TREATING THE SYMPTOMS BUT NOT THE DISEASE: A CALL TO REFORM FALSE CLAIMS ACT ENFORCEMENT

LIEUTENANT COLONEL CHARLES T. KIRCHMAIER*

I. Introduction

On May 20, 2009, President Barack Obama signed into law the Fraud Enforcement and Recovery Act (FERA), thereby ushering in the most sweeping changes to the False Claims Act (FCA) that had occurred in over twenty years.[1] According to the law's congressional sponsors, amending the FCA was vital to restoring "the spirit and the intent" of the law, and reinvigorating the Act's usefulness as the federal government's premier anti-corruption law.[2] President Obama welcomed the FCA's

* Judge Advocate, U.S. Army. Presently assigned as Chief, Contract and Fiscal Law Division, Office of the Judge Advocate, U.S. Army Europe, Germany; LL.M., 2010, The George Washington University Law School, Washington, District of Columbia; LL.M., 2005, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia; J.D., 1997, Temple University, Beasley School of Law, Philadelphia, Pennsylvania; B.A., 1989, The University of Florida, Gainesville, Florida. Previous assignments include Chief, Military Justice, Multi-National Corps–Iraq and XVIII Airborne Corps, Baghdad, Iraq, 2008–2009; Student, U.S. Army Command and General Staff School, Intermediate Level Education, Fort Leavenworth, Kansas, 2007–2008; Operational Law Trainer, U.S. Army Battle Command Training Program, Fort Leavenworth, Kansas, 2006–2007; Operational Law Fellow, Center for Law and Military Operations, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, 2005–2006; Regimental Judge Advocate, 75th Ranger Regiment, Fort Benning, Georgia, 2003–2004; International Law Attorney, Office of the General Counsel, Department of Defense, Pentagon, Washington, District of Columbia, 2002–2003; Trial Attorney, Contract Appeals Division, Arlington, Virginia, 2000–2002; Trial Counsel and Legal Assistance Attorney, 82d Airborne Division, 1998–2000. Member of the bar of New Jersey. The opinions expressed herein are those of the author in his individual capacity and do not necessarily reflect the official views of the U.S. Department of Defense, the Department of the Army, or the Office of the Judge Advocate, U.S. Army Europe.

[1] *See generally* The Fraud Enforcement and Recovery Act (FCA), Pub. L. No. 111-21, § 4(a)–(f), 123 Stat. 1625 (2009) (to be codified at 31 U.S.C. §§ 3729–3733 (2006)) [hereinafter the 2009 FCA Amendments], *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ021.111. *See also* False Claims Act Correction Act, H.R. 1788, 111th Cong. (2009); False Claims Act Clarification Act, S. 458, 111th Cong. (2009); *accord* The Civil False Claims Act, 31 U.S.C. §§ 3729–3733 (2006) [hereinafter False Claims Act or FCA].

[2] *See generally* 155 CONG. REC. S2424 (daily ed. Feb. 24, 2009) (statement of Sen. Charles Grassley) (introducing S. 458, The False Claims Clarification Act of 2009). *See also* 155 CONG. REC. E1295 (daily ed. June 3, 2009) (statement of Rep. Howard L.

changes as part of his administration's effort to restore the public's trust and confidence in the government's ability to oversee a federal acquisition system he described as being broken.[3] Congress intended the amendments to strengthen and enhance the government's ability to combat corruption within the federal acquisition system. More specifically, FERA incentivized increasing private relator involvement in the FCA enforcement process. These incentives lowered the evidentiary threshold for establishing a false claim while simultaneously increased the scope of actions that could be prosecuted under the Act.

However, two key issues remain unanswered: tangible ways to improve FCA enforcement, and the government's role in overseeing and monitoring the FCA enforcement process. Legislation aimed solely at increasing private lawsuit filings incorrectly presumes that the more FCA lawsuits filed, the better the FCA enforcement process becomes. Yet even the President acknowledged upon signing FERA into law that "[the] Government must set the rules of the road that are fair and fairly enforced."[4] By promoting legislation that invites increased *qui tam* lawsuit filings, the government should also accept greater responsibility for ensuring FCA enforcement is limited only to those suits that have some veritable basis for being prosecuted on the government's behalf.[5]

Berman) (describing how the 2009 Fraud Enforcement and Recovery Act would strengthen the FCA).

[3] On March 4, 2009, President Obama declared that the federal procurement system was "broken" and "plagued by massive cost overruns, outright fraud, and the absence of oversight and accountability." *See* President Barack H. Obama, Remarks by the President on Procurement (Mar. 4, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Procurement-3/4/09.

[4] President Barack H. Obama, Remarks by the President at the Signing of the Helping Families Save Their Homes Act and the Fraud Enforcement and Recovery Act (Nov. 20, 2009), http:// www.whitehouse.gov/the-press-office/Remarks-President-Signing-Helping-Families-Save-Their-Homes-Act-and-Fraud-Enforcement-and-Recovery-Act. This article presumes that when President Obama uses the term "Government," he refers only to the federal government.

[5] *Qui tam* is a Latin phrase for "who as well for the King as for himself sues in this matter." BLACK'S LAW DICTIONARY 1289 (8th ed. 2004). *Black's Law Dictionary* describes a *qui tam* action as, "An action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." *Id.* The individual who files a *qui tam* action on behalf of the Government is known as a relator. The FCA authorizes private citizens to enforce the law by filing lawsuits on the Government's behalf and keeping a portion of any recovery obtained from the defendant. *See*, *e.g.*, 155 CONG. REC., *supra* note 2, at E1295 (explaining that "[t]he 1863 Act authorized individuals, called 'qui tam relators,' to bring lawsuits on behalf of the United Sates to prosecute fraud against the Government and to recover funds that were wrongfully obtained").

This article outlines the problems underlying the government's current FCA enforcement practices and recommends a model for reforming how *qui tam* lawsuits are regulated by the Department of Justice (DoJ) before turning them over for private prosecution. Part II discusses the general concerns with the *qui tam* relator role in FCA prosecutions and current FCA enforcement practices. Part III provides a brief overview of the 1986 and 2009 FCA Amendments and explains how *qui tam* relators have gained a prominent role in litigating lawsuits on the government's behalf. The legislative history underlying the 2009 FCA Amendments demonstrates how Congress drafted FERA to further empower *qui tam* relators and overturn judicial precedent. Part IV assesses the future challenges in interpreting and applying the FCA's revised statutory scheme. This article predicts that the 2009 FCA Amendments may clarify little substantive law and actually raise new legal questions where it attempted to answer or resolve old ones. Part V examines recent FCA enforcement statistical trends and leads to the inevitable conclusion that the DoJ should be more proactive in dismissing frivolous *qui tam* lawsuits. Part VI provides an overview of how the DoJ outsources its prosecutorial function and proposes adopting stronger case screening guidelines to encourage earlier dismissal of frivolous lawsuits. Part VII proposes reforming current FCA enforcement practices by empowering agencies to employ alternate remedy procedures to resolve the majority of FCA lawsuits before they end up being dismissed in civil litigation. Finally, Part VIII summarizes the arguments for reforming current FCA enforcement practices in light of the changes wrought by FERA and the 2009 FCA Amendments.

II. The Expanded Role of the *Qui Tam* Relator

A. Treating the Symptoms But Not the Disease

Allowing *qui tam* relators to bring lawsuits under the FCA permits private individuals to perform a monitoring function for the government and thereby help protect the acquisition system's integrity.[6] Under the FCA, if the government does not bring an action against the defendant, relators may file a civil action in the government's name in return for a

[6] *See generally* Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract* Law, 11 PUB. PROCUREMENT L. REV. 103, 103 (2002). Professor Schooner describes "integrity" within the federal procurement arena as the rules of conduct for government personnel and private industry. *Id.*

percentage of any money awarded by the court.[7] If the DoJ declines to intervene in the relator's lawsuit, the FCA allows relators to act as "private attorneys generals" and prosecute a civil action on the Government's behalf.[8] *Qui tam* relators appear to offer an attractive, low-cost alternative to increased public spending for improved oversight capabilities. Through the Act's *qui tam* provisions, Congress grants relators a license to perform the Government's prosecutorial function and outsources what would otherwise be an inherently governmental function.[9]

---

[7] *See* 31 U.S.C. § 3730(d)(1)–(4) (2006) (providing, in part, the statutory basis for recovery awards to *qui tam* plaintiffs). If the Government proceeds with an action originally brought by a relator, the relator may receive at least 15% but not more than 25% of the proceeds or settlement obtained from the defendant. *Id.* § 3730(d)(1). If the Government declines to intervene in the relator's lawsuit, the court may award the relator at least 25% but not more than 30% from the proceeds of any judgment or settlement obtained from defendant. *Id*. § 3730(d)(2). The Government is therefore entitled to retain 85% of any recovery obtained from a defendant when the DoJ prosecutes a relator's lawsuit and up to 70% of any recovery obtained without the DoJ's intervention. *See also* 155 CONG. REC., *supra* note 2, at S2425 (remarking that the relator's incentive to bring a civil action on behalf of the Government is the relator's share of pecuniary compensation). *See generally* Press Release, Dep't of Justice, Justice Department Recovers $2.4 Billion in False Claims Cases in Fiscal Year 2009; More Than $24 Billion Since 1986 (Nov. 19, 2009), http://www.justice.gov/opa/pr/2009/November/09-civ-1253.html.

[8] *See generally* Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 680 (2001) (crediting Judge Jerome Frank with being the first legal practitioner to popularize the term "private attorney general" to describe *qui tam* relators). Professor Schooner suggests that "a robust private attorney general regime serves as a utilitarian substitute for a yet-to-be discovered optimal oversight mechanism." *Id*. at 685. *But see* Christina Orsini Broderick, Note, Qui Tam *Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 954 (2007) (relying on empirical analysis to demonstrate that the Government does not intervene in the overwhelming majority of privately-initiated FCA suits and questioning the "degree" to which these suits serve the public interest).

[9] *See generally* Schooner, *supra* note 8, at 685 (explaining that *qui tam* relators provide the government with a "second-best" alternative to a robust Government oversight regime). *But see* John T. Boese, *Written Statement of the Chamber of Commerce and the U.S. Chamber Institute for Legal Reform in Opposition to S. 2041 The False Claims Act Corrections Act of 2007*, at 2 (Feb. 27, 2008), http://www.ffhsj.com/files/QTam/boese.pdf. In a written statement prepared on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform in opposition to the 2007 False Claims Act Corrections Act, a noted FCA legal scholar summarized the inherent problem with outsourcing the Government's prosecutorial function this way:

> Ideally, a public prosecutor exercises discretion in choosing prosecution targets in order to avoid applying a statute in ways that undermine the public interest. A qui tam statute eliminates any incentive for a benevolent exercise of prosecutorial discretion. The

A growing body of statistical data suggests Congress should reevaluate the perceived utility derived from outsourcing FCA prosecutions to *qui tam* relators whenever the government affirmatively declines to intervene in a relator's lawsuit.[10] On an annual basis, the DoJ routinely elects to prosecute only about 20% of all *qui tam* lawsuits it is statutorily required to review.[11] The DoJ's own FCA statistics call into question the justification for allowing 80% of all *qui tam* lawsuits to be prosecuted without government assistance, when over 90% of them will eventually end up being dismissed.[12] Congressional amendments designed to encourage *qui tam* lawsuit filings may bring more civil actions into the courtroom, but do little to improve the government's diminished ability to carry out its acquisition oversight responsibilities.[13]

Providing *qui tam* relators an even greater role in performing the Government's monitoring and regulatory functions likely contributes to an adversarial atmosphere toward contractors that one prominent legal

---

> common informer has little reason to consider broader issues of public policy raised by a particular prosecution, and in fact has a strong financial incentive not to take such considerations into account. The result is that informers pursue litigation that disinterested prosecutors would consider contrary to the public good.

Id. (citing J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. REV. 539, 583 (2000)).

[10] *See, e.g.*, Broderick, *supra* note 8, at 975 (noting that between October 1987 and September 2004, at least 73% of all *qui tam* actions where the government did not intervene were ultimately dismissed); *see also* Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control* Qui Tam *Litigation Under the Civil False Claims Act*, 76 U. CIN. L. REV. 1233, 1264 (2008) (noting that 94% of cases declined by the government and prosecuted by *qui tam* litigants result in no monetary recovery to either the relator or the government).

[11] *See generally* Civil Div., U.S. Dep't of Justice, Fraud Statistics—Overview, October 1, 1987–September 30, 2010, at 1–2 (2010), http://www.taf.org/FCA-stats-2010.pdf [hereinafter DoJ Fraud Statistics] (indicating the DoJ intervened in 23% of the *qui tam* suits under review as of September 30, 2010). *See also* Memorandum, U.S. Dep't of Justice, False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits (n.d.), http://www.justice.gov/usao/pae/Documents/fcaprocess2.pdf [hereinafter DoJ-E.D. Pa. Memorandum] (noting that fewer than 25% of filed *qui tam* lawsuits will result in DoJ intervention).

[12] *See generally* DoJ Fraud Statistics, *supra* note 11, at 9.

[13] *See generally* Schooner, *supra* note 8, at 681 (citing to Jeremy A. Rabkin's observation that allowing private attorneys-general to drive "policy initiatives without taking full responsibility for the consequences" is an abdication of the government's oversight and regulatory functions). *See also* Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 LAW & CONTEMP. PROBS. 179 (1998).

scholar has described as "toxic."[14] A former administrator of the Office of Federal Procurement Policy has lamented that a 2010 advisory opinion by federal ethics officials discouraging participation by acquisition officials in programs sponsored by the National Contract Management Association "reflects a return to the older, dysfunctional view of government-industry communications."[15] Unfortunately, by not screening out more frivolous lawsuits, the DoJ inadvertently reinforces the public's perception that there is a "Global War on Contractors."[16] The Government should therefore assert its proper leadership role in helping tone down the "toxic" attitude toward contractors and, as Attorney General Eric Holder once said, pursue enforcement policies that "promote consistent adherence," and "emphasize the importance of pursuing False Claims Act cases in a fair and even-handed manner."[17]

---

[14] *See generally* Elizabeth Newell, *Bad Press Makes Contracting an Unattractive Field* (Feb. 25, 2010), http://www.govexec.com/dailyfed/0210/022510e1.htm (quoting Professor Steven Schooner, co-director of the George Washington University Government Procurement Law Program while testifying before the House Armed Services Committee's Defense Acquisition Reform Panel). Professor Schooner testified to the committee in relevant part:

> The pervasive anti-contractor rhetoric emanating from the media, not-for-profit organizations, the legislature, the executive branch (including, among others, the Justice Department, Defense Contract Audit Agency, and the inspectors general) colors public perceptions of contractors and the acquisition profession. . . . There is more truth to black humor in Jacques Gansler's popular new moniker for the current environment—the "global war on contractors."

Id.; *see also* John T. Bennett, *In U.S., a Global War on Contractors?* (Dec. 1, 2009), http://www.defensenews.com/story.php?i=4399790 [hereinafter *Global War on Contractors*] (quoting former Deputy Under Secretary of Defense for Acquisition Jacques Gansler as describing recent acquisition reform efforts as "a global war on contractors" and "go[ing] in the wrong direction"). *But cf.* John T. Bennett, *U.S. Industrial-Policy Chief: Plan Will Take Time* (Feb. 5, 2010), http://www.defensenews.com/story.php?i=4487622 (quoting Brett Lambert, Dir. of Indus. Policy in the Office for the Assistant Sec'y of Def. for Acquisition, describing one of the DoD's current acquisition policy goals as "[r]e-establishing a true partnership with industry and the financial community").

[15] *See generally* Steve Kelman, *Agencies Should Not Fear Talking to Contractors* (Feb. 17, 2010), http://fcw.com/articles/2010/02/22/comment-steve-kelman-communications.aspx (arguing that "effective communication between government and industry can save money and prevent misunderstandings").

[16] *See Global War on Contractors*, *supra* note 14.

[17] *See generally* Memorandum from Eric H. Holder, Jr., Deputy Attorney Gen., U.S. Dep't of Justice, Office of the Deputy Attorney Gen., Guidance on the Use of the False Claims Act in Civil Health Care Matters (June 3, 1998), http://www.justice.gov/dag/readingroom/chcm.htm; *accord* Memorandum from Eric H. Holder, Jr., Deputy Attorney

B. Concerns Arising From Current FCA Enforcement Practices

Allowing relators to litigate *qui tam* actions that have limited chances of success in the courts produces few discernible public benefits and generates unrecorded costs to the public fisc.[18] In a 2008 hearing before the U.S. Senate Judiciary Committee, the Deputy Assistant Attorney General for the DoJ's Civil Division expressed his concerns about the "considerable resources" the DoJ expends supporting relators' lawsuits after the DoJ affirmatively declines to intervene in the suit.[19] Most often, a federal agency will spend publicly funded resources supporting what can become an expensive and protracted civil litigation process between a relator and a defendant.[20] Additionally, if a relator's lawsuit is eventually dismissed, as happens to most *qui tam* suits, then the contractor's litigation costs can potentially be passed back to the

---

Gen., U.S. Dep't of Justice, Office of the Deputy Attorney Gen., Review of June 3, 1998, Guidance on the Use of the False Claims Act in Civil Health Care Fraud Matters (Feb. 3, 1999), http://www.justice.gov/dag/readingroom/holder-02031999.pdf (formalizing the policy guidance presented in the Deputy Attorney General's June 1998 memorandum). *See also* Memorandum from Paul J. McNulty, Deputy Attorney Gen., U.S. Dep't of Justice, Office of the Deputy Attorney Gen., Principles of Federal Prosecution of Business Organizations 17 (Dec. 2006), http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf (providing policy guidance on evaluating the use of non-punitive alternatives to criminal prosecution).

[18] Telephone Interview with Rodney Grandon, in Alexandria, Va. (Mar. 30, 2010). Mr. Grandon, formerly the Director, Office of Fraud Remedies, Office of the General Counsel, Department of the Air Force. *See also* Rich, *supra* note 10, at 1259, 1260 (noting that the government, and therefore the public, absorb the litigation costs generated by the relator and defendant while also burdening an overtaxed judicial system).

[19] *See generally* Michael F. Hertz, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Civil Div., The False Claims Corrections Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century 7 (Feb. 27, 2008), http://www.ffhsj.com/files/QTam/testimony_hertz.pdf [hereinafter Hertz Statement].

[20] In 2006, the Government Accountability Office (GAO) undertook a study of FCA litigation trends based on a request from several congressmen. The GAO report provided a comprehensive review of the DoJ's *qui tam* database on closed unsealed cases from 1987 to 2005. The study looked at relator cases where the DoJ intervened in some or all of a relator's claims and determined that it took the Attorney General a median of thirty-eight months to conclude an FCA lawsuit by settlement, judgment or dismissal. The DoJ does not collect data on how long it takes a relator to bring a case to conclusion where the government declines to intervene in a lawsuit. However, given the significant advantage in resources the government can bring to bear on resolving an FCA lawsuit, compared to a private relator, it is more likely that a conclusion can be brought about more quickly with government intervention than without it. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-320R, INFORMATION ON FALSE CLAIMS ACT LITIGATION 30 (Jan. 31, 2006), *available at* http://www.gao.gov/new.items/d06320r.pdf.

public as a reimbursable cost for doing business with the Government.[21] By not resolving these lawsuits in a more expedient and efficient manner, the relator is able to drive up the amount of money the public spends on subsidizing private *qui tam* monitoring—with either limited regulation or oversight by the DoJ or the affected government agency. [22]

Because FCA enforcement practices are not consistently pursued using objective case screening criteria, the FCA's incentive structure may function more like a lottery game for relators than a well-regulated system for monitoring fraudulent conduct against the Government.[23] One legal observer has noted that the high dismissal rate for *qui tam* lawsuits prosecuted by relators is attributable to the DoJ's own case screening and selection process.[24] Congress provides the DoJ with the discretionary authority to determine whether the Government should intervene in a relator's lawsuit, affirmatively dismiss the case, or effectively outsource its prosecutorial function to the relator.[25] If the Government elects to

---

[21] *See generally* JOHN CIBINIC, JR. & RALPH C. NASH, JR., COST-REIMBURSEMENT CONTRACTING 880–81 (3d ed. 2004) (noting that under GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 31.205-47(b) (July 2011) [hereinafter FAR], the contractor's incurred costs associated with defending itself against a relator's lawsuit would be allowable "if the matter is dropped by the government after investigation or the contractor is successful in defending itself in a proceeding"). *See also* William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1840–41 (June 1996) (identifying several types of impacts on public expenditures resulting from increased *qui tam* litigation activity).

[22] *See generally* Kovacic, *supra* note 21, at 1806–07 (arguing that using *qui tam* relators to perform regulatory and oversight functions as a way to curb agency costs can result in problems when the relator does not "act to maximize taxpayer interests").

[23] *See, e.g.*, Aaron S. Kesselheim, David M. Studdert, & Michelle M. Mello, *Whistle Blowers' Experiences in Fraud Litigation Against Pharmaceutical Companies*, 362 NEW ENG. J. MED. 1832 (2010) (studying the motivations and experiences of 42 whistle-blowers involved in *qui tam* lawsuits alleging FCA violations against pharmaceutical companies). One of the study's relators compared his reaction to receiving a large settlement from a defendant to "hitting the lottery." *Id.* at 1836. *But see id.* (describing a majority of the study's relators perceiving their net financial recovery to be small compared to the personal toll exacted for pursuing an FCA claim).

[24] *See generally* Rich, *supra* note 10, at 1256 (noting the majority of criticism regarding the delegation of prosecutorial discretion to relators arises when the DoJ neither dismisses nor intervenes in a relator's lawsuit). *See also id.* at 1260, 1264 (concluding that the DoJ's reluctance to dismiss relator's lawsuits is largely based on the possibility of a potential recovery obtained from the relator's litigation even though 94% of these non-intervened suits will be dismissed by the courts).

[25] *See* 31 U.S.C. § 3730(c)(2)–(5) (2006); *see also* Rich, *supra* note 10, at 1264–65 (arguing that although the DoJ should be able to evaluate a *qui tam* lawsuit's merits following the investigation into the relator's allegations, it fails to dismiss those lawsuits whose chances for success are assessed as questionable).

outsource its prosecutorial function, it can still recoup up to 60–70% of any resulting monetary recovery; the DoJ therefore has little incentive to dismiss a relator's lawsuit.[26]

A more comprehensive and useful approach to fighting acquisition-related corruption first would exhaust all of the government's available remedies before allowing *qui tam* relators to pursue lawsuits whose merits are questionable or weak.[27] Likewise, the DoJ should dismiss greater numbers of frivolous relator lawsuits instead of passing on this responsibility to the courts. False Claims Act enforcement practices should be reformed by allowing the government agency most affected by the alleged fraud to first attempt alternate dispute resolution (ADR) procedures through any available administrative means before the DoJ affirmatively declines to prosecute a civil FCA action.[28] Empowering agencies to take a greater role in resolving *qui tam* lawsuits through alternate remedies could provide a viable means to resolve potentially weak lawsuits the DoJ would otherwise decline to prosecute through the judicial process.[29] Policymakers should therefore be asking whether

---

[26] *See generally* Rich, *supra* note 10, at 1264 (concluding that non-intervened lawsuits have returned $300 million to the public fisc with the government receiving an average of $57,000 per each lawsuit). *But cf.* DoJ Fraud Statistics, *supra* note 11, at 2 (indicating the government recovered a total of $23.5 billion from *qui tam* and non-*qui tam* lawsuits it prosecuted).

[27] *See generally* Michael Davidson, *Combating Small Dollar Fraud Through a Reinvigorated Program Fraud Civil Remedies Act*, 37 PUB. CONT. L.J. 213, 233–36 (2008) (recommending legislative changes to the Program Fraud Civil Remedies Act to enhance the Agency's ability to combat acquisition-related fraud). *See also* Rich, *supra* note 10, at 1278 (concluding that the DoJ's reluctance to dismiss non-meritorious *qui tam* lawsuits results in significant costs being borne by defendants and the judicial system).

[28] *See generally* 31 U.S.C. § 3730(c)(5) (2006) (stating that the government may elect to pursue its claims through any alternate remedy available to the government, including administrative proceedings). Available alternate remedies may include, but are not necessarily limited to, the following: agency suspension and debarment proceedings (48 C.F.R. § 9.400 (2003)), the Program Fraud Civil Remedies Act (31 U.S.C. §§ 3801–3812) (2006), and the use of administrative agreements. *See also* U.S. DEP'T OF DEF., INSTR. 7050.05, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES ¶ 4.2 (4 June 2008) (stating that all investigations relating to fraud or corruption "shall be reviewed to determine and implement the appropriate contractual and administrative actions that are necessary to recover funds lost through fraud or corruption and to ensure the integrity of DoD programs and operations"). *Id.* The DoD's Instruction provides a list of approximately fourteen civil remedies and twenty-six administrative remedies that could be used to address a contractor's alleged misconduct. *Id.* ¶¶ E3.2–E3.4.10.

[29] *See generally* Anthony Ogus, *What Legal Scholars Can Learn from Law and Economics*, 79 CHI.-KENT L. REV. 383, 401 (2004) (suggesting that when evaluating legal or regulatory reforms, legal scholars should ask whether the administrative and

employing the government's regulatory response or the private law response is more effective at reducing the administrative and transaction costs associated with private *qui tam* monitoring efforts. Diverting greater numbers of *qui tam* lawsuits into an administrative process, instead of defaulting to civil litigation, would also help ensure FCA enforcement practices are being fairly enforced for all involved parties.

III. The 1986 and 2009 FCA Amendments—An Overview

Prior to the enactment of the 2009 amendments, the FCA had not undergone any significant revision for nearly twenty years. Taken together, the amendments demonstrate Congress's attempt to promote private monitoring and outsourced prosecutions as a viable approach to FCA enforcement. The amendments also illustrate Congress's sometimes testy relationship with the nation's federal courts when it appears the courts have attempted to regulate private monitoring and enforcement efforts.

A. The 1986 FCA Amendments: Increasing Private Monitoring

The 1986 FCA Amendments made several major changes to the Act at a time when Congress perceived that corruption within the Department of Defense (DoD) procurement sector reached crisis levels.[30] Unlike previous revisions to the Act, Congress did not pass the 1986 Amendments in response to widespread allegations of unchecked war

---

transaction costs associated with a regulatory response to a market failure are lower or higher than the private law response). Making reasonable attempts to resolve a dispute efficiently and expeditiously before proceeding to trial reflects the Government's desire to minimize both informal and transactional costs associated with civil litigation. *See* Exec. Order No. 12,988 3 C.F.R. 189, 190 (1996), http://www.archives.gov/federal-register/executive-orders/1996.html (declaring that civil justice reform facilitates the just and efficient resolution of civil claims involving the U.S. Government, while also encouraging the filing of only meritorious civil claims).

[30] *See generally* CHARLES DOYLE, CONG. RESEARCH SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 7–8 (2009), *available at* http://www.fas.org/sgp/crs/misc/R40785.pdf (providing a summarized list of the 1986 FCA Amendments). For *qui tam* relators, the most important of these changes included the following: a new penalty provision for reverse false claims against the government, 31 U.S.C. § 3729(a)(7) (2006); the inclusion of a whistleblower's protection provision, *id.* § 3730(h)); an increase in the imposable penalty amount from double to treble damages, *id.* § 3729(a); and an increase in the maximum award available to relators for up to 30% of any recovered monies, *id.* § 3730(d)(2)).

profiteering, but out of a growing public concern that government anti-corruption efforts were largely ineffective.[31] Between 1980 and 1985, defense spending nearly doubled and the government's largest defense contractors were engaging in fraudulent business practices.[32]

A lack of confidence in the government's ability to detect and deter fraudulent activity within the DoD prompted Congress to give the FCA its most significant makeover since the American Civil War.[33] Several of the 1986 FCA Amendments reveal Congress's desire to attract a greater number of *qui tam* lawsuits in the hope of curbing what some perceived as the government's inability to properly regulate and oversee procurement system integrity.[34] Rather than address the underlying problems that led up to the perceived crisis in public confidence, one of the amendment's sponsors sought to lay blame on how courts

---

[31] In 1863, at President Abraham Lincoln's urging, Congress enacted the FCA to combat the fraudulent contracting practices that undermined the federal government's efforts to supply and outfit the Union Army. DOYLE, *supra* note 30, at 5 (providing a historical overview of the FCA's legislative enactment). Historical research on the FCA's Civil War origins, reveals the bill's sponsor, Senator Jacob M. Howard of Michigan, as stating, "The bill offers, in short, a reward to the informer who comes into court and betrays his co-conspirator." *Id*. (citing 33 CONG. GLOBE 952–60 (1863)).

[32] *See generally* Martin Feldstein, Remarks at the U.S. Military Acad., West Point, N.Y., Increasing Defense Spending (Nov. 2, 2006), http://www.nber.org/feldstein/WestPoint Speech2006.html. Professor Feldstein is a Harvard University Professor of Economics and President and Chief Executive Officer of the National Bureau of Economic Research. *See also Defense Budget Policy in a Constrained Environment: Hearing Before the H. Task Force Comm. on Budget, Defense and International Affairs*, 100th CONG. 1–3 (1987) (statement of Robert F. Hale, Assistant Dir. Nat'l Sec. Div., Cong. Budget Office), *available at* http://www.cbo.gov/ftpdocs/83xx/doc8379/87doc97.pdf.; *accord* 155 CONG. REC. E1296 (daily ed. Feb. 24, 2009) (noting that in 1985 "45 of the 100 largest defense contractors—including 9 of the top 10—were under investigation for multiple fraud offenses").

[33] *See generally* DOYLE, *supra* note 30, at 5–6.

[34] *Id*. at 7. Several of the 1986 FCA Amendments were meant to enhance the relator's role in the enforcement process including the following changes to the Act:

- Creating a distinct "whistleblower" provision that protected relators from retaliation;
- Increasing punitive sanctions to a penalty of not less than $5,000 nor more than $10,000 per violation and treble damages;
- Increasing the maximum available award to qui tam relators to not more than 30% of any recovery; and,
- Expanding the statute of limitations for filing a claim under the FCA.

Id. at 7–8.

misinterpreted several of the Act's provisions.[35] Additionally, Senator Charles Grassley expressed his concern that "due to limited Government resources, allegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient."[36] One legal observer notes that the 1986 amendments incentivized relators to take on the "questionable" FCA cases, but not necessarily replace the government's prosecutorial function.[37] This last point illustrates Congress's expectation that *qui tam* relators would file lawsuits that are less valuable or meritorious than those selected for prosecution by the DoJ. What is omitted from the 1986 FCA Amendments is any guidance to the Attorney General on what measures should be taken to ensure only *qui tam* suits meriting further litigation go forward for prosecution. Thus, the nation's courts, instead of the DoJ, become the primary agent for regulating weak or frivolous *qui tam* lawsuits.

The 1986 FCA Amendments are notable for their attempt to empower and incentivize relators to increase the *volume* of FCA lawsuits being filed on the Government's behalf instead of the *quality* of lawsuits being litigated. Grasping the history behind the 1986 FCA Amendments is important to understanding the political motivations driving the subsequent 2009 FCA Amendments. Congress amended the FCA in 2009 to clarify its legislative intent for the 1986 FCA Amendments.[38] Congressional reformers criticized several judicial decisions they viewed as undermining the Act's usefulness by supposedly discouraging relators from filing *qui tam* lawsuits.[39] The 1986 FCA Amendments also reflect Congress's belief that *qui tam* litigation can succeed where the

---

[35] *See generally* 155 CONG. REC., at E1295 (observing that several court decisions broadly interpreted the Act's government knowledge bar and arbitrarily awarded relators' shares which undermined the Act's usefulness). Representative Berman also cited a 1981 Government Accountability Report that concluded "widespread" government fraud had resulted in "loss of confidence in Government programs, government benefits not going to intended recipients, and harm to public health and safety." *Id.* at E1296; *accord* 155 CONG. REC., at S. 2424.

[36] *Id.* at E1296 (citing to testimony and evidence received by the Committee on Administrative Practice and Procedure of the Senate Committee on the Judiciary).

[37] *See generally* Kovacic, *supra* note 21, at 1823 (noting that the 1986 Amendments attempted to reduce reliance on public authorities to prosecute FCA violations). *See also* S. REP. NO. 99-345, at 3 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5268, 1986 WL 31937, at *3 (citing a 1981 GAO study that had concluded "that most fraud goes undetected due to the failure of governmental agencies to effectively ensure accountability on the part of program recipients and government contractors").

[38] *See generally* False Claims Clarification Act, *supra* note 1.

[39] *See* discussion *infra* note 41.

government, supposedly, has failed at performing its regulatory and oversight capabilities. As a result, Congress expressed its preference for outsourcing regulatory and prosecutorial functions rather than addressing the underlying problems that gave rise to an atmosphere of permissive corruption. However, increasing the number of *qui tam* lawsuits to abate the perceived lawlessness within the federal procurement system did not hit a tipping point for almost eight years when the number of relator *qui tam* lawsuits finally exceeded those suits initiated by the DoJ.[40]

B. The 2009 FCA Amendments: Congress Clarifies the Act's True Intent

Congressional sponsors heralded the passage of the 2009 FCA Amendments as an attempt to clarify the "true" intent of the 1986 FCA Amendments.[41] When Senator Grassley introduced the Senate version of the 2009 FCA Amendments, he noted that the proposed legislation would protect taxpayer dollars and strengthen the government's hand in combating fraudulent conduct.[42] Senator Richard Durbin, a Senate bill cosponsor, claimed revising the Act would "enhance whistleblowers' ability to shine a light on fraudulent conduct involving government funds, and to hold the perpetrators accountable through legitimate qui tam claims."[43] Senator Patrick Leahy, borrowing a refrain used to rally support for the passage of the 1986 FCA Amendments, noted how several court decisions, including *Totten* and *Allison Engine*, had undermined the Act's effectiveness.[44] The criticism leveled at the nation's courts by the Act's congressional supporters appeared to be reminiscent of the same rhetoric used to garner favorable support for adopting the 1986 FCA Amendments. Following the 1986 Amendments, a handful of judicial decisions were eventually singled out as undermining the Act's scope and reach. Rather than addressing the quality or merits of the vast number of *qui tam* lawsuits that eventually

---

[40] *See* DoJ Fraud Statistics, *supra* note 11, at 1 (indicating that *qui tam* lawsuit filings did not surpass Government initiated matters until 1995).

[41] *See* Statement by Sen. Charles Grassley. 155 CONG. REC. S2424 (stating that the purpose of Senate Bill 386 was to clarify the Act's 1986 Amendments and "strengthen" the Act). One of the Act's House sponsors, Rep. Howard Berman, stated that the 2009 FCA Amendments only were meant to "clarify the existing scope of False Claims Act liability." *See generally id.* at E1300.

[42] *See id.* at S2424.

[43] *Id.* at S2428.

[44] *See generally* Statement of Sen. Patrick Leahy *infra* note 79 (arguing that the FCA "must quickly be corrected and clarified in order to protect from fraud the Federal assistance and relief funds expended in response to our current economic crisis").

end up dismissed as weak or frivolous, Congress elected to focus on changing a handful of court decisions. In 2009, Congress' objective was still the same as it was in 1986—change the law to further incentivize relators to file more *qui tam* lawsuits. The realistic outcome of this objective was an increase in the volume, but not necessarily the quality, of outsourced prosecutions. However, rather than tinker with the incentives and protections designed to encourage relators to file *qui tam* lawsuits as was done in 1986, Congress instead chose to lower the evidentiary standards that might otherwise discourage relators from filing weak lawsuits or asserting legal theories designed to expand the Act's scope and reach.[45]

Attempting to restore the FCA's true intent as expressed in the 1986 FCA Amendments, Congress revised three of the Act's key provisions to increase the volume of successfully litigated *qui tam* lawsuits. These provisions include: eliminating the Act's former requirement that an individual knowingly present, or cause to be presented, a false or fraudulent claim to an officer, U.S. Government employee, or member of the Armed Forces;[46] relaxing the requirement to prove a defendant's creation, use, or causing the making or use of a false record or statement for obtaining payment or approval from the government;[47] and, broadly redefining a claim for triggering liability under the Act.[48] Finally, Congress also inserted a retroactivity provision in the 2009 FCA

---

[45] *See generally* John T. Boese, *Civil False Claims Act: The False Claims Act Is Amended for the First Time in More Than Twenty Years As the President Signs the Fraud Enforcement and Recovery Act of 2009*, MONDAQ LTD., Apr. 27, 2009, *available at* 2009 WLNR 10089063. Reflecting on the Act's future impact on defendants and FCA jurisprudence in general, Mr. Boese noted in relevant part:

> The new amendments will adversely affect everyone, all government contractors and subcontractors, all healthcare providers, every public and private grantee and sub-grantee, and every other person, company, and entity that pays money to the government or receives Federal funds, by making it far easier to conduct FCA investigations and to win FCA recoveries. Quite simply, many logical defenses have been eliminated, and those who deal in any way with the Federal government are entering a whole new world in which FCA liability is much broader and easier to prove.

Id.

[46] 31 U.S.C. § 3729(a)(1)(A) (2006).

[47] *Id.* § 3729(a)(1)(B).

[48] *Id.* § 3729(b)(2)(A).

Amendments to legislatively overrule the *Totten* and *Allison Engine* court decisions.[49]

1. The Presentment Clause

Eliminating the Act's previous requirement that a false claim had to be presented directly to a U.S. Government employee, officer, or officer of the Armed Forces significantly expanded the universe of potential FCA violations.[50] Prior to the amendment's passage, liability for presenting a false claim attached only when a person knowingly presented, or caused to be presented, to an officer or employee of the U.S. Government or a member of the U.S. Armed Forces a false claim for payment or approval.[51] Congress revised this provision, also known as the presentment clause, due to concerns that an individual could submit a false claim for payment to a non-governmental actor or entity and potentially escape liability.[52] Eliminating the presentment requirement makes it possible for liability to attach "without qualification or limitation" as to how or where a false or fraudulent claim is submitted for payment or approval.[53] Thus, the 2009 FCA

[49] *See id.* § 3729 note (explaining that Title 31, subparagraph (B) of § 3729(a)(1), takes effect as if enacted on June 7, 2008, and applies to all claims under the Act that are pending on or after that date).

[50] *Id.* § 3729(a)(1)(A) (stating that liability attaches whenever any person knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval).

[51] *See id.* § 3729(a)(1) (1988 ed.) (stating that liability attaches whenever any person, knowingly presents, or causes to be presented, to an officer or employee of the U.S. Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval). The former presentment requirement to an officer, employee, or U.S. agent that previously existed under the section providing for liability under the Act is now used to help define what constitutes "a claim." *See also id.* § 3729(b)(2)(A)(i).

[52] *See generally* 155 CONG. REC. E1297 (daily ed. Feb. 24, 2009) (statement by Rep. Howard L. Berman) (noting that "[T]he Act does not impose liability for false claims on Government funds disbursed for a Government purpose by a Government contractor or other recipient of Government funds, even if such fraud damages the Government or its programs."). *See also* United States *ex rel.* DRC, Inc. v. Custer Battles LLC., 376 F. Supp. 2d 617 (E.D. Va. 2005) (setting aside the jury's verdict for the relator and finding as a matter of law that U.S. Government employees working for the Coalition Provisional Authority in Iraq were not Government agents for liability purposes), *aff'd in part, rev'd in part*, United States *ex rel.* DRC, Inc. v. Custer Battles, LLC, 562 F.3d 295 (4th Cir. 2009).

[53] *See generally* 155 CONG. REC., at E1297. *See also Custer Battles*, 562 F.3d at 306 (concluding that the lower court erred in assuming that U.S. Government personnel detailed to the Coalition Provisional Authority could not be working in their official

Amendments broadly expand the definition of who is a government agent, or is acting as a government agent, so long as that individual or entity has some care, custody, or control over U.S. Treasury funds being used to further a government interest.

2. False Records and Statements

The 2009 FCA Amendments significantly lower the threshold for finding a FCA violation by no longer requiring proof that the government actually relied on a defendant's false claim or statement.[54] Under its former version, the Act prohibited individuals from knowingly making, using, or causing to be made, a false record or statement to induce the government to pay or approve a false or fraudulent claim.[55] After the 2009 FCA Amendments, Congress eliminated this requirement so a relator need only prove that a defendant's false record or statement is "material" to the government's payment decision.[56] For a false record or statement to be material, it must have "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[57] Proving the government's actual reliance on a false record or statement is no longer a material requirement to proving an FCA violation and thereby makes it more likely that a relator's claim will withstand a defendant's motion for dismissal based on evidentiary grounds.

3. Claims

The 2009 FCA Amendments effectively expand the universe of potential offenses arising under the Act by redefining a claim as any

---

capacities as U.S. Government employees). The circuit court explained that the district court erred by assuming the Act required presentment to a U.S. officer or employee must be for payment or approval "by the U.S. government." *Id.* at 307. The court further explained that while Congress included a requirement of payment or approval "by the Government" in § 3729(a)(2), it did not include a parallel provision in § 3729(a)(1). *Id.* Given the statute's plain meaning, the circuit court declined to read a "by the Government" into the Act's presentment requirement where Congress had omitted it. *Id.*

[54] 31 U.S.C. § 3729(a)(1)(B) (2006) (stating liability will attach whenever any person knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim).

[55] *Id.* § 3729(a)(2) (1988).

[56] *Id.* § 3729(a)(1)(B).

[57] *Id.* § 3729(b)(4).

request or demand for federal money or property, regardless of whether or not the United States has title to the sought after money or property.[58] Prior to the 2009 FCA Amendments, a false claim could only be found whenever a claim was made against money or property owned or directly controlled by the United States. However, Congress deliberately rewrote the Act to broadly redefine its scope and reach of what might constitute a claim and thereby expand the potential pool of civil lawsuits filed under the Act.[59] Senator Grassley argued that claims should be given the most inclusive interpretation as possible, thereby ensuring almost any request or demand for payment or property falls under Act's jurisdiction.[60] Representative Howard L. Berman noted that "Congress intended in 1986 to make sure that the FCA would impose liability even if the claims or false statements were made to a party other than the government, if the payment thereon could potentially result in a loss to the government or cause the government to wrongfully pay out money."[61] Likewise, Senator Grassley asserted that the 2009 FCA Amendments clarified that even "non-taxpayer funds under the control of the U.S. Government subject to fraud are actionable under the False Claims Act."[62] By expanding the definition of what constitutes a claim under the Act, Congress expressed its preference for encouraging civil litigation as the primary means of enforcing the law.

In yet another significant expansion of the FCA's jurisdictional reach, a "claim" may also arise when the request or demand for money or property 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 the government

---

[58] *Id.* § 3729(b)(2).

[59] *See generally* 155 CONG. REC. E1296 (daily ed. Feb. 24, 2009) (noting that the term should be read broadly and not used as an "exclusive checklist").

[60] *Id*. (stating the Act's definition "applies to any request or demand for Government money or property, regardless of whether it is submitted to the Government or to another entity, such as a Government contractor, agency, instrumentality, quasi-governmental corporation, or a non-appropriated fund"); *see also* Burton, *infra* note 86 (urging Sen. Patrick J. Leahy, Chairman, U.S. Senate Committee on the Judiciary to "clarify that the FCA does not require presentment of a claim to a U.S. official or ownership by the federal government of the relevant funds").

[61] *See generally* 155 CONG. REC., at E1297.

[62] *See generally id.* at S2424. It is not readily apparent from Sen. Grassley's remarks what he meant by the use of the term "non-taxpayer" funds. The Act defines a claim as a demand or request for money or property where the U.S. Government has provided *any* portion of the money or property being requested or demanded. *Id.* (emphasis added); *see also* 31 U.S.C. § 3729(b)(2)(A)(i)(I) (2006).

"provides or has provided any portion of the money or property requested or demanded."[63] Expanding the claim definition now makes it possible for the government to unilaterally create an agency relationship with governmental and non-governmental actors whenever or wherever a request or demand for payment is to be satisfied with funds or property drawn from the public treasury.[64] Redefining the Act's claim definition may allow relator's to allege novel legal theories about agency relationships that would not have been previously considered actionable under the former Act.

4. Retroactive Application

Inserting a retroactivity clause into the 2009 FCA Amendments was a legislative means to overturn the judicial interpretations set forth in both the *Totten* and *Allison Engine* decisions. At least one congressman, Rep. Berman, proclaimed that the House version of the 2009 FCA Amendments included a retroactivity provision so as "to avoid the extensive litigation over whether the amendments apply retroactively, as occurred following the 1986 FCA amendments."[65] However, the focus of the Act's retroactivity clause was most likely the Supreme Court's *Allison Engine* decision—decided on June 9, 2008, just two days after the Act's retroactive provision was meant to take effect.[66] Senator Grassley expressed his desire to create a unified body of jurisprudence by announcing the 2009 FCA Amendments would "bring a level of reason and sanity instead of the current hodgepodge of laws across

---

[63] *See generally* 31 U.S.C. § 3729(b)(2)(A)(ii). *See also id.* § 3729(2)(A)(ii)(I). The revised FCA definitions do not include a description of what might constitute a "government interest" for purposes of defining a claim. *Id*.

[64] *Id.* (explaining that "[a]ny fraud that reduces the effectiveness of programs and initiatives the Government has sought to advance also undermines the Government's purpose in supplying funding support").

[65] *See* 155 CONG. REC. E1295, E1300 (daily ed. June 3, 2009).

[66] Senator Leahy, who cosponsored the Senate version of the Act, expressly noted that one of the primary motivations to amend the FCA was to reverse the judicial decisions in *Allison Engine* and *Totten II*. *See generally* Press Release, Office of U.S. Senator Patrick Leahy, Leahy, Grassley Introduce Anti-Fraud Legislation: Bill Would Give Federal Government More Resources to Combat Mortgage Fraud (Feb. 5, 2009), http://leahy.senate.gov/press/press_releases/release/?id=c556b483-a161-4e19-894d-dc9221b8cac3. *See also* discussion *supra* note 58 (describing Assistant Deputy Attorney General Burton's recommendation to Sen. Leahy that the Senate Judiciary committee "consider additional modifications to address the impact" of the Supreme Court's *Allison Engine* decision).

various circuit courts of appeals.[67] Inserting a retroactivity clause into the Amendments works to either reverse any existing decisions, or restrict any further judicial interpretations deemed antithetical to the Act's purpose.[68]

C. Defining the Act's Scope and Reach: Two Key Judicial Decisions

Several years after the 1986 FCA Amendments' passage, two key judicial decisions limiting the FCA's jurisdictional scope and reach became the focus for criticism by *qui tam* relators and their congressional supporters.[69] In a *déjà vu* moment from almost twenty-five years before, Senator Grassley decried what he described as a hodgepodge of FCA decisions that undermined the FCA's intent.[70] Senator Grassley, among others, reserved his strongest criticism for the Court of Appeals for the District of Columbia Circuit Court's *Totten v. Bombardier* decision and the U.S. Supreme Court's *Allison Engine v. U.S. ex rel. Sanders* decision.[71] The 2009 False Claims Clarification Act title reveals Congress's desire to clarify the Act's true intent for the nation's courts.[72] Understanding how these amendments were passed into law also demonstrates congressional favoritism for promoting outsourced FCA prosecutions despite the relatively high dismissal rates for the vast majority of *qui tam* prosecutions.

---

[67] *See* 155_CONG. REC. S2424, at S2425 (stating that the Supreme Court's *Allison Engine* decision created a legal loophole that threatened to undermine the Act's spirit and intent).
[68] *Id*.
[69] *See generally* 155_CONG. REC., at S2424. *See also* Press Release, Grassley, Durbin, Leahy, Specter Sponsor Legislation to Fortify Taxpayers Against Fraud (Sept. 12, 2007), http://pogoblog.typepad.com/pogo/2007/09/legislation-to-.html (describing the senate bill's sponsors collective intent to amend the FCA in response to several important judicial decisions viewed as narrowly restricting the Act's jurisdictional scope).
[70] *See generally* 155 CONG. REC., at S2424, S2425 (suggesting that these two key court decisions effectively undermined the 1986 FCA Amendments' spirit and intent).
[71] *Id*. Senator Leahy introduced the 2009 Fraud Enforcement and Recovery Act legislation on the senate floor and declared that the FCA's effectiveness had, "been undermined by court decisions which limit the scope of the law and allow subcontractors paid with government money to escape responsibility for proven frauds." 155 CONG. REC. S1681, 1682 (daily ed. Feb. 5, 2009) (statement of Sen. Patrick Leahy introducing S. 386, the Fraud Enforcement and Recovery Act of 2009).
[72] *See* discussion, *supra* note 1; *see also* Letter from John T. Boese, to the Honorable Patrick Leahy, Chairman, Comm. on the Judiciary 3 (Mar. 19, 2008), http://www.friedfrank.com/files/QTam/John%20T.%20Boese%20Letter%20on%20S.%202041.pdf [hereinafter Boese Letter] (describing the Totten decision as having a limited impact on FCA prosecutions).

1. Totten v. Bombardier[73]

In *Totten v. Bombardier*, the D.C. Circuit Court concluded that in order for liability to attach under the FCA, a false or fraudulent claim has to be presented to an officer or employee of the U.S. Government to satisfy the Act's presentment requirement.[74] Writing for the court's majority, then Circuit Judge John G. Roberts explained that the court's analysis of the presentment clause would begin and end with the Act's statutory language.[75] The question before the Court was whether a federal grantee, the National Railroad Passenger Corporation (Amtrak), who had received grant funds drawn from the public treasury and allegedly used them to pay out a false claim, was an authorized government agent for the presentment requirement.[76] The relator argued that because public funds were involved, a false claims submission to Amtrak acted as the functional equivalent of presenting a false claim to the federal government.[77] Focusing on the statute's plain meaning, the Court rejected the relator's argument and determined the language of the

---

[73] United States *ex rel.* Edward L. Totten v. Bombadier Corp. & Envirovac, Inc., 380 F.3d 488 (D.C. Cir. 2004).

[74] *See id.* at 502. *But see id.* at 503 (finding that 31 U.S.C. § 3729(a)(2) (2006) does not impose a presentment requirement) (Garland, M., dissenting)).

[75] *See id*. at 496. As the *Totten* Court noted,

> [I]f the overriding intent of Congress were in fact to delete the requirement that claims be presented to a Government officer or employee, Congress could readily have done just that - amend subsection (a)(1) to provide that claims be presented to the Government or a *grantee* or *recipien*t of Government funds.

Id. *See also* 31 U.S.C. § 3729(a)(1) (1988 ed.) *infra* note 76. For liability to attach, the government or relator must prove the defendant presented or intended to present a false claim for payment or approval to to an officer or employee of the U.S. Government or a member of the Armed Forces of the United States.

[76] *See Totten*, 380 F.3d at 490 (affirming the district court's opinion dismissing the relator's complaint and determining the plain language of § 3729(a)(1) requires a false claim to be presented to an officer or employee of the government before liability can attach); *see also* United States *ex rel*. Totten v. Bombardier Corp., No. 98-0657, mem. op. at 7, 2003 WL 22769033 (D.D.C. Sept. 3, 2003).

[77] *See Totten*, 380 F.3d at 491–92. The circuit court's decision significantly narrowed the universe of potential *qui tam* lawsuits seeking to expand the Act's liability provisions whenever public funds were used to satisfy a false claim. *See generally* Boese Letter, *supra* note 45, at 13 (observing that *Totten* potentially would have a significant impact on the government's larger federal block grant programs).

Act's presentment requirement was not broad enough to support the relator's assertion.[78]

Senator Grassley, among others, assailed the D.C. Circuit Court's *Totten* decision for relying upon the FCA's statutory presentment requirement to preclude recovery of public funds where a false claim for payment is presented to a contractor or someone other than a government employee.[79] Eliminating the Act's presentment clause would therefore remove a significant evidentiary hurdle for the government and *qui tam* relators; claimants would only have to demonstrate that someone with an agency relationship with the government received a false or fraudulent claim for payment or approval to establish a prima facie case.[80] Eliminating the presentment requirement also raises questions about when and how the government may create an agency relationship with anyone who has received, controls, or exercises custody over public funds or property.[81]

---

[78] *See Totten*, 380 F.3d at 496 (noting in *obiter dictum* "we can remain agnostic on the question whether Congress intentionally left the presentment requirement in *Section 3729(a)(1)* or simply forgot to take it out").

[79] *See* 155 CONG. REC. S2425 (daily ed. Feb. 24, 2009) (describing the Court's *Totten II* decision as the first of several cases that "created problems for the False Claims Act"); *see also* 155 CONG. REC. S.1682 (daily ed. Feb. 5, 2009) (statement by Sen. Patrick Leahy introducing S. 386, The Fraud Enforcement and Recovery Act of 2009). Senator Leahy stated, "The effectiveness of the False Claims Act has recently been undermined by court decisions which limit the scope of the law and allow sub-contractors paid with government money to escape responsibility for proven frauds." *Id.*

[80] Congress did establish at least one limitation to the Act's expanded liability provisions. *See, e.g.*, 31 U.S.C. § 3729(b)(2)(B) (2006) (excluding from the Act's claim definition any 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); *see also* Boese Letter, *supra* note 45, at 11 (arguing that the then-proposed FCA Amendments required modification to comport with judicial decisions rejecting liability theories based on fraud being committed against federal employees who are paid from the public treasury). Mr. Boese illustrated his point by referencing a *qui tam* lawsuit where a relator sued the United Way for allegedly misrepresenting its eligibility to participate in the Combined Federal Campaign. *Id*. (citing United States *ex rel*. Bustamante v. United Way/Crusade of Mercy, Inc., No. 98C5551, 2000 WL 690250, at *4 (N.D. Ill. May 25, 2000)).

[81] *See generally* Michael Murray, Comment, *Seeking More Scienter: The Effect of False Claims Act Interpretations*, 117 YALE L.J. 981, 985 (2008) (concluding that the *Totten* court limited the expansion of FCA liability as a way of protecting individuals who were unaware they were associating with the Government).

2. Allison Engine v. United States *ex rel.* Sanders[82]

A unanimous U.S. Supreme Court declared that under 31 U.S.C. § 3729(a)(2), liability only attaches if a defendant's false record or statement is material to the government's payment decision.[83] Like *Totten*, the Court rejected the government's request to examine the Act's legislative history and conclude that liability should attach whenever a defendant's false statement results in a payment or claim approval.[84] The Court rejected the government's contention that a plaintiff asserting a claim need only demonstrate that "government money was used to pay the false or fraudulent claim."[85] By rejecting the government's request to examine the FCA's legislative history, the Court ultimately provided Congress further impetus for introducing legislation intended to clarify the 1986 FCA Amendments and including a retroactivity provision to invalidate *Allison Engine*'s precedential value in future lawsuits.[86]

---

[82] 553 U.S. 662 (2008).

[83] *See generally id*. at 667 (noting that 31 U.S.C. § 3729 (a)(2) requires that a claimant must make a false record or statement with the intent to get the government itself to pay a claim).

[84] *Id*. at 2126 (concluding that a plaintiff must demonstrate how a defendant's conduct materially affected the Government's payment decision on a false claim).

[85] *Id*.; *see also* Peter B. Hutt & Steven C. Wu, Allison Engine*: The Supreme Court Addresses Liability Under the False Claims Act*, 44 PROCUREMENT L. 13 (Fall 2008) (observing that by requiring a defendant's false record or statement to be material to the government's payment decision, the Supreme Court foreclosed future liability claims where "the direct link between the false statement and the government's decision to pay or approve a false claim is too attenuated to establish liability").

[86] *See generally* M. Faith Burton, Acting Assistant Attorney Gen., Office of Legislative Affairs, U.S. Dep't of Justice (Feb. 24, 2009), http://www.friedfrank.com/files (requesting Sen. Leahy, the Senate Judiciary Committee Chairman, introduce for the committee's consideration several modifications to the proposed 2009 FCA Amendments so as to address the Supreme Court's *Allison Engine* decision). In an appendix to Ms. Burton's letter, she expresses the Department's view that the Supreme Court unduly narrowed the jurisdictional scope of § 3729(a)(2) and (a)(3). *Id*. app. 3. The letter goes on to state in relevant part:

> *Allison Engine* will require the government to expend substantial time and resources proving an intent requirement that, in our view, Congress never intended. Indeed, the fact that the Supreme Court imposed such a requirement in a classic case of fraud on the Treasury —a subcontractor alleged to have supplied defective parts for use in naval vessels—demonstrates the problems with this decision, and the appropriateness of a legislative response.

Id.

The Supreme Court used its *Allison Engine* decision to validate the FCA's mandatory presentment requirement expressed in *Totten* and rejected the Sixth Circuit Court's conclusion that the FCA's presentment requirement did not apply under 31 U.S.C. § 3729(a)(2) and (a)(3).[87] The underlying theory of the relator's lawsuit asserted the defendants had violated the FCA by fraudulently submitting false compliance certifications to a prime contractor in order to obtain payments for work that did not conform to the government's required contractual specifications.[88] The District Court dismissed the relator's action after finding that the defendant's false compliance certifications had been submitted to a prime contractor and not the Government as required.[89] Reversing the lower district court's findings, the Sixth Circuit Court of Appeals concluded the defendants' intent to submit false certifications to obtain payment from a prime contractor would violate the law.[90] By determining that false claim presentment to a government official was not a prerequisite to finding liability, the Sixth Circuit Court's decision ultimately represented a significant departure from the D.C. Circuit Court's *Totten* decision.

The Supreme Court rejected the Sixth Circuit Court's interpretation of 31 U.S.C. § 3729(a)(2) by finding the lower court had "impermissibly" deviated from the statute's plain meaning.[91] The

---

[87] *See Allison Engine*, 128 S. Ct. at 2123; *see also* United States *ex rel*. Sanders v. Allison Engine Co., 471 F.3d 610, 622 (6th Cir. 2006) (finding that the FCA's plain language and legislative history indicate that while § 3729(a)(1) requires false claim presentment to a government official, § 3729(a)(2) and (a)(3) do not), *rev'd*, 128 S. Ct. 2123 (2008).

[88] *See generally Allison Engine*, 128 S. Ct. at 2126–27. A prime contractor is a term used to describe a person or organization entering into a contract directly with the United States. RALPH C. NASH, JR. ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK 230 (3d ed. 2007).

[89] *See Allison Eng.*128 S. Ct. at 2127 (noting that the trial court granted defendants' motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a)).

[90] *Id.* at 2128 (acknowledging that the Court's rationale for finding liability under the FCA potentially would contradict the D.C. Circuit Court's *Totten II* decision).

[91] *Id*. *But see* Brief of Senator Charles E. Grassley as Amicus Curiae Supporting Respondents at 7, Allison Engine Co. v. United States *ex rel* Sanders, 128 S. Ct. 2123 (Jan. 22, 2008) (No. 07-214) (arguing to the Supreme Court that the 6th Circuit Court's lower decision correctly held that there is no presentment requirement under 31 U.S.C. § 3729(a)(2) and (a)(3)). Senator Grassley explained his support for the Sixth Circuit's findings in relevant part:

> This statute [31 U.S.C. § 3729(c)] added in 1986 to cover precisely situations such as this, establishes—and was intended to establish—that if the Act was violated by Petitioners, the violation was complete

Supreme Court concluded the FCA's intent requirement, "to get" a false claim paid by the Government, was not the same as getting a false claim paid with "government funds."[92] Citing the *Totten* decision, the Court also noted that eliminating the intent requirement would extend the law's reach to "almost boundless" civil actions that might arise under the False Claims Act.[93]

IV. Examining How the DoJ Outsources its Prosecutions to *Qui Tam* Relators

The government, as represented by the DoJ and the various agencies impacted by *qui tam* actions, should take affirmative steps to improve current FCA enforcement practices—including affirmatively dismissing frivolous FCA lawsuits. The DoJ's *qui tam* intervention decision involves more than just a prognostication about a lawsuit's chances for success, or the size of a potential monetary recovery because the DoJ's decision requires a thoughtful determination as to whether litigation is in the public's best interest.[94] Congress also has vested the DoJ with

---

> when the subcontractor submitted a false claim to the shipbuilder. If the shipbuilder failed to present a subcontractor's false claim to the United States (something which could result as easily from book-keeping error as a prime contractor's payment system) but still paid the subcontractor with government money, the subcontractor has used a false document to get a false claim paid, as prohibited by subsection (a)(2).

Id. Senator Grassley's brief asks the Court to reject the D.C. Circuit Court's *Totten* holding and argues that requiring presentment to a federal actor before FCA liability attaches is contrary to Congress's legislative intent. *Id.* at 14.

[92] *Id*. The Court clarified that it was not reading a presentment requirement into 31 U.S.C. § 3729(a)(2); rather, the proof required for liability under the Act need only show that a claimant made a false record or statement with the intent of getting a claim paid or approved by the Government. *Id.* at 2128; *see also* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 4:27 (Supp. 2009) (explaining how the Court distinguished the implied intent requirement under § 3729(a)(2) from the Act's intent requirement concerning the defendant's knowledge of a statement's falsity).

[93] *Allison Engine*, 128 S. Ct. at 2128.

[94] *See generally* 31 U.S.C. §§ 3730(b)(1), (c)(2)(A) (2006) (authorizing the government to dismiss the relator's lawsuit upon filing a motion with the appropriate court and the court providing the relator with an opportunity to be heard on the government's motion). *See also id.* § 3730(b)(1) (stating that a relator's lawsuit may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting); Kovacic, *supra* note 21, at 1820 (suggesting that Congress delegated a

plenary authority as a gatekeeper in deciding which *qui tam* lawsuits should or should not go forward.[95] Some legal commentators have concluded that the DoJ's lack of intervention in 80% of all *qui tam* lawsuits, coupled with a 90% dismissal rate for declined lawsuits, demonstrates that the DoJ may not be performing its gatekeeping function as aggressively as it could be.[96] As a result, the courts assume *de facto* responsibility for separating what one U.S. Attorney has called "the wheat from the chaff" and the government forgoes a valuable opportunity to help control the various economic costs generated by not dismissing frivolous lawsuits in a more expeditious fashion.[97]

A. The DoJ's Intervention Decision Process

The government's decision as to whether it will intervene in some or all of a relator's claims against a contractor is largely a collaborative process involving Assistant U.S. Attorneys (AUSA) from DoJ's Civil Fraud section, AUSAs at the district level, Federal Bureau of Investigation (FBI) investigators, the affected agency's legal counsel,

---

"gatekeeping function" to the DoJ by giving the Attorney General the discretion to dismiss meritless suits).

[95] *See generally* 31 U.S.C. § 3730(b)(1). *See also* Boese Letter, *supra* note 45 at 6 (arguing that declined cases are usually meritless and hurt small businesses that often lack the depth of resources to defend against frivolous lawsuits); Rich, *supra* note 10, at 1255 (explaining the Government's ability to dismiss a *qui tam* suit acts as "a safety valve" to "minimize damage" from potentially frivolous lawsuits).

[96] *See generally* Kovacic, *supra* note 21, at 1820 (noting the DoJ rarely moves to dismiss a realtor's lawsuit). *Accord* Broderick, *supra* note 8, at 975–76 (comparing DoJ's intervention data to the dismissal rates for declined cases and determining that 72% of all *qui tam* lawsuits are frivolous). *See also* Rich, *supra* note 10, at 1259 (suggesting that the DoJ is "not fulfilling its responsibility to counterbalance relator's financial motivations with appropriate consideration of the public interest"); and Elizabeth Murphy, Justice Department Celebrates 25 Years of False Claims Act (1 February 2012), http://www.mainjustice.com/2012/02/01/justice-department-celebrates-25-years-of-false-claims-act/ (quoting John T. Boese, as saying, "[I]t is a myth that the Department can't enforce the False Claims Act without private firms. To argue the Department is not tough enough, smart enough, well enoughed staffed or politically inclined to enforce [the] law is wrong in 1986 and it is wrong today.").

[97] *See, e.g.*, Kathleen McDermott, Qui Tam*: An AUSA's Perspective*, 11 FALSE CL. ACT AND QUI TAM Q. REV. 20, 25 (Oct. 1997), *available at* http://www.taf.org/publications/PDF/oct97qr.pdf (explaining the DoJ and the affected Agency almost exclusively bear the cost of investigating and evaluating the relator's allegations against a contractor). Ms. McDermott also observed "[b]ecause *qui tam* suits divert law enforcement resources from existing investigations, it is imperative to separate the wheat from the chaff as soon as possible." *Id.* at 24.

and other agency investigating personnel.[98] Once the relator files a complaint under seal in federal court, the DoJ assumes responsibility for overseeing and coordinating the investigation into the alleged FCA violations.[99] If the AUSA assigned to review a *qui tam* lawsuit is not prepared to render an intervention decision within sixty days of the relator's complaint filing, the AUSA may request an extension from the court for good cause shown.[100] While the relator's complaint remains under seal, the AUSA, with assistance from a specific agency's fraud counsel, will oversee the investigation into the contractor's alleged wrongdoing. The investigation is usually an interagency undertaking involving FBI agents working with the agency's own law enforcement agents.[101] Once the AUSA determines that sufficient evidence has been collected, the DoJ and the agency will render a decision on whether the government should intervene in the *qui tam* lawsuit.[102]

B. Establishing Screening Guidelines

The DoJ performs a very important function within the FCA enforcement process by determining whether a *qui tam* lawsuit should be prosecuted or dismissed, yet little information is readily available on how

---

[98] *See generally* THE NATIONAL PROCUREMENT FRAUD TASK FORCE PROGRESS REPORT (2008), *available at* http://pogoarchives.org/m/co/npftflc-white-paper-20080609.pdf (detailing the government's interagency efforts to combat procurement fraud throughout the federal acquisition process).

[99] 31 U.S.C. §§ 3730(a)–(b)(2) (stating the Attorney General shall diligently investigate alleged violations of the Act and the relator shall file the complaint with the appropriate court *in camera* where it will remain under seal for at least sixty days).

[100] *Id.* § 3730(b)(2)–(4). It may be time for Congress to reconsider the sixty-day time period it allots to the DoJ for reviewing a relator's FCA complaint and making an intervention decision. In FY 2010, the DoJ identified 573 lawsuits as new *qui tam* matters. *See, e.g.*, DoJ Fraud Statistics, *supra* note 11, at 2. It took the DoJ an average of 12.3 months to review each of these *qui tam* lawsuits before making an intervention decision. *See generally* Grassley Press Release, *infra* note 147, at 1. These figures suggest that the DoJ attorneys requested 573 review extensions before a federal district court judge every sixty days for one year. In sum, the DoJ requested an average of 3438 extensions during FY 2010 so that it could have sufficient time to review each new relator's complaint before making an intervention decision. Amending 31 U.S.C. § 3730(b)(4) to increase the amount of time allotted to the DoJ for reviewing a relator's complaint would reduce the number of annual court filings for seeking an extension and perhaps more accurately reflect the amount of time required to review a relator's complaint. *See* 31 U.S.C. § 3730(b)(4).

[101] *See generally* DoJ-E.D. Pa. Memorandum, *supra* note 11, at 1.

[102] 31 U.S.C. § 3730(b)(4)(A)–(B).

the DoJ performs its statutorily mandated gate-keeping function.[103] This DoJ decision process should address at least two separate but related issues before opting to decline intervention in a relator's lawsuit. First, a determination must be made as to whether the government can marshal sufficient evidence to sustain a conviction against an individual for an alleged FCA violation.[104] If such evidence exists, the AUSA should then determine whether it is in the government's best interest to seek redress through either judicial or administrative means. The U.S. Attorney's Manual enumerates a list of factors for AUSAs to consider when deciding how to proceed against a corporate target for alleged violations of criminal law.[105] Similar factors are not provided for determining how

---

[103] The DoJ enjoys significant discretion to dismiss *qui tam* lawsuits. *See, e.g.*, Hoyte v. Am. Nat'l Red Cross, 518 F.3d 61, 64 (D.C. Cir. 2008) (finding that the FCA does not require the court's consent if the Government moves to dismiss a relator's suit). *But see* Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 936 (10th Cir. 2005) (adopting the two-prong test used by the Ninth Circuit in United States *ex rel.* Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139 (9th Cir. 1998)). In *Sequoia*, the Ninth Circuit held that the government's motion to dismiss a relator's suit must successfully demonstrate: (1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose. *See id.* at 1145.

[104] To obtain an affirmative judgment against a defendant for violating 31 U.S.C. § 3729, the government would need to demonstrate the contractor's liability by a preponderance of the evidence. *See generally* DOYLE, *supra* note 30, at 19 (citing United States *ex rel.* Sikkenga v. Regence Blue Cross Blue Shield, 472 F.3d 702, 724 (10th Cir. 2006)).

[105] *See generally* U.S. ATTORNEY'S MANUAL § 9-28.300 (Aug. 2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html [hereinafter DoJ-U.S. ATTORNEY'S MANUAL]. Several key factors that could be used to guide an AUSA's decision on whether to intervene in a relator's lawsuit are:

> 1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crimes;
>
> 2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
>
> 3. the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
>
> 4. the existence and effectiveness of the corporation's pre-existing compliance program;
>
> 5. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or

to proceed against a contractor in a civil action, but the DoJ's criminal charging factors could easily be adopted as guidelines for assessing how to proceed with a *qui tam* relator's lawsuit. If there is insufficient evidence to prove that an individual's conduct did not amount to an FCA violation, or there are other factors that individually or collectively weigh in favor of declining intervention, then the relator's lawsuit should probably be dismissed.[106]

While an AUSA may exercise her prosecutorial discretion and decide against seeking judicial redress in federal court, this election does not preclude pursuing accountability through any other available alternate remedy or administrative proceeding.[107] Congress has granted the Attorney General the discretion to determine whether it is appropriate to seek relief on behalf of the United States though administrative

---

> terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
>
> 6. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
>
> 7. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
>
> 8. the adequacy of remedies such as civil or regulatory enforcement actions.

Id.

[106] *Id.* § 9-42.010(F) (noting that when coordinating criminal and civil fraud cases, a civil suit should be instituted "unless there is doubt as to collectability or doubt as to the facts or law"). This policy statement suggests that the DoJ should intervene in a relator's civil lawsuit unless there is some doubt about the suit's merits. Of course, the DoJ may also elect to file its own complaint stating additional facts or pleadings not contained within the relator's original claim. *See generally* DoJ-E.D. Pa. Memorandum, *supra* note 11, at 3 (noting that the DoJ's intervention decision does not necessarily mean that it will endorse, adopt or agree with every factual allegation or legal conclusion in the relator's complaint).

[107] *See generally* U.S. ATTORNEY'S MANUAL, *supra* note 105, § 9-28.300A.9 (suggesting that prosecutors evaluate the adequacy of remedies such as civil or regulatory enforcement actions). *See also* 31 U.S.C. § 3730(c)(5) (2006) (providing that 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). The use of the term "governmental interest" is not meant to connote a legal predicate that must be met before the government may pursue its claim through any alternate remedy available to the government.

means.[108] The Attorney General may decide, in consultation with the affected agency, the public's best interest is served by pursuing accountability through administrative channels before opting to decline intervention in a relator's lawsuit.[109]

C. Exploring All Available Alternate Remedies

Congress empowered all federal agencies to pursue accountability for FCA violations through the use of any available alternate remedy including any administrative remedy to determine a civil monetary penalty.[110] Under 31 U.S.C. § 2730(c)(5), the government may use its regulatory authority to pursue an FCA violation in any manner other than judicial redress in federal district court.[111] A plain reading of the FCA's alternate remedies provision indicates that Congress did not seek to impose any limitation on the government's ability to "pursue its claim through any alternate remedy available."[112] Instead of automatically defaulting to *qui tam* litigation when the government opts out of seeking judicial redress, the government should first evaluate whether it is in the public's best interest to pursue administrative redress through all

---

[108] *See generally* James B. Helmer, Jr. & Erin M. Schenz, *Alternate Remedies and the False Claims Act*, 40 FALSE CL. ACT & QUI TAM Q. REV. 15 (Jan. 2006) (citing to the D.C. District Court's reliance upon S. Rep. No. 345, at 27, 1986 U.S.C.C.A.N. at 5292, *in* Ervin & Assocs., Inc. v. United States, 2003 U.S. Dist. LEXIS 25064 (D.D.C. 2003)).

[109] *See generally* McDermott, *supra* note 97, at 25 (stating that a U.S. Attorney's intervention decision is "influenced by the affected agency's recommendation and the merits established by the investigation"). *See also* DoJ-E.D. Pa. Memorandum, *supra* note 11, at 1 (stating that the Agency's views are taken into account when determining whether to intervene in a relator's lawsuit).

[110] *See generally* 31 U.S.C. § 3730(c)(5) (2006). *See also* Helmer & Schenz, *supra* note 150, at 108 (describing congressional efforts to ensure the government could pursue any alternate remedy for recovering false claims using an administrative process).

[111] *See* Helmer & Schenz, *supra* note 108 at 121–26 (citing to three separate judicial opinions that determined an administrative proceeding qualified as an alternate remedy under 31 U.S.C. § 3730(c)(5)). One of the opinions cited by the authors held that a settlement agreement between the government and the defendants could also qualify as an alternate remedy. *See generally* United States *ex rel.* Bledsoe v. Comty. Health Sys., 342 F.3d 634, 649 (6th Cir. 2003). However, in a second appeal to the Sixth Circuit, the *Bledsoe* court later concluded that a *qui tam* action that fails adequately to state a claim for relief does not entitle the relator to a portion of any recovery obtained from the defendant through the government's use of an alternate remedy. *See* United States *ex rel.* Bledsoe v. Comty. Health Sys. (*Bledsoe II*), 501 F.3d 493, 522–23 (6th Cir. 2008).

[112] The government's election to assess a "civil money penalty" is in addition to any other available remedy the government may pursue. *See* 31 U.S.C. § 3730(c)(5) (2006).

available remedies before declining intervention in the relator's lawsuit.[113]

Requiring the government to first intervene in a relator's lawsuit before pursuing an alternate remedy is an important procedural requirement providing notice to the relator of the government's intention, while simultaneously protecting the relator's financial interests in any subsequent recovery obtained by the government.[114] In *United States* ex rel. *Bledsoe* v. *Community Health Systems*, the Sixth Circuit adopted the government's position that the FCA required the government's intervention in a relator's lawsuit as a prerequisite to pursuing an alternate remedy.[115] In *Bledsoe*, the government argued that requiring intervention as a prerequisite to pursuit of an alternate remedy protects

---

[113] For example, DoD Instruction 7050.05 lists fifty-eight separate actions that may be taken by the DoD's subordinate agencies to redress procurement-related fraud. *See generally* U.S. DEP'T OF DEF., INSTR. 7050.05, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES encl. 3 (4 June 2008), *available at* http://www.dtic.mil/whs/directives/corres/pdf/705005p.pdf. The listed remedies are further broken down into subject categories as follows: criminal (18); civil (14); contractual (16); and, administrative (10). *Id.* The instruction also directs that, "[w]hen appropriate, contractual or administrative remedies should be taken *before* final resolution of the criminal or civil case." *Id.* para. 4.3 (emphasis added). The purpose for the prescriptive nature of the DoD's policy is to protect the agency's interests by recovering lost funds where possible and ensuring "the integrity of DoD programs and operations." *Id.*

[114] *See generally* Final Brief for Appellee, United States *ex rel.* Bledsoe v. Comty. Health Sys., No. 01-6375, 2001 WL 35992712 (2001) [hereinafter Appellee's Brief] (asserting that the United States can only pursue an alternate remedy under 31 U.S.C. § 3730(c)(5) if it first intervenes in the relator's lawsuit) [hereinafter Appellee's Brief]. *See also Bledsoe II*, 501 F.3d at 522.

[115] *See* 31 U.S.C. § 3730(c)(5). The Act states in relevant part, "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." *Id.* § 3730(d)(1) (noting that a relator is entitled to receive at least fifteen percent but not more than twenty-five percent of any recovery obtained from a defendant "depending upon the extent to which the person substantially contributed to the prosecution of the action"). Likewise, a relator may receive up to ten percent of any recovery where the government's action is based on information other than that provided by the relator. *Id.* This last section could possibly be used as a catch-all provision to reward those relators who significantly assist the government in identifying and stopping an otherwise fraudulent or harmful business practice that otherwise went undetected. *But see Bledsoe II*, 501 F.3d at 522–23 (holding that a relator cannot recover settlement or damage proceeds without first alleging a valid *qui tam* action). The DoJ has taken the position that for a relator's complaint to be valid, and preserve the relator's right to a share of the recovery, the relator's action must satisfy the criteria of Rule 9(b) of the *Federal Rules Civil Procedure* by pleading with particularity. *See generally* Appellee's Brief, *supra* note 114, at *11.

the relator's interest in any subsequent recovery.[116] Requiring government intervention as a matter of policy would therefore protect both the government's and relator's interests while a decision is made as to how a particular case should be resolved.

The government could expand alternate remedy usage to give federal agencies a more active role in resolving the 80% of FCA disputes the DoJ elects not to pursue through judicial redress. The government should only decline intervention in a relator's suit after the DoJ and the affected agency have determined that judicial or administrative redress is not in the public's best interest and a relator's suit is neither frivolous or without merit. This suggested approach would not frustrate the FCA's legislative intent, as relators are still incentivized to help identify fraudulent and corrupt activities being committed against the government.[117] However, the increased use of alternate remedies could encourage agencies to take a more proactive role in the coordination of

---

[116] *See generally* Appellee's Brief, *supra* note 114, at *11. *See also Bledsoe II*, 501 F.3d at 522–23. *But see* Thomas L. Harris, *Alternate Remedies & The False Claims Act: Protecting* Qui Tam *Relators in Light of Government Intervention and Criminal Prosecution Decisions*, 94 CORNELL L. REV. 1293, 1310 (July 2009) (arguing that the Government's intervention decision should not affect whether it has pursued an alternate remedy). Harris argues that what should drive the court's determination is whether the government has utilized the information provided by the relator to recover against the same defendant in a manner outside of the qui tam action . . . mak[ing] an actual monetary recovery by the relator in the *qui tam* action, either impossible or futile." *Id.* at 1311–12 (citing United States v. Bisig, No. 100CV335JDTWTL, 2005 WL 3532554, at *4 (S.D. Ind. Dec. 21, 2005)). The problem with this assertion is that not all alternate remedies will or must result in a monetary recovery for the government. Intervention in a relator's suit publicly commits the government to informing all the stakeholders in the FCA enforcement process that it has a public interest in taking over the relator's suit. The government would then have at least three choices it would have to exercise in every *qui tam* lawsuit: intervene to protect a government interest; dismiss those lawsuits that run counter to the public's interest (including frivolous or meritless suits); or, declination when there is no superseding governmental interest to protect.

[117] *See, e.g.*, United States *ex rel*. Folliard v. CDW Tech. Servs. Inc., No. 07-2009, mem. op., 8 (D.C.C. June 28, 2010) (noting that the FCA's statutory language suggests the primary purpose of filing a *qui tam* complaint is to notify the DoJ of an alleged violation); *accord* 31 U.S.C. § 3730(c)(5) (2006) (preserving the relator's rights if any alternate remedy is pursued such that the relator shall have the same right in such proceeding as if the action were resolved through judicial redress). Since the Government would be proceeding with the relator's action, albeit through administrative redress, the relator should still be entitled to receive at least fifteen percent but not more than twenty-five percent of any recovered proceeds from the defendant. *See id.* § 3730(d)(1).

administrative proceedings and employ the full panoply of available remedies before declining to join a relator's lawsuit.[118]

V. A Proposed Model

Using the 2009 FCA Amendments to promote increased levels of *qui tam* litigation without first reforming the systems designed to manage these lawsuits is like treating a patient's symptoms while ignoring her ailment.[119] The impetus for proposing a model for improving how the civil FCA enforcement is threefold. First, the nation's premier anti-corruption law has evolved significantly since introduced in Congress in 1863, but in over 147 years the manner in which it has been enforced has changed very little.[120] The FCA operates like an anomaly because it

---

[118] *See generally* Memorandum from The Attorney Gen., U.S. Dep't of Justice, subject: Coordination of Parallel Criminal, Civil, and Administrative Proceedings (July 28, 1997), *available at* http://www.justice.gov/ag/readingroom/970728.htm. The Attorney General stated in relevant part:

> In order to maximize the efficient use of resources, it is essential that our attorneys consider whether there are investigative steps common to civil and criminal prosecutions, and to agency administrative actions, and that they discuss all significant issues that might have a bearing on the matter as a whole with their colleagues. When appropriate, criminal, civil, and administrative attorneys should coordinate an investigative strategy that includes prompt decisions on the merits of criminal and civil matters; sensitivity to grand jury secrecy, tax disclosure limitations and civil statutes of limitation; early computation and recovery of the full measure of the Government's losses; prevention of the dissipation of assets; global settlements; proper use of discovery; and compliance with the Double Jeopardy Clause. By bringing additional expertise to our efforts, expanding our arsenal of remedies, increasing program integrity and deterring future violations, we represent the full range of the government's interests.

Id.; *see also* U.S. ATTORNEY'S MANUAL, *supra* note 105, § 1-12.000, Coordination of Parallel Criminal, Civil, and Administrative Proceedings (updated Feb. 1998) (encouraging "effective and timely communication with cognizant agency officials, including suspension and debarment authorities, to enable agencies to pursue available remedies").

[119] *See generally* Kovacic, *supra* note 21, at 1846–47 (observing that "the loss of prosecutorial discretion is one element of a larger loss of institutional power to set policy and be held accountable for its results"). *See also* Rich, *supra* note 10 (noting that through the FCA, Congress essentially has delegated to the relator "the power to fulfill nearly all of the responsibilities typically reserved to the government").

[120] *See generally* DOYLE, *supra* note 30, at 5.

encourages litigation as the primary remedy, despite long-standing government policies promoting ADR for civil disputes in a more cost-efficient and expeditious manner.[121] Second, past concerns or criticisms about the Executive Branch's ability to oversee and regulate the federal acquisition process are largely political and therefore subject to periodic change.[122] Federal Claims Act enforcement requires regulatory reform that emphasizes the role each affected agency must play to resolve alleged contractor misconduct. Third, the historical and empirical evidence for the past twenty-two years continually demonstrates that almost 80% of the *qui tam* suits not prosecuted by the DoJ will eventually end up being dismissed, providing little or no recovery to the government.[123] These lawsuits generate real costs to the public fisc, but the government cedes its ability to control these costs when it declines intervention in a relator's lawsuit.[124]

---

[121] *See generally* Exec. Order No. 12,988, *supra* note 29 (directing government counsel to "make reasonable attempts" at resolving litigation disputes "expeditiously and properly *before* proceeding to trial). The President also directed, "Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlement rather than through utilization of any formal court proceeding." *Id.* at 190; *see also* Joshua Bolten & James L. Connaughton, Office of Mgmt. & Budget and President's Council on Environmental Quality, Memorandum on Environmental Conflict Resolution para. 1(d) (Nov. 28, 2005) (setting forth "basic principles for engaging federal agencies in environmental conflict resolution and collaborative problem solving"), *available at* http://www.adr.gov/pdf/ombceqjointstmt.pdf. The authors noted, "Alternate dispute resolution helps make the government more results-oriented, citizen-centered and provides for effective public participation in government decisions, encourages respect for affected parties and nurtures good relationships for the future." The environmental compliance and dispute resolution reforms urged by Bolten & Connaughton reflects similar challenges encountered by the government in managing FCA enforcement practices in the federal acquisition process. The authors' recommendations encourage greater emphasis on agency participation in the dispute resolution process and could be incorporated into the expanded alternate remedies use to resolve FCA disputes.

[122] *See, e.g.*, Schooner, *supra* note 8, at 670 n.144. Professor Schooner captures the observation of a well-known government contracting expert who noted during a previous period of acquisition reform, "The Pendulum swings back and forth. . . . What's going to happen now is that there will be some abuses, and then there will be some hearings, and then congressmen will say they're shocked—and then there will be a new wave of legislation." *Id.*

[123] *See generally* DoJ Fraud Statistics, *supra* note 11.

[124] *See, e.g.*, AMERICAN COLLEGE OF TRIAL LAWYERS, INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (Aug. 1, 2008), *available at* http://www.actl.com (reporting the results of 1494 Academy of Trial Lawyer fellows who routinely engage in civil litigation practice). Of those surveyed, ninety-two percent of respondents said that the longer a case is litigated the more costs are incurred for both parties; and eighty-five percent thought that litigation in general, and discovery in particular, were too expensive. *Id.* at 4. Sixty-four percent said that the economic

Through a combination of policy and legislative changes, agencies could take a more proactive role in overseeing and regulating civil FCA enforcement for the 80% of relator lawsuits that do not merit prosecution or judicial redress. Resolving the majority of *qui tam* lawsuits by first using any available administrative measure to achieve an expeditious resolution will not require extensive regulatory changes. By utilizing existing administrative processes, the government's ability to realize improved FCA compliance results will decrease the number of *qui tam* lawsuits that are processed through federal court. Likewise, enhancing the use of the Program Fraud Civil Remedies Act (PFCRA) and Suspension and Debarment (S&D) process can provide agencies the means to take a more proactive role in resolving FCA disputes.

A. Incentivizing Government Intervention

Congress should properly resource and empower agencies to assume greater oversight and regulatory responsibilities for FCA enforcement within the federal acquisition system. With the proper mix of agency incentives and external monitoring by the DoJ, the majority of *qui tam* lawsuits could be put on track for resolution through alternate remedies. If agencies are properly resourced, then maintaining government control over the FCA enforcement process can be accomplished using administrative procedures.

A new initiative should develop a cost mechanism to account for the public resources currently being spent to support *qui tam* litigation. Once these "unseen" costs are captured, an agency will be better positioned to justify increased resource allocations to help regulate and enforce FCA compliance. Congress should also grant agencies the authority to retain a portion of any proceeds recovered through the use of alternate remedy procedures. Like the DoJ, agencies could then use this money to help fund or offset the costs associated with conducting FCA enforcement, compliance and dispute resolution efforts, similar to a working capital fund.[125] Because Congress already has granted a similar exception to the

---

models of many law firms encourage more discovery than is necessary. *Id.* Ultimately, these costs are passed back either indirectly by the contractor to the public in the form of reimbursable costs, or more directly when agency resources are being utilized to support resource exhaustive discovery requests.

[125] *See, e.g.*, Establishment of a Working Capital Fund, Debt Collection Improvement, 28 U.S.C. § 527 (2006) (authorizing the establishment of a working capital fund for the DoJ and allowing the Attorney General to credit "up to 3% of all amounts collected pursuant

DoJ, the same external monitoring and reporting controls imposed on the DoJ could be imposed on other agencies to ensure the funding program's integrity and transparency. Granting agencies the authority to keep a portion of any recovery obtained through the FCA's alternate remedies provision would help offset unreimbursed costs to the public fisc.[126]

Increasing the use of alternate remedies should not diminish a relator's incentives to file *qui tam* suits since the FCA already provides that a relator's rights are identical to the government seeking judicial redress.[127] The agency should take on the responsibility of first attempting to resolve a relator's FCA claims against a defendant before the DoJ affirmatively declines to take over the relator's lawsuit. Since an agency's actions are reviewable by the DoJ and the court in which the lawsuit was filed, the relator helps monitor the agency's actions throughout the alternate remedy process.[128] Giving agencies an opportunity to resolve *qui tam* lawsuits that the DoJ declines to prosecute would help reduce the overall volume of weak or frivolous *qui tam* lawsuits, while potentially helping expedite the resolution of other suits that might otherwise languish in civil litigation.

---

to civil debt collection litigation activities of the Department of Justice"). Allowing agencies to keep a portion of any recovery under the False Claims Act would require Congress to first grant the agency an exception to the Miscellaneous Receipts Act. *See* 31 U.S.C. § 3302(b) (requiring that any Government official or agent receiving money from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim); *see also* Memorandum of Understanding (MOU) between the Def. Fin. & Accounting Serv. (DFAS), the Dep't of the Army, the Dep't of Justice (DoJ), and the U.S. Courts, subject: Collection of Army Procurement Fraud Recovery Funds (June 10, 2010) (establishing an inter-agency understanding to ensure the timely return of procurement fraud funds to Army command accounts before fund cancellation) (on file with author).

[126] *See generally* Brian D. Miller, *Five Ideas to Fight Fraud that IG's Should Be Interested In* ¶ 5 (30 June 2008), http://oig.gsa.gov/otherdocs/Five_ideas_to_fight_fraud.pdf (recommending that agencies be allowed to retain a portion of any recovery obtained from a contractor through the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801–3812). Mr. Miller is the Vice Chair of the National Procurement Fraud Task Force, Co-Chair of the Task Force's Legislation Committee, and the General Services Administration's Inspector General. *Accord* NPFTF White Paper, *infra* note 171, at iv (proposing the establishment of a working capital fund, "possibly located at the DoJ and comprised of a portion of procurement fraud-related recoveries," to be used for funding various Inspector Generals' fraud investigations and related activities).

[127] *See* 31 U.S.C. § 3730(c)(5).

[128] *See id.* §§ 3730(c)(2)(A)–(B) (granting the relator the opportunity to be heard on a Government motion to dismiss and at the hearing of any government proposed settlement).

B. Enhancing Existing Agency Remedies

Once an agency opens an investigation into a defendant's alleged misconduct, the affected agency should begin coordinating with the assigned AUSA to help develop a comprehensive remedies plan.[129] If the DoJ and the agency determine that a contractor has committed fraud against the government, the DoJ should intervene to seek accountability through judicial redress. However, if the investigation reveals that the contractor's conduct does not merit seeking judicial redress, then the DoJ should notify the agency that it intends either to dismiss the lawsuit or seek resolution through an alternate remedy. At this juncture, the agency should take the administrative lead in resolving the relator's *qui tam* lawsuit with the DoJ providing oversight and assistance to the agency and the relator acting as a monitoring agent over the agency.

Two of the most powerful, but perhaps underutilized, administrative remedies available to agencies are the Program Fraud Civil Remedies Act (PFCRA) and the Suspension and Debarment (S&D) process. The primary difference between them is the latter is designed to protect the Government's interests by looking prospectively, while the former operates as an adjudicative process and looks back retrospectively to establish accountability. The PFCRA has been criticized as being generally ineffective and administratively cumbersome, thereby making it less desirable as an alternate remedy option.[130] An agency could use its S&D process, where appropriate, to examine a relator's allegations of fraud against a contractor.[131] For the Air Force, the S&D process is an

---

[129] *See, e.g.*, U.S. DEP'T OF THE ARMY, REG. 27-40, LITIGATION para. 8-8a (19 Sept. 1994), *available at* http://www.army.mil/usapa/epubs/pdf/r27_40.pdf (advising counsel assigned to the Army's Procurement Fraud Division to develop a "comprehensive remedies plan" for each significant investigation into a contractor's alleged fraudulent activities).

[130] *See generally* Davidson, *supra* note 27, at 220–21 (describing the systemic challenges an agency faces when attempting to bring an action under the Program Fraud Civil Remedies Act (PFCRA).

[131] The agency's authority to suspend or debar a contractor is premised upon the principle that the government should only be contracting with responsible individuals. *See generally* FAR, *supra* note 21, 9.402(a) (prescribing the policies and procedures governing the debarment and suspension of contractors by executive agencies). A contractor who, allegedly, has violated the law or a regulatory statute, may be ordered by the agency head to show cause as to its present responsibility to continue contract performance for the government. *See, e.g.*, Delta Rocky Mountain Petroleum, Inc. v. Dep't of Def., 726 F. Supp. 278, 280 (D. Colo. 1989) (finding that the test for whether debarment is warranted is the contractor's present responsibility). Additionally, a debarment sanction is a non-punitive means of ensuring compliance with statutory goals and protecting the government's interests. *See generally* Janik Paving & Constr. v. Brock,

effective tool for examining a contractor's business integrity, honesty, and capability to perform.[132] Additionally, agencies can aggressively wield the FAR Mandatory Disclosure Rule, FAR 52.203-13(b)(3), as a valuable administrative tool for gaining a contractor's compliance with an agency's request for demonstrating ethical business conduct.[133] With a few additional legislative changes, both the PFCRA and the S&D processes could become the preferred means for seeking redress in the majority of *qui tam* lawsuits alleging contractor fraud against the Government.

---

828 F.2d 84, 91 (2d Cir. 1987) (noting that "a measure, such as debarment, may incidentally punish while it deters a statutory violation does not transform it into a purely punitive sanction").

[132] *See generally* Rodney A. Grandon & Christine S. McCommas, Administrative Agreements/Compliance Agreements 4 (providing a general overview of the Air Force's approach to the Suspension and Debarment (S&D process) (slides on file with author). Ms. McCommas is the former Chief, Army Procurement Fraud Branch, Department of the Army.

[133] *See generally* FAR, *supra* note 21, 52.203-13(b)(2)–(3). The Contractor Code of Business Ethics and Conduct, also known as "FAR Mandatory Disclosure Rule," states in relevant part that the Contractor shall:

> (2)(i) Exercise due diligence to prevent and detect criminal conduct; and
>
> (ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.
>
> (3)(i) The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has *credible evidence* that a principal, employee, agent, or subcontractor of the Contractor has committed—
>
> (A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or
>
> (B) A violation of the civil False Claims Act (31 U.S.C. 3729–3733).

Id. (emphasis added). Once the government has intervened in the relator's lawsuit and intends to seek redress through an alternate remedy, the agency should draft and forward a contact letter to the contractor carefully outlining the allegation(s) against the contractor and reminding the contractor of its contractual obligations under, *id.* 52. 203-13. *See also* Office of the Deputy Inspector Gen. for Pol'y and Oversight—Investigative Pol'y and Oversight, Pol'y & Programs Dir. (describing the DoD's Mandatory Disclosure program as "an additional means for a coordinated evaluation of administrative, civil, and criminal actions appropriate to the situation"), *available at* http://www.dodig.mil/Inspections/IPO/voldis.htm.

1. The Program Fraud Civil Remedies Act

The PFCRA can and should become an agency's primary tool for fighting contractor corruption that does not merit prosecution under the FCA.[134] One legal commentator has described the PFCRA as "an administrative or mini version of the civil False Claims Act."[135] While primarily designed to fight small dollar fraud, the relatively low jurisdictional threshold hardly justifies the investment of agency resources to enforce the PFRCA. The National Procurement Fraud Task Force's Legislative Committee has expressed its support for extending the PFCRA's jurisdiction by increasing the monetary ceiling under which claims may be resolved.[136] The Committee specifically recommended raising the PFCRA's jurisdictional limit from $150,000 to $500,000 "to keep up with inflation from 1986 to today."[137] It might make even more sense to tie the PFCRA's jurisdictional ceiling to a U.S. Attorney's authorized settlement authority so that a supervisory AUSA overseeing a *qui tam* action could easily seek approval on any potential settlement offers.[138] As a result, the PFCRA jurisdictional limit could be

---

[134] Michael Davidson's article on combating small dollar fraud with the PFCRA is an excellent primer on the law's background, the challenges agencies historically have faced when trying to apply it, and several recommendations as to how the law could be changed to increase its overall effectiveness as a fraud fighting tool. *See* Davidson, *supra* note 27, at 213.

[135] *Id.*

[136] *See generally* NPFTF White Paper, *supra* note 171, at 8.

[137] *Id.* (citing 2008 U.S. Bureau of Labor Statistics to demonstrate that "[i]t takes nearly $300,000 in today's dollars to equal the purchasing power of $150,000 in 1986").

[138] *See generally* U.S. ATTORNEY'S MANUAL, *supra* note 105, § 9-42.010(I) (citing Civil Division Directive No. 14-95, 60 Fed. Reg. 17457 (Apr. 6, 1995)). The Manual states in relevant part:

> Any fraud or False Claims Act case where the amount of single damages, plus civil penalties, if any, exceeds $1,000,000 will "normally" not be delegated to United States Attorneys. Nevertheless, upon the recommendation of the Director, Commercial Litigation Branch, the Assistant Attorney General, Civil Division may delegate to United States Attorneys suit authority involving any claims or suits where the gross amount of the original claim does not exceed $5,000,000 where the circumstances warrant such delegations. Any authority exercised by the United States Attorneys under Directive No. 14-95 may be re-delegated to Assistant United States Attorneys who supervise other Assistant United States Attorneys handling civil litigation.

Id. When the above directive was drafted in 1995, the DoJ Civil Division only reviewed 269 *qui tam* FCA lawsuits compared to 573 lawsuits for 2010. *See generally* DoJ Fraud

raised to $1,000,000 with limited changes to the DoJ's current regulations. This change would increase the overall number of potential disputes that could be resolved under the PFCRA.[139]

2. The Suspension and Debarment Process

Suspension and debarment (S&D) proceedings provide agencies with another effective means of evaluating whether a contractor has engaged in a course of conduct that is detrimental to the government's interests.[140] Unlike the PFCRA, the S&D process promotes regulatory compliance over punishment as its ultimate goal.[141] The consequences of being suspended or debarred, while not punitive in nature, are considered by some to be detrimental in their effect.[142] Thus, the S&D process provides

---

Statistics, *supra* note 11, at 1–2. Given the increased volume of FCA litigation that has occurred since 1995, the Attorney General should examine whether increasing the current regulatory settlement authorities outlined under Civil Division Directive No. 14-95 could lead to a more efficient administration of FCA enforcement and compliance. *See also* Davidson, *supra* note 27, at 235 (recommending the DoJ's PFCRA approval authority parallel its FCA approval authority).

[139] Actions brought by agencies under the PFCRA are heard before an administrative law judge (ALJ). *See generally* Davidson, *supra* note 27, at 227. Not all agencies have ALJs, so an agency may have to pay to arrange for an ALJ to preside over a PFCRA hearing. *Id.* This requirement is an unreimbursed cost to the government and may serve as a disincentive for using the PFCRA by those agencies, like the DoD, that lack an ALJ. However, if Congress were to approve legislation allowing agencies to keep a portion of any recovery obtained under 31 U.S.C. § 3730(c)(5), then those agencies could use these monies toward funding a dedicated ALJ position.

[140] *See generally* FAR, *supra* note 21, 9.402 (stating that the "serious nature of debarment and suspension requires that sanctions be imposed only in the public interest for the government's protection"). The causes for suspension include, among other things, the agency receiving adequate evidence of "commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of the contractor or subcontractor." *See also id.* 9.407-2(9) (describing "adequate evidence" as information sufficient to support the reasonable belief that a particular act or omission has occurred); *accord id.* 2.101. An agency's S&D official has significant discretion in reviewing a contractor's business practices as an alternate remedy to seeking judicial redress for an alleged FCA violation.

[141] *See generally id.* 9.402 (noting that S&D proceedings should not be used by agencies as a means to punish a contractor).

[142] *See generally id.* 9.405-9.405-2 (describing the consequences resulting from a contractor being listed on the Excluded Parties List System (EPLS)). As a practical matter, once a contractor has been listed on the EPLS, any subsequent attempts to compete for a government contract award will be difficult since a contractor's "Past Performance" is invariably a required source selection criterion. *See also* RALPH NASH & JOHN CIBINIC, FORMATION OF GOVERNMENT CONTRACTS 420 (3d ed. 1998) (observing that the Comptroller General has determined that the causes for suspension under FAR

the government with an effective alternate remedy for reviewing a contractor's responsibility in light of any derogatory information that is either self-disclosed or obtained during the FCA investigative process.

Agencies should expand the use of S&D proceedings as an alternate remedy to seeking administrative redress to alleged FCA violations. Once the government intervenes in the relator's suit, the agency can issue a "show cause" letter to the contractor outlining the relevant allegations against the contractor and reminding the contractor of his disclosure obligations under the FAR Mandatory Disclosure Rule.[143] If an agency's S&D official decides that proceeding with a S&D hearing is unnecessary, the official may still require the contractor to enter into an administrative agreement to ensure the contractor will meet its obligations to the government.[144] The agency's compliance agreements may require the contractor to adopt ethics and compliance training standards, hiring an independent monitor, and paying any of the government's costs associated with administering an agreement.[145] The compliance agreement is essentially a settlement agreement between the agency and the contractor; thus, any financial recovery paid by the contractor to the agency could be used to compensate the relator for assisting the government in performing its regulatory and compliance function. The agency's compliance agreement, like the agency debarring official's S&D determination, could be made publicly available and also

---

9.407-2 may be used to evaluate a bidder's integrity). *But see How Convicts and Con Artists Receive New Federal Contracts: Before the H. Comm. On Oversight and Gov't Reform*, 111th Cong. 123–25 (2009) (statement of Scott Amey, Gen. Counsel, Project on Government Oversight) (testifying before the House Committee on Oversight and Government Reform that federal agencies "under-utilize suspension and debarment against large contractors that supply the majority of the $530 billion worth of goods and services to the federal government each year"). *Id.* Mr. Amey is the General Counsel and Senior Investigator with the Project on Government Oversight (POGO). In his testimony, Mr. Amey observed there were only 4296 suspensions or debarments of contractors in FY 2007 which was down from 9900 in FY 2005. *Id.* (citing data obtained from the Council of the Inspectors General on Integrity and Efficiency).

[143] *See* FAR, *supra* note 21, para. 52.203-13(b)(3)(i). Once the agency supplies the contractor with sufficient evidence to undertake its own internal investigation, the contractor is then bound by its obligation to disclose any legal or regulatory violations wherever it may find credible evidence of potential wrongdoing. *Id.*

[144] *See, e.g.*, U.S. DEP'T OF DEF., DEFENSE FEDERAL ACQUISITION REG. SUPP. 209.406-1(a)(i)(B) (July 2011) (providing the agency debarring official with the discretion to impose appropriate requirements on the contractor to ensure its present responsibility).

[145] *See, e.g.*, Administrative Compliance Agreement, ITT Corporation 19 (Oct. 10, 2007) *available at* https://www.jagcnet.army.mil/JAGCENTInternet/Homepages/AC/ArmyFraud.nsf (requiring the contractor to compensate the Army for the cost of negotiating and administering the compliance agreement between the parties).

would be reviewable by the court overseeing the relator's lawsuit.[146] By making the compliance agreements publicly accessible and subject to judicial review, the agency helps ensure the transparency and integrity of the settlement process.

VI. Statistical Trends: Most *Qui Tam* Lawsuits Should Be Affirmatively Dismissed

The DoJ's own FCA statistical data suggests that roughly 8 out of 10 *qui tam* lawsuits could be affirmatively dismissed instead of being outsourced for private prosecution.[147] From 1987 through 2011, the DoJ has tracked FCA litigation outcomes for approximately 10,650 *qui tam* and non-*qui tam* lawsuits.[148] Examining this body of empirical data reveals three significant trends.[149] First, when the DoJ affirmatively intervenes in a relator's lawsuit, the resulting outcomes tend to return

---

[146] *See generally* Robert Brodsky, *Federal Acquisition Councils Anticipate Mandate to Increase Transparency* (May 13, 2010), http://www.govexec.com/dailyfed/0510/051310rb1.htm (reporting on how the FAR councils are exploring ways to amend the FAR and "enable public posting of contract actions, should such posting become a requirement in the future, without compromising contractors' proprietary and confidential commercial or financial information"). The FAR Councils are primarily focused on efforts to promote transparency in the awarding of government contracts; however, the same underlying principles for promoting transparency in the contract and grant awarding process also can be applied to opening up how an agency performs its regulatory and compliance functions on behalf of the public.

[147] *See* DoJ Fraud Statistics, *supra* note 11, at 9. Unlike prior reporting years, the DOJ's latest version of Fraud Statistics for FY 2011 does not include the total number of cases where the government declined intervention and those *qui tam* suits reported as dismissed. The last year this information was made available to the public was for FY 2010.

[148] *See generally id.* According to the DoJ's statistical overview, non-*qui tam* matters and judgments do not include FCA lawsuits delegated to the U.S. Attorney's offices. *Id.*

[149] Unfortunately, other useful statistical information about *qui tam* monitoring is not tracked by the DoJ and, therefore, makes it difficult to conduct a more comprehensive cost-benefit analysis. Ideally, the following information also would be tracked and reported to Congress and the public: the overall amount of public resources spent investigating *qui tam* lawsuit allegations; the amount of Government money spent on investigating *qui tam* lawsuits that are affirmatively declined for prosecution; the overall amount of public resources spent on supporting *qui tam* lawsuits after they are affirmatively declined for prosecution; and, the overall amount of public funds spent on reimbursing defendants after they have successfully defend themselves against a *qui tam* lawsuit the Government affirmatively declined to prosecute. *See also* GAO-04-863 No Fear Act Cost Accounting, *supra* note 186 (providing information on how the DoJ says it can account for personnel and non-personnel costs associated with handling employment discrimination cases under the No Fear Act).

significant financial sums back to the U.S. Treasury.[150] Second, when the DoJ affirmatively declines to intervene in a relator's action, the resulting *qui tam* prosecution returns very little money to the public fisc. Third, the public would derive greater benefits from private *qui tam* monitoring efforts if the DoJ affirmatively dismissed the weak and frivolous *qui tam* lawsuits as quickly as possible. From a policy standpoint, private *qui tam* monitoring reaps financial benefits in roughly twenty percent of all *qui tam* lawsuits, but a more complete picture would show that those financial benefits are offset, to some degree, by the remaining eighty percent of relators' lawsuits generating uncaptured costs to the Government.[151]

The DoJ's available statistical data illustrates the need for reevaluating the costs and benefits of granting *qui tam* relators a license to prosecute actions on the Government's behalf. In examining FCA statistical trends, most legal commentators traditionally have focused their examinations on several areas of reporting information: Government intervention rates; Government and relator share of recovered monies; the types of actions being filed; and the dismissal rate for *qui tam* initiated lawsuits.[152] From this body of information, these same commentators have drawn various conclusions about *qui tam* monitoring and the lawsuits relators prosecute on the Government's behalf. One commentator argues that the DoJ's relatively low *qui tam* lawsuit intervention rates, coupled with the relatively high dismissal rate where the Government has declined intervention, suggests the vast majority of *qui tam* lawsuits are essentially frivolous.[153] Another commentator observes that *qui tam* litigation trends reveal more about

---

[150] *See, e.g.*, Jack A. Meyer, *Fighting Medicare Fraud: More Bang for the Federal Buck* 1 (July 2006), http://www.taf.org/FCA-2006report.pdf (demonstrating in a study prepared for the Taxpayers Against Fraud Education Fund that for every dollar spent investigating and prosecuting health care fraud in civil cases, the Government receives fifteen dollars back in return).

[151] *See generally* GAO-04-148R Contractor Litigation Costs, *supra* note 181.

[152] *See, e.g.*, Broderick, *supra* note 8, at 971–81; *see also* Rich, *supra* note 10, at 1243–49.

[153] *See generally* Broderick, *supra* note 8, at 964–75 (arguing that a high Government intervention rate would indicate that the *qui tam* provision is in the public interest, while a low intervention rate would indicate that it is not). *See also id.* at 974–76 (noting that between October 1987 and September 2004, seventy-three percent of all *qui tam* cases were dismissed and, of that figure, ninety-two percent of all "declined" *qui tam* cases were eventually dismissed).

potential cash recoveries than they do about actual fraudulent activities occurring within the Government's acquisition system.[154]

The picture that emerges from the DoJ's statistical data shows a very high dismissal rate for *qui tam* lawsuits that are outsourced for private prosecution and a relatively low rate of monetary return for the 80% of *qui tam* lawsuits the DoJ affirmatively declines to prosecute. The following tables illustrate data collected by the DoJ regarding the amount of money returned to the U.S. Treasury through private *qui tam* monitoring efforts. The first table summarizes the general types of FCA actions being prosecuted and the overall amount of money recovered for the past five years. The second table shows the overall judgment and dismissal rates for *qui tam* lawsuits since Congress implemented the 1986 FCA Amendments.

Fiscal Year	New Matters Health and Human Services	New Matters Department of Defense	New Matters Agencies other than HHS or DoD	Settlements and Judgments with Government Intervention	Settlements and Judgments without Government Intervention
2004	275	50	106	$560,977,502	$9,261,879
2005	271	49	86	$1,149,047,524	$7,481,593
2006	223	68	93	$1,485,706,466	$22,661,363
2007	202	51	111	$1,283,305,474	$160,212,814
2008	230	43	106	$1,032,878,939	$10,678,936
2009	279	52	102	$1,957,296,965	$33,667,002
2010	382	56	135	$2,294,671,076	$97,282,508

Table 1: Types of *Qui Tam* Lawsuits Filed and Dollar Amounts Recovered Since 2004[155]

[154] Rich, *supra* note 10, at 1248–49 (noting that the increase in *qui tam* lawsuits alleging health care fraud over defense acquisition fraud is attributable to the potential for a number of actionable claims where providers are submitting a claim for each patient or procedure being billed to the Government). Rich notes, "In light of these incentives, [the] relator's shift in focus is unsurprising: they simply followed the money." *Id.*

	Active Cases	Settlement or Judgment	Dismissed	TOTAL
Govt. Intervened	139	1,128	60	1,327
Govt. Declined	412	253	3,962	4,628
Pending Intervention Decision				1,246[156]

Table 2: *Qui Tam* Intervention Decisions & Case Status[157]

A. A Minority of *Qui Tam* Lawsuits Recover Substantial Sums

Based on historical trends, the DoJ only elects to intervene in about 2 of 10 *qui tam* lawsuits.[158] Of those lawsuits, Table 1 demonstrates that when the DoJ intervenes or otherwise pursues a realtor's cause of action, those cases routinely generate 90% or more of all of the funds recovered through private monitoring efforts.[159] Conversely, when the Government affirmatively declines to prosecute a *qui tam* lawsuit, the amount of money returned to the U.S. Treasury will be significantly lower.[160] This trend suggests that either the DOJ only intervenes in those suits likely to

---

[155] *See generally* DoJ Fraud Statistics, *supra* note 11, at 1. The DoJ started tracking private *qui tam* monitoring data in 1987 following the passage of the 1986 FCA Amendments. *Id.* Table 1 is a sampling of the last five years of statistical data and reflects more recent trends in *qui tam* monitoring efforts. In contrast, Table 2 provides a snapshot of the number of *qui tam* lawsuits that result in dismissal where the United States declines intervention. The table is also noteworthy for the number of *qui tam* lawsuit cases under investigation and pending an intervention decision.

[156] On October 7, 2009, Senator Grassley issued a press release indicating that over 1040 *qui tam* lawsuits were actually pending a DoJ intervention decision. *See* Grassley Press Release, *supra* note 178.

[157] *See generally* DoJ Fraud Statistics, *supra* note 11, at 9.

[158] *See generally* Rich, *supra* note 10, at 1263 (noting that the government intervenes in approximately twenty-two percent of all *qui tam* actions).

[159] *See, e.g.*, DoJ Fraud Statistics, *supra* note 11, at 1. As an example, during FY 2007, *qui tam* lawsuits affirmatively declined for prosecution still resulted in settlements or judgments worth $160,212,814. *Id.* This amount represented the largest amount of settlements and judgments awarded to *qui tam* relators without government intervention between fiscal years 2004 and 2010. In contrast, *qui tam* lawsuits selected for intervention by the DoJ during FY 2007 recovered approximately $1,283,305,474. *Id.* For the one year that saw the highest amount of money obtained by *qui tam* relators without government intervention, this amount still only represented 12% of the overall recovered amounts. Roughly 20% of the FY 2007 lawsuits generated.

[160] *Id.* at 9 (comparing only fifty-eight dismissals out of 1076 cases where the government elected to intervene to 3681 dismissals out of 4366 cases where the government declined to intervene).

return a high recovery yield, or *qui tam* relators simply don't fare as well as the government in obtaining favorable financial outcomes. As noted in Table 2, out of the 1327 reported *qui tam* lawsuits selected for DoJ intervention, almost 95% of these lawsuits resulted in a favorable settlement or judgment for the government.[161] Overall, the DoJ's statistics suggest *qui tam* lawsuits selected for prosecution have a high probability of generating a substantial recovery for the government.

B. A Majority of *Qui Tam* Lawsuits Recover Significantly Smaller Sums

From fiscal year (FY) 1987 through September 30, 2010, relator lawsuits affirmatively declined by the DoJ for prosecution contributed less than three percent of the overall amount recovered through private *qui tam* monitoring efforts.[162] During this twenty-two year time period, the U.S. Treasury recovered $13,181,167,640 through private *qui tam* monitoring efforts; the Treasury recovered only $389,661,334 of that overall amount after the DoJ affirmatively declined to join the relators' lawsuits.[163] As noted in Table 2, out of the 3,921 *qui tam* lawsuits the DoJ affirmatively declined for prosecution, only 239 or roughly 6% of all declined lawsuits generated a settlement or judgment.[164] Overall, the DoJ's statistics for affirmatively declined *qui tam* lawsuits suggests the vast majority those lawsuits not dismissed by the DoJ will offer little or nothing in monetary recovery to the public fisc.

---

[161] *Id.*

[162] *Id.* at 2. From 1987 through September 2009, when the DoJ elected to intervene in *qui tam* lawsuits, the resulting settlements and judgments amounted to $15,186,360,670 in total recovery from defendants minus $2,394,854,364 for the relators' share of the award. *Id.* During this same time frame, when the DoJ affirmatively declined to take over *qui tam* lawsuits, the total recovery from defendants was only $472,043,167 minus $82,381,883 for the relators' share of the award. *Id.*

[163] *Id.* Recalling the Comptroller General's finding that the DoE reimbursed contractors for $330.5 million from October 1, 1998 through March 2003, it becomes apparent that the costs associated with supporting *qui tam* litigation by one government agency for a five-year-period quickly offsets the monies recovered by all privately prosecuted *qui tam* actions over a twenty-two year period. *See generally* GAO-04-148R Contractor Litigation Costs, *supra* note 181.

[164] *Id.*

C. Most *Qui Tam* Lawsuits Should Be Disposed of Expeditiously

Improving FCA enforcement practices and disposing of weak *qui tam* lawsuits suits as expeditiously as possible is in the Government's best interests. Since 1986, eighty-four percent of all *qui tam* lawsuits affirmatively declined for prosecution by the DoJ ultimately ended in some form of dismissal during the litigation process.[165] The DoJ rarely exercises its authority to dismiss a weak or frivolous *qui tam* lawsuit because it lacks the appropriate incentives to do so.[166] Under the FCA's recovery scheme, the government is able to retain up to eighty-five percent of any recovery the DoJ obtains after intervention in a *qui tam* lawsuit and a minimum of seventy-five percent of any recovery obtained after outsourcing its prosecution to a relator.[167] Forgoing a ten percent difference in a potential recovery that requires a relatively minor investment in time and resources fails to incentivize the DoJ to affirmatively dismiss frivolous lawsuits. A more comprehensive cost-benefit analysis should look at whether the DoJ should affirmatively dismiss more *qui tam* lawsuits then it historically does, particularly when only 6% of them will likely yield any type of financial recovery for the government.

Congress authorizes the DoJ to retain up to three percent of what it recovers from the settlements and judgments it obtains through its enforcement efforts,[168] thereby offsetting some of the costs incurred from

---

[165] *See generally* DoJ Fraud Statistics, *supra* note 11.

[166] *See also* Rich, *supra* note 10, at 1264–67 (noting that the FCA "allows the government to purchase the prosecution of minor fraud at the cost of the relator's increased recovery, thus freeing up limited government resources to pursue higher value cases"). Professor Rich argues that the FCA creates a disincentive for dismissing cases early in the litigation process since the Government can still recover some money if the relator recovers a settlement or judgment against a defendant. *See also* 31 U.S.C. §§ 3730(d)(1)–(2) (2006) (stating that a relator is entitled to at least 15% but not more than 25% of any recovery obtained with Government intervention and at least 25% but not more than 30% of any recovery obtained without Government intervention).

[167] 31 U.S.C. §§ 3730(d)(1); *see id.* § 3730(d)(1).

[168] *See generally* 28 U.S.C. § 527 (2009), Pub. L. No. 107-27, div. C, tit. I, § 11013(a), 116 Stat. 1823 (2002) (authorizing the Attorney General to credit, as an offsetting collection to the DoJ Working Capital Fund, up to 3% of all amounts collected pursuant to civil debt collection litigation activities). These funds may used for paying the costs of processing and tracking civil and criminal debt collection litigation and other operating expenses related to civil debt collection. *Id.* On January 5, 2009, Congress granted this authority to the DoJ as an exception to the Miscellaneous Receipts Act, 31 U.S.C. §§ 3302(b)–(c)(1) (2006) (requiring that except as otherwise provided for in law, any money

supporting *qui tam* litigation.[169] However, Congress has not enacted a similar provision to help individual agencies offset the costs they incur providing support to relators whose lawsuits were affirmatively declined by the DoJ for prosecution.[170] If agencies were given the opportunity to take a greater role in resolving *qui tam* lawsuits through administrative remedies, the overall recovery rate for both the government and relators could potentially increase. To offset any costs associated with pursuing administrative remedies, in lieu of litigation, Congress could grant an agency the authority to retain a portion of any recovery obtained from a defendant.[171]

VII. Future Challenges: Interpretation and Enforcement

The 2009 FCA Amendments change how federal courts interpret and apply the Act, but it is unclear whether these same changes will improve the quality of cases being filed by *qui tam* relators on the government's behalf. Lowering the FCA's evidentiary thresholds for proving civil liability, while simultaneously increasing the Act's jurisdictional scope and reach, provides a strong incentive for bringing more *qui tam* actions into the nation's courts. However, it is unclear whether these changes will also improve the overall quality of *qui tam* lawsuits seeking judicial redress through civil litigation.[172] Under the FCA's revised guidelines,

---

received by a Government official or agent for the Government shall be deposited into the U.S. Treasury as soon as practicable without deduction for any charge or claim).

[169] *Id.*; *see also* Hertz Statement, *supra* note 19, at 7 (explaining that the DoJ expends considerable resources supporting relators lawsuits even in those cases where the Department has declined intervention).

[170] *See generally* Nat'l Sci. Found.—Disposition of False Claims Act Recoveries, Comp. Gen. B-310725, 2008 WL 229784 (C.G. May 20, 2008) (determining that the National Science Foundation Inspector General's office is not authorized to retain or credit to its appropriations any monies recovered in a False Claims Act settlement). In contrast, the Comptroller General noted the DoJ is authorized to deduct a 3% fee for "its services from the total recovery." *Id.* at *2.

[171] *See, e.g.*, Brian D. Miller & Richard L. Skinner, Letter to Matthew W. Friedrich, Acting Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice, National Procurement Fraud Task Force, Legislation Committee White Paper, at iv (June 9, 2008), http://pogoarchives.org/m/co/npftflc-white-paper-20080609.pdf [hereinafter NPFTF White Paper] (noting that the committee had "considered general proposals to amend appropriations-related statutes in order to allow closed or expired funds to be credited back to the accounts of agencies that have experienced a procurement fraud-related loss").

[172] *See, e.g.*, The Fraud Enforcement and Recovery Act of 2009, S. 386, 111th Cong., §§ 4(a)–(f) (2009). The section containing the amendments is entitled, "Clarifications to the False Claims Act to Reflect the Original Intent of the Law." *Id.*

qui tam relators are essentially incentivized to explore the Act's boundaries in cases that might have previously been considered questionable or frivolous.[173]

Increasing the volume of *qui tam* litigation under the FCA will generate increased and unrecorded costs to the public fisc. The DoJ's own statistics call into question the justification for allowing eighty percent of all *qui tam* lawsuits to be prosecuted without government assistance, when over ninety percent of them eventually are dismissed.[174] When the government intervenes in a relator's lawsuit, the resulting settlement and judgment helps defray any costs associated with pursuing the action. However, when the majority of *qui tam* lawsuits do not result in any recovery to the government, there are real and tangible costs being absorbed by the DoJ, the agency, and the courts where these lawsuits are allowed to play out until their conclusion. The government should therefore focus on improving agency oversight and regulation of *qui tam* lawsuits to obtain better control over the unreimbursed costs these lawsuits generate. Implementing improved case screening criteria could help identify weak lawsuits and benefit the public by ensuring these cases are resolved in an expeditious manner.

A. Expanding the FCA's Scope and Jurisdiction

Using the 2009 FCA Amendments to broaden what actions will constitute a "claim" for liability purposes significantly expands the types of violations that can now be alleged under the Act. Including sub-contractors, grantees and recipients in the scope of individuals who may pass a false claim onto the government will help capture fraudulent conduct that may previously have escaped accountability under the original Act.[175] Expanding the Act's jurisdictional scope, while simultaneously lowering its evidentiary thresholds, effectively increases the number of *qui tam* lawsuit filings, while encouraging novel legal theories and testing the law's jurisdictional boundaries. Increasing the overall volume of FCA lawsuit filings may relieve the government from investing its resources to investigate and prosecute questionable cases,

---

[173] *See* discussion *supra* note 37.
[174] *See* Table 2, *Qui Tam* Intervention Decisions & Case Status, *infra* note 157.
[175] *See generally Allison Engine*, 553 U.S. at 669 (finding that a subcontractor could be held liable for submitting a false claim to a prime contractor working directly for and in privity with the government).

but fails to address how the government can improve its ability to encourage ethical business practices from its commercial partners.[176] The DoJ should take a more proactive role in screening *qui tam* actions to dismiss those lawsuits that go too far in attempting to redefine the FCA's civil liability provisions before allowing these actions to become embroiled in protracted civil litigation.

Additionally, by not defining what constitutes a "government interest," the FCA may fail to provide sufficient notice as to what conduct runs afoul of an undisclosed or unknown government interest.[177] The inclusion of the government interest provision leaves open the opportunity for the *qui tam* relator to initially define where government's interest lies under the Act. While the FCA's legislative history suggests that the government interest provision should not be used in this manner, drafting history alone is no substitute for adopting a uniform standard to ensure the Act is enforced consistently and fairly in all instances of

---

[176] *See generally* Kovacic, *supra* note 21, at 1799. Professor Kovacic suggests a framework for evaluating *qui tam* monitoring to help determine its net value to society by helping police the procurement system against fraudulent activity. *Id.* This framework is useful because it asks whether legislation designed to increase *qui tam* monitoring through the filing of lawsuits adequately addresses the problems plaguing regulatory compliance within the federal procurement system. The four questions comprising the inquiry ask:

> First, are there adequate controls to deal with plausible scenarios of relator error and opportunism? Second, are there less costly alternative methods for monitoring contractor behavior and for discouraging shirking by public enforcement officials? Third, are the underlying substantive conduct standards that qui tam monitoring seeks to enforce appropriate? Fourth, are penalties for violations calibrated to correspond to the seriousness of the underlying offense as measured by its economic harm?

Id.

[177] The FCA is not a criminal statute; but it is a punitive one as indicated by the Government's ability to impose civil fines and treble damages for statutory violations. *See* 31 U.S.C. § 3729(a)(1)(G) (2006). In the context of criminal statutes, the Supreme Court has stated that vague laws "may trap the innocent by not providing fair warnings." *See* Musser v. Utah, 333 U.S. 95, 97 (1948). In the context of regulatory statutes, the Supreme Court has explained, "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *See* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982). Creating liability based upon the vaguely defined notion of a "governmental interest" likely will provide future cannon fodder for defendant's counsel to attack the amended Act's constitutionality.

alleged violations.[178] By not defining what constitutes a "government interest" within the FCA's liability provisions, Congress likely sought to preserve maximum flexibility for initiating prosecutions under the Act. However, defining the Government's interests for purposes of obtaining accountability under the Act should be regarded as an inherently governmental function.

B. The Costs and Effects of FCA Expansion

The 2009 FCA Amendments didn't just clarify the Act's intent, they also expanded the potential pool of civil actions that can be brought under the Act's revised statutory scheme.[179] Enforcing the Act becomes less predictable; relators will inevitably raise and litigate issues based on revised statutory thresholds that were previously precluded under the *Totten* and *Allison Engine* decisions. Creating new grounds for litigating FCA claims increases the types of issues that can be litigated and thereby increases the potential volume of cases being litigated.[180] The discussion of costs to the government is largely missing; contractors who successfully defend themselves against frivolous suits may eventually pass their litigation costs back to the public.[181] In the end, the courts

---

[178] *See, e.g.*, 31 U.S.C. § 3729(b)(2)(B) (stating in relevant part that a claim under the FCA 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"). Representative Berman explains that the Act's "government interest" clause should be interpreted as follows:

> To ensure that the Act is not interpreted to federalize fraud that threatens no harm to Government purposes or federal program objectives, the Amendment explicitly excludes from liability 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, such as Social Security retirement benefits, with no restrictions on that individual's use or the money or property at issue.

See 155 CONG. REC. E1298 (daily ed. Feb. 24, 2009).

[179] *See* discussion *supra* note 37.

[180] *See, e.g.*, 155 CONG. REC. at E1300 (statement of Rep. Howard L. Berman) (explaining that the purpose of including a retroactivity provision is to "avoid the extensive litigation over whether the amendments apply retroactively as occurred following the 1986 False Claims Act").

[181] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-148R, DEPARTMENT OF ENERGY: REIMBURSEMENT OF CONTRACTOR LITIGATION COSTS 1 (Nov. 26, 2003)

become the default FCA enforcement regulators and expend their own publicly funded resources overseeing and managing the *qui tam* litigation process.[182]

Increasing private monitoring efforts to deter fraud may result in the federal government spending more money to acquire its goods and services. A 2009 poll involving more than 800 business professionals reflects a growing concern among many in the private sector that encouraging increased *qui tam* enforcement drives up the cost of doing business with the government.[183] Unfortunately, there is no readily available data on the amount of public funds being spent on reimbursing contractors who successfully defend themselves against *qui tam* relator lawsuits. A 2003 Government Accountability Office (GAO) Report examining the Department of Energy's (DOE) experience with

---

[hereinafter GAO-04-148R CONTRACTOR LITIGATION COSTS]. The GAO report noted in relevant part:

> The DOE reimbursed contractors for $330.5 million in litigation costs associated with 1,895 cases from fiscal year 1998 through March 2003, including $249.4 million for litigation costs and $81.1 million for judgments and settlements. During the same period, DOE estimates that contractors spent about $12 million without being reimbursed.
>
> DOE does not pay litigation costs when the contractor's actions involved either willful misconduct; lack of good faith; or failure to exercise prudent business judgment by the contractor's managerial personnel; nor does DOE pay in certain other circumstances, such as when the contractor is liable under the False Claims Act. When a contractor prevails in a False Claims Act case or prevails in other cases where a government entity has sued the contractor, DOE pays a maximum of 80% of reasonable litigation costs.

Id.

[182] The 2009 Fraud Enforcement and Recovery Act did include funding authorizations for increased spending on fraud prevention and enforcement; however, there is no indication how much of that money will be spent on supporting FCA-related litigation. *See* The White House, Office of the Press Sec'y, Reforms for American Homeowners and Consumers (May 20, 2009), http://www.whitehouse.gov/the-press-office/reforms-american-homeowners-and-consumers-president-obama-signs-helping-families-save-their-homes-act-and-fraud-enforcement-and-recovery-act (noting that the passage of The Fraud Enforcement and Recovery Act provides the Department of Justice spending authorization up to $165 million for fraud prevention and investigation resources in FY 2010 and 2011, including the hiring of fraud prosecutors and investigators).

[183] *See generally* Press Release, Deloitte Poll: Nearly Two Thirds of Business Professionals Expect Uptick in Recovered Government Funds (Jan. 27, 2010), http://www.deloitte.com/view/en_US/us/press/Press-Releases/press-release.

reimbursing contractors' litigation expenses offers a glimpse into the magnitude of costs being passed back onto the public.[184] The Comptroller General observed the DOE spent $330.5 million reimbursing its contractors' for litigation costs associated with defending themselves from frivolous lawsuits beginning in October 1998 and running through March 2003.[185] The cost to the public fisc likely would be even more significant when considering what likely was spent on litigation reimbursement within the Department of Defense and Health and Human Services agencies during the same five year time period. *Qui tam* litigation costs could be offset by charging fees similar to those charged for supporting Freedom of Information Act requests.[186] Federal agencies could track the time and resources expended supporting *qui tam* litigation requests and require both relators and defendants to pay for the expenditure of public resources used to support what is essentially a private endeavor.

The DoJ's responsibility to oversee and regulate private monitoring efforts increases in proportion to the number of *qui tam* suits being filed in the nation's courts. According to the DoJ's 2010 statistics, approximately 1246 FCA lawsuits were pending investigation and an intervention decision.[187] The statutory review period for conducting a

---

[184] *See* GAO-04-148R Contractor Litigation Costs, *supra* note 181, at 1.

[185] *Id.*

[186] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-863, NO FEAR ACT: METHODS THE JUSTICE DEP'T SAYS IT COULD USE TO ACCOUNT FOR ITS COSTS PER CASE UNDER THE ACT 3 (July 2004), http://www.gao.gov/new.items/d04863.pdf [hereinafter GAO-04-863 NO FEAR ACT COST ACCOUNTING] (describing the DoJ's ability to account for litigation-related costs while handling employment discrimination and whistleblower lawsuits brought against a federal agency under the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002). Within the DoD, certain components are able to track the costs associated with processing Freedom of Information Act (FOIA) requests and then require individuals who submit FOIA requests to defray certain costs of preparing the agency's response. *See, e.g.*, 32 C.F.R. § 286.29 (2009) (providing a fee schedule for the collection of fees associated with supporting FOIA requests). Opponents of collecting fees to support *qui tam* litigation may argue that this approach will stifle private monitoring efforts. However, if public resources are expended to support *qui tam* litigation, then the parties to that litigation could reimburse the government's agencies for these costs to the public's fisc.

[187] *See* DoJ Fraud Statistics *supra* note 11, at *Qui Tam* Intervention Decisions & Case Status; *see also* Press Release, Sen. Charles Grassley, More Than a Thousand Fraud Cases Await Government Action (Oct. 7, 2009), http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=23563 [hereinafter Grassley Press Release] (relaying the number and types of *qui tam* cases pending DoJ review). According to Senator Grassley's press release:

legal review and investigation into the allegations cited in a *qui tam* relator's lawsuit is sixty days.[188] It takes the DoJ almost six times the allotted statutory review period, or an average of 12.3 months, to investigate, review, and decide whether to intervene in a relator's lawsuit.[189] Adding more lawsuits to the DoJ's screening backlog likely will increase the overall reviewing and case processing times. As a result, evidence may grow stale, memories may fade, and prosecutorial interest in good, but lesser valued *qui tam* lawsuits, may wane. As congressional pressure on the DoJ to expedite its *qui tam* lawsuit investigations and case reviews increases, so too does the temptation to respond by outsourcing even more *qui tam* lawsuits. Considering that over 90% of all affirmatively declined *qui tam* lawsuits will end up being dismissed, Congress first should address how the DoJ could improve its ability to regulate the quality of cases being outsourced to private attorneys general. A revamped *qui tam* screening process at DoJ could avert some of the costs being passed onto the public as frivolous lawsuits and those cases identified for affirmative dismissal and reimbursement costs arising out of defending these lawsuits are therefore avoided.

> [T]here are 985 qui tam health care fraud cases pending, 200 qui tam cases have to do with pricing and marketing pharmaceuticals, and 205 qui tam cases allege procurement fraud with the Defense Department. In addition to cases pending a Justice Department decision to join the case, there are 130 pending qui tam cases the Justice Department has joined and about 490 cases that the Justice Department has declined to intervene. The Justice Department data also shows that, on average, it takes 12.3 months for the Justice Department to make a decision on whether to join a qui tam case.

Id.

[188] *See* 31 U.S.C. § 3730(b)(2)–(4) (2006) (stating that the Government may elect to intervene in a relator's suit within 60 days after receiving the complaint or move the court for an extension of time during which the complaint remains under seal).

[189] *Id.*; *see also* DoJ-E.D. Pa. Memorandum, *supra* note 11 (explaining that a *qui tam* complaint must be filed under seal for a period of at least sixty days to allow the DoJ sufficient time to review the matter for potential criminal prosecution and civil intervention). If at the conclusion of the sixty-day review period the DoJ requires an extension of time, the DoJ must file a motion showing "good cause" why the complaint should remain under seal. *Id.* (noting that such extensions, when granted, are usually for six months at a time). According to the DoJ's own description on current review times for a *qui tam* case filed under seal, a relator must wait an average 12.3 months before even going forward, with or without the Government's intervention, in a civil action alleging another's fraudulent conduct against the public fisc.

VIII. Conclusion

The 2009 FCA amendments will usher in a new era of FCA enforcement reforms, but changing the law without also changing how it is enforced may ultimately prove to be counterproductive. Proponents for amending the Act to enhance *qui tam* litigation tend to focus on the huge recoveries returned to the U.S. Treasury obtained in just 20% of the lawsuits brought into court, while failing to account for the costs to the public fisc in the remaining 80% of relator lawsuits that continue to be litigated after the Government declines intervention. In light of the empirical evidence demonstrating the importance of government intervention in relator lawsuits, the government effectively cedes its ability to control the costs these lawsuits generate back to the public fisc. Thus, the government should be promoting smarter FCA enforcement to counter the phenomenon of increased *qui tam* litigation.

Now that Congress has changed the FCA's rules of the road, the executive branch needs to put forth the requisite effort to ensure those rules are fairly enforced and take the lead in reversing the toxic environment in Government contracting. The most effective way to achieve these important acquisition policy goals is to ensure the government utilizes its full range of judicial and administrative remedies before declining intervention in a relator's lawsuit. Of all the stakeholders in the FCA enforcement process, agencies are best positioned to promote regulatory compliance and pursue accountability in a fair and even-handed manner. Expanding the use of administrative remedies to dispose of weak, frivolous, or smaller value *qui tam* lawsuits will promote a more expedient process for resolving these lawsuits than the current FCA enforcement process. By intervening in a greater proportion of the *qui tam* lawsuits it currently declines to prosecute, the government can realize cost savings and improved compliance results through the use of available alternate remedies.

Finally, if agencies are going to take a more enhanced role in obtaining FCA enforcement and compliance, then Congress should grant agencies the same incentives it provides to others to offset the costs of increased anti-fraud activities. Allowing agencies to keep a portion of any recovery obtained through any available alternate remedy procedure likely will promote interest within the agency to improve its fraud-fighting capabilities. The government should continue to promote and acknowledge the value relators provide in detecting fraudulent activities, but also recognize that agencies are best positioned to resolve the vast

majority of FCA disputes involving the government and its business partners.