

Qui Tam: The False Claims Act and Related Federal Statutes

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Summary

Qui tam enlists the public in the recovery of civil penalties and forfeitures. It rewards with a portion of the recovered proceeds those who sue in the government's name. A creature of antiquity, once common, today qui tam lives on in federal law only in the False Claims Act and in Indian protection laws.

The False Claims Act, expanded by the Fraud Enforcement and Recovery Act of 2009, P.L. 111-21, 123 Stat. 1617 (2009), now proscribes: (1) presenting a false claim; (2) making or using a false record or statement material to a false claim; (3) possessing property or money of the U.S. and delivering less than all of it; (4) delivering a certified receipt with intent to defraud the U.S.; (5) buying public property from a federal officer or employee, who may not lawfully sell it; (6) using a false record or statement material to an obligation to pay or transmit money or property to the U.S., or concealing or improperly avoiding or decreasing an obligation to pay or transmit money or property to the U.S.; or (7) conspiring to commit any such offense. Additional liability may also flow from any retaliatory action taken against whistleblowers under the False Claims Act. Offenders may be sued for triple damages, costs, expenses, and attorneys' fees in a civil action brought either by the United States or by a relator (whistleblower or other private party) in the name of the United States.

If the government initiates the suit, others may not join. If the government has not brought suit, a relator may do so, but must give the government notice and afford it 60 days to decide whether to take over the litigation. If the government declines to intervene, a prevailing relator's share of any recovery is capped at 30%; if the government intervenes, the caps are lower and depend upon the circumstances. Relators in patent and Indian protection qui tam cases are entitled to half of the recovery.

Federal qui tam statutes have survived two types of constitutional challenges—those based on defendants' rights in criminal cases and those based on the doctrine of separation of powers. The courts have found the rights required in criminal cases inapplicable, because qui tam actions are civil matters. They have generally rejected standing arguments, because relators stand in the shoes of the United States in whose name qui tam actions are brought. They have rejected appointments clause arguments, because relators hold no appointed office. They have rejected take care clause arguments, because the residue of governmental control over qui tam actions is considered constitutionally sufficient.

This report is available in an abridged version, as CRS Report R40786, *Qui Tam: An Abbreviated Look at the False Claims Act and Related Federal Statutes*, by Charles Doyle, stripped of the footnotes, quotations, appendix, and most of the citations found here.

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Introduction

Qui tam is whistleblower concept.¹ It is the process whereby an individual sues or prosecutes in the name of the government and shares in the proceeds of any successful litigation or settlement. Although frequently punitive, it is generally a civil procedure. Unlike antitrust, RICO, and other federal punitive damage, private attorney general provisions,² the individual need not have been a victim of the misconduct giving rise to the litigation. The name qui tam is the shortened version of an oft abbreviated Latin phrase which roughly translates to “he who prosecutes for himself as well as for the King.”³ Qui tam comes to us from before the dawn of the common law. Reviled at various times throughout the ages as a breeding ground for “viperous vermin”⁴ and parasites,⁵ legislative bodies have authorized it when they consider the enforcement of some law beyond the unaided capacity or interest of authorized law enforcement officials.⁶ Best known of the contemporary members of the line is the federal False Claims Act (31 U.S.C. 3729-3733). From 1986 until expansion of the Act in 2009, False Claims Act recoveries totaled an amount in excess of \$20 billion.⁷ Since then, they have totaled an additional \$13.3 billion.⁸

¹ A whistleblower is someone “who brings wrongdoing within an organization to light,” much like the police officer on the beat who blows his whistle when he sees burglars climbing out the window of house at night, THE AMERICAN HERITAGE COLLEGE DICTIONARY, 1538 (3d ed. 1997).

² 15 U.S.C. 15 (antitrust), 18 U.S.C. 1964 (racketeer influenced and corrupt organizations (RICO)); examples of other punitive damage provisions include 15 U.S.C. 1679g (consumer credit protection), 18 U.S.C. 2710 (wrongful disclosure of video tape rental or sales records), 18 U.S.C. 2520 (communications privacy), 18 U.S.C. 2724 (state motor vehicle record privacy), 47 U.S.C. 551 (cable subscriber privacy). Other federal private attorney general statutes permit suit by those who are not victims. These allow the award of attorney’s fees, but unlike qui tam provisions they do not call for the private plaintiff to share any damage or penalty award with the government, e.g., 33 U.S.C. 1365 (water pollution control), 42 U.S.C. 4911 (noise control).

³ Blackstone explained that the phrase “qui tam” comes from a longer one which he abbreviated to “*qui tam pro domino rege, &c, quam pro seipso in hac parte sequitur*,” III BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160 (1768)(transliteration supplied). Taking the “&c” into account, the phrase might read in full, “he who brings the following matter for my Lord the King and who brings the following matter for himself as well.” In any event, later courts and commentators usually drop at least the “&c” from Blackstone’s quote, see e.g., *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 768 n.1 (2000)(“*qui tam pro domino rege quam pro seipso in hac parte sequitur*”); Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 NORTH CAROLINA LAW REVIEW 539, 541 n. 3 (2000)(same); *The History and Development of Qui Tam*, 1972 WASHINGTON UNIVERSITY LAW QUARTERLY 81, 83 (“*Qui tam* is the accepted abbreviation of the phrase ‘*qui tam pro domino rege quam pro seipso*’”).

⁴ COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 194 (1628).

⁵ S. Rept. No. 77-1708, at 2 (1942), and H. Rept. No. 78-263 at 2 (1943), each quoting from a letter by Attorney General Biddle.

⁶ E.g., 132 Cong. Rec. 20535 (1986)(remarks of Sen. Grassley urging enactment of an anti-fraud qui tam measure)(“There is no question that the current state of affairs begs for reform. Fraud allegations are climbing at a steady rate while the Justice Department’s own economic crime council last year terms the level of enforcement in defense procurement fraud inadequate”).

⁷ *The False Claims Act Correction Act (S. 2041): Strengthening the Government’s Most Effective Tool Against Fraud for the 21st Century: Hearing Before the Senate Comm. on the Judiciary*, 110th Cong., 2d Sess. 1 (2008)(statement of Sen. Leahy).

⁸ Department of Justice Press Release, *Justice Department Recovers Nearly \$5 Billion in False Claims Act Cases in Fiscal Year 2012* (Dec. 4, 2012), available at <http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html>.

This is a brief discussion of the constitutional questions raised by qui tam provisions; of the history of such provisions; and of the two existing, active federal qui tam statutes: the False Claims Act⁹ and an Indian protection provision.¹⁰

Background

Qui Tam in England

The earliest cited example of a qui tam provision is the 695 declaration of King Wihtred of Kent, which stated that “If a freeman works during the forbidden time [*i.e.*, the Sabbath], he shall forfeit his *healsfang*, and the man who informs against him shall have half the fine, and [the profits arising] from the labour.”¹¹ By the fourteenth, fifteenth, and sixteenth century, qui tam statutes had become a common feature of English law.¹² They brought with them, however, unintended consequences. They gave rise to a class of bounty hunters who unscrupulously exploited weaknesses in the system. “Old statutes which had been forgotten were unearthed and used as means to gratify ill-will. Litigation was stirred up simply in order that the informer might compound [*i.e.*, settle] for a sum of money. Threats to sue were easy means of levying blackmail.”¹³ Coke in his *Third Part of the Institutes of the Laws of England* devotes a chapter to the reform legislation designed to control the practices of these “vexatious relators, informers, and promoters,” whom he classifies as *turbidum hominum genus* (a class of unruly men)¹⁴ and as a species among the classes of “viperous vermin”¹⁵ – a class was so unpopular that Queen

⁹ 31 U.S.C. 3729-3733.

¹⁰ 25 U.S.C. 201.

¹¹ Translated in Attenborough, *THE LAWS OF THE EARLIEST ENGLISH KINGS* 27 (1963); described in Plucknett, *EDWARD I AND CRIMINAL LAW* 31-2 (1960), and Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 NORTH CAROLINA LAW REVIEW 539, 567 (2000).

¹² *E.g.*, 12 EDWARD II, ch. 6 (1318), 1 STATS. OF THE REALM 177, 178 (“ . . . no officer in City or in Borough . . . shall . . . merchandise for Wines . . . And if any do, and be thereof convict[ed], the Merchandize whereof he is convict[ed] shall be forfeit[ed] to the King, and the third part thereof shall be delivered to the Party that sued the Offender, as the King’s Gift”); 22 EDWARD IV, ch. 8 (1482), 2 STATS. OF THE REALM 468, 476 (export violations required the offender to forfeit the contraband or its value and the statute provided that “our Lord the King to have as well the one Half of all such Merchandise forfeited and seised, as the one half of all Sums of Money which shall be recovered by Action in the Form aforementioned, [to pursue] for Value of any such Goods so forfeited; and the Person or Persons which shall seise or sue in the Form aforesaid, to have the other Half of the same”); 32 HENRY VIII, ch. 9, §3 (1540), 3 STATS. OF THE REALM 753, 753 (suborning perjury was made subject to a £10 penalty and “Th[e] one moytie [*i.e.*, half] thereof to the King our souveraine lorde and th[e] other moytie to him that w[ill] sue for the same by action of de[b]t[.] bill[.] playnte or information in any of the Kinges Courtis”).

¹³ IV HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 356 (1903). Coke strikes a similar note and adds the evils of forum shopping to a defendant’s inconvenience, expense, and disadvantage, COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 192, 194 (1628) (“First, many penall laws obsolete, and in time grown apparently impossible, or inconvenient to be performed, remained as snares, whereupon the relator, informer, or promooter did vex and entangle the subject The second mischief was, that common informers . . . drew all informations for any offence, in any place within the realm of England against any penall law to some of the kings courts as Westminster, to the intolerable charge, vexation, and trouble of the subject The third mischief was, that in informations, &c. the offence supposed to be against the penall law, and to be committed in one county, was at the pleasure of the informer, &c. alledged in any country where he would, where neither party nor witnesse was known, against the right institution of the law, that the jury (for their better notice) should come *de vicineto* of the place where the fact was committed”).

¹⁴ The term, which describes a species of lawless men who disrupt the normal peace and order of society, can be alternatively translated as, “a wild or disorderly class of men,” see Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 NORTH CAROLINA LAW REVIEW 539, 578 n. 201 (2000).

¹⁵ COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 191, 194 (1628).

Elizabeth I at one time found it necessary to issue a proclamation shielding its members from mob violence.¹⁶ Legislative reform, however, appears to have been effective, because a century and a half after Coke's comments, Blackstone describes *qui tam* without criticism, expect to note a statutorily-cured abuse.¹⁷

Early American Experience

Qui tam was no stranger to colonial America or to the early Republic. Colonial legislatures enacted *qui tam* statutes of their own,¹⁸ and colonial courts heard *qui tam* cases arising under these statutes,¹⁹ as well as under English law.²⁰ *Qui tam* statutes dot the work of the first Congresses of the new Republic,²¹ and *qui tam* cases appear among the cases of the early federal

¹⁶ *Protecting Informers*, 8 ELIZABETH I, PROCLAMATION OF NOVEMBER 10, 1566, reprinted with transliteration in II HUGHES & LARKIN, TUDOR ROYAL PROCLAMATIONS, 1553-1587, 288-89 (1969) ("The Queen's majesty, understanding the great disorder that of late hath been and yet is daily used in and about the cities of London and Westminster, and especially in and about Westminster Hall and the palace of Westminster, by divers light and evil-disposed persons who in great routs and companies have assembled themselves together against such as be informers upon penal laws and statutes, commonly called promoters; and so being assembled, have not only beaten and very evil treated divers of the same informers but also have made great outcries against the same persons, where the courts and places of justice in Westminster Hall and other places thereabouts have been much disquieted and troubled, and the Queen's majesty's peas broken. . . . Wherefore her majesty doth straightly charge and command all persons that they nor any of them do hereafter commit . . . any such disorder or misbehavior . . . against any such informers. . . upon pain to suffer imprisonment of their bodies by the space of three months . . ."). The Proclamation is available without transliteration in GREAT BRITAIN SOVEREIGNS, 1558-1603: PROCLAMATIONS, 373 (1971)(DeCapo Press).

¹⁷ III BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160 (1768)(transliteration supplied) ("But, more usually, these forfeitures created by statute are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same; and hence such actions are called *popular* actions, because they are given to the people in general. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor and then the suit is called a *qui tam* action, because it is brought by a person '*qui tam pro domino rege, &c, quam pro seipso in hac parte sequitur*.' If the king therefore himself commences this suit, he shall have the whole forfeiture. But if any one hath begun a *qui tam*, or *popular*, action, no other person can pursue it; and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even to the king himself. This has frequently occasioned offenders to procure their own friends to begin a suit, in order to forestall and prevent other actions: which practice is in some measure prevented by a statute made in the reign of a very sharp-sighted prince in penal laws . . .").

¹⁸ *E.g.*, COLONIAL LAWS OF MASSACHUSETTS 8 (1686)(penalties for fraud in the sale of bread to be distributed one-third to inspector who discovered the fraud and remainder for the benefit of the town where the offense occurred); *Id.* at 54 (penalties for catching mackerel out of season to be distributed one half to the informer and one half to the town where the offense occurred); 1 STATUTES OF CONNECTICUT 531 (1672)(penalties of 10 shillings for permitting a night-time disorderly assembly under one's roof to be distributed half to the town and half to the individual who filed the complaint); 1 COLONIAL LAWS OF NEW YORK, 1664-1719, 279, 281 (1692)(penalty of £50 for an officer's failure to perform duties for the prevention of piracy to be distributed one moiety [half] to the informer and one to the province); *Id.* at 845 (1715)(20 shilling penalties for taking oysters out of season to be distributed half to the informer and half to the benefit of the poor of the town where the offense occurred); 2 COLONIAL LAWS OF NEW YORK, 1720-1737, 988, 989-90 (1737)(penalties of £30 for peddling without a license to be distributed one moiety to the informer and one for the benefit of the town where the offense occurred); 7 VIRGINIA STATUTES (HENNING) 282, 285 (1759)(penalties for peddling without a license to be distributed one moiety to the king for the support of the College of William & Mary and one to informer who brings the action on the debt for its recovery); IV STATUTES OF SOUTH CAROLINA, 1752-1786, 460 (1778)(penalties of £1,000 for acting as a magistrate without authorization to be distributed one half to the public treasury and one half to those who sued for their recover).

¹⁹ *E.g.*, *Churchill v. Blackburn*, 1 Va. Colonial Dec. R26 (Va. Gen. Ct. 1730); *Musgrove, qui tam v. Gibbs*, 1 U.S. 216 (Pa. 1787).

²⁰ *E.g.*, *Britton, qui tam v. Ridgely*, 4 H. & McH. 503 (Md. Prov. 1768)(3 & 4 GEORGE II, ch.12); *Anderson, qui tam v. Winston*, 2 Va. Colonial Dec. B201 (Va. Gen. Ct. 1735)(32 HENRY VIII, ch. 9).

²¹ *E.g.*, §3, Act of March 1, 1790, 1 Stat. 101, 102 (1790); §4, Act of July 20, 1790, 1 Stat. 131, 133 (1790); §3, Act of July 22, 1790, 1 Stat. 137, 138 (1790); §44, Act of March 2, 1791, 1 Stat. 198, 209 (1791).

courts.²² By the turn of the twentieth century, qui tam statutes had largely fallen into disuse in this country, although they often remained on the books.

Contemporary Federal Qui Tam Statutes

In *Stevens*, the Supreme Court identified four contemporary federal qui tam statutes: the False Claims Act, the Patent Act, and two Indian protection laws.²³ One of the Indian protection statutes has since been amended so that it no longer authorizes a qui tam action.²⁴ The Leahy-Smith America Invests Act replaced the Patent Act qui tam provision with one that affords victims a cause of action.²⁵ Of the two survivors, the False Claims provision is by far the more often invoked.

Congress has enacted a number of other statutes, beyond those with obvious qui tam markings, which might be similarly characterized. The Supreme Court observed in *United States ex rel. Marcus v. Hess* that “statutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue.”²⁶ The suggestion encouraged environmentalists to bring qui tam actions based on an informer-reward provision in the Rivers and Harbors Act. The lower courts were not particularly receptive to the suggestion.²⁷ In fact thus far, they have generally refused to recognize the authority to bring a qui tam action under the Rivers and Harbors Act.²⁸

Yet the Court mentioned the suggestion again in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,²⁹ and in citing the existing qui tam-specific statutes, pointed out two of the

²² E.g., *United States v. Simms*, 5 U.S. (1 Cranch) 252 (1803); *Adams v. Woods*, 6 U.S. (2 Cranch) 336 (1805); *The Emulous*, 1 F.Cas. 697 (D. Mass. 1813)(No. 4,479), *rev’d sub nom.*, *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814).

²³ *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 768-69 n.1 (2000), referring to 31 U.S.C. 3729-3733; 35 U.S.C. 292; 25 U.S.C. 81; and 25 U.S.C. 201, respectively, all as they appeared at the time. A fifth, not identified, 26 U.S.C. 7341 (sale of untaxed, taxable property), appears to have been rarely used.

²⁴ 25 U.S.C. 81 (1994 ed.). The qui tam provision disappeared when the Indian Tribal Economic Development Act rewrote the section, P.L. 106-179, 114 Stat. 46 (2000).

²⁵ P.L. 112-29, 125 Stat. 329 (2011), 35 U.S.C. 292(b).

²⁶ *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4. (1943).

²⁷ *Bass Anglers Sportsman’s Soc. v. U.S. Plywood-Champion Papers, Inc.*, 324 F.Supp. 302, 306 (S.D.Tex. 1971) (“Justice Black’s dictum [from *Hess* and quoted above] would appear to state the law too broadly. The *qui tam* action depends entirely upon statutory authorization, as it has never found its way into the common law. The action arises only upon a statutory grant. The fact that someone is entitled by statute to share in some penalty or forfeiture does not necessarily also give such person the right to bring an original action to recover such penalty or forfeiture. There must be statutory authority, either express or implied, for the informer to bring the qui tam action”).

²⁸ *Jacklovich v. Interlake, Inc.*, 458 F.2d 923, 924 (7th Cir. 1972) (no qui tam authority may be drawn from the informer reward provision of the Rivers and Harbors Act); *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81, 84-8 (2d Cir. 1972); *Gerbingh ex rel. United States v. I.T.T. Rayoinier Inc.*, 332 F.Supp. 309, 310 (M.D.Fla. 1971); *Bass Anglers Sportsman’s Soc. v. Scholze Tannery, Inc.*, 329 F.Supp. 339, 344-45 (E.D.Tenn. 1971); *Bass Anglers Sportsman’s Soc. v. U.S. Plywood-Champion Papers, Inc.*, 324 F.Supp. at 306-307.

²⁹ *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 777 n.7 (2000), quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4. (1943).

qui tam-silent informer-reward statutes.³⁰ The lower federal courts, however, continue to maintain that “Congress must *explicitly* create *qui tam* statutes.”³¹

False Claims Act

Civil War Origins

The False Claims Act originated as the Act of March 2, 1863.³² Its brief legislative history is devoted almost exclusively to a subsequently abandoned proposal that all offenders, both military and civilian, be tried by courts martial.³³ Senator Howard, the sponsor and floor manager of the bill in the Senate, provided the only explicit explanation of the qui tam provision:

The other clauses which follow, and which prescribe the mode of proceeding to punish persons who are not in the military service of the United States, I take it, are open to no serious objection. The effect of them is simply to hold out to a confederate a strong temptation to betray his coconspirator, and bring him to justice. The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator, if he be such; but it is not confined to that class. Even the district attorney, who is required to be vigilant in the prosecution of such cases, may be also the informer, and entitle himself to one half the forfeiture under the *qui tam* clause, and to one half of the double damages which may be recovered against the person committing the act. In short, sir, I have based the fourth, fifth, sixth, and seventh sections upon the old-fashion idea of hold out a temptation, and “setting a rogue to catch a rogue,” which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.³⁴

As enacted, the statute prohibited various frauds against the government, including making or presenting false claims, false vouchers, false oaths, forged signatures, theft, embezzlement, and conspiracy.³⁵ The proscriptions applied to both military personnel and civilians.³⁶ Civilian offenders faced a sentence of imprisonment of from one to five years or a fine of not less than \$1,000 or more than \$5,000.³⁷ They also faced civil liability in the amount of \$2,000, double the

³⁰ *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. at 768-69 n.1, citing 18 U.S.C. 962 (vessels armed against nations with whom the U.S. is at peace); 46 U.S.C. 723 (now 46 U.S.C. 801030) (salvage of ship wrecks off the Florida coast). Other statutes of this sort include: 15 U.S.C. 1177 (confiscation of gambling devices pursuant to customs procedures); 16 U.S.C. 422d (theft or malicious mischief involving property on Moores Creek National Battlefield); 16 U.S.C. 425g (theft or malicious mischief involving property on Fredericksburg and Spotsylvania County Battle Field Memorials); 16 U.S.C. 430i (theft or malicious mischief involving property in Guilford Courthouse National Military Park); 18 U.S.C. 512 (confiscation of motor vehicles with altered identification numbers pursuant to customs procedures); 18 U.S.C. 1955 (confiscation of illegal gambling business property pursuant to customs procedures); 18 U.S.C. 1963 (confiscation of racketeering enterprise-related property pursuant to customs procedures); 18 U.S.C. 2513 (confiscation of communications interception devices pursuant customs procedures); 19 U.S.C. 1619 (confiscation under the customs laws); 26 U.S.C. 7214 (unlawful acts by revenue officers or agents); 50 U.S.C. 215 (confiscation of property used in aid of an insurrection).

³¹ *Stalley v. Methodist Healthcare*, 517 F.3d 911, 920 (6th Cir. 2008); see also *United Seniors Ass’n, Inc. v. Philip Morris USA*, 500 F.3d 18, 23 (1st Cir. 2007).

³² 12 Stat. 696 (1863).

³³ 33 *Cong. Globe* 952-960 (1863).

³⁴ *Id.* at 955-56 (remarks of Sen. Howard).

³⁵ Section 1, Act of March 2, 1863, 12 Stat. at 696-97 (1863).

³⁶ Sections 1 and 3, Act of March 2, 1863, 12 Stat. at 696-97, 698.

³⁷ Section 3, Act of March 2, 1863, 12 Stat. at 698.

amount of damage sustained by the United States, and costs.³⁸ Any person might bring suit in the name of the United States to recover the civil penalties, although the suit could only be settled with the consent of the court and federal prosecutors.³⁹ The private parties, known as relators,⁴⁰ were entitled to half of the penalty recovered and costs, if successful.⁴¹ The qui tam provisions were codified in the Revised Statutes⁴² and continued relatively unchanged until 1943 when the Attorney General sought to have them repealed.⁴³

1943 Amendments

On August 28, 1942, Attorney General Biddle requested repeal of the qui tam provisions in identical letters to the Speaker of the House and the Chairman of the Senate Judiciary Committee.⁴⁴ He explained that:

The reasons advanced by Senator Howard for the enactment of these sections are no longer pertinent. Recent experience shows that plaintiffs in informers' suits not only fail to furnish to the United States the information which is the basis of their actions, but on the contrary, at times base the litigation on information which has been secured by the Government in the regular course of law enforcement. Such plaintiffs at times not only use information contained in indictments returned against the defendant, but also seek to use Government files to prove their cases. Consequently, informers' suits have become mere parasitical actions, occasionally brought only after law-enforcement offices have investigated and prosecuted persons guilty of a violation of law and solely because of the hope of a large reward.⁴⁵

He also referred to a court of appeals decision that seemed to reflect judicial condemnation of the qui tam provisions.⁴⁶ The Senate passed the repeal proposal with little debate at the close of the 77th Congress.⁴⁷ The House acted with similar dispatch and passed a comparable bill when it convened in the 78th Congress.⁴⁸ In the interim, however, the Supreme Court had repudiated the lower court opinion which the Attorney General had cited.⁴⁹ Moreover, opposition to repeal had

³⁸ *Id.*

³⁹ Section 4, Act of March 2, 1863, 12 Stat. at 698.

⁴⁰ The term "relator" derives from the style used in qui tam suits. For example, the case that figures prominently in the 1943 amendments was styled *United States ex rel. Marcus v. Hess*. "Ex rel." stands for "ex rationale," which in this context means "in relation to." Thus, "United States ex rel. Marcus" means the "United States in relation to the allegations brought by Marcus."

⁴¹ Section 6, Act of March 2, 1863, 12 Stat. at 698.

⁴² The qui tam provisions appeared in REV. STAT. §§3490-3494; the criminal provisions in REV. STAT. §5438 (1876). The criminal provisions have remained separate and are now found in 18 U.S.C. 286-287. Their evolution is beyond the scope of this report.

⁴³ 31 U.S.C. 231-235 (1940 ed.).

⁴⁴ Printed in S. Rept. No. 77-1708, at 1-2 (1942); H. Rept. No. 78-263 at 1-2 (1943).

⁴⁵ S. Rept. No. 77-1708, at 2; H. Rept. No. 78-263 at 2.

⁴⁶ *Id.* ("In a recent informer's action, *United States ex rel. Marcus v. Hess*, 127 F. (2d) 233, the Circuit Court of Appeals for the Third Circuit, in reversing a judgment in the sum of \$315,100.91 in favor of the informer made the following observations (p. 235): 'Qui tam actions have always been regarded with disfavor: It is wrong for a free country to allow an informer to seek redress for his own pecuniary advantage in respect of a public wrong in which he has no direct personal interest or concern. A wrong to the State should surely be atoned for by a penalty payable to the State alone. * * * Hurst, *The Common Informer*, 147 Contemporary Review 189, 190").

⁴⁷ 88 Cong. Rec. 9138 (1942)(S. 2707).

⁴⁸ 89 Cong. Rec. 2801 (1943)(H.R. 1203).

⁴⁹ *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 (1943)("We cannot accept either the interpretive approach or

developed in the Senate.⁵⁰ As a consequence, the Senate Judiciary Committee recommended curtailing, rather than repealing, the false claim qui tam provisions.⁵¹ The two Houses ultimately concurred and passed Public Law 78-213.⁵²

The legislation required relators to provide the government with the evidence upon which their litigation was based and to allow the government 60 days to intervene.⁵³ It precluded qui tam suits based on information already within the government's possession,⁵⁴ and it reduced the relator's share of a successful suit from 50% to no more than 25% (no more than 10% should the government litigate the case).⁵⁵

1986 Amendments

The 1943 amendments addressed reform of those qui tam procedures seen as rewarding the unworthy and obstructing other law enforcement efforts. The 1986 amendments reinvigorated qui tam procedures in the face of the evidence of extensive fraud against the United States.⁵⁶ They reflected a fairly wide array of concerns. Changes included:

- an explicit cause of action for reverse false claims (false statements calculated to reduce an obligation to pay the United States),⁵⁷
- a cause of action for retaliation against whistleblowers,⁵⁸

the actual decision of the court below. Qui tam suits have been frequently permitted by legislative action, and have not been without defense by the courts"). In support of this latter point, the Supreme Court cited a nineteenth century opinion which lauded qui tam suits, *Id.* at 541 n. 5, quoting *United States v. Griswold*, 24 F. 361, 366 (D. Ore. 1885) ("The statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel").

⁵⁰ S. Rept. No. 78-291, Pt.2 (1943)(minority views of Sen. Langer).

⁵¹ S. Rept. No. 78-291 (1943).

⁵² 57 Stat. 608 (1943).

⁵³ 57 Stat. at 608, 31 U.S.C. 232(C)(1946 ed.).

⁵⁴ *Id.*

⁵⁵ 57 Stat. at 609; compare, 31 U.S.C. 234 (1940 ed.), with 31 U.S.C. 232(E)(1946 ed.).

⁵⁶ S. Rept. No. 99-345, at 2-3 (1986)("In 1985 . . . 45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses. Additionally, the Justice Department has reported that in the last year, four of the largest defense contractors . . . have been convicted of criminal offenses while another . . . has been indicted and awaits trial. . . . The Department of Justice has estimated fraud as draining 1 to 10 percent of the entire Federal budget. Taking into account the spending level in 1985 of nearly \$1 trillion, fraud against the Government could be costing taxpayers anywhere from \$10 to \$100 billion annually"); see also H. Rept. No. 99-660, at 18 (1986).

⁵⁷ 31 U.S.C. 3729(a)(7)(1988 ed.). Although some believed the False Claims Act already covered such misconduct, the Justice Department urged adoption of an explicit provision to avoid any ambiguity suggested by the case law, S. Rept. No. 99-345, at 15 (1986); H. Rept. No. 99-660, at 20 (1986).

⁵⁸ 31 U.S.C. 3730(h)(1988 ed.). H. Rept. No. 99-660, at 23 ("Under current law, there is no federal whistle blower protection statute for persons who are fired or otherwise discriminated against by their employer because of their lawful participation in a False Claims Act case. Often, the employee within the company may be the only person who can bring the information forward. If the person stands to lose his job, he may be unwilling to expose company fraud"); S. Rept. No. 99-345, at 4-5.

- an increase in sanctions from a penalty of not more than \$2,000 and double damages to a penalty of not less than \$5,000 nor more than \$10,000 and treble damages,⁵⁹
- an increase in the maximum award available to qui tam relators from not more than 25% to not more than 30%,⁶⁰
- an express definition of the knowledge required for a violation and declaration that a specific intent was unnecessary,⁶¹
- a specific preponderance-of-the-evidence burden of proof standard,⁶²
- a declaration that states might act as qui tam relators,⁶³
- a revised jurisdictional bar for qui tam suits based on matters of public knowledge,⁶⁴
- an expanded statute of limitations,⁶⁵ and
- an authorization for government use of civil investigative demands.⁶⁶

2009 Amendments

The amendments of the Fraud Enforcement and Recovery Act of 2009 reinforced the 1986 amendments, particularly in instances where judicial developments evidenced a need for clarification.⁶⁷ Modifications included:

- eliminating language suggesting that a false claim must be submitted directly to a federal officer or employee,⁶⁸
- adding a specific materiality element defined to encompass those false statements having natural tendency to influence payment,⁶⁹
- expanding the conspiracy proscription to apply to all of the substantive False Claims Act violations,⁷⁰ and
- enlarging the reverse false claims offense to cover not only false statements but any improper avoidance.⁷¹

⁵⁹ Compare, 31 U.S.C. 3729 (1982 ed.), with 31 U.S.C. 3729(a)(1988 ed.). Recall that the statutory penalty had been set at \$2,000 since 1863.

⁶⁰ Compare, 31 U.S.C. 3730(c)(2)(1982 ed.), with 31 U.S.C. 3730(d)(2)(1988 ed.).

⁶¹ 31 U.S.C. 3729(b)(1988 ed.). The Committee expressed concern that absent a specific provision the courts would require actual knowledge of a statement's false character and specific intent, S. Rept. No. 99-345, at 7, citing, *United States v. Aerodex, Inc.* 469 F.2d 1003 (5th Cir. 1972); H. Rept. No. 99-660, at 20-1.

⁶² 31 U.S.C. 3731(c). Without a statutory provision, some courts had imposed a more demanding standard, S. Rept. No. 99-345, at 31, citing, *United States v. Ueber*, 299 F.2d 310 (6th Cir. 1962) ("Some courts have required that the United States prove its case by clear and convincing, or even by clear, unequivocal, and convincing evidence"); H. Rept. No. 99-660 at 25-6.

⁶³ 31 U.S.C. 3732(b)(1988 ed.). At least one court had held in a Medicaid fraud action that they could not, *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984).

⁶⁴ 31 U.S.C. 3730(e)(1988 ed.).

⁶⁵ 31 U.S.C. 3731(b)(1988 ed.).

⁶⁶ 31 U.S.C. 3733. Civil investigative demands are a form of administrative subpoena.

⁶⁷ Section 4, P.L. 111-21, 123 Stat. 1617, 1621 (2009).

⁶⁸ 31 U.S.C. 3729(a)(1)(A).

⁶⁹ 31 U.S.C. 3729(a)(1)(B), (G), (b)(4).

⁷⁰ 31 U.S.C. 3729(a)(1)(C).

⁷¹ 31 U.S.C. 3729(a)(1)(G).

2010 Amendments

Congress tucked modest False Claims Act amendments into the Patient Protection and Affordable Care Act (PPACA)⁷² and the Dodd-Frank Wall Street Reform Act (Dodd-Frank).⁷³ PPACA clarified the definition of the relator “original source” qualification.⁷⁴ Dodd-Frank added an explicit 3-year statute of limitations within which a civil action in response to retaliation must be commenced.⁷⁵

Current State of the Law

Persons Who May Be Liable

The False Claims Act declares that any “person” who violates its prohibitions may incur liability. It does not define the term “person.” As a general rule, federal law understands the term to “include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”⁷⁶ Local governments are considered persons for purposes of False Claims Act suits brought against them,⁷⁷ but states⁷⁸ and Indian tribes are not.⁷⁹ The statute also denies federal courts jurisdiction over certain False Claims Act suits brought by private parties against Members of Congress, members of the federal judiciary, senior federal officials, or members of the armed forces.⁸⁰

⁷² P.L. 111-148, §10104(j)(2), 124 Stat. 901 (2010), amending, 31 U.S.C. 3730(e)(4).

⁷³ P.L. 111-203, §1079A(c), 124 Stat. 2079 (2010), amending, 31 U.S.C. 3730(h).

⁷⁴ Section 3730(e)(4)(emphasis added) now provides: “(A) The court shall dismiss an action . . . if substantially the same allegations . . . were publicly disclosed . . . unless . . . the person bringing the action is an original source of the information. (B) For purposes of this paragraph, “original source” means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) *who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions*, and who has voluntarily provided the information to the Government before filing an action under this section.

Prior law defined “original source” as “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)(B)(2006 ed.); *Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 476 (2007).

⁷⁵ 31 U.S.C. 3730(h)(3).

⁷⁶ 1 U.S.C. 1.

⁷⁷ *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 122 (2003). The same can be said of other state-created corporations that also function independently, *United States ex rel. Oberg v. Kentucky Higher Education Student Loan Corp.*, 681 F.3d 575, 578, 580 (4th Cir. 2012)(“To determine if [state-created entities] are subject to suit under the FCA . . . the critical inquiry is whether [they] are truly subject to sufficient state control to render them a part of the state, and not persons . . . [that is, to distinguish] a State-created entity functioning independently of the State from a State-created entity functioning as an arm of the State or its alter ego”).

⁷⁸ *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000). State agencies that function as an arm of the state are not “persons” subject to suit under the False Claims Act, *United States ex rel. Onnen v. Sioux Falls Independent School District 49-5*, 688 F.3d 410, 414 n.3 (8th Cir. 2012).

⁷⁹ *United States v. Menominee Tribal Enterprises*, 601 F.Supp.2d 1061, 1068 (E.D.Wis. 2009).

⁸⁰ 31 U.S.C. 3730(e)(1) and (2) provide:

“(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person’s service in the armed forces.

“(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a

Who May Bring an Action

The False Claims Act is designed to allow private individuals to sue on behalf of the government, but any False Claims Act litigation takes place in the shadow of the government's prerogatives. The action is brought in the name of the United States. The Attorney General may bring an action for violations.⁸¹ A private party may also bring such an action,⁸² but the government may elect to assume primary responsibility for the litigation from the beginning.⁸³ If it initially chooses not to do so, the government is nevertheless free to intervene later in the proceedings upon a showing of cause.⁸⁴ The government is likewise free to move to dismiss or settle the litigation over the objections of the relator, as long as the relator is given an opportunity to be heard.⁸⁵ The government may also petition the court to limit the relator's participation in the litigation in the interest of a more effective presentation of the action.⁸⁶

A relator may not bring a False Claims Act action based on public information or information from official proceedings, unless he or she is the original source of the information.⁸⁷ In addition,

member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

“(B) For purposes of this paragraph, ‘senior executive branch official’ means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).”

⁸¹ 31 U.S.C. 3730(a).

⁸² 31 U.S.C. 3730(b).

⁸³ 31 U.S.C. 3730(c)(1).

⁸⁴ 31 U.S.C. 3730(c)(3).

⁸⁵ 31 U.S.C. 3730(c)(2) (“(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion. (B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera”); *United States ex rel. Schweizer v. Oce N.V.*, 677 F.3d 1228, 1289-93 (D.D.C. 2012) (finding that the government’s option to dismiss under §3730(c)(2)(A) does not render §3730(c)(2)(A) a dead letter and that a relator is entitled to a judicial determination that a proposed settlement is “fair, adequate, and reasonable”).

⁸⁶ 31 U.S.C. 3730(c)(2)(C) (“Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government’s prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person’s participation, such as – (i) limiting the number of witnesses the person may call; (ii) limiting the length of the testimony of such witnesses; (iii) limiting the person’s cross-examination of witnesses; or (iv) otherwise limiting the participation by the person in the litigation”).

The court may also limit the relator’s participation in the interest of avoiding undue harassment of the defendant, 31 U.S.C. 3730(c)(2)(D) (“Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation”).

⁸⁷ 31 U.S.C. 3730(e)(4) (“(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed – (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) 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. (B) For purposes of this paragraph, “original source” means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section”); see also, *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S.Ct. 1885, 1889 (2011) (written agency response to relator’s wife’s Freedom of Information request constitutes a report for purposes of the original source provision); *Graham County Soil and Water Conservation*

the False Claims Act features a first-to-file bar which precludes a second relator from bringing a later copycat action.⁸⁸ The bar extends to any claims that allege the same material or essential elements of the same underlying fraud.⁸⁹ Furthermore, a member of the armed forces may not bring an action against another member based on the defendant's service.⁹⁰ On the other hand, even though relators are often referred to as private parties, government employees may bring a False Claims Act qui tam action as long as one of the statutory bars does not apply.⁹¹

Basis for Liability

Seven forms of misconduct give rise to civil liability under §3729. They occur when anyone:

- (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
- (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

District v. United States ex rel. Wilson, 130 S.Ct. 1396, 1400 (2010)(public disclosure bar of §3730(e)(4) includes state or local administrative reports, hearings, audits, or investigations); *United States ex rel. Davis v. District of Columbia*, 679 F.3d 832, 839 (D.C.Cir. 2012)(The False Claims Act “now allows a relator to proceed if he either meets the . . . pre-public disclosure notification requirement, or if he possesses knowledge independent of the public disclosure that materially adds to the public disclosure and he provides the information to the government prior to filing suit”).

⁸⁸ 31 U.S.C. 3730(b)(5)(“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”). “The first-to-file bar thus functions both to eliminate parasitic plaintiffs who piggy back off the claims of a prior relator, and to encourage legitimate relators to file quickly by protecting the spoils of the first to bring a claim,” *In re Natural Gas Royalties Qui Tam Litigation (CO2 Appeals)*, 566 F.3d 956, 961 (10th Cir. 2009).

A similar bar applies with respect to actions based on civil litigation or administrative penalty enforcement proceedings to which the United States is a party, 31 U.S.C. 3730(e)(3)(“In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party”).

⁸⁹ *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1208-210 (D.C.Cir. 2011); *United States ex rel. Duxbury v. Ortho Biotech Products*, 579 F.3d 13, 24 (1st Cir. 2009); *In re Natural Gas Royalties Qui Tam Litigation (CO2 Appeals)*, 566 F.3d at 962; *United States ex rel. Branch Consultants v. Allstate Insurance Co.*, 560 F.3d 371, 377 (5th Cir. 2009); *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 516 (6th Cir. 2009).

⁹⁰ 31 U.S.C. 3730(e)(1).

⁹¹ *United States ex rel. Holmes v. Consumer Insurance Group*, 318 F.3d 1199, 1212 (10th Cir. 2003)(en banc), citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546 (1943)(“Thus, we believe that *Marcus*, to the extent it construed the qui tam provision as allowing a government official to file suit as a relator based upon information obtained in the course of his or her official duties, remains valid”); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419-420 (9th Cir. 1991)(“The United States further argues that the ‘public disclosure’ required by the statute occurred when Hagood as a government employee ‘disclosed’ to himself as a member of the public information on which he based his suit. To say that the argument of the United States is tortured is to state the obvious. . . . We hold that no ‘public disclosure’ was made”); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1496-1500 (11th Cir. 1991); *United States ex rel. LeBlanc v. Raytheon Co., Inc.*, 913 F.2d 17, 20 (1st Cir. 1990); see also *United States ex rel. Burns v. A.D. Roe Co., Inc.*, 186 F.3d 717, 722-23 (6th Cir. 1999)(declining to address the argument that government employees are per se ineligible to file False Claims Act qui tam actions, but noting that the argument has been uniformly rejected by other courts). A federal employee may have difficulty qualifying as an “original source” of publicly available information upon which an action is based in the nature of his duties is that he is obligated to disclose the information to his superiors rather than “voluntarily” disclosing it as the definition of “original source” requires, *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 742-44 (9th Cir. 1995)(“[T]he fact Fine was employed specifically to disclose fraud is sufficient to render his disclosures nonvoluntary”).

(D) 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;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.⁹²

Additional liability may also flow from any retaliatory action taken against those who seek to stop violations of the False Claims Act, 31 U.S.C. 3730(h).

Presentation of a false or fraudulent claim (31 U.S.C. 3279(a)(1)(A))

Prior to enactment of the Fraud Enforcement and Recovery Act of 2009 (2009 Act),⁹³ this section was designated 31 U.S.C. 3279(a)(1) and read, “(a) Any person who – knowingly presents, or causes to be presented, to an officer or employee of the United States Government or member of the Armed Forces of the United States a false or fraudulent claim for payment or approval.”⁹⁴ The language had been construed in the D.C. Circuit’s *Totten* opinion to mean that liability “only attach[ed] if the claim [was] ‘presented to an officer or employee of the Government.’”⁹⁵ Congress removed the reference to federal government employees and members of the armed services in order to clarify “that direct presentment is not required for liability to attach.”⁹⁶ The claims encompassed within §3279(a)(1)(A) are those presented to the federal government, its employees or agents, as well as those presented to others for payment, directly or indirectly, out of federal funds.⁹⁷

Here and throughout §3279(a)(1), the government need not show that the defendant acted with the intent to defraud.⁹⁸ Moreover, the knowledge element can be satisfied with a showing that the

⁹² 31 U.S.C. 3729.

⁹³ P.L. 111-21, 123 Stat. 1617 (2009).

⁹⁴ 31 U.S.C. 3279 (2006 ed. & Supp. II).

⁹⁵ S. Rept. No. 111-10, at 10 (2009), quoting, *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 490 (D.C. Cir. 2004).

⁹⁶ S. Rept. No. 111-10, at 11.

⁹⁷ 31 U.S.C. 3279(b)(2) (“the term ‘claim’ – (A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—(i) is presented to an officer, employee, or agent of the United States; or (ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest, and if the United States Government – (I) provides or has provided any portion of the money or property requested or demanded; or (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and (B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual’s use of the money or property”).

⁹⁸ 31 U.S.C. 3279(b)(1)(B); *United States ex rel. Wall v. Circle C Construction, L.L.C.*, 697 F.3d 345, 356 (6th Cir. 2012); *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1049 (9th Cir. 2012).

defendant acted knowingly, with deliberate ignorance, or with reckless disregard.⁹⁹ The “reckless disregard” standard contemplates a mens rea somewhere between deliberate disregard and gross negligence.¹⁰⁰

Use of false records or statements material to a false or fraudulent claim (31 U.S.C. 3279(a)(1)(B))

Section 3279(a)(1)(B) reaches, “Any person . . . who knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.” Before the 2009 Act’s amendments, this section applied to, “Any person who . . . 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*.”¹⁰¹ The 2009 Act amended the section to negate the Supreme Court’s suggestion in *Allison Engine*¹⁰² that liability under its provisions required proof that “a defendant must intend that the Government itself pay the claim.”¹⁰³ The 2009 Act also made materiality a specific element of §3279(a)(1)(B), thus requiring that the false record or statement have “a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”¹⁰⁴ At the time of enactment, most but not all of the lower courts to consider the issue believed that §3279 contained an implicit materiality requirement.¹⁰⁵ The 2009 amendments also made its modifications retroactively applicable to cases pending on June 7, 2008 and thereafter.¹⁰⁶

Conspiracy to commit liability triggering misconduct (31 U.S.C. 3279(a)(1)(C))

At one time, this section (then referred to as §3279(a)(3)) imposed civil liability upon those who conspired “to defraud the Government by getting a false or fraudulent claim allowed or paid.”¹⁰⁷ To some, this meant that liability for substantive misconduct and conspiracy did not correspond.

⁹⁹ 31 U.S.C. 3729(b)(1)(A)(“the terms ‘knowing’ and ‘knowingly’ – (A) mean that a person, with respect to information – (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information”); *United States ex rel. K & R Ltd. v. Massachusetts Housing Finance Agency*, 530 F.3d 980, 983 (D.C.Cir. 2008); *United States ex rel. Farmer v. City of Houston*, 523 F.3d at 338; *United States ex rel. Taylor-Vick v. Smith*, 513 F.3d 228, 230 (5th Cir. 2008).

¹⁰⁰ *United States ex rel. Wall v. Circle C Construction, L.L.C.*, 697 F.3d 345, 356 (6th Cir. 2012)(“An aggravated form of gross negligence (i.e., reckless disregard) will satisfy the scienter requirement for an FCA violation”).

¹⁰¹ 31 U.S.C. 3720(a)(2)(2006 ed. & 2008 Supp.)(language removed by the 2009 Act in italics).

¹⁰² *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008).

¹⁰³ S. Rept. No. 111-10, at 10 (2009), quoting, *Allison Engine Co. v. United States ex rel. Sanders*, [553 U.S. at 669].

¹⁰⁴ 31 U.S.C. 3729(b)(4); *United States ex rel. Wall v. Circle C Construction, L.L.C.*, 697 F.3d 345, 356 (6th Cir. 2012). The definition tracks the generally understand materiality standard, see e.g., *United States v. Bourseau*, 531 F.3d 1159, 1171 (9th Cir. 2008), citing *Neder v. United States*, 527 U.S. 1, 16 (1999); *United States ex rel. Sanders v. North American Bus Industries, Inc.*, 546 F.3d 288, 297 (4th Cir. 2008); but see, *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998)(adopting a materiality standard under which the misconduct must have “the purpose and effect of causing the United States to pay out money it is not obligated to pay, or those actions which intentionally deprive the United States of money it is lawfully due”).

¹⁰⁵ *United States v. Bourseau*, 531 F.3d at 1170-171, noting the agreement of the First, Fourth, Fifth, Sixth, and Eighth Circuits, but pointing out that in *United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402, 415 (3d Cir. 1999), the Third Circuit had “cast[] doubt on whether materiality is an element under the FCA, but [had] declin[ed] to resolve the issue”. Later, the Second Circuit found it unnecessary to address the materiality issue, but noted in passing that it considers the 2009 materiality amendment to §3279(a)(1)(B) only prospectively applicable, *United States ex rel. Feldman v. van Gorp*, 697 F.3d 78, 86 n.5 (2d Cir. 2012).

¹⁰⁶ Section 4(f), P.L. 111-21, 123 Stat. 1625 (2009), 31 U.S.C. 3729 note.

¹⁰⁷ 31 U.S.C. 3729(a)(3)(2006 ed. & Supp. II).

For example, although civil liability might be incurred under then §3279(a)(7) for false statements calculated to conceal an obligation to pay the United States (reverse false claims), a reverse false claims conspiracy might not be thought to result in liability since it would not constitute a conspiracy to get a “claim allowed or paid,” as the language of the conspiracy prohibition then required.¹⁰⁸ The 2009 Act resolved the incongruity by recasting the section to establish liability for conspiracy to engage in any misconduct covered by the substantive pronouncements in §3729(a)(1) not just the misconduct described in §3729(a)(1)(A) and §3729(a)(1)(B) (the only two sections to expressly refer to claims).¹⁰⁹

Short-changing the government on the transfer of funds or other property (31 U.S.C. 3729(a)(1)(D))

The 2009 Act streamlined this section, eliminating the receipt requirement and substituting a knowledge element for one that once insisted on willful concealment or an intent to defraud. Where the section once declared:

Any person who . . . (4) 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 . . . is liable. . . . 31 U.S.C. 3729(a)(4) (2006 ed. & Supp. II).

It now states:

Any person who . . . (D) 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 . . . is liable. . . . 31 U.S.C. 3729(a)(1)(D).

Issuing a false government receipt (31 U.S.C. 3729(a)(1)(E))

Section 3729(a)(1)(E) (previously designated §3729(a)(5)) establishes civil liability for any individual, authorized to certify receipt of property on behalf of the government, who knowingly certifies falsely with the intent to defraud the government.¹¹⁰ Section 3729(a)(1)(E) is the only one of the offenses enumerated in §3729(a)(1) that requires that the defendant act “intending to defraud the Government.” None of the others expressly mentions an intent to defraud. Nevertheless, an intent to defraud might be considered an implicit component of the knowledge

¹⁰⁸ *United State ex rel. Huangyan Import v. Nature’s Farm Products*, 370 F.Supp.2d 993, 1102-1003 (N.D.Cal. 2005) (“Admittedly, this creates an unusual lack of symmetry in the FCA’s structure: Normal and reverse false claims are equally punishable as a substantive matter, but only conspiracies directed at the former, not the latter, are punishable. . . . The requirement that the conspiracy be directed at ‘getting a false or fraudulent claim allowed or paid,’ §3729(a)(3), is unambiguous: Its plain meaning requires that the conspirators seek to be ‘paid’ or to have a claim on the treasury ‘allowed.’ This is not what allegedly happened here; the alleged conspirators in this case wanted to avoid paying money to the United States”).

¹⁰⁹ 31 U.S.C. 3729(a)(1)(C) (“any person who . . . (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G)” incurs liability).

¹¹⁰ 31 U.S.C. 3729(a)(1)(E) (“Any person who . . . (E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true . . . is liable . . .”).

element found in the various enumerated offenses. Section 3729(b)(1), however, declares that an intent to defraud is not a component of the knowledge element.¹¹¹

Unlawful purchase of government property (31 U.S.C. 3729(a)(1)(F))

Section 3729(a)(1)(F)(once §3729(a)(6)) creates civil liability for those who purchase government property, or who accept government property as security, from a government officer or employee or member of the armed forces who has no authority to sell or pledge the property.¹¹² The section requires the relator to show that the defendant acted with guilty knowledge.¹¹³

Reverse false claims (31 U.S.C. 3729(a)(1)(G))

The 2009 Act rewrote and substantially changed the scope of §3729(a)(1)(G)(once §3729(a)(7)), the so-called reverse false claims section. It is “described as a ‘reverse false claims’ provision because the financial obligation that is the subject of the fraud flows in the opposite of the usual direction.”¹¹⁴ Instead of attempting to obtain money or property from the government, the misconduct is designed to avoid providing money or property to the government. In its present state, the section covers two forms of misconduct: (1) making or using a false statement or record material to an obligation to provide the government with money or property, and (2) knowingly concealing or improperly avoiding or decreasing an obligation to provide the government with money or property. The first prong is the traditional form; the 2009 Act added the second.

The Committee report accompanying passage of the 2009 Act explained that the second prong was designed for greater symmetry with §3729(a)(1)(A) and §3729(a)(1)(B). Where those sections speak of misconduct calculated to induce excessive payments by the government, section 3729(a)(1)(G) speaks of misconduct calculated to avoid full payment to the government. Sections 3729(a)(1)(B) and (A) condemn making false statements and submitting false claims to induce payment by the government; §3729(a)(1)(G) was crafted to condemn making false statements and engaging in other improper conduct calculated to avoid full payment of the government. Until passage of the 2009 Act, §3729(a)(1)(G)(then styled §3729(a)(7)) only covered false statements, but had no false presentation counterpart.¹¹⁵ The section was amended in hopes of filling the gap:

Any person who . . . (G) knowingly makes, uses, or causes to be made or used, a false record or statement *material* to an obligation to pay or transmit money or property to the Government, or *knowingly conceals or knowingly and improperly avoids or decreases an*

¹¹¹ 31 U.S.C. 3729(b)(“For purposes of this section– (1) the terms ‘knowing’ and ‘knowingly’ . . . (B) *require no proof of specific intent to defraud*”).

¹¹² 31 U.S.C. 3729(a)(1)(F)(“Any person who . . . (F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property . . . is liable . . .”).

¹¹³ *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1476-477 & n.21 (9th Cir. 1996), quoting, *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995)(“For a qui tam action to survive summary judgment, the relator must produce sufficient evidence to support an inference of knowing fraud”). Moreover, the required “knowledge” may take the form of “actual knowledge,” “deliberate ignorance,” or “reckless disregard,” 31 U.S.C. 3729(b)(1).

¹¹⁴ *United States ex rel. Ramadoss v. Caremark, Inc.*, 586 F.Supp.2d 668, 692 (W.D.Tex. 2008), quoting, *United States ex rel. Bahrani v. Conagra*, 465 F.3d 1189, 1195 (10th Cir. 2006).

¹¹⁵ “Any person who . . . (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government is liable. . . .” 31 U.S.C. 3729(a)(7)(2006 ed.).

obligation to pay or transmit money or property to the Government is liable. . . . 31 U.S.C. 3729(a)(1)(G)(language added by the 2009 Act in italics).¹¹⁶

The new language does more than fill gaps. Unlike §3729(a)(1)(A), it creates civil liability for not only false or fraudulent claims, but for “any knowing and improper conduct.” Moreover, unlike §3729(a)(1)(A), it establishes liability without insisting on either direct or indirect presentation.¹¹⁷ Nor need the misconduct involve a false or fraudulent statement or record; conscious or recklessly improper conduct will suffice.¹¹⁸

Although the term “improper” is not defined, the 2009 Act added a new definition of “obligation” which considerably enlarges the scope of the false statement and the improper avoidance prongs of §3729(a)(1)(G). Parsed to its constituent parts, the definition states:

obligation means

1. an established duty
2. whether fixed or not fixed
3. arising from
 - a. an express or implied
 - i. contractual,
 - ii. grantor-grantee, or
 - iii. licensor-licensee relationship
 - b. a fee-based or similar relationship
 - c. statute or regulation, or
 - d. the retention of any overpayment.¹¹⁹

Earlier courts, operating without the benefit an explicit definition, had often construed the term “obligation” more narrowly. Some courts had found that the reverse false claims section did not “extend to the potential or contingent obligations to pay the government fines or penalties which [had] not been levied or assessed . . . and which [did] not arise out of an economic relationship between the government and the defendant (such as a lease or a contract or the like).”¹²⁰ Although

¹¹⁶ S. Rept. No. 111-10 at 13-4 (“Section 3729(a)(7) . . . is commonly referred to as creating ‘reverse’ false claims liability because it is designed to cover Government money or property that is knowingly retained by a person even though they have no right to it. This provision is similar to the liability established under 3729(a)(2). . . . However, the provision does not capture conduct described in 3729(a)(1), which imposes liability for actions to conceal, avoid, or decrease an obligation directly to the Government. This legislation closes this loophole and incorporates an analogous provision to 3729(a)(1) for ‘reverse’ false claims liability”).

¹¹⁷ *Id.* at 14 (“The Committee also notes that the reverse false claims provision and amendments to that provision do not include any new language that would incorporate or should otherwise be construed to include a presentment requirement. This is consistent with various court decisions that have held that the current reverse false claims provision does not contain a presentment requirement”), citing, *United States ex rel. Bahrani v. Conagra, Inc.*, 465 F.3d 1189, 1208 (10th Cir. 2006) and *United States ex rel. Koch v. Koch Industries*, 57 F.Supp.2d 1122, 1144 (N.D. Okla. 1999).

¹¹⁸ Recall that §3729(b)(1) defines “knowingly” to mean actual knowledge, deliberate ignorance, or reckless disregard.

¹¹⁹ 31 U.S.C. 3729(b)(3)(“the term ‘obligation’ means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment”).

¹²⁰ *United States ex rel. Marcy v. Rowan Companies, Inc.*, 520 F.3d at 391, quoting, *United States ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648, 657 (5th Cir. 2004); see also, *United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1237 (11th Cir. 1999)(the section does cover obligations created by a contract between the government and the

a few had held that the obligation need not always be fixed,¹²¹ most had “held that in order to create liability under (a)(7), the obligations must be fixed and definite at the time of the false claim.”¹²² The 2009 Act codified a more expansive view:

The term ‘obligation’ is now defined under new Section 3729(b)(3) and includes fixed and contingent duties owed to the Government – including fixed liquidated obligations such as judgments, and fixed, unliquidated obligations such as tariffs on imported goods. . . . By including contingent obligations such as, ‘imposed contractual, quasi-contractual, grant-or-grantee, licensor-licensee, fee-based, or similar relationships, this new section reflects the Committee’s view, . . . that an ‘obligation’ arises across the spectrum of possibilities from the fixed amount debt obligation where all particulars are defined to the instance where there is a relationship between the Government and a person that results in a duty to pay the Government money, whether or not the amount owed is yet fixed.¹²³

It remains to be seen whether the section includes false statements or improper conduct calculated to mitigate the extent of a future fine or penalty assessment not constituting an obligation, contingent or fixed, at the time of the statement or conduct.

Retaliatory actions (31 U.S.C. 3730(h))

The False Claims Act for some time has encouraged insiders to report and cooperate with efforts to investigate and prosecute violations of the Act by offering them protection against retaliation.¹²⁴ A claim of retaliation does not require the prior filing of a False Claims Act action, but it does require proof of some adverse action taken in response or anticipation of such action.¹²⁵

Until passage of the 2009 Act, the False Claims Act condemned retaliation by employers against employees and mentioned some of the protected forms of assistance. The courts concluded that only employees might claim the section’s protection and that it exposed only employers to liability.¹²⁶ The 2009 Act expanded §3730(h) to specifically include employees, contractors, and agents and eliminated references to employers and specific examples of protected assistance:

defendant).

¹²¹ *United States ex rel. Bahrani v. Conagra*, 465 F.3d 1189, 1202 (10th Cir. 2006)(“We agree that there are instances in which a party is required to pay money to the government, but, at the time the obligation arises, the sum has not been precisely determined”).

¹²² *United States ex rel. Marcy v. Rowan Companies, Inc.*, 520 F.3d 384, 390 (5th Cir. 2008), citing, *American Textile Manufacturers Institute, Inc. v. The Limited, Inc.*, 190 F.3d 729, 735 (6th Cir. 1999) and *United States v. Q Inter'l Courier, Inc.*, 131 F.3d 770, 774 (8th Cir. 1997); see also, *United States v. Bourseau*, 531 F.3d 1159, 1169-170 (9th Cir. 2008).

¹²³ S Rept. No. 111-10, at 14 (2009).

¹²⁴ See P.L. 99-561, §4, 100 Stat. 3157 (1986), enacting 31 U.S.C. 3730(h)(1988 ed.).

¹²⁵ *McBride v. Peak Wellness Center, Inc.*, 688 F.3d 698, 704 (10th Cir. 2012)(“An employee need not actually file a qui tam action to qualify for whistleblower protection, but the activity prompting the plaintiff’s discharge must have been taken in furtherance of an FCA enforcement action”); *United States ex rel. Bartz v. Ortho-McNeil Pharmaceutical*, 856 F.Supp.2d 253, 271 (D.Mass. 2012)(“[C]onduct protected by the FCA is limited to activities that reasonably could lead to an FCA action”).

¹²⁶ *Vessell v. DPS Associates*, 148 F.3d 407, 413 (4th Cir. 1998)(the section does not cover independent contractors); *United States ex rel. Siewick v. Jamison Science and Engineering, Inc.*, 322 F.3d 738, 740 (D.C.Cir. 2003) (corporation’s President and CEO was not an employer and consequently beyond the section’s reach); *Yesudian ex rel. United States v. Howard University*, 270 F.3d 969, 972 (D.C. Cir. 2001)(the section does not apply to an employee’s supervisors); *United States ex rel. Morgan v. Science Applications International Co.*, 604 F.Supp.2d 245, 250-51 (D.D.C. 2009)(the section does not apply to the employees of a subcontractor); *United States ex rel. Saragoglou v. Weill Medical College*, 451 F.Supp.2d 613, 625 (S.D.N.Y. 2006)(the section does not apply to an employee’s

Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, 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, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.¹²⁷

Congress clearly intended to expand the protection to §3730(h) to include contractors and agents. Time will tell whether the courts will conclude that it intended also to expand liability under the section beyond employers to include supervisors, contractors, and agents of an employer.

Penalties and Awards

If a court finds a defendant liable under §3729, it may award treble damages; a statutory penalty ranging from \$5,000 to \$10,000; the government's litigation costs; and a relator's expenses, attorneys' fees, and costs.¹²⁸ The court may reduce its damage award to no less than double damages if it finds that a defendant made prompt disclosure and provided full cooperation before judicial or administrative proceedings began.¹²⁹ If a court finds an individual has been the victim of retaliation in violation of §3730(h), it may order the defendant to pay the individual's attorneys' fees, litigation costs, and twice the amount of "back pay, interest on back pay, and compensation for special damages sustained as a consequence" of the retaliation.¹³⁰

If the False Claims Act action succeeds, relators are entitled to a share in the proceeds of up to 30%. If the government has not participated in the litigation, they are entitled to an award of from 25% to 30%.¹³¹ If the government has participated in the litigation, they are entitled to an award of from 15% to 25%,¹³² reduced to no more than 10% when their claim was based primarily on

supervisors); *Orell v. UMass Memorial Medical Center, Inc.*, 203 F.Supp.2d 52, 65-7 (D.Mass. 2002)(same).

¹²⁷ 31 U.S.C. 3730(h). The relevant portion of the section previously read: "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 this section, including investigation for, initiation of, testimony for, or assistance in any action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole . . ." 31 U.S.C. 3730(h)(2006 ed.).

¹²⁸ 31 U.S.C. 3729(a)(1), (3); 3730(d). The 2009 Act amended §3729(a)(1) to provide for inflationary adjustments of the \$5,000-\$10,000 statutory penalty.

¹²⁹ 31 U.S.C. 3729(a)(2) ("If the court finds that – (A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information; (B) such person fully cooperated with any Government investigation of such violation; and (C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation, [–] the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person").

¹³⁰ 31 U.S.C. 3730(h)(2).

¹³¹ 31 U.S.C. 3730(d)(2) ("If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant").

¹³² 31 U.S.C. 3730(d)(1) ("If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially

public information.¹³³ In any case, they are also entitled to attorneys' fees, expenses, and costs,¹³⁴ but may be denied any award if they participated in the underlying fraud.¹³⁵ If the defendant prevails in a False Claims Act action in which only a private relator has taken part, the court may award the defendant attorneys' fees and expenses, should it conclude that the action was clearly frivolous, vexatious, or brought to harass.¹³⁶ The test for whether attorneys' fees and expenses are appropriate is said to be analogous to that used for prevailing defendants under 42 U.S.C. 1988.¹³⁷ Such awards are thought to be appropriate only under "rare and special circumstances,"¹³⁸ when the relator's action is meritless, groundless, or without foundation;¹³⁹ when allegations are bereft

contributed to the prosecution of the action. . . . Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant").

¹³³ *Id.* (" . . . Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to 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, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation . . . "); *Anderson v. United States*, 686 F.3d 791, 795 (9th Cir. 2012); *United States ex rel. Johnson v. Universal Health Services, Inc.*, ___ F.Supp.2d ___, ___ *2 (W.D. Va. Sept. 5, 2012), quoting, *United States ex rel. Shea v. Verizon Com., Inc.*, 844 F.Supp.2d 78, 81 (D.D.C. 2012) ("The fifteen percent award specified in the FCA has generally been regarded as a finder's fee to which the relators are entitled even if they only involvement in the suit was merely to file the action. It is noted that '[p]ercentage awards about the statutory 15% take into account whatever information, work, and help of any kind the relator provides, apart from the mere filing of the action, that leads to a recovery by the Government, and substantially contributes to the prosecution of the case without harming the Government's efforts").

¹³⁴ 31 U.S.C. 3730(d)(1), (2); *United States ex rel. Longhi v. Lithium Power Technologies Inc.*, 575 F.3d 458, 475-76 (5th Cir. 2009); *Gonter v. Hunt Valve Co., Inc.*, 510 F.3d 610, 614 (6th Cir. 2007) ("[O]nly the plaintiff has the power to demand that the defendant pay the fees of the plaintiff's attorney under the FCA; without such a demand the defendant is under no obligation to pay").

¹³⁵ 31 U.S.C. 3730(d)(3) ("Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of §3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of §3729 that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice").

¹³⁶ 31 U.S.C. 3730(d)(4) ("If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment"). The term "expenses" does not include "costs" which covers things like court fees and witness fees and may be awarded under the less demanding standards of Rule 54 of the Federal Rules of Civil Procedure, *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1171-172 (10th Cir. 2009); *United States ex rel. Costner v. United States*, 317 F.3d 889, 891 (8th Cir. 2003); *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1412-413 (9th Cir. 1995).

¹³⁷ *United States ex rel. Onnen v. Sioux Falls Independent School District No. 49-5*, 688 F.3d 410, 415 (8th Cir. 2012); *Pfingston v. Ronan Engineering Co.*, 284 F.3d 999, 1005-1006 (9th Cir. 2002); *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 705 (2d Cir. 2001), each citing, S. Rept. No. 99-345, at 29 (1986).

¹³⁸ *United States ex rel. Rafizadeh v. Continental Common, Inc.*, 553 F.3d 869, 875 (5th Cir. 2008); *Pfingston v. Ronan Engineering Co.* 284 F.3d at 1006-1007.

¹³⁹ *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1058 (10th Cir. 2004). "An action is not frivolous if existing law or a reasonable suggestion for its extension, modification, or reversal supports the action," *United States ex rel. Rafizadeh v. Continental Common, Inc.*, 553 F.3d at 875.

of factual support or when there is no reasonable chance of success;¹⁴⁰ or when brought or pursued for an improper motive.¹⁴¹

Procedure

The False Claims Act states that prosecution of a violation of §3729 must begin within six years, although there is an exception for undiscovered fraud which extends the deadline to 10 years as long as the action is brought within three years of discovery.¹⁴² The courts are divided over the question of whether this extension is available to private parties or only in cases initiated by the government.¹⁴³

In the case of litigation for retaliatory misconduct under §3730(h)(rather than one of §3729's proscriptions), Dodd-Frank Wall Street Reform Act established a 3-year statute of limitations.¹⁴⁴ Previously, parties were required to look to the most closely analogous statute of limitations under state law, since the sole explicit False Claims Act provision applied only to causes of action under §3729.¹⁴⁵

For private litigants, the process begins with a complaint filed under seal with the federal court in the district in which a violation occurred or in which any of the defendants are found, resides, or

¹⁴⁰ *United States ex rel. Mikes v. Straus*, 274 F.3d at 705; *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 356 (4th Cir. 2009).

¹⁴¹ *Pfingston v. Ronan Engineering Co.*, 284 F.3d at 1006. The courts may also be influenced by the defendant's conduct in the course of litigation, e.g., *United States ex rel. Onnen v. Sioux Falls Independent School District No. 49-5*, 688 F.3d at 415 ("Although we would also have affirmed an award of attorney's fees because the record contains indications that Onnen's unsupported claims were asserted primarily for vengeful harassment, we conclude the district court did not abuse its substantial discretion in denying an award of attorney's fees. Our conclusion is influenced somewhat by the defendants' urging of an alternative ground that prompted the Attorney General to appear as amicus curiae to urge a proper interpretation of the relevant federal statutes. It is appropriate that defendants pay their own attorney's fees when they chose, unnecessarily, to use this case in a misguided attempt to obtain blanket immunity from FCA liability").

¹⁴² 31 U.S.C. 3731(b) ("A civil action under section 3730 may not be brought – (1) more than 6 years after the date on which the violation of section 3729 committed, or (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, [–]whichever occurs last").

¹⁴³ *United States ex rel. Sanders v. North American Bus Industries, Inc.*, 546 F.3d 288, 294 (4th Cir. 2008)(the extension is only available to the government); *United States ex rel. Sikkenga v. Regence Blue Cross Blue Shield*, 472 F.3d 702, 722-25 (10th Cir. 2006)(same); *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1214-216 (9th Cir. 1996) (the extension is available to both the government and to a relator); *United States ex rel. Ven-A-Care v. Actavis Mid Atlantic LLC*, 659 F.Supp.2d 262, 273 (D.Mass. 2009)(same); see also, *United States ex rel. Snapp v. Ford Motor Co.*, 532 F.3d 496, 509-10 (6th Cir. 2008)(recognizing the split of authority, but finding it unnecessary to decide the issue); *United States ex rel. Klein v. Omeros Corp.*, ___ F.Supp.2d ___, ___ *2 (W.D. Wash. Oct. 15, 2012)(holding the Supreme Court's *Eisenstein* decision, relating to appeals in False Claims Act cases, did not implicitly overrule *Hyatt*).

¹⁴⁴ P.L. 111-203, §1079(c), 124 Stat. 2079 (2010), 31 U.S.C. 3730(h)(3).

¹⁴⁵ *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409, 422 (2005). The courts seem unlikely to apply the Dodd-Frank amendment retroactively to causes of action in place prior to its enactment, *Riddle v. Dynacorp Int'l, Inc.*, 666 F.3d 940, 943-44 (5th Cir. 2012)("The parties do raise the question of whether the newly-enacted Dodd-Frank [Act] . . . has an effect on this appeal. . . . Our precedent directs us to apply the statute of limitations that is in effect at the time a plaintiff files his complaint. We may sometimes apply a newly-enacted statute of limitations to a pending case, but not if the effect would be to revive a claim that expired before the statute's effective date"); cf., *Graham County Soil and Water Conservation District v. United States ex rel. Wilson*, 130 S.Ct. 1396, 1400 n.1 (2010)("The legislation [amending the public disclosure bar] makes no mention of retroactivity which would be necessary for its application to pending cases given that it eliminates petitioner's claimed defense to a qui tam suit").

does business.¹⁴⁶ Thereafter, relators must deliver all their material evidence and information to the government.¹⁴⁷ The government has 60 days, or until the end of a longer period of any extensions granted by the court for cause, in which to decide whether intervene.¹⁴⁸ The government has at its disposal civil investigative demand authority which allows it to compel the production of material and testimony in its investigations.¹⁴⁹

After the government has made its initial determination of whether to intervene, the defendants are served and have 20 days in which to respond.¹⁵⁰ The government, or in its absence the relator, must prove damages and all of the elements of the asserted violation by a preponderance of the evidence.¹⁵¹ A defendant, however, may not contest the presence of any elements of any violation which has been established or conceded against him in parallel criminal proceedings.¹⁵² Although they sue in the name of the United States, relators are bound by the 30-day deadline for appellate review rather than the 60-day deadline available to the government.¹⁵³

Until recently, some courts had held that the statute of limitations barred government intervention in a privately initiated case after the 6-year/3-year time period had run. That is, the government's action would not be thought to relate back to the private litigant's filing within the statute of limitations.¹⁵⁴ The 2009 Act added a new subsection to §3731 to afford the government the advantage of the date of the relator's complaint as a cut-off date for statute of limitations purposes.¹⁵⁵ Thus, a complaint, which would be time barred as of the date of the government's intervention, survives, if it would not be time barred on the date of the relator's earlier original complaint and relates to that complaint.¹⁵⁶

¹⁴⁶ 31 U.S.C. 3730(b)(2), 3732(a).

¹⁴⁷ 31 U.S.C. 3730(b)(2).

¹⁴⁸ 31 U.S.C. 3730(b)(2), (3), (4).

¹⁴⁹ 31 U.S.C. 3733.

¹⁵⁰ 31 U.S.C. 3730(b)(3).

¹⁵¹ 31 U.S.C. 3731(d); *United States ex rel. Sikkenga v. Regence Blue Cross Blue Shield*, 472 F.3d 702, 724 (10th Cir. 2006).

¹⁵² 31 U.S.C. 3731(e) ("Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730").

¹⁵³ *United States ex rel. Eisenstein v. New York*, 556 U.S. 928, 929 (2009).

¹⁵⁴ *United States v. The Baylor University Medical Center*, 469 F.3d 263, 267-70 (2d Cir. 2006).

¹⁵⁵ 31 U.S.C. 3731(c) ("If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, 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 prior complaint of that person"); *United States ex rel. Frascella v. Oracle Corp.*, 751 F.Supp.2d 842, 853-54 (E.D.Va. 2010); *United States ex rel. Freedman v. Suarez-Hoyos*, 781 F.Supp.2d 1270, 1282 (M.D.Fla. 2011)(emphasis added)("31 U.S.C. 3731(c) expressly provides that if the Government intervenes and files an amended complaint, then the amended complaint relates back to the date of the Relator's complaint for statute of limitations purposes, to the extent that the claims of the Government arise out of the conduct, transactions, occurrences set forth, or attempted to be set forth, in the Relator's complaint. While §3731(c) was added as part of the *Fraud Enforcement and Recovery Act of 2009 ('FERA')*, the Act contains a note that provides that §3731(c) applies in cases pending on the date of its enactment").

¹⁵⁶ *United States ex rel. Miller v. Bill Harbert Int'l Construction*, 608 F.3d 871 (D.C.Cir. 2010)("Miller's allegations

Indian Protection (25 U.S.C. 201)

All penalties which shall accrue under Title 28 of the Revised Statutes shall be sued for and recovered in an action in the nature of an action of debt, in the name of the United States, before any court having jurisdiction of the same, in any State or Territory in which the defendant shall be arrested or found, the one half to the use of the informer and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use. 25 U.S.C. 201.

Section 201 dates from 1834 and authorizes qui tam actions for violations of five separate statutes: (1) unlawful purchase of land from an Indian nation or tribe;¹⁵⁷ (2) driving livestock to feed on Indian land;¹⁵⁸ (3) settling on or surveying Indian land;¹⁵⁹ (4) setting up a distillery in Indian country;¹⁶⁰ and (5) trading in Indian country without a license.¹⁶¹

Qui tam actions under §201 are relatively rare and appear to have arisen most often under the unlicensed trading and grazing (livestock on Indian land) provisions. In the *Hall* unlicensed trader case, the relators' action survived a standing challenge,¹⁶² but was dismissed for failure to join an indispensable party – the tribe, which had contracted for gambling equipment and services from the unlicensed supplier.¹⁶³ In *Keith*, the relator's action was dismissed after the court concluded that “bureaucratic nonfeasance” made it impossible to obtain the required trader's license.¹⁶⁴ Relators were somewhat more successful in *Hornell*, where the court upheld recovery of the monetary penalty, but declined to affirm confiscation of the station wagon that was the object of the unlicensed sale.¹⁶⁵

Section 179 prohibits grazing horses, mules, or cattle on Indian land without permission and sets the penalty at \$1 per head. The circuits are divided over the question of whether the Secretary of the Interior may by regulation set the penalty at \$1 per head for each day of violation.¹⁶⁶ Federal

concerning any contracts beyond 20A were nothing more than ‘naked assertions[s] devoid of further factual enhancements’ Allowing such broad and vague allegations to expand the range of permissible amendments after the limitation period has run would circumvent the statutory requirement in the FCA that the amendments ‘arise[] out of the conduct, transactions, or occurrence in the original complaint, 31 U.S.C. 3731(c); it would also, we note, circumvent the recent teachings of [*Ashcroft*] v. [*Iqbal*], 556 U.S. 662 (2009)] and [*Bell Atlantic Corp.* v.] [*Twombly*], 550 U.S. 544 (2007)] by allowing amendments to relate back to allegations that were themselves nothing more than naked assertions. That potential for abuse is avoided by the relation back provision in the FCA, the amendment of which postdates *Twombly*, cabin[ing] the scope of otherwise untimely amendments by imposing the same ‘conduct, transactions, or occurrences’ requirement”).

¹⁵⁷ 25 U.S.C. 177 (Rev. Stat. §2116).

¹⁵⁸ 25 U.S.C. 179 (Rev. Stat. §2117).

¹⁵⁹ 25 U.S.C. 180 (Rev. Stat. §2118).

¹⁶⁰ 25 U.S.C. 251 (Rev. Stat. §2141).

¹⁶¹ 25 U.S.C. 264 (Rev. Stat. 2133). Section 201 applies where Congress established monetary penalties for various prohibitions enacted for the protection of the Indians; it does not create a qui tam cause of action with respect criminal statutes which come replete with terms of imprisonment such as the embezzlement provisions of 25 U.S.C. 450d, *United States ex rel. Burnette v. Driving Hawk*, 587 F.2d 23, 23-5 (8th Cir. 1978).

¹⁶² *United States ex rel. Hall v. Tribal Development Corp.*, 49 F.3d 1208, 1216 (7th Cir. 1995).

¹⁶³ *United States ex rel. Hall v. Tribal Development Corp.*, 100 F.3d 476, 478 (7th Cir. 1996).

¹⁶⁴ *United States ex rel. Keith v. Sioux Nation Shopping Center*, 634 F.2d 401, 403 (8th Cir. 1980).

¹⁶⁵ *United States ex rel. Hornell v. One 1976 Chevrolet Station Wagon*, 585 F.2d 978, 980-81 (10th Cir. 1978).

¹⁶⁶ *United States ex rel. Whitehorse v. Briggs*, 555 F.2d 283, 288 (10th Cir. 1977)(to “permit a cow to trespass and graze on Indian land for a day, a month, a year, or forever, upon the payment of a statutory penalty in the amount of \$1 . . . would completely defeat the intent of, and purpose behind, the statute”); *United States ex rel. Chase v. Wald*, 557 F.2d

district courts have jurisdiction exclusive of the states for enforcement of the penalties under §179, but they may abstain from exercising jurisdiction in favor of enforcement in a tribal court of jurisdiction.¹⁶⁷

There may be some question whether the monetary penalty established in §177 may be enforced by a qui tam action under §201. Section 201, however, applies to “penalties which shall accrue under Title 28 of the Revised Statutes,” (*i.e.*, Rev. Stat. §§2039-2157). Section 177 appears in Title 28 of the Revised Statutes as section 2116. Thus, on its face, §201 permits a qui tam action to recover the penalties accruing under §177.

In *Harlan*, however, the Eighth Circuit stated in dicta that “25 U.S.C. §177 appears to deal directly with cases where, as here, a person attempts to lease tribal lands without express approval of the federal government. . . . The statute makes violators subject to a fine of \$1,000, *but has no provision entitling relators to bring actions under it.* See *James v. Watt*, 716 F.2d 71 (1st Cir. 1983).”¹⁶⁸ The issue in *Harlan* was whether the qui tam provisions then found in 25 U.S.C. 81, relating to contracts for services which required government approval, extended to sharecrop agreements. The court referred to section 177 “simply . . . to demonstrate that a broad and general policy to oversee all contracts by Indians need not be accomplished through 25 U.S.C. §81 alone.” The *James* case, which the court cites, held that an individual tribal member, suing as a victim of a violation of section 177, may only do so as a representative of his tribe and not on his own behalf.¹⁶⁹ It says nothing of whether he may do so on behalf of the United States qui tam.

The application of section 201 to the penalties under §177 seems clear on its face, but the contrary statement in *Harlan* seems equally clear.

Constitutional Concerns

Qui tam evokes constitutional issues of two classes. First, to what extent may qui tam defendants claim the constitutional protections available to defendants in criminal cases? Second, is qui tam compatible with the Constitution’s allocation of powers among the three branches of government? At first glance, the first question seems the least troubling. The rights available in criminal proceedings exist precisely because the proceedings are criminal. The Sixth Amendment rights – the right to counsel; to call and confront witnesses; to informed of the nature of the charges against him; to trial in the place where the offense occurred; and to a speedy and public trial before an impartial jury – apply only to “the accused” in criminal proceedings.¹⁷⁰ Thus, they are inapplicable to federal qui tam proceedings which are civil in nature.¹⁷¹ Rights found elsewhere in the Constitution, however, often turn upon whether the government’s action may be or must be considered punitive. Here the answers are bit less clear.

157, 161 (8th Cir. 1977)(the Secretary has no authority to increase the statutory penalty).

¹⁶⁷ *United States v. Plainbull*, 957 F.2d 724, 726-28 (9th Cir. 1992).

¹⁶⁸ *United States ex rel. Harlan v. Bacon*, 21 F.3d 209, 212 (1994)(emphasis added).

¹⁶⁹ *James v. Watt*, 716 F.2d 71, 72 (1st Cir. 1983)(emphasis in the original)(“this court has held that the INA [Indian Nonintercourse Act, 25 U.S.C. 177] was designed to protect the land rights only of *tribes*; that the INA therefore granted a cause of action to tribes; and that individual Indians could not assert INA rights on their own behalf”).

¹⁷⁰ U.S. Const. Amend. VI (“In all criminal proceedings, the accused shall enjoy the right . . .”).

¹⁷¹ *E.g.*, 31 U.S.C. 3730(a)(“ . . . The Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action . . .); 31 U.S.C. 3730(b)(1)(“A person may bring a civil action for a violation of section 3729 for the person and for the United States Government . . . ”); 35 U.S.C. 292(b)(“Any person may sue for the penalty . . . ”).

Double Jeopardy

For example, in the context of the False Claims Act, it was once thought that the Fifth Amendment's double jeopardy clause applied to "actions intended to authorize criminal punishment to vindicate public justice" but not to "civil, remedial actions brought primarily to protect the government from financial loss."¹⁷² It was further thought that a legislatively established civil remedy should not be considered a criminal penalty for double jeopardy purposes unless its purpose or effect was so excessive as to belie its civil designation.¹⁷³

But then the Court seemed to make a rule of the exception when it declared in *United States v. Harper* that, "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."¹⁷⁴ Nine years later, however, in *Hudson v. United States*, the Court withdrew from the broad implications of *Halper* whose analysis it characterized as "ill considered."¹⁷⁵ The appropriate test, the Court declared,¹⁷⁶ is one exemplified in its pre-*Halper* case law:

Whether Congress, in establishing the penalizing mechanism, indicate[] either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, [was] the statutory scheme . . . so punitive either in purpose or effect as to negate that intention. In regard to this latter inquiry, we have noted that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.¹⁷⁷

The Court has looked to the due process standards listed in *Kennedy v. Mendoza-Martinez*,¹⁷⁸ when defendants seek to satisfy the daunting "clearest proof" test.¹⁷⁹ Although *Hudson* was not a qui tam case, later lower federal court qui tam cases consider it dispositive.¹⁸⁰

¹⁷² *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548, 549 (1943).

¹⁷³ *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956).

¹⁷⁴ *United States v. Halper*, 490 U.S. 435, 448-49 (1989). Yet the Court observed in a footnote, "We express no opinion as to whether a *qui tam* action, such as the one in *Hess*, is properly characterized as a suit between private parties for the purpose of this rule," *Id.* at 451 n.10.

¹⁷⁵ 522 U.S. 93, 101 (1997).

¹⁷⁶ *Id.* at 96 ("We hold that the Double Jeopardy Clause of the Fifth Amendment is not a bar to the later criminal prosecution because the administrative proceedings were civil, not criminal. Our reasons for so holding in large part disavow the method of analysis used in *United States v. Halper*. 490 U.S. 435, 448 (1989), and reaffirm the previously established rule exemplified in *United States v. Ward*, 448 U.S. 242, 248-249 (1980)").

¹⁷⁷ *United States v. Ward*, 448 U.S. at 248-49 (internal citations and quotation marks omitted).

¹⁷⁸ 372 U.S. 144, 168-69 (1963).

¹⁷⁹ *United States v. Hudson*, 522 U.S. at 99 (internal citations and quotations omitted) ("Even in those cases where the legislature has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty. In making this latter determination, the factors listed in *Kennedy v. Mendoza-Martinez* provide useful guideposts, including: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment – retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned"); see also *United States v. Ward*, 448 U.S. at 249.

¹⁸⁰ *United States v. Rogan*, 517 F.3d 449, (7th Cir. 2008) ("We know from *Hudson v. United States* . . . that penalties under the False Claims Act are not criminal punishment for the purposes of the Double Jeopardy Clause in the Fifth Amendment"); see also, *United States v. Karron*, 750 F.Supp.2d 480, 493 n. 12 (S.D.N.Y. 2011); *United States v.*

Excessive Fines

The Supreme Court implied in *Hudson* that the problems which drove its *Halper* analysis might more appropriately be judged by Eighth Amendment excessive fines standards.¹⁸¹ The Eighth Amendment states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹⁸² In other contexts, the Supreme Court has determined that the excessive fines clause “does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.”¹⁸³ The clause does apply to “the government’s power to extract payments . . . as punishment for some offense.”¹⁸⁴ The critical question is not whether the procedure for extracting the payment is classified as civil or criminal or whether it serves some additional remedial purposes; if the payment constitutes punishment, it is a “fine” and as a general matter may not be excessive.¹⁸⁵ A fine is excessive, in the eyes of the Court, “if it is grossly disproportionate to the gravity of the defendant’s offense.”¹⁸⁶

In the qui tam context, some lower courts treat False Claims Act qui tam penalties as punishment and consequently subject to excessive fines clause analysis.¹⁸⁷ They have generally concluded, however, that the fines imposed in the cases before them were not excessive for Eighth Amendment purposes.¹⁸⁸

Lumanna, 114 F.Supp.2d 193, 197 (W.D.N.Y. 2000).

¹⁸¹ 522 U.S. at 102-103.

¹⁸² U.S. Const. Amend. VIII.

¹⁸³ *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, 264 (1989) (holding that the excessive fines clause did not apply to a treble damage antitrust award). The Court “left open the question whether a *qui tam* action, in which a private party brings suit in the name of the United States and shares in any award of damages, would implicate . . . the Eighth Amendment’s Excessive Fines Clause,” *Id.* at 275-76 n. 21.

¹⁸⁴ *Austin v. United States*, 509 U.S. 602, 609-10 (1993).

¹⁸⁵ *Id.* at 610. Once again, however, the Court declined to resolve the question of the clause’s application to qui tam penalties, “In *Browning-Ferris*, we left open the question whether the Excessive Fines Clause applies to *qui tam* actions in which a private party brings suit in the name of the United States and shares in the proceeds . . . Because the instant suit was prosecuted by the United States and because Austin’s property was forfeited to the United States, we have no occasion to address that question here,” *Id.* at 607 n.3.

¹⁸⁶ *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

¹⁸⁷ *United States v. Bourseau*, 531 F.3d 1159, 1173-174 (9th Cir. 2008); *United States v. Mackby*, 339 F.3d 1013, 1016 (9th Cir. 2003); *United States v. Medquest Associates, Inc.*, 812 F.Supp.2d 821, 868 (M.D.Tenn. 2011); *United States ex rel. Tyson v. Amerigroup Illinois, Inc.*, 488 F.Supp.2d 719, 743-45 (N.D.Ill. 2007); *United States v. Eghbal*, 475 F.Supp.2d 1008, 1016-19 (C.D.Cal. 2007); *United States v. Byrd*, 100 F.Supp.2d 342, 344-45 (E.D.N.C. 2000); but see, *United States v. Rogan*, 517 F.3d 449, 453-54 (7th Cir. 2007) (finding it unnecessary to resolve the issue and indicating that the results of double jeopardy and excessive fines analysis should be the same, but noting that it considers the law in the area is “unsettled”).

¹⁸⁸ *United States v. Bourseau*, 531 F.3d at 1173-174 (\$15.6 million Medicare False Claim Act penalty was not excessive in light of the harm to the U.S. Treasury and to the integrity of the Medicare program); *United States v. Mackby*, 339 F.3d at 1019 (\$729,454.92 Medicare False Claims Act judgment was not excessive in light of the defendant’s culpability and the harm caused by the offense); *United States ex rel. Tyson v. Amerigroup Illinois, Inc.*, 488 F.Supp.2d 719, 743-45 (N.D.Ill. 2007) (\$334 million Medicaid False Claims Act penalty was not excessive in light of the fact that the statute permitted a penalty of \$524 million); *United States v. Eghbal*, 475 F.Supp.2d at 1016-19 (\$5.851 million in mortgage fraud False Claims Act damages and penalties was not excessive in light of the defendant’s culpability, the seriousness of the offense, and the harm caused); *United States v. Byrd*, 100 F.Supp.2d at 344-55 (\$1.575 million food stamp False Claims Act penalty was not excessive in light of the fact that a penalty of \$2.895 million was authorized under the statute).

Due Process

Two Supreme Court cases suggest that permitting individuals with a personal interest to prosecute in the name of the United States may present due process issues. In *Marshall v. Jerrico, Inc.*, the Court rejected the argument that an administrative agency's receipt of civil penalties which it assessed and collected posed a due process risk of biased prosecution.¹⁸⁹ In the course of its opinion, however, the Court noted that it "need not say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function. In particular, we need not say whether different considerations might be held to apply if the alleged biasing influence contributed to prosecutions against particular persons, rather than to a general zealotry in the enforcement process."¹⁹⁰ That fact pattern surfaced in *Young v. United States ex rel. Vuitton et Fils S.A.*, but the issue splintered the Court.

Young and Vuitton were engaged in trademark litigation which had resulted in the issuance of an order enjoining Young from manufacturing or distributing counterfeit versions of Vuitton's product line.¹⁹¹ Upon a showing of probable cause to believe that Young had violated the injunction, the court appointed Vuitton's lawyers to prosecute the criminal contempt.¹⁹² Five members of the Supreme Court agreed that Young's subsequent conviction should be overturned because, "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order."¹⁹³ Four members of the Court felt this was so because the appointment of an interested prosecutor constituted error which undermined confidence in the integrity of the criminal proceeding.¹⁹⁴ One of the four went so far as to assert that the failure to appoint a disinterested prosecutor constituted a due process violation.¹⁹⁵ A fifth Justice merely concurred in the result, because he felt that the lower court's appointment of a prosecutor – disinterested or not – was invalid on separation of powers grounds.¹⁹⁶

Lower federal courts thereafter confronted with due process challenges to qui tam have rejected them based on the fact that relators press their claims as private civil litigants and thus do not exercise government power subject to due process clause restrictions on criminal prosecutions.¹⁹⁷

Other due process challenges have occasionally arisen over the retroactive amendments to qui tam legislation, sometimes in conjunction with an ex post facto challenge. Ex post facto challenges have failed because the courts considered the statute insufficiently penal to trigger

¹⁸⁹ *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 252 (1980).

¹⁹⁰ *Id.* at 250 n. 12 and accompanying text.

¹⁹¹ *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 790-91 (1987).

¹⁹² *Id.* at 791-92.

¹⁹³ *Id.* at 809.

¹⁹⁴ *Id.* at 810.

¹⁹⁵ *Id.* at 814-15 (Blackmun, J., concurring).

¹⁹⁶ *Id.* at 815 (Scalia, J., concurring in the judgment).

¹⁹⁷ *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 760 (9th Cir. 1993); accord *United States ex rel. Phillips v. Pediatric Services of America, Inc.*, 123 F.Supp.2d 990, 994-95 (W.D.N.C. 2000); *United States ex rel. Fallon v. Accundyne Corp.*, 921 F.Supp. 611, 623-24 (W.D.Wis 1995); *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F.Supp. 1084, 1088 n.4 (C.D.Cal. 1989); but see *Friedman v. Rite Aid Corp.*, 152 F.Supp.2d 766, 771 (E.D.Pa. 2001)(finding due process inapplicable because relators merely receive "an appropriate incentive and reward for aiding the Government").

such concerns.¹⁹⁸ Retroactivity due process challenges have failed because the courts concluded that rational legislative purposes justified retroactive application.¹⁹⁹

Separation of Powers

Is qui tam legislation compatible with the Constitution's allocation of powers among the three branches? The Constitution allocates federal governmental authority among three coordinated branches. It vests all legislative powers in Congress, executive power in the President, and the judicial power of the United States in the federal courts.²⁰⁰ It declares that Congress shall have the power to make all laws, necessary and proper, for carrying into execution its own powers and those of the executive and judicial branches.²⁰¹ It empowers Congress to remove by impeachment the President, the Vice President, and any civil officer of the United States for treason, bribery, or other high crimes and misdemeanors.²⁰² It requires the advice and consent of the Senate for the appointment of ambassadors, public ministers and consuls, judges of the Supreme Court, and all other officers of the United States (except for those inferior officers whose appointment has been otherwise provided for by law).²⁰³ It instructs the President "to take care that the laws be faithfully executed."²⁰⁴

The Constitution authorizes the President to recommend legislation to Congress and to call Congress into extraordinary session.²⁰⁵ Legislation may not become law until presented to the President for his approval, and in the case of his disapproval only upon the vote of a super majority in each House.²⁰⁶ The Constitution says little about how the President may or must exercise the executive authority of the United States. It names the President commander in chief of the armed forces.²⁰⁷ It empowers the President to nominate, and with Senate advice and consent to appoint, ambassadors, public ministers, consuls, judges of the Supreme Court, and all other officers of the United States (except for those inferior officers whose appointment has been otherwise provided for by law).²⁰⁸ It permits the President to grant pardons and reprieves with respect to offenses against the United States and to require executive department heads to provide him with written opinions on matters relevant to their duties.²⁰⁹ It authorizes the President to receive ambassadors and other public ministers.²¹⁰ Finally, the Constitution defines those cases and controversies to which the judicial power of the United States extends.²¹¹

¹⁹⁸ *Sanders v. Allison Engine Co., Inc.*, 703 F.3d 930, 942-48 (6th Cir. Nov. 2, 2012); *United States ex rel. Miller v. Bill Harbert Int'l Construction Inc.*, 608 F.3d 871, 878 (D.C.Cir. 2010).

¹⁹⁹ E.g., *Sanders v. Allison Engine Co., Inc.*, 703 F.3d at 948-49.

²⁰⁰ U.S. Const. Art. I, §1; Art. II, §1; and Art. III, respectively.

²⁰¹ U.S. Const. Art. I, §8, cl. 18.

²⁰² U.S. Const. Art. II, §4.

²⁰³ U.S. Const. Art. II, §2, cl. 2. During a recess of the Senate, the President may fill a vacancy in office with a commission which expires at the end of the next session, U.S. Const. Art. II, §2, cl. 3.

²⁰⁴ U.S. Const., Art. II, §3.

²⁰⁵ *Id.*

²⁰⁶ U.S. Const. Art. I, §7, cl. 2.

²⁰⁷ U.S. Const. Art. II, §2, cl. 1.

²⁰⁸ U.S. Const. Art. II, §2, cl. 2. During a recess of the Senate, the President may fill vacancies in office by commissions which expire at the end of the next session, U.S. Const. Art. II, §2, cl. 3.

²⁰⁹ U.S. Const. Art. II, §2, cl. 1.

²¹⁰ U.S. Const. Art. II, §3.

²¹¹ U.S. Const. Art. III, §2.

This “system of separation of powers and checks and balances . . . was regarded by the Framers as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other[s].”²¹² Yet, in this interwoven fabric of governmental authority, the Framers realized that “[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”²¹³

Commentators and litigants have questioned whether the qui tam is at odds with these basic constitutional principles.²¹⁴ Their concerns are three. First, the Constitution grants the federal courts the judicial power over “cases and controversies.” This is thought to require at least two parties with conflicting interests, presented in a context suitable for judicial resolution, *i.e.*, standing in a case or controversy. Yet, relators come to court with no interest of their own, only a contingent personal interest.²¹⁵ Second, the Constitution instructs the President to see that the laws are faithfully executed. Yet, without his approval or unrestricted control, relators may initiate and prosecute litigation.²¹⁶ Third, the President is vested with the authority to appoint officers of the United States and, with the courts and heads of departments, to appoint inferior officers. Yet, relators, who engage in activities otherwise reserved to officers and inferior officers of the United States, are appointed neither by the President, the courts, nor by the head of any department.²¹⁷

²¹² *Metropolitan Washington Airport Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 273, quoting, *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

²¹³ *United States v. Mistretta*, 488 U.S. 361, 381 (1989), quoting, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (Jackson, J., concurring); see also, *Morrison v. Olson*, 487 U.S. 654, 693-94 (1988) (“Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches . . . We have not hesitated to invalidate provisions of law which violate this principle. On the other hand, we have never held that the Constitution requires that the three branches of government operate with absolute independence”).

²¹⁴ Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE LAW JOURNAL 341 (1989); *The Constitutionality of the False Claims Act’s Qui Tam Provisions*, 16 HARVARD JOURNAL OF LAW & PUBLIC POLICY 701 (1993); Edgar, “Missing the Analytical Boat”: *The Unconstitutionality of the Qui Tam Provisions of the False Claims Act*, 27 IDAHO LAW REVIEW 319 (1990); 1001 Attorneys General: *Executive-Employee Qui Tam Suits and the Constitution*, 62 GEORGE WASHINGTON LAW REVIEW 609 (1993); but see Bales, *A Constitutional Defense of Qui Tam*, 2001 WISCONSIN LAW REVIEW 381.

²¹⁵ “The constitutional cornerstone of the modern doctrine of standing is injury in fact, and without this a party cannot invoke the power of the federal courts. Since by definition a *qui tam* plaintiff has no injury in fact in a False Claims suit, then the *qui tam* provisions of the Act are unconstitutional under Article III’s requirements of ‘cases’ and ‘controversies.’” *Missing the Analytical Boat”: The Unconstitutionality of the Qui Tam Provisions of the False Claims Act*, 27 IDAHO LAW REVIEW 319, 345 (1990).

²¹⁶ “Article II gives the President – and only the President – the power and duty to ‘take Care that the Laws be faithfully executed.’ Although *Morrison* [*Morrison v. Olson*, 487 U.S. 654 (1988)] held that Congress can place certain executive functions in the hands of persons who are not members of the Executive Branch, the Court has never held that Congress may divest the Executive of the power to *initiate* a lawsuit to vindicate the United States’ interest. In fact, a line of cases suggests that this power to initiate lawsuits is a special and inherently executive function. . . . The FCA’s *qui tam* provision interest with the Executive’s ‘initiation power.’ Once a relator files an action under Section 3730(b), that action will proceed regardless of whether the government chooses to intervene.” *Fight for Your Right to Litigate: Qui Tam, Article II, and the President*, 49 STANFORD LAW REVIEW 853, 868, 872 (1997).

²¹⁷ “When one combines *Buckley*’s [*Buckley v. Valeo*, 424 U.S. 1 (1976)] holding that only properly appointed officers can litigate on behalf of the United States with *Fretag*’s [*Fretag v. Commission*, 501 U.S. 868 (1991)] holding that Congressional diffusion of the appointment power – and not only aggrandizement – can violate the Appointments Clause, the conclusion is simple: It is unconstitutional for *qui tam* relators to enforce the FCA on behalf of the United States government because they have not been properly appointed to do so,” *The Constitutionality of the False Claims Act’s Qui Tam Provision*, 16 HARVARD JOURNAL OF LAW & PUBLIC POLICY 701, 743 (1993).

Each of the constitutional challenges to the False Claims Act's qui tam provisions faces an apparent hurdle. Qui tam statutes were fairly common at the time of the drafting of the Constitution. Qui tam statutes were enacted by the early Congresses, populated by men responsible for drafting and ratifying the new Constitution. Although enactment in an early Congress is hardly a sure mark of constitutionality,²¹⁸ action there "provides contemporaneous and weighty evidence of the Constitution's meaning."²¹⁹ Thus, critics face the problem of explaining how a process, which the Framers did not consider unconstitutional, should now be so construed.

Standing

History plays a significant role in determining whether standing exists. Standing requires (1) a concrete injury to the plaintiff's interest, (2) attributable to the defendant, (3) and amenable to judicial relief.²²⁰ When it put standing challenges to rest in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the Supreme Court observed that:

[T]he long tradition of *qui tam* actions in England and the American colonies . . . is particularly relevant to the constitutional standing inquiry since . . . Article III's restriction of the judicial power to "Cases" and "Controversies" is properly understood to mean "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process."²²¹

On the more perplexing matter of the relator's injury, the *Stevens* Court found the injury to the United States sufficient to establish False Claims Act relator standing. With respect to the government's share of the fruits of successful litigation, the Court found standing in the relator as an agent of the defrauded United States.²²² With respect to the relator's share, it considered him the assignee of that portion of the interest of the United States.²²³

Relator standing is in greater doubt in cases where tangible injury to the United States is less obvious. In the case of the false marking section of the Patent Act, at least one court has held that the relator must show either an injury to himself or an injury to the United States for which he might be the agent/assignee, *i.e.*, "an actual or imminent injury in fact to competition, to the

²¹⁸ Recall that the First Congress passed the Judiciary Act of 1789, §13 of which unconstitutionally endeavored to enlarge the original jurisdiction of the Supreme Court, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 172-80 (1803).

²¹⁹ *Bowsher v. Synar*, 478 U.S. 714, 723 (1986), citing *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

²²⁰ *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) ("to satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision").

²²¹ *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000), quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998).

²²² *Id.* at 771-72 ("It is beyond doubt that the complaint asserts any injury to the United States. . . . It would perhaps suffice to say that the relator here is simply the statutorily designated agent of the United States, in whose name . . . the suit is brought—and that the relator's bounty is simply the fee he receives out of the United States' recovery. . . . This analysis is precluded, however, by the fact that the statute gives the relator himself an interest in the lawsuit. . . . For the portion of the recovery retained by the relator, therefore, some explanation of standing other than agency for the Government must be identified").

²²³ *Id.* at 773 ("We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim").

United States economy, or [to] the public that could be assigned to him as a qui tam plaintiff or be vindicated through this litigation.”²²⁴

The *Stevens* Court resolved the issue of qui tam standing, but it “express[ed] no view on the question of whether *qui tam* suits violate Article II, in particular the Appointments Clause of §2 and the ‘take Care’ Clause of §3.”²²⁵

Appointments clause

... [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.²²⁶

The appointments clause issue in qui tam cases flows from apparently contradictory language in two Supreme Court cases. In the more recent, *Buckley v. Valeo*, the Court seemed to conclude that only officers appointed under Article II could be vested with conducting civil litigation on behalf of the United States:

We hold that these provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Art. II, §2, cl. 2, of the Constitution. Such functions may be discharged only by persons who are “Officers of the United States” within the language of that section.²²⁷

Yet, earlier Court decisions suggested that the appointments clause applied only to those purported to hold an “office of the United States,” and that Congress might authorize the performance of services in the name of the United States by those who did so without the attributes of office, selected other than under Article II. The line begins with *United States v. Hartwell* which found that a Treasury Department clerk was an officer of the United States for purposes of an embezzlement statute. The Court noted that the defendant had been appointed in a manner consistent with Article II to a position that “embraced the ideas of tenure, duration, emolument, and duties” and for which the duties were continuing and permanent rather than occasional or temporary.²²⁸

The second case, *United States v. Germaine*, likewise involved a penal statute applicable to “officers of the United States.” The Court concluded that the defendant, a surgeon paid to conduct and report on the results of examinations of applicants and recipients of federal pensions, was not an officer of the United States.²²⁹ The Court supported its view by noting that the defendant filled no office; his duties were occasional and intermittent; he kept no place of business for the public use; he gave no bond; he took no oath; he was but an agent employed by the Commissioner of Pensions to obtain information needed for the performance of the Commissioner’s duties.²³⁰

²²⁴ *Stauffer v. Brooks Brothers, Inc.*, 615 F.Supp.2d 248, 255 (S.D.N.Y. 2009).

²²⁵ *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. at 778 n.8.

²²⁶ U.S. Const. Art. II, §2, cl. 2.

²²⁷ *Buckley v. Valeo*, 424 U.S. 1, 140 (1976).

²²⁸ *United States v. Hartwell*, 73 (6 Wall.) 385, 393-4 (1867).

²²⁹ *United States v. Germaine*, 99 U.S. 508 (1878).

²³⁰ *Id.* at 511-12.

The Court used the same mode of analysis in *Auffmordt v. Hedden*, when it concluded that appraisers called upon in the event of a customs dispute were not officers of the United States and consequently their selection other than under the Article II formula did not invalidate their efforts.²³¹

The Court in *Buckley* distinguished rather than repudiated *Germaine* and *Affmordt*, but it did so in manner that does not necessarily resolve the qui tam issue:

[The term] “Officers of the United States” does not include all employees of the United States, but there is no claim made that the Commissioners are employees of the United States rather than officers. Employees are lesser functionaries subordinate to officers of the United States, see *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890); *United States v. Germaine*, *supra*, whereas the Commissioners, appointed for a statutory term, are not subject to the control or direction of any other executive, judicial, or legislative authority.²³²

The Court later affirmed the *Buckley* assertion that only officers appointed in conformity with Article II could “exercis[e] significant authority pursuant to the laws of the United States.”²³³

Yet in *Freytag*, it acknowledged the existence of various classes empowered other than by Article II appointment who performed services in the name of the United States. There it distinguished Tax Court special trial judges (inferior officers) from special masters (not officers) along the lines suggested in *Germaine* rather than based on a relative degree of independence mentioned in *Buckley*:

The office of special trial judge is established by Law, and the duties, salary, and means of appointment for that office are specified by statute. These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute. Furthermore, special trial judges perform more than ministerial tasks. . . . [T]he special trial judges exercise significant discretion.²³⁴

Although the Court has thus far “express[ed] no view on the question of whether *qui tam* suits violate Article II, in particular the Appointments Clause of §2,”²³⁵ the lower federal courts generally see no appointments clause impediments, because they do not consider qui tam relators officers of the United States:

The procedural requirements of the Appointments Clause only apply to the appointment of officers. Thus, the threshold question that we face is whether *qui tam* relators are “officers” for purposes of Article II. We conclude that they are not; *qui tam* relators do not serve in any office of the United States. There is no legislatively created office of informer or relator under the FCA. Relators are not entitled to the benefits of officeholders, such as drawing a government salary. And they are not subject to the requirement, noted long ago by the Supreme Court, that the definition of an officer “embraces the ideas of tenure, duration, emolument, and duties, and the latter were continuing and permanent, not occasional or

²³¹ *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (His position is without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily).

²³² *Buckley v. Valeo*, 424 U.S. at 126 n.162 (parallel citations omitted).

²³³ *Freytag v. Commissioner*, 501 U.S. 868, 881 (1991), quoting *Buckley v. Valeo*, 424 U.S. at 126.

²³⁴ *Freytag v. Commissioner*, 501 U.S. at 881-82 (internal citations omitted).

²³⁵ *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000).

temporary.” *United States v. Germaine*, 99 U.S. 508, 511-12 (1878); see also *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890).²³⁶

Take care

Unlike the appointments clause, the take care clause does not vest authority in the President. Instead, it imposes a responsibility upon him. The Framers, however, allocated powers among the branches so as to prevent Congress or the courts from undermining or unduly interfering with the President’s ability to perform his constitutional duties, including the duty to take care to see that the laws are faithfully executed.²³⁷ *Morrison v. Olson* presents a question perhaps most closely analogous to the one of whether qui tam statutes undermine or unduly interfere with the President’s ability to fulfill his responsibilities under the take care clause. The case involved the constitutionality of the independent counsel provisions of the Ethics in Government Act.²³⁸ The statute permitted judicial appointment of a special prosecutor (independent counsel) under limited circumstances to investigate and in some instances to criminally prosecute senior executive branch officials.²³⁹

It was suggested that the Act impermissibly “reduc[ed] the President’s ability to control the prosecutorial powers wielded by the independent counsel,” both specifically when it precluded removal of the special prosecutor except for cause and as a general matter.²⁴⁰ The Court disagreed. It began by noting that the Constitution’s “system of separation of powers and checks and balances” was crafted “as a self-executing safe-guard against the encroachment or aggrandizement of one branch at the expense of the other.”²⁴¹ It found that the Act presented no such threat.²⁴² The Court then ran through an abbreviated check list of features which might be said to restrict the Executive’s prosecutorial control as well as those which appeared to re-enforce his control.

It acknowledged that under the Act the President’s agent, the Attorney General: (1) did not select the special prosecutor; (2) did not define the scope of the special prosecutor’s inquiry; and (3) could not remove the special prosecutor without cause.²⁴³ On the other hand, (1) a special

²³⁶ *United States ex rel. Stone v. Rockwell International Corp.*, 282 F.3d 787, 805 (10th Cir. 2002)(parallel citations omitted); *Riley v. St. Luke’s Episcopal Hospital*, 252 F.3d 749, 757-58 (5th Cir. 2001)(en banc)(“Supreme Court precedent has established that the constitutional definition of an ‘officer’ encompasses, at a minimum, a continuing and formalized relationship of employment with the United States Government. . . . There is no such relationship with regard to qui tam relators”); *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*, 41 F.3d 1032, 1041 (6th Cir. 1995); see also *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 758 (9th Cir. 1993)(“The appropriate questions in this case, therefore, are whether qui tam relators exercise ‘significant authority’ under the FCA, and whether the FCA vests in relators ‘primary responsibility’ for enforcing the Act by litigating in the federal courts. Our answers to these questions follow logically from our determination . . . that the qui tam provisions do not violate the separation of powers principle. We have concluded that the Executive Branch retains ‘sufficient control’ of relators such that their exercise of authority to sue on behalf of the United States does not ‘impermissibly undermine’ executive functions. In keeping with that conclusion, we find it impossible to characterize the authority exercised by relators as so ‘significant’ that it must only be exercised by officers appointed in the manner which Article II, §2, cl.2 prescribes”).

²³⁷ *Morrison v. Olson*, 487 U.S. 654, 695-96 (1988); cf., *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 856-57 (1986).

²³⁸ *Morrison v. Olson*, 487 U.S. at 659-60.

²³⁹ *Id.*, citing 28 U.S.C. 591-599 (1982 ed., Supp. V).

²⁴⁰ *Morrison v. Olson*, 487 U.S. at 685.

²⁴¹ *Id.* at 693, quoting *Buckley v. Valeo*, 424 U.S. 1, 123 (1976).

²⁴² *Morrison v. Olson*, 487 U.S. at 694-95.

²⁴³ *Id.* at 695-96.

prosecutor could be selected only upon the Attorney General’s unreviewable request; (2) the court defined the special prosecutor’s scope of authority based upon the facts contained in that request; and (3) the Attorney General might remove the special prosecutor for cause.²⁴⁴ All of which indicated to the Court that “the Act give[s] the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.”

Lower court False Claims Act qui tam cases decided in *Morrison*’s shadow generally reached the same conclusion – the False Claims Act affords the Executive Branch sufficient control to turn aside a take care clause challenge – although they often concede that the control factors of the two were not the same.²⁴⁵

False Claims Act (Text)

31 U.S.C. 3729

(a) Liability for certain acts.–

(1) In general.– Subject to paragraph (2), any person who –

- (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
- (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
- (D) 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;

²⁴⁴ *Id.* at 696.

²⁴⁵ *United States ex rel. Stone v. Rockwell International Corp.*, 282 F.3d 787, 805-807 (10th Cir. 2002); *Riley v. St. Luke’s Episcopal Hospital*, 252 F.3d 749, 757 (5th Cir. 2001)(en banc)(“Any intrusion by the qui tam relator in the Executive’s Article II power is comparatively modest, especially given the control mechanisms inherent in the FCA to mitigate such an intrusion and the civil context in which qui tam suits are pursued. Hence, the qui tam portions of the FCA do not violate the constitutional doctrine of separation of powers by impinging upon the Executive’s constitutional duty to take care that the laws are faithfully executed under Article II of the Constitution”); *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*, 41 F.3d 1032, 1041 (6th Cir. 1995); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 757 (9th Cir. 1993)(“Taken as a whole, and considering the removal issue in particular, the FCA affords the Executive Branch a degree of control over qui tam relators that is not distinguishable from the degree of control the *Morrison* Court found the Executive Branch exercises over independent counsels”); *Kirkwood Florist, Inc. v. Hi-Float, Inc.*, 812 F.Supp.2d 1000, 1002-1004 (E.D.Mo. 2011); *Hollander v. Ranbaxy Laboratories Inc.*, 804 F.Supp.2d 344, 352-56 (E.D.Pa. 2011); *Luka v. Procter and Gamble Co.*, 785 F.Supp.2d 712, 718-22 (N.D.Ill. 2011)(“Every circuit to consider Article II challenges to the False Claims Act . . . has upheld the statute”); *United States ex rel. K & R Limited Partnership v. Massachusetts Housing Finance Agency*, 154 F.Supp.2d 19, 26 (D.D.C. 2001); *United States ex rel. Phillips v. Pediatric Services of American, Inc.*, 123 F.Supp.2d 990, 992-93 (W.D.N.C. 2000)(“However, the Supreme Court did not intend the analysis in *Morrison* to serve as an unalterable list of the minimum control elements necessary for sustaining all acts implicating the Take Care Clause. On the contrary, by twice stating that the proper inquiry was to take the act as a whole, *Morrison* instructs us to compare the qui tam provisions as a whole to the independent counsel provisions as a whole”); but see *Riley v. St. Luke’s Episcopal Hospital*, 252 F.3d at 766 (Smith & DeMoss, JJ., dissenting)(“[T]he most crucial ways in which the FCA fails to provide the executive with sufficient control are that the FCA does not allow the Executive to initiate litigation, terminate litigation (without court approval), control the scope and pace of the litigation, or control the procedures used by the lawyer prosecuting the case. The FCA’s most severe violations of the separation of powers principles embedded in the Take Care Clause include the fact that unaccountable, self-interested relators are put in charge of vindicating government rights, and that the transparency and controls of the constitutional system are not in place to influence the outcome of such litigation”).

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; P.L. 104-410), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced damages.—If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of civil actions.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Definitions.—For purposes of this section—

(1) the terms “knowing” and “knowingly” —

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term “claim” —

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual’s use of the money or property;

(3) the term “obligation” means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term “material” means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) Exemption from disclosure. –Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) Exclusion. –This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

[(e) Redesignated (d)]

31 U.S.C. 3730

(a) Responsibilities of the Attorney General. –The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons. –**(1)** A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall–

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) 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.

(c) Rights of the parties to qui tam actions. –**(1)** If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government’s prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person’s participation, such as–

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person’s cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to qui tam plaintiff.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to 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, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred. –(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed –

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) 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.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

(f) Government not liable for certain expenses. –The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. –In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Relief from retaliatory actions. –

(1) **In general.** – Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, 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, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) **Relief.** – Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, 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.

(3) **Limitation on bringing civil action.** – A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

31 U.S.C. 3731

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

- (1)** more than 6 years after the date on which the violation of section 3729 is committed, or
- (2)** more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, 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 prior complaint of that person.

(d) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(e) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

31 U.S.C. 3732

(a) Actions under section 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims under state law.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(c) Service on State or local authorities.—With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

31 U.S.C. 3733

(a) In general. —

(1) Issuance and service. —Whenever the Attorney General, or a designee (for purposes of this section), 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, the Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or making an

election under section 3730(b), issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

- (A) to produce such documentary material for inspection and copying,
- (B) to answer in writing written interrogatories with respect to such documentary material or information,
- (C) to give oral testimony concerning such documentary material or information, or
- (D) to furnish any combination of such material, answers, or testimony.

The Attorney General may delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served. Any 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.

(2) Contents and deadlines. –

- (A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.
- (B) If such demand is for the production of documentary material, the demand shall—
 - (i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;
 - (ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and
 - (iii) identify the false claims law investigator to whom such material shall be made available.
- (C) If such demand is for answers to written interrogatories, the demand shall—
 - (i) set forth with specificity the written interrogatories to be answered;
 - (ii) prescribe dates at which time answers to written interrogatories shall be submitted; and
 - (iii) identify the false claims law investigator to whom such answers shall be submitted.
- (D) If such demand is for the giving of oral testimony, the demand shall—
 - (i) prescribe a date, time, and place at which oral testimony shall be commenced;
 - (ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;
 - (iii) specify that such attendance and testimony are necessary to the conduct of the investigation;
 - (iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and
 - (v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.
- (E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.
- (F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.
- (G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary.

(b) Protected material or information. –

(1) In general. –A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under–

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) Effect on other orders, rules, and laws. –Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) Service; jurisdiction. –

(1) By whom served. –Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries. –Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) Service upon legal entities and natural persons. –

(1) Legal entities. –Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by–

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons. –Service of any such demand or petition may be made upon any natural person by–

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) Proof of service. –A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) Documentary material. –

(1) Sworn certificates. –The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by–

- (A) in the case of a natural person, the person to whom the demand is directed, or
- (B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) Production of materials. –Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) Interrogatories. –Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by–

- (1) in the case of a natural person, the person to whom the demand is directed, or
- (2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) Oral examinations. –

(1) Procedures. –The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present. –The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken. –The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) Transcript of testimony. –When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to

examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) Certification and delivery to custodian. –The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness. –Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) Conduct of oral testimony. –**(A)** Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) Witness fees and allowances. –Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) Custodians of documents, answers, and transcripts. –

(1) Designation. –The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure. –**(A)** A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) **Use of material, answers, or transcripts in other proceedings.** —Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) **Conditions for return of material.** —If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and—

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) **Appointment of successor custodians.** —In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) **Judicial proceedings.** —

(1) **Petition for enforcement.** —Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) **Petition to modify or set aside demand.** —(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the

judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery.—(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) Petition to require performance by custodian of duties.—At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) Jurisdiction.—Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) Applicability of federal rules of civil procedure.—The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) Disclosure exemption.—Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) Definitions.—For purposes of this section—

(1) the term “false claims law” means—

(A) this section and sections 3729 and 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term “false claims law investigation” means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term “false claims law investigator” means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term “person” means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term “documentary material” includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

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Author Information

Charles Doyle
Senior Specialist in American Public Law

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