assistant Attorney General for the Commercial Litigation Branch of the Civil Division at the Department of Justice. He served continuously with the Department for over 30 years. Beginning in 1975 when he joined the Civil Division's appellate staff, he supervised and litigated False Claims Act cases extensively during his long and distinguished career. And I might note that through the years, in both Republican and Democratic administrations, I have noted that it is the career people in the Department of Justice that are the most important aspect of that Department. I remember how appealing I found them when I was a young law student—I actually did value getting my law degree—when the then-Attorney General was basically asking me if I would come out of law school and join the Department of Justice.

I remember that Attorney General. I was very impressed with my meeting with him, and telling me how in the professional division they did not allow politics to influence them. I had some interest in the Criminal Division. He said even the President of the United States—he told the President of the United States he could not interfere with a criminal investigation. And I thanked Attorney General Robert Kennedy for telling me that, and it turned out, as history showed, that when a strong supporter of his brother was involved with a criminal matter, they prosecuted him. And that is, of course, the way it should be.

Mr. Hertz during his service with the Department has received numerous awards, including the Stanley D. Rose Memorial Award. That is the Civil Division's highest ranking award. He received that in 2002. He has his bachelor's degree from Rensselaer, a law degree from Northwestern University School of Law. Please, Mr. Hertz, go ahead.

STATEMENT OF MICHAEL HERTZ, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. HERTZ. Mr. Chairman, Senator Grassley, I want to thank the Committee for inviting me to testify and present the views of the Department of Justice on Senate bill 2041. I also appreciate having this opportunity to review with you the Department's experience with qui tam actions since the 1986 amendments.

The Department of Justice is committed to the vigorous enforcement of the laws against those who perpetrate fraud to obtain money from the Government. Since the False Claims Act was amended and liberalized in 1986, over \$20 billion has been recovered on behalf of taxpayers by the Department with more than \$5 billion of that amount in just the past 2 years. The qui tam provisions of the False Claims Act statute, which the Department continues to vigorously support, have augmented our resources to address fraud in connection with Government programs and to recover some losses to the Federal fisc that would not have otherwise been identified. Since the qui tam provisions of the False Claims Act were amended, there have been more than 5,800 suits filed with the Department through fiscal year 2007. It is significant to note that of the \$20 billion recovered under the False Claims Act since 1986, \$12.6 billion has been the result of qui tam actions, and the Department has paid awards to qui tam relators of \$2 billion.

We believe that the success of the Act's qui tam provisions are in large part due to the efforts of both whistleblowers, whom we acknowledge bring these cases often at great personal sacrifice, and the highly professional, skilled and dedicated Government attorneys, agents, auditors, who, with the encouragement of the Department, work with relators and their attorneys to fully implement the public-private partnership contemplated by the 1986 amendments.

As I have said, the Department is of the view that the False Claims Act is effective and working very well. Accordingly, we have not independently urged or seen a pressing need for major amendments at this time. As our views letter and appendix reflect, however, the Department has considered the bill carefully and is sym-

pathetic and can support many of the proposed changes to the False Claims Act, although in a number of instances we proposed alternative language to accomplish essentially the same purpose.

For example, we have argued that the presentment and Federal funds limitations imposed by the courts in the *Totten* decision and the *Custer Battles* decision were incorrectly imposed, and we have filed amicus briefs arguing that both cases were wrongly decided. To the extent that S. 2041 proposes to redress those holdings, we have provided comments for an effective and simple way to do so.

Similarly, we support the goals embodied by the provisions of S. 2041 that: one, clarify the conspiracy provisions apply to all substantive bases of liability; two, make actionable under the False Claims Act the requirement to return overpayments; three, prohibit the unwitting waiver of claims by relators; four, provide a single 10-year statute of limitations under the False Claims Act; five, make clear that under the False Claims Act amended allegations filed by the United States relate back to the date of the original complaint by the relator; and, six, streamline and make effective the False Claims Act civil investigative demands.

Notwithstanding these areas of mutual agreement, and principally because of S. 2041's specific proposals with respect to the right of Government employees to serve as relators, and the public disclosure bar, as well as the preference for the alternative language we have proposed, the Department cannot support the bill as currently drafted.

The Department is opposed to an explicit legislative recognition of the right of Government employees to serve as relators and obtain qui tam awards. Each Federal employee has an existing duty to report fraud, waste, and abuse. Adding a financial incentive to file qui tam suits conflicts with this duty and has the potential to undermine both the employee's loyalty to the Government and the public's confidence in the fairness and impartiality of the Government's decisions. This is particularly true for those Government employees such as auditors, investigators, contracting officials, and attorneys who are paid salaries by the taxpayers to identify and root out fraud and who, under S. 2041, would not be barred from filing suits using information they learned in carrying out those duties.

We are also concerned that in an effort to correct the current public disclosure bar, the proposed legislation will unduly narrow it. One of the guiding principles of the False Claims Act was that it was intended to provide the Government with information about fraud it otherwise would not have discovered. As currently drafted, the proposed narrowing restrictions would enable rewards to be claimed by plaintiffs with no firsthand knowledge of fraud and who do not add information beyond what is in the public domain, as well as plaintiffs in a broad range of cases where the Government is already taking action.

While the Department could support aspects of the bill's proposal that eliminate the jurisdictional nature of the public disclosure bar and that permit only the Attorney General, and not defendants, to seek dismissal of relators on this ground, it could only do so if the bar reflects the concerns we have outlined. In our view, the public disclosure bar would have to be revised to permit dismissal of a qui

tam action by the Government if it is already pursuing the matter unless the relator provides new information that would enhance the Government's recovery or the Government's investigation is based on information voluntarily provided by the relator.

The Department wishes to acknowledge the efforts of Senators Grassley, Leahy, Specter, and Durbin and their staffs for the thoughtful work that has gone into S. 2041. Although as currently proposed the Department cannot support the bill, we remain willing to work with the Committee to address our concerns and ensure that the False Claims Act remains the vital anti-fraud weapon that it is today.

I look forward to your questions. Thank you.

Chairman LEAHY. Well, thank you, Mr. Hertz. You know, I am somewhat concerned on the part that you do disagree with, and I appreciate the fact that the Department agrees with a number of the sections. And I take it you feel the *Rockwell* decision was wrongly decided. Is that correct?

Mr. HERTZ. That is correct. The Government filed an amicus urging that the relator in that case be allowed to retain the award.

Chairman LEAHY. I agree with that. But you understand that under our bill—and I understand what you said about employees already have—Government employees have a duty to report fraud or abuse, and we will all agree on that. The concern I have had—and I know Senator Grassley and others have had—is that many times when that is reported, it is reported to the detriment of the career of the person doing the reporting. And our bill says that if they discover a fraud, they have to report it to their superiors or to the Inspector General of the Department. And they are not allowed to sue if action is taken. But the only time they can sue is if a year goes by and no action has been taken. Then they can sue.

Do you really find that unreasonable?

Mr. HERTZ. Mr. Chairman, we appreciate the efforts that the provisions of the bill attempt to put restrictions on Government employees, and we recognize that there are some policy choices to be made here. But at the end of the day, we are left with a couple of factors that cause us to say that Government employees should not be allowed to file suit even in the circumstances you outline.

First and foremost is, at the end of the day, after the Government employee follows all the procedures in the bill and files a lawsuit, you will still have the situation where the Government employee has a personal financial interest in the matter that he worked on as a Government employee. This is something that is contrary to ethics regs and ethics statutes.

Chairman LEAHY. I understand that, but we have a certain amount of frustration. If somebody finds something and they report it to the Inspector General, they report it to the Secretary or whoever it might be, and nothing happens—and that has been a situation—what do you do? I mean, you read all these cases about Iraq and Afghanistan. We have spent \$500 billion there. You read in the press there seem to be well—documented cases of fraud and waste. There has been, if I am correct by my notes here, five False Claims Act settlements through the Justice Department, \$16 million in cases involving fraud in Iraq and Afghanistan. The AG says there

are 230 false claim cases involving defense procurement fraud under seal at the Justice Department.

My concern is that political decisions can be made to stop these claims from going forward or that if you have a Government employee—usually, the first one who can see fraud and waste, you know, the trucks get a flat tire, and they just leave the trucks behind, the huge amounts of money that Halliburton was spending on hotels and things like this. They are the ones who are going to see it. And if nothing is done on it, does it just get covered up?

Mr. HERTZ. I think we are talking about potentially two different issues. One—

Chairman LEAHY. Tell me why.

Mr. HERTZ. Well, we are talking about, one, cases in Iraq. If you look at the qui tam cases that have come out from under seal involving Iraq, they have not involved Government employee relators. And we are working the cases that have been filed in connection with the war in Iraq.

Chairman LEAHY. Well, you mentioned those under seal. How many have been under seal for more than 2 years?

Mr. HERTZ. In Iraq?

Chairman LEAHY. In Iraq and Afghanistan.

Mr. HERTZ. Well, I do not know. There have been a total of approximately 45 cases involving Iraq and Afghanistan, and about 15 of them are out from under seal. Some we have declined, some we have intervened, some we have settled. One of the things that we have done, we did—you know, unfortunately, these cases are complicated, and they take time.

Chairman LEAHY. Well, let me ask it another way: Defense procurement cases—and this involves everywhere, not necessarily just Iraq and Afghanistan—the AG says there are 230 under seal. How many of those under seal involve either Iraq or Afghanistan?

Mr. HERTZ. It should be about 30 of those.

Chairman LEAHY. OK. That is what I wanted to make sure I understood. And how many of those have been under seal for more than 2 years?

Mr. HERTZ. Well, you know, I do not know the answer to that, but most of the cases that have come in regarding Iraq have come in in the last 3 years. If you look at the total number of cases that are still under seal, most of those have come in in the last 3 years.

We know that it takes a long time to work these cases. There doesn't seem to be any significant difference in the period of time before the Government makes an intervention decision in the cases involving Iraq and the other cases, the pharmaceutical cases that we have, other areas.

Chairman LEAHY. If I might just ask one last question—I have gone over my time, but you have about 1,000 backlogged now. Have you ever seen a backlog this—you have got institutional memory that most people do not have. Have you ever seen a backlog this big?

Mr. HERTZ. You know, I have not really looked at the numbers that way. We are trying—they come in at the rate of about 350 a year. Whether the—

Chairman LEAHY. And the Justice Department is settling about 100 a year.

Mr. HERTZ. The *qui tam*—right, but we decline an awful lot of cases. You know, we decline and do not proceed with 75 to 80 percent of the cases.

Chairman LEAHY. I understand.

Mr. HERTZ. Most of those cases actually end up not producing any recovery for the Government. Whether we are disposing more than the 350 that come in per year, I would have to go back and look at that. So I do not know whether the backlog has built over the last few years or has started going down.

Chairman LEAHY. I tell you what. My time is up. I am going to ask my staff—I have got a number of questions, and they are aware of them—to sit down and work with you on questions of whether we need more staffing. And if you could be good enough to respond to those, please.

Mr. HERTZ. I would be happy to respond to the questions.

Chairman LEAHY. Thank you. And Senator Durbin has come in, but as before, I am going to be leaving for this other Committee meeting, and I am going to turn it over to Senator Grassley to chair this.

Senator GRASSLEY. [Presiding.] Thank you. I would like to defer to Senator Durbin because I know a Leader has limited time. No, please go ahead. Please go ahead.

Senator DURBIN. Thank you very much.

Senator GRASSLEY. Because I may have the whole meeting to myself. So you go ahead.

[Laughter.]

Senator DURBIN. Thank you, Senator Grassley and Senator Leahy. Senator Leahy, thank you for this hearing. And Senator Grassley has been an extraordinary champion of this issue for as long as I have served in the Senate, probably before. I think it is an extraordinary opportunity to try to ferret out fraud and waste of taxpayers' dollars, and I am a little bit honored and taken by the fact that it started under a President from the State of Illinois.

Let me just ask you this, if I might, basic questions, Mr. Hertz. I take it that the Department does not agree with the fundamental goal of this legislation, which is to try to make certain that taxpayers' funds are not wasted, that we do not defraud people who are supposedly serving in good faith, trying to serve their Government. Is that true?

Mr. HERTZ. No, I do not think that it is true that we disagree with the fundamental purposes of the legislation. I think our—as I have said, we are actually sympathetic with many of the provisions that they are trying to accomplish. I have also said that some of the issues, for example, like *Totten* and *Custer Battles*, are actually still in the courts. We do not have final judicial resolution—

Senator DURBIN. Well, we try to resolve the *Totten* issue. Do you have any problem with our resolution of that?

Mr. HERTZ. I think we propose a different way to fix it. We have said that *Totten* was wrongly decided.

Senator DURBIN. OK.

Mr. HERTZ. And we disagree with, you know, the ruling and think the principle should be otherwise.

Senator DURBIN. So let's go to the next question. The question is: What about rank-and-file Government employees who see fraud,

report it to the supervisor, the Inspector General, and nothing happens? What if the employee's supervisors do nothing to correct or even investigate the fraud? Should we do something to incentivize those employees to keep working to bring that fraud to light?

Mr. HERTZ. I think we already have incentivized those employees. I think if they run into resistance within their chain of command, they should have the right and go to the Inspector General of that agency, or even come directly to the Department of Justice. The Department of Justice, I would suggest, has actually a fairly good record when it gets cases that come to us in the qui tam context. As I said, we intervene in about 20 to 25 percent of the cases. Virtually all of those end up in a recovery for the Government. And the 75 to 80 percent of the cases that we decide not to go forward with, there are much more limited recoveries. That is what history shows us.

So I think that these employees have a place to go. Given that and given what we would say are the potential conflicts of that employee using information that comes to him in his Government capacity for a personal financial gain, which could essentially cause the public to really distrust people who are doing regulating—people in the Government who are regulating or contracting with or investigating or auditing third parties. If they can use that information to file their own qui tam lawsuit, even accepting the fact that their supervisors have rejected going forward with a fraud case, I think that calls—the public could have a perception problem that the Government is acting fairly in those circumstances.

Senator DURBIN. I just wanted to check my notes here and try to—I have some information here, and I do not know if Senator Grassley has it, that since 1986 the Federal Government and qui tam relators have worked together to recover \$20 billion in Government money. So, clearly, there is some value to the current system.

Mr. HERTZ. Oh, absolutely.

Senator DURBIN. And my question to you is: If the ordinary process, the due process of Government does not result in an investigation, your position is it should end at that point.

Mr. HERTZ. No. We accept and we have long accepted that when a relator who is not a Government employee files a case, even if the Government decides not to go forward, that relator should be allowed to go forward.

Senator DURBIN. Why restrict it to just non-Government employees?

Mr. HERTZ. Because the non-Government employee does not have the restrictions on them not to use public information for their own personal gain.

Senator DURBIN. And the non-Government employee is less likely to have the information to pursue a claim.

Mr. HERTZ. Actually, we would suggest otherwise. The non-Government employee who is in the corporation is likely to have first-hand knowledge of the fraud. The Government employee is likely to only have secondhand or derivative knowledge, things that were reported to him.

Senator DURBIN. Well, I do not know how we can generalize in this situation and say that you would exclude Government employees. But I take it that just as a fundamental principle, you are op-

posed to the idea of a Government employee recovering any money personally as a result of a fraud on our Government

Mr. HERTZ. As a result of using information they learned as a Government employee, and using information they learned performing their Government duties as a regulator, investigator, auditor, using that information for their personal gain, correct.

Senator DURBIN. Having served on the Intelligence Committee where they classify everything that is not moving, including the coffee pot, I am concerned here, because I know that if you want to break out and get something done significantly, there are many ways within Government to stop you. And these people who have pursued regular governmental due process without good results have as last recourse the option as a Government employee of taking these to court and getting it resolved. And my fear is that at the end of the day, if we follow your lead and follow your suggestion, we are going to close off a lot of opportunities to stop the fraud on the taxpayers. That seems to me like a greater public good than the possible notion that a Federal employee who does the right thing, blows the whistle, and gets the right result may end up with some money in their pocket.

Mr. HERTZ. As I said, these are policy questions that we come down on a different side. Our experience shows that those Government employees that have filed qui tam suits for the most part have not gone to the Inspector General first, have not come to the Department of Justice. And as I said, when we get cases, when we in the Civil Division, the career employees who work these cases, who have dedicated their professional lives to bringing these cases, we have a pretty good track record of bringing the meritorious ones, and the ones that do not get brought—although there have been exceptions, there have been recoveries in cases where the Government has declined. I do not want to suggest otherwise. We think that is a relatively small price to pay, to give up those potential suits, considering the harm to public perception of allowing a Government employee to use information they learn in their official capacity.

Senator DURBIN. I would just conclude by saying I think the American public would be less scandalized by the notion that a Federal employee might end up with 10 percent or 20 percent of the outcome and find millions, if not billions of dollars being saved from being defrauded.

Mr. HERTZ. Well, as I said, you know, if there is millions or billions of dollars being defrauded and it is reported to the Department of Justice, the Department of Justice is going to bring that case on behalf of—

Senator DURBIN. It should bring this case, but it does not always bring the case.

Mr. HERTZ. Well, again, we do not really have any experience of cases being brought by Federal employees to the Department of Justice that were not brought.

Senator DURBIN. Never.

Mr. HERTZ. In terms of meritorious cases?

Senator DURBIN. Never.

Mr. HERTZ. Well, because what I am suggesting is the Government employee cases that have been brought have not previously

been brought to the Department of Justice before those cases were filed.

Senator DURBIN. Never. So there has never been a meritorious case brought to the Department for investigation that you have not followed through?

Mr. HERTZ. No. I am saying Government employees—the experience that exists today with Government employees filing qui tam suits, none of those, to my recollection, were brought to the Department of Justice before the Government employee filed that suit.

Senator DURBIN. Senator Grassley, back to you.

Senator GRASSLEY. Senator Durbin, we do have some circuit courts that say a Government employee ought to be able to do it. We have other circuits that say they could not. And we ought to solve this, and that is the purpose of having the issue you raise in the legislation, so we can—and then I could also—later on I will bring up that in 1990, 4 years after the law was passed, I gave several testimonies to different committees of Congress that the intent of the original legislation was that Government employees ought to be relators.

Mr. Hertz, I am going to ask—I cannot ask you all the questions I would like to ask you, so you will have to answer a lot of them in writing that we will submit to you and to the Department. So I will go with just a few of the questions.

I have a longstanding belief that the 1986 amendments did not preclude Federal Government employees from acting as qui tam relators. For instances, in 1990, I testified in the House that Government employees should be allowed to file qui tam suits if they first make a good-faith effort to report the fraud within proper channels. My rationale is that if a Government employee reports the fraud and supervisors sit on it because they do not want egg on their face, there needs to be a way to address the loss to the American taxpayers. Allowing Government employees to act as relators is yet another check that we can have on bureaucracy that may be too big and too unenthusiastic about stopping fraud.

However, we should put reasonable steps in place to ensure that these employees are not just sitting on the job building a qui tam case. Section 3 of the bill includes requirements that a Government employee must overcome, such as reporting to supervisors, the Inspector General, and then to the Attorney General. Then after that, there has to be a whole year that has to elapse, inaction on the part of the Government. It would seem to me that 1 year is long enough for the Government to make a decision if they are going to get involved or not be involved, and if they decide not to get involved, then the qui tam ought to proceed. These are procedural hurdles that are not even required now under the case in the Eleventh Circuit.

I understand the Department strongly opposes this section, but what should a Government employee who uncovers fraud do if he reports it up the chain and then there is nothing to stop it?

Mr. HERTZ. Senator Grassley, as I said, we appreciate the efforts that the bill makes to put some restrictions on this. It deals with some of the concerns that we have with regard to Government employees. But in the end, it does not deal and we do not see how it can deal with what we see as the fundamental problem of a Gov-

ernment employee who, after he has followed all these procedures, files a lawsuit using information that came to him in his governmental capacity for his personal gain. That is just a principle that comes out of congressional statutes. It comes out of regulations. It is something we drill all executive branch employees in terms of training every year. For us, that is just a principle that really allowing these lawsuits would violate.

In addition, as I said—I might read something. In 1943, the Supreme Court decided *Marcus v. Hess*—Senator Specter referred to it—and this was the case that led to the amendments in 1943 when the Supreme Court had decided that a relator who had actually just copied public information could bring a lawsuit, Congress wanted to change that. Justice Jackson dissented from that decision. The dissent eventually became the law, and although that case did not involve a Government employee, the issue apparently came up. He pointed out and he said to permit law enforcement officials to “use information gleaned in their investigation to sue as informers for their own profit would make the law a downright vicious and corrupting one.” He went on to say, “If we were to add motives of personal avarice to other prompters of official zeal, the time might come when the scandals of law enforcement would exceed the scandals of its violation.”

It was clear under the 1943 amendments—and it was actually debated on the floor, at least in one of the Houses—that Government employees would not be able to file qui tam cases. In 1986, there appears not to have been any public discussion of it in the legislative history. The change of the legislative bar had, we think, the unintended effect of potentially allowing Government employees, and as I have said, we think that that is really a policy that should not stand.

Senator GRASSLEY. Well, my next question was going to be if there was any sort of suggestions you could make, but I think I have just heard from you that there is really no middle ground between the position that Senator Durbin and I have in our bill and what you have just stated as the position of the Department. Or do you think there might be some middle ground?

Mr. HERTZ. I have not been able to think of any. We certainly would be willing to try to think of it. But as I said, at the end of the day, when all those procedures you put in the bill are followed, you still have the situation of the Government employee using Government information to file a lawsuit from which he personally can potentially benefit.

Senator GRASSLEY. Well, you know, the questions raised by you and then by the quotes that you gave that it might promote corruption on the part of Government employees to personally profit, but do not forget we are trying to stop other people from corrupting the public process and the public purse. And it seems to me if we have a heck of a lot more people doing business with the Government than we have Government employees, there is greater possibility for corruption on the outside that a Government employee might know something about than there is corruption from a few whistleblowers.

Mr. HERTZ. Right, and as we said, we would encourage Government employees who run into a stone wall within their agency to

go to the Inspector General, come directly to the Department of Justice.

Senator GRASSLEY. That is what we do, and we just ask the Department of Justice to make a decision in 1 year. Otherwise, they can proceed.

Would you oppose future Government relators if the Eleventh Circuit allowed them to proceed?

Mr. HERTZ. You are quite correct, there are at least two courts of appeals that have suggested that Government employees under the existing law, where there is not otherwise a public disclosure, can proceed—the Eleventh Circuit and the Tenth Circuit. We do not think that really all the courts have spoken on that. Even the Tenth Circuit has suggested that there may be arguments that the Government could make that a Government employee would hold any recovery that they had in constructive trust for the United States.

So I think in terms of where we are sort of in terms of judicial decisions, we would like the opportunity to keep litigating the Government's positions prior to having an explicit legislative recognition of the right of a Government employee to file a *qui tam* lawsuit.

Senator GRASSLEY. OK. Now, I know you mentioned that there was no legislative history on this issue, but I want to assure you, even though you disagree with me, I was there, and I want to make it very clear to you. And I think I made this clear in some of my testimony that I gave to Congress later on after 1986 that we intentionally meant to overturn the 1943 amendments to the False Claims Act when we changed it in 1986. That was our intent. Now, you might disagree with that intent.

Mr. HERTZ. Oh, I agree that the intent was to overturn the 1943 amendments in certain regards. Obviously, the bar on the Government having knowledge about information barring a *qui tam* relator, what I suggested was we did not see anything in the legislative history dealing with the specific question of Government employee relators.

Senator GRASSLEY. OK. Let me go on to the *Totten* decision. There the D.C. Circuit raised the notion that Section 3729(a)(1) included a requirement that claims be presented directly to a Government employee. While this may be a legitimate reading, the court further added that in reading Section 3729(a) implies that the presentment requirement be read into subsections (a)(2) and (a)(3).

This was not the intent of Congress in 1986. The D.C. Circuit even concluded that subsection (a)(2) has “no express requirements of presentment.” However, just yesterday, the Supreme Court heard oral arguments in a case where the petitioners seek this result. I wrote a brief opposing this view, and I know the Department did as well. I have learned not to hold my breath when it comes to the False Claims Act cases before the Court, so Section 1 of S. 2041 would correct this problem.

Looking at the Department of Justice views letter, the Department, in a fairly convoluted way, seems to support fixing the presentment requirement, but not the way that Section 1 is drafted. What is the problem with trying to have the False Claims Act li-

ability to all Government money and property, as Section 1 currently does?

Mr. HERTZ. Well, what we suggested in our appendix to our views letters is we thought there was a simpler way to accomplish that. We were concerned that uses of phrases in 2041, such as an “administrative beneficiary,” which is a brand new phrase incorporated into the False Claims Act, would give the courts an opportunity to interpret terms and we are not exactly sure how they would interpret it.

We also thought that the simplest fix with regard to the decision with regard to *Totten* is to remove the word “presentment” from (a)(1) because that word in (a)(1) allowed then-Judge Roberts to say that (a)(2) should be parallel to it. So we think we have a more simplified way to do this using terms that are less likely to be ambiguous or where people could argue that they are ambiguous and have an unintended interpretation by the Court.

Senator GRASSLEY. Can I at least say that even though there are different ways to approach it, you do not disagree with what we are trying to accomplish?

Mr. HERTZ. I mean, we agree that *Totten* is wrongly decided. We agree that the principle in *Totten* should not be a principle under the False Claims Act. I think the only thing I would suggest is at this point in time, since we do not know what the Supreme Court is going to do in *Allison Engine*, and we could get some language that might—it is hard to—as you say, hard to predict. We might actually want to see what that decision looks like before we had, you know, a final fix on the *Totten* problem.

Senator GRASSLEY. Senator Durbin, I am glad to go back to you since I went over my time.

[No response.]

Senator GRASSLEY. OK. Then to followup, in the views letters, the Department states, “It does not advocate and would not support application of the False Claims Act to all acts of fraud directed at an entity that receives money from the United States.” Do you believe that my bill would apply the False Claims Act to all acts of fraud directed at any entity that receives money from the United States? And if so, why?

Mr. HERTZ. No, I do not believe that your bill does that. I think we just wanted to make clear that we do think there are limits, and we think there are limits in your bill as well.

Senator GRASSLEY. OK. I appreciate your testimony. I wanted to ask your views on the view letter. In the cover letter, the Department states that, “There is no pressing need for major amendments” to the False Claims Act. Further, the letter states that the administration cannot support the bill “as currently drafted.” However, after reading the appendix filing and the amicus brief alongside the Department of Justice in the Supreme Court, and after hearing from the line attorneys in the Department of Justice, I believe that there is a lot in this bill that the Department of Justice does support. Further, I think there are provisions that the Department of Justice needs to effectively enforce the False Claims Act.

If you had to name one legislative fix that is needed, what would be the top choice and why?

Mr. HERTZ. If there was only going to be one, I think I would opt for a relatively simple fix involving the CID provisions, because it is relatively straightforward, it would probably have the most effect on a day-to-day basis for our line attorneys who are actually investigating these cases, the ability to essentially subpoena witnesses and compel depositions without having to go through the cumbersome procedure of having to get approval from the Attorney General. We would think that this particular change would be relatively straightforward and should not engender a lot of controversy. And as I said, I think it would probably have the most immediate effect.

Senator GRASSLEY. OK. Another question along the same line. How far apart do you think that my bill is from the suggestions for edit that you have made for presentment and public disclosure? And do you think that we could reach an agreement on that section?

Mr. HERTZ. Well, again, I think we—you know, as I said, we appreciate the work that you and your staff have done. It obviously represents a lot of work. It is currently a complicated statute with lots of court interpretations. You know, it takes some careful thought to think about how language should be structured to get the results that we intend. We tried to come up with our best shot at trying to fix what we think are the same problems and achieve the same goals that you were going for, and I think really we would be at the stage where we would sit down and talk with your staff, because I am sure they probably may have noticed things in our proposals that they might think do not work as well as we might think.

Senator GRASSLEY. If we were to make the changes to the public disclosure bar of presentment, do you think it would increase the chances of Government fraud recovery?

Mr. HERTZ. I am not sure which changes you are referring to.

Senator GRASSLEY. Let me repeat and then I will have my staff—if it is not clear, I will have my staff clarify. If we were to make the changes to the public disclosure bar or presentment, do you think it will increase the chances of Government fraud recoveries?

Mr. HERTZ. There are two questions: presentment and public disclosure. You know, to be candid, we have had pretty good luck since the *Totten* decision in essentially limiting that decision and finding other avenues under the existing language of the False Claims Act to go after frauds. So I am not sure at this point in time I could say that there are a lot of cases that could not be brought because of the *Totten* decision. That would be something that would probably play out over time.

With regard to the public disclosure bar, as I think we have outlined, we do have some disagreements with the proposal in S. 2041. And so I think under our version, you know, I do not know the answer whether it would increase or decrease the number of *qui tam* cases.

Senator GRASSLEY. OK. Mr. Hertz, I think the rest of my questions will have to be submitted in writing. Does Senator Durbin have any more questions?

[No response.]

Senator GRASSLEY. OK. Thank you very much.

Mr. HERTZ. Thank you, Senator.

[The prepared statement of Mr. Hertz appears as a submission for the record.]

Senator GRASSLEY. Could I have the next panel come, every one of you come at the same time? And maybe before you sit down, each of you, it is a tradition in this Committee to swear people, so I would ask you to hold your—well, I will wait until you get to the table.

Thank you all. Would you—this is what I am not customarily doing because we do not do this in the Finance Committee. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. GONTER. I do.

Judge CLARK. I do.

Mr. BOESE. I do.

Senator GRASSLEY. Thank you. I want to introduce each of you before you testify. We have Tina Gonter. From 1982 to 1996, she worked as a nuclear mechanical systems inspector for the Department of Defense and was assigned to the Quality Assurance Department, Norfolk Navy Shipyard, Plymouth, Virginia. In 1999, she moved to Ohio and began work for Hunt Valve Company as military quality assurance manager. She filed a qui tam case under the False Claims Act along with her husband against the Hunt Valve Company in April 2001. The case settled in 2005. Their investigation exposed serious fraud perpetrated against the U.S. Navy. She now lives with her husband in Jacksonville, Florida. I think her story is a truly amazing example of how the False Claims Act works.

Judge Clark focuses his current practice on representation of relators in qui tam litigation under Federal false claims and corresponding State laws. Judge Clark is of counsel, San Antonio law firm of Goode, Casseb, Jones, Riklin, Choate & Watson. From 1969 to 1977, he worked for the Department of Justice; served as U.S. Attorney, Western District of Texas, 1975 to 1977. Judge Clark was appointed and served as Justice, Texas Court of Appeals, Fourth Circuit, 1981 to 1982. Judge Clark served as a member and Chairman of several commissions, advisory boards, including Texas Ethics Commission, received a bachelor degree from Lamar University, and his law degree, University of Texas.

John Boese is a partner at the Washington law firm Fried, Frank, Harris, Shriver & Jacobson. Mr. Boese has represented defendants in numerous false claims cases brought by qui tam relators and Department of Justice over 25 years now. Prior to joining Fried, Frank in 1977, he was a trial attorney with the Civil Division, U.S. Department of Justice. He is an author of a book called "Civil False Claims and Qui Tam Actions," a two-volume discussion of civil False Claims Act and qui tam enforcement at the Federal and State level. He lectures frequently, private and public groups, on civil fraud issues and co-chairs the Biennial American Bar Association National Institute of Civil False Claims Act and Qui Tam Enforcement. Mr. Boese received a bachelor's degree, Washington University, and law degree, St. Louis University.

And then we had another witness that is sick and could not come, and that was Professor Pamela Bucy.

I am going to start in the order we gave, and we will have each of you testify for your 10 minutes—am I right, 10 minutes that was allotted? Or 5 minutes. Yes, 5 minutes. Your whole testimony that would be obviously longer will be printed in the record, so we will start with you, Ms. Gonter.

STATEMENT OF TINA M. GONTER, JACKSONVILLE, FLORIDA

Ms. GONTER. It is an honor to be here. Just to correct just a little note in the introduction.

Senator GRASSLEY. Maybe pull your—whatever sort of correction you want to make, you can make.

Ms. GONTER. OK.

Senator GRASSLEY. Go ahead.

Ms. GONTER. I was not a nuclear mechanical systems inspector from 1982 to 1996. I started off as a metals inspector in radiography. So I just wanted to make sure that that was clear.

Senator GRASSLEY. Sure. We stand corrected. And don't be nervous. This may be your first time before the U.S. Congress. We put our pants on a leg at a time just like everybody else.

[Laughter.]

Senator GRASSLEY. Just feel comfortable.

Ms. GONTER. Mr. Chairman and members of the Committee, my name is Tina Gonter, and I was a relator in a False Claims Act suit from 2001 to 2006. I reported fraud committed by military defense contractors Northrop Grumman and EB, who delivered nuclear submarines to the Navy. I worked for their subcontractor, Hunt Valve, who supplied valves for submarines. My background as a quality assurance specialist prepared me for my position at Hunt.

For many years, I worked for Norfolk Naval Shipyard as a nuclear mechanical ship systems inspector. During my time at the shipyard, I received extensive and comprehensive training in quality control requirements.

In November of 2000, I was hired on as quality manager at Hunt Valve in Salem, Ohio, where my husband had already recently started working. Hunt was the major supplier of valves and valve parts to the U.S. Navy and its shipbuilding prime contractors, including Level I/SUBSAFE valves. These valves have critical applications on the submarines and surface ships and, thus, have extremely high standards and requirements for all aspects of their development.

Within a few days of starting at Hunt, I began to suspect that they were committing fraud. I witnessed the complete disregard for quality control standards. My first course of action was to initiate cause and corrective action and try to resolve the violations. This, however, quickly resulted in upper management directing me to only concern myself with my office and the paperwork I was required to review.

After many, many confrontations, and being ignored by my boss and others, I decided I needed outside help. After lots of calls to try to find someone to help me, I connected with qui tam lawyers Rich Morgan and Jennifer Verkamp. They quickly involved DCIS

agents Jay Strauch and Mike Hampp. During our first meeting with the agents, they expressed concern that if my allegations could be proved, the impact to the Department of Defense was serious. They brought a tape recorder to the first meeting, and they asked if I would start taping what was transpiring at Hunt. I agreed, and I wore a tape recorder under my clothes for many months as I gathered information for the Government.

This lasted until August of 2001. It resulted in 8,000 pages of transcripts. I was scared and anxious every day, but honestly, I was more scared of not taping because of the seriousness of what was taking place. I knew that I had to do everything I could to prove that what I was telling them was really happening.

The tape backed up what I had been reporting and revealed the unthinkable extent of fraud and violations. The people involved were completely aware of what they were doing, and this included not just the people at Hunt but the prime contractors as well. The tapes showed that EB source inspectors and upper management were fully aware of what was going on at Hunt. I assisted the Government as much as I could from the inside until I was fired in August of 2001. I believe that Hunt's employees suspected that I was recording conversations, and they certainly knew that I believed their conduct violated the law and their contract requirements. I was told that I was costing too much to correct the deficiencies, and they said that they were making an extreme personnel cutback. However, I was the only one that was fired.

On September the 17th of 2001, 6 days after 9/11, the Defense Department, with the help of the NRC and NCIS and DOE, swarmed Hunt Valve with a search warrant and more than 40 agents. They seized over a million pages of evidence and all computer files. Fearing for our safety, my husband resigned from Hunt, and we made plans to move. We went from a combined income of \$106,000 a year to nothing overnight. We sold our property at a substantial loss in order to have money to live on. We moved to Columbus, Ohio, where the DCIS agents were based in order to assist them in making sense of the huge volume of records seized.

After some time, my husband obtained work, and I spent the next 2 years reviewing files and transcripts with the assistance of my lawyers' paralegal, Mary Jones. We reviewed the documents seized from Hunt in tandem with John Carruthers and Bob Hardin from DCAA. They showed, among other things, that more than half of Hunt's certifications were falsified and that Hunt's welding personnel were improperly and illegally qualified and that material control was not properly documented or maintained.

The Justice Department decided not to intervene in our case against General Dynamics and Northrop Grumman. This decision was never explained to us. However, much later, we were present when the judge was told that if the Navy recovered moneys from General Dynamics and Northrop Grumman, they would add more money to future contract bids and the Navy would just end up paying them back.

Because of the qui tam provisions of the False Claims Act, we were able to go forward on our own. The shipyards were represented by Mr. Boese's firm, I believe, and other huge Washington firms—I am sorry, that is, Boese. The civil case eventually settled,

with the help of Honorable Daniel Polster, who held multiple sessions with all parties. There was also a criminal case, which resulted in Hunt's quality manager and the vice president both pleading guilty to fraud and going to Federal prison for more than 2 years each.

Senator Grassley, I realize I have gone over my time, but I would like to request just another couple minutes.

Senator GRASSLEY. Please go ahead, and I will give each of the other witnesses equal time.

Ms. GONTER. Thank you.

My most sincere goal in all of this was to enhance the safety of our Navy men and women aboard the submarine and surface ships. I believe this happened. I pray that Hunt Valve under new management is doing better at supplying conforming valves. Sadly, I know the reality is that there are many other Hunts out there, and there are many other men and women who have found themselves in situations like this, like ours.

I am so grateful for the False Claims Act, which gives ordinary people like me a voice to try to correct these crimes. I also hope that you do everything you can to make it better, to help people like me not just come forward but to see it through to the end. I think it is critically important that this corrections act covers sub-contractors like Hunt, not just direct Government contractors. Hunt's fraud was not known to the Government, and there is no reason the statute of limitations should be a defense in a situation like this. And while there should never be an issue of whether someone like me is an original source of information, the law should be clear that relators can use what they learn in the course of the Government investigation without putting their lawsuit at risk. Finally, I cannot overstate the importance of comprehensive retaliation protections.

It is a great honor to be here today. But it does not compare to the honor of using the False Claims Act to stop Hunt Valve in its tracks. I urge you to do everything you can to help.

Thank you.

[The prepared statement of Ms. Gonter appears as a submission for the record.]

Senator GRASSLEY. And thank you very much.

Proceed, Judge Clark.

STATEMENT OF HON. JOHN E. CLARK, OF COUNSEL, GOODE, CASSEB, JONES, RIKLIN, CHOATE & WATSON, P.C., SAN ANTONIO, TEXAS

Judge CLARK. Mr. Chairman, Senator Durbin, thank you for allowing me to comment on this bill.

Relators' counsel are glad to see that this bill addresses a lot of the concerns that we have had for improving the False Claims Act and making it work the way Congress intended. We have also read the comments of the Department of Justice, and we think a lot of their suggestions will strengthen and improve the bill. We look forward to working with the Department to help Congress make the Government's primary remedy against fraud even more effective.

I have been a lawyer for nearly 47 years. For the last 15 years I have represented whistleblowers under the False Claims Act and

some State counterparts. Earlier in my career, like many attorneys who represent whistleblowers today, I was a Federal prosecutor, first at the Department of Justice and then in Texas. I prosecuted white-collar crime, and I continued to do that when President Ford appointed me United States Attorney for the Western District of Texas.

I am not a plaintiff's lawyer. I do not represent plaintiffs in negligence cases. I am not what the press refers to as a "trial lawyer." These cases are not about negligence or good-faith mistakes or confusion about regulations. These cases are about knowingly defrauding the United States. And these cases allow me to feel that I am still making at least a small contribution to law enforcement, because that is what this is.

Now, hearing Ms. Gonter's story reminds me once again that it is because of courageous persons like her that I am still representing whistleblowers long past the time when the calendar suggests I should have retired. What she did and what she endured points up why whistleblowers are so important to the Government.

Now, her story is more dramatic than most, but every whistleblower has to understand that his or her life may get turned upside down, and the stress can last for years while the case is under seal. And they will not be able to explain why they had to make a mid-life career change or what is happening to them and why they are having financial problems.

The personal stresses of being a whistleblower drive some quiet plaintiffs into bankruptcy, psychological counseling, and divorce courts, and I have seen it happen. I have to explain those disincentives to prospective whistleblowers when they come to see me so that they and I can decide if they have the courage and the strength and the staying power to even start down that road. But I also have to explain some legal disincentives to them. Some are obstacles that courts have created by misinterpreting the statute, and others have to do with some unforeseen consequences of some of the 1986 amendments. And those obstacles trump all the others because they can kill even the most meritorious case for inconsequential or misguided reasons.

It is disappointing how often I have to explain those legal road blocks to prospective whistleblowers in the context of telling them why their claim will not succeed and I will not pursue it for them.

This bill addresses a lot of those judicial misinterpretations and unforeseen consequences, and I am glad to see the changes. I have given my written comments explaining the reasons. I would like to comment briefly, though, on two particularly important issues:

First, the presentment issue, the *Totten* case and *Custer Battles* decisions. We know from the Department of Justice's testimony they share our concern about the *Totten* decision, and they have suggested some alternative language to improve the way the bill addresses those decisions. As I sit here today, I am not certain that their proposed language would ensure the desired result, but that is for technical reasons that lawyers and law professors can debate about. It has to do with the precise wording chosen, not with the intent, because our intent and their intent is the same. We are trying to ensure the result that we all want.

As to the public disclosure bar, Mr. Chairman, it appears to me that after listening to the Department of Justice and reading their comments and their appendix, we in the relators bar and the Department of Justice are very close to being on common ground. One of the most troublesome aspects of the public disclosure bar is its availability to defendants as a jurisdictional defense, regardless of the defendant's culpability. We strongly agree with the premise of the bill that it should be the Government's sole prerogative to seek dismissal of a qui tam action on public disclosure grounds. The Government is uniquely in a position to know whether it considers the whistleblower somebody it wants to be protected from or values him as an ally whose assistance and resources will help prosecute the case. We deplore the tendency of some courts to interpret the current public disclosure bar far too broadly. That has caused a lot of problems.

Now, we have some questions about how the Department of Justice and the courts would interpret some of the terms and conditions that the Government has suggested as grounds on which the Government could seek a dismissal under public disclosure if they had the sole discretion. But we are very optimistic that we in the relators bar can work with the Department of Justice to reach agreement on some common ground that we could recommend to change the language. But the primary thing is taking the public disclosure bar out of the hands of defendants as a jurisdictional defense, when it has nothing whatever to do with their culpability, it is purely technical when it comes to the relator.

Thank you, Mr. Chairman.

[The prepared statement of Judge Clark appears as a submission for the record.]

Senator GRASSLEY. Thank you, Judge Clark.

Now Mr. Boese.

**STATEMENT OF JOHN T. BOESE, PARTNER, FRIED, FRANK,
HARRIS, SHRIVER & JACOBSON LLP, WASHINGTON, D.C.**

Mr. BOESE. Senator Grassley, Senator Durbin, and members of the Committee, I appreciate the opportunity to testify today on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform in opposition to S. 2041. For the last 25 years, I have had the privilege of defending False Claims Act cases against large and small companies in health care, oil and gas, technology and defense, as well as colleges and universities, airports, churches, and local government agencies—precisely the diverse group of defendants that this bill so deeply affects.

My legal treatise, "Civil False Claims and Qui Tam Actions," has been the leading authority cited by academics in Federal courts for almost 15 years.

The Chamber fully supports the Department of Justice's efforts to recover from those who cheat the Government, and we recognize the importance of an appropriate use of the False Claims Act in those efforts.

As I listened to you and Senator Specter and Chairman Leahy and Senator Durbin speak this morning, I think the difference between us, Senator, is that you are concerned about the guilty under the False Claims Act, and I am concerned about the innocent. And

I am concerned about the abuse of qui tam enforcement by the private plaintiffs bar against innocent defendants in qui tam cases.

The Chamber opposes 2041 because we believe it will not assist the Government in its fraud-fighting efforts and will not result in increased moneys being returned to the Treasury.

Instead, the bill will breach the legitimate expectation of American businesses and institutions who honestly do the Government's work that their Government will treat them fairly, and this bill does not.

I want to first dispel a common misperception that these amendments are necessary for private attorneys to combat major fraud by big corporate interests because those big corporate interests outgun DOJ attorneys. In my experience, the exact opposite is true, and the statistics bear that out. Of the \$20 billion recovered under the False Claims Act between the 1986 amendments and 2007, far less than 2 percent—really 1.4 percent—was recovered in qui tam cases handled by private counsel where the DOJ did not take over the case and prosecute it. These amendments, which are intended to encourage qui tam enforcement really without DOJ, benefit only those qui tam plaintiffs and their lawyers, and not the U.S. taxpayer.

I have also read the DOJ letter that we received on Friday. We have a number of comments about that that I hope we will be able to address in our answer.

With that, I will now quickly address the most egregious impacts of 2041.

First, this bill would dramatically expand the scope of the Act to cover many private contracts and transactions. Although I believe completely unintended, the bill's broad definitions of the terms "Government money" and "administrative beneficiary" will, for example, bring within the scope of the False Claims Act disputes between Federal employees and their hairdressers and their landscapers if they are paid with the Federal employee's salary. It will usurp State contract and tort law if either party receives Federal money in any way or form, and every product liability case will become a False Claims Act case if the product is bought by a Social Security recipient with their Social Security check.

This amendment is an unjustified reaction to a handful of decisions which came to the unremarkable conclusion that the False Claims Act should only apply if the Federal Treasury has been cheated. The Act was never designed to make a Federal case out of every transaction involving money that the Federal Government has touched in any way.

Second, the 1986 amendments struck a delicate balance to allow true whistleblowers to come forward and be rewarded while preventing parasitic qui tam suits by plaintiffs who file qui tam cases based on public information. By effectively eliminating the public disclosure and original source defense, the bill will force American businesses and institutions to defend themselves against qui tam plaintiffs who are not true whistleblowers. And it will allow individuals to use public information to take 25 percent of Government recoveries simply because they are the first to file a qui tam case.

Third, S. 2041 will effectively encourage Federal employees, including Federal auditors and investigators, to use the private infor-

mation they obtain as Federal employees to enrich themselves by filing qui tam suits. The so-called safeguards included in the bill are impractical and illusory. One cannot imagine a better way of destroying the trust and confidence Americans have in their Government and in their Government employees. In our view, S. 2041 reflects bad policy and bad law. There is simply no reasons to treat so unfairly the businesses and institutions who deal with the Government in good faith.

Thank you for this opportunity to present my views. I am happy to take any questions the Committee may have.

[The prepared statement of Mr. Boese appears as a submission for the record.]

Senator GRASSLEY. Senator Durbin, I would like to turn to you because I am sure—then I could continue, if you are the only one that is going to be here, and if you only want one turn, and then I would continue right on through my questions.

Senator DURBIN. Mr. Boese—am I pronouncing your name correctly?

Mr. BOESE. Boese, Your Honor. It rhymes with “crazy.”

Senator DURBIN. Pardon me?

Mr. BOESE. It rhymes with “crazy.”

[Laughter.]

Senator DURBIN. Right. And for the record, I am not a “Your Honor.”

Mr. BOESE. That is where I spend most of my time, Senator. I spend it in court.

Senator DURBIN. So do I understand your testimony that you think our changing the law would mean that if someone brought an action against a company for selling a defective product and, in fact, a Social Security recipient had bought that defective product, you think that is covered by our law?

Mr. BOESE. Yes, sir, I do.

Senator DURBIN. I think you are way off base. I have no idea what you are talking about.

Mr. BOESE. Well, Senator, I can explain it very simply. We—

Senator DURBIN. Please do, because I am a Senator.

Mr. BOESE. And we can supplement that. We can supplement that. And, in fact, in our written statement beginning on page 9— or 10 of our written statement, we go into very significant detail about the definitions of “Government money or property” and “administrative beneficiary.” What those really say is, if you read those amendments, especially subsections (b) and (c) of those amendments, it broadens the definition of who is an administrative beneficiary. If you wanted to include—I mean, we can talk about the Coalition Provisional Authority because I argued the *Custer Battles* case. I am happy to talk about that case. But if you want to extend it to some institutions, I can understand that and we can deal with that. But what you have really said is that anyone who receives money for a Federal purpose.

Now, if you are going to give money to a Social Security beneficiary, the purpose is to support them. You—

Senator DURBIN. So anything the Social Security beneficiary spends money on then comes within the purview of qui tam, as you read it?

Mr. BOESE. If you pass this bill as it is written, yes, I believe that is—

Senator DURBIN. That is the most tortured logic I have ever heard in this Committee. I congratulate you for it. But I think you are completely off base.

Mr. BOESE. Senator—

Senator DURBIN. You are a great advocate, I am sure. I can tell. And I am sure that you have been very successful in your profession. And I have a confession. I used to be one, a real trial lawyer, before I got to be a Senator and a Congressman. So my hat is off to you. But I think you are off base, and we will take a look at it. Certainly it is not our intent, and what you have said—I believe Senator Grassley would agree with me—has never been our intent.

Ms. Gonter, if I can ask you the situation here, you have heard Mr. Boese suggest that the abuses that might take place if we allow the current system to continue. Now, and you also heard the earlier testimony from the Department of Justice about what they think you should have done with your discovery of the fraud on the Government.

First, the fraud that you found involved in your work for the Government, could this have endangered human life?

Ms. GONTER. It is my belief that—

Senator DURBIN. You have to push the button on your microphone to be heard.

Ms. GONTER. The light is on. I am just not close enough.

Senator DURBIN. OK.

Ms. GONTER. It is my belief that, yes, this could have cost lives.

Senator DURBIN. And was there an ordinary process that you could follow to disclose this fraud and to try to do something about it within your workplace?

Ms. GONTER. I approached the quality control manager, who was a lateral position, who was doing the multitude of the fraud, and then went to our boss, who was the vice president of the company. Not only was this happening while I was there, it is under—I understand that it had been going on for approximately 10 years from looking at the paperwork, if not longer.

Senator DURBIN. And I take it from your testimony that that did not result in any action being taken to stop this fraud.

Ms. GONTER. Absolutely not. I was ostracized from meetings. I was then pretty much taken out of my position.

Senator DURBIN. So you followed what you understood to be the ordinary chain of command, the ordinary rules—

Ms. GONTER. Absolutely.

Senator DURBIN.—to try to disclose this fraud that you had found, with no results.

Ms. GONTER. No results.

Senator DURBIN. And your only recourse at that point was either to quit, accept it and be part of it, or do something about it. Is that, as you saw it, the only choice?

Ms. GONTER. There was no choice. I had to do something.

Senator DURBIN. And so you chose to wear a tape recorder and to record 8,000 pages of testimony or transcript conversation.

Ms. GONTER. Approximately 8,000. Yes, sir.

Senator DURBIN. Yes. Mr. Hertz earlier was dismissive of your role in this type of thing, saying, you know, the Government has a way of taking care of these things. Was there anything that—you were employed by a private contractor, I believe, at this time. Is that correct?

Ms. GONTER. That is correct.

Senator DURBIN. Was there anything that you could have turned to, anything outside of your company, for example, where you think you might have turned to the Government for help?

Ms. GONTER. Not that I know of. Just from working with Norfolk Navy Shipyard, we knew that there had to be some type of avenue to report something like this. We knew we had to let someone know. We got on the phone and just started calling everybody that we could think of, and we were directed toward—through the Government, actually. I cannot even remember the guy's name. But he gave us Rick Morgan's name.

Senator DURBIN. And this is a private attorney—Mr. Morgan?

Ms. GONTER. Yes.

Senator DURBIN. OK. And that is what resulted in the qui tam suit.

Ms. GONTER. Yes, sir.

Senator DURBIN. Tell me the outcome of that suit again. When it was all over, was your claim substantiated? Did they agree with you that there had been a defrauding of the Government?

Ms. GONTER. It was settled for \$12 million. Almost \$3 million.

Senator DURBIN. How much?

Ms. GONTER. It was 12-point something, almost \$13 million.

Senator DURBIN. Almost \$13 million.

Ms. GONTER. Yes, sir.

Senator DURBIN. It was found that they had defrauded the Government of that amount. Is that correct?

Ms. GONTER. That was the settlement agreement.

Senator DURBIN. Settlement.

Ms. GONTER. I do not know that they admitted to anything.

Senator DURBIN. All right. Judge Clark, as you cautioned us ahead of time, you are not a plaintiffs' lawyer, so I will not accuse you of that.

[Laughter.]

Judge CLARK. It is not a bad word.

Senator DURBIN. I did not think so. I made a living at it.

Judge CLARK. But I am on the other side of that bar, as a rule.

Senator DURBIN. I understand. And so you have heard Mr. Boese talk about the abuses of this process. Would you like to comment on his interpretation or his evaluation of the Grassley-Durbin bill?

Judge CLARK. Well, some of Mr. Boese's comments strike me as fantasy when he talks about the broad interpretation that could be given. I also take a little offense at the notion that there are a lot of abusive relators' representatives filing these lawsuits. I know personally, I guess, most of the, perhaps 200 or 300 lawyers around the country who are primarily involved in this kind of litigation. And I do not know a finer group of people or a more responsible group of people. They choose their cases carefully and always try to choose cases that the Government will like and intervene in.

Senator DURBIN. Can you relate to me the complexity of these cases, if they are undertaken?

Judge CLARK. They are very complex, and it is a tough road to go down, not only for the relator, like Ms. Gonter, to make that decision, but for the lawyer to make that decision, because these cases typically involve complex facts, facts that have been concealed sometimes for years in the corporate records or some employer's records, facts that are hard to get to. The defendants oftentimes are represented by law firms that have 700 or 800 or 1,000 partners and maybe twice that many paralegals, and so you are embarking on a serious battle if you take one on.

Senator DURBIN. Ms. Gonter's testimony suggests that she was involved in this for years, as I remember. Is that commonplace in this type of litigation?

Judge CLARK. It is. Some of these cases remain under seal for many years. I filed one lawsuit in 1998 for a relator who was in his late 70's at the time. It was finally resolved almost literally on New Year's Eve—yes, New Year's Eve 2004. And I had to remind the court at one time, when the thing was dragging along and settlement negotiations were prolonged, that Charles Dickens used to write about cases in the English chancery courts that parties got born into and died out of. And my now 83-year-old relator was concerned whether he was going to survive this case. These cases can take a long time. It is not at all uncommon for one to remain under seal for 3, 4, 5 years.

Senator DURBIN. Well, I think that is an important part of the record, Senator Grassley, because testimony from Mr. Boese on behalf of the Chamber of Commerce may lead one to believe that this is an ambulance chase that ends very quickly. But it sounds to me like it is a lawsuit that can involve a lot of emotional commitment and a lot of time against the odds, against formidable representation on the other side, and lawsuits of long duration. I do not know many attorneys that would sign up for a lawsuit like that unless they really believed that they had a chance for recovery, a legitimate claim. That has been my experience. You will not keep your law office open very long if you make too many miscalculations in that type of lawsuit.

Judge CLARK. You will not. I am the only one in my law firm who devotes most of his time to this kind of lawsuit. Everybody else is trying to do things that produce a regular stream of income.

Senator DURBIN. Thank you, Senator Grassley.

Senator GRASSLEY. Senator Durbin, it should not surprise you that we have business taking the same point of view, because for 4 years after we passed this legislation, the defense industry tried to gut it, various amendments on appropriation bills, et cetera. We stopped that. When they did not have the credibility to get the job done, they turned to the hospitals of America for a couple years, trying to gut it. They finally gave up. So the last 15 years, we have not had to defend it through the appropriation process and riders trying to gut it and all that. But there are still people that do not want this legislation to function the way it was intended.

Senator DURBIN. Well, they should have known better than to take on an Iowa corn farmer.

[Laughter.]

Senator GRASSLEY. Thank you. Thank you. Are you done? OK.

I have questions of everybody, but I am going to start with Ms. Gonter. First of all, I need to thank you for testifying, and I have been a person that has found whistleblowers to be courageous people. I find very few of them that come to me that do not have a great deal of credibility and lead us to a lot of skeletons being buried in the bureaucracy or within corporations that need to be exposed and we have been able to expose them. And I also agree with what has been testified to already that for the most part whistleblowers ruin themselves professionally as a result of their patriotic efforts. And so, obviously, I come from the standpoint that not every whistleblower might be right, but so many are right that we owe that class of people a debt of gratitude.

Whistleblowers are strong-willed people, obviously. So what was it like to be a whistleblower wearing a wire undercover without your co-workers knowing what you were really doing and some hardships connected with that?

Ms. GONTER. Well, first off, it was scary. Mostly being afraid that you were going to be discovered. There was times where I had to go to the ladies' restroom in a stall and change the tapes out, which you could imagine would make a little bit of racket, unusual racket in a stall that people would probably wonder about.

There was one incident when I was actually in the office, and the tape started malfunctioning. I do not know, somehow it went into like a reverse mode and started clicking relatively loud in my shirt. So I just started talking loudly and tried to back out of the room.

It was uncomfortable. It was scary, and especially in the beginning. But toward the end, I kind of felt like it was my security blanket. And I do not know if I am allowed to do this, but if there is a whistleblower out there and if you can do that, I would recommend it, because it really shows that what is going on is happening, that you are not putting words into other people's mouths. But it was scary.

Senator GRASSLEY. I do not know whether you answered a question like this for Senator Durbin or not, but do you believe that your firing was directly related to your work when you tried to correct the quality at Hunt Valve?

Ms. GONTER. Yes, sir, I do.

Senator GRASSLEY. Do you have any advice for others who know of fraud or are contemplating blowing the whistle? And I think you just in your previous statement gave them encouragement. Do you have any further advice for whistleblowers?

Ms. GONTER. If you are thinking about blowing the whistle, the first obligation is to go through your chain of command. That is not a question. That is your obligation. You go through the chain of command. And I think that anyone, any respectable person in their field, whatever it is, knows that that is the appropriate avenue.

If it is serious enough and your heart just tells you that this is so unacceptable that you cannot deal with it, it is no longer a choice. It is not a choice of whether, you know, I do this or I do not. You have to do it. Who else is going to do it? If it is that important to you, then you have to make that move. You have to contact people that are going to listen to you.

In my case, it was not a choice because we were talking about our sailors' lives.

Senator GRASSLEY. Judge Clark, yesterday the Supreme Court addressed the *Totten* decision in the *Allison Engine* case. I have long stated that I believe the *Totten* decision was incorrectly decided and that it is contrary to the intent of my amendments in 1986.

As a member of the Committee on Finance, I wear another hat because we have so much jurisdiction over Federal Medicare and Medicaid programs. I am concerned with the impact of the *Totten* decision and its progeny may have on health care fraud cases.

As you have litigated a number of Medicare- and Medicaid—related false claim cases, what is your opinion of the impact that *Totten* has had on health care-related false claim cases?

Judge CLARK. Senator, I am very concerned about that because one court in Texas has recently indicated that he thinks the Federal Government does not have standing to make a claim for Medicaid fraud. And that is partly as a result of the *Totten* decision. So it is a source of considerable concern.

Senator GRASSLEY. Is the *Totten* decision being used as a defense to the false claims liability in health care fraud cases? Is that what you just told me?

Judge CLARK. That is the indication that I got. This is not a case of mine, but one that another party is pursuing—well, the State of Texas is pursuing it.

Senator GRASSLEY. I assume you have read a lot of legislative history about the 1986 amendments. Do they contradict the *Totten* decision?

Judge CLARK. Well, yes—

Senator GRASSLEY. You understand?

Judge CLARK. I think so. I think clearly the intention of Congress is contravened by the *Totten* decision. The statute was intended to reach the kind of thing that *Totten* says it does not, in my opinion.

Senator GRASSLEY. In the views letter submitted by the Department, they propose different language to correct the presentment problem of *Totten*. For instance, they suggest that we keep the language in subsection 3729(a)(2) that references “payment or approval by the Government” and suggest modifications in subsection 3729(a)(1) to include the (a)(2) language instead of the presentment language. They also propose expanding subsection (c) defining the word “claim.”

In your view, will this proposal from the Department of Justice adequately address the *Totten* problem?

Judge CLARK. Senator, I am not sure that it does. I have some concern about certain terms, like the prepositional phrase “for payment or approval by the Government.” But these are some things that I would like to personally talk to representatives of the Department of Justice about because I think they and I as a relators counsel are aiming to do the same thing, and that is, to ensure that we cure the problem.

Senator GRASSLEY. OK. I want to ask Mr. Boese a question, but I would like to have you listen, Mr. Clark. I may want you to comment on it. And, again, I get back, Mr. Boese, to the Supreme Court oral arguments yesterday on *Allison Engine*. In that case, similar but unrelated to Ms. Gonter's case, a defense contractor is

accused of jeopardizing the lives of Navy sailors by building defective battleship generators. The contractor argued that it is not liable under the False Claims Act simply because a U.S. Government employee had not personally approved or paid its invoices. Because some courts have supported this application of the law which is contrary to the intent of Congress in 1986, I authored the legislation to clarify that point.

Mr. Boese, do you argue that we should keep this presentment requirement in the Act, thereby only attaching liability to those claims that are actually presented by a Government employee or official? Mr. Boese, since you make that argument, why shouldn't we protect all Government funds, not just those funds directly paid or approved by Government employees?

Mr. BOESE. Senator Grassley, I was at the oral argument yesterday, and—because I filed an amicus brief, as you did, in—I filed it in support of the defendant in that case. I was at the oral argument, and I was particularly drawn to Justice Breyer's concern. Now, no one could really talk about—you know, he seemed to have come to the argument originally, frankly adverse to the Government contractor viewpoint. But during the course of the Solicitor General's argument—and the Department of Justice argued in favor of the defendant in that case. In the course of listening to the theory of the Justice Department, Justice Breyer realized something that I think is very important to this entire argument, which is, when you talk about Government money because of Government contracts, Government grants, and Government programs, Government money is endemic in the American economy. There is virtually no entity that would not have some Government money. And if a fraud on an entity—Justice Breyer asked, if a fraud on an entity which received some Government money becomes a violation of the False Claims Act, there is no end to the statute. It has no limits, and it can be enforced either by the Justice Department, but much more likely by qui tam relators. And I am sorry, I think Senator Durbin misunderstood me. I did not accuse all qui tam relators of being ambulance chasers. But one must understand that because of the treble damages and enormous penalties that are available under this statute, the ability of getting rich very quickly attracts some cases that should never be brought.

Returning back to your question, Senator, about the *Totten* case, what the Supreme Court currently has before it—and I would strongly urge the Committee to see what the Supreme Court says, because I think the judgments that are going to be issued and the explanations that are going to be given are going to explain this issue, which I also discussed with Senator Durbin: If you basically make a false claim to any person or entity who receives Federal money, if that is your definition, then you are expanding the False Claims Act far beyond its roots. The roots of the False Claims Act are that we are out to remedy fraud on the Federal Government.

Now, that fraud on the Federal Government can take many forms. I personally have no basis for arguing—I would never argue that fraud on Medicaid or Medicare does not come within the scope of the False Claims Act because of the *Totten* decision. In fact, I wrote at the time of the *Totten* decision that I thought it was a decision of very limited applicability to entities like Amtrak and the

Coalition Provisional Authority. That is less than one-tenth of 1 percent of all False Claims Act cases.

And what we are doing in S. 2041 is overturning and potentially expanding the False Claims Act beyond its entire—beyond its roots to every aspect of the American economy simply to fix two almost unique cases that the Supreme Court may fix for us.

Senator GRASSLEY. Mr. Clark, I would like to have you either have a rebuttal or a commentary on that from your experience of what Mr. Boese just said.

Judge CLARK. Senator, I think it is important to note that there is a big difference between the Government spending money and the Government putting money in somebody's hand, like a grantee, to spend the money for the Government, as directed by the Government. I do not see anything in the bill that suggests to me that it was intended to reach controversies between private parties or, for goodness sake, to reach something purchased by a Social Security recipient.

I think the intent was, it appears to me, to protect the Government's money when it puts it in somebody else's hands to spend as directed pursuant to a program or to protect Government money or money that the Government is holding in trust, so to speak, for somebody else.

I guess I would turn the question around a bit and say, If someone tries fraudulently to get their hands on money that came from the United States pursuant to a program, why shouldn't they be penalized for trying to do that?

Senator GRASSLEY. OK. I am going to have another series of questions that involve all three of you. I want to go back to Ms. Gonter.

Your testimony highlighted many of the reasons why I drafted the qui tam provisions of the False Claims Act in 1986. Most notably, I am pleased to hear that you were able to continue your case against the contractors, the shipbuilders, even though the Department of Justice declined to intervene. You stated the reason that they declined was never given to you, so I have to ask you: Why do you believe the Department of Justice declined to intervene against the shipbuilders?

Ms. GONTER. My personal view is that there are only, you know, a few shipbuilders, you know, yards that actually can build submarines. They know that they have the contracts with them, and it was said. It was said that they were going to have to make up that money in future contracts. Whatever they paid, they would have to make up in future contracts. I believe they are in bed with them.

Senator GRASSLEY. Well, at least there were rumors flying around about that being the reason.

Ms. GONTER. Yes, there were.

Senator GRASSLEY. I mean, you had heard—

Ms. GONTER. I had heard.

Senator GRASSLEY.—people comment that way.

Ms. GONTER. Yes, sir.

Senator GRASSLEY. Yes. What was the judge's reaction when he learned that the Department of Justice would not intervene along with you?

Ms. GONTER. I believe from looking at his expression on his face that he was surprised.

Senator GRASSLEY. Do you think that it would have been sufficient to let the prime contractors off the hook because the subcontractor paid a settlement?

Ms. GONTER. Oh, absolutely not. The prime contractors were just as guilty, if not more so. It was their responsibility to make—whenever they give out their subcontracts to, that they follow those requirements. And they did not do that. They have to contract with people that are going to meet the requirements, and they absolutely did not do that.

The source inspector that was onsite, a representative of EB, knew exactly what was going on there. He did not stop it, at times even contributed to it. He was on tape in as much—and his resolution—I asked him for help, actually. And his resolution to me was to take a stick of dynamite and blow the place up. That was not a joke.

Senator GRASSLEY. OK.

Ms. GONTER. I mean, he may have been exaggerating about the stick of dynamite, but, you know, he was serious about how bad it was.

Senator GRASSLEY. OK. Mr. Clark, the public disclosure bar is an area of great debate in the false claims community. In 1986, we sought to undo the overly burdensome Government knowledge bar and replace it with something more workable. The compromise that we developed was the public disclosure bar, which limited False Claims Act cases based upon public information unless the relator was the original source.

As your testimony shows, the courts have litigated this section of the False Claims Act to death, and to the detriment of good-faith relators and American taxpayers. Further, these interpretations, including those in *Rockwell*, created a disincentive for relators. Our bill amends the public disclosure bar and removes this jurisdictional challenge from the hands of opportunistic defendants and puts it in the hands of the Justice Department, the party that the bar was originally intended to benefit.

So to what extent has the public disclosure bar become a strategic tool utilized by defendants to shape the relationship between the Department and the relator? And do you have any examples?

Judge CLARK. Well, the public disclosure bar is used by defendants to a large extent. It is one of their favorite defenses. They assert it every time they get a chance.

I have spent a lot of time answering public disclosure bar motions in cases, motions that really had no basis and were filed by somebody who either did not understand what the public disclosure bar meant, or they were trying to confuse the court. There was a recent case out of Atlanta in which a district court wrote an opinion and said, in denying a public disclosure bar motion to dismiss, this looks to have been done to create delay.

But when the defendant can use it as a jurisdictional bar, that is a great irony because the whole purpose of the public disclosure bar was to encourage relators to come forward and to protect the Government from having to share rewards with relators who really did not do anything except copy something out of the newspaper.

So when it becomes a jurisdictional bar that has nothing to do with what the defendant did, that is a real irony. It has created a lot of mischief. It is probably the most litigated provision of the current False Claims Act.

Senator GRASSLEY. OK. To what extent has the public disclosure bar become a problem with relators rushing to file false claims cases without a complete record only to protect their claim from becoming public?

Judge CLARK. The relator, of course, always needs to be concerned about being the first to file, but for a couple of reasons, the relator also wants to be sure that he has got the facts right, because you do not want to file pleadings in a Federal court that are not well founded in fact because you can get sanctioned for doing that. So you want to be sure you are right, but you want to be sure you are first.

I have dissuaded prospective relators from filing Freedom of Information Act requests, for example, because of the court decisions that have said that when the Government responds to a Freedom of Information Act request by sending you the document that you ask for, that that is an administrative report. I think that is a far extension of the statute, but that is what some courts have said.

Senator GRASSLEY. Mr. Boese, kind of along the same lines, I want to ask a question, and then I want to state something you assert in your testimony, and then a final question. So I would like to have you answer them both at the same time.

Isn't the Government in the best position to determine whether a relator is bringing a parasitic qui tam lawsuit? You assert in your testimony that the public disclosure bar is normally only applied when the Government does not intervene. Yet in the *Rockwell* case, decided by the Supreme Court last year, the relator was not thrown out by the bar until after the Government intervened and a successful trial verdict was reached. This case seems to refute that argument as well as demonstrate a clear deviation from the congressional intent in the 1986 amendments. Wouldn't you agree that when the Court interprets a statute inconsistent with the intent of Congress, it is appropriate for Congress to pass corrective legislation?

Mr. BOESE. Senator, I will start with the *Rockwell* case because I think it is interesting. It was also an anomaly. I have been doing work on the False Claims Act under the 1986 amendments since 1986. I was doing this work 5 years before that. I have almost—I think one time I have filed a public disclosure/original source motion in a case in which the Government had intervened, and then only because it was such an outrage and I knew that I was going to get hit for attorney's fees, and I won that motion.

When the Government intervenes in a qui tam case, public disclosure and original source become irrelevant. Our major goal is to resolve the issues with the Government. And, remember, the Government only intervenes in 20 percent of these cases, and 99 percent of the recoveries under the False Claims Act cases are in cases in which the Government intervenes. So my concern is, once the Government intervenes, resolving that case with the Government. And if at that point in time I have to pay attorney's fees, that is the price of doing business. Once I filed a public disclosure. Rock-

well was simply an anomaly. Rockwell had raised that defense in the very beginning and had asserted it throughout. The relator, nevertheless, spent almost \$10 million—they were only liable for about \$3 million in damages. The attorney's fees were \$10 million, and that is the reason that case—that case is not a reason in order to pass this legislation because in 99.9 percent of the cases in which the Government intervenes, which is where you get 99 percent of the recoveries, this is not an issue.

Public disclosure and original source, in all candor, Senator, is used by courts to get rid of meritless cases—meritless cases that the Government does not intervene in. The courts have significant discretion as to how they define public disclosure and how they define original source. And in my experience—and this is a very practical experience—courts have used public disclosure and original source, as well as one other defense, in order to dismiss meritless cases. This is not an issue on cases where there is real fraud. This is not an issue in a case like Ms. Gonter's case. It is not an issue there because the Government comes in and that is where your recoveries are.

Senator GRASSLEY. Well, you surely have to admit that Ms. Gonter's case is an example of a serious fraud that proceeded without the Justice Department's help.

Mr. BOESE. I would not agree with that, Senator. A couple of things about that case—

Senator GRASSLEY. You would not agree?

Mr. BOESE. I would not agree with your statement. And with full disclosure, my firm represented one of the shipyards in that case, so I know the case a little bit better, but it was not my case.

The Government, as Ms. Gonter says—and she is a courageous relator. I believe that she is exactly the way this law should work, because when she brought her allegations to the attention of the Government, they sprang to action. The investigators sprang to action. They put a wire on her. They started to investigate this matter. And the system worked the way it did.

The Justice Department did intervene against whom they believed to be the wrongdoer, which was Hunt Valve. They did not intervene against the two shipbuilders. I do not know why. They know why. You can ask Mr. Hertz why they did not do it. But the real wrongdoer here was Hunt Valve, not the shipbuilders.

Eventually, the shipbuilders settled that case because they had contract claims. The very fact that they had an inadequate supplier like Hunt Valve subjected them to significant contract damages—not False Claims Act damages but contract damages.

Senator GRASSLEY. I would like to ask one last question, and I am going to start with you, Mr. Boese, and then I might ask Mr. Clark to listen and probably have some rebuttal. No court has ruled that there is a per se ban against Government employee relators. However, most courts have held that a Government employee cannot qualify for the original source exception when there has been a prior public disclosure, as under the false claims public disclosure bar.

Given this confusing legal backdrop, the proposed amendments seek to clarify how the act applies to Federal employees who discover fraud during the course of their employment. The bill pro-

vides the Government the authority to move to dismiss the action of any Federal employee who brings a qui tam action under the Act without first meeting certain requirements. These requirements provide the Government fair notice and opportunity to investigate. Only after reporting the claims to supervisors, the Inspector General, and/or the Attorney General can the employee file a qui tam.

In Ms. Gonter's case, she was not a Government employee, but as her testimony shows, the Government was reluctant to pursue the fraud by the prime contractor due to their future contracts with the Government. Had she been a Government employee, how would that fraud have been recovered? The False Claims Act is an important safety valve then for uncovering fraud when a governmental agency has been unwilling or unable to prosecute.

Isn't a defined set of procedures for Government employees to follow before becoming a relator better than the current and ad hoc system of the circuit-to-circuit seesaw that we are involved in?

Mr. BOESE. Senator, first of all, I agree with you that some set of rules was better than nothing. However, I would echo the statements by Mr. Hertz on behalf of the Justice Department and, I might add, Professor Pam Bucy, who submitted a written testimony but was not able to be here, saying that allowing Government employees to bring qui tam cases is not just bad policy, it is toxic. We spend a fair amount of time in our written report on pages 21 through 27 talking about all the problems that occur. I would specifically refer the Committee to review the discussion of the *POGO* case on page 25, where a Government employee who was actually interpreting regulations that were the subject of a False Claims Act suit, of a separate qui tam suit, that same employee was receiving 10 percent of the results of whatever the qui tam relator received.

Now, the Justice Department sued both the relator and the employee in Federal court under the Ethics in Government Act and just earlier this month got a result. But when you allow a Government employee to bring a qui tam suit, then all the deference that should be due an employee's decision because they are independent—in other words, we give deference to a Government employee's interpretation of the law because they are independent. Once we allow them to bring qui tam cases to benefit themselves personally, we are essentially taking that deference away from them because they will not be acting for the good of the public. They are going to be acting for the good of themselves.

The problem I have with the procedure you set forth is that in many ways it is the worst of all possible worlds. It is the situation where an IRS agent or another agent audits an individual or a company and then uses that information to put money in their own pocket. That is what this bill allows, and that is why we are so opposed to it.

Senator GRASSLEY. As I suggested, Judge Clark, what do you think, whether or not Congress ought to clarify the playing field so that there is not this mismatch and also circuit discrepancy that we have on whether or not an employee can be a qui tam relator?

Judge CLARK. I have not had the experience myself of being approached by a Government employee to be a whistleblower, but then we do not have nearly as many of those in San Antonio as

there are in Washington. But I guess the bottom line for me is I would hate to see a fraud against the Government go unredressed simply because the person who knows about it and is trying to blow the whistle about it is a Government employee.

If I might, I would like to add two very brief comments addressing a couple of things that Mr. Boese said, if you would indulge me in that.

First, as to whether public disclosure bar motions are filed in intervened cases, they are not irrelevant at all. I have answered public disclosure motions in intervened cases because defendants would love to knock out a relator who is sitting there side by side with the United States and has brought resources to the battle with the relator. So, yes, they file them in intervened cases.

And as to the statistic about 1.4 percent, or whatever it is, of recoveries coming in declined cases and that 80 percent of them are declined because they are meritless, in the first place there are many reasons cases are declined. I have had the Government tell me, when a court unseals a case before the Government is ready to intervene, "Will you carry the ball until we can finish our investigation and get in?" And that happens. Not only that, there have been substantial recoveries that are in the column that says intervened cases that were intervened in right at the last minute for settlement.

Just a couple of examples. The *Merck* case that was in the headlines just recently, that was a \$670 million settlement. Now, most of that, \$400 million plus, was in one case that the Government did intervene in; the balance of that settlement came from a declined case that the attorney from New Orleans litigated without the Government, right until the time to settle.

The same thing happened in the *Gabelli* case. That was \$130 million. That was settled on the eve of trial. The Government intervened very close to the time of trial.

The *Amerigroup* case, \$144 million plus penalties, was intervened in very close to going to trial.

The *Northrop* case, \$62 million, that was litigated by the relator and his counsel for 10 years, and it was intervened in just before it was settled.

The *Alderson* case, the *Columbia-HCA* case, that is another one. I do not know the amount of that one, but that one was litigated by the relator and their counsel for years. There was an intervention, I believe, but it came right at the end as the case was being brought to fruition.

So the statistic that says all this money comes out of intervened cases includes those cases that are intervened in very late after the relator has litigated that case sometimes for years.

Senator GRASSLEY. Did you have something you wanted to say, Mr. Boese?

Mr. BOESE. Well, I believe the *Alderson* case was the *Columbia-HCA* case. I believe the ultimate recoveries there were \$1.4 billion. As one of the early attorneys for *Columbia-HCA* in that case, I can tell you that the Government was in it very early and very often. They had seven teams of attorneys working on that case. That was not a case of un—intervene.

And with regard to most of the others that he referred to, some of which I am familiar with and some of which I am not, many of those were done by State Attorneys General who were acting under their State qui tam laws. I do not consider that to be a qui tam case. I believe that to be a State operating under its own qui tam laws and bringing the Government along with it.

Senator GRASSLEY. I am going to close now, but I have a summation because I was not able to give an opening statement. But before I do that, I am going to ask, without dissent, that my opening statement be printed in the record as if read.

And I also have a request here from Senator Cornyn that a statement that he has been placed in the record because he was not able to come.

I thank you all very much for your testimony. It has been very worthwhile testimony.

After this testimony, I do believe that there is agreement that the False Claims Act can be strengthened with some provisions of 2041. Further, while not endorsing the bill in the current form, I have found from the testimony this morning, the views letter also from the Justice Department, to be very encouraging. I am committed to ensuring that the Department has the necessary tools to enforce laws against those who seek to defraud. S. 2041 contains some provisions that will help the Department of Justice in efforts to root out that fraud. And I am going to work with the Department to see if we can get some consensus.

I would like to note that the False Claims Act works because of courageous whistleblowers. I speak often about honoring whistleblowers, and no less you, Ms. Gonter. As the Department's testimony shows, qui tam whistleblowers are at the heart of false claims actions, accounting for nearly 63 percent of all recoveries. You and your husband and the lengths that you went to to ensure that our sailors aboard our Navy submarines are safe have to be honored and acknowledged. This is the real power of whistleblowers to expose complex fraud schemes from the inside and then push the Government to not sit on its laurels but recover fraud that was lost.

I will admit that I struggle to see why the Department decided to not intervene in Ms. Gonter's case despite the volumes of evidence she uncovered while working from the inside. That said, the qui tam provisions worked, and Ms. Gonter saved the taxpayers over \$13 million, and commendation for that cannot be too great.

With approximately 1,000 qui tam cases under seal, waiting intervention, I can only guess that there are hundreds if not thousands of whistleblowers just like Ms. Gonter waiting to tell their story. While this large number is testament to the False Claims Act, it is also a reminder that fraud never sleeps and that we need to keep fighting to protect taxpayers' dollars. S. 2041 will help strengthen the False Claims Act for the next 20 years and help courageous individuals in the future, like Ms. Gonter has shown us today, to continue to bring fraud to light.

I especially take note of Chairman Leahy's interest in this, more importantly for bringing the attention that he did through this hearing and also for his participation in it. And I also note that the statements of all Senators other than those that I have already

mentioned will be received by unanimous consent and to remind each of you who are witnesses, besides my own questions that I may submit—or will submit, that maybe members who could not be here would also have questions, that we would ask you to submit, and so the record would remain open for 7 days for that purpose.

Thank you all very much.

[Whereupon, at 12:15 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

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The Honorable Patrick Leahy
 Chairman, Committee on the Judiciary
 United States Senate
 Washington, D.C. 20510-6275

Re: S. 2041

Dear Senator Leahy:

Thank you again for inviting me to testify on February 27 on behalf of the Chamber of Commerce and the U.S. Chamber Institute for Legal Reform regarding S. 2041, which would amend the False Claims Act ("FCA") in many significant ways. In response to your letter of March 6, 2008, I submit the following answers to the written questions from Members of the Committee. The questions as sent to me are reproduced below in italics, with my answers following each question. I would note that, although the Committee's questions referenced the original version of S. 2041, I have addressed in my responses below both the original version of S. 2041 and the Manager's Substitute for S. 2041 (hereinafter "Substitute S. 2041"), which was circulated to the Members of the Committee on March 5, 2008.

1. S. 2041 strips a defendant's ability to challenge the jurisdiction of a qui tam relator who brings a case based on publicly available information. Currently, the government usually relies on the resources of the defendants to challenge parasitic lawsuits. In your written testimony, you argue that one of the results of S. 2041 will be more parasitic lawsuits because the government lacks resources to challenge a relator's satisfaction of the jurisdictional bar on "public disclosure."

- If the Justice Department were given further resources, would your concern over parasitic lawsuits be alleviated?*

Providing the Department of Justice ("DOJ") with additional resources would not alleviate the concern that appropriate "public disclosure" motions will go unfiled if the prerogative to file such motions lies solely with the DOJ, as proposed in S. 2041, unless (1) those additional resources are adequate and (2) there is a specific instruction that the DOJ is required to move to dismiss a case that is based on a public disclosure. Although a lack of resources is certainly a concern, the principal obstacle to the DOJ filing such motions is not just a lack of resources within the DOJ but, instead, a lack of motivation. As a practical matter, there is a

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reluctance on the part of the DOJ to challenge the status of *qui tam* relators on public disclosure/original source grounds — a reluctance borne out of a human concern by attorneys within the DOJ not to be seen as attacking whistleblowers or favoring defendants.

More fundamentally, the DOJ operates under an inherent conflict of interest in deciding whether to file a motion to dismiss based on public disclosure. On the one hand, the DOJ is charged with ensuring that only true whistleblowers are rewarded for coming forward as *qui tam* relators, but the DOJ also is charged with maximizing the Government's recovery under the FCA. As a practical matter, the question of whether a relator satisfies the public disclosure bar is only an issue in the 80% of filed *qui tam* cases where the DOJ has elected *not* to intervene. Thus, once the DOJ has decided not to intervene in a particular case, its commitment of resources to that case going forward is quite limited — the *qui tam* relator and his attorneys prosecute the case for the DOJ. And, because the Government stands to receive at least 70% of whatever might be recovered by the *qui tam* relator in a declined case, there is little incentive for the DOJ to halt such a case — even when it is brought by a relator who is not a true whistleblower and regardless of the merits of the *qui tam* case — given the possibility, however remote, of some return on the Government's limited "investment" in the case once the DOJ has declined to intervene. Allowing such cases to proceed has a significant overall cost to the system, to other agencies within the Executive Branch required to dedicate time and resources to investigating and responding to discovery requests, and to all FCA defendants (and, ultimately, to the American taxpayers to whom the costs of doing business with the Government are passed). I fear that these costs will, in most cases, be too generalized and non-specific to warrant the DOJ using its limited resources to take the discovery necessary to prepare and file these motions.

Although the DOJ may file a public disclosure motion in an appropriate case, preserving the ability of *defendants* to file such motions (whatever the "public disclosure" standard may be) will help ensure that the FCA is used as a mechanism to encourage true whistleblowers to come forward, and not as a bludgeoning tool of parasitic *qui tam* relators to extract settlements from defendants threatened with potentially crippling liability because of the trebled damages and significant monetary penalties available under the FCA.

2. Both the Justice Department and Judge Clark, assert that Totten was wrongly decided and the "presentment" requirement in the False Claims Act was not properly interpreted in Totten and subsequent decisions relying on Totten. Do you have an alternative suggestion for clarifying the "presentment" requirement, so that vast sums of federal monies will not be left outside FCA protection, but without the consequences you assert would result in S. 2041?

The question of whether the "presentment" requirement in the current version of the FCA needs modification or clarification is, in my view, almost entirely academic.

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First, the “presentment” issue is currently before the Supreme Court in *Allison Engine Co. v. United States ex rel. Sanders*, No. 07-214, which was argued on February 26, 2008. A decision in that case is expected by June 2008. Given the issues before the Court in this case, the perceived problems with the “presentment” requirement under the current FCA statute are likely to be resolved.¹ Thus, a legislative change may not be necessary. Moreover, the Supreme Court’s resolution of these issues would have the added benefit of likely ending the judicial debate once and for all. A legislative fix, on the other hand, is likely to provoke years of additional litigation, especially where, as in S. 2041, the proposed fix necessarily injects new terminology and untested concepts into the FCA.

Second, and more importantly, the so-called “presentment” problem is a chimera — in practice, “presentment” is rarely, if ever, a real issue in current FCA cases. Certainly, the decision in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), has not materialized into the watershed case its detractors first predicted it would be. Indeed, as Deputy Assistant Attorney General Michael Hertz testified before the Committee on February 27, the DOJ has effectively limited the impact of the *Totten* decision and has had little problem finding adequate means of bringing frauds under the scope of the current version of the FCA. During his testimony, Mr. Hertz went so far as to express doubt that there were many cases that could not be brought because of the *Totten* decision.

The reality is that the practical impact of *Totten* is and has been severely limited. In almost every case involving Federal funding — and certainly any case involving a contract or subcontract with the Federal Government — providing sufficient evidence of “presentment” is a relatively simple evidentiary matter. In fact, one would be hard pressed to find more than a handful of FCA cases dismissed on “presentment” grounds, and not reversed on appeal, where the alleged fraud actually involved a fraud on the Federal fisc and a loss to the Federal Treasury.

The “presentment” case currently before the Supreme Court, *Allison Engine Co. v. United States ex rel. Sanders*, No. 07-214, strikes me as a particularly good example of how the presentment issue need not be an issue at all. In that case, the attorneys for the *qui tam* relators apparently made a tactical decision not to present any direct or circumstantial evidence of the prime contractors’ submission of claims to the Navy in connection with the allegedly false claims submitted by the defendant subcontractors to the prime contractors. In fact, the *qui tam*

¹ The other case that has sparked significant interest in the “presentment” issue is *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D. Va. 2005), which involves allegedly false claims submitted to the now-defunct Coalition Provisional Authority in Iraq. That case is currently on appeal as well, and the court of appeals is awaiting the Supreme Court’s decision in the *Allison Engine Co.* case.

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relators in that case did not call one witness from the Navy or one witness from the prime contractors.

This failure to adduce proof of “presentment” of claims from the prime contractors to the Navy, however, could have been avoided had the relators presented documentary or testimonial evidence from the prime contractors or the Navy linking the defendant subcontractors’ allegedly false claims to the claims that were ultimately submitted by the prime contractors to the Navy. Although the question presented to the Supreme Court in the *Allison Engine Co.* case is now whether “presentment” is required for a violation of Sections 3729(a)(2) and (a)(3) of the FCA, this question need not have ever been an issue, particularly in that case, had the relators simply provided sufficient evidence linking the defendant subcontractors’ alleged false claims and the ultimate claims made by the prime contractors to the Navy.²

In the end, it simply is not true that “vast sums of monies” are left outside the reach of the current FCA. Federal contracts and Federal grant awards are invariably structured so that a “presentment” requirement will never be an obstacle to bringing an FCA case. As Mr. Hertz testified before the Committee, the *Totten* decision simply has not proved to be a real obstacle to the Government’s FCA enforcement efforts. And, even in the very rare instances at the margins where the FCA has been held not to apply because of the current FCA’s “presentment” requirement (a circumstance that almost always involves entities intentionally set up to function outside the Federal Government), there are other statutes and causes of action at the Government’s disposal that could be used to address such frauds. *See, e.g.*, Major Fraud Act, 18 U.S.C. § 1031.

Moreover, both the original S. 2041 and Substitute S. 2041 fail to accomplish deleting the concept of “presentment” or “submission” from an FCA violation while also ensuring some rational limit to the reach of the FCA. The language in the original S. 2041 was so broad it did in fact extend FCA liability to claims paid from the salaries of Federal employees and the benefits received by Social Security beneficiaries. Substitute S. 2041 now specifically excludes claims involving such funds. The language in Substitute S. 2041, however, still begs the same question that loomed over the original version — *where does the FCA end?* The problem with adopting too broad a definition of “claim” for purposes of the FCA was highlighted during the

² Only the attorneys for the *qui tam* relators know why this tactical decision was made. Some of the *amicus* briefs filed with the Supreme Court speculated that the reason was that witnesses from the prime contractor and the Navy would have testified to the excellent, long-term functioning of the goods provided by the defendant subcontractors and to the immateriality of any problems with those goods.

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recent oral argument before the Supreme Court in the *Allison Engine Co.* case, where, in the course of questioning the DOJ attorney about the scope of the FCA, Justice Breyer noted:

JUSTICE BREYER: The difference is that government money today is in everything. So if it's in everything, then everything is going to become subject to this False Claims Act. And of course I exaggerate by using the word "everything," but only a little. (Laughter.)

Transcript of Oral Argument at 36, lines 3-8, *Allison Engine Co. v. United States ex rel. Sanders* (U.S. No. 07-214). The audience at the Supreme Court laughed at such a reading of the FCA, but that is the precise problem with both S. 2041 and Substitute S. 2041, which, while trying to eliminate the "presentment" requirement, also eliminate the link between the false claim and a loss to the Federal Treasury.

In short, there simply is no pressing or lingering need to "fix" the current FCA's presentment "problem." The FCA is not, and never has been, a remedy for every fraud involving money that has, at some point, passed through the Federal Treasury. For the reasons so succinctly stated by Justice Breyer, the proposed fixes in S. 2041 and Substitute S. 2041 will radically transform the FCA into a potential catchall mechanism for litigating any and all alleged frauds practiced on anyone who has received money from the Federal Government, regardless of whether the Federal Government itself was defrauded. The proper reach of the FCA — and the trebled damages and significant monetary penalties that are paid to the United States Treasury under this statute — should be reserved to rooting out and remedying false claims truly made upon the Federal fisc.

3. *In your testimony you argue passionately against most of the False Claims Act amendments proposed in S. 2041. Are there any changes to the False Claims Act that would be acceptable?*

I agree with the DOJ that there is no need at this time to change the FCA. With regard to the changes proposed in S. 2041 and Substitute S. 2041, however, and to the extent that I do not address such changes below in my answer to Question 4, I do find the following proposed changes to be acceptable:

- Revising the conspiracy provision, Section 3729(a)(3), so that it is clear that this provision applies to conspiracies to commit a violation of any of the other enumerated violations of the FCA (i.e., subsections (a)(1), (a)(2), (a)(4), etc.).

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- Clarifying the penalties provision in Section 3729(a) to reflect that the original \$5,000 to \$10,000 range has been adjusted by subsequent legislation.

4. *The Department of Justice provided the Committee with the Administration[']s concerns with S. 2041. I have attached a copy of the letter. As you can see, the Department of Justice has many suggestions for improving S. 2041. Do you support the Department's suggestions?*

At the outset, I would note that the DOJ in its letter of February 21, 2008 (hereinafter "DOJ Comment Letter") stated its position (page 1) that "the FCA in its current form has worked well" and that "there is no pressing need for major amendments." Nevertheless, to the extent Congress is considering amendments to the FCA, the DOJ Comment Letter did make a number of suggestions for improving, in the DOJ's view, the amendments proposed in S. 2041. I agree with some of the DOJ's suggestions, specifically the opposition to any Government employee using *Government* information obtained in his or her employment to file a *qui tam* case for personal profit.

With regard to the remainder of the DOJ Comment Letter, however, I believe many of the DOJ proposals are unnecessary and contrary to any concept of fairness and to the public interest. I will summarize those below.

A. *Eliminating "Government Loss" from Calculation of FCA Damages*

In a single sentence on page 2 of the DOJ Comment Letter, the DOJ proposes a change in how damages (before trebling) are calculated under the FCA. (The DOJ's proposal in this regard appears to have been adopted in Substitute S. 2041.) Since 1863, damages under the FCA have been calculated as "treble the amount of damages which the Government sustains because of the acts of that person," 31 U.S.C. § 3729(a), and virtually all courts, including the Supreme Court, have interpreted "damages" to be the Government's actual loss caused by the false claim. The DOJ Comment Letter proposes, without rationale or explanation, that this be changed to "treble the amount of money or property paid because of the action of that person." Apparently, the DOJ proposes eliminating "loss" from the calculation of damages and replacing it simply with the "amount paid" whether or not the Government suffers any loss at all because of the FCA violation. For a number of reasons, this is bad policy.

First, the proposed change represents a radical departure from the basic principle underlying the FCA for almost 150 years — protection of the Federal Treasury from fraud. This change would entitle the Government to enormous windfalls because it would be entitled to recover treble the amount of a contract or claim, even where it suffered no actual loss at all. Thus, for example, even in the situation where the Government receives what it has paid for and,

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thus, sustains no actual damages, the DOJ's proposed change would entitle the Government to recover three times the amount paid to the contractor.³

Second, under the proposed language, even where the Government suffered some actual loss, the amount recovered by the Government would not be based on that loss, contrary to current law. Instead, the proposed language would allow the Government to recover amounts far in excess of any losses actually suffered, and these amounts would then be trebled and additional civil penalties assessed. With respect to the so-called "reverse false claims"⁴ provision, Section 3729(a)(7), the DOJ's proposed language makes no sense at all. Because a "reverse false claim" is in the nature of money owed to the Government, it would be impossible for a court to treble the amount "paid or approved because of" the defendant's reverse false claim violation, as required by the DOJ's proposed language.

Third, the proposed language is unnecessary to protect the interests of the Government. It appears that one of the unstated factors motivating the proposed language is to ensure that, where the Government received a product or service with no value, it can recover the full amount it paid for the worthless product or service. But the proposed language is unnecessary to address this situation because current law already covers "worthless product" cases where the Government receives effectively nothing of value. In those cases, the Government's damages have always been the full amount paid for the worthless product or service.⁵

³ Here is a real-life example of the practical effect of this change. A contractor was sued under the FCA because it allegedly violated a conflict of interest provision in awarding a subcontract. The subcontract was fully and successfully performed to the satisfaction of the Federal agency. At trial, the jury found that there indeed had been a conflict of interest violation and, as a result, that the claims submitted for work performed under the subcontract were "false" for that single reason. The jury also found that, because of the satisfactory nature of the work, the United States suffered no damages, and it assessed \$0 in damages but \$80,000 in penalties. Under the proposed new provisions, the judgment in this case would have been for \$27 million in damages (three times the \$9 million the Government paid the contractor for the work) plus penalties – even though the Government suffered no actual loss because of the FCA violation. See *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003).

⁴ "Reverse" means only that the flow of money is in "reverse"; that is, the money flows from the defendant to the Government rather than from the Government to the defendant, as is the case for false claims under Sections 3729(a)(1) and (a)(2).

⁵ See, e.g., *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296 (6th Cir. 1998); *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972).

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Finally, trebling the amount of money paid or approved — rather than the amount of loss actually suffered by the Government — will transform the FCA into even more of a punitive statute than it already is and will greatly exacerbate Constitutional problems under the Eighth Amendment's prohibition against "excessive fines." The Supreme Court has already recognized that the treble damages regime of the existing FCA is "essentially punitive in nature." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784-86 (2000). The Eighth Amendment prohibits FCA awards of penalties and trebled damages that are "grossly disproportionate" to the gravity of the underlying liability. See *United States v. Mackby*, 261 F.3d 821 (9th Cir. 2001). The proposed language will, in many cases, lead to far higher recoveries that are entirely unrelated to any damages or loss sustained by the Government, thereby creating many more situations in which FCA awards may be held to violate the Eighth Amendment.⁶

B. Making the Amendments Retroactive

The DOJ Comment Letter proposes (page 17) to apply the amendments to "all civil actions filed before, on or after" the date of enactment. (The DOJ's proposal is also incorporated into Substitute S. 2041.) This proposal is a recipe for disaster.

This retroactivity provision will mean that *every* active case, even those in which a petition for a writ of *certiorari* is on file in the Supreme Court and those cases about to go to trial, will need to be remanded to and/or reconsidered by the district court in light of the amendments. In essence, all pending cases will come to a halt to determine (1) whether the amendments apply and (2) whether application of one or more of the amendments in each case violates Due Process. See *Landsgraff v. USI Film Prods.*, 511 U.S. 244, 269 (1994). Settlement discussions will also come to a halt because the parties will have to reconsider their offers and demands in light of the amendments.

⁶ Although the suggestion does not appear in the DOJ Comment Letter, I would note that Substitute S. 2041 includes a new proposal in Section 2 that would make defendants "liable to the United States Government for the costs of a civil action brought" under the FCA. This provision further exacerbates Eighth Amendment concerns. The trebled damages and penalties awarded under the FCA already represent a form of "rough justice" intended to make the Government whole not only for "the amount of the fraud itself, but also ancillary costs, such as the costs of detection and investigation, that routinely attend the Government's efforts to root out deceptive practices directed at the public purse." *United States v. Halper*, 490 U.S. 435, 445 (1989); *Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 131 (2003). Allowing the Government to recoup its costs twice over, in addition to recovering statutory penalties and treble the amount the Government "paid or approved" will bring the FCA that much closer to the Eighth Amendment's tipping point, where "rough justice becomes clear injustice." See *Halper*, 490 U.S. at 446.

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Furthermore, retroactively applying the amendments expanding the scope of liability would likely violate the *Ex Post Facto* clause of the Constitution, which prohibits retroactive application of punitive statutes. As I noted above, the Supreme Court, in the *Stevens* case, has held that the FCA's treble damages regime is "essentially punitive in nature." See *Stevens*, 529 U.S. at 784-86.

C. Modifying Liability for Retaining "Overpayments"

The DOJ Comment Letter proposes (pages 3-4) to add "the retention of any overpayment" to the definition of "obligation" for purposes of the "reverse false claims" provision, Section 3729(a)(7), and to eliminate the need for the person to have made a false statement or record in order to conceal, avoid, or decrease the obligation to pay money to the Government. (Substitute S. 2041 has also incorporated this proposal.) According to the DOJ Comment Letter, the impetus for these changes, which would impose FCA liability on a person who retains an overpayment received from the Government without regard to whether that person makes any false statement or record or takes any affirmative step to conceal or avoid repaying the Government, is to make the "reverse false claim" provision parallel with the FCA's affirmative liability provisions.

Whatever its intent, however, the DOJ's proposal should not be adopted. Because of the low scienter threshold under the FCA (a defendant need not actually know that a claim is false but, instead, is liable so long as it acts with "reckless disregard"), the DOJ's proposed change with regard to "overpayments" will sweep innocent parties into FCA liability if ever they receive an overpayment from the Government, regardless of whether that party requested, expected, or even knew it had received such an overpayment. In short, with the DOJ's proposed one-two punch of eliminating the requirement for a defendant to make a "false statement or record" in order to avoid an obligation to pay money and expanding (a)(7) liability to the retention of an overpayment, the reverse false claims provision will effectively impose strict liability on anyone who receives an overpayment, regardless of whether that person engaged in any culpable act other than receiving the overpayment (whether or not it was known to be an overpayment) in the first place. The severe punitive remedies available under the FCA are inconsistent with imposing strict liability on a person who does nothing more than receive an overpayment from the Government.

D. Amending the Definition of "Obligation" in 31 U.S.C. § 3729(a)(7)

The DOJ Comment Letter proposes (pages 3-4) an amendment to the definition of "obligation" that is critical to determining liability under the so-called "reverse false claim" provision, Section 3729(a)(7). (Substitute S. 2041 also incorporates this proposal.) The FCA provides, in pertinent part, that any person, company, or institution that knowingly underpays or

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avoids an "obligation" to pay money to the Federal Government is liable for three times the amount of the underpayment, plus penalties of up to \$11,000 for each false certification. Prior court decisions have interpreted "obligation" in a commonsense way to require a fixed and certain amount due the Government.

The DOJ's proposal adds a new definition of "obligation," as follows:

[T]he term "obligation" means a fixed duty, or a contingent duty arising from an express or implied contractual, quasi-contractual, grantor-grantee, licensor-licensee, fee-based, or similar relationship, including customs duties for mismarking country of origin, and the retention of any overpayment.

This proposal is specifically designed to overrule the decision in *United States ex rel. American Textile Mfrs. Inst. v. The Limited, Inc.*, 190 F.3d 729 (6th Cir. 1999). That decision was based on a large number of earlier decisions which held that an "obligation" under the FCA must be certain and fixed, not contingent or uncertain. The DOJ's proposed new definition of "obligation," however, will be almost impossible to enforce. The commonsense approach of the court of appeals in the *ATMI* case was based on its sensible conclusion that contingent liabilities are, by definition, *contingent*, which means they may never occur. As a practical matter, one cannot assess trebled damages for avoiding an obligation that has not and may never occur.

E. Expanding the Statute of Limitations

As I explained in my February 27 written testimony for the Committee, extending the FCA's statute of limitations to ten years is both bad public policy and unnecessary. Although the DOJ Comment Letter endorses (page 14) the limitations extension proposed in S. 2041, this proposed change will have little impact on the Government's ability to pursue fraud perpetrated against the Federal Treasury, but it will place an enormous burden on *innocent* contractors and grantees who must be prepared to defend themselves against stale FCA claims (especially FCA claims brought by *qui tam* relators). This concern is exacerbated when viewed in conjunction with the DOJ's retroactivity suggestion that I discussed above.

F. Redefining the Term "Claim"

I am pleased that the DOJ Comment Letter acknowledged and objected (pages 1-3) to many of the most problematic changes to the definition of "claim" that appear in S. 2041 and that I discussed in my February 27 written testimony for the Committee. (I would note, too, that Substitute S. 2041 also addresses many of the concerns I expressed in my testimony regarding the definition of "claim," especially with regard to the new definitions of "Government money or

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property” and “administrative beneficiary.”) Nevertheless, the DOJ’s suggested revisions to S. 2041’s definition of “claim” are also objectionable.

The DOJ Comment Letter suggests revising the definition of a “claim” in current Section 3729(c) so that a “claim” exists where, among other things, the United States pays out money or property or if Federal funds are “impacted.” At bottom, the DOJ’s proposed language (which Substitute S. 2041 now tracks) suffers from the same problems that plagued the original S. 2041 — it is far too broad. The DOJ’s proposed language (as well as Substitute S. 2041), defines as a “claim” any demand for money “made to a recipient” of such money if the Government “provides or has provided any portion of the money or property requested.” This is defined as a “claim” under the FCA “whether or not the United States has title to the money or property.” While the DOJ Comment Letter pays lip service (page 3) to the notion that the proposed definition of “claim” should be limited -- at least with respect to grants -- to claims for money used for a “Government purpose,” this limitation, and indeed the term “Government purpose,” is nowhere to be found in the DOJ’s suggested *statutory* language. I would note, too, that Substitute S. 2041 does not include any limitation of a claim to money spent for a “Government purpose.”

The new definition of “claim” offered by the DOJ would mean that, so long as the recipient of Federal funding has commingled those funds with other funds, any person submitting claims to a contractor, grantee, or other recipient of Federal funds — including claims submitted to any state or local government, university, business, or institution that receives Federal funding — could be held liable under the FCA for trebled damages and penalties, even though no claims are ever presented to the Federal Government or its agents and even if no U.S. Government purpose is at issue. Furthermore, because the DOJ’s proposed definition of “claim” does not even require the U.S. Government to have title over the funds or property, the DOJ’s proposed definition encompasses claims made for non-U.S. funds that happen to be in the possession of the U.S. Government. This would mean, for example, that all foreign government and private party funds the United States holds as a custodian will fall within the ambit of the FCA.

In the end, the DOJ’s proposed definition of “claim” is so broad that it will result in a wholesale expansion of the FCA -- which since 1863 has been aimed solely at rooting out and remedying false claims made upon the Federal fisc -- by making a potential Federal FCA case out of every alleged fraud practiced on any third party that happened to receive some or all of its money or funding from the Federal Government, regardless of whether the Federal Government *itself* was ever defrauded. As I explained in my February 27 written testimony for the Committee, such an expansion of the FCA would inject the FCA into private disputes properly reserved for state tort and contract law.

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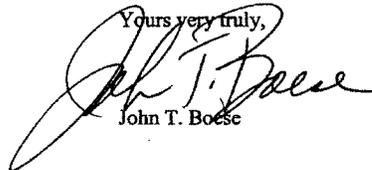
G. *Eliminating the "Public Disclosure/Original Source" Defense*

I wholeheartedly agree with nearly all of the DOJ Comment Letter's strong objections (pages 11-13) to S. 2041's proposed modifications to the public disclosure bar. I part company with the DOJ Comment Letter, however, in two important respects. First, as I explained in my February 27 written testimony and as discussed in my answer to Question 1 above, defendants should retain the ability to challenge the status of *qui tam* relators on public disclosure grounds. Although the DOJ Comment Letter is silent on whether defendants should retain the ability to file public disclosure motions, the DOJ's proposed revisions to S. 2041 provide only for the Government to file such motions.

Second, I oppose the DOJ's proposed 90-day window for the Government to have initiated an investigation or audit where the public disclosure occurs in the media or congressional hearing, report, or investigation. Although this artificial 90-day period has the benefit of being definite, this time period is relatively short given the pace at which Government agencies generally operate and, therefore, as a practical matter, will result in very few successful "public disclosure" motions even where the publicly disclosed allegations ultimately do prompt or would have prompted a Government investigation or audit within a reasonable time period. Thus, rather than limiting this time period to 90 days, I would propose a more reasonable period of one year, which would allow the cognizant Government agencies and officials sufficient time in which to act on the publicly disclosed information on their own.

* * * * *

Thank you again for the opportunity to submit these views regarding S. 2041. Please let me know if I can be of any further assistance to you or the Committee.

Yours very truly,

 John T. Boesc

DC01:290888 v.5

John E. Clark, Goode Casseb Jones Riklin Choate & Watson

(Questions from Committee Members)

1. Judge Clark, your written testimony is strongly supportive of the main provisions of S. 2041. However, you do not mention Section 3 of S. 2041 that permits government employees to qualify as relators when the government employee utilizes the designated protocol and no action is taken by the government. Is it sound policy to permit government employees to qualify as relators?

Answer:

I believe it is sound policy to allow government employees to qualify as relators, subject to qualifications such as those in S. 2041 to ensure that the public interest is not compromised by the employee's private interest. Sometimes it must happen that the only person in a position to identify and document a false claim who also is interested in redressing the wrong to the public fisc is a government employee. I believe a government employee in that unique position should be able to invoke the False Claims Act if his efforts to protect the public interest through traditional means prove unavailing.

2. Judge Clark, in your written testimony you go into great depth arguing in favor of Section 2 of S. 2041. Section 2 would overrule *U.S. ex rel. Totten v. Bombardier Co.* and remove the current "presentment" requirement, by imposing liability for any knowing false claim that would inflict financial damage on the United States, regardless of whether the claim was presented to a U.S. government official.

- In Mr. Boese's written testimony he argues that Section 2 of S. 2041 would transform disputes traditionally addressed through state tort, contract, or fraud law into federal law. As a former state court judge and an attorney who has brought cases under the Texas Medicaid Fraud Prevention Act, you are particularly well qualified to comment on the federalism implications of S. 2041. Are there significant federalism concerns with S. 2041?

Answer:

I believe S. 2041 presents no significant federalism concerns, and I am sure it was not intended to do so. Recent federal court decisions such as *Totten* and *Custer Battles* have in my opinion construed the False Claims Act so restrictively as to place funds of the United States held by designees, to be expended or administered as directed by the United States in furtherance of a program or agreement, at risk of being pillaged with impunity by fraud feasons. The suggestions by some that S. 2041 would extend the reach of the statute, for example, to funds paid by the government as benefits to federal pensioners, or to tort and contract disputes between private parties that traditionally are addressed only by state law, are, in my opinion, fanciful.

When the federal government places funds in the hands of a designee, to be expended or administered at the government's direction, the government's interest in ensuring that the funds are expended or administered in accordance with the intended governmental purpose remains intact, and federal protection of those funds from fraud is entirely consistent with the preservation of the governmental interest and with the principles of federalism.

3. In your written testimony you argue that S. 2041's amendment to the "public disclosure bar" is the "most critical aspect of the bill." Do you believe S. 2041 will result in a flood of cases asserting claims based largely on information already known to the government or reported to the media?

Answer:

I do not believe S. 2041 will result in a proliferation of cases asserting claims based on information already known to the government or previously reported in the news media. First, the provisions in S. 2041 discourage a mere opportunist from filing suit derived from information already known to the Government. S. 2041 provides that the Government may move to dismiss relators who have derived the essential elements of liability supporting their lawsuit from public sources. In the typical False Claims Act case, the essential elements of liability include: (i) a "false claim," (ii) made "knowingly" for (iii) Government property or funds. Accordingly, if the news media or a public document reports fraud or knowing misconduct involving the same transactions, the relator will be barred.

Second, another provision in the False Claims Act referred to as "the first-to-file bar" will discourage whistle blowers from filing cases with allegations known to the Government. The "first to file bar" provides that, "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. Sec. 3730(b)(5) If the Government truly is cognizant of the alleged false claims by the time a person files a qui tam case, then it is more likely than not that someone else already has filed a qui tam case. Most of the Department of Justice's new fraud matters, and the majority of its fraud recoveries, arise from qui tam cases.

Rather than encouraging parasitic lawsuits, S. 2041 serves to restore the ability of whistle blowers to bring the Government important new information and removes the disincentives in the current law that discourage whistle blowers from taking diligent steps to confirm the accuracy of their information before filing. S. 2041 corrects the expansive and disheartening interpretations of the "public disclosure" bar by a number of federal courts that have disqualified meritorious actions by deserving whistleblowers on insubstantial, technical, and highly imaginative grounds, even over the government's objection. I anticipate that, by permitting deserving whistleblowers more latitude to confirm the merits of potential claims before filing suit (by, for example, filing a request under the Freedom of Information Act to confirm that the defendant submitted the false invoices identified by the whistle blower to the Government), S. 2041 will encourage the filing of better-documented cases and reduce the filing of cases with latent flaws that would otherwise have been identified only through the government's investigation, after filing. Under S. 2041, deserving persons will be encouraged to document and file meritorious cases, knowing that the defendant cannot arbitrarily defeat their claims on grounds having nothing to do with merit.



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 2, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Please find enclosed a response to questions arising from the appearance of Deputy Assistant Attorney General Michael Hertz before the Committee on February 27, 2008, at a hearing entitled "The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century".

We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Keith B. Nelson".

Keith B. Nelson
Principal Deputy Assistant Attorney General

Cc: The Honorable Arlen Specter
Ranking Member

“The False Claims Act Corrections Act (S. 2041): Strengthening the Government’s Most Effective Tool Against Fraud”

February 27, 2008

**Questions for the Hearing Record
for
Michael Hertz
Deputy Assistant Attorney General
Civil Division
United States Department of Justice**

QUESTIONS FROM SENATOR SPECTER:

1. **Mr. Hertz, in your written testimony you discuss how successful the Justice Department has been in utilizing the False Claims Act to fight fraud against the government. Does the Justice Department have the resources to effectively fight fraud against the government? If S. 2041 becomes law in its current form, will the Justice Department need additional resources?**

RESPONSE:

The number and increased complexity of the fraud schemes presented to the Department, combined with the volume of cases now under review, certainly present challenges. In addition, we must devote significant resources to monitoring declined *qui tam* cases in order to ensure that we address any legal issues of importance under the False Claims Act. The President’s Budget for Fiscal Year (FY) 2009 now under consideration by the Congress seeks additional resources for the Department to continue to effectively fight fraud against the government. We urge passage of that budget.

S. 2041 seeks to eliminate the jurisdictional nature of the public disclosure bar and would vest with the Department the sole authority to dismiss relators’ actions based on that ground. Similarly, S. 2041 would expressly allow government employees to file *qui tam* suits based on information acquired in the course of their government employment under certain conditions; this is a provision, for the reasons discussed in our Views letter of February 21, 2008, we oppose. Both provisions have the potential to consume additional investigative and litigative resources to the extent they increase the government’s responsibility for determining whether relators are qualified to proceed under the statute.

2. **In Professor Bucy’s written testimony, she asserts that relators’ actions often require the courts to referee disputes between relators and the Justice Department. Consequently, courts find themselves delving into issues of prosecutorial discretion and executive branch policy, presenting separation of powers tensions. Do such separation of powers tensions exist as a result of**

the False Claims Act private-public partnership? If so, are judicial resources wasted because the court finds itself refereeing disputes between relators and the Justice Department?

RESPONSE:

The Department has taken the position, and several circuit courts addressing the issue have agreed, that the False Claims Act vests sufficient control with the Attorney General to ensure that its *qui tam* provisions do not contravene the constitutional principle of separation of powers. See *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749,753 (5th Cir. 2001); *United States ex rel. Kelly v. Boeing Co.*, 9 F. 3d 743, 754 n. 11 (9th Cir. 1993); *Ridenour v. Kaiser-Hill Co.*, 9 F.3d 925, 933 (10th Cir. 2005); *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994).

The Department does not systematically track those cases in which the interests of relators diverge from those of the government, causing disputes that result in judicial intervention. On an anecdotal basis, however, we know that such disputes are relatively rare. In the majority of instances in which such a dispute does arise, it arises from a disagreement over an appropriate share to be paid to the relator from a False Claims Act recovery. On less frequent occasions, disagreements may arise between Department lawyers and relators' counsel regarding litigation strategy. These disputes are almost always resolved without resort to the courts.

- 3. The Justice Department has an important supervisory power in *qui tam* actions because of its authority to move for dismissal of a relator's lawsuit if the Department deems the *qui tam* action to be frivolous. How often does the Department exercise this important function to ensure that frivolous suits do not result in a waste of resources for all parties? Does the Justice Department have the resources needed to carry out the important function of ensuring frivolous *qui tam* actions do not move forward?**

RESPONSE:

The Department does not systematically track the reasons why dismissal is sought in particular *qui tam* actions, so we are not able to provide a precise number of *qui tam* actions that we have moved to dismiss because they are frivolous. When we review *qui tam* cases we devote sufficient resources to make a judgment about whether the government should join the suit and take it over. We do not routinely devote the additional resources that would be needed to determine that a *qui tam* action is frivolous or to move to dismiss on those grounds. In the absence of making a determination that cases are frivolous, and consistent with the underlying premise of the *qui tam* provisions that relators should generally have the right to proceed with cases the government declines, we generally do not divert resources dedicated to investigating and pursuing meritorious actions to move to dismiss cases that we are declining.

SUBMISSIONS FOR THE RECORD



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 21, 2008

The Honorable Patrick J. Leahy
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Mr. Chairman:

This provides the Department's views on S. 2041, the False Claims Act Correction Act of 2007, introduced in the Senate on September 12, 2007. As you know, the False Claims Act (FCA) is an important civil tool in fighting fraud against the public fisc and has worked well in its present form. While the Administration is sympathetic to some of the proposed improvements, it cannot support the current version of the bill.

Since the statute was amended in 1986, the Government, through the end of Fiscal Year 2007, has recovered over \$20 billion pursuant to the FCA. This remarkable accomplishment has been with the assistance of the *qui tam* provisions, which have augmented our resources to address fraud in connection with Government contracts and programs and which we continue to support vigorously. Indeed, of the \$20 billion recovered under the FCA since 1986, over \$12 billion was the result of *qui tam* actions. We have encouraged the Department's litigators to make every effort to work cooperatively with relators to maximize the Government's recovery. In implementing the FCA, we have scrutinized the legal arguments advanced to ensure that, in protecting the Government's recoveries, we do not impair the incentives which are necessary to ensure that relators come forward, especially in light of the large personal hardships many must endure in bringing these suits. The Department and its client agencies have dedicated enormous resources to the investigation and prosecution of these cases, and we have advanced legal arguments in courts throughout the nation, advocating the rights of relators.

In our view, as noted above, the FCA in its present form has worked well and there is no pressing need for major amendments. Moreover, we have strong concerns about the False Claims Act Correction Act of 2007. Specifically, we believe that Section 3, which would allow federal employees to act as relators, is unsound as a matter of public policy, will cause an unnecessary drain on the Treasury, will invite interference with federal investigations, and thus will *not* further our shared goal of protecting the public fisc.

We are similarly concerned about Section 4's narrowing of the current public disclosure bar. This section severely narrows the circumstances where the bar would apply in a way that would reward relators with no first hand knowledge and who do not add information beyond what is in the public domain, as well as relators in a broad range of cases where the government already is taking action. If these changes were implemented, then even if there is an active Government investigation into the same matter, a relator could file suit and reduce the taxpayers'

recovery even though he or she has not contributed anything new to the Government's case. We think this is fundamentally at odds with the underlying purpose of the *qui tam* provisions, which is to incentivize relators to disclose wrongdoing of which the Government would otherwise be unaware.

The Administration cannot support this legislation as currently drafted. That said, we have attached as an appendix a detailed analysis of the legislation's provisions to assist this Committee in its consideration of the present legislation. We would also appreciate the opportunity to continue to work with the Committee and its Members to find the best approach for furthering our common goal: fighting fraud against the public fisc.

The Office of Management and Budget has advised that there is no objection to the presentation of these views from the standpoint of the Administration's program. If we may be of additional assistance, please do not hesitate to contact this office.

Sincerely,



Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Member

Enclosure

APPENDIX1. Presentment and Federal Funds

Section 2 of S. 2041 proposes changes designed to address the issue of presentment that has arisen in the wake of *U.S. ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542 (D.C. Cir. 2004), in which the United States Court of Appeals for the District of Columbia Circuit held that both §§ 3729(a)(1) and (a)(2) require that a false claim be presented to an official of the United States, and not just a recipient of federal funds. That issue is now pending in the Supreme Court. See *Allison Engine v. United States*, 471 F.3d 610 (6th Cir. 2006), cert. granted, 128 S. Ct. 491 (2007). Section 2 eliminates from §§ 3729(a)(1) and (a)(2) the language that the D.C. Circuit relied upon to require presentment to the United States, and revises these sections to impose liability on any person who presents, or uses a false statement or record to get paid, “a false or fraudulent claim for Government money or property”. The legislation defines “Government money or property” to include money or property that the United States “provides, has provided, or will reimburse to a contractor, grantee, agent or other recipient to be spent or used on the Government’s behalf or to advance Government programs.”

The new definition of “Government money or property” contains terms that are unclear and may engender significant litigation. For example, as previously noted, “Government money or property” is defined to include money or property provided to a third party that is to be spent or used “on the Government’s behalf” or “to advance Government programs”. The meaning of the quoted terms may be subject to judicial debate.

Also, the Department has argued that the district court’s opinion in *U.S. ex rel. DRC v. Custer Battles*, 376 F.Supp.2d 628 (E.D. Va. 2006) (appeal filed, No. 07-1220 (4th Cir.), and placed in abeyance pending the Supreme Court’s decision in *Allison Engine*) is incorrect. Nevertheless, the language in S. 2041 is problematic. In *Custer Battles*, the district court held that the FCA encompassed only claims for federal funds, and therefore contracts paid from the Development Fund for Iraq (DFI funds) did not give rise to actionable claims because DFI funds were not federal funds. Section 2 of the proposed legislation appears to address this ruling by defining “Government money or property” to include “money or property belonging to any administrative beneficiary”. An administrative beneficiary is defined, in turn, to mean “any natural person or entity...” on whose behalf the United States Government, alone or with others, collects, possesses, transmits, administers, manages, or acts as custodian of money or property.” Furthermore, Section 2 amends the FCA to provide that the Government may recover three times the amount of damages which “the Government, its grantee, or administrative beneficiary” sustains.

While the new definition of “administrative beneficiary” would supersede the district court’s holding in *Custer Battles* that the FCA is limited to only federal funds, it is not clear whether the proposed new definition would lead to a different result in that case. The district court concluded that the Coalition Provisional Authority (CPA) in Iraq,

which controlled the DFI funds at issue in that case, was not an entity of the United States. Accordingly, the proposed definition of administrative beneficiary would only encompass the DFI monies at issue in *Custer Battles* if the United States can be said to have “collect[ed], possess[ed], transmit[ed], administer[ed], manage[d], or act[ed] as a custodian” of the DFI funds “alone or with” the CPA. If neither the CPA, nor the American employees working for the CPA, is considered to constitute the “United States” for purposes of the FCA, then it is not clear that this standard would have been satisfied with respect to the DFI monies at issue in *Custer Battles*. At a minimum, the exact scope of the term “administrative beneficiary” can also be expected to engender significant litigation.

The Department has argued in numerous cases – including in the Supreme Court – against the interpretation of the FCA advanced in *Totten*. Similarly, the Department argued against the district court’s ruling in *Custer Battles*, and has filed an amicus brief in the Fourth Circuit urging it to reverse that ruling. If the purpose is to redress the primary holdings in *Totten* and *Custer Battles* in the proposed legislation, then there may be a more effective and simpler way to do so. First, revising current § 3729(a)(1) to remove the reference to “presentment” and to parallel the language of current § 3729(a)(2), thereby imposing liability on any person who “knowingly, makes, uses, or causes to be made or used a false or fraudulent claim for payment or approval by the Government.” Second, revising the definition of a “claim” in current § 3729(c) to clarify that a claim exists if either the United States pays out money or property, or if federal funds are impacted, as follows: “The term ‘claim’ includes any request or demand, whether under a contract or otherwise, for money or property (A) which is presented to an officer or employee of the United States, whether or not the United States has title to the money or property, or (B) which is made to a contractor, grantee, or other recipient if the United States Government provides or has provided any portion of the money or property requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.” Third, revising the current damages provision in the FCA to provide for a penalty “plus 3 times the amount of money or property paid or approved because of the act of that person” (and should modify the FCA’s voluntary disclosure provision in a similar fashion). These changes would clarify the presentment and federal funds issues, and make clear that they are not prerequisites to the imposition of liability or the recovery of damages under the FCA, without the need for the new and untested terms contained in the legislation.

Although the Department has argued that the *Totten* and *Custer Battles* decisions were wrongly decided, the Department does not advocate, and would not support, application of the FCA to all acts of fraud directed at any entity that receives money from the United States. Thus, for example, a FCA claim does not and should not exist where a particular contractor performs work both for the federal government and for private customers, and a subcontractor submits to the contractor a fraudulent request for payment on a private customer’s project. Even though the contractor was a recipient of federal funds, the subcontractor’s false claim for payment would not implicate federal interests if it does not have a potential effect on the government’s funding under its contracts.

Similarly, the United States does not support expansion of the FCA to claims submitted to grant recipients where the fraudulent claim made to the grantee does not affect the furtherance of the grant's federal purpose.

2. Conspiracy

Section 2 extends the FCA's current conspiracy provision to any person who "conspires to commit any substantive violation" of the FCA. This change would be a useful correction to the rulings of several courts that the current FCA conspiracy provision does not encompass a conspiracy to submit a reverse false claim. To avoid any possible confusion, however, rather than using the phrase "any substantive violation," we recommend that the legislation specify the particular provisions encompassed by the revised conspiracy provision (i.e., §§ 3729(a)(1)(A)-(B), (D)-(G)).

3. Failing to Deliver Money or Property

Section 2 revises § 3729(a)(4) of the FCA, which imposes liability for failing to return money or property to the Government. The legislation, among other things, adds to this section a reference to "retaining overpayments" and "conversion of money or property", and eliminates the reference to a "certificate or receipt".

We agree that current § 3729(a)(4) should be revised, but recommend a more streamlined version than that proposed by the current legislation. We recommend that any reference to specific intent to defraud, or concealment or conversion of property, be removed and that the provision provide for liability against any person who "has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property." This change would make § 3729(a)(4) more consistent with the other primary liability provisions, by removing the reference to specific intent and concealment, and requiring a showing only that the defendant acted "knowingly."

At a minimum, the legislation should be revised to eliminate the reference to "Government money or property" and instead retain the current reference in § 3729(a)(4) to money or property "used or to be used by the Government". Under the proposed amendment to this subsection, money or property that was owed to the United States, but had not yet been delivered into the Government's possession, would arguably fall outside the provision as revised. Thus, for example, if a private mail carrier were to destroy property being shipped to a U.S. facility before it reached the facility, that conduct might not be actionable under the proposed amendment.

Finally, we agree that it would be useful to expand the FCA to prohibit the knowing retention of an overpayment. Since an overpayment is in the nature of a reverse false claim, we believe, however, that corrective language addressing the issue of overpayments is more appropriately accomplished by revising current § 3729(a)(7), commonly known as the reverse false claims provision, and adding a definition of the term "obligation", rather than by adding a reference to overpayments to current

§ 3729(a)(4). To that end, we would recommend that: (i) § 3729(a)(7) be amended to impose liability not only on those who use a false statement or record to reduce, conceal, or avoid an obligation owed to the United States, but also to impose liability where a person knowingly “conceals, avoids, or decreases an obligation to pay or transmit money or property to the Government” even in the absence of any false statement or record, and (ii) the term “obligation” be defined to include “a fixed duty, or a contingent duty arising from an express or implied contractual, quasi-contractual, grantor-grantee, licensor-licensee, fee-based, or similar relationship, including the retention of any overpayment.”

These revisions would make explicit that we can pursue those who knowingly retain an overpayment. Additionally, the revised version of § 3729(a)(7) would be more faithful to Congress’ general purpose in enacting this subsection in 1986, which was to provide for liability equal but opposite to that imposed under the Act’s affirmative liability provisions. While those affirmative provisions currently impose liability even in the absence of any false statement or record, there is no analogue in the reverse false claim context. Finally, the proposed definition of obligation would also redress those cases that have held or suggested that the term obligation encompasses only a duty to pay that is fixed in all particulars, including the specific amount owed. *See, e.g., American Textile Mfrs. Inst. v. The Limited, Inc.*, 190 F.3d 729 (6th Cir. 1999); *United States v. Q International Courier, Inc.*, 131 F.3d 770 (8th Cir. 1997).

If a reference to overpayments is retained in § 3729(a)(4), then we recommend that the proposed legislation clarify the level of scienter that must be demonstrated to recover an overpayment. The legislation currently provides for liability against any person who “intending to defraud the Government, to retain overpayment, or knowingly to convert the money or property...to an unauthorized use” fails to return it. It is unclear from the quoted language whether one has to show an intent to defraud in order to impose liability for failure to return an overpayment. The amendment should make clear that proof of a “knowing” failure to return an overpayment, just like a knowing conversion of money or property to an unauthorized use, is sufficient for liability.

4. Penalties

Section 2 describes the range of applicable penalties as “not less than \$5,000 and not more than \$10,000.” Since the penalty range has been modified by other Acts of Congress to account for inflation, we recommend that the legislation clarify that it is not intended to override these subsequent modifications, by including the following language: “not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 104-410, as amended by the Debt Collection Improvement Act of 1996, Pub. L. 104-134.”

5. Voluntary Disclosure

Section 2 places the voluntary disclosure provision into a separate subsection with a subheading titled “Lesser Penalty”. Since the voluntary disclosure provision does not provide for a lesser penalty, but rather for reduced damages, in the event certain

requirements are satisfied, we recommend that the subheading be changed to "Reduced Damages".

Furthermore, the placement of the voluntary disclosure provision in a new subsection may raise a question as to whether penalties are still available where a defendant satisfies the voluntary disclosure requirements. The voluntary disclosure provision continues to make reference only to damages. If the voluntary disclosure provision were contained in a distinct subsection, the absence of any reference to penalties could be used by a defendant to argue that penalties are no longer available. Accordingly, we recommend that the legislation expressly provide in the voluntary disclosure provision that the penalties available are "not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 104-410, as amended by the Debt Collection Improvement Act of 1996, Pub. L. 104-134."

6. Knowledge

Section 2 adds the term "known" to the definition of the terms "knowing" and "knowingly". It is unclear why this change was made, since neither the current, nor the proposed version, of the FCA's liability provisions uses the term "known".

7. Service of Complaint

Section 3730(b)(2) of the Act currently provides that the relator shall serve the United States with a copy of the relator's complaint and written disclosure pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. While S. 2041 does not address this issue, we recommend that the reference to Rule 4(d)(4) be changed just to Rule 4, since this rule has been amended and paragraph (d)(4) no longer addresses the issue of service on the United States.

8. Government Employees

Section 3 of S. 2041 proposes to modify 31 U.S.C. § 3730 to permit *qui tam* suits by Government employees. The new legislation would authorize a Government employee to file suit based on information learned during the course of the employee's duties unless (i) "all the necessary and specific material allegations" underlying the employee's action were "derived from an open and active fraud investigation", or (ii) the employee failed to disclose "substantially all material evidence" in his or her possession to certain designated federal officials prior to filing suit and the Government did not file an action within 12 months (or any extension of that period) of those disclosures.

We believe that there should be a complete bar on *qui tam* suits filed by current and former Government employees that utilize information acquired during the course of Government employment. It has been the Department's longstanding view, through several Administrations, that allowing such suits is unsound as a matter of public policy, will cause an unnecessary drain on the Treasury, and will invite interference with federal

investigations, and thus will *not* further our shared goal of protecting the public fisc. Each federal employee has an existing duty to report fraud. Adding a personal financial incentive to file *qui tam* suits creates the potential for conflicts with this duty, and undermines both the employees' loyalty to the Government and the public's confidence that the Government's decisions are based on the public interest rather than individual employees' personal financial interests. We note that existing mechanisms are available to all Government employees who seek to report fraud and initiate Government action. The Inspectors General of the executive agencies are charged with the responsibility to investigate and pursue allegations of fraud on their agency's contracts and programs; similarly, the Attorney General is charged with the responsibility to litigate and prosecute those allegations in the federal courts. In addition, where a federal employee believes he or she has suffered reprisals as a result of making such a report to an Inspector General or the Department of Justice, the employee can seek protection under the current federal whistleblower protection laws.

While it is true that all Government employees are obligated to report fraud, it is particularly true for those Government employees, such as auditors, investigators or attorneys, who are paid salaries by the taxpayer to identify and root out fraud, and should not need an additional personal financial incentive to do their important jobs. The opportunity for personal gain presents a potentially corrupting incentive for such employees either to allege fraud where it does not exist, or to withhold information from supervisors and colleagues so that the Government is not able to pursue the fraud through official action and the employees instead may pursue it personally for their own financial benefit. Employees also will have an incentive to focus on those matters likely to lead to lucrative recoveries for themselves, perhaps at the expense of other official duties of equal or greater importance to the Government. Moreover, once an auditor or investigator has filed a *qui tam* suit, the question arises whether the employee's personal financial interest gives rise to a conflict of interest that impairs the employee's ability to work on the matter, *see, e.g.*, 18 U.S.C. § 208, 5 C.F.R. § 2635.101, Executive Order 12731 (Oct. 17, 1990), or to serve as a fact or expert witness for the Government in any criminal or civil trial. The taxpayers thus could end up paying the salaries of individuals whose personal financial interests limit their performance of the jobs the taxpayers are paying them to do. At a minimum, suits by this category of employees (or that utilize information acquired by such employees) should be excluded.

In addition to the broad concerns regarding this category of relators, we also have a number of specific concerns. First, the dismissal provisions should be extended to cover any person who learns of information from a Government employee. Otherwise, a Government employee could skirt the limitations imposed by the current legislation by passing his or her information to a third party. To address this issue, the current legislation should be revised in several ways. Proposed new § 3730(b)(6)(A) should permit dismissal of any action or claim that utilizes information "obtained in the course of federal employment", and not just suits filed by current Government employees, as the legislation currently provides. Additionally, new language should be added to the legislation not only to bar suits by federal investigators, auditors, or attorneys, but also suits by those who learn information from such employees. This can be accomplished by

adding the following language: “No action or claim may be brought that utilizes information obtained in the course of employment by any employee of an investigatory or audit agency of the United States, including, but not limited to, the United States Department of Justice, an Office of Inspector General, the Defense Contract Audit Agency, or the Government Accountability Office, or by any individual acting as an attorney, contracting officer, contracting officer’s technical representative, or other government contracting official, auditor or investigator for the United States or any of its agencies.”

Second, it is unclear whether the United States would continue to have the right to dismiss *qui tam* actions filed by Government employees on grounds unrelated to their status as Government employees, such as the first to file or public disclosure provisions. We do not believe that the proposed legislation intended to confer any greater right upon Government employees to pursue *qui tam* actions than other citizens or to curtail the Government’s power to dismiss *qui tam* actions under 31 U.S.C. § 3730(c)(2). To the extent Section 3 may be construed otherwise, it potentially raises constitutional concerns, because it would diminish the Government’s control over litigation to enforce its interests. Court challenges that have upheld the constitutionality of the existing *qui tam* provisions against separation of powers challenges have relied at least in part on the Government’s broad power of dismissal. *See, e.g., United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 754-55 (9th Cir. 1993). Therefore, the proposed legislation should clarify that it is not intended to have this effect, nor to limit the government’s right to dismiss on any other grounds, by adding the following language to the Government employee provisions: “Nothing in this subsection (b)(6) shall be construed to limit the Government’s authority to dismiss an action or claim, or a person who brings an action or claim, under § 3730(b) for any reason other than that the action or claim utilizes information obtained in the course of federal employment.”

Third, the proposed legislation permits the Government to dismiss a Government employee’s *qui tam* action if “all the necessary and specific allegations were derived from an open and active fraud investigation.” As discussed below, we recommend that the public disclosure provision be revised to exclude any relator – whether a Government employee or a private citizen – if the Government is already pursuing the matter and the relator fails to provide new information to the Government.

In any event, we believe that the proposed standard for dismissal is too narrow in several important respects. By limiting dismissal to situations where the Government employee “derived” his or her information from a Government investigation, it would permit the employee to claim a share even where the Government is actively investigating the fraud, and the employee has contributed nothing to that investigation. Additionally, the requirement that “all the necessary and specific allegations” be derived from the Government’s investigation will enable an employee who derives the core allegations of his or her complaint from such an investigation, but then adds one additional allegation from some other source, to share in a case the Government unquestionably is pursuing. Furthermore, the reference to an “active” fraud investigation is not defined, and many investigations are not labeled “fraud” investigations, at least

initially, but nonetheless often form the basis for FCA referrals and cases. Finally, a Government employee should be prohibited from borrowing from audits as well as investigations. Thus, if this aspect of the proposed Government employee provision is retained, then it should be revised to make the touchstone for dismissal whether there exists “a filed criminal indictment or information, or an open criminal, civil, or administrative investigation or audit by the Government into substantially the same matters as set out in the complaint.”

Fourth, the proposed legislation also permits the Government to dismiss a Government employee *qui tam* action if “none of the following has occurred” – the relator disclosed “substantially all material evidence and information” to certain designated federal officials, and the Government failed to file suit within 12 months (or any extension of that period). We have several concerns about this aspect of the proposed legislation.

Initially, the phrase “none of the following has occurred” is confusing and could be read to foreclose the Government from moving to dismiss if it failed to file an action within 12 months, even if the relator did not make the requisite disclosures. The “none of the following” language should be removed and replaced with language that makes clear that dismissal is proper if (1) the relator failed to make the requisite disclosures; or (2) if such disclosures were made, the Government filed an action within 12 months (or any extension of that period) of those disclosures.

Furthermore, the Government has 12 months to file a complaint after it receives notice of the Government employee's allegations, but may seek leave of court for another 12 month extension. The new provision, however, does not specify where the Government is to file an extension application given that there is no pending court action at that point. To avoid this logistical difficulty, the additional 12 month period should be triggered upon written notice by the Government to the employee.

Fifth, the legislation provides the Government with only 60 days to file a motion to dismiss once the relator's suit is filed. We believe this time period is too short. A minimum of 120 days should be provided, since the Government will be required to use its limited resources both to investigate how the relator learned of the fraud and whether he or she made the requisite disclosures, in addition to investigating the underlying merits of the relator's allegations. We also believe the Government should be able to dismiss even after the initial dismissal period expires “for good cause shown.” Otherwise, the Government would be potentially without recourse if it learned that an employee had misrepresented facts bearing upon his or her compliance with the disclosure requirements until after the initial period for filing a motion to dismiss had expired.

Sixth, the legislation does not expressly state that the lawsuit must be dismissed if the stated criteria are not satisfied. Proposed new § 3730(6)(A) should be rephrased to read: “The court shall dismiss an action or claim, or the person bringing an action or claim, under subsection (b), upon a motion filed by the Government not later than...”

Seventh, the proposed legislation requires the Government's motion to dismiss to "set forth documentation of the allegations, evidence and information in support of the motion." It is not clear what "documentation of the allegations, evidence and information" refers to, or why this provision is necessary. To the extent that it suggests that the burden of proof is on the Government, we disagree and believe instead that the relator should have the burden of showing entitlement to funds that would otherwise belong to the American taxpayer. Accordingly, we recommend that this language be removed and replaced with a statement that "it shall be the burden of the person bringing the civil action to demonstrate that all of the conditions" for filing suit have occurred.

Eighth, the proposed legislation provides insufficient protection for information that the Government may introduce in support of a motion to dismiss. While the defendant is not permitted to seek discovery of such information from the Government, only the relator is authorized to object to the public disclosure of this information, and neither the relator nor the Government may prevent the disclosure of this information to the defendant, which may obtain this information at the discretion of the court. Because the information introduced by the Government may relate to an ongoing investigation, disclosure of this information to the defendant or others may jeopardize the Government's evidence or legal theories, and thereby adversely impact the Government's ability to protect the public fisc. Thus, we think it is important that the legislation provide that the evidentiary material submitted by the Government "shall not be disclosed" to the defendant, and that the Government may move to restrict the relator's access to this information as well.

Conversely, the legislation provides that if the Government employee's suit is dismissed, the matter "shall" remain sealed. The Government believes, and established case law supports, that the public has a presumptive right to learn about judicial decisions. Accordingly, we recommend that the question of whether a case should remain sealed after it is terminated should continue to be decided by the courts on a case by case basis, consistent with the traditional standards governing public access to court proceedings.

Ninth, the proposed legislation requires the Department to report every 6 months on any motions filed by the Government to dismiss Government employees from a *qui tam* suit. This requirement would impose an unnecessary burden on the Department and distract from the pressing business of investigating and litigating claims of fraud on the Government. Moreover, the current seal provisions of the FCA would preclude such reporting, absent leave of court, and if the proposed legislation is enacted, would also prohibit such reporting absent the consent of the relator.

Finally, the legislation should clarify that the right of Government employees to file *qui tam* actions does not bring them within the ambit of the "whistleblower protection" provisions in §3730(h) of the Act, since federal employees are covered by, and entitled to the protection of, the Civil Service Reform Act, which was intended to provide the exclusive remedy for claims against federal employers. We therefore

recommend that language be added to § 3730(h) stating that it does not apply “against the United States or any of its agencies.”

9. Waiver of Claims

Section 4(a) adds language providing that “[n]o claim for a violation of section 3729 may be waived or released by any action of any person, except insofar as such action is part of a court approved settlement of a false claim civil action brought under this section.” This provision appears to be designed to prevent defendants from arguing that a private person can unwittingly waive the right of either the United States, or that person, to file a False Claims Act action – for example, by releasing all claims against his or her employer as part of a separation agreement, or by failing to disclose a pending or potential *qui tam* action in a bankruptcy proceeding. See *U.S. ex rel. Gebert v. Transport Administrative Services*, 260 F.3d 909 (8th Cir. 2001) (relator lacked standing to bring *qui tam* suit because putative suit was not disclosed on list of assets in bankruptcy proceeding and because relator released all claims against defendant in settlement agreement with bankruptcy trustee); *U.S. ex rel. Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995) (prefiling release of *qui tam* claim could not be enforced to bar subsequent *qui tam* claim).

While we support the objective of precluding an unwitting waiver by a private party of that party's right to bring a *qui tam* action, the specific language in the proposed legislation is over-broad and could lead to unintended and inappropriate consequences. As written, it would appear to preclude the United States from settling a *qui tam* action with a defendant without court approval, even where the relator agrees to the settlement. Furthermore, it might even require court approval of a non-*qui tam* settlement negotiated by the United States, depending on how the term “action of any person” is interpreted. This runs contrary to the general principle that courts should play a limited role in approving settlements absent special circumstances, such as the need to protect the rights of unrepresented third parties, see *United States v. City of Miami*, 614 F.2d 1322, 1330 (5th Cir. 1980). Moreover, curtailment of the settlement power of the United States under these provisions, like curtailment of its power to dismiss the litigation, would reduce control by the Executive Branch over *qui tam* (and potentially other) litigation and thereby raise constitutional separation of powers concerns.

To redress the foregoing concerns, the waiver provision should be amended as follows to make clear that it does not require court approval of any non-*qui tam* settlement, or of any *qui tam* settlement unless the relator objects: “No claim for a violation of section 3729 may be waived or released by any action of any person who brings an action under this subsection (b), except insofar as such action is part of a court approved settlement of a false claim civil action brought under this section. Nothing in this subsection (1) shall be construed to limit the ability of the United States to decline to pursue any claim brought under this subsection (b), or to require court approval of a settlement by the Government with a defendant of an action brought pursuant to subsection (a), or pursuant to subsection (b) unless the person bringing the action objects to the settlement pursuant to subparagraph (c)(2)(B).” At a minimum, the new provision

should refer to the “person bringing the action” rather than merely the “person” to clarify that it is not intended to reach a non-*qui tam* settlement between the United States and a defendant.

10. Public Disclosure

Section 4 of the legislation substantially narrows the current public disclosure bar. It permits dismissal only if “all essential elements” of the relator’s allegations are “based exclusively on the public disclosure” of allegations or transactions in certain enumerated types of disclosures. A “public disclosure” is defined to be only a disclosure “on the public record” or that has otherwise been “disseminated broadly to the public”. Additionally, a relator’s action is defined to be “based upon” a public disclosure only if the relator “derived his knowledge” of “all essential elements of liability” from the public disclosure. Finally, the public disclosure bar is no longer defined as jurisdictional and only the Government (not the defendant) is allowed to dismiss on this ground.

The Department supports revisions to the public disclosure bar that will address our two major and longstanding concerns. First, it is our view that a relator who has no firsthand information about fraud and brings nothing new to the suit should not be entitled to reap the rewards of a False Claims Act suit. Second, where the government is already pursuing a matter, the reward only harms the taxpayers by diverting up to 30 percent to the private plaintiff.

We strongly object to the proposal in Section 4 because it severely narrows the circumstances where the bar would apply in a way that would reward relators with no first hand knowledge and who do not add information beyond what is in the public domain, as well as relators in a broad range of cases where the government already is taking action. If these changes were implemented, then even if there is an active Government investigation into the same matter, a relator could file suit and reduce the taxpayers’ recovery even though he or she has not contributed anything new to the Government’s case. We think this is fundamentally at odds with the underlying purpose of the *qui tam* provisions, which is to incentivize relators to disclose wrongdoing of which the Government would otherwise be unaware. Moreover, the proposed standard for dismissal under this provision is too limited, and will allow the diversion of taxpayer dollars to relators who provide little assistance to the Government’s fraud efforts. While the Department could support aspects of the proposal that eliminate the jurisdictional nature of the public disclosure bar and that permit only the Attorney General (and not defendants) to seek dismissal of relators on this ground, it could only do so if the bar reflects the concerns we’ve outlined; we do not agree with the legislation’s drastic narrowing of the bar.

In lieu of the proposed amendments, we recommend instead that the public disclosure bar be revised to permit dismissal of a *qui tam* action by the Government if it is already pursuing the matter unless the relator provides new information that would enhance the Government’s recovery and which the Government’s existing investigation would not have uncovered, or the Government’s investigation is based on information

voluntarily provided by the relator. Specifically, we would recommend the following revised language: "A court shall dismiss an action or claim or the person bringing the action or claim under subsection 3730(b), upon a motion by the Government filed on or before service of a complaint on the defendant pursuant to Section 3730(b), or thereafter for good cause shown, if (A) on the date the action or claim was filed substantially the same matters as alleged in the action or claim were contained in, or the subject of, (I) a filed criminal indictment or information, or an open criminal, civil or administrative investigation, or (II) a news media report, or congressional hearing, report or investigation, if within 90 days of the issuance or completion of such news media report or congressional hearing, report or investigation, the executive branch of the Government opened an investigation or audit of the facts contained in such news media report or congressional hearing, report or investigation, (B) any new information provided by the person does not add substantial grounds for additional recovery beyond those encompassed within the Government's existing indictment, information, investigation, or audit, and (C) the Government's existing indictment, information, investigation or audit was not initiated based on information voluntarily brought by the person to the Government." In addition, we would recommend that § 3730(d)(1) be revised as follows: "If the person bringing the action is not dismissed under subsection (e)(4) because the person provided new information that adds substantial grounds for additional recovery beyond those encompassed within the Government's existing indictment, information, investigation or audit, then such person shall be entitled to receive a share, pursuant to the first sentence of this paragraph, only of proceeds of the action or settlement that are attributable to the new basis for recovery that is stated in the action brought by that person."

This alternative language remains faithful to the fundamental principle that taxpayer dollars should be used to reward only those relators who supplement, not duplicate, the Government's fraud enforcement efforts. We recognize that there are situations when even though the Government is pursuing an allegation of fraud, a relator may bring valuable new information which significantly increases the Government's recovery. The alternative language protects such a relator by allowing the relator to recover where the new information provides "substantial grounds for additional recovery beyond those encompassed within the Government's existing indictment, information, investigation or audit." However, such a relator's recovery would be limited to the "proceeds of the action or settlement that are attributable to the new basis for recovery that is stated in the action brought by that person." Thus, if a relator files a lawsuit alleging fraud A and B, and fraud A is already under investigation by the Government, but fraud B is new information to the Government, the relator may recover a share of the proceeds attributable to fraud B.

We also recognize that there are situations where the Government's pursuit of a fraud allegation may have been triggered by the actions of the relator. Again, the alternative language protects such a relator by allowing the relator to recover if the Government's enforcement efforts are "based on information voluntarily brought by the person to the Government." But where a relator neither puts the Government on the trail of the fraud, nor contributes anything new, under the Government's proposed language

the relator would not be permitted to allege claims already being pursued by the Government.

We also object to the proposed amendments to the public disclosure provision for the following additional reasons. First, with respect to the Government seeking the dismissal of a relator on public disclosure grounds, we think it is important that the Government be given adequate time to file such a motion, and recommend that the proposed legislation expressly provide for such a motion to be filed “on or before service of a complaint on the defendant pursuant to Section 3730(b), or thereafter for good cause shown.” This change is particularly important if the current language of the proposed legislation is enacted, since it may require substantial investigation, including discovery of the relator, to determine where the relator derived his or her knowledge.

Second, by limiting a public disclosure to “disclosures made on the public record” or “broadly to the general public”, the proposed amendment will encourage opportunism at the expense of the taxpayers. The new language would not cover the common situation where a private party, usually a company employee, learns of a Government investigation as a result of being questioned by Government auditors or investigators, or who is tasked with gathering information in response to a Government subpoena or audit request. Under the proposed legislation, such a person would be free to file a *qui tam* action, despite the fact that his or her lawsuit in no way helps the Government to protect the public fisc.

Third, the proposed legislation permits dismissal of a relator only if “all of the essential elements” of the relator’s allegations are derived from the public disclosure. As discussed above, such a standard inappropriately would permit a relator who derives substantially all of his or her information about that scheme from a public disclosure, but then adds one additional element from another source, to reduce the Government’s recovery for the taxpayers.

11. Qui Tam Awards

Section 4(c) revises § 3730(d)(3) of the FCA to provide that a court may reduce the relator’s share if the court determines that the relator “planned and initiated the violation of section 3729”, or derived his or her knowledge “primarily from specific information . . . that the Government publicly disclosed . . . or that [the Government] disclosed privately” to the relator. Although the proposed legislation retains the second sentence of § 3730(d)(1) – which caps a relator’s share at 10 percent if his or her action is based primarily on certain disclosures – we presume the amendment was designed to replace this provision, and to remove the 10 percent cap on the relator’s share where the Government is already on the trail of the fraud. Thus, the amendment would treat this situation the same as where the relator is a planner and initiator of the fraud – and leave it entirely to the discretion of the court whether, and how much, to reduce the relator’s share.

We agree that both situations should be treated similarly, but believe the change should go in the other direction, and that the 10 percent cap should be extended to the situation where the relator is a planner and initiator. We think a reduced share – capped at 10 percent – is an appropriate limitation where a relator was the one who triggered the initial fraudulent scheme, and still provides the relator with an adequate incentive to disclose the scheme if the relator is inclined to do so. We also believe that a 10 percent cap is appropriate where the Government is already on the trail of the fraud at the time the relator files suit, and thus oppose removing the cap in these situations. Such a cap is all the more important if the legislation's version of the public disclosure provision is to be adopted, since under this revision the relator would not even need to possess direct and independent knowledge of the fraudulent activity being pursued by the Government. For this reason, we strongly encourage Congress to retain the 10 percent cap on the relator's share where the Government was already pursuing the fraud alleged by the relator independent of any information provided by the relator.

The issue of whether to keep the 10 percent cap where the Government is already on the trail of the fraud would be mooted if the alternative language for the public disclosure bar suggested above were to be enacted. As discussed, under the alternative language, a relator would be entitled to claim a share of any recovery even if the Government was already on the trail of the fraud, but only of the additional recovery attributable to any new information brought forth by the relator.

12. Statute of Limitations

Section 6 amends § 3731(b)(1) to provide for a single 10 year statute of limitations in all FCA cases, and to clarify that the Government's pleading upon intervention relates back to the relator's complaint for statute of limitations purposes, "to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth or attempted to be set forth" in the relator's complaint. We welcome both of these changes.

13. Civil Investigative Demands

Section 7 proposes two modifications to the FCA's Civil Investigative Demand (CID) provisions. While we support these changes, we believe that a more streamlined CID provision is preferable to the current statute even with the modifications proposed by the current legislation. We would welcome the opportunity to discuss with you and your staff the contours of such a provision.

Section 7 proposes to amend the CID provisions to permit the Attorney General to delegate some of the authority currently conferred upon him under 31 U.S.C. § 3733. We would recommend that the Attorney General be authorized to delegate any of the authority he possesses under this section to the Assistant Attorney General for the Civil Division.

Section 7 also authorizes the Government to share CID information with relators. Again, while we support this change, we do not think it goes far enough. The current CID provisions allow CID information to be provided “for official use” to any Department officer or employee “who is authorized for such use under regulations which the Attorney General shall issue.”

We think it is important that this language be modified to permit the Government to share information with any person or entity that can assist in the Government’s investigation, such as other federal and state law enforcement agencies. For example, the Government routinely works with agents from the State Medicaid Fraud Control Units in connection with its health care fraud investigations, and the inability of the Government to share CID information with these agents is a significant and unnecessary impediment to these investigations.

To eliminate this restriction, we recommend the following changes: i) strike from § 3733(I)(2)(B) the phrase “who is authorized for such use under regulations which the Attorney General shall issue”, ii) strike from subsection 3733(I)(2)(C) the sentence: “Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities,” and iii) add a new § 3733(I)(8) providing that “the term official use means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including, but not limited to, use in connection with internal Department of Justice memoranda and reports; communications between the Department of Justice and a federal, state, or local government agency, or a contractor of a federal, state, or local government agency, undertaken in furtherance of a Department of Justice investigation, or prosecution, of a case; interviews of any *qui tam* relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.”

We also note that the current version of the proposed legislation specifies that “any information” obtained by a CID may be shared with a *qui tam* relator. It is not clear whether Congress intended the use of the term “any” to permit the Government to share information that might otherwise be precluded from disclosure under other federal laws, such as the Trade Secrets Act. Although the Department does not oppose such a result, if Congress intended the revised language to permit disclosure notwithstanding these other laws, then it should state its intention expressly. Otherwise, Government attorneys and investigators will be left without clear guidance as to whether these more restrictive laws, many of which contain criminal sanctions, preclude disclosure of otherwise covered information.

Finally, we recommend that Section 7 clarify that the Attorney General (or his designee) may issue CIDs in connection with a *qui tam* action prior to the Government’s

election to intervene or decline to intervene in that action. Specifically, we recommend that § 3733(a)(1), instead of stating that “the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue [a CID]” provide that “the Attorney General may, before commencing a civil proceeding under subsection 3730(a) or other false claims law, or electing pursuant to section 3730(b)(4) to intervene or decline to intervene in an action under subsection 3730(b), issue [a CID].”

14. Applicable Date

Following the passage of the 1986 amendments, the Department spent substantial time and resources litigating the effective date of those amendments. To avoid such a recurrence, Congress should make clear in the proposed legislation when it intends the proposed changes to be effective. Specifically, we recommend that Congress add the following language to the legislation: “This Act shall apply to all cases pending on the date of enactment, and to all cases filed thereafter.”

15. Severability

Out of an abundance of caution, in order to ensure that any provision in the FCA that might be invalidated does not result in the invalidity of the remaining provisions, we suggest a severability clause. Thus, we recommend that Congress add a provision stating as follows: “If any provision or application of this Act is held invalid, the invalidity shall not affect other provisions or applications of this Act which can be given effect without regard to the invalid provision or application, and to this end the provisions or applications of this Act are severable.”

**WRITTEN STATEMENT OF THE CHAMBER OF COMMERCE AND THE
U.S. CHAMBER INSTITUTE FOR LEGAL REFORM
IN OPPOSITION TO
S. 2041
THE FALSE CLAIMS ACT CORRECTIONS ACT OF 2007
BY
JOHN T. BOESE
FRIED FRANK HARRIS SHRIVER & JACOBSON LLP
WASHINGTON, DC**

FEBRUARY 27, 2008

I appreciate the opportunity to submit my views on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform in opposition to S. 2041. For the last 25 years, I have had the privilege of representing a wide variety of defendants in False Claims Act cases. My clients have included large and small companies in healthcare, oil and gas, technology and defense, as well as colleges and universities, municipal airports, churches, individuals, and local government agencies — precisely the diverse group that this proposed legislation threatens to affect most dramatically. In addition to my practice, I have also taught and studied the False Claims Act for many years. My two-volume treatise, *Civil False Claims and Qui Tam Actions*, was originally published in 1993 and is now in its Third Edition. It was the first treatise on the False Claims Act and *qui tam* enforcement and remains the leading authority cited by academics and practitioners as well as by Federal district and appellate courts on this topic.

The Chamber fully supports the Department of Justice's efforts to remedy fraud on the Government and does not countenance or support those who defraud the Federal Treasury. The Chamber recognizes the importance of an appropriate use of the False Claims Act in those efforts. The Chamber opposes S. 2041, however, because it will not assist the DOJ in its fraud-fighting efforts, it will not increase the monies returned to the Treasury, and it will not encourage more whistleblowers to bring new allegations of real fraud to the attention of the Government.

We oppose this bill because it would:

- greatly expand the scope of the Act to private contract disputes which do not affect the Treasury;
- cost the Treasury far more than it might gain by rewarding those who bring no new allegations of fraud to the attention of the Government;
- allow Government employees to abuse Government information for personal profit;
- create an administrative nightmare for any person, company, or institution that pays or receives Federal money;

- disassociate the whistleblower protection provisions of the Act from any activities regarding *qui tam* enforcement; and
- encourage private counsel access to information obtained under a Civil Investigative Demand to supplement *qui tam* complaints that do not state a claim under the Act.

In short, the amendments in S. 2041 would increase the possibility that False Claims Act enforcement will be abused by *qui tam* relators' counsel, particularly in the 80% of *qui tam* cases in which the DOJ declines to intervene because the cases are meritless.

The concerns being expressed by the Chamber on behalf of the business community are supported by more distant experience with *qui tam* enforcement. In fact, another country's experience with a very broad *qui tam* enforcement system provides an excellent preview of things to come if the proposed amendments are enacted. That history is described in a scholarly study published in 2000 by Professor Randy Beck, who traced the decline and ultimate repeal, in 1951, of England's *qui tam* laws. See J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539 (2000). Professor Beck describes a country plagued by malicious and harassing *qui tam* prosecution and reports that public sentiment turned against *qui tam* enforcement in England because of "the obnoxious practices of common informers," who were widely perceived to be practicing a "form of legalized blackmail." *Id.* at 603-04. As Professor Beck notes:

A further defect in the system of *qui tam* enforcement related to selection of targets for prosecution. Ideally, a public prosecutor exercises discretion in choosing prosecution targets in order to avoid applying a statute in ways that undermine the public interest. A *qui tam* statute eliminates any incentive for a benevolent exercise of prosecutorial discretion. The common informer has little reason to consider broader issues of public policy raised by a particular prosecution, and in fact has a strong financial incentive not to take such considerations into account. The result is that informers pursue litigation that disinterested prosecutors would consider contrary to the public good.

Id. at 583 (internal citations omitted). Adoption of the amendments in S. 2041 will likewise undermine public support for the goals of the False Claims Act in this country.

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I. THE AMENDMENTS WILL EXPAND *QUI TAM* ENFORCEMENT, WHICH HAS BEEN ABUSED BY THE PLAINTIFFS' BAR

Before I address the amendments themselves, I believe it is important to address five (5) common misconceptions about the False Claims Act ("FCA" or "the Act"), and particularly *qui tam* enforcement in FCA cases declined by the DOJ.¹ This, after all, is the focus of the vast majority of these amendments, and this discussion should inform the Committee's view of the amendments that benefit those *qui tam* relators and their lawyers.

Some background information on FCA litigation will also help the Committee better understand why the proposed legislation poses a grave threat to the economic viability of many businesses, non-profit groups, and local governmental entities. It is against this background that the Committee should exercise great caution before expanding a statute that threatens such severe consequences for so many.

A. *Qui Tam* Enforcement Does Not Result in Large Recoveries

There is a common misconception, perpetuated by the plaintiffs' bar, that these particular amendments are necessary for private attorneys to combat major fraud by the big corporate interests who outgun DOJ attorneys. The opposite is true: Of the \$20 billion recovered under the False Claims Act since the 1986 Amendments, only 1.4% was recovered in *qui tam* cases in which the DOJ did not intervene.² These amendments, designed only to expand this type of litigation with such a low track record for success, benefit only *qui tam* relators and their attorneys, not the U.S. taxpayer.

The fact is, the FCA works best when the Government investigates, intervenes, and determines whether or not a case has merit and, if so, prosecutes the case. These declined cases³ are, by and large, meritless, and are focused on questionable cases or small businesses and institutions which can ill afford to defend themselves. They involve violations of regulations without loss to the Treasury and are contrary to public policy and common sense.

¹ Under the Act, a *qui tam* case must be filed under seal to give the Government the opportunity to investigate the allegations. After that investigation, DOJ can either intervene, in which case it has primary responsibility for the litigation, or decline to intervene, in which case the *qui tam* relator can proceed alone. 31 U.S.C. §§ 3730(b)(4) & (c). Historically, the DOJ intervenes in approximately 20% of *qui tam* cases. Department of Justice, Fraud Statistics for 2007-Overview (2007) (hereinafter "DOJ Statistics"), available at http://www.fhjs.com/practice_groups/qui_tam/overview_2007.pdf. A copy of the DOJ Statistics is appended hereto as Attachment B.

² DOJ Statistics at pp. 2 & 6.

³ When the Justice Department chooses not to exercise its statutory right to intervene in and take over *qui tam* FCA cases, such cases are commonly referred to as "declined" cases.

B. *Qui Tam* Enforcement Does Not Target Only Large American Businesses

A second common misconception, perpetrated by the plaintiffs' bar that profits from these cases, is that whistleblowers need the amendments so they can pursue big corporate frauds. While some *qui tam* cases are filed against large companies, the majority of defendants in *qui tam* cases are small businesses, local governments, and non-profit institutions. A sample from just the last few years includes:

Arkansas Game and Fish Commission	North Carolina Easter Seals UPC
California Santa Clara County Office of Education Old Baldy Council of Boy Scouts of America	Ohio Cuyahoga Falls General Hospital
Georgia Augusta-Richmond County Providence Missionary Baptist Church of Atlanta	Pennsylvania Mercy Hospital of Pittsburgh Tyrone Hospital Lavender Hill Herb Farm
Illinois Village of River Forest Board of Education of Chicago Pekin Memorial Hospital	Tennessee St. Jude's Children's Research Hospital Memphis Baptist Hospital Valley Milk Products, LLC
Michigan Oakland Livingston Legal Aid	Texas Dallas-Forth Worth Int'l Airport Board Hudson Independent School District Ector County Hospital
Missouri City of St. Louis	Vermont City of South Burlington
New York State Division of Housing and Community Renewal Erie County Medical Center	Virginia George Mason University
	Washington Housing Authority of Seattle

These non-profit institutions and public entities cannot, in many cases, afford to defend themselves against the treble damages and oppressive penalties assessed under the FCA, but they must divert valuable resources to do so because failing to do so would expose them to the very real risk of bankruptcy.

C. Innocent Companies and Institutions Are Adversely Affected by *Qui Tam* Enforcement of the FCA

A third common misconception is that *qui tam* enforcement only targets those who clearly defraud the Government. In fact, the opposite is true, and these meritless cases cost the American public dearly. As shown above, *qui tam* cases are filed every day against almost every type of institution in America. In 80% of those cases, the Government investigates and then declines to intervene, yet the *qui tam* relator and lawyer proceed with hopes of a big payoff. Those declined cases bring in only 1.4% of all FCA recoveries, yet they must be vigorously defended because the onerous treble damages and penalties will bankrupt most institutions. And they cost a fortune to defend.

I have two examples for the Committee from my own experience:

Example 1: A municipal airport was sued by a former environmental compliance officer under the FCA for applying for FAA grants and allegedly falsely certifying compliance with environmental regulations. The DOJ did not intervene. The court denied most pretrial motions, and the case went to trial. The jury entered a verdict against the *qui tam* relator and in favor of the airport, and the Fifth Circuit recently affirmed.

Cost of that trial and appeal to the airport: approximately \$5 million.

Example 2: A non-profit hospital was sued by its former head nurse alleging violations of Medicare regulations. The DOJ did not intervene. Preliminary motions were denied, and the case went to full discovery. A month before trial, the court ruled in favor of the hospital on a summary judgment motion. No appeal was taken.

Cost to defend the hospital without a trial or appeal: approximately \$1.7 million.

While some large defense contractors can try to pass on a portion of these defense costs to the Government, most small businesses and grantees have no ability to do so. They must simply absorb those costs as a “cost of doing business” with the U.S. Government. For many businesses, *qui tam* enforcement makes that cost too high.

D. Many *Qui Tam* Cases Are Inconsistent with Government Policy and the Public Interest

Most FCA cases brought by *qui tam* relators without DOJ intervention do not involve claims for services that were never rendered or products that were defective or never delivered. Instead, they more commonly involve allegations that, in the course of manufacturing a product or providing a service, a defendant falsely represented, or certified, that it was complying with various laws, regulations, and contract terms. *Qui tam* relators allege that such certifications are a basis for liability even if the Government is accurately billed for the correct amount.

The increasing tendency of *qui tam* relators to bootstrap regulatory violations onto the FCA is cause for great concern to the business community because most operate in highly regulated environments. Most of those laws and regulations — though perhaps important — have little or no direct bearing on the project or service being funded or the Government’s purposes for

funding that project. In a typical contract or grant, for example, the recipient must certify that it is and will remain in compliance with more than 50 specified laws, regulations, executive orders, and other Federal requirements.

But imagine the daunting task of conducting business in an environment where such certifications become whistleblower-driven compliance traps, which can cost hundreds of millions of dollars and have the very real capacity to cripple organizations that are often among the most important employers in a community.

Medicare cost report certifications are good examples: the preparer must certify that he or she is “familiar with the laws and regulations regarding the provision of health care services and that the services identified in [the] cost report were provided in compliance with such laws and regulations.” *United States ex rel. Thompson v. Columbia/HCA*, 20 F. Supp. 2d 1017, 1041 (S.D. Tex. 1998). The Federal “laws and regulations regarding the provision of health care services” occupy, according to one reliable estimate, “more than 130,000 pages of rules and regulations for all Government healthcare programs, over 100,000 of which are related to Medicare.” *Rx for the Health Care System*, WALL ST. J. at A18 (Oct. 8, 1998) (quoting Robert R. Waller, M.D., president and CEO of the Mayo Foundation). This staggeringly broad certification has been the basis for dozens of *qui tam* suits.

Congress has wisely refrained from creating a private enforcement mechanism for most of these laws and regulations, but the FCA is already widely used by private plaintiffs to litigate alleged regulatory and statutory violations indirectly. When such cases involve little or no economic harm to the Federal Treasury (where, for example, an otherwise perfectly fine product was delivered and a well-performed service was actually rendered), the high per-claim penalties available under the FCA mean that penalties can quickly accrue to the point where they far exceed any actual out-of-pocket loss experienced by the Government.⁴ It is safe to say that most legislators and regulators would not and did not impose such draconian sanctions for the underlying regulatory or statutory violations: The public outcry over such a regime would be deafening. Yet, the Act allows *qui tam* relators, for their own profit, to sue for just such extraordinary sanctions.

⁴ This draconian and excessive penalty is compounded dramatically when plaintiffs argue that all claims made during the period of alleged non-compliance were “false” and that the measure of damages is not the Government’s economic loss (which is often zero), but rather three times the total amount received from the Government during that period. See, e.g., *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003); *Ab-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429, 430-33 (Fed. Cir. 1994). Although both of these courts rejected this approach to calculating damages, many of the FCA settlements involving the pharmaceutical industry involved drugs that were actually prescribed and provided, but the Government and relators asserted that the corresponding payment claims were “tainted” by kickbacks. Plaintiffs typically argue that the damages in “tainted” claims cases are measured by the total sum paid by the Government for a claim it allegedly would have refused to pay, if it had known of the alleged legal violation.

E. Extravagantly Excessive Bounties Encourage Frivolous *Qui Tam* Litigation

Under existing law, *qui tam* relators can receive up to 30% of an FCA settlement or judgment. Large settlements paid in recent years have produced extravagantly large relator share payments. Two relators received a \$95 million payment in connection with a settlement paid by TAP Pharmaceuticals in 2001.⁵ Another relator recently received a \$62 million bounty in connection with a settlement paid by Merck.⁶ But if the relators would, as is likely, have been very satisfied with \$20 million each, then the Government overpaid the two TAP relators by a total of \$55 million and the Merck relator received \$42 million more than necessary, resulting in an economically inefficient misallocation of \$97 million that should have been paid to the U.S. Treasury.

This analysis is relevant to the Senate's consideration of the proposed amendments because it reveals how the lottery-like aspect of the existing system encourages frivolous litigation that comes at significant direct and indirect cost to consumers, businesses and taxpayers. Although most relators get much less than the amounts listed above, the hope of a Lotto payoff encourages individuals to take a chance on a *qui tam* suit. If nothing else, claiming whistleblower status often allows problematic employees to extract some sort of payment from their former employers. The proposed amendments would increase the economic inefficiencies and abuses in the existing system and could have particularly catastrophic effects on American businesses in the current difficult economic environment.

II. THE COMMITTEE SHOULD REJECT THE NEW DEFINITION OF "GOVERNMENT MONEY OR PROPERTY" TO COVER PRIVATE CONTRACT AND TORT DISPUTES WITH NO LOSS TO THE FEDERAL TREASURY

A. Summary

Section 2 of S. 2041 would define "Government money or property" to include any money the Government possesses, handles, or processes in any way, regardless of whether the Government has a property interest in those funds as a matter of law. It would dramatically re-define historical concepts of property and would allow the FCA to be used in disputes over money or property held by a bankruptcy trustee or Federal employee donations made to private

⁵ See "TAP Pharmaceuticals and Others Charged With Health Care Crimes: Company Agrees to Pay \$875 Million to Settle Charges," DOJ Press Release # 513 (Oct. 31, 2001), available at <http://www.usdoj.gov/opa/pr/2001/October/513civ.htm>. What is extremely telling about subsequent developments in this case is that the 11 individual defendants indicted by the Justice Department who fought these charges at trial were *acquitted* by a jury of all of the charges against them. Because of the overwhelming failure of proof in this case (the defendants did not put on a defense because the case in chief was so inadequate), the court set aside the guilty plea that had been entered by one defendant before the case went to trial.

⁶ See "Merck to Pay More Than \$650 Million to Resolve Claims of Fraudulent Price Reporting and Kickbacks," DOJ Press Release # 08-094 (Feb. 7, 2008), available at http://www.usdoj.gov/opa/pr/2008/February/08_civ_094.html.

charities participating in the Combined Federal Campaign. It constitutes a gross overreaction to issues raised in a very small number of cases that are better addressed through already existing remedies. The proposed amendment would divorce the FCA from the protection of the Federal Treasury and would “federalize” routine private contract disputes between private parties simply because one of the parties receives some Federal funds. In many ways, this effort to dramatically re-characterize “Government money or property” would trivialize the Act and subject the statute to public ridicule and to constitutional challenges that have a high probability of success.

B. Current Law

1. The FCA currently requires a call upon the public fisc

Under current law, the False Claims Act reaches any “claim,” which includes “any request or demand which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.” 31 U.S.C. § 3729(c).

For FCA liability to arise under current law, there must be an actual call upon the public fisc. See, e.g., *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999). The First Circuit held, in *United States v. Rivera*, 55 F.3d 703, 710 (1st Cir. 1995), that the FCA attaches liability not to the underlying fraudulent activity or to the Government’s wrongful payment, but to the “claim for payment.” Courts must examine whether a false claim or statement actually has “the practical purpose and effect” of causing the Government to pay when it otherwise would not have done so. *Id.* at 710. Similarly, in *United States ex rel. Hutchins v. Wilentz, Goldman and Spitzer*, 253 F.3d 176, 183-84 (3d Cir. 2001), the Third Circuit emphasized that the ultimate payer or reimbursor of the claim must be the United States Government.

2. Courts have properly concluded that wages paid to Federal employees are not Federal funds once they vest in the employee, even if the Federal Government processes those funds

Under current law, alleged schemes targeting funds that belong to Federal employees are not actionable under the FCA. The proposed amendments, however, would change that, despite the lack of any justifiable Federal interest in such cases.

One relator already tried to pursue a *qui tam* case under this theory, suing the United Way for allegedly misrepresenting its eligibility to participate in the Combined Federal Campaign (“CFC”). The relator claimed that because Federal employees are paid from the U.S. Treasury, “[t]his is a fraud perpetrated on recipients of federal funds to gain access to a portion of those funds.” *United States ex rel. Bustamante v. United Way/Crusade of Mercy, Inc.*, No. 98C5551, 2000 WL 690250, at *4 (N.D. Ill. May 25, 2000). Under current law, the court easily rejected this expansive theory of liability, holding that

although the federal government, as the employer, is responsible for deducting the designated contribution from an employee’s paycheck, this does not convert the

employee's personally paid charitable contribution into federal money. . . . [I]t would indeed be an illogical result if any time a federal employee spent her federal wages, she was considered to be expending federal funds and therefore protected from fraud by the FCA.

Id. at *5. See also *Sakote v. District of Columbia*, 56 Fed. Appx. 519 (D.C. Cir. 2003). However, as is explained below, this “illogical result” is exactly what S. 2041 would produce.

C. Analysis of the Proposed Amendment

S. 2041 proposes to define “Government money or property” as “money or property belonging to the United States Government; money or property the United States Government provides, has provided or will reimburse to a contractor, grantee, agent or other recipient to be spent or used on the Government’s behalf or to advance Government programs; or money or property belonging to any ‘administrative beneficiary.’” S. 2041, § 2(1)(b)(2).

An “administrative beneficiary” is further defined in a proposed new definition as any “natural person or entity, including any governmental or quasi-governmental entity, on whose behalf the United States Government, alone or with others, collects, possesses, transmits, administers, manages, or acts as custodian of money or property.” *Id.* § (2)(1)(b)(4).

1. The proposed legislation would disassociate FCA liability from the act of submitting claims to the Federal Government

By changing the definition of Government funds, the amendment alters the definition of “claim” — removing from the liability assessment the critical element of Government approval or denial of payment — and thus eliminates that which is the “*sine qua non* of liability under the FCA: the submission of the false claim to the Government.” See, e.g., *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 225 (1st Cir. 2004); *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002). By allowing FCA liability to extend to transactions between individuals based on some loose “association” with the Government rather than on the relatively well-defined act involved in an affirmative decision — *by the Government* — to pay or not to pay claims, the bill would change the statute’s fundamental concern from preventing fraud against the Government to something completely different. It would apply the Act’s lower intent threshold, punitive damages, and mandatory penalties to non-governmental transactions that are now covered by the higher intent standards that states require for proving common law fraud. Changing the law so drastically represents a fundamental policy change that should not occur because of a poorly conceived or unintended response to a few cases that resulted in rulings adverse to *qui tam* relators. They are not “corrections” to the law, but rather drastic changes to both common law and the FCA.

2. The proposed amendments would federalize disputes between private parties

The primary flaw in the proposed language re-defining “Government money or property” is the breadth of subsections (b) and (c). Viewed literally and broadly, a disputed claim to a Federal employee or retiree or Social Security beneficiary — who is arguably paid with Federal

funds “to advance Government programs” — would be swept under the False Claims Act. This would include claims by roofers, contractors, or landscapers who work at the private homes of Government employees, grantors, or contractors. Although the drafters clearly tried to avoid a broad result by inserting language purportedly limiting the application of the FCA to “money to be spent or used on Government programs,” that effort is undone by the language that follows — a virtually limitless category of sums spent “to advance Government programs.” Clearly, wages paid to Federal employees and benefits paid to Social Security beneficiaries advance Government interests and would thus lead to the absurd scenarios described above.

Relators will also inevitably assert that the allegations easily rejected in *Bustamante* are a valid basis for liability under this theory. In the unlikely event that they fail under the legislation’s new definition of what qualifies as Government money or property, S. 2041 provides a generous second chance: FCA plaintiffs would also argue that the Federal Government transmits and administers money on behalf of Federal employees and CFC charities as “administrative beneficiaries.” The 2007 list of CFC charities contains the names of 2,053 organizations, including the Tibet Fund, the Desmond Tutu Peace Foundation, and Bikes Not Bombs, Inc. Even if one assumes that an outright fraud has been committed against one of these organizations, it is difficult to understand how relatively small donations made with the personal funds of Federal employees justify the application of the civil FCA in such circumstances, particularly when the costs of such litigation described above are considered.

3. The proposed legislation intrudes on rights traditionally reserved to the states

Section 2 of S. 2041 would transform disputes traditionally addressed through state tort, contract, or fraud law into — literally — a Federal case. This raises significant federalism concerns because it shifts functions traditionally reserved to the states to individual whistleblowers and DOJ. S. 2041 creates a Federal fraud statute for private frauds, which is both unprecedented and, we hope, unintended.

This would have a particularly adverse effect on the cost of commercial products. Under this amendment, an allegedly defective product would, if purchased by a Federal employee (or Social Security recipient or any person or entity receiving Federal funds), be subject to the treble damages and penalty provisions of the Act. The cost of such litigation would cause the price for those products to skyrocket, even though such disputes have traditionally been resolved under state tort law.

4. The proposed legislation is a gross overreaction to a small number of cases involving unusual facts

The sponsors of this amendment explained that it is intended to overrule *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D. Va. 2005), which is now on appeal to the U.S. Court of Appeals for the Fourth Circuit. That decision, which is still on appeal, concerned allegedly false claims to the Coalition Provisional Authority (“CPA”) in Iraq,

an international entity that ceased to exist in 2004.⁷ This is one case out of thousands brought under the FCA since 1986. Even if published reports of other sealed cases involving allegedly false claims to the CPA are true, amending the False Claims Act so drastically to allow it to apply to a small category of cases that are so unique — and incapable of repetition — is simply unnecessary and threatens the viability of American businesses.

5. The proposed legislation would be vulnerable to constitutional challenges that are very likely to be successful

This provision, if enacted, will face vigorous constitutional challenge. The Supreme Court has held in a series of decisions that FCA damages and penalties that exceed a reasonable multiple of the actual loss to the Government are unconstitutional under both the Due Process and Excessive Fines Clauses. *United States v. Halper*, 490 U.S. 435 (1989); *Hudson v. United States*, 522 U.S. 93 (1997) (stating that “[t]he Due Process and Equal Protection Clauses already protect individuals from sanctions which are downright irrational [and] [t]he Eighth Amendment protects against excessive civil fines”); see also *United States v. Mackby*, 261 F.3d 821, 831 (9th Cir. 2001) (ruling that because FCA damages and penalties have a punitive purpose, they both must be analyzed under the Eighth Amendment to determine whether they are unconstitutionally excessive). By definition, the Government suffers no economic loss when non-Government funds are at stake. There is, therefore, serious question as to whether such a provision, if passed, would survive a constitutional challenge.

* * *

Even more fundamentally, the question for the Senate is whether it wishes to impose on an even broader sector of the American economy the type of litigation described in the Introduction — where the False Claims Act is wielded as a sledgehammer in litigations involving an almost endless universe of organizations, entities, and beneficiaries whose transactions would potentially fall within the reach of the FCA under the sweeping definitions found in Section 2 of this proposed legislation.

⁷ That case held that two categories of funds at issue were Government funds within the meaning of the FCA: deposits in U.S. banks that once belonged to the Government of Iraq, but were seized by the United States during the first Gulf War, and funds and moveable property seized by Coalition forces on the ground in Iraq. *Custer Battles*, 376 F. Supp. 2d at 626, 645-46. Claims for one category of funds, however, were not “claims” within the meaning of the FCA because they had always been Iraqi funds: money from the Development Fund for Iraq, which originated primarily from sales of Iraqi oil under the United Nations Oil for Food program. *Id.* at *87.

III. THE COMMITTEE SHOULD REJECT THE AMENDMENT ALLOWING NON-WHISTLEBLOWERS TO BRING *QUI TAM* CASES BY ELIMINATING THE “PUBLIC DISCLOSURE/ORIGINAL SOURCE” DEFENSE

A. Summary

Section 4 of S. 2041 effectively eliminates a core tenet of *qui tam* enforcement—encouraging whistleblowers to come forward with new allegations of fraud against the Government. The Government pays up to 30% of all recoveries to a *qui tam* plaintiff because that person is a true whistleblower who exposes a fraud that has escaped the attention of the Federal Government. Section 4 of S. 2041 abandons that sensible approach and instead allows relators to turn public information into a winning lottery ticket for no other reason than the relators were the first to file a *qui tam* case and thus entitled to their share of the Government’s recovery, even though they brought no new fraud allegations to the attention of the Government.

One of the most effective bars to meritless and parasitic lawsuits under the False Claims Act has been and continues to be the “public disclosure” bar that Congress included as part of the 1986 Amendments. The public disclosure bar allows defendants to seek dismissal if the relator’s case is based on publicly disclosed information and the *qui tam* relator is not an “original source” to the Government.⁸ This jurisdictional defense was the result of Congress’ legitimate efforts in 1986 to strike a balance between the twin goals of preventing such “parasitic exploitation” of public information while still encouraging legitimate “whistleblowers” to give the Government important substantive information about fraud. The provisions of S. 2041 turn that delicate balance on its head, creating ample prospects for opportunistic relators to recycle stale information as they file parasitic suits that do little to enhance the Government’s fraud investigation. Indeed, the bill would allow recovery in so-called “whistleblower” cases by those who are not whistleblowers at all.

In the end, the proposed elimination of the public disclosure/original source defense in *qui tam* cases will not increase the recovery of money lost to the U.S. Treasury from fraud. Instead, this provision will simply enrich the plaintiffs’ bar and increase the costs of *qui tam* litigation to innocent American companies and institutions. By effectively eliminating the “public disclosure/original source” defense, these amendments will force American businesses and institutions to defend themselves against *qui tam* relators who do not bring any new fraud allegations to the attention of the Government.

B. Current Law

The purpose, of course, of the *qui tam* provisions of the False Claims Act is to “enhance the Government’s ability to recover losses sustained as a result of fraud against the Government.” S. Rep. No. 99-345, at 1 (1986), *reprinted in* 1986 U.S.C.A.A.N. 5266, 5266.

⁸ Importantly, this “public disclosure/original source” bar does not apply to the Government, only to *qui tam* relators, and is normally relevant only in *qui tam* cases in which the DOJ investigates and declines to prosecute. Unless the relator claims enormous attorneys’ fees, the issue rarely arises in cases in which the DOJ intervenes because the case proceeds regardless of the status of the relator.

Qui tam enforcement accomplishes this goal by encouraging “private individuals who are aware of fraud being perpetrated against the Government to bring such information forward” in exchange for a percentage of the Government’s ultimate recovery. H.R. Rep. No. 99-660, at 22 (1986). In other words, the *qui tam* enforcement mechanism essentially allows the Government to “purchase” from private citizens the information they may have about fraud on the U.S. Treasury. *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 309 (5th Cir. 1999).

The effectiveness of *qui tam* enforcement, however, also makes it susceptible to abuse by opportunistic bounty hunters masquerading as whistleblowers. Creating a statutory scheme that weeds out the former and encourages the latter has proved to be a tricky task. Thus, there should be no surprise that “[t]he history of the FCA *qui tam* provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior.” *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994).

In 1986, after over 100 years of living with two different extremes — one that allowed parasitic *qui tam* relators to cut and paste allegations from the Government’s own pleadings and another that disallowed *qui tam* suits where the Government had knowledge of the information even if the relator was the Government’s source⁹ — Congress forged a more balanced approach to screening for proper *qui tam* relators when it enacted the “public disclosure/original source” provision codified in 31 U.S.C. § 3730(e)(4). This provision states in full:

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

⁹ The first example is the infamous case of *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), in which an enterprising *qui tam* relator made a direct copy of a criminal indictment, incorporated those allegations in a civil action under the False Claims Act and requested half of any subsequent civil judgment. *Id.* at 545. He ultimately prevailed, and, in response, Congress quickly amended the False Claims Act in 1943 to bar *qui tam* actions “based on evidence or information the Government had when the action was brought.” Act of Dec. 23, 1943, Pub. L. No. 78-213, ch. 377, 57 Stat. 608.

The second example is from the equally infamous *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), in which the court refused to allow Wisconsin to act as a *qui tam* relator in a Medicaid fraud action (even though the investigation had been conducted solely by the State of Wisconsin and the Federal Government learned of the fraud only because Wisconsin had reported it) because, the court held, the FCA barred *qui tam* actions “whenever the government has knowledge of the ‘essential information upon which the suit is predicated’ before the suit is filed, even when the plaintiff is the source of that knowledge.” *Id.* at 1103.

The *Marcus* case was largely responsible for the 1943 Amendments to the FCA; the *Dean* case was a key motivator for the 1986 Amendments. For a complete discussion of the history and policy behind the 1943 and 1986 Amendments, see John T. Boese, *Civil False Claims and Qui Tam Actions*, 3d ed. ch. 4.02.

(B) For purposes of this paragraph, “original source” means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4). Although not without its own ambiguities and interpretive challenges, Section 3730(e)(4) deprives courts of jurisdiction over claims that are based upon publicly disclosed allegations and transactions unless the relator is an “original source.”

Lower courts have long understood Section 3730(e)(4)’s public disclosure provision to be a “quick trigger” test that, if necessary, will lead to the more nuanced original source analysis to determine whether the particular *qui tam* relator in a given case is a true whistleblower. See *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1545 (10th Cir. 1996); *United States ex rel. Hagood v. Sonoma Co. Water Agency*, 81 F.3d 1465, 1476 n.18 (9th Cir. 1996); *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 568 n.10 (11th Cir. 1994) (per curiam). The “original source” analysis is designed “to bar parasitic suits through which a plaintiff seeks a reward even though he has contributed nothing significant to the exposure of fraud,” *United States ex rel. Devlin v. State of California*, 84 F.3d 358, 362 (9th Cir. 1996), and the original source provisions are structured “to encourage individuals who are either close observers or involved in the fraudulent activity to come forward” and to avoid “windfalls for people with secondhand knowledge,” *United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003). Taken together, this scheme is designed to obtain “the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own.” *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995) (internal quotation marks and citation omitted).

C. Analysis of the Proposed Amendment

S. 2041 entirely dismantles the balance to *qui tam* enforcement that Congress achieved with the 1986 Amendments — amendments that allowed true whistleblowers to proceed with their actions while at the same time allowing defendants the opportunity, early in the litigation, to fend off truly parasitic *qui tam* suits. This bill abandons that sensible approach and, instead, effectively returns the FCA to the infamous pre-1943 days of “parasitic exploitation of the public coffers,” where copying information from the Government’s own criminal indictment could serve as a basis for a successful *qui tam* suit. *Springfield Terminal Railway*, 14 F.3d at 649 (citing *Marcus v. Hess*, 317 U.S. 537 (1943)). This bill also discards over 20 years of developed case law, culminating in the Supreme Court’s recent decision in *Rockwell International Corp. v. United States*, 127 S. Ct. 1397 (U.S. 2007), that has brought the current public disclosure/original source provisions into sharper focus.

The proposed bill hits American companies and institutions with a triple whammy: (1) it neutralizes the meaning of “public disclosure,” (2) it strips defendants of their standing to challenge relators who fail to meet the jurisdictional bar, and (3) it eliminates the requirement that the relator be an original source and instead substitutes a new threshold (whether the relator provides any “essential element of liability”) that is so low almost any competent attorney could

draft a complaint to satisfy it. This wholesale abandonment of the public disclosure/original source provisions of the current FCA is unwarranted and will revolutionize *qui tam* enforcement, but not in a good way.

1. The definition of “public disclosure” is far too narrow

S. 2041 redefines the term “public disclosure” to mean “the public disclosure of allegations or transactions in a Federal criminal, civil, or administrative hearing, in a congressional, Federal administrative, or Government Accountability Office report, hearing, audit or investigation, or from the news media.” S. 2041, § 4(b). It goes further, though, to narrow the definition even more by limiting public disclosures to include “only disclosures made on the public record or that have otherwise been disseminated broadly to the general public.” *Id.*

Thus, under the proposed bill, public information does *not* include information from state and local proceedings, hearings, administrative reports, audits, or investigations, regardless of whether the Federal Government already has that information or has access to it. Moreover, by redefining “public disclosure” to mean only those disclosures made on the public record or disseminated broadly to the general public, opportunistic relators will be permitted to scavenge suits from otherwise public information that does not meet this new “public record” or “disseminated broadly to the general public” standard. Indeed, the very term “disseminated broadly to the general public” defies clear definition — does that mean it has to be in the *New York Times*, or will the *Scranton Times-Tribune* suffice?

The bottom line effect of this amendment will be to encourage more *qui tam* cases based on public information by relators who add nothing to the Government’s knowledge or fraud fighting efforts. This means that anyone in Juneau, Alaska, with Internet access, a PACER account, and enough patience to monitor pleadings filed in the U.S. District Court for the Southern District of Florida could cobble together a *qui tam* complaint from criminal indictments filed against any federal contractor in Miami, never mind whether the purported whistleblower has ever *witnessed* any fraudulent activity by the defendants, ever *met* the alleged perpetrators, or even *visited* Miami.

2. The elimination of the defendant’s ability to dismiss parasitic cases is unwarranted

S. 2041 also strips a defendant of its standing to challenge the jurisdiction of a *qui tam* relator who brings a case based on publicly available information. A defendant’s ability to make this kind of challenge, however, has been a mainstay of the False Claims Act since 1943. This jurisdictional defense has allowed defendants to bring to an early end those parasitic cases that should never have been brought in the first place. This bill, instead, provides that only the United States may challenge the status of a *qui tam* relator, thus providing defendants no defense or remedy whatsoever when they face *qui tam* suits based on public information where the Government has declined to intervene in the case. *See* S. 2041, § 4.

Under the proposed bill, a defendant would have no standing at all to challenge the jurisdiction of a *qui tam* relator who derived every aspect of every element of every claim against it from publicly available, broadly disseminated information found in the news media and openly

discussed in Federal hearings. Even the Government would lack the power to challenge a relator who had gathered his key information about the fraud from public sources rather than from his own substantive knowledge and who has built a case on information the Government already has.

Putting aside these more fundamental flaws in the bill, there still is no reason to deprive defendants of the ability to seek dismissal of parasitic *qui tam* suits. Stripping defendants of their standing to challenge the jurisdiction of relators who have filed frivolous claims effectively eliminates the jurisdictional bar altogether. The Government has consistently demonstrated that it lacks the resources and the willingness to challenge a relator's satisfaction of the jurisdictional bar and usually does so only on those few occasions when a dispute occurs concerning a relator's claim to a settlement. The Government, instead, has relied on the resources of defendants to challenge parasitic lawsuits.

By placing the burden solely on the DOJ, S. 2041 places yet another burden on the limited resources of the DOJ. The Government already must investigate every *qui tam* lawsuit to determine whether to intervene in the case (*see* 31 U.S.C. § 3730(b)). With this bill all but eliminating the requirement that *qui tam* relators be true whistleblowers, a dramatic proliferation in the filing of *qui tam* suits is sure to follow, and the DOJ will have to investigate each and every one of these suits. The DOJ does not have the resources, and likely will not have the inclination, to seek dismissal of even those cases that qualify for dismissal under the otherwise stringent public disclosure provisions of S. 2041.

3. The grounds for dismissal are too narrow

Moreover, even in the rare circumstance where the Government might seek dismissal of a parasitic *qui tam* action, S. 2041 erects such a high threshold for obtaining such a dismissal that there would be very few motions, if any, that could succeed. The bill allows dismissal of only those cases where "the allegations relating to *all essential* elements of liability" are based "*exclusively* on the public disclosure." S. 2041, § 4 (emphasis added). Meeting *that* burden will be, quite literally, impossible, especially at an early stage of the litigation. This hurdle, such as it is, could be overcome by a relator basing just part of any one of the allegations that comprise the elements of a False Claims Act violation — *including* a general allegation that the defendant acted with the requisite "knowledge" (either actual knowledge, deliberate ignorance, or reckless disregard), *see* 31 U.S.C. § 3729(b) — on anything other than the public disclosure. Rather than shifting the law to give relators the benefit of this low threshold, the focus should remain, as the law does now, on examining the relator's knowledge of the substance of the alleged fraud.

This "all essential elements" test is also misguided. More importantly, it is difficult to understand why a *qui tam* lawsuit should go forward simply because at least some of the relator's allegations were derived from one source that, for one reason or another, does not qualify as a "public disclosure," when those same allegations and transactions were described in detail in a GAO report (for example) published the year before. There is little reason for the Government to pay a bounty to a relator who was savvy enough not to base his entire *qui tam* complaint on the contents of the GAO report (either out of ignorance of the report or by design) when the purpose of paying that bounty in the first place is to encourage whistleblowers to inform the Government of fraud.

4. The “source” of the public information should be irrelevant

Finally, although Section 4 of S. 2041 appears to include a provision meant to be an analog to the current “original source” requirement, this provision only allows a court to *reduce* a *qui tam* relator’s bounty at the end of a case. Specifically, this provision allows a court to reduce the share of the proceeds for *qui tam* relators who derive their knowledge “primarily from specific information relating to the allegations or transactions” that the Government publicly disclosed or privately disclosed to the relators “in the course of its investigation.” S. 2041, § 4.

Two features of this provision render it almost a nullity. First, a court must find that the relator not only derived some of his knowledge from a public disclosure — the court must find that the relator derived his knowledge “*primarily* from *specific* information relating to the allegations or transactions” in the public disclosure. (Emphasis added.) These limitations all but ensure that the only relators who will get caught by this provision are those who literally cut and paste their complaints from public disclosures obtained from the Government. Second, for the very few relators who may qualify for a reduction under this new provision, the reality is that even 5% or 10% of a multi-million dollar judgment is better than nothing. The low risk that a court, at the end of the case, *might* reduce a parasitic *qui tam* relator’s share is simply too remote and, in any event, too insignificant to discourage such relators. And, perhaps more importantly, this provision would do absolutely nothing to discourage the attorneys of parasitic *qui tam* relators — S. 2041 does nothing to change the current provision in 31 U.S.C. § 3730(d)(4) that awards attorneys’ fees and costs to successful *qui tam* relators.

5. The Amendment further erodes the constitutionality of *qui tam* enforcement

The Chamber has taken the consistent position that *qui tam* enforcement of the False Claims Act is unconstitutional under Article II of the U.S. Constitution, as it violates the Separation of Powers doctrine. *See Morrison v. Olson*, 487 U.S. 654 (1988) (the “degree of control exercised by the executive branch over a suit on behalf of the United States is determinative of the separation of powers issue”). We submit that, through the *qui tam* enforcement provisions, Congress has improperly delegated prosecutorial functions to private persons, whereas the Constitution vests the power to execute the laws exclusively in the executive branch. U.S. Const. art. II, § 3. *Qui tam* enforcement also violates the Due Process Clause because the provisions authorize representation of the United States by parties whose financial interests in the cases they prosecute unavoidably conflict with the duty of a government representative to seek a just and fair result. *Cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811-13 (1987) (holding that counsel for a party that is the beneficiary of a court order may not be appointed as a prosecutor in a contempt action alleging a violation of that order). The provisions of S. 2041 that eliminate the original source/public disclosure requirements only heighten the constitutional concerns that courts will consider in the future.

* * *

The False Claims Act has had a jurisdictional public disclosure bar since 1943. By redefining what constitutes a “public disclosure” and by eliminating altogether the “original source” provisions of the current law, S. 2041 renders this jurisdictional bar a dead letter. Rather

than rewarding *qui tam* relators who come forward with knowledge about fraud on the Federal Treasury, S. 2041 opens the door to a wave of parasitic lawsuits by the relators' bar while at the same time slamming shut the one procedure by which such suits can be exposed. Section 4 of S. 2041 should not be adopted.

IV. THE COMMITTEE SHOULD REJECT THE AMENDMENT ENCOURAGING FEDERAL EMPLOYEES TO ABUSE THEIR GOVERNMENT POSITIONS BY FILING *QUI TAM* SUITS

A. Summary

The Senate should not, under any circumstances, pass Section 3 of S. 2041, which allows former and current Government employees to enrich themselves by filing *qui tam* cases based on information gained as Government employees. This is bad public policy. Such suits destroy any respect and deference given to Government employees who interact with the American public and who demand and receive the most confidential and sensitive information on individual citizens, companies, and institutions. Allowing Government employees to misappropriate that information to enrich themselves is the best way to degrade and undermine Government functions.

Courts have long recognized, and the DOJ consistently agrees, that this is bad public policy. The proposal to "clarify" existing law by explicitly allowing Government employees to act as relators is an open invitation to suits by Government accountants, auditors, investigators, attorneys, and technical staff, creating clear conflicts of interest, perpetuating perverse incentives, undermining the credibility of Federal employees, and advancing the personal financial interest of Government employees and their lawyers — all at the public's expense. The proposed "safeguards" set forth in S. 2014 to avoid abuse are unworkable and restrictive, to the point that any protections they offer are illusory. The American public will understand only one thing: They are being sued by a Government employee using Government information for personal gain. That is toxic.

Instead of barring *qui tam* suits by Government employees, this bill for the first time explicitly allows such suits. The proposed legislation strips defendants of their standing to challenge suits by Government employee relators, instead granting this right only to the Government and then making it practically impossible for the Government to prevail on such a motion.

Under this flawed scheme, the Government would only have 60 days to move to dismiss a Government employee relator, even where the relator's action is derived from an "open and active fraud investigation by the Government" and then only if "*all* the necessary and material allegations" were derived from that investigation. S. 2041, § 3 (emphasis added). The other ground for the DOJ to seek dismissal is if the relator failed to first notify his agency's Inspector General, the Attorney General, and his supervisor before filing. Based on these requirements, only the most egregious cases of interference with a Government investigation — where the *qui tam* allegations were derived directly from an active Government investigation that had elicited a high degree of specific information — would subject a *qui tam* suit to dismissal. Under the great number of other circumstances, the Government lacks the ability to challenge a

Government employee's attempt to use Government information gained on the job to enrich herself and destroy the Government's relationship with the American people.

The "protections" in the proposed amendment are woefully inadequate to avoid the harm that will come by allowing Government employees to use Government information to enrich themselves. Instead of protecting those who are regulated by the Government and expect Government employees to act in good faith, the amendment practically encourages auditors, investigators, and regulators to file such suits.

B. Current Law

1. Pre-1986 law

Prior to the 1986 Amendments, Government employees could not file *qui tam* suits because of a jurisdictional prohibition in the law. In 1943, in response to the filing of parasitic *qui tam* actions based upon publicly disclosed indictments and hearings, Congress amended the False Claims Act to prohibit suits based upon information already possessed by the Government. See, e.g., *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 671 (9th Cir. 1978). This 1943 amendment effectively barred Government employees from filing *qui tam* actions by prohibiting actions "based upon evidence or information in the possession of the United States, or any agency, officer, or employee thereof, at the time such suit was brought." 31 U.S.C. § 232(C) (1976).

Recognizing that this provision unduly restricted *qui tam* enforcement by true whistleblowers, Congress eliminated this provision in 1986 and replaced it with the "public disclosure/original source" limitation found in the current law, 31 U.S.C. § 3730(e)(4). The legislative history to the 1986 Amendments contains no indication that Congress intended — for the first time — to allow Government employees to bring *qui tam* cases, for their own financial benefit, based on information learned on the job. In fact Congress never intended to allow Government employees to bring *qui tam* actions by abusing their positions.

2. The law after the 1986 Amendments

While there was no indication in 1986 that Congress intended to change prior law with regard to *qui tam* suits by Government employees, the result of the change in statutory language had an unintended result. Despite vigorous and consistent opposition by the Government since 1986, most courts have reluctantly allowed *qui tam* suits by Government employees to proceed. Although many judges have severely criticized this result (see below), most courts have held that the current language of Section 3730(e)(4) left them no choice. For this reason, challenges to Government *qui tam* relators then shifted to other defenses. Importantly, current law gives both defendants and the Government latitude to challenge the right of Government employees to bring *qui tam* cases.

Where a *qui tam* action is based upon publicly disclosed allegations, the relator must be an "original source" of that information. 31 U.S.C. § 3730(e)(4); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 741 (9th Cir. 1995). To qualify as an "original source," the relator must *voluntarily* provide the information forming the basis of the claim to the Government prior to filing the suit. *Chevron*, 72 F.3d at 741. Where a Government employee

provides the information underlying his claims as part of his job responsibilities, courts have held that such a disclosure is not made “voluntarily” within the meaning of the False Claims Act and the relator therefore is not an original source. *Id.*

The Ninth Circuit in *Chevron* premised its decision on this logic. There, the putative relator was an auditor within the Office of Inspector General of the Department of Energy. *Id.* His job required him to supervise audits that other employees had conducted and to edit audit reports that others had written; as many as 97% of the audit reports from the Western Region Audit Office came from employees under his supervision. *Id.* As the court wrote, “he was a salaried Government employee, compelled to disclose fraud by the very terms of his employment. He no more voluntarily provided information to the Government than we, as Federal judges, voluntarily hear arguments and draft dispositions.” *Id.* at 743-44.

In finding that a Government employee was ineligible to act as a relator, the First Circuit, in *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990), based its decision on different reasoning, but reached the same result. There, the court said that the Government employee’s knowledge could not qualify as “independent” since his employment was conditioned on the duty to uncover fraud, rendering the “fruits of his effort” the property of his employer.

Existing law, however, by no means provides an absolute jurisdictional bar to Government employees acting as relators under many circumstances. The rationale for the dismissal of the Government employee relators in the cases referenced above only occurred because the allegations had been “publicly disclosed.” Without such disclosure, the case proceeds. In *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991), for example, an Air Force attorney discovered suspected bid rigging on Federal contracts in Japan. He reported the allegations to his superiors and then filed a *qui tam* suit. Because the allegations had not been made public and the Air Force attorney/relator complied with the procedural requirements of the FCA, the Eleventh Circuit ruled that he was a proper *qui tam* plaintiff. Mr. Williams therefore became eligible for as much as \$30 million, or 30% of the settlement.

As the *Williams* case demonstrates, courts have reluctantly allowed some Government employees to bring *qui tam* cases under very limited circumstances despite DOJ’s efforts. Even these limited circumstances, however, have been criticized by judges and commentators as improper.

C. Analysis of the Proposed Amendment

1. Sound public policy requires rejection of this Amendment

No matter how they arrive at their conclusion, courts generally tend toward the same result: Government employees should not be permitted to receive a financial windfall for merely doing their jobs. See *United States ex rel. Biddle v. Board of Trustees of Leland Stanford, Jr. Univ.*, 147 F.3d 821, 829 (9th Cir. 1998). According to one editorial discussion of certain Government employee suits, “the conflict of interest here is as clear as it would be if judges were empowered to set fines and keep a percentage of everything they collect.” *Qui Tam Scam*, WASH. POST, Dec. 26, 1991, at A22.

Citing a brief by the Government, the *Chevron* court offered a persuasive and comprehensive statement on the relator status of Government employees, and the perverse incentives that unfettered relator status creates:

To spend work time looking for personally remunerative cases . . . rather than doing their assigned work; to conceal information about fraud from superiors and government prosecutors so that they can capitalize on it for personal gain; to race the government to the courthouse to file ongoing audit and investigatory matters as *qui tam* actions before those cases have been sufficiently developed by the government to justify a lawsuit, this prematurely tipping off the target, undermining the likely effectiveness of the case, and diverting unnecessarily up to 30% of the government's recovery to the government employee; and to use the substantial powers of the federal government conferred upon public investigators . . . to advance their personal financial interests Public confidence in the integrity and impartiality of Government audits and investigations will necessarily decrease.

Chevron, 72 F.3d at 745, citing Amicus Brief of the United States in Support of Defendants-Appellees' Petitions for Rehearing and Suggestions for Rehearing En Banc at 8-9 (footnotes omitted).

The concurring opinion of Judge Trott in the *Chevron* case acknowledged this policy consideration and argued that Government employees should therefore be prohibited from bringing a *qui tam* suit. The judge's examples are devastating:

Permitting auditors to sue literally would destroy the government's anti-fraud and anti-waste programs. The "perverse incentives" outlined by the government and adopted by the majority exceed worrisome. Imagine, for example, an employee of the IRS bringing a *qui tam* lawsuit against a company that the employee had just audited on behalf of the government. Shades of the days leading up to the French Revolution of 1789 when taxes were collected by a private concern called the "Ferme Generale," or "Tax Farm." The first to be guillotined in the Place de la Revolution during the incarnadine Reign of Terror were the hated private tax collectors who made a profit by collecting more from the public than the amount needed by the government. One day, *Inspector* Fine uses the awesome power of the federal government to investigate you; the next, *Mr.* Fine uses the information he pries loose from you with that power to augment his bank account. Can anyone say when Inspector Fine wields the coercive tools of the government that he is also not working for himself? Dr. Jekyll one day, Mr. Hyde the next. Such an abuse could only cause the public to distrust government officials even more than the public already does.

Chevron, 72 F.3d at 747-48.

Other Federal law prohibits parties from making, and certain Government employees from receiving, payments that compensate those employees for their Government service. 18

U.S.C. § 209(a). Another provision prescribes criminal and civil penalties for violation of that provision. 18 U.S.C. § 216.

2. The POGO case

A recently-tried case demonstrates the evils of allowing Government employees to profit from *qui tam* cases. That case, *United States v. Project on Government Oversight*, underscores the potential for abuse when they do so. In that case, a senior economist with the Department of the Interior, Robert Berman, was given a \$383,600 “public service award” from the Project on Government Oversight (“POGO”) after POGO was one of several *qui tam* plaintiffs to secure a *qui tam* settlement stemming from the oil industry’s alleged underpayment of royalties to the Government. In fact, that “award” was really a payment to Mr. Berman pursuant to an agreement with POGO to pay him 10% of whatever POGO recovered in its *qui tam* suits. In pursuit of its case, POGO published four investigative reports that contained citations to memoranda written by Mr. Berman. Moreover, around the time that POGO was making its efforts to initiate an action against the oil companies in question, Mr. Berman was himself allegedly participating in proposed rulemaking governing valuation for oil royalties. The United States maintained that, while he was employed at the Department of the Interior, Mr. Berman drafted a memorandum to the director of the agency responsible for managing oil royalties that contained suggestions intended to “ensure that the pending *qui tam* litigation would not be jeopardized.”

After the scheme became public, the Government filed suit against both POGO and Mr. Berman, claiming the “public service award” violated 18 U.S.C. § 209(a). On February 11, 2008, the jury found both Mr. Berman and POGO guilty of violating that law. See generally *United States v. Project on Government Oversight*, Civil Action No. 03-0096 (JDB), Memorandum Opinion 12/3/07 and Verdict Form 2/1/08.

Cases like *Project on Government Oversight* make clear the potential for self-enrichment that the provisions of S. 2041 offer to Government employees. Government employees are in the unique position of interpreting the very rules and regulations that are the basis for allegations that companies violate the False Claims Act. Their interpretation must be above reproach and unaffected by personal conflicts. If Congress is to amend the rules on Government employee relators in any way, it should amend existing law to ensure that Government employees are not presented with conflicts of interest which threaten not only their own integrity but also the integrity of the programs, investigations, and audits with which the public has entrusted them. As currently written, S. 2041 would strip defendants of their standing to challenge relators’ jurisdiction to file suit and leave the Government virtually powerless to dismiss many suits by Government employee relators. Such an amendment stands to undermine the very policies that form the foundation of the False Claims Act.

3. The “exceptions” in S. 2014 would allow more Government employees to file *qui tam* cases

Under S. 2041, the DOJ can dismiss a Government employee’s *qui tam* case if it is based on an “open and active fraud investigation,” but only under the following conditions: (1) the DOJ motion must be filed no more than 60 days after the relator files the case under seal and

serves the Government and (2) all necessary and specific material allegations must derive from that open and active investigation. There is no rational basis for these restrictions.

If there is an existing “open and active fraud investigation,” why should the Government reward any *qui tam* relator for filing such a suit, much less one who learned of the allegations as a Government employee? Why is DOJ only given 60 days to move to have the relator dismissed? The DOJ may not even be aware of a grand jury or Inspector General investigation within that time period. Why must “all necessary and specific material allegations” derive from that investigation? These restrictions encourage Government auditors and investigators to misappropriate information they receive on the job and file *qui tam* cases to enrich themselves.

S. 2041 also allows a Government employee to bring a *qui tam* case if he or she notifies his or her agency’s Inspector General (or the Attorney General) and if, after 12 months, the DOJ has not filed an FCA suit. This allows a Government auditor, investigator, or regulator to bring a *qui tam* action even if the agency and DOJ determine there was no fraud.

One cannot imagine a more outrageous situation: The Federal regulatory agency and the chief enforcement agency conclude that no fraud exists, yet a Government employee, using Government information, can sue a regulated entity and attempt to force a settlement to enrich himself.

* * *

Allowing *qui tam* suits by Government employees will destroy whatever trust and confidence exists between the American people and the Government employees who regulate them. If Congress is to amend the False Claims Act, it should amend it to prohibit — without exception — all *qui tam* suits by Government employees based on information gained as a Government employee.

V. THE COMMITTEE SHOULD REJECT THE AMENDMENT CREATING AN ADMINISTRATIVE NIGHTMARE FOR AMERICAN BUSINESSES AND FEDERAL GRANTEES BY EXTENDING THE STATUTE OF LIMITATIONS AND THE TOLLING PROVISIONS

A. Summary

Two provisions of Section 6 of S. 2041 dramatically lengthen the time period for filing *qui tam* cases. By extending the statute of limitations to 10 years in all cases, regardless of actual Government knowledge of the alleged fraud, S. 2041 allows the Government or a *qui tam* relator to bring a lawsuit long after the documents and witnesses essential to the case have disappeared.

This same proposed amendment also provides that this lengthy limitations period does not even begin to run in a *qui tam* case until that case is unsealed. Today, cases often are not unsealed for at least 2 years after filing, and many are not unsealed for over 5 years, since there are no legal limits on how long a *qui tam* case can remain under seal. Nor is there any requirement in existing law that the Government give notice to a defendant of the pendency of a sealed *qui tam* case.

If amended as proposed, the False Claims Act will have one of the longest statutes of limitations in all Federal law. It will require any individuals, institutions, or companies that receive money from, or pay money to, the Federal Government to retain records and files almost forever. Witnesses who can explain the circumstances of a business relationship, contract term, or claim process will inevitably retire, disappear, or die in the decade or more that transpires between the relevant events and the subsequent litigation. Even when witnesses remain available, memories — especially regarding the kinds of details that can make or break an FCA case — grow increasingly unreliable with each passing year. Access to critical documents in the files of third parties or Government agencies will be unavailable. This will create an administrative nightmare for anyone dealing with the Government and make it extraordinarily difficult to mount a defense to such stale claims.

B. Current Law

The False Claims Act currently requires that that the Government bring an action within 6 years of submission of the alleged false claim, or within three years of the date that the Government learns, or should have learned, that a fraud has been, or might have been, committed. There is also a 10-year cutoff date for all actions, *see* 31 U.S.C. § 3731(b), but this 10-year period applies only when the Government is not aware of the alleged fraud. Where the Government *is* aware of the fraud, however, the limitations period is 6 years. The 10-year repose provision was meant as an ultimate cutoff date to protect defendants from precisely the scenario threatened today — litigation of stale issues from the distant past. The limitations period prescribed under current law forces the Government to act expeditiously when it learns of an alleged fraud so that defendants are aware of the allegations and can retain records, witnesses, and other sources of evidence relevant to the fraud. The proposed legislation turns this system on its head.

Outside the context of False Claims Act cases, civil complaints are not filed under seal and must be served within 120 days of filing, giving a defendant almost immediate notice of the allegations. Fed. R. Civ. P. 4. This is significant because Federal Rule of Civil Procedure 15(c)(2) normally allows an amendment to a pleading to relate back to the date of the original pleading when the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading. Recent appellate decisions have generally held that the statute of limitations will run despite the fact that a case is under seal; the fact that a case is under seal will not toll the running of the statute.

For example, the Second Circuit recently held that the secrecy of the allegations in *qui tam* complaints filed under seal conflicts with principles of fundamental fairness and common sense. *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263 (2d Cir. 2006). Rule 15(c) assumes that a defendant has notice of the allegations once a case has been filed. The *Baylor* court held that a rule that would allow additional allegations to relate back to the date of a *sealed* complaint lacks the necessary notice to defendants of the claims filed against them on the date that the original pleading was filed. The *Baylor* decision rested on the principle of fundamental fairness — that a defendant should not have to defend allegations over 10 years old unless the defendant had been formally notified of those allegations.

The proposed legislation threatens to unravel the balance achieved by the current system, which values notice to defendants and litigation of claims before evidence disappears.

C. Analysis of the Proposed Amendment

The proposed 10-year limitations period is unfair, unworkable, and unprecedented. The proposed amendments in S. 2041 extend the statute of limitations to 10 years in all cases, regardless of Government knowledge of alleged fraud, and overrule the *Baylor* decision by allowing the period a *qui tam* case is under seal to stop the running of the limitations period. See S. 2041, § 6.

1. The limitations period unfairly burdens defendants

The 10-year statute of limitations period, coupled with the provision that the statute of limitations is tolled while the case is under seal, would require all organizations that receive money from, or pay money to, the Federal Government — no matter how small, no matter how unsophisticated — to defend themselves for actions that occurred 12, 15 or even 20 years ago, depending on how long a *qui tam* case remains under seal. The amendments would require small businesses, churches, and other similar organizations to keep records for staggering lengths of time. More importantly, witnesses critical to both the interpretation of contracts and regulations, as well as to demonstrating good faith, could be deceased or otherwise unavailable.

The proposed limitations period also poses the risk of subjecting defendants to unfair, seemingly unending delay on the part of the Government. *United States ex rel. Health Outcomes Techs. v. Hallmark Health Sys., Inc.*, 409 F. Supp. 2d 43 (D. Mass. 2006), illustrates the problem. There, the court applied Federal Rule of Civil Procedure 15(c)(2) to new allegations that the Government attempted to add as amendments to the original complaint. The court found that the Government's long delay conflicted with the spirit of the False Claims Act. The court wrote, "[a]fter Health Outcomes brought its complaint in 1996, the Government strategically chose not to intervene in the action but rather to stand to one side and pick off defendants *seriatim*. The Government's investigation dragged on incessantly, and with respect to these particular hospital-defendants seven years, until it chose officially to intervene." *Id.* at 50.

In addition to the threat of Government delay, the legislation will provide relators with an opportunity to further delay *qui tam* suits to increase recoveries and force ever higher settlements. Instead of encouraging the Government and *qui tam* relators to bring their cases as quickly as possible, these amendments will encourage more delay because every day brings higher damages and more penalties.

The proposed legislation will subvert existing law on tolling, which is designed to ensure that defendants have notice of the claims against them and can retain documents and other evidence to prepare for litigation.

2. The limitations period is unworkable for the Government

In FCA cases, Government documents, as well as the documents of third parties, are almost always critical. Agency documents are particularly critical, since the agency's interpretation of a regulation or contract or grant term is essential to determining whether a

particular claim or statement is “false” and to calculating the amount of damages suffered by the Government. By extending the time limitations period to 10, 12 or 15 years, those documents will inevitably become unavailable or irretrievable.

Issues of stale proof will inevitably arise beyond just the context of document retention. The Government and defendants alike will be faced with the unworkable prospect of finding witnesses who are knowledgeable about events that took place years — potentially decades — in the past. Witnesses forget. Witnesses move. Witnesses change their names. Witnesses die. The Government cannot build a case, and parties cannot defend themselves, where witnesses are expected to provide information from the distant past.

3. The limitations period is unprecedented

The proposed limitations period is a complete aberration. A look to other Federal laws with significant damages and civil enforcement mechanisms like those of the False Claims Act is illustrative. Both the Racketeer Influenced and Corrupt Organizations (“RICO”) statute, 18 U.S.C. § 1961, and the Clayton Antitrust Act, 15 U.S.C. § 15, like the False Claims Act, contain a private right of action and provide for the recovery of treble damages, costs, and attorneys’ fees.

All civil claims under RICO are subject to a 4-year statute of limitations. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987). The Supreme Court based its decision in *Agency Holding Corp.* on the statute of limitations period found in the civil enforcement provision of the Clayton Antitrust Act, which is also 4 years. *Id.* at 150-56.

* * *

The limitations provisions of S. 2041 are drastically out of line with analogous law and are so unreasonably long that they offer few of the protections normally inherent in a statute of limitations.

VI. EXPANSION OF THE WHISTLEBLOWER RETALIATION DEFINITION PROVISION IS UNNECESSARY

A. Summary

Currently, Section 3730(h) of the FCA provides relief from retaliation by employers against employees who take lawful steps in furtherance of a *qui tam* suit. Section 3730(h) protects employees who have engaged in such protected conduct, but it also protects employers from unfounded claims of retaliation that are not based on protected conduct. S. 2041 invites unfounded claims, however, by eliminating the test for retaliation that requires the employee to take steps in furtherance of FCA allegations that notify the employer about the allegations. S. 2041 substitutes another test that is poorly drafted and ambiguous, under which no clear steps toward initiating FCA claims are apparently required. It also enlarges the pool of individuals who will bring these suits to include those that are not employees and includes protection for undefined actions that are unrelated to FCA claims.

The new standards in the bill are poorly drafted, ambiguous, and overbroad. They remove necessary protections provided under the current law and will open the door to suits that are based on conduct that is unrelated to FCA actions without helping true whistleblowers or the Government.

B. Current Law

Under Section 3730(h), an employee is protected from an employer's retaliation for protected conduct that is defined as:

lawful acts . . . in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section

In order to recover under Section 3730(h), employees must show that the following elements are met:

1. that the employee engaged in conduct protected under the statute,
2. that the employer was aware of the protected conduct, and
3. that the employer discriminated against the employee because of her protected conduct.

In applying the FCA's whistleblower protection, courts have looked to the common law and similar statutes for definitions of employer-employee relationships to define the parameters of the protection, but they differ on the correct test that triggers its application. *See, e.g., Neal v. Honeywell*, 33 F.3d 860, 865 (7th Cir. 1994) (whether litigation is a distinct possibility); *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996) (if employee's job is to report wrongdoing to supervisors, such reports, without more, would not necessarily meet "in furtherance" test); *Wilkins v. St. Louis Housing Auth.*, 314 F.3d 927, 933 (8th Cir. 2002) (whether reasonable employee would have believed that employer was committing fraud against the Government). No bright line test, such as a requirement that a *qui tam* complaint was filed or that the Government was alerted to the fraud, has developed. Instead, the caselaw in this area establishes the following basic parameters: Where serious allegations of fraud are made by an employee whose job responsibility does not involve investigating fraud in the company, courts are likely to find protected activity, but where the employee's complaints are such that it is the employee's job to disclose such fraud, courts are less likely to find simple complaints protected activity without a distinct possibility of a *qui tam* suit.

C. Analysis of the Proposed Amendment

Section 5 of S.2041 enlarges the pool of individuals entitled to relief from "any employee" to "any employee, Government contractor, or agent" and removes from the definition of retaliatory acts the requirement that limits them to acts "by . . . [the] employer." It also defines protected acts as those taken in furtherance of "other efforts to stop 1 or more violations of this subchapter" and includes within protected acts those that are taken by a protected individual on behalf of "associated others."

Most employment-related discrimination occurs within the relationship of an employment contract and thus is covered by the current law. Protected conduct that occurs outside of the employment relationship should, if it is important enough to protect, at least be clearly defined. S. 2041 enlarges the members of the protected group to include contractors and agents without carefully defining the group receiving protection or the protected acts, and it removes the requirement that limits retaliatory acts to those taken by employers. The bill's removal of the phrase "by his or her employer" that limits liability to employers is a deceptively simple change and masks the exponential expansion of liability it would allow, including any and all persons that interact with the plaintiff in the workplace, whether in their individual capacities or in their capacities as employers. Without that limit, extending liability to anyone in any of these contexts yields absurd results and claims that have no place in a whistleblower protection statute.

In addition, protecting acts on behalf of "associated others" is entirely open-ended and so vague that it could include acts on behalf of a business acquaintance or a neighbor or acts undertaken at the direction of a *qui tam* attorney. Such conduct does not properly fall within the purposes of a retaliation provision and the False Claims Act and should not be a basis for recoveries under it.

Under the current law, courts generally limit relief under Section 3730(h) to employees who have engaged in conduct that sends a clear signal of serious allegations about fraud against the Government to their employers so that the employer understands that the employee's actions are in furtherance of a whistleblower claim. If the employee's job responsibilities include alerting the employer to fraud within the company, the employee usually must do more than point out the fraud to the employer to produce this understanding. Mere "saber-rattling" is unprotected because it does not provide this notice to the employer. *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 193 (3d Cir. 2001); *Yesudian v. Howard Univ.*, 153 F.3d 731, 740 (D.C. Cir. 1998); *Zahodnick v. Int'l Bus. Machs. Corp.*, 135 F.3d 911 (4th Cir. 1997). The importance of establishing a clear standard that incorporates notice to employers was enunciated in *United States ex rel. Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730 (7th Cir. 1999). The court in *Luckey* affirmed the lower court's grant of summary judgment on behalf of defendant, holding that defendant's decision to terminate the relator's employment was permissible because the relator's actions could not be understood as acts in furtherance of a whistleblower claim. The court explained that:

[I]ntra-corporate debates about optimal testing protocols cannot be equated to knowledge of litigation An employer is entitled to treat a suggestion for improvement as what it purports to be rather than as a precursor to litigation [E]mployees who use reports of fraud to better their own position, or who behave like Chicken Little, impose costs on employers without advancing any of the goals of the False Claims Act. Saber-rattling is not protected conduct. Only investigation, testimony, and litigation are protected.

Id. at 733 (quotations and citations omitted).

The bill's ambiguous reference to "other efforts" to stop violations puts the basis for retaliation claims on unsteady ground. It removes the guidance provided under the long history

of the current law and opens this provision to use in disputes without requiring a clear relationship to FCA allegations. Specifically, the bill's substitution of acts "in furtherance of other efforts to stop" a violation for the current requirement of acts that are "in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section" removes the key language in Section 3730(h) that ties the protected acts to FCA claims.

At bottom, the ambiguities in this new provision and the potential overbreadth associated with it would allow extension of whistleblower protections to cases where no false claims allegations are involved and where no retaliation by an employer is required. The provision would extend the benefits intended for whistleblowers to others who do not act on the Government's behalf and would subject non-employers to liability for normal interactions in the workplace. The current retaliation provision should remain limited to protect those who truly engage in acts in furtherance of false claims allegations, rather than make other complaints, and the protections for employers and other individuals from unfounded retaliation suits should remain.

VII. THE CHANGES TO THE CIVIL INVESTIGATIVE DEMAND PROCESS ARE UNNECESSARY AND WOULD ENCOURAGE ABUSE BY RELATORS

A. Summary

The Civil Investigative Demand ("CID") is a tool which authorizes the Attorney General to request information (by way of documents, sworn depositions, interrogatories, and other forms of discovery) as part of the Government's investigation of false claims. The bill would permit the Government to share the information obtained through a CID with any *qui tam* relator if, in the Attorney General's judgment or that of a designee, it is "necessary as part of any false claims act investigation." See S. 2041, § 7. It would also allow the Attorney General to share the authority to issue CIDs with a "designee," without defining who that person or persons would be.

Government investigators already have adequate tools to obtain documents under the subpoena power of the Inspectors General and can allow a relator, or any other witness, to review those documents as part of the investigation. The only purpose for this amendment must be to allow non-documentary evidence — particularly depositions — taken under a CID to be shown to a relator's counsel. Its effect, however, is to allow relators expansive discovery prior to unsealing, without regard to the merits of their allegations, whether or not they would meet the stringent pleading requirements of Rule 9(b) without such discovery, even when the Government ultimately decides not to bring the case. These changes give private parties sensitive information on an *ex parte* basis without helping the Government or true whistleblowers.

B. Current Law

Under 31 U.S.C. § 3733(a)(1), the Attorney General may issue a CID when he or she has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation. Before the commencement of an FCA proceeding, the Attorney General may require the person to produce documentary evidence, answer interrogatories, give oral testimony, or furnish a combination of such evidence.

The Attorney General may not delegate the authority to issue a CID to anyone else, and the information received in response to the CID is allowed to be disclosed to no one other than Government agencies or Congress.

C. Analysis of the Proposed Amendment

Section 7 of S. 2041 allows “the Attorney General, or a designee (for purposes of this section)” to issue a CID, authorizing him or her to share the authority to issue CIDs without defining who the designee would be. In addition, the bill provides that:

[a]ny information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any *qui tam* relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation.

Thus, the bill allows the information received in response to a CID to be shared with “any *qui tam* relator” if the Attorney General or designee believes it is “necessary for any false claims act investigation.”

The bill represents a complete about-face from existing law, and it threatens to expand abusive *qui tam* suits by allowing relators who are not true whistleblowers. The purpose of CID authority is to allow the Government to get the information it needs in order to determine whether there is sufficient evidence to file an FCA suit. That is the reason that the exercise of this authority is limited to the period prior to the commencement of an FCA proceeding under Section 3730. See H.R. Rep. No. 99-660, at. 26 (1986) (citing to similar CID provisions in Hart-Scott-Rodino Anti-Trust Improvements Act of 1976, 15 U.S.C. §§ 1311-1314). In fact, courts have noted that “using the CIDs for a purpose other than to determine if there is sufficient evidence to file” a suit would be improper. *United States v. Witmer*, 835 F. Supp. 208, 219 (M.D. Pa. 1993). See also *United States v. Seitz*, No. MS2-93-063, 1993 WL 501817 (S.D. Ohio Aug. 26, 1993). The purposes of relators are not so limited, however, because they are potential litigants in FCA actions, whether the Government decides to proceed with the suit or not. That difference is a major reason why information gathered by the Government on an *ex parte* basis through CIDs in advance of intervention should not be shared with them and why, instead, relators should gather their information according to the discovery provisions of the Federal Rules.

Despite the critical difference between the Government’s purpose and the purposes of relators and their counsel in accessing CID information, the bill makes the information easily accessible to relators when a “designee” determines that it is necessary as part of any FCA investigation. It gives relators expanded access to information that they should already have, since true whistleblowers should have enough information to make *qui tam* allegations without the help of discovery or publicly disclosed information. See, e.g., *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 231 (1st Cir. 2004); *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 566 (6th Cir. 2003); *United States ex rel. Clausen v. Lab Corp. of Am., Inc.*, 290 F.3d 1301, 1313 n.24 (11th Cir. 2002).

Moreover, easy access to the information submitted to the Government by CID recipients can be abused by relators who are also business competitors, disgruntled employees, or others for purposes other than helping to uncover fraud against the Government. *See, e.g., United States ex rel. Taylor v. Gabelli*, Civ. No. 03 8762(PAC), 2005 WL 2978921 (S.D.N.Y. Nov. 4, 2005) (*qui tam* suit by competitor relator); *Clausen*, 290 F.3d 1301 (*qui tam* suit by competitor relator). Providing this information to these relators prior to unsealing assists them in cases that the Government declines. These changes are unwarranted, and do not help, true whistleblowers.

This provision is entirely unnecessary. Under current law, the Government is fully empowered to issue a CID in order to gain information that will be useful in its fraud investigations. A *qui tam* relator, on the other hand, is supposed to be a whistleblower who brings new information and new allegations of fraud to the Government and is richly rewarded for that information. Existing law already provides that documents obtained in compliance with an Inspector General subpoena can be shared with relators if it is part of the investigation. *See* Inspector General Act of 1978, 5 U.S.C. app. 3 § 6(a)(4) (2000) (authorizing Inspectors General to serve subpoenas for documentary evidence). Whatever the propriety of that sharing, no court has prohibited it. The only information not obtainable through an IG subpoena that can be obtained through a CID is oral testimony. The bill would allow relators' attorneys to gain access to this information when true whistleblowers do not need it. This does not advance the goal of ferreting out fraud perpetrated against the Treasury. Allowing the Government to share the information gleaned from depositions stands only to strengthen the hand of those who bring cases that the Government declines.

CONCLUSION

I want to urge the Committee to recognize the potential abuse that these amendments will impose not only on large and small American businesses but also on all other institutions that receive Federal funds — the churches, local Government entities, schools and colleges, and other contractors and grantees. When these companies and institutions deal with the Government, they are properly expected to do so honestly and forthrightly. But the Government also promises that it will deal with them fairly. These amendments, if passed, would break that promise.

FRAUD STATISTICS - OVERVIEW October 1, 1986 - September 30, 2007 Civil Division, U.S. Department of Justice												
FY	NEW MATTERS ¹				SETTLEMENTS AND JUDGMENTS ²					RELATOR SHARE AWARDS ³		
	NON QUI TAM	QUI TAM	NON QUI TAM ⁴		QUIT TAM			TOTAL QUITAM AND NON QUITAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL	
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL						
1987	340	31	86,479,949	0	0	0	0	86,479,949	0	0	0	
1988	210	43	173,287,663	2,309,344	33,750	2,343,104	175,630,767	88,750	8,437	97,187		
1989	221	88	197,202,180	15,111,719	1,681	15,113,400	212,315,580	1,446,770	200	1,446,970		
1990	240	75	189,564,367	40,483,367	75,000	40,558,367	230,122,734	6,590,936	20,670	6,611,606		
1991	234	84	270,445,467	70,384,431	154,500	70,538,931	340,984,398	10,667,537	18,750	10,686,287		
1992	285	113	137,358,206	134,549,447	994,456	135,543,903	272,902,109	24,196,648	259,784	24,456,432		
1993	304	138	181,945,576	183,643,787	6,078,000	189,721,787	371,667,363	27,576,235	1,766,902	29,343,137		
1994	279	219	706,022,897	379,018,205	2,822,323	381,840,528	1,087,863,425	69,453,350	838,896	70,292,246		
1995	232	269	269,989,642	239,024,292	1,635,000	240,659,292	510,648,934	45,162,296	465,800	45,628,096		
1996	186	344	247,357,271	124,361,203	13,390,011	137,751,214	385,108,485	22,119,619	3,731,978	25,851,597		
1997	187	546	465,568,061	621,919,274	6,021,200	627,940,474	1,093,508,535	63,857,419	1,658,485	67,515,904		
1998	118	467	151,435,793	438,834,846	30,248,075	469,082,921	630,518,714	70,264,372	8,486,645	78,751,017		
1999	140	493	195,390,485	492,924,785	5,067,503	497,992,288	693,382,773	63,018,064	1,374,487	64,392,551		
2000	95	363	367,887,197	1,208,715,188	1,688,957	1,210,404,145	1,578,291,342	183,682,977	375,143	184,058,120		

FRAUD STATISTICS - OVERVIEW October 1, 1986 - September 30, 2007 Civil Division, U.S. Department of Justice												
FY	NEW MATTERS ¹				SETTLEMENTS AND JUDGMENTS ²					RELATOR SHARE AWARDS ³		
	NON QUI TAM	QUI TAM	NON QUI TAM ¹		QUITAM			TOTAL QUITAM AND NON QUITAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL	
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL						
2001	86	311	492,196,974	1,167,531,786	128,587,151	1,296,118,937	1,788,315,911	186,908,812	30,701,881	217,610,693		
2002	62	318	119,598,292	1,077,375,794	25,786,140	1,103,161,934	1,222,760,226	160,914,076	4,582,319	165,496,395		
2003	92	334	703,003,368	1,512,457,284	5,185,911	1,517,643,195	2,220,646,563	331,873,857	1,382,741	333,256,598		
2004	120	431	115,656,023	557,080,136	9,261,879	566,342,015	681,998,038	110,113,220	2,376,128	112,489,348		
2005	107	406	276,914,983	1,148,057,102	7,081,143	1,155,138,245	1,432,043,228	168,409,043	1,911,560	170,320,603		
2006	85	384	1,714,824,081	1,482,048,337	22,493,863	1,504,342,200	3,219,366,281	218,392,497	5,598,336	223,990,833		
2007	128	356	559,255,115	1,436,468,132	15,370,120	1,451,838,252	2,011,093,367	173,221,033	4,169,498	177,390,531		
TOTAL	3,751	5,813	7,621,363,690	12,332,298,469	281,976,663	12,614,275,132	20,235,658,722	1,939,957,511	69,728,640	2,009,686,151		

NOTES:

1. "New Matters" refers to newly received referrals, investigations, and *qui tam* actions.
2. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
3. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(b).

FRAUD STATISTICS - HEALTH & HUMAN SERVICES ¹						
October 1, 1986 - September 30, 2007						
Civil Division, U.S. Department of Justice						
FY	NEW MATTERS ²		SETTLEMENTS AND JUDGMENTS ³			TOTAL QUI TAM AND NON QUI TAM
	NON QUI TAM	QUI TAM	NON QUI TAM ³	QUI TAM		
			TOTAL	TOTAL	RELATOR SHARE ⁴	
1987	12	3	11,361,826	0	0	11,361,826
1988	8	5	2,182,675	355,000	88,750	2,537,675
1989	20	16	350,460	5,099,661	50,000	5,450,121
1990	27	11	10,327,500	903,158	119,474	11,230,658
1991	22	12	8,670,735	5,420,000	861,401	14,090,735
1992	29	15	9,821,640	2,192,478	446,648	12,014,118
1993	22	38	12,523,165	151,760,404	22,946,101	164,283,569
1994	42	76	381,470,015	6,520,815	1,185,597	387,990,830
1995	26	87	96,290,779	85,681,789	14,803,782	181,972,568
1996	20	179	63,059,873	51,576,698	9,374,568	114,636,571
1997	50	274	351,440,027	579,079,581	58,872,855	930,519,608
1998	35	275	40,107,920	258,638,736	47,822,301	298,746,656
1999	28	315	38,000,792	408,128,379	45,492,385	446,129,171
2000	36	210	208,899,015	725,011,203	115,759,246	933,910,218
2001	35	177	433,549,179	900,260,345	147,318,543	1,333,809,524
2002	24	194	74,567,427	960,450,528	153,825,657	1,035,017,955
2003	26	219	536,834,879	1,287,796,031	279,770,601	1,824,630,910
2004	28	275	34,816,447	475,370,142	97,434,278	510,186,589
2005	34	271	204,821,548	911,972,558	122,597,758	1,116,794,106
2006	18	223	1,047,745,714	1,239,957,154	166,506,405	2,287,702,868
2007	22	196	461,582,993	1,084,809,242	153,138,241	1,546,392,235
TOTAL	564	3,871	4,028,424,609	9,140,983,902	1,438,414,591	13,169,408,511

NOTES:

1. The information reported in this table covers matters in which the Department of Health and Human Services is the primary client agency.
2. "New Matters" refers to newly received referrals, investigations, and *qui tam* actions.
3. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

FRAUD STATISTICS - DEPARTMENT OF DEFENSE ¹ October 1, 1986 - September 30, 2007 Civil Division, U.S. Department of Justice						
FY	NEW MATTERS ²		SETTLEMENTS AND JUDGMENTS ³			
	NON QUI TAM	QUI TAM	NON QUI TAM ⁴	QUITAM		TOTAL QUITAM AND NON QUI TAM
			TOTAL	TOTAL	RELATOR SHARE ⁴	
1987	236	22	27,897,128	0	0	27,897,128
1988	122	28	149,136,213	33,750	8,438	149,169,963
1989	119	32	154,588,297	10,002,058	1,394,770	164,590,355
1990	74	41	117,715,978	21,743,463	3,804,470	139,459,441
1991	78	44	227,813,245	57,327,000	8,636,300	285,140,245
1992	73	61	62,003,695	129,294,456	23,874,784	191,298,151
1993	93	53	83,742,840	29,707,641	4,951,923	113,450,481
1994	62	82	226,083,266	370,666,206	68,163,879	596,749,472
1995	54	87	111,424,866	140,563,237	28,348,711	251,988,103
1996	44	81	78,085,099	61,833,653	12,522,473	139,918,752
1997	46	82	33,723,347	36,328,913	6,392,620	70,252,260
1998	29	62	71,063,139	150,180,185	20,511,801	221,243,324
1999	33	70	30,522,711	15,859,646	2,863,936	46,382,357
2000	10	46	53,007,693	96,287,825	15,812,059	149,295,518
2001	10	42	17,715,878	116,188,794	25,067,682	133,904,672
2002	16	44	15,017,365	19,407,658	2,957,196	34,425,023
2003	10	36	107,337,000	205,124,468	48,640,795	312,461,468
2004	16	50	10,098,491	17,684,000	3,031,610	27,782,491
2005	16	49	19,049,935	102,234,052	21,649,855	121,283,987
2006	13	74	586,430,385	48,809,599	10,488,996	635,239,984
2007	22	66	16,400,000	32,035,609	1,681,419	48,435,609
TOTAL	1,176	1,152	2,198,856,571	1,661,512,213	310,803,717	3,860,368,784

NOTES:

1. The information reported in this table covers matters in which the Department of Defense is the primary client agency.
2. "New Matters" refers to newly received referrals, investigations, and *qui tam* actions.
3. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(b).

FRAUD STATISTICS - OTHER (NON-HHS, NON-DOD) ¹ October 1, 1986 - September 30, 2007 Civil Division, U.S. Department of Justice						
FY	NEW MATTERS ²		SETTLEMENTS AND JUDGMENTS ³			
	NON QUI TAM	QUI TAM	NON QUI TAM ⁴	QUI TAM		TOTAL QUI TAM AND NON QUI TAM
			TOTAL	TOTAL	RELATOR SHARE ⁴	
1987	92	6	47,220,995	0	0	47,220,995
1988	80	10	21,968,775	1,954,354	0	23,923,129
1989	82	40	42,263,423	11,681	2,200	42,275,104
1990	139	23	61,520,889	17,911,746	2,687,662	79,432,635
1991	134	28	33,961,487	7,791,931	1,188,586	41,753,418
1992	183	37	65,532,871	4,056,969	135,000	69,589,840
1993	189	47	85,679,571	8,253,742	1,445,113	93,933,313
1994	175	61	98,469,616	4,653,507	942,770	103,123,123
1995	152	95	62,273,997	14,414,266	2,475,603	76,688,263
1996	122	84	106,212,299	24,340,863	3,954,557	130,553,162
1997	91	190	80,404,687	12,331,980	2,250,430	92,736,667
1998	54	130	40,264,734	60,264,000	10,416,915	100,528,734
1999	79	108	126,866,982	74,004,263	16,036,231	200,871,245
2000	49	107	105,980,489	389,105,117	52,486,815	495,085,606
2001	41	92	40,931,918	279,669,798	45,224,468	320,601,716
2002	22	80	30,013,300	123,303,748	8,713,542	153,317,248
2003	56	79	58,831,489	24,722,697	4,845,202	83,554,186
2004	76	106	70,741,084	73,287,873	12,023,461	144,028,957
2005	57	86	53,043,500	140,931,636	26,072,989	193,975,136
2006	54	87	80,647,982	215,775,447	46,995,431	296,423,429
2007	84	94	81,272,122	334,993,400	22,570,872	416,265,522
TOTAL	2,011	1,590	1,394,102,410	1,811,779,018	260,467,847	3,205,881,428

NOTES:

1. The information reported in this table covers matters in which the primary client agency is neither the Department of Health and Human Services nor the Department of Defense.
2. "New Matters" refers to newly received referrals, investigations, and *qui tam* actions.
3. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

FRAUD STATISTICS <i>QUI TAM</i> INTERVENTION DECISIONS & CASE STATUS As of September 30, 2007 Civil Division, U.S. Department of Justice					
	ACTIVE	SETTLEMENT OR JUDGMENT	DISMISSED	UNCLEAR	TOTAL
U.S. Intervened	93	947	52	2	1,094
U.S. Declined	363	212	3,170	7	3,752
Under Investigation					967
					5,813

TESTIMONY OF JIM BRICKMAN
U.S. SENATE COMMITTEE ON JUDICIARY
FEBRUARY 27, 2008

“The False Claims Act Correction Act (S. 2041): Strengthening the Government’s Most Effective Tool Against Fraud for the 21st Century”

Chairman Leahy, Ranking Member Specter, and Members of the Committee, I appreciate this opportunity to submit this testimony on the need to correct the False Claims Act so that it fulfills its goal of combating fraud against the federal government. I am grateful to the Chairman and Ranking Member of the Committee for their support and cosponsorship of The False Claims Act Correction Act of 2007, which is absolutely needed to correct a series of wrong-headed judicial decisions that have eviscerated the ability of people to bring false claims cases to the federal courts.

I am Jim Brickman, a semi-retired real estate developer and investor in Texas. Since 2002, I have investigated improper and fraudulent lending practices that systematically have corrupted the SBA’s § 7(a) federal loan guarantee programs, including specifically the Preferred Lenders Program and the General Purpose Lenders Program. In particular, I have investigated the lending practices of Business Loan Express, LLC and Business Loan Center, LLC (collectively, “BLX”), subsidiaries of Allied Capital Corp. (“Allied”), a publicly traded company.

In undertaking this six year investigation, Greenlight Capital, Inc. (“Greenlight”) and I have uncovered a massive scheme to defraud the SBA out of tens of millions of dollars of loan guarantee payments. Our investigation included an examination of shrimp boat loans made under the SBA’s General Purpose Lenders Program by Business Loan Express, LLC and Business Loan Center, LLC (collectively, “BLX”).

On December 13, 2005, Greenlight and I initiated a *qui tam* action under the False Claims Act regarding approximately one hundred SBA-guaranteed shrimp boat loans made by BLX. The case involves scores of specific, documented examples of BLX’s violations of the False Claims Act by knowingly submitting false claims to the SBA for payment of guarantees on recklessly underwritten shrimp boat loans. The Government declined to intervene. On December 19, 2007, the district court dismissed our action, holding that the “public disclosure bar” of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A), foreclosed its jurisdiction. The court erroneously held that certain publicly disclosed information was sufficient to trigger the public disclosure bar.

Greenlight and I are now appealing that decision. After devoting several years of work involving thousands of hours of our time and that of others working with us, we found and were able to document that BLX fraudulently obtained the SBA’s guarantee for tens of millions of dollars on loans to shrimp boat operators along the Gulf Coast. When these recklessly underwritten loans ultimately defaulted, BLX submitted to the SBA various false certifications to induce the SBA to satisfy its guarantee obligation on the loans. BLX’s systematic disregard for the truth of its representations and certifications to the SBA has cost the taxpayers tens of millions of dollars.

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Prior to our initiating the *qui tam* suit, neither these nor similar allegations had ever been made against BLX through any of the methods of public disclosure specified in the FCA. Since our investigation – and our repeated efforts to bring these frauds to the attention of the SBA and the U.S. Department of Justice (“Justice”) – Justice has initiated an investigation into \$76 million in fraudulent SBA loans originated in BLX’s Michigan office. Additionally, the SBA Office of Inspector General conducted an audit and issued a report which indicates that BLX knowingly and systematically disregarded the SBA’s standard operating procedures.¹ To this date, our complaint remains the only “public disclosure” of BLX’s fraudulent submission of false claims to the SBA regarding payments of guarantees on defaulted shrimp boat loans.

The dismissal of our case was based on exactly the type of faulty decision-making by the federal courts that the legislation before this Committee would halt. S. 2041 contains specific language to correct this. It would define the public disclosure bar as applying only when the person bringing the action has derived his knowledge of all essential elements of liability of the action or claim alleged in the complaint from previously publicly disclosed material. It also limits the term ‘public disclosure’ to include only disclosures made on the public record or that have otherwise been disseminated broadly to the general public, and expressly states that the person bringing the action does not create a public disclosure by obtaining information from a Freedom of Information Act request or from information exchanges with law enforcement and other Government employees if such information does not otherwise qualify as publicly disclosed.

With this kind of language in place, we believe the courts could not continue to ignore Congressional intent by dismissing cases involving massive investigations that uncover new information about fraud against the government on the ground that contain some information that could be pieced together from multiple public sources through great time and effort.

Congress has previously articulated what the standard is supposed to be under current law under the False Claims Act. As Senator Grassley, who spearheaded the 1986 Amendments that established the current standard for public disclosure, stated in a letter that he and Congressman Howard Berman sent to Attorney General Reno on July 14, 1999:

First and foremost, Congress wanted to encourage those with knowledge of fraud to come forward. Second, we wanted a mechanism to force the government to investigate and act on credible allegations of fraud. Third, we wanted relators and their counsel to contribute additional resources to the government’s battle against fraud, both in terms of detecting, investigating and reporting fraud and in terms of helping the government prosecute cases. The reward to the relator is for furthering these goals. In

¹ <http://www.sba.gov/ig/7-28.pdf>.

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reversing the old government knowledge bar, however, we wanted to continue to preclude qui tam cases that merely repackage allegations the government can be presumed already to know about because they were disclosed publicly either in a federal proceeding or in the news media. . .

In writing Attorney General Reno, Senator Grassley and Congressman Berman noted that in some cases the courts had misunderstood these principles, and interpreted the 1986 Amendments to bar a case "in ways that mock the very purpose and intent of the 1986 Amendments." They emphasized that the amendments specifically limit a public disclosure to "allegations or transactions" disclosed in a "criminal, civil, or administrative hearing, in a Congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media."

The dismissal of our *qui tam* suit is just such a mockery of Congressional intent, and provides one example of why this legislation is needed to address continuing inappropriate applications by the courts of the existing law. Our investigation of BLX's activities, rather than being "parasitic," was groundbreaking. It included:

- Years of investigation;
- More than 5,000 hours of work;
- Detailed reviews of 148 shrimp boat loans;
- Review and analysis of more than 600 court filings totaling more than 20,000 pages;
- Interviews of former BLX employees regarding the frauds;
- Meetings with attorneys who had represented BLX's borrowers in bankruptcies;
- Commissioning reports and analyses of BLX's loan portfolio never otherwise undertaken by anyone;
- Approximately 200 FOIA and email requests to the SBA for information regarding BLX.

Thus, the allegations in our *qui tam* suit involved thousands of hours of work and were based on a wide range of sources, including individuals who communicated information they had from inside the transactions and which was not contained in any public document. For Greenlight and I to put the case together took extensive expertise, time, and money, none of which the government or any other party had brought to bear on the shrimp boat cases.

As Senator Grassley has stated previously in his April 4, 1990 testimony before the House Subcommittee on Administrative Law and Governmental Relations of the House Committee of Judiciary:

. . . I think we need to be careful that the qui tam jurisdictional provisions are not emasculated. A party with knowledge of fraud against the Government ought to be able to maintain a qui tam action as long as he had some of the information in advance of the public disclosure.

Testimony of Jim Brickman
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Moreover, the publication of general, nonspecific information does not necessarily lead to the discovery of specific individual fraud, which is the target of *qui tam* action.

Because of the type of court ruling I have now witnessed first-hand, corrections to the False Claims Act as set forth in the bill before this Committee are urgently required. The Supreme Court has called the law the "Government's primary litigative tool for combating fraud," a law "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." If construed according to Congress' original intent, the False Claims Act would bring in many billions of additional dollars in recoveries from those who have cheated at the expense of the taxpayer. But the courts continue to throw out cases such as ours, unreasonably barring people with meritorious claims from pursuing cases.

The bill before the Committee today is needed to protect the viability of the *qui tam* provisions of the False Claims Act from judicial evisceration. I congratulate the sponsors of this legislation, and urge the Committee to move forward with its passage, to fulfill the original intent of the False Claims Act in combating fraud against the government.



COMMITTEE ON THE JUDICIARY

Hearings on S.2041, The False Claims Act Correction Act of 2007

February 27, 2008

Written Statement¹

Submitted by Pamela H. Bucy
 Bainbridge Professor of Law
 University of Alabama School of Law

S.2041, "The False Claims Act Correction Act of 2007," is likely to encourage more whistleblowers to bring actions under The False Claim Act (FCA).² In addition, because S.2041 also gives the United States Department of Justice (DOJ) greater authority to monitor frivolous *qui tam* actions, S. 2041 has the potential to enhance the quality of relators' actions and thereby protect defendants from inappropriate *qui tam* action. There are, however, some respects in which S. 2041 could be improved upon. This Statement addresses those.

**I. OVERVIEW OF THE CIVIL FALSE CLAIMS ACT,
 31 U.S.C. §3729 et seq.**

The civil False Claims Act (FCA) creates a cause of action on the part of "any person" who believes that another person or entity has submitted false claims to the federal government. The FCA has been heralded as one of the most effective crime-fighting tools ever devised, and cursed as irresponsible and disruptive to a healthy economy.

Under the FCA, a person who believes that he has information and evidence that someone else (individual or company) has filed false claims against the federal government may file a lawsuit making such allegations. This plaintiff (termed a "*qui tam* relator") is required to file his lawsuit under seal (not even serving it on the defendant). The relator is also required to give a copy of the lawsuit to the United States Department of Justice (DOJ), along with a written report of "all material evidence and information" the relator possesses.³ The lawsuit stays under seal, often for two years or more, to allow DOJ to fully investigate the charges made by the relator. The secrecy provided by sealing the complaint not only protects a defendant's reputation if the relator's information amounts to nothing, but also facilitates DOJ's further investigation of the relator's information.

¹ Portions of this written statement are excerpted from Pamela H. Bucy, *Games and Stories: Game Theory and the Civil False Claims Act*, 31 FLA. ST. U. L. REV. 603 (2004); Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1 (2002); Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 HOUS. L. REV. 905 (2002).

² 31 U.S.C. § 3729 et seq.

³ 31 U.S.C. § 3730(b)(2) (2002).

At the conclusion of its investigation, DOJ decides whether it will intervene in the lawsuit as an additional plaintiff. If it does, DOJ assumes "primary responsibility" for the case, although the relator remains as a plaintiff and is guaranteed a participatory role.⁴ In some cases, DOJ handles the entire case after intervening; in others, relators work hand-in-hand with government prosecutors. In some cases, relators and their attorneys assume the bulk of the investigative and litigative duties.

If DOJ does not join the lawsuit, the relator may continue pursuing the case, litigating it alone. Even if DOJ does not join a relator's case, it retains authority over the relator's lawsuit in several ways: DOJ monitors the case and may join it at any time, even for limited purposes, such as appeal; DOJ may settle or dismiss a relator's suit over the relator's objections as long as the relator has been given an opportunity in court to be heard; DOJ may seek limitations on the relator's involvement in the case, or seek alternative remedies (such as administrative sanctions) in lieu of the relator's lawsuit.

If the government joins the relator's case, the relator is guaranteed at least 15 percent of any judgment or settlement and the court can award more -- up to 25 percent. If the government does not join the lawsuit, the relator is guaranteed 25 percent and could receive up to 30 percent of the judgment. The amount within the statutory award depends upon the relator's helpfulness to the government. Because the FCA's damages and penalty provisions tend to generate exceptionally large judgments, relators' percentages involve substantial sums.

II. THE FCA'S PRIVATE-PUBLIC PARTNERSHIP MAKES THE FCA AN EFFECTIVE TOOL AGAINST FRAUD

There are three primary reasons the FCA is so effective. First, it recognizes the value of "inside information of fraud and encourages those who have such information to come forward with it. Second, it effectively recruits legal talent who can supplement strapped prosecutive resources of DOJ. Third, it provides a mechanism for private citizens to report information to, and work with, law enforcement. This dialog has the potential, not yet fully realized, for controlling frivolous *qui tam* actions.

A. The Importance of Whistleblowers In Detecting, Deterring and Combating Fraud

Complex economic wrongdoing cannot be detected or deterred effectively without the help of those who are intimately familiar with it. Law enforcement will always be outsiders to organizations where fraud is occurring. They will not find out about such fraud until it is too late, if at all. When law enforcement does find out about such fraud, it is very labor intensive to investigate.

Fraud is usually buried in mountains of paper or digital documents. It is hidden within an

⁴ *Id.* at § 3730(b)(4)(B).

organization. Many different people within an organization, in multiple offices, divisions, and corporate capacities, may have participated in the illegality. Because of the complex nature of economic crime and the diffuse nature of business environments, it may not be apparent, perhaps for years, that malfeasance is afoot. By then, victims will have been hurt, records and witnesses will have disappeared, and memories will have faded.

Given these facts, insiders who are willing to blow the whistle are the only effective way to learn that wrongdoing has occurred.

Information from insiders is the only way to effectively and efficiently piece together what happened and who is responsible. Insiders can provide invaluable assistance during an investigation by identifying key records and witnesses, interpreting technical or industry information, providing expertise, and explaining the customs and habits of the business or industry. Help from an insider can save time and expense for both law enforcement and putative defendants by focusing the investigation on relevant areas.

Because of the valuable information brought by insiders, it is no surprise that government officials state: "Whistleblowers are essential to our operation. Without them, we wouldn't have cases."⁵

It can be a difficult decision to become a whistleblower because "[w]hat happens to whistleblowers shouldn't happen to a dog."⁶ Personally and professionally, it can be a devastating experience to become a whistleblower. And, unlike the typical cooperating individual whose looming criminal liability is the impetus to cooperate with law enforcement, most whistleblowers have a choice. They have not participated in illegality and thus need not cooperate to obtain a "better bargain" for their own problems.

The FCA recognizes the difficulty of coming forward as a whistleblower, and in three ways encourages insiders to become whistleblowers. First, it awards whistleblowers who become relators in successful cases. This is simple market economics. Not only does the FCA guarantee such relators a share of judgements obtained and recovery of attorneys fees and litigation expenses, but it communicates, in this way, that whistleblowing is valuable. For whistleblowing to be seen as socially acceptable, rather than disloyal snitching or "tattling," it must be viewed with approval.⁷ It is a human tendency to measure worth by material rewards.⁸ Large financial awards to those who

⁵ Justin Gillis, *Whistleblowing: What Price Among Scientists?* WASH. POST, Dec. 28, 1995, at A21 (quoting Lawrence J. Rhoades, a division director at the U.S. Department of Health and Human Services, which polices federal health research for scientific misconduct).

⁶ Jane Bryan Quinn, *When Whistleblowing Backfires*, WA. POST, May 24, 1998, at H2.

⁷ As Professors Robert Frank and Philip Cook note, "the recognition and approval of others is a profound source of human recognition." ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER TAKE-ALL SOCIETY* 113 (1995).

⁸ FRANK & COOK at 113.

provide helpful inside information not only increase the attention whistleblowing gets and helps overcome the hardships it brings, they also affirm whistleblowing as a worthy endeavor.

B. The Resource of Legal Talent

In *qui tam* practice under the FCA, insiders potentially bring another resource to law enforcement: legal talent with skill and resources that can supplement DOJ resources. The large potential recoveries and statutory award of attorneys' fees under the FCA are incentive for top legal to represent relators. The structure of the FCA also has the potential to discourage inexperienced or unskilled relators' counsel. Every relator's goal is to convince DOJ to intervene as co-plaintiff in the case. To do so, relators' attorneys need to present to DOJ, prior to filing their complaint, a thorough, well thought out, carefully researched case describing exactly how the false claims were generated and how the fraud can be proven.

C. Mechanism for Cooperation

The FCA provides a protocol for whistleblowers to report their information and for law enforcement to evaluate their information. DOJ has a structured system in place for obtaining information from whistleblowers about potential fraud upon the government, for investigating this information, and for working with whistleblowers who become *qui tam* relators. The FCA allocate duties to both DOJ and relators. While the adequacy of DOJ resources to fully participate in this protocol is an open question, the point is a structured system exists for whistleblowers and law enforcement to work together to pursue potential fraud.

III. THE COSTS OF THE FCA'S PRIVATE-PUBLIC PARTNERSHIP

An honest appraisal of the FCA recognizes that for all of its benefits, the FCA's unusual partnering of private and public plaintiffs presents potential problems for businesses, regulatory authorities, and the judicial system.

The FCA presents problems for businesses. It is expensive for a company to respond to a allegations of fraud. Company employees are distracted from their normal duties when they have to gather subpoenaed records, respond to inquiries of investigators, or testify at hearings or depositions. When a fraud investigation becomes public, business expansions, corporate borrowing, and mergers may be put on hold, or lost as opportunities. Stock prices may fall and lay-offs may result, clients may leave, company stars may jump ship, company moral may plummet.

The FCA present problems for DOJ. It absorbs resources of DOJ and the agencies that investigate relators' allegations. Relators can end up driving some of DOJ's investigative agenda by filing cases. Relators may generate harmful precedent that binds DOJ and prevents DOJ from shaping the law. Whereas DOJ can choose which cases to pursue so as to present favorable legal

theories and facts on appeal in efforts to develop helpful precedent and further the FCA, relators rarely will have this institutional interest in case law development.

Lastly, the FCA poses complications for the judicial system. Relators' actions often require the courts to referee disputes between relators and DOJ. To resolve these conflicts, courts find themselves delving into issues of prosecutive discretion and executive branch policy, issues that present separation of powers tensions.

IV. WAYS IN WHICH THE FCA CURRENTLY ADDRESSES THE COSTS OF THE FCA'S PRIVATE-PUBLIC PROSECUTOR PARTNERSHIP

The FCA currently includes four features which help address the tensions created by the FCA's unique private-public prosecutor partnership: (1) required dialog between relators and DOJ, (2) seal requirement, (3) DOJ's statutory authority to monitor and limit relators' involvement, (4) DOJ's authority to move for dismissal of frivolous actions. These features can neutralize the difficulties created for businesses, regulators, and the courts by this tension.

A. Required Dialog

The FCA requires that relators present their information of potential fraud to the DOJ prior to filing their complaint and also provide DOJ with a copy of their complaint and all relevant information and evidence they have after filing the complaint.⁹ This required communication provides DOJ with the opportunity to corral frivolous relators' actions.

B. Seal Period

When relators file their lawsuits they are required to do so under seal, not even serving the defendants.¹⁰ While the matter remains under seal, DOJ has the opportunity to investigate the allegations to determine if it will intervene as plaintiff, seek dismissal of the case, or seek some restrictions on the relator's involvement in the case. The initial secrecy surrounding *qui tam* complaints and the confidentiality of the reports relators file with DOJ help to protect defendants from reputational damage and the costs incurred in responding to a frivolous private action. DOJ can weed out frivolous allegations and refine credible allegations further protects defendants from reputational and financial damage that could result from unfounded or poorly pled private lawsuits.

C. DOJ Authority To Monitor Relators

The FCA gives DOJ considerable authority to monitor and control relators' conduct in FCA

⁹ 31 U.S.C. § 3730(b)(2).

¹⁰ 31 U.S.C. § 3730(b)(2).

actions, whether or not DOJ intervenes. DOJ may move for extensions of the seal period to allow full investigation of relators' complaints and evidence,¹¹ seek restrictions on a relator's involvement in a case,¹² monitor lawsuits in which DOJ does not intervene by receiving copies of all pleadings filed, and depositions taken,¹³ intervene at any time during a case "upon a showing of good cause,"¹⁴ seek stays (*in camera* if necessary) in the relators' action if it interferes with Government investigations of related civil or criminal matters,¹⁵ pursue the matter through any alternate remedy including administrative proceedings.¹⁶

D. DOJ Authority To Move for Dismissal

Of all of DOJ's supervisory powers over relators, the most important in protecting against frivolous *qui tam* actions is its authority to move for dismissal of a relator's lawsuit.¹⁷ DOJ has utilized its authority to seek dismissal of *qui tam* actions sparingly. There is some logic to this approach: there is always a chance, however small, that the relator will prevail and collect a judgment, of which at least seventy percent will go to the government. Thus, economically it is advantageous for the government to remain a passive observer in the FCA actions it does not join.

E. Resources

It takes considerable DOJ resources to exercise its authority over relators' actions. If the FCA is to remain a powerful tool against fraud, such resources need to be allocated. Only by effective and thorough monitoring, can we have some assurance that the FCA's unique private-public partnership will further the public interest, protect defendants from frivolous actions, and preserve the long-term viability of the FCA.

V. HOW S.2041 ENHANCES THE FCA'S EFFECTIVENESS AND HOW REVISIONS IN S. 2041 WOULD FURTHER ENHANCE THE FCA'S EFFECTIVENESS

¹¹ 31 U.S.C. § 3730(b)(3).

¹² *Id.* at § 3730(c)(2)(C),(D).

¹³ *Id.* at § 3730(3).

¹⁴ *Id.*

¹⁵ *Id.* at § 3730(4).

¹⁶ *Id.*

¹⁷ 31 U.S.C. § 3730(c)(2)(A).

**A. The “Presentment” Clause
S. 2041, Section 2**

S. 2041, Section 2 addresses the “presentment” issue raised in *United States ex rel. Totten v. Bombardier Corp.*¹⁸ and *United States DRC v. Custer Battles*.¹⁹ In these decisions, courts held that liability under the FCA attaches only if the claim is “presented to an officer or employee of the United States Government.” In both cases, the courts held that this meant the FCA did not apply to false claims submitted. In *Totten*, the claims had been submitted to a “grantee” of federal funds; in *Custer Battles*, the claims were submitted to the Coalition Provisional Authority (CPA) established to rebuild and administer Iraq after Saddam Hussein’s capture.²⁰

Edward L. Totten brought a *qui tam* action alleging that defendants, Bombardier Corporation, and Envirovac, Inc., delivered defective rail cars to the National Railroad Passenger Corporation (Amtrak) and further, that they submitted false claims for payment of the rail cars by certifying that the cars met contractual specifications when they did not. Amtrak is not a federal governmental agency but a private entity which receives federal funds as a “grantee.” As a grantee, Amtrak paid defendants with federal funds.²¹

While recognizing that the FCA’s definition of “claim” specifically includes “claims presented to grantees,”²² the DC Court of Appeals noted that the FCA, in § 3729(a)(1) also requires presentment of the claims “to an officer or employee of the United States Government.”²³ Finding the language in § 3729(a)(1) controlling, the court held that presentment to a federal grantee did not fall within the FCA. The DC Circuit noted that the inconsistency in the FCA provisions was likely a “drafting error”²⁴ but held that Congress, not the courts, was the body to correct the error.²⁵

¹⁸ 380 F.3d 488 (D.C. 2004)

¹⁹ 376 F. Supp. 2d 628 (E.D. Va. 2006) (appeal filed, No. 07-1220, 4th Cir.)

²⁰ *Id.* at 618.

²¹ 380 F. 3d.at 490-91.

²² *Id.* at 492; See 31 U.S.C. § 3729 (c): “CLAIM DEFINED – For purposes of this section, ‘claim’ includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.” (emphasis added)

²³ 380 F.3d at 492; See 31 U.S.C. § 3729 (a)(1): Any person who...knowingly presents, or causes to be presented, to an officer or employee of the United States Government...a false or fraudulent claims for payment or approval.” (emphasis added)

²⁴ *Id.* at 496.

²⁵ “[O]ur job is reading statutes as written, not rewriting them “in an effort to achieve that which congress is perceived to have failed to do.” *Id.* at 497

In *Custer Battles*, the District Court for the Eastern District of Virginia examined three types of funds that financed the Coalition Provisional Authority (CPA) established to rebuild Iraq. The court found that Iraqi funds confiscated by the United States “vested” title in the United States and thus claims for “vested” funds were within the FCA.²⁶ The court further found that claims submitted for “seized” funds (Iraqi state assets, mostly currency and negotiable instruments, “seized” by Coalition Forces were within the FCA because even though the United States did not hold title to such funds, it had “dominion and control” over such funds,²⁷ and had the “discretion to direct [that their] expenditure [be] in the best interest of the United States.”²⁸ Lastly, the court held that claims submitted for funds from the “Development Fund for Iraq” (DFI), funded from multiple sources including the United Nations and international donations, were not within the FCA because these were funds given to and belonging to the Iraqi people.²⁹ Clarifying the definition of “Government money or property” will help resolve questions of blended funds.

Lastly, the Sixth Circuit has weighed in, holding in *United States ex rel. Sanders v. Allison Engine Company, Inc.* that the FCA, at least in §§ 3729(a)(2) and (a) (3), do not require presentment to an “officer or employee of the Government.”³⁰ The Supreme Court has granted certiorari in this case.

By defining “Government money or property” as “money or property the United States Government provides, has provided, or will reimburse to a contractor, grantee, agent or other recipient to be spent or used on the Government’s behalf or to advance Government programs,”³¹ S. 2041 makes clear that the FCA covers federal funds, whether disbursed by a grantee or directly by the federal government, and whether held by the federal government as a beneficiary for others.

S. 2041 does not, however, correct the “drafting error” identified by the D.C. Court of Appeals whereby one provision of the FCA (§ 3729(a)(1)) requires presentment of the claim to “an officer or employee of the United States Government,” while another provision (§ 3739(c)) includes claims submitted to “grantees,” who likely are not “officers or employees of the United States Government.”

This anomaly should be corrected. Thus, I would recommend that § 3729(a)(1) be amended by substituting “knowingly makes, uses or causes to be made or used” for the language “knowingly presents, or causes to be presented.”

²⁶ *Id.* at 641.

²⁷ *Id.* at 644.

²⁸ *Id.* at 645.

²⁹ *Id.* at 646-647.

³⁰ 471 F.3d 610 (6th Cir. 2006).

³¹ S. 2041, Section 2.

B. Government Employees as Relators
S. 2041, Section 3

Section 3 of S. 2041 addresses a problem that has bedeviled courts for decades, *i.e.*, whether government employees qualify to be relators. Utilizing different rationales, almost all courts have held that government employees whose duties include uncovering fraud, do not qualify as relators.³² S. 2041 permits a government employee to qualify as a relator when the government employee reports the fraud utilizing the designated protocol and no one does anything.³³ In this circumstance and after waiting at least 12 months, the employee may file an FCA action.

There are several noteworthy points about S. 2041, Section 3:

(1) The employees to whom this protocol applies are those who “learned of the information that underlies the alleged violation of § 3729 that is the basis of the action in the course of the person’s employment by the United States.” Thus, government employees who happen to learn of fraud independently of their government employment still qualify as relators. For obvious policy reasons (bringing forth important information of fraud) and to maintain equality with other potential relators, this limitation is appropriate. This is also the approach taken, appropriately so, by the courts that have considered this scenario.³⁴

(2) The employee must present “all necessary and specific material allegations” through the proscribed reporting chain. This requirement of specificity should prevent government employees from “gaming” the reporting protocol by reporting generalities, or holding back information, in hopes of filing their own FCA actions.

(3) The reporting mechanism set forth (to the agency inspector general, employee’s supervisor and Attorney General) is multi-sourced and thus, the information is less likely to get overlooked.

(4) The proviso that the government employee may file an FCA action after 12 months from the time he reports the information as required if the Attorney General has not filed an FCA action is consistent with the FCA’s terms and philosophy that *qui tam* actions should be able to proceed

³² See, e.g., *LeBlanc*, 913 F.2d 17 (1st Cir.) (on the ground that such a relator does not qualify as an original source as required in the FCA if the information in the complaint is known to the government); *Fine*, 72 F.3d 740 (9th Cir.) (on the ground that the relator did not “voluntarily” provide the information in his complaint to the government as required in the FCA).

³³ S. 2041 specifies that the employee must report “all ...necessary and specific material allegations” to relevant inspector general, the employee’s supervisor and the Attorney General” or to the employee’s supervisor and the Attorney General if the employee’s agency does not have an inspector general.

³⁴ *United States ex rel. Givler v. Smith*, 760 F. Supp 72 (E.D. PA 1991); *United States ex rel McDowell v. McDonnell Douglas*, 755 F. Supp 1038, 1040 (M.D. Ga. 1991)

even if DOJ does not intervene.

Despite these positive aspects of this amendment, it should not be passed. There are significant policy problems in allowing government employees to file FCA actions when the information they use is information they obtain while serving as a government employee. The reporting protocols in S. 2041, which by the way should be required for government employees regardless of FCA issues, cannot overcome these problems.

(1) Access to confidential information. By virtue of their official position, government employees whose duty is to investigate fraud by government contractors, obtain access to confidential, proprietary, and privileged information of companies that serve as government contractors. These governmental officials also have access to internal governmental information including confidential and non-public records and experts. Access to all of this information is granted only because of the employee's governmental position. It is wrong for a government employee to use this access for his personal benefit.

(2) Damaged Credibility. Often the government auditor or agent who investigated fraud by a contractor is a key witness at any civil or criminal trial or administrative hearing. These individuals often testify as summary expert witnesses, explaining billing requirements and tracing how the defendant's conduct violated these requirements. When this individual has filed a lawsuit under the FCA in his own name and stands to profit personally from it, his credibility as a witness is ruined. This unfairly cripples any government case.

(3) Conflict of Interest. There are specific prohibitions against federal employees using "nonpublic government information...to further any private interest,"³⁵ participating in a government matter in which the employee has a financial interest,³⁶ using public office for private gain,³⁷ using government property or time for personal purposes,³⁸ and holding a financial interest that may conflict with the impartial performance of government duties³⁹. There are also criminal penalties for federal government employees who participate in matters in which they have a financial interest.⁴⁰

When a government employee who obtains information of fraud by a government contractor in the course of the employee's duties, files an FCA action in his own name, all of the above

³⁵ 5 C.F.R. §§ 2635.101(b)(3), 2635.7039(a).

³⁶ 5 C.F.R. §§ 2635.402, 2635.501, 2635.502.

³⁷ 5 C.F.R. §§ 2635.101(b)(7), 2635.702.

³⁸ 5 C.F.R. §§ 2635.704, 2635.705.

³⁹ 5 C.F.R. §§ 2635.403.

⁴⁰ 18 U.S.C. § 201.

regulations and statutes are violated. They are violated when the employee reviews documents, interviews witnesses, and discusses strategy and investigative direction with other government employees with expertise in such matters. Access to such information and expertise would not be available to the employee if he were a private citizen; he should not reap special benefit from the unique access he obtains by virtue of his employment.

(4) Erosion of Public Confidence. When potential defendants or witnesses know that a government employee who is investigating fraud may be working for himself and his own profit, they are less likely to come forward or voluntarily cooperate, or be fully forthcoming.

Also, the general public cannot help but look with scorn on a governmental system that allows its employees to personally profit from doing his job.

Summary: Section 3 of S. 2041 should not be passed, nor under any circumstance should government employees who obtain information about fraud in the course of their governmental duties be allowed to file *qui tam* actions.

C. Barred Actions S. 2041, Section 4

S. 2041, Section 4, amends what is known as the FCA's "jurisdictional bar" provision. This provision, which seeks to ensure that relators' information in fact assists the government, is key to the FCA's goal of encouraging knowledgeable whistleblowers to bring forth helpful information about fraud upon the government. Since the 1986 amendments, this provision has generated the greatest amount of litigation of any FCA issue. While S. 2041 remedies inequities that have arisen given court decisions, principally *Rockwell International Corporation v. United States ex rel. Stone*,⁴¹ it is not yet an optimal revision of the "jurisdictional bar" provision.

S. 2041 makes three major changes to current "jurisdictional bar" provision: (1) it gives the Attorney General sole authority to raise the issue whether relators' information is based upon what is publicly known, (2) it cures the problem created by *Rockwell*, and (3) it redefines the definition of "public information."

(1) Authority to Challenge Relator's Eligibility as Plaintiff. S. 2041 assigns to the Attorney General sole authority to seek dismissal of a relator on the ground that the relator provides nothing new to the case.⁴² Currently, this provision is "jurisdictional," which empowers any party, including defendants, to seek dismissal of a relator on this ground. For two reasons, this part of S. 2041, Section 3, makes sense. First, DOJ should assume a greater role in policing frivolous *qui tam* actions. This amendment consolidates and helps direct this duty to DOJ. Second, DOJ is uniquely situated to determine whether the allegations made by a relator are in fact based upon public

⁴¹ 549 U.S. ____, 127 S. Ct. 1397 (2007).

⁴² S. 2041(4)(A).

information since assessing this often requires analysis of data available primarily to DOJ.

(2) The *Rockwell* Decision. In *Rockwell*, the Supreme Court held that James Stone, the relator who brought a *qui tam* action against Rockwell International Corporation, was precluded from recovering any portion of the almost \$5 million judgment awarded because the information Stone presented to DOJ when he initiated the case were not the ultimate facts upon which Rockwell was convicted.⁴³ By adding a wild card (the claims upon which the verdict will rest) to the existing unpredictability of litigation, this interpretation of the FCA will discourage knowledgeable individuals from becoming relators. S. 2041 cures this problem by making clear that a relator is entitled to a portion of any recovery if the relator's information contributed to the "essential elements of liability."

Although S. 2041 cures the problem presented by *Rockwell*, it does so in a confusing way that will lead to significant practical problems. By focusing on "essential elements of liability" *ie*, what ultimately is proven in a case, S. 2041 adds to tensions between relators and DOJ. Linking relators' recoveries to the claims stay in the case all the way to judgment may well cause DOJ and relators to battle over what claims stay in a case or are heavily litigated during a trial. DOJ may be tempted to leverage the decision about claims into a decision about what percentage of the recovery relators will get. These disagreements will require more refereeing by the courts. This, in turn, will add to the separation of powers tensions already existing in FCA cases.

If S. 2041 focused instead on the information the relator brings to DOJ *initially* rather than on the ultimate outcome of the case, the FCA will continue to encourage relators to come forward while also avoiding the inequity of *Rockwell* and the practical problems created by the current amendment. Instead of the suggestion in S. 2041, Section 3, 31 U.S.C. § 3730(e)(4)(A) should be amended as follows:

(4)(A) Upon timely motion of the Attorney General, a court shall dismiss an action or claim brought under section 3730(b) if the information supplied to the Attorney General by the relator is based exclusively on the public disclosure of allegations or transactions in"

(2) Changes to sources of "disqualifying public information". S. 2041 changes the definition of "public disclosure" in four ways. These changes impact relators' ability to bring FCA actions.

The first change to the definition of "public disclosure" in S. 2041 (at (4)(B)) is limiting public disclosures to "disclosures made on the public record or that have otherwise been disseminated broadly to the general public." There are three problems with this proposal. First, it is vague. "Public record" and "disseminated broadly to the general public" are unclear terms. No one: not relators, defense counsel, DOJ, or the courts, will have a clear sense of what these terms

⁴³ 127 S. Ct. at 1397.

mean. The second reason this provision should not be enacted is that it is confusing when read with 4(A), which sets forth a list of sources of public disclosure. Interpretative questions abound: Does 4(B) overrule 4(A), or supplement it? If there are conflicts in 4(A) and 4(B), which controls? For example, what if a "hearing" referred to in 4(A) is not on the "public record?" The third problem with this provision is that it is unnecessary. Section 4(A) lists the sources of public disclosure. There is no need to describe them again, this time generically, in 4(B).

The second change S. 2041 makes to the definition of public disclosure also limits the definition. Specifically, 4(A) of S. 2041 provides that relators are disqualified if their information is based upon a "*Federal* criminal, civil, or administrative hearing" or a *Federal* administrative or General Accounting Office report, hearing, audit or investigation. Currently, the FCA is not limited to *Federal* matters. Thus with S. 2041, relators whose information is based upon *state* or possibly *international* criminal, civil or administrative matters would qualify as relators as long as the relator's information is not otherwise barred (because it had been disclosed, for example, in the news media).

This is an appropriate proposal. The point of the FCA is to encourage individuals who have knowledge of fraud upon the federal government to come forward with their information. Trolling through the overwhelming amount of information publicly available to find instances, even large instances, of fraud upon the federal government, is not a job that federal law enforcement officials can do alone. There is too much information and not enough investigative resources. To encourage knowledgeable individuals (*ie*, "professional relators" who specialize in such data gathering endeavors) to seek out information about fraud upon the federal government about which federal law enforcement officials are not aware, is good policy.

Notably, there are two significant restrictions on this "trolling-through-state-proceedings" opportunity that will limit possible abuse. The first restriction is the requirement that the information brought by a relator has not been disclosed in the news media. If the facts from the state proceeding have appeared in the news media, the information is public and the relator is disqualified. Second, a number of state agencies, Medicaid for example, are statutorily and contractually obligated to report instances of fraud involving federal funds to the federal government. When these state agencies fulfill their federal obligation to report such fraud, they will do so in a "federal administrative report" which the current amendment similarly includes as public information. Once such a report is made to federal authorities by a state office, the relator is disqualified.

The third change S. 2041 makes in the definition of "public disclosure" is excluding information obtained from "a Freedom of Information Act [FOIA] request."⁴⁴ Like the limitation of public disclosure to "Federal" sources of information," this proposal will expand relators' ability to bring actions. It will encourage "professional relators" to seek and research FOIA data sources, thereby supplementing law enforcement's investigative resources. Because any such FOIA search efforts are still subject to existing limitations on what is public disclosure, namely, information in

⁴⁴ S. 2041(4)(B).

the news media or disclosed in various hearings, reports or audits, this FOIA “carve-out,” should result in helpful but not duplicative assistance from relators.

The fourth change S. 2041 makes to the definition of “public disclosure” is excluding information obtained from “exchanges with law enforcement and other Government employees.”⁴⁵ Like the other limitations to the definition of public disclosure proposed by S. 2041, this information is still subject to the caveat that it is nevertheless public information if this information is reported in media or in hearings, audits or reports.

This change in the definition of “public disclosure” should not be made. It will be helpful only in a few instances (when all government employees at issue are ignoring their duties) and could generate considerable mischief (encouraging would-be relators to pester government employees for information). For these two reasons it should not be included.

Lastly, S. 2041 does not make a change to the “jurisdictional bar” provision that should be made. Neither current § 3730(e)(4)(A) nor S.2041, 4(A), includes “investigation” in the list of sources that constitute public disclosure. Both refer to “public disclosure...in a criminal, civil or administrative hearing” and later to a “congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation....” The term “investigation” should be added in both places for the obvious reason that sometimes investigations will become public. Allowing relators to file suit based upon a publicly disclosed investigation would be parasitic to the government’s existing effort.

In summary, therefore, S. 2041, Section 4 at 4(A) and (B) should state:⁴⁶

(4)(A) Upon timely motion of the Attorney General, a court shall dismiss an action or claim brought under section 3730(b) if the ~~allegations relating to all essential elements of liability of the action or claim are~~ information supplied by the relator is based exclusively on the public disclosure of allegations or transactions in a Federal criminal, civil or administrative hearing or investigation, in a congressional, Federal administrative, or Government Accountability Office report, hearing, audit or investigation or from the news media.

(B) ~~In this paragraph:~~

(i) ~~The term “public disclosure” includes only disclosures made on the public record or that have otherwise been disseminated broadly to the general public.~~

(ii) The person bringing the action does not create a public disclosure

⁴⁵ S. 2041

⁴⁶ The underlined portion is the additional language I propose to S. 2041, Section 4, at 4(A) and (B).

by obtaining information from a Freedom of Information Act request ~~or from information exchanges with law enforcement and other Government employees~~ if such information does not otherwise qualify as publicly disclosed.

~~(iii) An action or claim is based on public disclosure only if the person bringing the action derived his knowledge of all essential elements of liability of the action or claim alleged in his complaint from the public disclosure.~~

D. Relief From Retaliatory Actions S. 2041, Section 5

Section 5 makes two major changes in the protection against retaliatory actions. First, section 5 expands the coverage of individuals who are entitled to seek relief from an “employee” to “employee, government contractor or agent.” This is an appropriate expansion of the FCA. It reflects the reality of who is, can be, and should be, relators under the FCA.

The second major change made by section 5 concerns the description of conduct which activates the protection of the FCA. The current FCA provides protection for “lawful acts ...in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section.” S. 2041 replaces this language with the following: “lawful acts...in furtherance of other efforts to stop 1 or more violations of this chapter.”

S. 2041’s proposed change in the conduct protected is problematic. The amendment is confusing and raises multiple interpretative difficulties. What exactly is an “effort” to “stop” a “violation”? Is reporting the problem internally sufficient “effort”? Or is reporting to law enforcement agencies necessary to qualify for protection? Must a person report to the correct agency or just make a reasonable attempt to report to the appropriate agency? How much information must be reported to constitute an “effort”? Is “effort” satisfied only by filing an FCA action? Does “violation” mean the defendant must be found liable before the protection is activated? Depending on the interpretation of these terms, S. 2041 could be too narrow (providing protection only the filing of FCA actions and only when defendants are actually found liable) or too broad (reporting vague suspicions internally).

It seems more prudent to retain the current language with minor amendments to it to clarify issues over which courts have struggled. For example, while most courts hold that it is not necessary to actually file an FCA action to obtain protection under the FCA,⁴⁷ the matter is not completely settled. The applicable statute of limitations for retaliatory claims was resolved by the Supreme Court but only by applying a default rule of statutory construction. The Court held that the statute

⁴⁷ United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 235 (1st Cir. 2004); Dookeran v. Mercy Hospital, 281 F.3d 105, 108 (3d Cir. 2002).

of limitations for a 3730(h) action runs from the date of retaliation rather than from the date of the FCA violation.⁴⁸ Because the facts concerning the violation of the FCA will enter into the issues of retaliation, the activating event for statute of limitation purposes should be the FCA violation. In addition, a 10-year statute of limitations is consistent with S. 2041, Section 6.

In summary, S. 2041, Section 5 should amend 31 U.S.C. § 3730(h) as follows:⁴⁹

(1) **IN GENERAL** – Any employee, government contractor, or agent shall be entitled to all relief necessary to make that employee, government contractor whole, if that employee, government contractor or Agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, government contractor, or agent ~~in furtherance of other efforts to stop 1 or more violations of this subchapter in furtherance of an action under this section, not necessarily including filing an action under this Section but including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section.~~

(2) **RELIEF** – Relief under (1) shall include reinstatement with the same seniority status that employee, government contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

E. Statute of Limitations
S. 2041, Section 6

This amendment replaces the dual 3 and 10 year provision to a simplified 10 year standard for all cases. It also provides that when the government intervenes in a case brought by a relator, pleadings relate back and do not change the original filing date as long as “the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint....” This amendment is appropriate and should be enacted. Doing so will clarify what have been an unnecessarily confusing aspects of FCA practice.

⁴⁸ United States *ex rel.* Wilson, Graham County Soil & Water Conserv., 545 U.S. 409 (2005).

⁴⁹ Underlined portion is additional to S. 2041 and also is identical to existing § 3730(h) except for the italicized portion which is new to both.

F. Civil Investigative Demands
S. 2041, Section 7

Civil Investigative Demands (CIDs) permit DOJ to obtain, prior to filing suit, “any documentary material or information relevant to a false claims law investigation.” CIDs have great potential, allowing DOJ to fully investigate a matter before deciding whether to intervene. Full use of CIDs help DOJ weed out frivolous *qui tam* actions.

As currently drafted, the FCA has been interpreted by DOJ to permit only the Attorney General, Deputy Attorney General, or Assistant Attorney General to authorize CIDs. This is unworkable. S. 2041 provides that the Attorney General “or his designee” may authorize CIDs. This is an appropriate amendment for it recognizes the practicalities of DOJ delegation of duties.

DOJ has also interpreted the FCA as prohibiting sharing with relators information obtained by virtue of CIDs. S. 2041 addresses this issue and allows such sharing of information “if the Attorney General, or his designee, “determine it to be necessary as part of any false claims act investigation. This amendment should be adopted for it recognizes the investigative needs and potential of the private-public partnership created by the FCA.

TESTIMONY OF JOHN E. CLARK
BEFORE THE SENATE JUDICIARY COMMITTEE

Hearing on "The False Claims Act Correction
Act (S. 2041): Strengthening the
Government's Most Effective Tool Against
Fraud in the 21st Century"

February 27, 2008

Introduction

As a long-time False Claims Act practitioner, I submit this testimony in support of Senate Bill 2041, the False Claims Act Correction Act of 2007 ("S. 2041").¹ I am a member of the qui tam bar, the unofficial term for the attorneys who specialize in representing private parties who bring cases under the federal False Claims Act ("FCA") on behalf of the United States. For more than 15 years, my practice has consisted almost exclusively of qui tam cases.

I have been a member of legal teams representing qui tam plaintiffs whose claims have resulted in recoveries exceeding half a billion dollars (\$500,000,000) for the United States. The cases have involved both health care fraud and defense contracting fraud, the two primary areas of fraud against the government today. Many of the defendants have been publicly traded companies, including such familiar names as HealthSouth Corporation, SmithKline Beecham Clinical Laboratories, Science Applications International Corporation, and prescription drug manufacturers Bayer, Aventis, Bristol Myers Squibb, and GlaxoSmithKline. I have also represented qui tam plaintiffs in cases brought under the Texas Medicaid Fraud Prevention Act, which is patterned after the federal FCA, that have resulted in recoveries of approximately \$70 million for Texas and the United States to date.

My whistleblower clients have included physicians and other health care professionals; corporate executives; clerical and administrative personnel; non-executive salaried employees; hourly skilled workers; a competitor of a corporate health care provider; and, an 83-year-old

¹S. 2041, 110th Cong., 1st Sess. (2007).

physical therapy patient (a veteran of World War II, Korea, and Vietnam) who saw and understood that Medicare was being systematically cheated by a major corporate health care provider.

The clients who were employees of the entities sued have all had one thing in common: before seeking the assistance of a qui tam attorney, each had tried, without success, to get his or her employer to cease its unlawful conduct. Even the physical therapy patient tried first, without success, to get the corporate provider to change its conduct voluntarily.

Currently, I practice law at Goode Casseb Jones Riklin Choate & Watson, a San Antonio, Texas law firm that I helped found in 1991. I also serve on the Board of Directors of Taxpayers Against Fraud (TAF), the non-profit public interest organization dedicated to combating fraud against the Federal Government through the promotion and use of the Federal FCA and its qui tam provisions.

My views on S. 2041 are informed by my previous government service as well as by my current career representing qui tam plaintiffs. From 1969 to 1977, as a litigation attorney in the Justice Department's Criminal Division, as an Assistant U.S. Attorney, and finally as the United States Attorney for the sprawling Western District of Texas, I handled and oversaw a wide variety of civil and criminal litigation for the United States. I served as U.S. Attorney for the Western District of Texas from 1975 to 1977. In addition, I served as a Justice on the Texas Fourth Court of Appeals, the state counterpart to the federal circuit courts, in 1981-1982.

S. 2041 is important to remedy and deter fraud on U.S. government programs. The Bill's proposed amendments to the FCA - many of which are clarifications of the existing statute - are needed to correct a number of decisions by courts that have misconstrued the statute and limited its effectiveness. A number of unfortunate, judicial rulings inhibit the law from operating as Congress intended when it enacted the law in 1863 to combat fraud in Civil War defense contracts. Other rulings hinder the law from working as Congress intended when it amended the law in 1986 to put in place sufficient incentives to encourage private citizens to come forward.

In my testimony, I will address my reasons for supporting each of the key provisions of S. 2041 and I will discuss two other areas that are badly in need of legislative correction:

- The permissible uses of Civil Investigative Demand material in FCA proceedings need to be clarified so that Department of Justice attorneys will use this tool when appropriate; and,
- The procedural provisions need to be clarified to confirm that qui tam plaintiffs need not plead the specifics of billing documentation to survive a motion to dismiss.

I. Provisions in the Current Bill

A. Fixing the "Public Disclosure" Jurisdictional Bar

Perhaps the most critical aspect of this bill is its amendment of the so-called "public disclosure bar" - a provision that has been misinterpreted by too many courts. The case law has veered so far off the course Congress intended that it has seriously handicapped the fight against fraud. After setting out the legislative history of this provision and summarizing the state of the case law, I will offer examples from my own experience that demonstrate the need for legislative action.

1. Summary of Legislative History

Congress amended the FCA to add the public disclosure bar in 1986. This provision deprives a court of jurisdiction over any qui tam action "based upon" the "public disclosure" of "allegations or transactions" in the news media, or in an administrative, congressional or judicial report, audit or proceeding, unless the qui tam plaintiff is an "original source" of the information and has disclosed it to the government before filing suit.

When Congress added the "public disclosure bar" to the FCA in 1986, it deliberately removed another jurisdictional bar, colloquially referred to as the "government knowledge bar." The government knowledge bar, which was added to the statute in 1943, had deprived courts of jurisdiction over qui tam actions "based on evidence or information the Government had when the action was brought." Congress had

added the "government knowledge bar" to the statute in 1943 to address concerns about "opportunistic" or "parasitic" relators who brought no information of any value to the Government, but merely lifted public materials, such as an indictment, into their complaints.

In practice, however, the "government knowledge bar" had not worked as intended. It was far too sweeping, disqualifying meritorious and non-meritorious actions alike, and potential whistleblowers were unwilling to put their careers on the line when facing the risk that their cases would be barred if information about the apparent false claims lay dormant somewhere in the government's vast files. As a result, the government knowledge bar deterred qui tam filings, and the qui tam cause of action fell into virtual disuse for over forty years. (In eight years of service as a federal prosecutor, from 1969 to 1977, I never heard of the FCA.) Meanwhile, defense procurement fraud ran rampant, and was inadequately redressed by the government.

By 1986, Congress had determined to eliminate the so-called "government knowledge bar" in light of its stated concern about cases in which "the Government knew of the information that was the basis of the qui tam suit, but in which the Government took no action." See H.R. REP. NO. 660, 99th Cong., 2d Sess. 22-23 (1986). Congress wished to "encourage more private enforcement suits" and consequently amended the statute to eliminate the government knowledge bar in 1986. S. REP. NO. 345, 99th Cong., 2d Sess. 23-24 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5266, 5288-89. Congress remained concerned, however, about "parasitic" or "opportunistic" relators such as those filing complaints simply copied from a government indictment.

To address the continued concern about the opportunistic relator, Congress' 1986 amendments created a jurisdictional bar that was intended to strike a balance between "encouraging people to come forward with information and . . . preventing parasitic lawsuits."² As well stated by the Court of Appeals for the District of Columbia:

² *FCA Implementation 1990*, Hearing Before the Subcomm. on Admin. Law and Gov. Relations of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 3 (1990) (statement of Sen. Grassley).

Seeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own, Congress has frequently altered its course in drafting and amending the *qui tam* provisions since initial passage of the FCA over a century ago.³

The result of Congress' 1986 effort to find the right balance between providing adequate incentives for relators with inside information and discouraging those that add nothing to the government's efforts was the current "public disclosure bar." This bar precludes a *qui tam* plaintiff's action if his complaint is "based upon" publicly disclosed allegations or transactions, unless the plaintiff is an "original source of the information." The jurisdictional bar no longer focuses on whether the government is on notice of the fraud. Importantly, Senator Grassley, who sponsored these amendments, explained that the new jurisdictional bar would apply only to actions based "solely" on public disclosures. Cong. Record, S. 11244 (August 11, 1986)

2. State of the Case Law

Although it was intended to benefit the government, the "public disclosure bar" unfortunately has evolved into little more than a cudgel for defendants seeking to escape judgment for their misdeeds. The Department of Justice rarely invokes the clause. Defendants, however, can be counted on to assert it on even the flimsiest pretext, and all too many courts seem eager to seize upon it as if indulging a presumption that whistleblower claims are not favored and should be discouraged. Armed with the best defense counsel in the country and virtually unlimited financial resources for litigation, large defense contractors and health care providers have brought hundreds of jurisdictional challenges to *qui tam* cases under the public disclosure provision. They have exploited what some courts have characterized as ambiguities in the provision, arguing that "based upon" means "similar to" and that "public" disclosures include even those disclosures made in private settings. These challenges have led to case law that, in effect, has restored aspects of the "government

³ *U.S. ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994).

knowledge" bar that Congress tried to remove in 1986. They also have depleted the financial resources of whistleblowers, wasted precious judicial resources, and led to a confounding array of conflicting interpretations of the terms "based upon" and "public disclosure."

To give the Senate Judiciary Committee a sense of the scope of the problem, I point out the following:

*The United States Code Annotated currently reports nearly 200 published and unpublished rulings in 103 separate cases on questions relating to the proper interpretation of the "public disclosure" bar and its "original source" exception.

*In a case that reached the Supreme Court last year, *Rockwell International, Inc.* successfully used the public disclosure bar to deny an award to a whistleblower over the strong objections of the United States.⁴

*Most of the Courts of Appeals that have looked at the issue have agreed with defendants that the term "based upon" should be interpreted to mean "similar to" rather than "derived from."⁵ In doing so, they have determined that the proper inquiry is whether the information in the public domain is sufficient to put the government "on notice" of the alleged misconduct, in effect restoring -- as the first part of the "public disclosure" jurisdictional analysis -- the "government knowledge" bar that Congress tried to remove in 1986.⁶

⁴ *Rockwell Int'l Corp. v. U.S.*, 127 S. Ct. 1397 (2007).

⁵ See *U.S. ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 176 (5th Cir. 2004); *Minn. Ass'n of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032 (8th Cir.), cert. denied, 537 U.S. 944 (2002); *U.S. v. Board of Trustees of the Leland Stanford, Jr. Univ.*, 161 F.3d 533 (9th Cir. 1998), cert. denied, 526 U.S. 1066 (1999); *U.S. ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir.), cert. denied, 522 U.S. 865 (1997); *U.S. ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992), cert. den. 507 U.S. 951 (1993); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2nd Cir. 1992).

⁶ If the court finds both that there has been a public disclosure and that the qui tam plaintiff has based his complaint on the public disclosure, then the next step of the public disclosure analysis involves looking to see whether the qui tam plaintiff qualifies as an

*On the other hand, the Courts of Appeals for the Fourth, Seventh and Eleventh Circuits have interpreted the term "based upon" as used in the public disclosure bar to mean "derived from."⁷

*Several Courts of Appeals have ruled that private exchanges of information, such as those between a government investigator and a potential fact witness, constitute "public disclosures" even when a relator is not part of the information exchange.⁸

*One Court of Appeals has ruled that production of documents or information during the discovery phase of a lawsuit is a "public disclosure" even if the material is not put on the public record of the judicial proceeding.⁹

*At least three Courts of Appeals have ruled that responses to FOIA requests are "public disclosures" that can deprive a court of jurisdiction even if the relator relies exclusively on his status as an insider to establish requisite elements of the fraud.¹⁰

"original source" and is therefore exempt from the jurisdictional bar. To qualify as an "original source," the qui tam plaintiff must jump over more hurdles than necessary to just establish that he did not derive his lawsuit from the public data. He must: i) prove his "direct" knowledge of the information; ii) prove his "independent" knowledge of the information; iii) establish that he disclosed the information to the government before filing suit; and, iv) in some circuits, show that, prior to the public disclosure, he also disclosed the information to the entity that made the public disclosure.

⁷ See *Battle v. Bd. of Regents*, 468 F.3d 755 (11th Cir. 2006); *U.S. v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999); *U.S. ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347-48 (4th Cir.), cert. den. 513 U.S. 928 (1994).

⁸ See *U.S. v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999) (disclosure by defendant to public official with managerial responsibility for the allegedly false claims); *U.S. ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2nd Cir. 1992) (disclosures by government investigators to employees of defendant.)

⁹ See *U.S. ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 333-334 (3rd Cir. 2005); *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1158 (3rd Cir. 1991).

¹⁰ See, e.g., *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1051 (10th Cir. 2004), cert. denied, 545 U.S. 1139 (2005); *U.S. ex rel.*

*On the other hand, the Court of Appeals for the 9th Circuit has held that a response to a FOIA request is not a "public disclosure" within the meaning of the statute.¹¹

3. My Experience with the Public Disclosure Bar

The many court decisions that have interpreted the terms "public disclosure" and "based upon" in unduly broad terms have made relators reluctant to take otherwise prudent steps to confirm their allegations prior to filing suit, as these steps could generate disclosures from outside parties that might be deemed "public." Moreover, these decisions have led lower courts to bar meritorious allegations that never would have been uncovered or pursued by the government on its own.

For example, I have been consulted by clients and prospective clients with knowledge of a defendant's culpable practices, but without access to the inculpatory documents submitted to the government, who have suggested filing a FOIA request to obtain copies of the documents in question and thus confirm that the defendant actually submitted false claims. I have counseled such clients against filing FOIA requests because of the case law that poses a significant risk that the government's compliance with a FOIA request could be found to constitute a "public disclosure," potentially barring the client's lawsuit.

Case law that deters whistleblowers from confirming key facts before filing suit is not in the public interest. If flawed cases are filed as a result of incomplete or inaccurate understandings of the facts, executive and judicial branch time and resources, as well as the time and resources of the whistleblower, will be expended needlessly, and the whistleblower's career may be jeopardized. Moreover, this case law can prevent clients from meeting the requirements of other cases that require whistleblowers not only to allege how someone is defrauding the government, but also to present copies of the actual

Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys., 384 F.3d 168, 175-176 (5th Cir. 2004); *U.S. ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 383 (3rd Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000).

¹¹ *U.S. v. Catholic Healthcare W.*, 445 F.3d 1147, 1153-56 (9th Cir.), *cert. denied*, 127 S. Ct. 730 (2006).

invoices or other claim documents submitted to the government.

In one instance our client assisted in the government's investigation, after we filed his *qui tam* action, by identifying categories of documents to be subpoenaed that would corroborate his allegations. When the government obtained the documents, the client reviewed and analyzed them at the government's request, in the privacy of a secure federal office. The documents corroborated the client's claims and furthered the investigation, and with the government's acquiescence the still-sealed complaint was amended to reflect specific examples of the corroborative facts. The court unsealed the case before the government's investigation was completed. Although the government's attorneys anticipated electing to intervene, they were not prepared to do so at that time and hoped we would be able to prosecute the case alone until the government was ready to intervene. After the complaint was unsealed, the court dismissed the case on the defendant's motion, ruling that a disqualifying "public disclosure" occurred when the client reviewed the documents to aid in the government's investigation.

The court's interpretation of "public disclosure" as encompassing post-filing disclosures by the government to the relator is particularly troubling in light of the Supreme Court's recent decision in *Rockwell Int'l Corp. v. U.S.*, *supra*. In that decision, the Supreme Court looked to the final articulation of the legal claim that led to the judgment against the defendant to determine whether that claim was based upon publicly disclosed information. When *qui tam* plaintiffs pursue cases declined by the United States, however, the final articulation of the legal claim will almost always encompass billing documentation that the *qui tam* plaintiff obtained from either the defendant or the government during discovery. Few insiders to fraud have access to all of the pertinent billing documentation. If the reasoning of the *Rockwell* court is ever combined with the reasoning of the judge in the case I just discussed, it could be the death knell for declined *qui tam* cases.

In my practice, I have seen how the courts' conflicting and unduly restrictive readings of this provision have been exploited to the fullest by defendants - parties that have no legitimate interest in the public disclosure question. The public disclosure provision was adopted for the government's benefit - *i.e.*, to encourage

whistleblowers to come forward and to allow the government to avoid sharing a recovery with an opportunistic relator who merely repeats in pleadings what is already widely known. It has nothing whatever to do with the defendant's culpability. It was not intended to shield defendants from liability merely because their misconduct was publicly exposed before the relator filed his lawsuit, and it flies in the face of the public interest to allow it to serve that distorted purpose.

Moreover, because courts consider "public disclosure" a jurisdictional bar, a defendant can use it to attack a relator regardless of whether the government considers the relator an opportunist from whom it wants to be protected, or a valued ally whose assistance and resources the government wishes to have on its side in the litigation. The government, for whose benefit the "public disclosure" bar was intended, should have - and exercise - the sole discretion to make that strategic decision. Again and again, defendants have raised this jurisdictional bar to force qui tam plaintiffs to incur the risk and expense of litigating this threshold issue, to delay adjudications of the merits of cases, and ultimately to avoid liability for defrauding the government. I have also had the experience of responding to "public disclosure" motions so lacking in merit as to suggest that they were filed either without a basic understanding of the law or with the hope of confusing or misleading the court. Congress could do no greater service in furtherance of the FCA than to amend this provision in the manner proposed in Senate Bill 2041.

4. The Proposed Amendments to the Public Disclosure Provision

The proposed amendments empower the government, and not the defendant, to seek the dismissal of opportunistic actions that merely repeat allegations already on the public record. Under the amendments, a FCA action could be dismissed due to a public disclosure only upon "timely" motion of the Attorney General. "Public disclosure" would be defined to include only disclosures on the public record and those that have been "disseminated broadly to the general public," with responses to Freedom of Information Act requests and exchanges with law enforcement expressly excluded from the definition. An action would be deemed to be "based upon" a public disclosure only when all elements of liability are "derived exclusively from" the public disclosure. The much-litigated "original source" language

would drop out of the provision, as the new definition of "based upon" would have the effect of carving out complaints by original sources.

These changes, which endorse the interpretations in several of the opinions cited above, will conform the statute to original Congressional intent, leaving in place incentives for all but merely opportunistic relators. They will permit potential qui tam plaintiffs and their counsel to investigate diligently the merits of a potential case before filing suit without concern that such investigation will trigger the public disclosure bar. These changes will prevent defendants from delaying or obstructing litigation of the merits and wasting the resources of the government and the judiciary by repeated, often frivolous, challenges to the court's jurisdiction. Finally, they will empower the government, and not the defendant, to decide whether it is in the public interest for the relator to pursue a qui tam action notwithstanding public knowledge of the defendant's wrongdoing. As the recently decided *Rockwell* case illustrates, the government does not always favor a dismissal on "public disclosure" grounds but can be powerless to prevent it and retain the benefit of the relator's efforts and resources when the option to squelch the case lies with the defendant.

B. Clarifying that the FCA Protects All U.S. Government Money and Property

1. The Bill's Proposed Amendment of the Liability Provisions

The statute currently imposes liability on anyone who, among other things:

- (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; or
- (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.

31 U.S.C. § 3729(a) (1) and (2).

The statute defines the term "claim" to mean "any request or demand, whether under a contract or otherwise,

for money or property which is made to a contractor, grantee, or other recipient if the United States provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c).

Notwithstanding the definition of "claim" set forth above, the Court of Appeals for the District of Columbia has ruled that FCA liability will lie only when the false claim has actually been presented to an employee or official of the United States. *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 492-493 (D.C. Cir. 2004), cert. denied, 544 U.S. 1032 (2005). In the opinion of the D.C. Circuit, false claims submitted to a federal government agent, contractor or grantee are not claims presented to the United States even if the agent, contractor or grantee pays the claims with federal funding in order to carry out the goals of a federal program.

In Section Two, through amendments to 31 U.S.C. § 3729(a), S. 2041 would clarify that the FCA imposes liability for any knowing false claim that would inflict financial damage on the United States, regardless of whether the false claim is "presented" to a U.S. Government employee. Key to liability would be whether the defendant's misconduct ultimately would result in a loss to the United States, with false claims on government grantees, contractors and administrative agents considered within the ambit of the Act whenever the United States would suffer an economic loss as a result of the defendant's malfeasance.

Thus, revised Section 3729(a) expressly would protect "Government money or property" from knowing false claims, false statements made to get false claims paid, and the other categories of misconduct set forth in Section 3729. In new Section 3729(b)(2), the proposed amendments would define "Government money or property" to include not only money "belonging" to the United States, but also money that the United States provides a contractor, grantee, agent or other recipient "to be spent or used on the Government's behalf or to advance Government programs."

This amendment would overrule *U.S. ex rel. Totten*, supra, and its progeny. The amendment would embrace several recent judicial decisions that have held that the

FCA should reflect Congress' intent to make a false claim actionable "although the claims were made to a party other than the Government, if the payment therefore would ultimately result in a loss to the United States." S. REP. 345 at 10. (See notes 11 and 12, *infra*.)

2. Congressional Intent Behind the 1986 Amendments

As noted above, the FCA defines the claims subject to the Act to include those "made to a contractor, grantee, or other recipient if the United States provides any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c). In the legislative history to this provision, which Congress enacted in 1986, the Senate Judiciary Committee explained that the definition was added to clarify that:

[a] false claim for reimbursement under the Medicare, Medicaid, or similar program is actionable under the act . . . A claim upon any Government agency or instrumentality, quasi-governmental corporation, or non-appropriated fund activity is a claim upon the United States . . . a claim is actionable although the claims or false statements were made to a party other than the Government, if the payment therefrom would ultimately result in a loss to the United States . . . a false claim to a recipient of a grant from the United States or to a State under a program financed in part by the United States, is a false claim to the United States.

S. REP. 345 at 9-10.

Moreover, the FCA applies to "circumstances where claims are submitted to state, local or private programs funded in part by the United States where there is significant Federal regulation and involvement." S. REP. 345 at 19-20.

3. The Totten Decision

Notwithstanding Congress' efforts in 1986 to make crystal clear that the FCA covers claims on grantees and quasi-governmental corporations, a divided panel of the Court of Appeals for the D.C. Circuit in *U.S. ex rel. Totten, supra*, ruled to the contrary, ignoring the the legislative history behind the definition of "claim." The

court held in *Totten* that Sections 3729(a)(1) and (a)(2) of the FCA do not impose liability for false claims submitted to a government grantee or quasi-governmental corporation even if the entity paying the false claims uses federal money to do so. According to that court, such liability will arise only if the false claims are then resubmitted to a government official or employee. At issue in the *Totten* case were alleged false claims submitted to Amtrak, a quasi-governmental corporation that is also a federal government grantee that has received billions of dollars from the federal government.

Justice Roberts, the author of the *Totten* court's majority opinion, has acknowledged that this was a difficult decision for the Court of Appeals that reasonably could have gone either way. During his Senate confirmation hearings for the position of Supreme Court Justice, Senator Grassley grilled Justice Roberts on why he had ignored the 1986 legislative history when ruling as he did. Justice Roberts acknowledged:

[I]t's certainly possible that the majority in that case didn't get it right. And the dissent, that was a very strong dissent, did get it right. . . . I'm happy to concede that it was among the more difficult cases I've had over the past two years. Any time Judge Garland disagrees, you know you're in a difficult area. . . . it's obviously to me, a case on which reasonable judges can disagree.¹²

The *Totten* decision has led a number of lower courts to rule that the FCA may not be used to remedy misconduct involving knowing false claims unless the defendant is dealing directly with a U.S. government official. These lower court rulings effectively create "fraud free zones" in a vast array of situations in which the federal government uses an outside entity - such as an insurance company or a state agency - to administer its programs. These decisions fly directly in the face of the expressed legislative intent in that they hold that the FCA is not

¹² Roberts, John. *Confirmation hearing on the nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary*, testimony before the U.S. Senate Committee on the Judiciary, 109th Congress, 1st Sess. September 12-15, 2005 on September 14, 2005. Washington, D.C.: Congressional Quarterly Inc., CQ Transcriptions. Available on: Lexis Nexis, U.S. Congress, Committee Hearing Transcripts; Accessed: 1/23/08.

available as a tool against Medicare and Medicaid fraud,¹³ against defense subcontractor fraud,¹⁴ or against fraud on local and state programs, even those "funded in part by the United States where there is significant Federal regulation and involvement."¹⁵ S. REP. 345 at 19-20 (citing an area in which Congress intended the FCA to be applicable.)

4. The Impact of *Totten*

As a result of the *Totten* decision, not only are the courts dismissing cases that involve significant financial losses for the United States, they also are discouraging the *qui tam* bar from bringing such cases. I can speak from personal experience. In 2007, due in large part to the *Totten* ruling, I considered and rejected a case involving a federally-funded project that was to be carried out by a local governmental entity. The general contractor had submitted allegedly false claims to the local government entity, which had paid the claims without knowing of the fraud. Likewise, in 2006, I considered and rejected a case involving a state agency program with substantial federal funding for reasons that included the difficulty of proving that the state agency passed on the principal contractor's allegedly false claims to the United States.

With an increasing amount of our federal government's operations "outsourced" to private contractors, it is more

¹³ See *U.S. ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302, 1305-06 (N.D. Ala. 2004), *aff'd*, 470 F.3d 1350 (11th Cir. 2006) (dismissing case involving nursing home claims on state Medicaid agency); *U.S. ex rel. Brunson v. Narrows Health & Wellness, LLC*, 469 F. Supp. 2d 1048, 1053 (N.D. Ala. 2006), (dismissing Medicare claims submitted to an insurance company hired by the federal government to administer the Medicare program.)

¹⁴ See *U.S. ex rel. Sanders v. Allison Engine Co.*, 364 F. Supp. 2d 710 (S.D. Ohio 2003), *rev'd by*, 471 F.3d 610 (6th Cir. 2006), *cert. granted*, 128 S.Ct. 491 (2007).

¹⁵ See, e.g., *U.S. ex rel. Rutz v. Village of River Forest*, 2007 West Law 3231439 (N.D. Ill. Oct. 25, 2007) (federal Bureau of Justice Assistance block grant to county); *U.S. DOT ex rel. Arnold v. CMS Eng'g*, 2007 U.S. Dist. LEXIS 9118 (W.D. Pa. Feb. 6, 2007) (U.S. Department of Transportation grant to Pennsylvania Department of Transportation); *U.S. v. City of Houston*, 2006 U.S. Dist. LEXIS 57741 (S.D. Tex. Aug. 16, 2006) (U.S. Department of Housing funding of City of Houston housing authority); *U.S. ex rel. Rafizadeh v. Cont'l Common, Inc.*, 2006 U.S. Dist. LEXIS 18164 (E.D. La. April 10, 2006) (U.S. grants to state Department of Social Services and state Department of Health & Hospitals.)

important than ever that Congress clarify that the FCA is designed to protect federal assets - whether disbursed by a U.S. government official or by a third party. As the Department of Justice warned the Court of Appeals in its briefs in the *Totten* case, interpreting the Act to require presentment of the false claim to a federal employee leaves "'vast sums of federal monies' without FCA protection." 380 F.3d 488 at 502 (2004).

The proposed definition of "government money and property" is a sound one: the focus is on the intended use of the assets as much as the source of the assets - not only must the assets originate with the United States, they must also be assets that are being held by an outside entity specifically to be used on the Government's behalf or to advance government programs. Contrary to the spurious arguments raised by the defense bar in opposition to this provision, the definition does not encompass the salaries of government employees or Social Security checks paid to the aged. Once paid to government employees and Social Security recipients, funds that originated with the United States are no longer being held "on behalf of" the government or "to advance a government program."

5. Judicial Decisions Supporting the Proposed Clarification

This proposed amendment to the liability provisions, which would overrule the *Totten* Court's ruling that "presentment" to the United States is a precondition of FCA liability, finds support in compelling opinions issued by several highly respected federal judges. For example, in his dissent in the *Totten* case, Judge Merrick Garland opined that the Court's interpretation of Section 3729(a)(2) was "inconsistent" with the plain text of the statute, and "irreconcilable" with the legislative history. He noted that:

Under the Court's interpretation, the government cannot recover against a contractor that obtains money by presenting a false claim to a federal grantee - even if every penny paid to the contractor comes out of an account comprised wholly of federal funds - unless the grantee 're-presents' that false claim to a federal employee.

380 F.3d 488 at 502-03.

Writing the majority opinion for the court, Judge Julia Gibbons of the 6th Circuit Court of Appeals also rejected the analysis of the majority in *Totten*. The case before the 6th Circuit involved alleged false claims by Allison Engine, Inc. as a subcontractor on a Department of Defense (DOD) contract. Overruling the district court's dismissal of the case due to the fact that the subcontractor was not in contractual privity with the federal government, Judge Gibbons ruled that:

Congress intended the 1986 amendments to overrule restrictive judicial interpretations of the FCA and increase the reach of the statute. By re-wording the statute and adding subsection (c), Congress accomplished this expansion, including making the FCA applicable to cases in which the government sustains a financial loss, regardless of whether the false claim is actually presented to the government. Reading a presentment requirement into subsections (a)(2) and (a)(3) is contrary to this purpose and contradicts the plain language of the statute.¹⁶

The Supreme Court will consider the defendant's appeal of this Sixth Circuit ruling in its upcoming term.¹⁷

C. Clarifying That the FCA Extends to Claims Against U.S.-Administered Funds

The language of the FCA is silent on whether it protects funds administered by the United States. As noted above, the Act speaks of claims "presented to" the United States "for payment or approval" and claims "paid or approved by the Government." 31 U.S.C. §3729(a)(1) and (2). As a matter of practice, the *qui tam* bar and the Department of Justice have interpreted the Act to protect U.S.-administered funds, and have enforced the Act accordingly. The United States has utilized the FCA to recover hundreds of millions of dollars from oil, gas and

¹⁶ *U.S. ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610, 615 (6th Cir. 2006), cert. granted, 128 S.Ct. 491 (2007.)

¹⁷ Other supportive opinions by esteemed judges are those by Judge Paul Cassell in *U.S. ex rel. Maxfield v. Wasatch Constructors*, 2005 U.S. Dist. LEXIS 10162 at * 22 (D. Utah May 27, 2005) and by Judge Harry D. Leinenweber in *U.S. ex rel. Tyson v. Amerigroup Illinois, Inc.*, 2005 U.S. Dist. LEXIS 24032 at *9 (N.D. Ill. Oct. 17, 2005).

mining companies that have underreported the royalties owed under leases on Indian land.¹⁸

The availability of the Act as a remedy in these circumstances is now at risk. In a recent decision in a high profile case involving Iraq reconstruction fraud, a United States district court held that the FCA does not reach false claims on money administered but not owned by the U.S. Government. See *U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617, 636-641 (E.D. Va. 2005). This decision not only inhibits the use of the FCA to address Iraq reconstruction fraud, it also could negatively affect the ability of the government to pursue the many false claims cases involving fraud on oil, gas, mining and other leasehold interests administered by the U.S. on behalf of Native American tribal authorities.

In Section Two, S. 2041 would clarify that the FCA covers funds administered by the United States, such as funds of the Coalition Provisional Authority or Native American funds. The amendments do this by defining the "Government money or property" protected by the Act to include not only funds belonging to the United States or provided to a third party to be spent on the Government's behalf, but also funds managed by the United States for an administrative beneficiary, as that term is defined in new paragraph (b) (4).

When the Government affirmatively takes on the role of administering the assets of another entity, it does so because it sees its interests and goals as inextricably intertwined with the interests and goals of that other entity. In those situations, the FCA should apply since false claims on the administered fund damage the interests and goals of the United States. If Government-administered funds are not protected by the FCA, the interests of both parties are deprived of the protection of the Government's primary remedy against fraud.

¹⁸ See, e.g., *Kennard v. Comstock Res., Inc.*, 363 F.3d 1039 (10th Cir. 2004), cert. denied, 545 U.S. 1139 (2005); *U.S. v. Chevron*, 186 F.3d 644 (5th Cir. 1999); *U.S. ex rel. Wright v. Agip Petroleum Co.*, 2006 U.S. Dist. LEXIS 93415 (E.D. Tex. Dec. 27, 2006); *U.S. ex rel. Koch v. Koch Indus.*, 57 F. Supp. 2d 1122 (N.D. Okla. 1999).

D. Knowing Retention of U.S. Overpayments and Unauthorized Diversion of Government Funds or Property

In addition to imposing liability on those who knowingly make or cause false claims, or false statements in support of false claims, the FCA also imposes liability on anyone who:

has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt.

31 U.S.C. § 3729(a)(4).

Through long term practice under the Act, qui tam counsel such as I have seen that this provision could be improved by express reference to those situations in which a recipient of government funds learns after receiving the money that it was overpaid or was ineligible to receive the money in the first place, and, knowing this, fails to report the overpayment or return the funds to the government. This situation comes up most frequently in the health care context, in which providers learn from employees that they have been overcharging the government for years (by using the wrong billing code, for example).

This provision also could be improved by addressing those situations in which a company submits a proper claim for government funds, and then diverts the funds for unauthorized purposes. Examples would include research institutions using government grant money for expenditures unrelated to the grant or defense contractors using up-front payments by the military to pay bribes or kickbacks.

By adding language to the liability provision found at 31 U.S.C. Section 3729(a)(4), the bill would clarify that the FCA covers situations in which a person who already has obtained government funds either diverts the funds to unauthorized uses after obtaining the funds, or holds onto the funds after learning that they were not entitled to receive them in the first place. Thus, the bill would amend Section 3729(a)(4) so that it imposes liability on

anyone who:

has possession, custody, or control of Government money or property and, intending . . . to retain overpayment [sic] or knowingly to convert the money or property, permanently or temporarily, to an unauthorized use, fails to deliver or return, or fails to cause the return or delivery of the money or property, or delivers, returns or causes to be delivered, or returned less money or property than the amount due or owed.

I support this amendment because it wisely anticipates the need for the Department of Justice to have a statutory mechanism in place to recover funds that have been advanced to an entity for one purpose, and are then employed for a second, unauthorized purpose, including, for example, bribes, kickbacks or personal enrichment. During wartime, funds are often disbursed on an emergent basis in advance of the work being performed, and without the usual required certifications of performance under the contract. This amendment would give the United States a means to recover from a contractor that knowingly used government money for an unauthorized purpose.

I also support the amendment because it implements the Supreme Court's admonition that Americans should "turn square corners" when doing business with the Government.¹⁹ Health care providers and others who learn after the fact that they have obtained government money to which they are not entitled should be required by law to return the money, and should be held accountable under the FCA if they fail to do so. With our Medicare, Medicaid and other Social Security programs struggling for financial solvency, it is imperative that we put in place all available checks on fraud.

E. Prohibiting Release of FCA Claims by Private Parties

The proposed legislation is aimed at a new tactic used by companies subject to internal accusations of fraud: terminating potential informants with severance packages that include covenants not to sue. While most

¹⁹ *Heckler v. Community Health Servs.*, 467 U.S. 51, 63 (1984), citing *Rock Island, A & L.R. Co. v. U.S.*, 254 U.S. 141, 143 (J. Holmes).

jurisdictions strike down these covenants as contrary to public policy when a company tries to use them to bar a FCA action, the lack of clear language on this issue in the FCA creates opportunities for companies to discourage potential whistleblowers from coming forward. It also provides companies with an avenue to retaliate against those who do come forward, and to delay the progress of the FCA prosecutions they initiate, by seeking to enforce these covenants.

In my own practice, I have seen the chilling effect that these covenants can have on those considering suits under the FCA. I have been contacted by attorneys representing individuals who either have signed, or have been asked to sign, a covenant not to sue, and who were unsure whether such a covenant would bar their contemplated qui tam lawsuit. I am confident that many individuals never make that initial call to a lawyer due to their incorrect assumption that these covenants prevent them from suing their company even when doing so on behalf of the United States.

To address this issue, the bill adds a new provision stating that: "No claim for a violation of section 3729 may be waived or released by any action of any person, except insofar as such action is part of a court approved settlement of a false claim civil action brought under this section."

I strongly support this provision. First and foremost, it alerts potential whistleblowers early on - when they are considering whether even to call a lawyer - that private covenants cannot interfere with their ability to bring a FCA lawsuit on behalf of the United States. Prior to hiring a lawyer, potential informants are much more likely to consult the text of the FCA than they are likely to research and review the case law on contracts that violate public policy. As a result of this statutory change, more potential informants will come forward in the first instance. Second, with this amendment, once a case has been filed, defendants cannot rely on conflicting case law, or case law that they might try to distinguish, to penalize or bar a qui tam lawsuit.

F. Protecting Company Contractors and Agents from Retaliation and Protecting Steps Taken to Stop FCA Violations and Association with Whistle-Blowers

The FCA protects employees from retaliation through discrimination in the terms of their employment as a result of steps they have taken to further a qui tam action. Thus, the statute currently provides for monetary damages and other relief for:

"Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under [Section 3730]. . . ."

S. 2041 would expand the class of protected persons to include contractors and agents, as well as employees. It also would expand the class of protected activity to include: i) steps taken towards stopping the violation of the FCA and, ii) association with those filing FCA actions or attempting to stop violations of the FCA.

These changes are badly needed. Many potential whistleblowers learn of violations of the FCA as contractors or agents of the defendant, rather than as employees. For example, many of the cases alleging fraud on Medicare or Medicaid are brought by physicians against the hospitals and clinics who employ them through contracts. These individuals are as deserving of protection from retaliation as those who fall strictly within the definition of an "employee." Moreover, the anti-retaliation provision encourages informants to come forward. While informants recognize they will become unemployable within their industries once it becomes known that they have blown the whistle, the anti-retaliation provision of the Act provides somewhat of an "insurance policy" against financial devastation and may serve to deter retaliation.

It is also good public policy to amend this provision so that it protects those who try to stop misconduct from the inside, by using internal compliance programs, for

example. Whistleblowers should be supported in their efforts to seek to correct the defendant's misdeeds through appropriate corporate channels before taking the more extreme step of bringing a qui tam lawsuit. Most of the whistleblowers I have represented or considered representing were employees who observed improper practices, tried to put an end to them within the company or organization, and were ignored, rebuffed, threatened with termination, or terminated. Typically, they explored the possibility of a FCA lawsuit only after failing to bring about change from within.

The wording of S. 2041 regrettably drops some of the prior language of the statute which provided protection against retaliation for those who take steps toward filing a qui tam lawsuit. This language should be restored to the bill so that the existing protections are not inadvertently removed.

G. FCA's Statute of Limitations Applicable to Section 3730(h) Actions

Another important clarification in S. 2041 pertains to the appropriate statute of limitations for lawsuits brought under the FCA against those who retaliate against whistleblowers by discriminating against them in the terms of employment. Section 3730(h) of the FCA provides a remedy for whistleblowers suffering such retaliation. Section 3731(b)(1) of the Act permits any "civil action under Section 3730" to be brought by the later of six years from the violation of Section 3729, or three years from government discovery of the violation, not to exceed ten years from the violation.

The Supreme Court recently held that the language in the FCA's statute of limitations that provides that the period to bring a claim begins to run on the date of "the violation of Section 3729" means that Congress did not intend the FCA's statute of limitations to apply to anti-retaliation claims, which arise under Section 3730 rather than under Section 3729. See *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 415 (2005). The Supreme Court so ruled notwithstanding the fact that Congress drafted Section 3731 so that it expressly applies to "any" civil action brought under Section 3730. Identifying a number of state statutes of limitations as examples, the Supreme Court held that individuals bringing Section 3730(h) claims must comply

with the state statute of limitations applicable to the most "analogous" sort of action available under state law.

The bill amends Section 3731(b) to provide expressly that the statute of limitations for anti-retaliation claims brought under Section 3730(h) of the Act is the same as the statute of limitations for qui tam actions brought on behalf of the United States. The proposed amendment is advisable to protect the viability of the anti-retaliation remedy in Section 3730(h). It is also advisable to alleviate the pressure on whistleblowers to file qui tam actions prematurely to comply with the extremely short statutes of limitations for wrongful discharge found in state law.

The effect of the *Graham County* decision is that many whistleblowers who have suffered retaliation will have to file their anti-retaliation claims within an extremely short period following the retaliatory action in order to invoke the FCA's remedy. State statutes of limitation for unlawful discharge are ordinarily quite short. In fact, in Texas, where I practice, it is possible that the 90 day statute of limitations for causes of action based on retaliation against public employees might apply; in *Graham County*, Justice Thomas, who wrote the majority opinion, identified this state statute along with one other as "the likely analogous state statutes of limitations." 545 U.S. at 419, n. 3 (citing to TEX. GOVT. CODE ANN. § 554.005 (West 2004)). Examples of other extremely short statutes of limitations considered analogous by the *Graham County* Court are the following:

*Connecticut's 90 day statute of limitations for retaliation actions by whistleblowers (CONN. GEN. STAT. 31-51m (2007)),

*Florida's 180 day statute of limitations for retaliation actions by public whistleblowers (FLA. STAT. §§ ch. 112.3187(8) (a) (2007), ch. 448.103(2007));

* Michigan's 90 day statute of limitations for retaliation actions by whistleblowers (MICH. COMP. LAWS ANN. § 15.363(1) (West 2008));

* New York's one year statute of limitations for actions to enforce a statute "given wholly or partly to any person who will prosecute" (N.Y. CIV. PRAC. LAW ANN. § 215(4) (West 2003)); and

*Ohio's six month statute of limitations for retaliation actions by whistleblowers. (OHIO REV. CODE ANN. § 4113.52(D) (Lexis 2008)).

The reason this decision reduces the effectiveness of the anti-retaliation remedy is that it will force many potential whistleblowers to give up this remedy so that they do not forfeit their ability to pursue a qui tam action in the manner contemplated by the statute. Individuals with causes of action under Section 3730(h) ordinarily have potential causes of action under Section 3729. However, the investigation and preparation of a qui tam complaint almost always requires much more time and work than the preparation of an anti-retaliation complaint.

In my experience, it is the extremely rare qui tam case that can be put together from "soup to nuts" in the short periods of time found in many of the state statutes of limitations for retaliatory discharge. To file a qui tam case, an individual must first locate counsel who specializes in qui tam law. Given the significant financial risks of taking on these complex cases, potential qui tam plaintiffs often find it necessary to present their information to several successive attorneys over a period of many months before finding one who will take the case. During the process of trying to retain counsel, and thereafter, considerable effort is expended researching applicable program or contract rules, which are often complicated and difficult to identify. In addition, potential relators may spend months locating, assembling and analyzing the evidence of the false claims. Often these individuals approach other witnesses to ask for their cooperation in obtaining additional documents or testimony. With the federal government's investigative resources as overburdened as they are, skilled qui tam counsel always endeavor to present the government with as much evidence as possible at the time of the qui tam filing. The chances of government interest in the case increase exponentially with the quantity of probative evidence submitted alongside the filing.

While in theory a potential qui tam relator could file his wrongful termination case in a timely fashion, and then continue to work on preparing a possible qui tam case, this course of action has serious disadvantages. First and foremost, the Section 3730(h) action, which inevitably would discuss the misconduct about which the individual had

complained internally, would have to be filed on the public record. The FCA does not provide for a seal on anti-retaliation claims. As a result, the defendant would learn that the individual had "blown the whistle" before the Department of Justice had had an opportunity to investigate the allegations using covert means, as contemplated by the seal on qui tam actions. Second, the public disclosure rulings discussed above pose a serious risk that the anti-retaliation case would be viewed as a "public disclosure" barring a later qui tam case "based" on the allegations set forth in the anti-retaliation case.

Accordingly, unless this proposed legislation is enacted, the *Graham County* decision will limit many potential informants to three undesirable alternatives: i) file a wrongful discharge case in open court, thereby prejudicing the ability of the U.S. government to investigate any later-filed qui tam action and risking the effect of the "public disclosure bar"; ii) forego the wrongful discharge claim so that the allegations of misconduct can be filed under seal as part of a carefully-prepared qui tam case; or, iii) rush to file a qui tam action before the running of the state statute of limitations on the anti-retaliation claim, without engaging in adequate investigation and research to substantiate the merits of the qui tam claim.

H. Relation Back of Government Complaints

The FCA provides for qui tam plaintiffs to file their cases under seal so that the United States may investigate the allegations and decide whether to intervene while the matter remains confidential. The statute provides for a sixty day period for the intervention decision, unless the court grants an extension of this time for "good cause shown." As a practical matter, the Government rarely, if ever, makes its intervention decision within sixty days. The Government ordinarily applies for repeated extensions of the seal, and makes its decision within two to five years of the original filing. The lengthy period of Government investigation is a product of several factors: i) the complicated and inherently secret nature of financial frauds, which often requires the Government to use multiple subpoenas and review hundreds of boxes of documents to uncover or confirm the truth; ii) the tendency of defendants to engage counsel who employ sophisticated tactics to delay the investigation and postpone the day of reckoning; and, iii) the increasingly

scarce resources available to the Government to investigate the hundreds of qui tam cases filed every year.

When the Government does decide to intervene in a case, it typically files an amended complaint that reflects some of the additional information and evidence gathered in its investigation, and, in some cases, refines the legal theories set forth in the relator's complaint. Since the overall statutory scheme provides for the relator to sue "on behalf of" the United States, it has been reasonable, until recently, to assume that the Government's amended complaint "relates back" to the qui tam filing, for statute of limitations purposes, just as if the original filing had been filed by the Government itself. Federal Rule of Civil Procedure 15(c)(2) allows amended pleadings to relate back when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

A recent Court of Appeals decision, however, casts doubt on the relation-back assumption. In *U.S. v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 268-70 (2nd Cir. 2006), the Second Circuit ruled that the United States may not avail itself of Fed. R. Civ. P. 15(c)(2) when amending a qui tam plaintiff's complaint. The implication of this ruling is that the United States sometimes will be forced to forego a thorough investigation of the merits of qui tam allegations in order to ensure that it does not lose claims due to the running of the statute of limitations. No public policy purpose is served by such a rule if the defendant is on notice of the alleged wrongdoing, as it almost always is once the government's investigation is launched through subpoenas and witness interviews.

S. 2041 would add a new paragraph (b)(3) to Section 3731 to clarify that, when the United States intervenes in a qui tam action and files a complaint embodying allegations that arise out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original qui tam pleading, the United States' complaint "relates back" to the date of the qui tam complaint for statute of limitations purposes. The new statutory language would be consistent with the rules on "relation back" of pleadings in non-qui tam cases, as set forth in Federal Rule of Civil Procedure 15(c)(2).

As a practical matter, this amendment is necessary to preserve the FCA as an effective tool. With the shortage of investigative resources, it is now common for qui tam cases to remain under seal without a government intervention decision for three to five years. I have represented clients in at least two cases that remained under seal even longer. During this period of time, the statute of limitations is likely to run on many of the claims alleged in the qui tam complaint unless they are, in effect, tolled for the United States by the filing of the relator's claim on its behalf.

I. Delegation of CID Authority

The FCA was amended in 1986 to give the Department of Justice an investigative tool: civil investigative demands, or "CIDs," which are administrative subpoenas for documents, interrogatory responses and sworn testimony that may be used to investigate allegations of potential violations of the FCA. See 31 U.S.C. § 3733. Under the current statute, the Attorney General must review and issue every CID. 31 U.S.C. § 3733(a)(1). The Attorney General may not delegate this authority. *Id.*

The use of some form of Department of Justice compulsory process is increasingly necessary for effective investigation of FCA allegations. Program agencies are short on resources and often are unable to assign investigators even to patently meritorious cases, let alone issue Office of Inspector General subpoenas. Congress has enacted statutory restrictions on interviewing former and current employees of defendants without going through counsel, thereby making it difficult for the government's investigators to interview many of the key witnesses.

Regrettably, however, due to the statutory requirement that the Attorney General must personally issue every CID, the Department of Justice very rarely uses this investigatory tool. My understanding is that Assistant U.S. Attorneys and Main Justice trial attorneys are disinclined to request the issuance of CIDs because they have heard of CID request memos that languished in the bureaucracy for months without action. At one point just a few years ago, attorneys in the Commercial Litigation Branch advised one of my colleagues that CIDs sent to the Attorney General for approval and signature were not being acted upon; for over a year, they were neither reviewed nor approved. I am aware of very few instances in which the

Department of Justice issued or even considered issuing a CID to investigate my clients' allegations.

S. 2041 would permit the Attorney General to delegate the authority to issue CIDs. This is a badly needed "fix" to the FCA that I understand is desired by both the qui tam bar and the Department of Justice.

II. Other Needed Changes

A. Permissible Uses of CID Material

There is a second reason why the Department of Justice has been reluctant to employ the CID authority. My understanding is that Department attorneys are concerned about language in the FCA that limits access to CID material to government "custodians" and "false claims law investigators." They see a risk that a court might conclude that such this language implicitly precludes them from showing the CID material to fact and expert witnesses, consultants and the parties. This is unfortunate because the qui tam relator and other witnesses and experts often are uniquely qualified to assess whether a defendant has responded fully to a CID, or to explain the meaning, function or context of a produced document. I have consistently been told by government attorneys, however, that they can not disclose materials obtained through CIDs to me or to my clients, even though they covet our assistance in reviewing the often voluminous materials for responsiveness and completeness, and need our help in analyzing the meaning and significance of the materials.

While statutory language does permit Department of Justice attorneys to make "official use" of CID material in "other cases and proceedings," they are disinclined to rely on this language since it references "other" cases and proceedings rather than "False Claims Act" cases and proceedings. Without express authority to disclose the CID material to fact witnesses, experts and the parties to an FCA proceeding, they fear that they may be unable to interpret accurately and efficiently the documents and information produced and, accordingly, that time spent on CID requests may be largely unproductive.

I urge the Committee to expand the bill to define the uses that the Department of Justice may make of CID material in false claims law proceedings. Surely, Congress

intended the Department of Justice to use the material to develop further evidence, to litigate the case and/or to resolve the allegations. Accordingly, the statute should state clearly that the Department of Justice may use CID material for those purposes.

B. Clarifying that Qui Tam Cases May Proceed Without Billing Documents

The majority of Circuits have ruled that FCA complaints contain averments of fraud, and consequently must be pled with particularity pursuant to Federal Rule of Civil Procedure 9(b). Unfortunately, however, in addressing the question whether qui tam complaints satisfy Rule 9(b), many of these Circuit Courts have required a degree of detail that could not be known to anyone outside a defendant's billing or audit department, insisting that qui tam complaints not only describe the fraud scheme with particularity, but also describe the false claims submitted to the Government in such detail as essentially to require access to billing documents in order to provide claim numbers, dates, patient names, procedure codes, etc.²⁰

These rulings significantly undercut the viability of the FCA, rendering it extraordinarily difficult for many insiders with reliable knowledge of fraud to bring cases that will survive a motion to dismiss. For example, because compartmentalization of functions is common in most organizations, operational personnel who are knowledgeable about the organization's fraud scheme and how it works often have no involvement with the billing process and thus cannot provide such details as the dates on which the defendant sent false invoices to the government. Without such details, that person's qui tam complaint would be vulnerable to dismissal for lack of particularity under many court decisions.

²⁰ See *U.S. ex rel. Bledsoe v. Cmty. Health Sys., et al.*, 501 F.3d 493, 504-505 (6th Cir. 2007); *U.S. ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 559 (8th Cir. 2006), cert. denied, 127 S. Ct. 189 (2006); *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield*, 472 F.3d 702, 727 (10th Cir. 2006); *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006), cert. denied, 127 S. Ct. (2006); *U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 226-234 (1st Cir.), cert. denied, 543 U.S. 820 (2004); *In re Genesis Health Ventures, Inc.*, 112 Fed. Appx. 140, 144 (3rd Cir. 2004); *U.S. ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1308-1309 (11th Cir. 2002), cert. denied, 537 U.S. 1105 (2003).

Courts apply the particularity requirements of traditional fraud cases to False Claims Act pleadings, but there is an important distinction between those two kinds of cases that should be noted and addressed. In a traditional fraud case, the plaintiff complains of the fraud perpetrated on him by the defendant. It is not surprising, therefore, that he is expected to allege in some detail the defendant's fraudulent interactions with him. In a False Claims Act case, on the other hand, the plaintiff complains of the fraud perpetrated by the defendant on a third party - the government. In that circumstance the plaintiff may be very knowledgeable about the fraud scheme and how it works, but he may quite understandably lack access to some of the transactional details he would possess if he were the defrauded party. Defendants are entitled to fair notice of the transgressions they are alleged to have committed, but hyper-technical pleading requirements that serve no purpose but to defeat False Claims Act actions without regard to the merits of a claim disserve both the remedial purposes of the Act and the public interest.

Congress should amend the Act to overrule these strict application decisions. Congress could do so without placing FCA cases outside the ambit of Fed. R. Civ. P. 9(b), by providing that a qui tam case may proceed so long as the particulars alleged in the complaint are sufficient to put the defendant on notice of the nature of the alleged misconduct, and that the specifics of the claims documentation need not be pled if other information serves this purpose.

TESTIMONY OF TINA MARIE GONTER
BEFORE THE COMMITTEE ON THE JUDICIARY
OF THE UNITED STATES SENATE

**“The False Claims Act Correction Act (S. 2041): Strengthening the
Government's Most Effective Tool Against Fraud for the 21st Century”**

February 27, 2008

Good morning, Mr. Chairman and Members of the Committee. My name is Tina Gonter. I am what many people call a whistleblower. I used to be uncomfortable with that term, but now I understand that it means someone who has no choice but to do the right thing when others are willing to turn a blind eye. In my case, what dozens of others were willing to let slide was the safety of the sailors aboard the submarine fleet of the United States Navy. The False Claims Act allowed me to report terrible misconduct by a subcontractor which had gone on for years. Much of this misconduct was known to the prime contractors. As a result of my case, two senior executives of a defense contractor went to federal prison, their company was, we hope, rehabilitated, and the Navy had the opportunity to assess the extent to which it was harmed by delivery and installation of thousands of potentially-nonconforming submarine valves.

Despite overwhelming evidence that Navy prime contractors General Dynamics and Northrop Grumman knew what was going on at Hunt, the government did not intervene in our case against them. Because the False Claims Act allows *qui tam* relators to go forward on their own when the government decides not to intervene, we were able to carry our case forward to resolution. If this right did not exist, our case would have disappeared. We would have gotten almost nothing for reporting this massive fraud against the taxpayers and spending four years of our lives helping the

government investigate the extent of the fraud.

Also, if the False Claims Act did not permit cases against subcontractors, then Hunt Valve would have been immune for its massive fraud against the taxpayers.

I am here today to ask that you make sure that those who know of danger to American troops or American citizens be able to come forward with confidence that the False Claims Act lives up to its full potential by ensuring that relators can carry on cases against government contractors even when the government decides not to participate; by ensuring that subcontractors and suppliers who cheat the taxpayers not be able to hide behind the skirts of prime contractors; and by ensuring that the False Claims Act's protection of those who are retaliated against for doing the right thing is as strong as possible.

Background.

After the *U.S.S. Thresher (SSN 593)* and all 129 men aboard were lost in 8,400 feet of water on April 10, 1963, because a pipe joint failed, the Navy imposed the strictest quality requirements in history on suppliers who choose to make parts for submarines. This program is called "Level One/SUBSAFE," and requires cradle-to-grave documentation on all major systems. The point of the system is that if a valve or other part has a problem, documents exist which allow the Navy to trace that problem back to its source and figure out what other parts are affected and what submarines may be impacted.

My husband, Bill, and I worked for many years as civilian employees of the Department of Defense, until 1996. We were assigned to the Quality Assurance

Department of Norfolk Navy Shipyard. My title was Nuclear Mechanical Systems Inspector. I learned all about Level One/SUBSAFE because it was my job to ensure that its strict standards were met. I completed a four-year quality assurance apprenticeship with the Department of the Navy. I held Level 2 certifications in Radiographic Inspection, Material Certification, Visual Inspection, Magnetic Particle Inspection, Liquid Penetrant Inspection, and Precision Measurement Devices. I was trained and/or certified in ISO 9000, Supplier Source Inspections, QC Marking and Material Verifications, Receipt Inspection, Level 1 Material Handling, Storage, Inspection and Certification, Valve Repair Inspection, Hydrostatic Testing, Welding Procedures and Joint Design.

While at the Shipyard, my responsibilities included verifying that the paperwork relating to valves and other components to be installed on Navy submarines was in order. Once a valve is assembled, many critical surfaces and components are not accessible, and the certifications and inspection reports which are completed by the manufacturer are the only available evidence of what lies beneath the surface.

In 1996, Bill, a Vietnam combat veteran of the United States Navy, and I decided to move to Rogers, Ohio, where he had grown up. He had inherited some land from his father and we planned to build our dream house. Our plans for an early retirement were dashed when I was diagnosed with cancer. My treatment wiped out our savings. Once I recovered, we both looked for jobs.

In mid-1999, Bill got a job at Hunt Valve Company in Salem, Ohio, close to Youngstown. Hunt made valves for nuclear submarines and the uranium enrichment

process. These are not valves like on a kitchen sink: Some of them are six feet across, weigh several thousand pounds and cost tens of thousands of dollars. Others are smaller, but all the valves, no matter what size, are to be manufactured to precise standards, and inspected to be sure that those precise standards are met.

Bill and I knew about Hunt from our work at the Navy Shipyard and believed that it was a reputable company.¹ Bill's job involved reviewing paperwork and on their face, Hunt's paperwork seemed to be in order.

The Truth About Hunt.

A few months later, I got a job at Hunt. My title was Military Quality Assurance Manager. Supposedly, my job was to help make sure that Hunt's production of critical submarine valves complied with the Navy's strict quality and manufacturing

¹ According to a DoD press release regarding the conviction of one of Hunt's senior executives:

Hunt Valve is a major supplier of valves and valve parts to the U.S. Navy. These valves are used in Level I/SUBSAFE and non-Level I applications. Hunt Valve also marketed valves under the brand names of Union Flonetics, WAECO Valves, Morland Valves and PJ Valves. From 1993 to 2003, Hunt Valve sold approximately 40,000 valves to the Navy or prime contractors of which approximately 15,000 were Level I/SUBSAFE.

Hunt Valve supplied valves directly to the Navy and to prime contractors of the Department of Defense. The company also sold spare valves and valve parts directly to the government through the Naval Inventory Control Point (NAVICP), Mechanicsburg, PA and the Defense Supply Center Columbus (DSCC), Columbus, OH. These valves are used on five Navy programs including Seawolf class submarines, Virginia class submarines, AEGIS class Arleigh Burke guided missile destroyers, nuclear-powered aircraft carriers and the amphibious transport dock. Hunt Valve also supplied valves to the Department of Energy and the United States Enrichment Corporation, a certificate of the Nuclear Regulatory Commission. These valves are used on containers that store and transport uranium hexafluoride (UF6) and depleted uranium hexafluoride (DUF6).

requirements. I was excited to be back in the submarine quality-assurance business.

Within just a few days, I began to suspect that Hunt was committing fraud. Its personnel routinely falsified certified paperwork, skipped inspections, and cheated on production. They used the wrong materials and did not supervise their subcontractors. Once I started trying to get my arms around the scope of the problem, I learned that these things had been going on for more than a decade without anyone doing anything about it, much less telling the Navy about these systemic problems. Hunt was devoted to creating paperwork which looked great but had little to do with the valves it shipped.

Hunt was a disaster waiting to happen.

As a former civilian Navy Inspector, I was shocked at the extreme level of violations I saw. I was even more shocked that dozens of people—including employees from General Dynamics who were actually on-site at Hunt most days—not only knew about these problems, but had watched it happen for years. But nobody did anything about it, and bogus valves just kept shipping out. I made my concerns known to management, who ignored me—they knew full well what they were doing. When I attempted to order that things were done correctly, my instructions were ignored. I knew that the men and women aboard our nuclear submarines and ships were exposed to the risk that a Hunt valve would fail at sea. I began taking copies of documents home because I was afraid that evidence was being changed on a daily basis to hide the problems which I saw before my eyes.

2001: Blowing the Whistle.

Because I had heard about the False Claims Act, I contacted Rick Morgan, a lawyer who had experience with the False Claims Act and with quality systems. At first, he did not believe that things could possibly be as bad as I said. He and his partner Jennifer Verkamp, spent more than a month working with me to understand why I was so concerned about what was going on at Hunt. Then Rick set up a meeting with agents of the Defense Criminal Investigative Service.

My husband and I met with DCIS Agents Jay Strauch and Mike Hampp in early March 2001. That meeting, which was the first of too many to count, started after work and lasted until late that night. Believing I had only one opportunity to convince the government of the problems, I poured out my story to the agents, who expressed concerns that if my allegations could be proved, the impact to the Department of Defense was serious. Prior to the meeting, my lawyers had helped me organize the documents I had copied and make notes of what was happening and the agents seemed convinced that there were serious issues with Hunt Valve. The agents explained that a case like this, their ability to prove the allegations would be greatly improved if I would agree to wear a tape recorder and record conversations with Hunt Valve and General Dynamics employees. Although I was fearful of wearing a recorder, I knew I had to do it. They had brought what they called "consensual monitoring" equipment with them, and I left the meeting with a miniature tape recorder and body microphone. I was "enrolled as a confidential source" for the Department of Defense in a criminal investigation of Hunt Valve Company and its customers.

For the next several months, I wore the recorder under my clothes every work day. Before I went to work in the morning, I had to make sure that the recorder was securely strapped under my clothes so that it could not be seen, and had to make sure that it operated properly. I spent each day trying to do my best to make sure that defective valves did not ship out of Hunt while also engaging my co-workers and others in conversations about the fraud that they were committing. If there was a lot going on, I would have to go into the restroom and change the tape in order to get all that was said. We made copies of documents showing the use of bad parts or procedures, or skipped or falsified inspections, when we could, and carried them under our clothes or in files to hide them in a box so that the agents could find them later. Every night, I had to catalog the day's tapes, make notes about what topics were discussed, and talk to my lawyers and the investigators about what had happened that day. Even so I knew that there was much more fraud at Hunt than I could ever document. I was sometimes physically ill from the stress and fear of these activities, and of course my husband was worried sick about me and the future of our family. I recorded hundreds of hours of conversation which filled almost 8,000 transcript pages.

In April 2001, my husband and I filed a *qui tam* case under the False Claims Act. From the beginning, we put enormous resources into our case. The government did not have the resources to transcribe all the tapes, and my lawyers helped with that; in addition, Mary Jones, their paralegal, and I each listened to every tape and compared it to the transcripts. This took thousands of hours. My lawyers were able to dedicate so much effort to our case because they not only believed in our case, but

knew that if we won our False Claims Act case, with or without the government, the defendants would have to pay my legal fees.

Bill and I feared constantly for our jobs and our personal safety. We were always looking over our shoulders and I worried every day that someone would figure out that I was taping. I had a recurrence of cancer, and major surgery. I knew that chemotherapy would make me sick, and so I skipped those treatments and went to work earlier than my doctors recommended because I knew how important the government's investigation was, and that without my tapes that investigation would not proceed.

It is impossible to exaggerate how bad things were at Hunt. For example, Hunt's janitor routinely did inspections of valves and valve parts—something which was never documented but which my tapes proved to be true. When the Quality Manager used fingernail polish to trick a General Dynamics inspector, his bragging about it was recorded for all time. And when welders admitted that they cut corners all the time, the tapes backed up my observations.

Although what was going on at Hunt made me sick, I was even more troubled by the response of General Dynamics and Northrop Grumman, which were the prime government contractors. General Dynamics had an employee named Harry Arnold who worked onsite at Hunt Valve. Mr. Arnold and I talked frequently about how bad things were. He told me that he never had any confidence in Hunt's ability to produce valves which met the Navy's requirements. Another time, he told me he had "lost all confidence" in Hunt. I recorded many statements by Mr. Arnold, and many conver-

sations between him and Hunt management. Here are just a couple of examples.

- In March, Hunt was ready to ship a valve which was not inspected. I required an inspection, which showed that the valve was seriously cracked. Mr. Arnold talked to his managers at General Dynamics and told Hunt that while the valve would be rejected, Hunt would not be required to provide a report showing why it had not been tested and what would be done, which is called "cause and corrective action." Mr. Arnold said his boss, Mr. Smelings, said to tell Hunt management he was giving them an "Easter present."
- One day, Mr. Arnold said to me, "I don't know how you're ever gonna straighten this mess out, I just don't even know where to begin." When I asked him if he had any suggestions, Mr. Arnold replied "Yeah, stick of dynamite, blow this freaking place up."

Hunt's Non-Destructive Testing Inspector routinely signed NDT reports falsely certifying that testing was done when it was not, or when he did not know that it had been; routinely performed nondestructive testing without following contractually-required procedures; and routinely permitted uncertified personnel to perform nondestructive testing after which he would certify that the testing had been conducted by certified personnel.

In August, Hunt became fed up with my constant efforts to get its personnel to do their jobs and fired me. I was told that I was fired because it cost Hunt so much to fix the problems I found that it could not afford my \$64,000 salary. But I believe that I was fired because Hunt knew that I was unwilling to allow it to cut corners on Level One submarine hardware and insisted that Hunt follow the Navy's requirements. Laughably, I was told that there was an "extensive cut" that "affected my job," but I was the only person fired.

On September 17, 2001, the Defense Department, with the help of the Nuclear

Regulatory Commission, the Naval Criminal Investigative Service, and the Department of Energy, swarmed Hunt Valve with a search warrant and more than 40 federal agents. They took all of Hunt's records—well over a million pages worth. They copied all the computer data and hard drives in the plant. They also found and recovered our box of “hot documents,” which corroborated much of the fraud at Hunt.

After the raid, Hunt management held meetings where they said that Hunt did nothing wrong and the government was on a witch hunt. The president of the company had the gall to compare the “attack” on Hunt to the destruction of the World Trade Centers just a week earlier. Hourly workers made threats to “take care of whoever did this.”

Bill was still working for the company, but we decided he had to leave because we feared for his safety—and mine. When he was at work, I carried a pistol from room to room in our house. Unknown cars were coming partway up our rural driveway and we felt like we were in danger.

Bill resigned from Hunt. Our family income went from \$106,000 a year to zero. We sold our property, in which we had heavily invested, at a huge loss so that we would have money to live on.

2002–2005: Supporting the Government

In order to help the agents make sense of the huge volume of records they seized, we moved to Columbus, where we had no family or friends. Because our *qui tam* case was under seal, we couldn't tell anyone—not even our friends and family—what we were doing. Our lawyers became like family as I spent the next two years working

almost full-time going through those files with the help of my lawyers and their staff, and answering question after question about what the documents showed. The government did not have enough people assigned to the case to review the files. For many months, the civil part of the Justice Department did not want us involved in the file review, even though we had moved to Columbus to perform that review, because they were worried that we would try to take credit for claims we didn't already know about. The Defense Department investigators and the criminal prosecutor on the case, Assistant United States Attorney Richard Blake, insisted that our work was necessary to their criminal prosecution. For many months, that was the only way we could get access to Hunt's records, even though the government had no personnel who could review the records.

After we exhausted the money from selling our house, Bill got a quality-assurance job with the Defense Logistic Agency. I continued working on the investigation. Our income was well below half what it would have been if, like everybody else, we had decided to just keep our mouths shut about what was going on at Hunt Valve Company.

Our review of the documents seized from Hunt, which we performed in tandem with John Carruthers and Bob Hardin of the Defense Contract Audit Agency ("DCAA"), showed—among many other things—that more than half of Hunt's certifications were demonstrably falsified; that Hunt welding personnel were improperly and illegally qualified; and that material was not properly documented or maintained.

We also met with many Navy engineers and scientists. One such meeting,

which took place in September of 2002, was attended by 17 government employees, including experts in welding, quality assurance, engineering, and submarine valves. They questioned us for two full days. I believe they shared our concern with the gravity of the situation at Hunt, because shortly afterward they sent a huge audit team of Navy and civilian experts to survey conditions at Hunt. We were not surprised to learn that the auditors found that things were no better a year after the search warrant was executed than while we were there, because we believed that Hunt's people simply did not know how to do it right, and the shipbuilders never showed them.

We were shocked to learn that the Navy allowed Northrop Grumman and General Dynamics to conduct an inspection of some Hunt valves which had been delivered. This was very concerning to us, because I knew from my conversations with Harry Arnold and other people from the prime contractors that those two companies—the same companies accused of inspecting, buying and installing valves which they knew, or at a minimum should have known, were bogus—were a huge part of the problem. I could not for the life of me understand why an independent company was not tasked with testing the valves. When I expressed my wonderment at this, however, my concerns were dismissed even as Bill and I were thanked for our service.

In any event, the contractors looked at 331 valves, and identified 495 physical defects—an average of 1.5 defects per valve. Since the Level 1/SUBSAFE watchwords are "ZERO DEFECTS," we thought this was significant. Moreover, early in the investigation, the Navy actually concluded that *all* of Hunt Valve's paperwork was fraudulent and decreed that it had to be completely ignored—meaning that the

taxpayers and the Navy were cheated every time they got a Hunt valve.

At the same time the Navy was investigating, we also spent many days meeting with investigators for the Department of Energy and the Nuclear Regulatory Commission regarding Hunt's fraudulent sale of uranium hexafluoride ("UF₆") containment valves. Public exposure to UF₆ is the primary health and safety hazard for consideration at gaseous diffusion plants. Hunt made and sold tens of thousands of those valves without using proper procedures or properly-trained personnel.² A number of Hunt's valves failed tests conducted by the NRC.

2005-06: Going it Alone

Because Bill and I blew the whistle, Hunt Quality Manager Wayne Aldrich pled guilty to fraud and went to federal prison for almost three years.³ My boss, Hunt Vice

² As stated in the Criminal Information against Hunt Quality Manager Wayne Aldrich,

Hunt Valve supplied valves to the United States Enrichment Corporation ("USEC") and DOE through USEC, for use on containers that transport and are part of the processing and storage of uranium hexafluoride (UF₆) and depleted uranium hexafluoride ("DUF₆") at various sites, including the Paducah Gaseous Diffusion Plant, Paducah, Kentucky; the Portsmouth Gaseous Diffusion Plant, Portsmouth, Ohio; and, the East Tennessee Technology Park ("K-25"), Oak Ridge, Tennessee.

³ According to the government's press release,

Aldrich worked for Hunt Valve from April 1980 until he resigned in May 2001. Aldrich was the Quality Assurance Manager from April 1992 until he resigned. The investigation disclosed that from approximately April 1992 to May 2001, Aldrich and other co-conspirators altered and created false documentation and delivered or caused the delivery of valves that failed to conform to physical and contractual requirements mandated by the U.S. Government. Aldrich used scanners, computers and facsimile machines to alter vendor certifications by changing revision dates, adding signatures and adding or changing test results; falsified Hunt Valve certifications indicating non-destructive testing (NDT) was performed when he knew it had not been;

President Larry Kelly, went to prison for two years.⁴ I do not believe that these convictions ever could have been obtained without our whistleblowing and, just as important, without our continued gathering and assessing of evidence from 2001-2004. These two are convicted felons and they can never work on another government contract for the rest of their lives.

Hunt Valve was sold and is under new management. We pray that it is doing a better job and hope that its customers, who continue to be Northrop Grumman and General Dynamics, are doing their job of ensuring that Hunt supplies conforming valves. The Navy, we were told, has revamped the way it buys and inspects hardware for its ships. The agents in charge of the case, for whom I have profound respect, have told me that they believe this to be one of the most important cases of their careers. The DoD, NRC, NCIS and Department of Energy agents, by the way, received an

permitted non-certified personnel to perform NDT inspections; and manufactured or repaired valves using unapproved and improper techniques and procedures. As a result of Aldrich's actions a sample of the valves supplied by Hunt Valve were tested by the U.S. Navy and their shipbuilders at a cost of over \$4 million.

⁴ In the plea agreement which Kelly filed with the U.S. District Court he admits that he:

Aided in the falsification and delivery to the United States Navy and the U.S. Department of Energy of certification packets for valves that did not meet requirements for traceability of component parts to their origin; and

Aided in the submission of falsified certifications when he learned that a subordinate employee had altered the original documents by adding information to the certifications and faxing the certifications from one Hunt Valve fax machine to another in the same building to make the documents appear "fuzzy."

award from the President's Council on Integrity and Efficiency for their work on this case. That award said:

This award recognizes the members of the Hunt Valve Investigative Team for outstanding performance and sustained distinguished performance for their efforts to protect United States military personnel and the nation's nuclear programs in the investigation of large scale, complex corporate fraud by a U.S. Government contractor.

Agents Strauch and Hampp, who spearheaded the government's effort, received a separate award from the DoD Inspector General.

Much was done, but much more could have been done. The Justice Department never sought subpoenas from General Dynamics or Northrop Grumman, and the government never, so far as we know, investigated how much those prime contractors knew about Hunt's misconduct—or how many other subcontractors were using subcontracts with these companies to defraud the Navy and deliver bogus submarine hardware.

We also found evidence that Hunt was forced by General Dynamics to use a company called All Stainless to cheat on General Dynamics's minority subcontractor promises to the Navy by having All Stainless act as a "distributor" of Hunt Valves, even though all it did was shuffle paperwork and get paid a kickback by Hunt. Under this arrangement, General Dynamics required Hunt to pay as much as 3% of its price to All Stainless for doing nothing, and of course this additional expense got passed through to the taxpayers. To our knowledge, nothing was done to recover the money paid by the government on this and similar arrangements.

In early 2005, our case was still under seal. The judge assigned to it, Honorable Dan Aaron Polster in Cleveland, became frustrated with the duration of the seal and ordered the government to make its intervention decision.

The government decided to intervene against Hunt Valve. In fact, Hunt Valve *begged* the government to intervene, to protect Hunt from our lawsuit. Hunt had delivered an estimated 40,000 suspect valves with bogus paperwork to the shipbuilders and the Navy. 15,000 of those valves were required to meet Level 1/SUBSAFE standards. Hunt also had delivered thousands of improperly-inspected and, in some cases, obviously-defective valves for containment of hazardous nuclear byproducts. There is no way to know how many of those valves include bad workmanship, incorrect materials, or would have failed proper inspection. We estimated the loss to the government in the tens of millions of dollars. The government's investigation alone cost at least \$4.2 million.

The government settled with Hunt for \$666,000 paid over several years. Bill and I shared 15% of this amount with our lawyers. Hunt is still making small payments. While we could have objected to the settlement, the government represented to us that it was more important for Hunt to keep making valves than for the government to be paid for its losses.

Although we had rooms full of evidence, the Justice Department decided not to intervene in our case against General Dynamics and Northrop Grumman. This decision was never explained to us. However, much later, we were present when the judge was told that the Navy believed that if it recovered money from General

Dynamics and Northrop Grumman, they would just add the money to a future contract bid and the Navy would end up paying them back.

Because the *qui tam* provisions of the False Claims Act allow whistleblowers to go forward on their own, we were able to proceed, and after much anxious soul-searching and much analysis by our lawyers, we decided that we had to carry our case forward. Our lawyers served our 116-page Amended Complaint on the defendants. The shipyards were represented by Mr. Boese's firm and other huge Washington law firms. They filed massive motions to dismiss, contending that we *still* did not have enough evidence, because we did not have the bills that the shipyards submitted to the Navy for the submarines. The shipyards also tried to convince the Judge that the government had concluded that our case against them was worthless because it did not intervene. However, Judge Polster "invited" the Justice Department and the Navy to participate in settlement discussions, and they debunked the defendants' statements.

In the fall of 2005, we settled our case with the shipyards for \$12.6 million. Most of the money went to the Navy, of course, but my husband and I shared 29% of the money (before taxes, of course) with our lawyers. We bought a small house in Jacksonville to be close to our daughter and are getting on with our lives as best we can. Neither of us can ever work in our chosen field, using the skills we learned over decades as nuclear quality-assurance specialists, because our history as whistleblowers is but a Google search away.

If the Justice Department's decision not to intervene against General

Dynamics and the other defendants had ended my case, my husband and I would have gotten virtually nothing for the loss of our jobs and the many years we spent helping the government investigate Hunt Valve and the corporate felons who worked for it. Instead, because we and our lawyers were able to forge ahead, we were able to put our lives back together.

Several of the Amendments now under consideration are relevant to my case. We had access to the claims submitted to General Dynamics and Northrop Grumman by Hunt Valve, but not the claims they submitted to the Navy. Some would say that we could not make our case without them. I hope you make it crystal clear that we could—that is, that subcontractors who cheat the government are no different than prime contractors who cheat the government. Perhaps, if Civil Investigative Demands had been easier to obtain and use, the Justice Department would have sought information from the shipyards. Hunt hid its misconduct for many years, and clarifying the statute of limitations is important. We suspected that Hunt's customers encouraged Hunt to fire me. I don't know whether this is true, but it is important to clarify that anyone who retaliates against a whistleblower be held to answer—not just "employers." And there should be no question that when somebody like me reviews documents to help the government, that is not a "public disclosure" under the Act.

Without the False Claims Act, I would not have been able to force the government to focus on the fraud at Hunt Valve Company. I am eternally grateful to the United States Congress for making that possible. Maybe I would have tried

to get someone to pay attention, but I don't think they would have believed me. More likely, I would have left the company, and lain awake at night worrying that my inaction would cost sailors' lives. Perhaps more important, without the strong *qui tam* provisions in the False Claims Act, the shipyards would have suffered no consequences for what they did.

A Navy website about the Level 1/SUBSAFE Program says: "The bitterness of poor quality lingers long after the sweetness of meeting a schedule is forgotten." In fact, however, the government contractors in this case wasted untold millions of federal dollars because they were more concerned with their schedules—and the incentives they got for meeting those schedules—than with taking the time and expending the effort to require Hunt Valve Company to do the job for which it was paid millions of federal taxpayer dollars. From this whistleblower's chair, it looks like a pretty sweet deal for them.

There are other Tina Gonters out there. Senators, anyone who says there are not also other Hunt Valve Companies out there is kidding herself—and not reading the news. I have read this Committee's report from 1986 and while my experience shows that you accomplished much of what you set out to achieve, work remains to be done.

Thank you for allowing me to tell you my story. It is a profound honor to appear before you in support of the False Claims Act Amendments. I urge you in the strongest possible terms to do everything you can to help others like me to do the right thing. Do not doubt that in addition to the billions of dollars recovered under the False Claims Act, lives hang in the balance.



Department of Justice

STATEMENT OF

MICHAEL F. HERTZ
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

HEARING TITLED

“THE FALSE CLAIMS CORRECTIONS ACT (S. 2041):
STRENGTHENING THE GOVERNMENT’S MOST EFFECTIVE
TOOL AGAINST FRAUD FOR THE 21ST CENTURY”

PRESENTED

February 27, 2008

Mr. Chairman, Ranking Member Specter, Members of the Committee: Thank you for inviting me to testify regarding our efforts under the False Claims Act, and to present the views of the Department of Justice on S. 2041, The False Claims Corrections Act of 2007. I appreciate having this opportunity to review with you the Department's experience with *qui tam* actions, or whistleblower suits, since the 1986 amendments, and the success of the False Claims Act generally in meeting the goal we all share: preventing and redressing fraud against the Government.

The Department of Justice is committed to the vigorous enforcement of the laws against those who perpetrate fraud to obtain money from the Government. The False Claims Act has been a very important civil statutory weapon against fraud. Since the Act was amended and liberalized in 1986, over \$20 billion has been recovered on behalf of taxpayers by the Civil Division working closely with the Offices of the United States Attorneys. The recoveries in the period before the amendments, as compared with the period after 1986, are illustrative of the overall effectiveness of the Act. In Fiscal Year 1986, the year prior to the amendments of the False Claims Act, the Department recovered \$54 million under the Act¹. Since then, we have seen a steady increase in recoveries, culminating in settlements and judgments of more than \$5 billion in just the past two years.

This remarkable accomplishment has been with the assistance of the *qui tam* provisions, which have augmented our resources to address fraud in connection with Government contracts and programs and which we continue vigorously to support. As

¹ This figure does not account for inflation.

this Committee well knows, the False Claims Act Amendments in 1986 substantially changed the *qui tam* provisions to encourage more citizens to report fraud, and to increase the Government's ability to recover its losses. Since the *qui tam* provisions of the False Claims Act were amended, there have been more than 5800 suits filed with the Department through Fiscal Year 2007. Indeed, of the \$20 billion recovered under the FCA since 1986, \$12.6 billion has been the result of *qui tam* actions.

We have encouraged the Department's litigators to make every effort to work cooperatively with relators to maximize the Government's recovery. The Department and its client agencies have dedicated enormous resources to the investigation and prosecution of these cases. We have advanced or supported legal arguments in courts throughout the nation, and at every level, that both vigorously enforce the liability provisions of the False Claims Act and advocate the rights of relators.

Several facts about the Department's experience with the *qui tam* provisions of the False Claims Act are noteworthy. First, the Act has been widely used to allege fraud in a broad range of agency programs and contracts. More than half of these cases, 3117 of the 5800 filed since the 1986 amendments, focus on fraud against government health care programs such as Medicare and Medicaid. These health care fraud cases also are the largest source of dollars recovered in False Claims Act *qui tam* cases, representing \$9.1 billion, or more than 72 percent of the total \$12.6 billion in *qui tam* recoveries. *Qui tam* cases alleging fraud against the Department of Defense constitute about 20 percent of the

qui tam cases filed under the Act since 1986, and about 13 percent of the *qui tam* recoveries (a total of \$1.6 billion).

While these two areas are predominant among various fraud schemes addressed by the Act since 1986, there are no government programs that are immune from possible fraud, as reflected by our caseload. Cases brought by the Department under the Act, including those initiated by whistleblowers, have recovered significant funds on behalf of the Department of Interior, the General Services Administration, the Department of Housing and Urban Development, the Department of Agriculture, the Department of Education, the Department of State, the Department of Energy, NASA, and more recently, the Department of Homeland Security, to name but a few. The following results from this past year illustrate the variety that exists in our pending case matters:

- Just this month, Merck & Company paid more than \$650 million to resolve allegations that it failed to remit legally-required rebates to Medicaid and other government health care programs and paid illegal remuneration to health care providers to induce them to prescribe the company's products.
- Bristol-Myers Squibb Company (BMS) and its generic division, Apothecan, paid over \$515 million to resolve a broad array of allegations involving illegal drug pricing and marketing activities.
- A judgment was obtained against Amerigroup Illinois, Inc. for \$334 million that included \$172 million for allegations under the False Claims Act relating to the federal share of Medicaid. A court determined that Amerigroup fraudulently skewed enrollment in its Medicaid HMO program

by discouraging pregnant women and other potentially costly patients from joining.

- Medco Health Solutions, Inc. paid \$155 million to settle allegations that Medco submitted false claims in connection with the mail order prescription drug benefit offered under the Federal Employee Health Benefits Program. The government alleged that Medco cancelled prescriptions it could not fill timely to avoid late penalties, shorted pills, and billed for pharmacy services it didn't provide. The government also alleged that Medco solicited kickbacks from pharmaceutical manufacturers to favor their drugs on Medco's formulary, and paid kickbacks to health plans to obtain business.
- Oracle Corporation, in a record fraud settlement involving the General Services Administration (GSA), paid \$98.5 million to resolve allegations that PeopleSoft Inc., which was acquired by Oracle in 2005, violated the False Claims Act when it provided GSA with pricing disclosures for its software and related maintenance services that were not complete, accurate and current.
- Burlington Resources, Inc., a subsidiary of ConocoPhillips, the third largest integrated energy company in the United States, paid \$97.5 million to settle claims that Burlington underpaid royalties owed on natural gas produced under federal and Indian leases.
- Harbert International, Inc., Bill Harbert International Construction, Inc., Bilhar International Establishment f/k/a Harbert International

Establishment, a Liechtenstein company, and Harbert Corporation were found liable after a seven-week trial and ordered to pay \$90 million. The defendants were found liable under the False Claims Act for conspiracy to rig bids on contracts to construct wastewater treatment facilities in Cairo, Egypt. These contracts were financed by the U.S. Agency for International Development.

- Maximus, Inc. paid \$42.65 million to settle allegations in connection with false claims it submitted to the District of Columbia's Medicaid program. The District of Columbia Child and Family Services Agency (CFSA) hired Maximus to assist it in submitting claims to Medicaid for targeted case management services provided by the District to children in its foster care program. The United States alleged that Maximus caused CFSA to submit claims for every child in the foster care program whether or not targeted case management services had been provided to the child. Maximus also entered into a deferred prosecution agreement with the U.S. Attorney's Office.
- Mellon Bank, N.A., paid \$34.6 million to resolve allegations that the bank violated the False Claims Act when in April, 2001, several of its employees hid and then destroyed approximately 77,000 individual income tax returns, together with tax payment checks, instead of processing the returns and checks as required by its Lockbox Depository Agreement with the Internal Revenue Service (IRS).

- Last week, the 7th Circuit affirmed a \$64 million judgment against Peter Rogan, the CEO of an Illinois hospital, for paying doctors to refer patients to the hospital. After a bench trial, the district court found that Rogan had violated various prohibitions on the payment of compensation for referrals to federal health care programs.

Whistleblowers played an important role in many of these cases, and the 1986 *qui tam* amendments to the Act that strengthened whistleblower provisions have allowed us to recover losses to the federal fisc that we might not have otherwise been able to identify. Moreover, the *qui tam* provisions have had a more subtle and unquantifiable impact in our fight against fraud. In the wake of well-publicized recoveries attributable to *qui tam* cases, those who might otherwise submit false claims to the federal government are more aware than ever of the "watchdog" effect of the *qui tam* statute. We have no doubt that the Act has had the salutary effect of deterring fraudulent conduct.

As I indicated at the outset of my remarks, the Department continues to actively support the *qui tam* provisions of the Act by dedicating the resources necessary to investigate allegations to the fullest extent, by litigating the meritorious cases vigorously, and by ensuring that settlements reflect both the gravity of the violations and the loss to the Treasury. In addition to the efforts of relators, who often come forward at the risk of personal hardship, we believe that the success of the Act's *qui tam* provisions are in large part due to the efforts of the government attorneys, agents, auditors and other personnel charged with responsibilities under the statute, as the statistics bear out. We have now

approximately 75 full-time attorneys in the Civil Division responsible for False Claims Act cases, as well as scores of Assistant United States Attorneys throughout the country. This is a highly professional, skilled and dedicated group of lawyers who are fully committed to the task at hand and who have elected to intervene in approximately one in four of the *qui tam* suits filed since 1986. At the conclusion of those cases, and as required by the False Claims Act, the Department has paid awards to *qui tam* relators of \$2 billion since 1986. In Fiscal Year 2007 alone, the Department paid relator awards of more than \$177 million. And although the Department has declined to intervene in 75 to 80 percent of the *qui tams* that have been filed, only 2.6 percent of total recoveries since 1986 under the Act, or \$520 million, has been recovered in those cases where we have declined or otherwise not participated. This latter statistic reveals that the Department has been appropriately judicious in its review of *qui tam* matters and has been highly successful in intervening in those cases that have true merit. However, even in those cases in which we decline to intervene, the Department is often called upon to expend considerable resources by briefing legal issues at the request of the relator or the court, producing documents and witnesses from throughout the government, and otherwise ensuring that the False Claims Act is properly applied by relators and interpreted by courts.

We have reviewed carefully S. 2041. While the Administration is sympathetic to some of the proposed amendments, it cannot support the bill in its current form. Among our concerns are the proposals narrowing the public disclosure bar to permit those with no first hand knowledge beyond that available in the public domain to serve as relators,

and permitting government employees to serve as relators in certain circumstances, which is unsound public policy as all government employees have an obligation to report fraud. Moreover, many provisions of S. 2041 deal with issues that have not yet been fully resolved by the courts. Our more detailed analysis is provided in our views letter and appendix which we have provided the Committee and which are attached to this testimony. However, as that letter and appendix make clear, and as I have indicated today, the False Claims Act and its *qui tam* provisions have proven to be an extremely effective weapon in the Government's fight against fraud and we see no pressing need for major amendments at this time.

These positions are more fully laid out in our views letter and appendix. We have provided the appendix to assist the Committee as it considers this legislation and to ensure that the corrections now being considered do not, in themselves, create additional obstacles to Government enforcement efforts.

Conclusion

Mr. Chairman, Ranking Member Specter, Members of the Committee: Let me restate my appreciation, and that of my colleagues in the Department of Justice, for this opportunity to comment on the success of the False Claims Act since enactment of the 1986 amendments, as well as our overall views on S. 2041. We appreciate the efforts that have been made by you and your staffs to further improve the False Claims Act. I reiterate the offer, contained in the views letter, to work with the Committee and its staff

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to find the best approach for furthering our common goal of fighting fraud against the public fisc.

I look forward to your questions. Thank you.

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

**“The False Claims Act Correction Act (S. 2041): Strengthening the
Government's Most Effective Tool Against Fraud for the 21st Century”**

WRITTEN TESTIMONY OF STEPHEN M. KOHN^{1/}
President, National Whistleblower Center

February 27, 2008

Chairman Patrick J. Leahy, Ranking Member Arlen Specter and Honorable Members of the Senate Judiciary Committee:

On behalf of the National Whistleblower Center, thank you for the opportunity to submit this written testimony concerning the False Claims Act Correction Act (S.2041).

President Abraham Lincoln and the loyal Members of Congress who had the foresight to enact the original False Claims Act (“FCA”) during the height of the Civil War are looking kindly down upon the work of the Committee. President Lincoln and his supporters in Congress knew that the key to American Democracy and the freedoms enshrined in the Declaration of Independence rested upon the active support of the People. In was in this light that they enacted the FCA – America’s first whistleblower law. President Lincoln and the Civil War Congress sought to empower citizens with the ability to expose fraud in government contracting. They knew that citizens who exposed wrongdoing faced harsh retaliation, so they created a mechanism, based on longstanding legal precedent (known as “*qui tam*”) to encourage and enable citizens to report contractor abuse, the sale of defective products to the government and conspiracies between unscrupulous contractors and corrupt federal employees to steal from taxpayers.

Over 120 years later, their vision of American Democracy has been vindicated. The FCA has the potential to be the most important anti-fraud law in American history. Under this law, the government has already collected tens of billions of dollars from unscrupulous contractors and the law’s deterrent effect has saved taxpayers untold billions of dollars.

The FCA is based on a fundamental pillar --- encouraging and protecting whistleblowers (i.e. persons who become aware of contractual wrongdoing or other attempts to improperly bill the federal government). The FCA is not simply an anti-fraud law. It is a law premised on the recognition that employee-witnesses play a critical and irreplaceable role in uncovering fraud.

Based on this intent, the FCA has two overriding purposes: First, the protection of the public purse. Second, the protection of whistleblowers. Unfortunately, the whistleblower protection provisions of the FCA have not been properly appreciated by the Courts, and today the very effectiveness of the FCA as the premier fraud-fighting law is threatened by a deep erosion into the basic fundamental pillar of the FCA: whistleblower protection.

Bluntly stated, the overwhelming majority of employees with information about corrupt contracting practices will be left without adequate protection if the current FCA is not corrected in accordance with S.2041. This will result in a major loss to the United States – the loss of the key informants recognized by the Civil War Congress as indispensable to the ability of the United States to detect fraud and prove these cases in court.

The *Correction Act* is essential legislation for protecting the integrity of procurement and contracting process. It is narrowly designed to correct a number of judicial interpretations which undermined the original intent of the False Claims Act. For example, the *Correction Act* would Congressionally reverse the Appeals Court decision in the U.S. ex rel. Totten v. Bombardier Corp, 380 F.3d 488 (D.C. Cir. 2004). That case endorsed Enron-style “shell games” which permit government contractors to hide behind third party entities to escape liability. The result: Billions of dollars in taxpayer monies stolen or wasted, and no recourse open to protect the American taxpayers or the whistleblowers who exposed the frauds. The Correction Act also directly addresses the problem created by the Federal District Court for the Eastern District of Virginia in United States ex rel. DRC, Inc. v. Custer Battles, LLC, 2006 WL 2388790 (E.D. Va. Aug. 16, 2006), which dismissed a jury verdict finding FCA violations for funds allocated to contractors operating on Iraqi funds administered by the U.S. Government.

The *Correction Act* seeks to restore a proper balance in the jurisdictional bar which can prevent whistleblowers from obtaining protection under the FCA. This bar prohibits employees who are not “original sources” for obtaining FCA coverage, if the information on which they are blowing the whistle was “publicly disclosed.” The *Correction Act* maintains this jurisdictional bar, but clarifies the definition of a “public disclosure” in a manner consistent with the original intent behind the FCA.

Attached to this testimony is a letter signed by 27 public interest organizations. As set forth in this letter, there is strong public support for the passage of the *Corrections Act* and for Congress to ensure that whistleblower protection provisions are fair, adequate and reasonable.

CONCLUSION

Today FCA whistleblower protections are stuck in the mud. Whistleblowers risk their careers, are fired from their jobs and are blacklisted. They need full protection. They need to be encouraged. Congress must pass the *Corrections Act* to ensure that America’s most important anti-fraud law remains an effective instrument protecting taxpayers.

The *Corrections Act* has been endorsed by a broad array of public interest organizations, including the American Library Association, the National Security Whistleblower Coalition, The National Taxpayers Union, the Project on Government Oversight, the Government Accountability Project, and Public Citizen (see attached letter). Thank you for the opportunity to submit this written testimony. We look forward to working with you to ensure that adequate and effective legislation can be voted on during this Congressional session.

Respectfully submitted by:

_____/s/ Stephen M. Kohn_____
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¹ Stephen M. Kohn is the President of the National Whistleblower Center, a partner in the Washington, D.C. law firm of Kohn, Kohn & Colapinto, LLP. For over 20 years he has represented nationally known whistleblowers in retaliation and False Claims Act cases. Mr. Kohn is the author or co-author of six books on whistleblower law: *Whistleblower Law* (Greenwood Publishing, 2004); *Concepts and Procedures in Whistleblower Law* (Quorum, 2000), *The Whistleblower Litigation Handbook*, (Weily Legal Publishing, 1990), *The Labor Lawyers Guide to the Rights and Responsibility of Employee Whistleblowers* (Quorum, 1988), *Protecting Environmental and Nuclear Whistleblowers: A Litigation Manual* (NIRS, 1985) and *Federal Whistleblower Laws and Regulations* (NWC, 2003). In 2006, he was awarded the Daynard Public Interest Visiting Fellowship by the Northeastern University School of Law.

The National Whistleblower Center is a non-profit, tax-exempt organization specializing in the support of employee whistleblowers. Created in 1988, one of the major goals of the Center is to protect the taxpayers by educating the public about the need to protect employees to disclose government abuse, misconduct and corruption. The Center publishes an educational web page, www.whistleblowers.org, supports precedent-setting litigation on behalf of employee whistleblowers, and provides counsel and attorney referrals to whistleblowers.

September 20, 2007

The Honorable Harry Reid
Majority Leader, U.S. Senate
528 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Nancy Pelosi
Speaker, U.S. House of Representatives
H-232, U.S. Capitol
Washington, D.C., 20515

The Honorable Mitch McConnell
Minority Leader, U.S. Senate
361-A Russell Senate Building
Washington, D.C. 20510

The Honorable John Boehner
Minority Leader, U.S. House of Representatives
1011 Longworth H.O.B.
Washington, D.C., 20515

Dear Majority Leader Reid, Madam Speaker Pelosi, Senator McConnell and Congressman Boehner:

We are writing to request your firm commitment to bring legislation to protect all whistleblowers to a vote during this Congressional term.

The public record, which includes numerous Congressional hearings, overwhelmingly supports immediate Congressional action to ensure that all employees who risk their jobs and careers to report violations of federal law are adequately protected. Currently, a majority of whistleblowers in the United States lack any protection whatsoever. The few existing whistleblower laws are riddled with loopholes and are ineffective.

The American people fully understand the scope of this problem, and the need for prompt Congressional action. This was evidenced by a recent scientifically validated bipartisan opinion poll of 1014 "likely voters" in which 79 percent of the voters expressed a clear expectation that Congress will enact strong whistleblower protections. A copy of this polling report is attached.

We recognize that Congressional leaders have shown their strong commitment to protecting employees from retaliation when they tell the truth about workplace misconduct. Numerous whistleblower protection laws have been introduced into both chambers of Congress. H.R. 985, the Whistleblower Protection Enhancement Act of 2007, passed the House by an overwhelming 331-94 majority this spring. Most recently, Congress overwhelmingly passed transportation-industry whistleblower protection provisions in sections 1413, 1536, and 20109 of H.R. 1, the "Implementing Recommendations of the 9/11 Commission Act of 2007." These are positive steps, but do not solve the problem. The vast majority of American employees will still lack whistleblower protection, even if the Enhancement Act is signed into law.

It is now time for Congress to get the job done. A reasonable, effective whistleblower protection provision should contain the following features: (1) all employees, including all federal employees, contractors and federal grant recipients, must be protected; (2) procedures protecting

whistleblowers must be meaningful, and include, at a minimum, procedural protections from the Whistleblower Enhancement Act and/or the recently passed transportation whistleblower laws; (3) the remedies available to employees must, at a minimum, contain a complete "make whole" remedy and full compensatory damages, consistent with the damage provisions in the Enhancement Act, Title VII and the newly enacted transportation whistleblower laws.

Finally, we also strongly support immediate enactment of the False Claims Act Correction Act of 2007, which was introduced into the Senate in a bi-partisan manner by Senators Patrick Leahy (D-VT), Arlen Specter (R-PA), Charles Grassley (R-IA), and Dick Durbin (D-IL). This law would hold federal contractors fully accountable for any fraud on the taxpayer or intentional misuse of federal funds. The Correction Act is narrowly tailored to correct specific technical deficiencies in the current False Claims Act that have permitted unscrupulous contractors to escape accountability. We also firmly support strengthening the anti-retaliation provisions contained in subsection (h).

Thank you very much for your time and careful consideration. We look forward to working with you to ensure that this legislation can be voted on during this Congressional session.

Sincerely yours,

Stephen M. Kohn
Executive Director
National Whistleblower Center

Tom Devine
Legal Director
Government Accountability Project

Linda Andros
Legislative Counsel
Public Citizen

Beth Daley
Director of Investigations
Project On Government Oversight

Sibel Edmonds
Executive Director
National Security Whistleblower Coalition

Lynne Bradley
Director, Office of Government Relations
American Library Association

Joseph E. B. White, Esq.
Executive Director
Taxpayers Against Fraud

Jeff Ruch
Executive Director
Public Employees for Environmental Responsibility

Celia Wexler
Washington Representative for Scientific Integrity
Union of Concerned Scientists

Sean Moulton
Director, Federal Information Policy
OMB Watch

George Anderson
Ethics in Government Group

Carol Bernstein, PhD
Past President
American Association of University Professors, AZ Conference

P. Jeffrey Black
Nevada State Chapter President
Federal Law Enforcement Officers Association

Lynne Bradley
Director, Office of Government Relations
American Library Association

Dr. Roland Chalifoux
The Semmelweis Society International

Betsy Combier
Editor, Parentadvocates.org
President, The E-Accountability Foundation

Zena D. Crenshaw
Campaign Director
Focus-On-Indiana

Andrew D. Jackson,
Project Coordinator
National Judicial Conduct and Disability Law Project, Inc.

Kevin Kuritzky
The Student Health Integrity Project

Linda Lewis
Director
Whistleblowers USA

Gwen Marshall
Co-Chairman
Georgians for Open Government

Ron Marshall
Chairman
The New Grady Coalition

Patrice McDermott
Director
OpenTheGovernment.org

Gil Mileikowsky, M.D.
Alliance for Patient Safety

Dr. Jim Murtagh
Doctors for Open Government

Pete Sepp
Vice President for Communications
National Taxpayers Union

Dane vonBreichenruchardt
President
U.S. Bill of Rights Foundation

Mark Zaid
James Madison Project

**Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
Hearing on "The False Claims Act Corrections Act of 2007 (S. 2041): Strengthening
the Government's Most Effective Tool Against Fraud for the 21st Century"
February 27, 2008**

Nearly a century and half ago, President Abraham Lincoln pushed through the False Claims Act in order to combat rampant fraud and war profiteering during the Civil War. It is fitting that we hold this hearing on legislation to strengthen "Lincoln's Law" the same month we celebrate President Lincoln's birth.

Today, again in the midst of war and facing reports of billions lost to fraud and waste in Iraq and Afghanistan, we are considering important new improvements to the False Claims Act – not only to punish and deter those who seek to defraud our nation, but also to recover billions in taxpayer dollars stolen from the public trust.

In recent years, the False Claims Act has become the government's most effective tool against fraud. Since 1986, it has been used to recover more than \$20 billion lost to fraud, about half of that coming in just the past five years. It has been used to punish contractors selling defective body armor to our police, to recover hundreds of millions from oil and gas companies bilking the government on valuable leases on federal land, to thwart major technology corporations from colluding in bids for government contracts, and to uncover massive fraud by insurance companies illegally shifting their losses from Hurricane Katrina to the Federal Government.

Perhaps the Act's greatest success has been to expose complex schemes that have defrauded billions from federal health care programs. Just this month, the drug company Merck agreed to pay a \$650 million false claims settlement for illegally overcharging Medicaid for Vioxx, Zocor, and other drugs. This settlement was among the largest ever under the False Claims Act, and part of more than five billion dollars recovered in health care cases just this decade.

More than 600 false claims cases are still pending against health care and drug companies, and 150 of those involve overcharging the government for pharmaceuticals. It seems clear that future false claims settlements will soon dwarf what we have seen so far.

But these recent successes do not tell the full story, as the False Claims Act has yet to fulfill its true potential for combating fraud. In 1986, Senator Grassley led the effort to reinvigorate the False Claims Act by amending the law to encourage citizens to report fraud against the government. Since then, citizen whistleblowers have become the greatest source for uncovering complex frauds against the government, and their cases now account for about 70 percent of all the money recovered under the False Claims Act. Yet, opponents of the False Claims Act, those who defend the major defense contractors and big drug companies, have worked hard to undermine the original intent of these

amendments, and a series of recent court decisions have placed new, technical impediments on false claims cases. These court decisions threaten to weaken the law, and undo the successes of recent years.

Today, we consider bipartisan legislation – the False Claims Act Corrections Act of 2007 – that will correct these judicial interpretation problems and strengthen the False Claims Act for the 21st Century. In doing so, I want to recognize the longstanding leadership of my friend Senator Chuck Grassley, who recently introduced this bill in order to restore the original intent of his 1986 amendments. Senator Grassley has worked tirelessly over the years in defense of the False Claims Act, and I am proud to join with him, as well as Senators Durbin, Specter, and Whitehouse, in support of this bill. I look forward to working with all these Senators and the Committee to make the False Claims Act even more effective, and to provide important, new protections for the citizen whistleblowers, who are so vital to uncovering these frauds.

At our hearing today, we will ask important questions of the Justice Department, about its failure to dedicate sufficient lawyers and investigators to pursue these fraud cases. The Justice Department has a backlog of more than 1,000 false claims cases, which at its current pace would take nearly 10 years to resolve, even if no new cases were brought. When one considers that a recent study found that for every dollar spent enforcing the law in health care cases, the government recovered 15 dollars on behalf of the American taxpayer, there's no excuse for failing to pursue these cases aggressively.

In light of the politicization of the Bush Justice Department, many wonder whether it has resisted pursuing certain false claims cases for political reasons – most notably those involving contracting fraud related to the war in Iraq and Afghanistan. Over the past five years, the Justice Department has participated in more than 600 false claims settlements nationwide and recovered more than \$10 billion. Yet, during that same time, the Justice Department participated in only five cases involving contracting fraud in Iraq and Afghanistan and has recovered a mere \$16 million – that's less than two tenths of one percent of the overall total. Since 2002, our government has spent nearly \$500 billion on the wars in Iraq and Afghanistan, much of it on government contracting, and billions of taxpayers' dollars have been lost to fraud, waste, and abuse. The False Claims Act was designed to attack such rampant war profiteering, and it is just as necessary today, as it was during the Civil War. Iraq Study Group Chairman Lee Hamilton said in testimony to this Committee that nothing undermines our efforts in Iraq more than abuse and fraud in the reconstruction of the country. I share these concerns with Chairman Hamilton and others who have recognized the tremendous harm this conduct causes. Yet, this administration has apparently decided that pursuing unscrupulous defense contractors would be embarrassing and aggressively pursuing these frauds is not their priority.

This morning we will hear from a courageous citizen whistleblower, who will tell us how she used the False Claims Act not only to hold one of our nations' largest defense contractors to account, but also to keep the Justice Department honest. Tina Gonter was a quality engineer working for a submarine parts supplier in Ohio when she discovered

the valves produced at her plant were faulty and could lead to catastrophic failure for our nation's submarine fleet. She reported the problem to her superiors, but they did nothing. After contacting a lawyer, she reported her observations to criminal investigators, she agreed to volunteer as an undercover informant, and wore a secret tape recorder gathering evidence against her bosses. After the criminal investigation was complete, she filed a False Claims Act case, but even after her immediate bosses went to jail, the Justice Department refused to join her case against the defense contractors who also knew about and benefited from the fraud, and she pursued the case alone, until a judge scolded the Justice Department for not taking action and they joined in the settlement at the last minute.

Ms. Gonter is a testament to the courage of citizen whistleblowers. She risked her job and was retaliated against but she took on the powerful, moneyed defense contractors anyway. These whistleblowers should be recognized as "citizen soldiers," as President Lincoln called them when the False Claims Act was first passed so many years ago. They keep government contractors honest and are responsible for returning billions to the American taxpayers. Her story demonstrates how the False Claims Act works for all Americans, and why new protections for citizen whistleblowers in the bill we consider today are necessary to encourage others to come forward and tell their stories.

I expect that some may suggest that citizens should not be allowed to bring these cases against their employers, or that this law creates unnecessary incentives for lawsuits against defense contractors and drug companies. But no one can deny that these citizen whistleblowers are now the single, most important source for uncovering fraud against the government, and their cases have returned tens of billions to the American taxpayers, money that the government would never have recovered without them.

I hope all Senators will join us to honor the legacy of Lincoln's Law and take action now to strengthen and improve the False Claims Act for the next century.

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