NOTE

REWARDING INTEGRITY: THE STRUGGLE TO PROTECT DECENTRALIZED FRAUD ENFORCEMENT THROUGH THE PUBLIC DISCLOSURE BAR OF THE FALSE CLAIMS ACT

ABSTRACT

Despite twenty years of success in returning billions of dollars to the U.S. Treasury, citizens attempting to recover damages under the False Claims Act (FCA) continue to face judicial hostility in their efforts to expose corporate fraud. Judges twist the public disclosure bar of the FCA to deny well-deserving plaintiffs a portion of the proceeds as envisioned by Congress when it resculpted the qui tam *provision in 1986. Some courts have distorted the common sense meanings of words like "based upon" beyond recognition in what only can be a subterfuge for serious, underlying resentment toward citizen actions.*

This note provides the long history of qui tam *actions, explains basic* qui tam *terminology, and describes relevant portions of the FCA. An examination of judicial hostility toward the FCA follows, highlighting key areas of dispute between the circuits in interpretation of the public disclosure bar. Arguments and rationales for judicial encouragement of citizen actions are presented. Finally, congressional attempts to end the courts' limitations on these actions through recent amendments are discussed.*

I. INTRODUCTION

Few can argue the efficacy of the False Claims Act (FCA),[1] the federal statute that imposes liability upon those who submit false claims to the federal government for payment. Since its reinvigoration in 1986, the FCA has been responsible for recapturing $20 billion in government funds and returning those funds to the U.S. Treasury.[2] Few can question

[1]31 U.S.C. §§ 3729-3731 (2007).

[2]Stuart M. Gerson, *The False Claims Correction Act: What Would It Correct?*, LEGAL BACKGROUNDER, Oct. 19, 2007, at 1, 2, *available at* http://www.wlf.org/upload/10-19-07 gerson.pdf. Gerson reports *qui tam* actions are responsible for $12 billion of the total amount recovered. *Id.*

the enduring value of *qui tam*[3] actions. Sovereignties have relied upon *qui tam* actions since AD 635.[4] Then, as now, sovereignties recognized that they are not omniscient, and they called on the citizenry to provide the manpower necessary to police and monitor their interests. Then, as now, citizens who performed the service of reporting misdeeds shared in the recovery of the property lost. The modern equivalent of this ancient tradition, the FCA, proves as useful today as it ever was.

So why the judicial animosity? Often stereotyped by the judiciary as "parasites,"[5] *qui tam*-FCA relators[6] have faced recurring difficulties in having their claims reviewed by federal courts.[7] Courts engage in, at times, absurd machinations to grant dismissals to corporate defendants in government fraud actions via application of the FCA's public disclosure jurisdictional bar. The judiciary periodically imposes its own distorted and obscure interpretations of the statute's provisions, relying on questionable claims of statutory ambiguity as its "permission" to ignore clear expressions of legislative intent.[8] *Qui tam* actions enjoy centuries of jurisprudence, yet are often regarded by American courts and legal scholars as novel and unusual. As a result, courts regularly resist and

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[3]Usually pronounced "kee tam," the term refers to a lawsuit:

> brought by an informer [usually a citizen], under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution.

BLACK'S LAW DICTIONARY 1251 (6th ed. 1990).

[4]R. Harrison Smith, Commentary, *A Key Time for Qui Tam: The False Claims Act and Alabama*, 58 ALA. L. REV. 1199, 1200 (2007).

[5]James Roy Moncus III, Note, *The Marriage of the False Claims Act and the Freedom of Information Act: Parasitic Potential or Positive Synergy*, 55 VAND. L. REV. 1549, 1550 (2002).

[6]Those informing the government are now called "relators," but in the past, the term "informant" was used.

[7]Press Release, United States Senator Patrick Leahy, Leahy, Grassley, Durbin, Specter Sponsor Bipartisan Bill to Protect Taxpayers Against Fraud (Sept. 12, 2007), *available at* http://leahy.senate.gov/press/200709/091207.html [hereinafter Leahy Press Release] (discussing recent court decisions that limit the application of the False Claims Act).

[8]*American Jurisprudence* provides rules on limiting liberal construction. Section 180 states:

> A liberal construction is subject to the principle that all rules of statutory construction are merely for the purpose of ascertaining the intention of the legislature as expressed in the statute. It does not permit the courts to effectuate its own conception of right by putting into a law that which the legislature never intended to be there. The doctrine of liberal construction does not imply that the legislative mandate may be disregarded, or that an exception contained in a statute may be nullified. Furthermore, a liberal construction does not authorize the courts to read into a statute something which does not come within the meaning of the language used, or which unreasonably restricts or enlarges or extends the scope of the statute . . . .

73 AM. JUR. 2D *Statutes* § 180 (2007).

prematurely reject *qui tam* actions. Rather than supporting clear congressional intent to promote *qui tam* actions, courts narrowly construe the FCA, either because of overreactions to parasitic suits or because of broad hostility toward False Claims relators generally. The hostility to *qui tam* claims is recurring and persistent.[9]

The so-called "public disclosure" bar is a statutory device designed to restrict access to the courts for citizens who inappropriately base their FCA lawsuits on nothing more than already reported fraud allegations.[10] Defendants eagerly invoke the public disclosure bar, whenever and wherever they can, in the hopes that a court will bar judicial review of the claim and dismiss the action. The judiciary has interpreted aspects of the jurisdictional restriction in several curious ways, but most judicial applications of interest revolve around three sets of interpretive issues: (1) the definition of "public disclosure," (2) the meaning of "based upon," and (3) the meaning of the original source exception.[11] The trend of the judiciary has been to address all three in ways that harm all relators, not just those who are parasitic, and harm the public as well.

The Supreme Court has largely chosen to avoid the fray, content to sit by while the circuit courts resolve the jurisdictional bar's application.[12] On March 27, 2007, however, the Supreme Court issued its first substantive decision concerning the public disclosure bar of the FCA in *Rockwell International Corp. v. United States*.[13] The Court limited its discussion to clarification of the "original source" exception to the

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[9]Justice Black identified the problem of judicial hostility toward *qui tam* actions in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 540-41 (1943). Several current sources discuss the problem of judicial hostility toward the FCA as it persists through today. *See, e.g.*, Moncus, *supra* note 5 (discussing judicial impressions of *qui tam* relators as parasites).

[10]31 U.S.C. § 3730(e)(4) (2007).

[11]*Id.*

[12]On October 29, 2007, the Supreme Court granted certiorari in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 491 (2007). The focus of the case is on whether the plaintiff asserting a claim under section 3729(a)(2) or (a)(3) of the FCA must prove that the false claim was submitted to the federal government, or if it is sufficient to establish that the claim was paid using federal funds. *See* United States *ex rel.* Sanders v. Allison Engine Co., 471 F.3d 610, 613 (6th Cir. 2006). The issue appears to be unrelated to the application of the public disclosure bar.

[13]127 S. Ct. 1397 (2007). The Court's first case of any sort regarding the FCA *qui tam* provision after the 1986 Amendments was *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997). The Court narrowed its review to the question of whether or not the 1986 amendments applied retroactively and held that the public disclosure bar could not be applied retroactively to deprive a court of jurisdiction over the case. *Id.* at 941-42. The Court chose not to address whether disclosure by a corporate defendant to its employees constituted a public disclosure nor did it comment on whether misuse of public money constituted a necessary element of a cause of action under the FCA. *Id.* at 945.

jurisdictional barrier,[14] opting not to address several open and persistent disputes among lower federal courts about how broadly or narrowly the FCA's jurisdictional limitation should be applied.

In response to *Rockwell* and other decisions, the FCA's longtime champion, Senator Chuck Grassley,[15] recently introduced the False Claims Act Correction Act of 2007 (FCACA)[16] hoping to stop the judiciary's assault on relator actions. Senator Grassley criticized the *Rockwell* Court for complicating an already convoluted area of law and for its dramatic limitation of FCA claims.[17] The FCACA clarifies much of the disputed language of the public disclosure bar. If passed, it could resolve persistent disputes among the federal courts and decrease litigation costs by making clear when and to whom the jurisdictional bar applies.

This note first provides an explanation of basic *qui tam* terminology, the history of *qui tam* actions, and a description of relevant portions of the FCA. An examination of examples of judicial hostility follows, highlighting key areas of dispute between circuits in interpretation of the public disclosure bar. Next, arguments and rationales arguing for judicial encouragement of relators' actions are presented. Finally, the FCACA's attempt to put an end to the courts' limitations on relators is discussed.

II. BACKGROUND: TERMS, HISTORY, AND STATUTE

A. *Basic Terminology*

"*Qui tam*" is a legal provision under the FCA that permits a private individual with direct knowledge of fraud against the federal government

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[14]Aaron P. Silberman & David F. Innis, *The Supreme Court Raids the Public Disclosure Bar: Cleaning Up After* Rockwell International v. United States, 42 PROCUREMENT LAW 1 (2007).

[15]Senator Chuck Grassley of Iowa currently ranks as the fifteenth highest member of the U.S. Senate. United States Senator Chuck Grassley of Iowa, http://grassley.senate.gov/public/index.cfm?FuseAction=Biography.Home. He was the primary legislative mover behind the FCA's 1986 amendments. HENRY SCAMMELL, GIANTKILLERS: THE TEAM AND THE LAW THAT HELP WHISTLE-BLOWERS RECOVER AMERICA'S STOLEN BILLIONS 66-68 (2004).

[16]S. 2041, 110th Cong. § 4(b)(4)(A) (2007). Senator Grassley introduced S. 2041 on September 12, 2007. *Id.* The repetition of the word "act" is consistent with the title of the bill when it was introduced on the floor of the Senate. Some commentators have chosen to drop the first "act" and refer to the bill as the False Claims Correction Act. *See, e.g.*, Gerson, *supra* note 2.

[17]Press Release, United States Senator Chuck Grassley of Iowa, Grassley-Authored Legislation Helps Justice Department Recover $1.45 Billion This Year (Nov. 1, 2007), *available at* http://grassley.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=fc276799-1321-0e36-ba32-d94f86957981 [hereinafter Grassley Press Release].

to bring suit on the government's behalf.[18] The FCA provides incentives and protections to whistle-blowers by offering protection against retaliation and a share in the recovery.[19] The *qui tam* action is filed under seal, which gives the government time to review its merits and decide if it finds the claim meritorious enough for the government to join in the action.[20] The private plaintiff can opt to pursue the action after the government's review has ended, regardless of whether the government chooses to become involved.[21]

While there are other examples of statutory *qui tam* provisions in existence today, this note focuses on those encompassed within the FCA. Originally passed in 1863,[22] the FCA took its current form in 1986.[23] The 1986 Amendments of the FCA had three objectives: "(1) to encourage those with information of fraud on the government to disclose this information; (2) to discourage 'parasitic qui tam actions that simply take advantage of information already in the public domain;' and (3) to assist and prod the government to act upon the information provided."[24]

Those informing the government are now called "relators," but in the past, the term "informant" was used.[25] It may be helpful to think of a relator as a *qui tam* plaintiff. Today, to win an FCA claim, the relator must prove three elements:

1. The defendant presented, or caused to be presented, a claim for payment or approval to the federal government.[26]
2. The defendant's claim was false or fraudulent.[27]
3. The defendant knew[28] the claim was false.[29]

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[18]31 U.S.C. §§ 3729-3731 (2007).

[19]31 U.S.C. § 3730(d), (h) (2007).

[20]Taxpayers Against Fraud Education Fund, *Frequently Asked Questions about the FCA*, *available at* http://www.taf.org/faq.htm#q16.

[21]*Id.*

[22]Deborah L. Collins, *The* Qui Tam *Relator: A Modern Day Goldilocks Searching for the Just Right Circuit*, 2001 ARMY LAWYER 1, 2 (2001), *available at* http://findarticles.com/p/articles/mi_m6052/is_2001_June/ai_84971955/pg_1 (discussing the 1863 statute).

[23]*Id.* at 3.

[24]Moncus, *supra* note 5, at 1558 (quoting United States *ex rel.* Mistick PBT v. Hous. Auth., 186 F.3d 376, 400 (3d Cir. 1999) (Becker, C.J., dissenting)).

[25]For a more complete description of the background of *qui tam* actions, see *infra* Part II.B.

[26]31 U.S.C. § 3729(a)(1).

[27]*Id.*

[28]A defendant "knowingly" engages in fraud under the FCA if he or she: "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard for the truth or falsity of the information." *Id.* § 3729(b).

Judicial interpretation of the scienter prong has been quite liberal and, on at least one occasion, extended to a corporation's failure to conduct an effective compliance program.[30] In *United States ex rel. Hunt v. Merck-Medco Managed Care*,[31] the government alleged that since the corporation's compliance program in place at the relevant time was not reasonably capable of reducing the possibility of misconduct, the corporation had no effective means of monitoring or reporting on compliance.[32] Therefore, the government argued, "a corporation's ineffective compliance program could establish a corporation's knowing submissions of false claims."[33]

If the relator prevails, that party is entitled to a percentage of the proceeds from the action.[34] The government keeps the remaining proceeds, regardless of whether it was also a plaintiff in the action.[35]

B. *The History of* Qui Tam *Actions*[36]

The term *qui tam* is shortened from the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur,* which translates to "who pursues this action on our Lord the King's behalf as well as his own."[37] *Qui tam* actions originated in England as a joinder device allowing a party to bring an action for a combination of interests—private, and that of the sovereign, or public.[38] In AD 635, King Wihtred of Kent outlawed labor on the Sabbath, and his decree included a *qui tam* provision.[39] Any man who informed against a violator of the King's decree would receive half of the fine imposed and the profits from the labor.[40]

Interests of private parties in the thirteenth century included the interests of those who had suffered an injury and those of common informers, a type of bounty hunter who would report violations and share

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[29]*Id.* § 3729(a)(1).

[30]United States *ex rel.* Hunt v. Merk-Medco Managed Care, 336 F. Supp. 2d 430 (E.D. Pa. 2004).

[31]*Id.*

[32]*Id.* at 441.

[33]Marc S. Raspanti & Gregg W. Mackuse, *What's Really So Important About an Effective Compliance Program*, 31 CHAMPION 22, 25 (2007).

[34]Taxpayers Against Fraud Education Fund, *Frequently Asked Questions about the FCA*, *available at* http://www.taf.org/faq.htm#q11.

[35]*Id.*, *available at* http://www.taf.org/faq.htm#q12.

[36]The following information was drawn primarily from two sources: SCAMMELL, *supra* note 15; and Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81 (1972). No independent research was conducted into the history of *qui tam* actions.

[37]Rockwell Int'l Corp. v. United States, 127 S. Ct. 1397, 1403 (2007).

[38]Note, *supra* note 36, at 83.

[39]Smith, *supra* note 4, at 1200.

[40]*Id.*

in the recovery from the violation.[41] English courts recognized statutory and common law *qui tam* actions by 1400.[42] Statutory *qui tam* actions allowed private prosecutors to share financially in the penalty and permitted private persons to initiate a suit to recover the penalty.[43]

From 1576 to 1623, informer abuse engendered limitations by Parliament on informer provisions of *qui tam* actions.[44] Informers had colluded with wrongdoers by bringing suit and settling for a small penalty or allowing the wrongdoer to win at trial.[45] Overzealous informers committed a second form of abuse by bringing actions on obscure violations and causing annoyance.[46] Parliament imposed penalties on these vexatious informers and allowed corporate defendants to recover court costs in cases of harassment.[47] Next, venue restriction and a one-year statute of limitations were enacted.[48] Finally, pleading procedures were changed to better favor the defendant in a *qui tam* action.[49]

Along with the adoption of English law by states and colonies in America, *qui tam* actions migrated into early American jurisprudence.[50] Several examples of statutory *qui tam* actions existed during the early years of the United States, though no common law *qui tam* actions have been found.[51] Colonies either adopted English *qui tam* statutes or created their own *qui tam* provisions that were almost identical to the English approach.[52] American statutes allowed informers to sue or to otherwise collect rewards for informing, without filing a lawsuit.[53] Early American courts ruled that permission for informers to bring *qui tam* actions had to be expressly granted or clearly implied by the legislature.[54]

Similar to the English efforts to address *qui tam* abuse, the states experimented with remedies to curb collusive and vexatious informers

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[41]Note, *supra* note 36, at 84-85.

[42]*Id.* at 86 (citing A Remedy for Him Who Is Wrongfully Pursued in Admiralty Court, 2 Hen. 4, c.11 (1400)).

[43]*Id.* at 87.

[44]*Id.* at 89-90.

[45]Note, *supra* note 36, at 89; *see also* Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 HOUS. L. REV. 905, 913 (2002) (discussing collusion between defendants and relators).

[46]Note, *supra* note 36, at 89; Bucy, *supra* note 45, at 913-14.

[47]Note, *supra* note 36, at 90.

[48]*Id.*

[49]*Id.* Parliament first addressed informer abuse by venue restriction in 1587 and later restricted venue even further in 1623. *Id.* Parliament's statute in 1623 incorporated all of the reforms implemented since 1576 and applied only to informers. *Id.*

[50]Smith, *supra* note 4, at 1201.

[51]Note, *supra* note 36, at 91-94.

[52]*Id.* at 94.

[53]*Id.* at 94-95.

[54]*Id.* at 95.

from the formation of the colonies up through the early 1800s.[55] States began to centralize prosecution in state governments, either expressly eliminating the ability of a private informer to prosecute via *qui tam* or by allowing the government to pardon an entire penalty rather than just its share of the penalty.[56] Repeal of most state *qui tam* statutes followed.[57]

During the Civil War, corrupt profiteers engaged in massive fraud by selling defective goods to the military.[58] For example, Union soldiers' uniforms were held together with glue rather than thread.[59] The "fabric" was not woven but made from old, shredded materials that were pounded into a pulp and then rolled out and dried.[60] When it rained, the uniforms dissolved and fell away from the soldiers in oatmeal-like clumps.[61] Gun dealers sold defective guns for $2 each to profiteers who then sold them to the government for $24 each.[62] The guns did not fire.[63] With no Department of Justice (DOJ) and no national law enforcement agency, outraged Senator Jacob Howard of Michigan proposed the FCA, a reinvigoration of the *qui tam* action.[64] President Abraham Lincoln enthusiastically supported the legislation to such an extent that it became known as "Mr. Lincoln's Law."[65] The FCA passed in 1863[66] but remained in relative obscurity with only ten cases recorded between 1863 and the start of World War II.[67]

In 1943, an attorney learned of federal indictments against contractors for rigging bids regarding shipyards in Pittsburgh and filed a *qui tam* action though he initially knew nothing about the conspiracy.[68] He simply heard about the indictments, picked up copies at the

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[55]Note, *supra* note 36, at 97.

[56]*Id.* at 97-98.

[57]*Id.*

[58]SCAMMELL, *supra* note 15, at 36.

[59]*Id.*

[60]*Id.*

[61]*Id.*

[62]SCAMMELL, *supra* note 15, at 37. Even more disturbing, Scammell explains that the seller of the $2 guns was the government. *Id.* The military would buy the guns, find they did not shoot, and then sell them to profiteers who would sell them to quartermasters in other locations. *Id.*

[63]*Id.* at 36. Another reason guns did not fire is because sellers mixed sawdust into the gunpowder to make the quantities appear larger to increase their profits. *Id.*

[64]*Id.* at 39. Some commentators argue that the creation of the DOJ in 1870 obviated the need for federal *qui tam* actions. *See, e.g.*, Kathryn Feola, *Bad Habits: The* Qui Tam *Provisions of the False Claims Act Are Unconstitutional Under Article II*, 19 J. CONTEMP. HEALTH L. & POL'Y 151, 158 (2002). This argument relies on several misperceptions discussed later in this note. *Infra* Part III.

[65]SCAMMELL, *supra* note 15, at 39.

[66]Feola, *supra* note 64, at 157.

[67]SCAMMELL, *supra* note 15, at 40.

[68]*Id.* at 41.

courthouse, and used them as the basis of his *qui tam* action.[69] The DOJ moved to dismiss the attorney's claim, but the Supreme Court ruled that the attorney was entitled to half of the recovery, and the federal government was entitled to the other half, consistent with the FCA.[70] Lawyers all over the country began to file claims on the basis of federal indictments, spurring the DOJ to describe *qui tam* actions as "parasitic."[71] Attorney General Francis Biddle urged Congress to stop the filing of parasitic FCA actions based on government criminal indictments.[72] He asked Congress to either repeal the FCA entirely or amend it to allow the government the first chance to litigate the action.[73] Congress revised the FCA the same year.[74] The informer's, or relator's, share of the penalty was reduced from fifty percent to ten percent in cases when the government opted to join in the action, and from fifty percent to twenty-five percent when the government chose not to join in the action.[75] Congress also enacted a "government knowledge barrier"[76] that banned *qui tam* litigation based on evidence already in the government's possession. Some courts interpreted this barrier broadly, ruling that information anywhere in the government's possession, even if ignored, barred a private relator's claim.[77] The 1943 Amendment resulted in the failure of almost all *qui tam* actions filed between 1943 and the next revision in 1986, including those filed by states attempting to recover for fraud against both the state and federal government.[78] Thereafter, *qui tam* actions dwindled into near extinction.[79]

During the 1980s, military spending again captured the attention of Congress. The press revealed several abuses, like a $640 toilet seat and the payment to a defense contractor of $435 for a $7.66 hammer.[80] In

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[69] *Id.*

[70] *Id.*; United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 540 (1943).

[71] SCAMMELL, *supra* note 15, at 41.

[72] 89 CONG. REC. 7569, 7571 (1943).

[73] *Id.*

[74] Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (codified as amended at 31 U.S.C. §§ 3729-3731 (1994)).

[75] *Id.* § 3730(d).

[76] *Id.* § 3730(e).

[77] SCAMMELL, *supra* note 15, at 42.

[78] *Id.* Scammell relays a decision by the Court of Appeals for the Seventh Circuit dismissing a suit the State of Wisconsin brought against a nursing home that allegedly filed false claims for reimbursement from both the federal and the state government, on the basis of the government knowledge barrier. *Id.* Wisconsin argued that the only reason the federal government possessed the information was because the state had disclosed it. *Id.* The Seventh Circuit's ruling, therefore, punished the state by denying it the opportunity to share in the recovery because it informed the federal government of the fraud as explicitly required in the statute. It rewarded the perpetrators by dismissing the action.

[79] *Id.*

[80] *Id.* at 42-43.

one highly publicized instance, the army's "Meals Ready to Eat" pouches were filled with maggots, and army workers disposing of the pouches became ill.[81] Senator Grassley criticized the defense contractors, as well as the DOJ, for their failure to pursue those contractors for repayment, and he worked to secure passage of a revitalized FCA.[82] By 1985, nine of the top ten defense contractors were being investigated for defrauding the government.[83] At this point, the DOJ also proposed revisions to the FCA but resisted any restoration of its *qui tam* provisions because of concerns that private lawyers would inhibit successful government criminal prosecutions.[84] Senator Grassley and the DOJ compromised by requiring that all *qui tam* actions be filed under seal for sixty days, which could be extended at the DOJ's request.[85] The sixty-day period would allow the DOJ to evaluate the case and determine if it wanted to join the action.[86] If the DOJ decided the case was not strong enough, then there was virtually no possibility that any parallel criminal prosecution would be placed at risk.[87] Senator Grassley liked the provision because it would force the government to focus on the alleged fraud.[88] Despite considerable opposition by the defense industry, President Reagan resisted pressure to "pocket veto" the bill and signed it the day before it was scheduled to die in 1986.[89]

The 1986 Amendments were intended to encourage private citizens to report fraud against the federal government.[90] The relator's percentage of recovery when the government intervened increased to at least fifteen percent but was capped at no more than twenty-five percent

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[81]SCAMMELL, *supra* note 15, at 44-45.

[82]*Id.* at 66. According to Scammell, Senator Grassley felt that government waste and tolerance for waste had become so routine that it was institutionalized. *Id.* at 67. Government officials resisted dealing with it due to a "mind-set." *Id.*

[83]*Id.* at 69.

[84]*Id.* at 70, 72. *See also* Michael Lawrence Kolis, Comment, *Settling for Less: The Department of Justice's Command Performance Under the 1986 False Claims Amendments Act*, 7 ADMIN. L.J. AM. U. 409, 412 (1993) (noting that most researchers addressing the issue agree that the DOJ has been resistant to pursuing claims under the FCA and describes the DOJ's "uneasy and seemingly grudging" response to the Act).

[85]SCAMMELL, *supra* note 15, at 72.

[86]*Id.*

[87]*Id.*

[88]*Id.* at 72-73.

[89]SCAMMELL, *supra* note 15, at 78-79. Scammell states that Reagan was being privately pressured by the defense industry into a "pocket veto" of the amendments. *Id.* at 79. A pocket veto differs from a formal veto in that the president allows the bill to automatically die by not signing it within ten days of adjournment rather than issuing an official veto. *Id.* at 78. With a pocket veto, the president takes no action at all. *Id.* Pocket vetoes do not require public explanations as do formal vetoes and are usually accomplished without public awareness. *Id.*

[90]Moncus, *supra* note 5, at 1557.

of the proceeds of the action.[91] When the government chose not to intervene, the relator's recovery was increased to not less than twenty-five percent and capped at not more than thirty percent of the proceeds.[92] Penalties for filing false claims increased from $2,000 per claim to between $5,000 and $10,000 per claim.[93] In 1987, thirty-three *qui tam* actions were filed, and in 1997, filings had increased to 533.[94] Since 1986, the total amount recovered by the U.S. Treasury under *qui tam* actions has been more than $20 billion.[95]

C. *The Public Disclosure Bar*

The current version of the FCA includes a public disclosure jurisdictional bar to relator actions.[96] Section 3730(e)(4) states:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
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> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.[97]

By statute, a court cannot hear an FCA *qui tam* action if the relator based his or her allegations on "previously publicly disclosed allegations or transactions, unless the relator is an original source."[98] Courts currently dispute whether state and local government disclosures meet the statute's public disclosure provision, the meaning of "based upon" in

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[91]Feola, *supra* note 64, at 159.
[92]*Id.*
[93]*Id.* at 159-60.
[94]*Id.* at 160.
[95]Grassley Press Release, *supra* note 17.
[96]31 U.S.C. § 3730(e)(4) (2007).
[97]*Id.*
[98]Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 TENN. L. REV. 455, 468 (1998).

section 3730(e)(4)(A), and who or what satisfies the "original source" exception.[99]

III. THE JUDICIAL ASSAULT ON THE FCA: EXPANSIVE INTERPRETATION OF THE PUBLIC DISCLOSURE BAR

Justice Black's 1943 opinion in *United States ex rel. Marcus v. Hess*[100] noted that "*qui tam* or informer actions 'have always been regarded with disfavor' by the courts."[101] Despite this ominous observation of judicial hostility toward *qui tam* actions, Justice Black's opinion directed that informers were entitled to a liberal interpretation of standing, even when the relevant statute does not specifically "authorize or forbid the informer to institute the action."[102] Almost immediately after this favorable ruling, numerous attorneys all over the country began filing suits on the basis of federal government indictments.[103] In response to pressure from the media, corporate defendants, and the DOJ, Congress repealed many sections of the FCA.[104] The courts began to apply doctrinal restrictions on *qui tam* actions, following the lead of the 1943 legislative amendments.[105]

A. *What Counts as Public Disclosure?*

Courts are at odds over what constitutes a public disclosure barring jurisdiction in FCA claims.[106] Broad interpretation of "public disclosure" means that fewer claims will be reviewed by courts; a narrow definition of the term means that more claims will be reviewed.

1. *John Doe Corp.* and *Schumer*

In *United States ex rel. Doe v. John Doe Corp.*,[107] the Second Circuit ruled that a disclosure by government investigators to employees during execution of a search warrant constituted a public disclosure barring jurisdiction over a subsequent *qui tam* action, broadening the

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[99]*See infra* Parts III.A.1-2

[100]317 U.S. 537 (1943).

[101]*Id.* at 540-41 (quoting United States *ex rel.* Marcus v. Hess, 127 F.2d 233, 235 (3d Cir. 1942)).

[102]Note, *supra* note 36, at 100 (quoting United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 542 n.4 (1943)).

[103]Smith, *supra* note 4, at 1202.

[104]SCAMMELL, *supra* note 15, at 41.

[105]Smith, *supra* note 4, at 1202.

[106]*See infra* Parts III.A.1-2.

[107]960 F.2d 318 (2d Cir. 1992).

definition of "public disclosure" significantly.[108] The Second Circuit acted as if it simply had no choice in the matter if it adhered to the plain language of the statute. The court stated, "Public disclosure of the allegations divests district courts of jurisdiction over *qui tam* suits, *regardless of where the relator obtained his information.*"[109]

The opinion provoked the criticism of the Ninth Circuit in *United States ex rel. Schumer v. Hughes Aircraft Co.*[110] Discussing the expansion of situations which constitute public disclosure, the court emphasized that:

> it drastically curtails the ability of insiders to bring suit once the government becomes involved in the matter. If revelation to employees at [that stage of investigation] would constitute public disclosure, any employee who receives word of government allegations would be barred from bringing suit. Contrary to Congress's intentions for the jurisdictional bar, the *Doe* rule "effectively shifts the standard from *'public disclosure'* back to *'government investigation,'*" so that government possession of information relating to fraud effectively forecloses *qui tam* suits.[111]

Defendant Hughes Aircraft also unsuccessfully argued that when certain reports were potentially available to the public through the Freedom of Information Act (FOIA),[112] public disclosure requiring dismissal under the jurisdictional bar occurred.[113] The Ninth Circuit rejected this claim as well, reasoning that unless information was actually shared, no public disclosure had, in fact, occurred.[114]

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[108] *Id.* at 323-24.

[109] *Id.* at 324 (citing United States *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d 13, 18 (2d Cir. 1990)) (emphasis added). The court notes that an original source exception exists with regard to the public disclosure bar but dismisses any possibility of an original source exception in this case because the relator did not claim he was an original source. *Id.* at 322.

[110] 63 F.3d 1512 (9th Cir. 1995), *vacated on separate grounds*, 520 U.S. 939 (1997).

[111] *Id.* at 1519 (quoting *Doe*, 960 F.2d at 326 (Walker, J., dissenting)) (emphasis added).

[112] 5 U.S.C. § 552 (2007).

[113] *Schumer*, 63 F.3d at 1519-20.

[114] *Id.* at 1520. The Supreme Court agreed to hear *Schumer* on appeal. Despite being explicitly asked to clarify the definition of "public disclosure," the Supreme Court left the issue unresolved. *See generally* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939 (1997).

2. *Anti-Discrimination Center*

Perhaps taking notes from the corporate defendant in *Schumer*, a defendant in New York recently argued that the public disclosure bar applied when a relator had actually received documents through a similar request.[115] The question is discussed to great extent in the Southern District of New York's decision in *United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, New York*.[116] The case itself is unusual among FCA *qui tam* actions because it appears to be an advocacy action to enforce race discrimination policy rather than being primarily motivated by economic considerations.[117] The Anti-Discrimination Center (Center) challenged certifications the county had issued to qualify itself for federal funds on the basis that the county knew the certifications were improper because they did not "identify or analyze community resistance to integration on the basis of race."[118] The Center argued that since the federal certifications were incomplete, the county improperly received $45 million in federal funds.[119] The county moved to dismiss based, in part, on the grounds that the information relied upon by the Center had been publicly disclosed and that the Center could not prove it was an original source as needed to trigger the exception to the public disclosure bar.[120]

The Center had relied in large part on information obtained through New York's Freedom of Information Law (FOIL), the state's version of the FOIA.[121] The county argued the Center's use of information obtained through the FOIL constituted administrative reports triggering the public disclosure bar.[122] In addition, the county disputed that the Center's own experience or collateral research could satisfy the original source exception.[123] The district court noted that the FCA identified the modes of public disclosure as "state and federal hearings and trials, and *federal* government reports, hearings, audits, and

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[115]United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, N.Y., 495 F. Supp. 2d 375, 380 (S.D.N.Y. 2007).

[116]*Id.*

[117]*Id.* at 377-78.

[118]*Id.* at 377.

[119]*Anti-Discrimination Ctr.*, 495 F. Supp. 2d at 378.

[120]Defendant's Motion to Dismiss the Complaint at 15-16, United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, N.Y., 495 F. Supp. 2d 375 (S.D.N.Y. 2007) (No. 06 CV 2860).

[121]*Anti-Discrimination Ctr.*, 495 F. Supp. 2d at 380-81, 383; *see also* N.Y. PUB. OFF. § 87 (2007) (providing New York's version of the Freedom of Information Act).

[122]Defendant's Reply Memorandum of Law in Further Support of Its Motion to Dismiss the Complaint at 7-8, United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, N.Y., 495 F. Supp. 2d 375 (S.D.N.Y. 2007) (No. 06 CV 2860).

[123]*Id.* at 9.

investigations."[124] The court went on to note that the Second Circuit had yet to address whether *state* government reports, hearings, audits, and investigations were also considered sufficient public disclosure to trigger the jurisdictional bar.[125] The court observed that other circuits were divided on the issue and cited a Third Circuit opinion[126] that conflicted with the Eighth[127] and Ninth Circuits'[128] opinions. The court rejected the Eighth and Ninth Circuits' opinions in favor of the Third Circuit's *Dunleavy* ruling, which was based upon the Third Circuit's application of the doctrine of *noscitur a sociis*,[129] which instructs the court to gather the meaning of a particular word from those words around it.[130] The court found the doctrine and the Third Circuit's textual approach to be "more faithful to the language that Congress chose to express the scope of the jurisdictional bar."[131] The court further reasoned that the Third Circuit's approach was "fully supported by a rational basis for Congress's line drawing."[132] How does the federal government, one might reason, become aware of state and local government fraud against the federal government if citizens are discouraged from bringing such information to the attention of the federal government because the perpetrators are themselves public officials and had possession of the information?[133] The court concluded that information obtained through the FOIL requests did not constitute a public disclosure sufficient to trigger the jurisdictional bar of the FCA.[134] Because the court found that FOIL requests did not trigger the public disclosure bar of the FCA, it had no need to address whether the information offered by the Center—evidence of a meeting with the Center and county officials, the Center's own experience, and the Center's own collateral research—sufficed to qualify

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[124] *Anti-Discrimination Ctr.*, 495 F. Supp. 2d at 380 (citing United States *ex rel.* Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148, 1158 (2d Cir. 1993)) (emphasis added).

[125] *Id.*

[126] United States *ex rel.* Dunleavy v. County of Del., 123 F.3d 734, 745 (3d Cir. 1997).

[127] Hays v. Hoffman, 325 F.3d 982, 988 (8th Cir. 2003).

[128] United States *ex rel.* Bly-Magee v. Premo, 470 F.3d 914, 918 (9th Cir. 2006).

[129] The doctrine of *noscitur a sociis* is a "familiar policy" which controls when words may not have significant meaning in isolation, but a particular meaning appears from their use in the statute. 73 AM. JUR. 2D *Statutes* § 134 (2007).

[130] *Anti-Discrimination Ctr.*, 495 F. Supp. 2d at 381 (citing *Dunleavy*, 123 F.3d at 745).

[131] *Id.* at 382. *See also* AM. JUR. 2D, *supra* note 129, § 134. (explaining that not only is it appropriate to apply the doctrine of *noscitur a sociis*, but it is improper to take a few words out of context and then try to determine their meaning).

[132] *Anti-Discrimination Ctr.*, 495 F. Supp. 2d at 383.

[133] *See id.*

[134] *Id.*

it as an original source.[135] The case is under appeal to the Second Circuit at this time.[136]

3. Analysis

Stretching the list of "public disclosures" in section 3730(e)(4)(A) to include FOIA or FOIL requests seems to be extraordinarily strained, regardless of whether or not the fulfillment of the request actually occurred. Public disclosure, first and foremost, requires communication to the public. FOIA requests are filled when someone in a government office receives a request for information, pulls the record out of a drawer, copies it, and sends it to the requesting party.[137] The government's compliance with a FOIA request cannot be construed to mean that the content of the document will be investigated for fraud or even that the requested document will be reviewed. Recognizing, tracking, and constructing a fraud action is complex. There is considerably more to fraud investigations than copying and mailing a document.[138] Given the amount of work that goes into taking a requested document from the point of receipt to filing an FCA action in court, one wonders how the relator can be deemed to be a parasite riding on the coattails of some government investigation, when no government investigation exists. The situation seems to be a far cry from the instance of an attorney simply copying a criminal indictment. There appears to be no justifiable explanation for describing relators who obtain information from FOIA requests as parasitic.

B. *The Ongoing "Based Upon" Dispute*

Courts are barred from hearing FCA claims "based upon" public disclosures.[139] The majority of circuits interpret "based upon" as including the same information as that previously included in a public disclosure.[140] The minority view holds that "based upon" does not mean

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[135] *Id.*

[136] United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, No. 06 Civ. 2860 (DLC) 2007 U.S. Dist. LEXIS 62108 (S.D.N.Y. Aug. 22, 2007) (acknowledging that the defendant certified the decision for appeal).

[137] For more information on how to file a FOIA request, see the First Amendment Center's webpage, *How to File an FOIA Request,* http://www.firstamendmentcenter.org/press/information/topic.aspx?topic=how_to_FOIA#request (last visited May 20, 2008).

[138] *See, e.g.*, Pamela H. Bucy, *Growing Pains: Using the False Claims Act to Combat Health Care Fraud*, 51 ALA. L. REV. 57, 77-78 (1999) (discussing the myriad of health care billing regulations and its impact on fraud investigations).

[139] 31 U.S.C. § 3730(e)(4)(A) (2007).

[140] 186 F.3d 376, 386 (3d Cir. 1999).

"the same as" but "derived from."[141] The majority view results in more claims being barred; the minority view results in fewer claims being barred.

1. *Mistick*

One Third Circuit opinion, *United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*,[142] merits close attention because it was written by Justice Alito before he was elevated to the Supreme Court.[143] Justice Alito is part of the 2007 majority opinion in *Rockwell* that emphasized the importance of the plain language interpretation of the public disclosure bar.[144] In *Mistick*, Justice Alito evidenced a departure from the plain language interpretation of the public disclosure bar and broadly interpreted its language to support dismissal of a relator's action.[145] Justice Alito determined that a response from the U.S. Department of Housing and Urban Development to a FOIA request constituted a public disclosure in FCA actions, basing his determination on a Supreme Court interpretation of the Consumer Product Safety Act.[146] The *Mistick* court found that FOIA responses were the equivalent of federal agency administrative reports bringing them within the public disclosure bar.[147] Justice Alito dismissed the Fourth Circuit's position that "based upon" means "derived from" on the ground that such an interpretation would render the original source exception to the public disclosure bar "largely superfluous,"[148] and seemingly rejected the Third Circuit's own previous adherence to the plain language of the statute in *Dunleavy*. Justice Alito defends his imposition, in part, by noting that the FCA amendments were poorly crafted and conflicted with each other.[149] Justice Alito's departure from a plain language interpretation of the FCA was criticized by dissenting

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[141] *Id.* at 385-86.

[142] 186 F.3d 376 (3d Cir. 1999).

[143] *Id.* at 378.

[144] *See* Rockwell Int'l Corp. v. United States, 127 S. Ct. 1397 (2007).

[145] *See Mistick*, 186 F.3d at 386.

[146] *Id.* at 383. The Supreme Court case did not involve the FCA. *See* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980).

[147] *Mistick*, 186 F.3d at 383-84. *See also* United States *ex. rel.* Merena v. SmithKline Beecham Corp., 205 F.3d 97 (3d Cir. 2000). *Merena* was decided shortly after *Mistick* and presents an interesting example of the DOJ's hostility toward a relator. This suggests that Justice Alito may simply be taking the lead of the DOJ in determining whether or not a case is worthy of court review. For an in-depth analysis of the trial court's decision in *Merena*, see Marc S. Raspanti & David M. Laigaie, *A Case Study: Department of Justice v.* Qui Tam *Relators*, 2 HEALTH CARE FRAUD REP. (BNA) 424, (June 3, 1998).

[148] *Mistick*, 186 F.3d at 387.

[149] *Id.* Specifically, Justice Alito stated, "Section 3730(e)(4)(A) does not reflect careful drafting or a precise use of language." *Id.*

then-Chief Judge Becker.[150] Chief Judge Becker[151] points out that mere duplication of a document pursuant to a FOIA request does not constitute a "report" as listed in the FCA.[152] Chief Judge Becker goes on to state that while statutory language is often sloppy, the term "based upon" is unambiguous.[153] He concludes his dissent with the following:

> The policy consideration undergirding the restrictive view of qui tam litigation (and the expansive view of the jurisdictional bar) is that it is necessary to eliminate opportunistic and parasitic lawsuits. I share the view that such suits are an abomination. I believe, however, that *Stinson*, *Findley*, and their progeny (including the majority opinion here) cut such a broad swath that they eviscerate bona fide suits, such as the one at bar, in a laudable but misguided effort to halt a feared torrent of litigation.
>
> In my view, the recent amendments to the False Claims Act were intended to encourage qui tam suits that do not derive their knowledge of an underlying fraud from truly public disclosures, and to encourage those with information about frauds on the government to inform the government about the fraud, assist the government in bringing legal action to bear against the defrauders, and, if necessary, prod the government into action. I see the majority opinion as inconsistent with this intent of Congress. More importantly, it is inconsistent with the plain language of the FCA. Because the majority's misreading affects the outcome of this case, I respectfully dissent.[154]

2. *Fowler*

The court in *United States ex rel. Fowler v. Caremark RX, L.L.C.*[155] stated that a "majority of circuits apply the standard 'that a qui tam action is "*based upon*" a public disclosure when the supporting

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[150]*Id.* at 389 (Becker, C.J., dissenting). In *Rockwell*, the Supreme Court favorably cited Justice Alito's opinion in *Merena*, where he referred to the FCA as having "quirks." *Merena*, 205 F.3d at 101 (citing *Mistick*, 186 F.3d at 387).

[151]Chief Judge Becker is now deceased.

[152]*Mistick*, 186 F.3d at 393-94 (Becker, C.J., dissenting).

[153]*Id.* at 397-98.

[154]*Id.* at 403 (citing United States *ex rel.* Stinson v. Prudential Ins. Co., 944 F.2d 1149 (3d Cir. 1991); United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675 (D.C. Cir. 1997).

[155]496 F.3d 730 (7th Cir. 2007).

allegations are "*the same as* those that have been publicly disclosed . . . regardless of where the relator obtained his information.'"[156] The court identified the Second, Third, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits as maintaining this position.[157] Despite the majority position to the contrary, the Seventh Circuit chose to remain consistent with the Fourth Circuit's position that "'*based upon*' does not mean '*similar . . to*' but '*derived from.*'"[158] The Seventh Circuit worried that too broad an interpretation of the "based upon" language would prevent meritorious, nonparasitic claims from receiving the judicial attention that Congress had intended.[159] In the end, the *Fowler* court decided that the plain language interpretation trumps the majority argument on the issue and opted against the corporate defendant's "based upon" interpretation.[160]

3. Analysis

In no other aspect of the FCA does judicial hostility evidence itself to a greater degree than in the interpretation of "based upon." "Based upon" is not ambiguous, and the circuit split over its meaning compels examination. Determining that "based upon" means "the same as" and rejecting the term's common, everyday meaning suggests that most circuits are working to limit relators' claims. Why else distort the plain language of the statute? Why feign a lack of statutory clarity in order to interpret the FCA in a way that is inconsistent with what Congress intended and *wrote*? Apparently, something else is driving the circuits. That "something else" is judicial hostility fueled by false perceptions of *qui tam* actions.

Unfortunately, judicial conduct of this nature contributes to the erosion of public trust in the legal profession.[161] Nonlawyers automatically mistrust members of the legal profession when they act as if common, ordinary words have secret "legal" meanings. When judges or lawyers work so hard to twist the meaning of common words, nonlawyers throw up their hands in frustration. Congress probably wants to as well. How much more specific does legislation have to be to

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[156] *Id.* at 737 (quoting United States *ex rel.* Mathews v. Bank of Farmington, 166 F.3d 853, 863 (7th Cir. 1999)) (emphasis added).

[157] *Id.*

[158] *Id.* (quoting *Mathews*, 166 F.3d at 863) (emphasis added).

[159] *Fowler*, 496 F.3d at 739.

[160] *Id.* at 743. The Seventh Circuit ultimately upheld the trial court's determination that the relator could not file a new amended complaint on other grounds. *Id.*

[161] MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE 31-63 (2005). Galanter's book discusses the erosion of respect for the legal profession as evidenced through attorney jokes. He devotes an entire chapter, "Lies and Stratagems: The Corruption of Discourse," to the discussion of the legal profession's manipulation of language and how it contributes to public distrust. *Id.*

protect it from being mangled by the courts? While one can appreciate a defense lawyer's motivation in making the "based upon" argument, the judiciary has an obligation to reject such claims in favor of the statute's plain and simple meaning, if not out of respect for separation of powers, then to promote the public's trust in the courts.[162] Courts need to refrain from twisting the meaning of common, everyday language into something it is not.

C. *Who or What is an "Original Source"?*

The FCA creates an exception to the public disclosure bar for claims brought by an "original source."[163] Interpretive disputes about the exception revolve around the quantum of information needed to qualify as an original source and whether or not the relator must be the catalyst for the public disclosure. Narrow interpretation of who qualifies as an original source results in fewer claims being reviewed, whereas broad interpretation of the original source exception to the public disclosure bar means more claims will be reviewed.

1. *Rockwell*

The Supreme Court in *Rockwell* found that the language of the public disclosure bar meant that it could not be waived and that it represented "a clear and explicit *withdrawal* of jurisdiction" over the matter.[164] The Court resolved a circuit split by agreeing with the Third, Ninth, and Tenth Circuits that the allegations in the relator's complaint were relevant to the jurisdictional bar, not the allegations in the public disclosure.[165] Courts had been looking at the content of the public disclosure and assessing whether or not the relator had been instrumental in forming it, rather than focusing the inquiry on the content of the relator's complaint.[166] "Original source" was held to the language of the statute and read as an exception to the public disclosure bar simply requiring that the relator have direct and independent knowledge of the allegation and have voluntarily provided the information to the government before filing the action.[167] Reasoning through the language of section 3730(e)(4), the Court stated it could not imagine "why Congress would care whether a relator knows about the information

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[162]CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 1, cmt. (1999).
[163]31 U.S.C. § 3730(e)(4) (2007).
[164]Rockwell Int'l Corp. v. United States, 127 S. Ct. 1397, 1405 (2007).
[165]*Id.* at 1407-08.
[166]*See supra* Part III.B.3.
[167]*Rockwell*, 127 S. Ct. at 1407.

underlying a publicly disclosed allegation . . . when the relator has direct and independent knowledge of different information supporting the same allegation . . . ."[168] The Court also clarified that the attorney general can become a substitute plaintiff in the event the relator does not qualify as an original source, rejecting the view that when the relator does not qualify, the suit must be dismissed.[169] The 6-2 decision was hailed by some as a "literal interpretation of the statute consistent with its historical antecedents."[170] The original source requirements imposed by circuits have been some of the most litigated aspects of the public disclosure bar,[171] so the decision should limit at least one aspect of the confusion among district and circuit courts in interpreting the FCA's public disclosure bar.[172]

Unfortunately, the *Rockwell* Court also dramatically extended the original source provision by stating that the *qui tam* relator had to be the original source for all claims ultimately settled or for which a verdict is rendered.[173] As a result, relators who would otherwise be motivated to bring fraud to the attention of the DOJ with information that the DOJ expands upon and ultimately settles on other grounds now experience dramatically limited opportunities for recovery.[174] Other aspects of the public disclosure bar controversy remain open, such as the extent of public disclosure necessary to trigger the bar to jurisdiction, the "quantum of direct and independent knowledge necessary to be an original source . . . and whether a relator must have been the catalyst for a public disclosure in order to qualify as an original source."[175] Plenty of room remains for courts to interpret these issues narrowly or broadly, thereby encouraging or discouraging relators to fulfill Congress's vision for the FCA.

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[168] *Id.* at 1407-08 (discussing the split in circuits).

[169] *Id.* at 1411 ("[B]y holding that an action originally brought by a private person, which the Attorney General has joined, becomes an action brought by the Attorney General once the private person has been determined to lack the jurisdictional prerequisites for suit.").

[170] Silberman & Innis, *supra* note 14, at 21.

[171] ALICE G. GOSFIELD, MEDICARE AND MEDICAID FRAUD AND ABUSE § 5:14 (2007).

[172] The Court noted that every court which has reviewed the question agreed that the FCA did not permit "claim smuggling." *Rockwell*, 127 S. Ct. at 1410. Claim smuggling is the colorful term for a relator's attempts to extend his original source status of one aspect of the claim to permit jurisdiction over all related claims. *Id.*

[173] *Id.* (citing then-Judge Alito's decision in *United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 102 (3d Cir. 2000)).

[174] Grassley Press Release, *supra* note 17.

[175] Silberman & Innis, *supra* note 14, at 20.

2. Quantum of Information Needed to Qualify as Original Source

Prior to the *Rockwell* decision, the Eighth Circuit addressed the nature and extent of knowledge necessary to be an original source in *United States ex rel. Barth v. Ridgedale Electric, Inc.*,[176] stretching the concept to its ultimate limits.[177] The relator in *Barth* visited the job site, reviewed publicly filed payroll records, and interviewed employees to identify and report the allegations of fraud.[178] The court determined that "original source" required the relator's knowledge to be "first-hand" and could not be obtained through "intermediary sources," like employees.[179] The court justified its interpretation by stating the interpretation was necessary to protect the system from parasitic lawsuits and suggested that the "direct" observation requirement of the original source exception might require the relator to actually see the fraudulent transaction "with his own eyes."[180] One critic of the extratextual requirements placed on and limiting the original source exception stated, "The abursdity of the court's logic is manifest."[181]

In *United States ex rel. Devlin v. California*,[182] the court dismissed a claim because the relators failed to "make a genuinely valuable contribution to the exposure of the alleged fraud."[183] The relators had obtained information prior to the appearance of a news article about the fraud, satisfying the requirement that they had independent knowledge of the claim.[184] The court found, however, that they failed to satisfy the "direct" aspect of the original source exception because they obtained their information from an employee of the corporate defendant.[185] The relators argued that they independently verified the employee's information, but the court found that this was insufficient.[186] The employee, the court said, would qualify, but the relators would not because "[t]hey did not see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else

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[176]44 F.3d 699 (8th Cir. 1995).

[177]*Id.* at 703-04.

[178]*Id.* at 701-02.

[179]*Id.* at 703.

[180]*Barth*, 44 F.3d at 703 (quoting Wang v. FMC Corp., 975 F.2d 1412, 1417 (9th Cir. 1992)).

[181]Gary W. Thompson, *A Critical Analysis of Restrictive Interpretations Under the False Claims Act's Public Disclosure Bar: Reopening the* Qui Tam *Door*, 27 PUB. CONT. L.J. 669, 709 (1998).

[182]84 F.3d 358 (9th Cir. 1996).

[183]*Id.* at 362.

[184]*Id.* at 360-61 (citing *Wang*, 975 F.2d at 1417).

[185]*Id.* at 361.

[186]*Devlin*, 84 F.3d at 361.

...."[187] The *Devlin* opinion suggests that unless the relator's contribution is essential to the formation of the case, the relator cannot qualify as an original source.[188]

3. Must the Relator be the Catalyst for the Disclosure?

While all circuits agree that a relator must have direct and independent knowledge of the allegations, they disagree over what role the relator must play in publicly disclosing information about the allegations.[189] The Ninth and Second Circuits require that the relator play a role in publicly disclosing the information upon which the allegations are based to qualify as an original source.[190] The Second Circuit's decision in *United States ex rel. Dick v. Long Island Lighting Co.*[191] is internally inconsistent. Claiming first to have engaged in a "straightforward reading" of the statute, the court nevertheless adds an extratextual requirement.[192] The court states:

> A close textual analysis combined with a review of the legislative history convinces us that under § 3730(e)(4)(A) there is an additional requirement that a *qui tam* plaintiff must meet in order to be considered an "original source," namely, a plaintiff also must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based.[193]

The court fails to cite what aspect of "legislative history" it reviewed to come to the conclusion that an extra requirement should be placed upon relators.[194]

The Sixth and D.C. Circuits have adopted a different extratextual hurdle for the original source exception—a timing requirement.[195] They

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[187] *Id.*

[188] Ann M. Lininger, *The False Claims Act and Environmental Law Enforcement*, 16 VA. ENVTL. L.J. 577, 594-95 (1997).

[189] Meador & Warren, *supra* note 98, at 479. While the courts agree that "direct and independent knowledge" is required by the FCA, they nonetheless differ quite a bit over what "direct and independent knowledge" means. *Id.*

[190] Wang v. FMC Corp., 975 F.2d 1412, 1418 (9th Cir. 1992); United States *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d 13, 16 (2d Cir. 1990).

[191] 912 F.2d 13 (2d Cir. 1990).

[192] *Id.* at 16.

[193] *Id.*

[194] *Id.* This particular extratextual interpretation has become known as the *Dick/Wang* requirement. *See* Thompson, *supra* note 181, at 710-12.

require the relator to provide the information to the federal government before it is publicly disclosed.[196] The Fifth and Seventh Circuits have rejected that there is a third, extratextual prong, while the D.C. and Tenth Circuits have left the question open.[197]

4. Analysis

Hopefully, the *Rockwell* decision will put an end to some aspects of the original source debate. *Rockwell*'s adherence to the plain language of the original source exception, and its almost casual dismissal of the idea that the relator needs to know anything about the contents of a public disclosure, should signal to the lower courts that more relators qualify as original sources than those circuits applying extratextual constraints have previously thought.[198]

Of course, if judicial hostility toward the FCA continues after *Rockwell*, it will probably persist in the expansion of the words "direct and independent." In some circuits, "direct" has become "first hand," "with his own eyes," and without intermediaries.[199] The *Merriam Webster Dictionary* supports these interpretations.[200] What cannot be supported are the extratextual requirements imposed upon an original source requiring the source to pass a timing test or show that he or she served as the front for the public disclosure. When a court puts these demands on relators, it imposes extra obstacles to FCA relator claims that Congress never intended.

If the courts truly want to support the clearly stated legislative intent of promoting FCA claims, they would adopt the least restrictive of the common meanings of "direct," which is "characterized by close

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[195]United States *ex rel.* McKenzie v. Bellsouth Telecomms., Inc., 123 F.3d 935, 938-39 (6th Cir. 1997); United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 689-91 (D.C. Cir. 1997).

[196]*McKenzie*, 123 F.3d at 938-39; *Findley*, 105 F.3d at 690.

[197]*See* Thompson, *supra* note 181, at 713. Thompson cites *Fed. Recovery Servs., Inc. v. United States*, 72 F.3d 447, 451-52 (5th Cir. 1995) and *United States ex rel. Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 504-05 (7th Cir. 1989) as rejecting the extratextual prong; and cites *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 656-57 (D.C. Cir. 1994) and *United States ex. rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 553-54 (10th Cir. 1992) as leaving the extratextual prong as an open question. *Id.*

[198]Unfortunately, this may be an optimistic viewpoint. After all, the Fourth Circuit first determined that the original source exception's language was unambiguous in 1994 in *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1353 (4th Cir. 1994), and problems persisted anyway.

[199]*See supra* Parts III.C.2-C.4.

[200]Merriam-Webster's Online dictionary identifies seven distinct meanings of "direct" used as an adjective, and four of them arguably apply here. *See* Merriam-Webster Online Dictionary, http://www.merriamwebster.com/dictionary (last visited May 22, 2008).

logical, causal, or consequential relationship."[201] This definition best advances the FCA's general goal of reducing fraud through citizen action.[202] Perpetrators of fraud should not be allowed to evade prosecution because their own employees did not bring the violation to court themselves. In keeping with Congress's desire to protect whistle-blowers and the common knowledge of the demands and costs of whistle-blowing,[203] employees should feel comfortable relaying concerns to an intermediary who knows something about fraud actions and desires to address them legally. Consequently, the *Barth* court's prohibition against the use of employees as intermediaries, though it is in keeping with common language interpretations of the word "direct," should be abandoned.[204]

D. *The "Little Need" Doctrine*

Similar to their artful machinations to find requirements where none exist, courts have developed a variety of creative rationales for their actions. The D.C. Circuit's *Findley* case provides one such opportunity to examine the logic underlying the courts' drive to narrow the application of the FCA.[205] The *Findley* court determined that Congress's goal was to limit FCA actions "to those in which the relator has contributed significant independent information [that is not already in the public domain]."[206] The court reached this conclusion by finding that the public disclosure bar and the original source exception must be somehow harmonized to discern the meaning of original source, despite the original source exception's plain and obvious language.[207] The court used this harmonization approach to justify a new and novel means for further broadening of the public disclosure bar.[208] The D.C. Circuit rationalized its finding that a relator's action was barred on the ground

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[201] *Id.*

[202] Moncus, *supra* note 5, at 1558.

[203] ROBERTA ANN JOHNSON, WHISTLEBLOWING: WHEN IT WORKS—AND WHY 25 (2003).

[204] United States *ex rel.* Barth v. Ridgedale Elec., Inc., 44 F.3d 699, 703 (8th Cir. 1995). The fifth meaning of "direct" in Merriam-Webster's online dictionary is "marked by absence of an intervening agency, instrumentality, or influence." *See* Merriam-Webster Online Dictionary, http://www.merriamwebster.com/dictionary (last visited May 22, 2008).

[205] United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 682 (D.C. Cir. 1997).

[206] *Id.* (quoting United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 653 (D.C. Cir. 1994)).

[207] *Id.* at 689. *See* Thompson, supra note 181, at 682. The "harmonization" approach seems counter-intuitive. One wonders how exceptions to a rule can be harmonized with a rule. Isn't that why they are exceptions?

[208] *See Findley*, 105 F.3d at 689.

that *based upon* meant something more than *derived from* by explaining that there was "little need" for private citizen involvement once the information supporting the allegation was in the public domain.[209] Therefore, "the *Findley* court's 'little need' policy view rests largely on the erroneous assumption that the Government learns of allegations or transactions of fraud any time they are 'publicly disclosed."[210]

IV. MISPLACED PERCEPTIONS

The D.C. Circuit is not alone among the circuits in relying on misplaced perceptions in its interpretation of the FCA's public disclosure bar. Closer analysis of the motives for otherwise inexplicable and extraordinary distortions of the plain meaning of the jurisdictional bar suggest that what is really fueling the judiciary is a combination of misplaced perceptions about fraud actions, public officials, the framers' intent with regard to *qui tam* actions, and relators in general. A review of some of the more problematic misperceptions follows.

A. *Misplaced Faith in Public Officials*

The two assumptions that (1) government fraud investigators will learn of a fraudulent claim or transaction whenever one is disclosed to any part of the government, and (2) the government will investigate and prosecute those frauds upon disclosure could not be more naive. Corrupt public officials exist at all levels of government and represent a serious, ongoing problem.[211] The courts, at times, appear gullible when they say, "Uncle Sam will surely check into that straightaway." As a result, one has to adopt the rather cynical view that such assumptions, like the controversy surrounding the separation of powers attacks,[212] are merely a subterfuge for a noticeable bias against *qui tam* actions and private citizen actions against fraud. Even average citizens understand that simply making a copy of a document and mailing it to someone does not mean that the content of that document will be scrutinized and investigated by a government official with an eye toward curbing fraud. Is the judiciary less aware than average citizens of implications of common day-to-day transactions like making copies? Unlike the judiciary, the typical person no longer feels confident that the federal

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[209] *Id.* at 691; Thompson, *supra* note 181, at 683.

[210] Thompson, *supra* note 181, at 685 (quoting *Findley*, 105 F.3d at 685).

[211] Aaron R. Petty, *How* Qui Tam *Actions Could Fight Public Corruption*, 39 U. MICH. J.L. REFORM 851, 888 (2006).

[212] *See supra* Part III.B.

government will aggressively address issues of wrongdoing,[213] and our history is replete with examples of government officials turning their backs on such problems, either because they do not want to bother or because they have been bribed to do so.[214] Public corruption has been an unfortunate mainstay of our system of government since the country was formed,[215] and for courts to deny the citizenry the opportunity to act upon raids on the public fisc when explicitly permitted by Congress to do so is a waste of resources and a rejection of a significant and demonstrably effective mechanism the country possesses to deal with the problem.

The National Association of Medicaid Fraud Control Units (Association) told the Senate Finance Committee that Medicaid frauds are "some of the largest and most sophisticated frauds ever committed against the program."[216] The president of the Association testified that:

> [its members] have seen wave after wave of fraud sweeping through nursing homes and hospitals, clinics and pharmacies, podiatrists and medical equipment vendors, radiology providers and labs, home health care providers and durable medical equipment vendors and, more recently, pharmaceutical companies. Each surge has brought its own special brand of profiteer in search of the next great loophole in the Medicaid program.[217]

The federal government simply does not have the resources, even if it were so inclined, to do the kind of investigation that is necessary to substantially combat fraud.[218] The Health Care Government Accountability Office (HCGAO), in its June 2005 statement to the Senate

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[213]GALANTER, *supra* note 161, at 157. Galanter reports, "The portion of Americans who responded that 'the government in Washington' can be trusted 'to do what is right' *most of the time* or *just about always* fell from 76.4 percent in 1964 to 28.9 percent in 1994." *Id.*

[214]*See generally* MARK GROSSMAN, POLITICAL CORRUPTION IN AMERICA: AN ENCYCLOPEDIA OF SCANDALS, POWER, AND GREED (2003) (detailing famous people, court cases, and events of political scandals throughout the history of the United States from its inception to the present day).

[215]For example, in 1800, then-President John Adams was criticized for inappropriately communicating with a judge. *Id.* at 402. The House of Representatives determined that Adams engaged in a "dangerous interference of the Executive with Judicial decisions." *Id.*

[216]*Medicaid Issues: Testimony Before the Comm. on S. Fin.*, 109th Cong. 2 (2005) (statement of Nicholas Messuri, President, National Association of Medicaid Fraud Control Units), *available at* http://www.senate.gov/~finance/hearings/testimony/2005test/NMTest062805.pdf.

[217]*Id.*

[218]Timothy Stoltzfus Jost & Sharon L. Davies, *The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement*, 51 ALA. L. REV. 239, 277-78 (1999). They note that while Medicare claims increased by seventy percent from 1988 to 1996, claims review resources only increased by eleven percent in the same period. *Id.* at 278.

Finance Committee, responded to questions raised about the commitment of the Centers for Medicare and Medicaid Services (CMS) to Medicaid fraud and abuse control.[219] HCGAO explained that staff can only "identify fraud and abuse leads on an incidental basis."[220] Due to CMS's workload, "federal oversight of a state's Medicaid program safeguards will not occur, at best, more than once every 7 years."[221] HCGAO noted that CMS's role in combating fraud is largely one of technical assistance and support to state agencies, and humbly acknowledged that "an increased commitment to helping states fight fraud and abuse is warranted."[222]

One questions the utility of relying on the states to provide leads for federal fraud investigations when one realizes that Medicaid is a matching program. Thus, it comes as no surprise that "improper payments by States to providers always cause corresponding improper Federal payments."[223] The Department of Health and Human Services describes the problem as "specific program vulnerabilities" in the effort to identify and resolve fraud and says that "inappropriate claims by States for a Federal share are not always easily identified."[224] Despite these widely acknowledged problems, at least one circuit court points to state requirements to investigate fraud upon receiving a complaint as an appropriate rationale to broaden "public disclosure" to include audits conducted by state or local agencies or private contractors, limiting relator access to the courts.[225]

The issue of agency commitment to combating fraud, even if the agency could recognize when fraud occurred and had the resources to address it, is an intriguing one. "Sometimes regulatory agencies are part of the . . . [problem] because they are compromised, or simply because they are ineffective."[226] Federal agencies engage in a constant give and take with providers and states. The federal agency has an agenda with several items to push. If it can gain ground with a state to push a key

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[219] *Medicaid Issues: Testimony Before the Comm. on S. Fin.*, 109th Cong. 2 (2005) (statement of Leslie Aronovitz, Director, Health Care Government Accountability Office), *available at* http://finance.senate.gov/hearings/testimony/2005test/LATest062805.pdf [hereinafter Aronovitz Testimony].

[220] *Id.* at 2 n.3.

[221] *Id.* at 3.

[222] *Id.* at 4.

[223] *Medicaid Issues*, *supra* note 216, at 1 (statement of Daniel R. Levinson, Inspector General, U.S. Dept. of Health and Human Services).

[224] *Id.*

[225] United States *ex rel.* Hays v. Hoffman, 325 F.3d 982, 988-89 (8th Cir. 2003).

[226] Bucy, *supra* note 45, at 947.

agenda item forward, is it going to jeopardize that progress with an aggressive fraud investigation into a few million dollars?[227] Likely not.

The HCGAO alludes to this conflict of interest problem by periodically noting throughout its testimony that Medicaid fraud and abuse control staff is headquartered apart from other CMS staff,[228] presumably to insulate fraud and abuse personnel from the pressures of competing agendas faced by their colleagues. Professor Erwin Chemerinsky states that relators can act as "insurance" in situations where public prosecutors or agency officials themselves might be "allied with the action challenged."[229]

Obviously, more serious problems than agenda conflicts can arise in public agencies and act as deterrents against prosecution of fraud. Bribery actions and other consensual crimes come to mind as relevant scenarios.[230] Without incentives for, and support of, citizen actions, Professor Chemerinsky argues, it is likely that illegal practices of government officials would not be addressed.[231]

B. *Constitutional Challenges to Citizen Actions Generally*

In the early 1970s, environmentalists who sought enforcement of the Refuse Act of 1899[232] filed several *qui tam* suits because a House Committee of Government Operations report stated that false claims actions could be brought as an enforcement mechanism.[233] In all of the cases, the courts dismissed the actions for lack of standing, lack of jurisdiction, or failure to state a claim.[234] The rulings against *qui tam*

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[227]Sidney A. Shapiro, *Symposium on the 50th Anniversary of the APA: A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89, 93 (1996). Describing this phenomenon, Shapiro states, "Pluralistic political participation in agency decisionmaking may promote democracy, but it also invites officials to broker an acceptable deal between competing interests, rather than to make an independent judgment of appropriate policy." *Id.* at 92-93.

[228]Aronovitz Testimony, *supra* note 219, at 3.

[229]Erwin Chemerinsky, *Controlling Fraud Against the Government: The Need for Decentralized Enforcement*, 58 NOTRE DAME L. REV. 995, 1014 (1983).

[230]*Id.* at 1015.

[231]*Id.*

[232]33 U.S.C. § 407 (2008).

[233]Note, *supra* note 36, at 81.

[234]*Id.* at 82. In several cases, the courts decided that the Refuse Act was a criminal statute and precluded *qui tam* suits on that basis. *Id.* at 105. Five courts took the English approach and decided that since the Refuse Act did not discuss *qui tam* actions, *qui tam* actions were not permitted. *Id.* at 106. Each of the courts that attempted to ascertain congressional intent reached a different conclusion. *Id.* One court inaccurately stated "that *qui tam* had not found its way into common law," which implied that only statutory *qui tam* actions were permissible. *Id.* at 107. The judge ignored centuries of English common law. *Id.* Another court identified a possible jurisdictional conflict if the government brought a criminal action against a defendant, and a relator brought a *qui tam* action against the same defendant. *Id.*

actions seemed inconsistent with the judicial mood at the time because courts ignored previous decisions interpreting the Securities Exchange Act (Act)[235] as giving private parties a right of action to sue despite the lack of an informer provision.[236] The Supreme Court had reasoned that implied rights of action were allowed under the Act as a way for Congress to actualize the statute's purpose of protecting investors. Indeed, the Court held in *J.I. Case Co. v. Borak*[237] that such actions could be implied by a review of congressional purpose.[238] The Court stated that private actions would greatly enhance the Act's effectiveness and that the Securities and Exchange Commission did not have the resources necessary to regulate and police the relevant provisions of the Act.[239] The Court recognized and allowed the two interests—public and private—to merge, recognizing that while the informer/relator was highly interested in a personal economic return, the public also benefited from the effective enforcement of public policy.[240] Despite the *Borak* Court's recognition of the advantages of citizen suits, *qui tam* actions continued to face jurisdictional hurdles.

One explanation may be that courts resent the idea of granting standing to a plaintiff who has not suffered a typical personal injury or harm. *Qui tam* actions permit private individuals to enforce policy decisions and participate in common law rule making via a mechanism that has fallen into obscurity. Professor Laurence Tribe explains that "[t]he judicial hostility to private lawmaking . . . represents a persistent theme in American constitutional law."[241] The problem extends to many forms of citizen actions.

Often touted as an example of judicial hostility toward environmental citizen actions, *Lujan v. Defenders of Wildlife*[242] elevated questions of standing to constitutional status, throwing significant roadblocks into the path of environmentalists.[243] Justice Scalia's opinion

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[235]15 U.S.C. § 78 (2008).

[236]Note, *supra* note 36, at 111.

[237]377 U.S. 426 (1964).

[238]*Id.* at 431-33.

[239]*Id. See also* Note, *supra* note 36, at 114 (discussing the Court's reasoning in *J.I. Case Co. v. Borak*, 377 U.S. at 432-33).

[240]Note, *supra* note 36, at 115. This view recognizes and supports the idea that perhaps parasites are not entirely bad. One could argue that those motivated purely by economic incentives to bring FCA actions nonetheless provide an important public service—exposure of fraud—and deserve to be compensated accordingly. The concept is similar to the apparent goals of the Anti-Discrimination Center. *See* United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, N.Y., 495 F. Supp. 2d 375 (S.D.N.Y. 2007).

[241]LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 993 (3d ed. 2000).

[242]504 U.S. 555 (1992).

[243]*Id.* at 559-62. *See also* Harold Feld, *Saving the Citizen Suit: The Effect of* Lujan v. Defenders of Wildlife *and the Role of Citizen Suits in Environmental Enforcement*, 19 COLUM.

in *Lujan* placed heavy emphasis on requiring plaintiffs to demonstrate standing by narrowing the former "legal wrong" requirement to a "personal injury" only requirement.[244] Proponents of the personal injury requirement somehow invoke Article III of the Constitution as authority, though Article III contains no requirement for personal injury.[245] Justice Scalia relies on his "hard-core" approach to separation of powers and his belief that the Court must stay out of squabbles between the legislative and executive branches and allow them to be resolved through the political process.[246] The "hard core" approach does not permit any branch to waive separation and presents an almost insurmountable hurdle to creative and cooperative problem solving by the branches.[247]

Professor Cass Sunstein challenges the notion that constitutional limits apply to citizen suits and suggests that an easy way to ensure private standing in government enforcement actions would be to include in the legislation a cash bounty, which would satisfy the rigid personal injury requirement of *Lujan*.[248] He views *qui tam* actions as being impervious to strict Article III separation of powers arguments on the ground of their extensive history and support by English and American legislatures and courts.[249] Irrefutable is Professor Sunstein's position that *qui tam* actions were well known to the framers of the Constitution and that any interpretation of the Constitution that stretches it to prohibit *qui tam* actions is plainly disrespectful of the history and the framers' intentions at the time the Constitution was written.[250] Professor Sunstein asserts that there is simply no evidence that the framers even conceived *qui tam* actions might be disallowed under the Constitution.[251] He describes the position as "far-fetched."[252]

If there were truly separation of powers problems with *qui tam* actions, surely they would have provoked the apprehension of constitutional scholar Professor Chemerinsky.[253] Instead, in 1983, Professor

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J. ENVTL. L. 141, 141 (1994) (analyzing the heightened standing requirements promulgated by the Court's decision in *Lujan*).

[244]*Lujan*, 504 U.S. at 561-63. Justice Scalia's personal injury requirement appears to have been crafted from thin air. *Id.* Similarly, neither the plain language of the FCA nor its legislative history requires a materiality or damages element as necessary to bring a suit. *See* 31 U.S.C. §§ 3729-3731 (2007).

[245]U.S. CONST. art. III, § 2.

[246]Feld, *supra* note 243, at 158-59.

[247]*Id.* at 159.

[248]Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 232 (1992).

[249]*Id.* at 176-77.

[250]*Id.* at 175-76.

[251]*Id.* at 173, 175-78.

[252]Sunstein, *supra* note 248, at 178.

[253]In April 2005, Professor Chemerinksy was named one of the "top 20 legal thinkers in America" by *Legal Affairs*. Duke University, http://www.law.duke.edu/fac/chemerinsky/.

Chemerinsky unabashedly supported amendments to the FCA as a decentralized mechanism to combat fraud.[254] He dispatched Article II exclusivity challenges by pointing out that there is no reason why the DOJ should have sole authority to determine if an action should be brought to recover government funds lost due to fraud.[255] Professor Chemerinsky argues for decentralized enforcement authority, stating that government fraud is so large a problem that "its solution exceeds any realistic commitment of government resources."[256]

Perhaps in deference to Professor Chemerinsky and centuries of *qui tam* history, Justice Scalia expressly excepted *qui tam* from *Lujan's* expanded standing requirements as an "unusual" case.[257] Other commentators contend that Professor Sunstein's suggestion of simply installing a cash bounty system and relying on the judiciary to respect the history of *qui tam* actions will not be enough to ensure that citizen-brought government enforcement actions survive.[258] At least one commentator, for example, persists in the notion that the *qui tam* component of the FCA is unconstitutional, adopting Justice Scalia's hard core approach to separation of powers principles.[259] Harkening back to the concerns about Professor Sunstein's proposal that courts may not give due deference to *qui tam*'s rich and long history, the commentator ignores centuries of *qui tam* litigation and limits her analysis to the enactment of the FCA in 1863 as if *qui tam* actions before that time had never existed.[260]

C. *The Potential to Aid Collusion*

In their zeal to decrease *qui tam* actions through broad interpretation of the public disclosure bar, courts seem to have forgotten that, historically, there were two types of *qui tam* abuse—parasitic actions and collusive actions.[261] An inherent tension arguably exists

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[254]*See* Chemerinsky, *supra* note 229, at 1015-16.

[255]*Id.* at 1005-06.

[256]*Id.* at 1018.

[257]Lujan v. Defenders of Wildlife, 504 U.S. 555, 572-73 (1992). It is not clear how *qui tam* actions could be considered "unusual" when they have been in existence since AD 635 and were considered typical causes of action by the framers. *See* Smith, *supra* note 4, at 1200.

[258]*See* Feld, *supra* note 243, at 181-82.

[259]Feola, *supra* note 64, at 161-62.

[260]*See id.* at 160.

[261]Bucy, *supra* note 45, at 946 (asserting instances of "collusion, concealment, and cover-up are rampant"). Examples of collusion between relators and corporate defendants can be found today. *See* United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994) (involving allegations by the United States that collusion between the corporate defendant and the relator occurred to deprive the government of its fair share of the settlement).

between reforms designed to deter parasites and those designed to deter collusion. Every time the court dismisses a *qui tam* action on the basis of a strangled and contrived interpretation of the public disclosure bar, it may increase the opportunity for a perpetrator of fraud to escape scrutiny through manipulation of the investigation process. In some areas of the country, corrupt profiteers can avoid prosecution simply by having an employee share information with a potential relator or by fulfillment of a FOIA request.[262] States cannot act on information disclosed to them, perhaps because the allegation was based on a "public disclosure," e.g., the state filing.[263] Does this mean that profiteers can evade prosecution by disclosing information to a state agency and then succeed in moving for dismissal on the ground that its disclosure to the state constituted a public disclosure? Courts should be careful not to aid collusion while they work to limit parasitic claims.

D. *What's Wrong with Parasites Anyway?*

Why not be a little more tolerant of parasitic relators? They perform a necessary service. Must one experience the angst of a whistleblower to fight fraud? Why not handsomely compensate those who successfully fight fraud? Does the government not need the help? Blowing the whistle sometimes exacts a great toll on the relator. Senator David Pryor is quoted as saying, "[I]n the cruel world of the bureaucracy, most Government whistleblowers can expect extraordinary efforts by their own agency to shut them up, to discredit them, or to eliminate them."[264] Insiders are often reluctant to pay the price associated with

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[262]United States *ex rel.* Mistick PBT v. Hous. Auth., 186 F.3d 376, 383-84 (3d Cir. 1999); *see also* Abigail H. Avery, *Weapons of Mass Construction: The Potential Liability of Halliburton Under the False Claims Act and the Implications to Defense Contracting*, 57 ALA. L. REV. 827, 845 (2006). According to Avery, Halliburton disclosed that a few of its officers accepted more than $6 million in kickbacks from a Kuwaiti subcontractor, exposing Halliburton to liability for the false claims of the subcontractor that had previously been presented for payment. *Id.* The collusion between the officers and the subcontractor "rendered the claims false; the officers knew they were false; and the government was damaged when it paid the claim." *Id.* Halliburton quickly paid the government back the $6 million and fired the officers, likely saving itself from the treble damage provision of the FCA through its own disclosure of the fraud. *Id.*

[263]In *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1103-04 (7th Cir. 1984), the court cited the state's provision to the federal government of reports about fraudulent Medicaid claims as a reason to preclude its FCA claim under the 1943 version of the Act because (1) the state reported the information to the federal government, so (2) the federal government had the information, and so (3) the court had to dismiss the case. *Id.* at 1104. The state argued, unsuccessfully, that it was required to report the information, which implied an exception to the statute. *Id.*

[264]FRANK ANECHIARICO & JAMES B. JACOBS, THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE 64 (1996).

bringing fraud information forward.[265] One whistle-blower stated that her boss "told me that he would say that I did it and I would be the one going to federal prison."[266] Coworkers threatened her by saying that if she told the government about the fraud she would be responsible for 350 people losing their jobs.[267] Many would-be whistle-blowers would prefer that an outsider investigate and address fraud rather than experience the potential reprisals that go hand in hand with such reports.[268]

Despite the common knowledge that whistle-blowers suffer greatly for their actions, courts presume that people cannot wait to file fraud claims.[269] Professor Chemerinsky discusses the "floodgates" objection to *qui tam* promotion—the fear that parasitic relators will deluge the court system with their false claims actions.[270] One commentator complains that the FCA "forces" the DOJ to take a "reactive posture to screen the suits in deciding whether to intervene, rather than focusing on its own investigations of fraud."[271] Professor Chemerinsky wryly notes that such arguments necessarily concede that a deluge would mean that many fraud cases are not now being prosecuted.[272] Courts have the ability and the tools to screen out truly frivolous claims in their early stages.[273] Surely it is better, Professor Chemerinsky reasons, to burden the judiciary than it is to allow numbers of fraud cases to go unprosecuted.[274] Surely, the sheer amount of money recovered by the Treasury—$20 billion that would otherwise be lost to fraud—makes the possible cost to the system worthwhile.[275] As a public corruption tool, the *qui tam* action is unmatched in terms of the resources—both manpower and money—it generates.

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[265]JOHNSON, *supra* note 203, at 25.

[266]Bucy, *supra* note 45, at 946 (citing Bruce Jaspen, *The Blue Cross Whistle-blower's Private Ordeal*, CHI. TRIB., July 24, 1998, at N24).

[267]*Id.* at 946-47 (citing Jaspen, *supra* note 266, at N24).

[268]Johnson reports that reprisals are likely whether one stays in his insider job or resigns, limiting even the option of leaving one's place of employment to escape reprisal. JOHNSON, *supra* note 203, at 64.

[269]*See* Chemerinsky, *supra* note 229, at 1016-17.

[270]*Id.*

[271]Francis E. Purcell, Jr., Comment, Qui Tam *Suits Under the False Claims Amendments Act of 1986: The Need for Clear Legislative Expression*, 42 CATH. U. L. REV. 935, 975 (1993).

[272]Chemerinsky, *supra* note 229, at 1016.

[273]*Id.* (discussing ability of courts to screen for non-meritorious claims).

[274]*Id.* at 1016-17.

[275]Gerson, *supra* note 2, at 1.

V. THE FALSE CLAIMS ACT CORRECTION ACT OF 2007

A. *Description*

Senator Grassley, the prime sponsor of the Senate version of the 1986 Amendments, recently introduced a bill to amend the FCA[276] to put a halt to the spate of federal court decisions that broadly apply the public disclosure bar.[277] Senator Grassley makes it clear that the bill directly responds to the courts' maneuvering to limit claims under the FCA, stating: "Our new legislation works to make sure recent court decisions won't weaken the government's ability to recover tax dollars lost to fraud, whether it's in health care, defense or another areas of spending."[278] The bill would settle current areas of dispute between circuits by:

1. defining "public disclosure" as only disclosures made on the public record or that have been broadly disseminated to the public;
2. stating that relators who obtain information via FOIA requests or from information exchanges with government employees are not thereby barred; and
3. stating that an action is based on public disclosure only if the relator derived his or her knowledge of all essential elements of the action from public disclosure.[279]

The specific public disclosure bar language drops the original source exception and narrows the definition of public disclosure. Section four of S. 2041, as introduced in the Senate, reads:

> (b) Dismissal—Section 3730(e)(4) of title 31, United States Code, is amended to read as follows:
>
> (4)(A) Upon timely motion of the Attorney General, a court shall dismiss an action or claim brought under section 3730(b) if the allegations relating to all essential elements of liability of the action or claim are based exclusively on the public disclosure of allegations or transactions in a Federal criminal, civil, or

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[276]False Claims Act Correction Act of 2007, S. 2041, 110th Cong. (2007), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=s110-2041. The bill was introduced on September 12, 2007. *Id.* Senators Grassley, Durbin, Leahy, Specter, and Whitehouse sponsored the bill. *Id.*

[277]Leahy Press Release, *supra* note 7.

[278]*Id.*

[279]*Id.*

> administrative hearing, in a congressional, Federal administrative, or Government Accountability Office report, hearing, audit or investigation, or from the news media.
>
> (B) In this paragraph:
>
> (i) The term "public disclosure" includes only disclosures made on the public record or that have otherwise been disseminated broadly to the general public.
>
> (ii) The person bringing the action does not create a public disclosure by obtaining information from a Freedom of Information Act request or from information exchanges with law enforcement and other Government employees if such information does not otherwise qualify as publicly disclosed.
>
> (iii) An action or claim is based on a public disclosure only if the person bringing the action derived his knowledge of all essential elements of liability of the action or claim alleged in his complaint from the public disclosure.[280]

In addition, the bill extends the application of the FCA to nongovernment funds that are administered by the U.S. Government on behalf of third parties and clarifies the process through which federal employees can serve as relators.[281] Significantly, the legislation also removes "presentment" requirements and includes broader definitions of government property and claims that broaden the scope of liability for contractors.[282] The penalties for violation of the FCA remain the same.[283]

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[280]S. 2041, 110th Cong. (2007), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=s110-2041.

[281]In 1992, both the House and the Senate introduced bills designed to restrict or eliminate the ability of a government employee to file suit under the FCA. Purcell, *supra* note 271, at 967. Neither bill resulted in revision of the FCA. *See id.*

[282]Akin Gump Strauss Hauer & Feld LLP, *False Claims Act Alert: Bipartisan Bill Introduced in Senate to Expand Scope of False Claims Act Liability and Eviscerate Defenses*, Sept. 13, 2007, http://www.akingump.com/docs/publication/1025.pdf [hereinafter *Bipartisan Bill*].

[283]S. 2041, 110th Cong. § 2(a)(1) (2007).

B. *Analysis*

The FCACA is being simultaneously described as just a little tinkering by Taxpayers Against Fraud[284] and wholesale evisceration of the public disclosure bar by defense firms.[285] Senator Patrick Leahy, one of the sponsors of the FCACA, noted that the war in Iraq and unscrupulous defense contractors make the FCACA "more important than ever."[286] Noted defense attorney Stuart Gerson agrees that the FCA is effective and asserts that since it is so effective, it does not need to be fixed.[287]

The proposed language for the public disclosure bar would greatly benefit relators' efforts to persuade courts to hear their claims. The elimination of the original source exception is offset by explicit narrowing of the term "public disclosure." The FCACA specifies that the government being discussed is the federal government, closing the door on application to state and local government audits and proceedings as public disclosures.[288] The FCACA also settles the question of how much common information can be found in relators' allegations when compared to publicly disclosed allegations before the bar is triggered.[289] The claim can only be barred if "*all essential elements*" of the relator's claim were *derived from* the public disclosure.[290] The subsection also settles the ongoing "based upon" dispute as well. The FCACA's sponsors strike the extratextual interpretations by some circuits, specifically excepting FOIA responses and government employees from the definition of "public disclosure."[291]

While the amendment, if passed, would help to address some of the current conflicts in interpretation among the federal courts, one wonders if the long ingrained hostility of the courts against *qui tam* actions will simply manifest in new, more creative ways. Consider, for example, the FCACA's attempt to define *disclosure* as "only disclosures made on the public record or that have otherwise been disseminated broadly to the general public."[292] Generally, "on the public record" requires a transcript, but the courts may struggle to turn this common

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[284] *Statement of James Moorman, President, Taxpayers Against Fraud, on introduction of the False Claims Act Corrections Act of 2007*, TAF NEWSLETTER (Sept. 12, 2007), *available at* http://www.taf.org/whistle165-FCA-corrections-act.htm.

[285] *Bipartisan Bill*, *supra* note 282.

[286] Leahy Press Release, *supra* note 7.

[287] Gerson, *supra* note 2, at 1.

[288] S. 2041, 110th Cong. § 4(b)(4)(A) (2007).

[289] *Id.* § 4(b)(4)(B)(i)-(iii).

[290] *Id.* § 4(b)(4)(B)(iii) (emphasis added).

[291] *Id.* § 4(b)(4)(B)(ii).

[292] S. 2041, 110th Cong. § 4(b)(4)(B)(i) (2007).

phrase into something else. Does a letter sent to a federal agency constitute a disclosure "on the public record"? Does the public record include anything and everything in the agency's filing cabinets? Does "on the public record" mean a transcript is required or not? Although it may seem onerous, the sponsors may want to consider making their intentions even more clear on this point. Similarly, a bill for services in the possession of the federal government could possibly be construed as a public disclosure. Confusion here may be caused by the lumping of "transactions" into "allegations."[293] Dropping "transactions" from the public disclosure bar may assist courts to more easily understand and fulfill the drafters' intent this time around.

One area of concern about the FCA that may continue to fuel negative reactions is its damages provision. A "claim" is defined as any request or demand for federal government property, and each false claim carries a penalty of "not less than $5,000 and not more than $10,000 plus 3 times the amount of damages which the Government . . . sustains" as a result of the act.[294] Billings for federal reimbursement can be, and have been, calculated as hundreds of separate false "claims," one for every instance of improper "coding."[295] The penalties can easily add up to far more than the supposedly ill-gotten gains that are the object of the false claims action. Senator Grassley's proposal allows this provision of the 1986 Amendments to stand in his 2007 version.[296] Proponents of the FCACA could do much to lessen opposition if the coding situation were somehow capped.[297]

One change that may diminish concerns about the truly parasitic relators is the addition of public disclosure language to the section that permits courts to reduce an award to a relator under specific circumstances.[298] Section 4(c) of S. 2041, as introduced, states:

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[293] *Id.* § 4(b)(4)(A).

[294] *Id.* §§ 2(a)(1), 2(b)(3). The FCACA proposed in S. 2041 maintains the penalty provision of the 1986 Amendments.

[295] *See, e.g.*, United States v. Mackby, 339 F.3d 1013 (9th Cir. 2003) (discussing whether billing as separate false claims is excessive).

[296] S. 2041, 110th Cong. (2007), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=s110-2041.

[297] The Supreme Court has already cautioned the careful restriction of the penalty provisions in the FCA in *United States v. Bornstein*, 423 U.S. 303, 313 (1976). In *Bornstein*, the Court rejected the government's argument that three shipments billed through thirty-five invoices equaled thirty-five violations, opting instead to count one violation for each shipment for a total of three violations. *Id.* at 313-14.

[298] At least one defense lawyer criticizes the changes to § 3729(e)(4), saying that they "erase the jurisdictional bar," but is curiously silent with regard to the addition of public disclosure language to § 3730(d)(3). *See* Gerson, *supra* note 2, at 3.

> (c) QUI TAM AWARDS—Section 3730(d)(3) of title 31, United States Code, is amended to read as follows:
>
> (3)(A) Whether or not the Government proceeds with the action, the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which a person would otherwise receive under paragraph (1) or (2) of this subsection (taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation), if the court finds that person—
>
> (i) planned and initiated the violation of section 3729 upon which the action was brought; or
>
> (ii) derived the knowledge of the claims in the action primarily from specific information relating to allegations or transactions (other than information provided by the person bringing the action) that the Government publicly disclosed, as that term is defined in subsection (e)(4)(A), or that the Government disclosed privately to the person bringing the action in the course of its investigation into potential violations of this subchapter.[299]

With the exception of the maintenance of the penalty provision and some picky wording changes intended to head off hostile judges,[300] the FCACA, even if inartfully titled, would greatly assist the effort to reward those who attempt to expose fraud against the government by inhibiting judicial constraint on *qui tam* actions.

VI. CONCLUSION

Like the situation with Medicaid today, the circumstances of corrupt defense contractors of the 1980s, and the problems with civil war profiteers, fraud against the government presents an alarming and difficult challenge. The FCA over the last twenty years has proven itself to be an important weapon in the federal government's attempts to

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[299]S. 2041, 110th Cong. § 4(c)(3)(A) (2007).

[300]*See* S. 2041, 110th Cong. (2007).

recapture stolen money.[301] Judicial hostility to the FCA consists of misplaced perceptions, like inappropriate faith in public officials' ability to effectively address fraud and confusion about the relationship between the Constitution and *qui tam* actions. The judiciary needs to overcome this bias toward relators. "[O]btaining . . . knowledge of public corruption is, or should be, an important public goal."[302] Passage of the FCACA would assist enormously in ensuring *qui tam* relators access to the courts. *Qui tam* actions, through their decentralized nature, their inherent grant of needed resources, and their impressive historical pedigree, are likely our best bet for effectively addressing fraud against the government.

Linda J. Stengle

[301]Gerson, *supra* note 2, at 1. Gerson states, "The FCA, with its *qui tam* provisions, has become the most powerful, and often effective, weapon in the federal arsenal of fraud fighting machinery." *Id.*

[302]Petty, *supra* note 211, at 851.