DOUBLE DIPPERS OR BUREAUCRACY BUSTERS? FALSE CLAIMS ACT SUITS BY GOVERNMENT EMPLOYEES

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I. INTRODUCTION

In 1986, convinced that fraud against the government had reached epic proportions,[1] Congress turned to a classic strategy to combat the problem: exchanging money for information. To effect this strategy, legislators built on the existing framework of the False Claims Act (FCA or Act).[2] Originally enacted in 1863,[3] the FCA imposes liability on individuals and organizations who present fraudulent claims to the federal

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1. *See* SENATE COMM. ON THE JUDICIARY, FALSE CLAIMS REFORM ACT OF 1985, S. REP. NO. 345, 99th Cong., 2d Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267 [hereinafter SENATE COMM. ON THE JUDICIARY] ("Fraud permeates all Government programs ranging from welfare and food stamps benefits, to multibillion dollar defense procurements, to crop subsidies and disasters relief programs.").

2. 31 U.S.C.A. §§ 3729-3733 (West 1983 & Supp. 1995) (amended by 31 U.S.C. §§ 3729-3733 (1994)).

3. An Act to Prevent and Punish Frauds upon the Government of the United States, ch. 67, 12 Stat. 696 (1863) (amended and codified at 31 U.S.C. §§ 3729-3733 (1994)).

government.[4] The Act also authorizes private parties to initiate a suit on behalf of the United States, and it awards them a share of the proceeds recovered from the defendant.[5]

By the middle of the twentieth century, however, judicial interpretations and legislative action had limited the incentives for private parties to file a suit on behalf of the United States.[6] Amendments passed by Congress in 1986, however, including provisions significantly increasing potential recoveries for private plaintiffs, led to a phenomenal increase in the number of FCA suits.[7] Current and former employees of the federal government filed some of these suits based on information they gained on their jobs.[8] These suits, which had been barred by statutory language deleted in 1986, raise a host of practical and policy issues.[9]

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4. 31 U.S.C. § 3729(a).

5. 31 U.S.C. § 3730(b)(1), (c)(1), (d).

6. *See infra* notes 49-60 and accompanying text.

7. *See infra* notes 61-67 and accompanying text.

8. *See* United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 39 F.3d 957 (9th Cir. 1994) (reversing a dismissal of *qui tam* action brought by former auditor for the United States Department of Energy, Office of Inspector General); United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493 (11th Cir. 1991) (reversing dismissal of *qui tam* action brought by former Air Force attorney); United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991) (finding jurisdiction of *qui tam* action filed by assistant district counsel of Army Corps of Engineers); United States *ex rel.* Fine v. MK-Ferguson Co., 861 F. Supp. 1544 (D.N.M. 1994) (denying defendants' motion to dismiss in action filed by former assistant manager of Department of Energy Inspector General's Office); United States v. Stern, 818 F. Supp. 1521 (M.D. Fla. 1993) (determining costs in a *qui tam* action brought by former federal employee); United States *ex rel.* Givler v. Smith, 760 F. Supp. 72 (E.D. Pa. 1991) (denying motion to dismiss in suit filed by former housing commissioner); United States *ex rel.* McDowell v. McDonnell Douglas Corp., 755 F. Supp. 1038 (M.D. Ga. 1991) (rejecting Government motion to dismiss in claim filed by federal employee), *aff'd*, 999 F.2d 1583 (11th Cir. 1993); United States v. CAC-Ramsay, Inc., 744 F. Supp. 1158 (S.D. Fla. 1990) (granting motion of former employee of the Department of Health and Human Services, Office of Inspector General, to share in settlement of FCA suit), *aff'd*, 963 F.2d 384 (11th Cir. 1992); United States *ex rel.* LeBlanc v. Raytheon Co., 729 F. Supp. 170 (D. Mass. 1990) (denying plaintiff's motion to strike Government's reservation of rights in *qui tam* action brought by former Quality Assurance Specialist of the United States Defense Contract Administrative Service (DCAS)), *aff'd*, 913 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 921 (1991); Erickson *ex rel.* United States v. American Inst. of Biological Sciences, 716 F. Supp. 908 (E.D. Va. 1989) (dismissing suit brought by employee of Agency for International Development (AID) because the employee failed to follow proper procedures). *See infra* note 25 (defining "*qui tam*").

9. *See infra* notes 68-107 and accompanying text.

To their detractors, government employees who file FCA suits are shameless exploiters of the public trust.[10] Other observers believe that federal workers should receive the same rewards as other whistleblowers who risk retaliation to disclose fraud against the government.[11] Congress and the courts continue to grapple with this issue.

This Article begins with a brief description of the False Claims Act and its 1986 amendments. The Article then describes the Act's jurisdictional provisions, which classify potential plaintiffs. Next, the Article discusses judicial and congressional responses to the 1986 amendments and how they relate to FCA suits filed by government employees. Finally, the Article evaluates the benefits and drawbacks of permitting government workers to file FCA suits and proposes a framework for permitting such actions in certain circumstances.

II. AN OUTLINE OF THE FALSE CLAIMS ACT

Congress first passed the FCA at the urging of President Lincoln to address widespread military procurements fraud during the American Civil War;[12] however, it significantly revised the FCA in 1943[13] and, most recently, in 1986.[14] As a result of the 1986 amendments, the number of *qui tam* plaintiffs increased.[15] First, the amendments guarantee the plaintiff will recover the minimum amount from a successful claim.[16] Second, the amendments make it easier for the

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10. *See generally infra* notes 111-13, 116-18, 144-45, 148-50 & 152-55 and accompanying text (discussing arguments against allowing FCA suits by government employees).

11. *See generally infra* notes 119 & 139-43 and accompanying text (outlining considerations favoring FCA lawsuits by government employees).

12. For a discussion of the circumstances leading to the initial passage of the Act, see United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1496-97 (11th Cir. 1991); Erickson *ex rel.* United States v. American Inst. of Biological Sciences, 716 F. Supp. 908, 915 (E.D. Va. 1989).

13. *See infra* notes 49-56 and accompanying text.

14. For an extended discussion of the 1986 amendments, see Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 305-18 (1992).

15. *Id.* at 305. *See infra* text accompanying notes 38-46.

16. Callahan & Dworkin, *supra* note 14, at 305-07. *See infra* text accompanying notes 31-36.

plaintiff to prove an action.[17] Finally, the amendments broaden the classes of potential plaintiffs.[18]

At present, the Act provides that a person who knowingly seeks payment of a false or fraudulent claim[19] from the United States government[20] is liable for a civil penalty of $5000 to $10,000 per

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17. Callahan & Dworkin, *supra* note 14, at 305, 308-10. *See infra* note 23 and accompanying text.

18. Callahan & Dworkin, *supra* note 14, at 305, 310-14. *See infra* part III.

19. Congress made insignificant changes to the FCA in 1994. *See* Pub. L. No. 103-272, 108 Stat. 1362 (1994) (current version at 31 U.S.C.A. § 3729(a) (West Supp. 1995)). Actions covered by the FCA include those taken by any person who:

> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
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> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
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> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;
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> (4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;
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> (5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
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> (6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or
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> (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, . . .

31 U.S.C. § 3729(a).

The United States Supreme Court had indicated its support for an inclusive interpretation of the types of claims covered by the FCA. United States v. Neifert-White Co., 390 U.S. 228, 232-33 (1968) ("The Act was intended to reach all types of frauds . . . that might result in financial loss to the government."). Lower court decisions prior to 1986, however, tended to take a less generous approach. *See, e.g.*, Hansen v. National Comm'n on the Observance of Int'l Women's Year, 628 F.2d 533, 534 (9th Cir. 1980) ("The False Claims Act is limited to actions involving false demands for either the payment of money or the transfer of property . . . .") (citing Hageny v. United States, 570 F.2d 924, 931 (Ct. Cl. 1978)).

20. The Act also covers false claims "made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or

claim,[21] as well as double or treble damages.[22] The Act defines "knowing" actions expansively, to include those taken in deliberate ignorance of or with reckless disregard for the truth or falsity of the claim for payment.[23]

Although the FCA requires the Attorney General to enforce the Act,[24] a private party may bring a "*qui tam*" action.[25] The Act authorizes the *qui tam* plaintiff (referred to as the "relator")[26] to file suit

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other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c).

21. The Act defines "claim" to include "any request or demand, whether under contract or otherwise, for money or property. . . ." *Id.* § 3729(c). Accordingly, the court may assess the statutory penalty on the defendant for *each* false claim submitted.

22. 31 U.S.C. § 3729(a). The court awards treble damages unless it determines that:

> (A) the person committing the violation . . . furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;
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> (B) such person fully cooperated with any Government investigation of such violation; and
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> (C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under [the Act] with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation; . . .

Id. § 3729(a)(A)-(C). The court awards double damages when a treble damages award is unwarranted. *Id.*

23. A person "knowing" or "knowingly" has information if he:

> (1) has actual knowledge of the information;
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> (2) acts in deliberate ignorance of the truth or falsity of the information; or
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> (3) acts in reckless disregard of the truth or falsity of the information, and

no proof of specific intent to defraud is required.

31 U.S.C. § 3729(b)(1)-(3). Prior to the amended definition of "knowing," some courts required the plaintiff to prove specific intent to defraud. *See, e.g.*, United States v. Mead, 426 F.2d 118, 123 (9th Cir. 1970).

24. 31 U.S.C. § 3730(a).

25. *Id.* § 3730(b), (c). The term "*qui tam*" derives from the phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," meaning "who brings the action for the king as well as for himself." Steve France, *The Private War on Pentagon Fraud*, A.B.A. J., Mar. 1990, at 46, 47.

26. A relator is an interested party who is "permitted to institute a proceeding in the name of the People or the Attorney General when the right to sue resides solely in that official." BLACK'S LAW DICTIONARY 1289 (6th ed. 1990).

on behalf of the government[27] and to share in the proceeds recovered from the defendant.[28] To initiate an action, the FCA requires the relator to serve "[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses" on the Government.[29] The Government then has sixty days to decide whether it will assume the primary responsibility for prosecuting the claim.[30]

The amount the relator may recover from the defendant depends primarily on whether the government decides to prosecute the claim. If the Justice Department declines the case, the Act provides for the successful *qui tam* plaintiff to receive between 25% and 30% of the judgment or settlement.[31] If the government decides to prosecute the case, the Act provides for the relator to receive between 15% and 25% of the amount recovered.[32] The amount of recovery depends on whether the person "substantially contributed to the prosecution of the action."[33] Even if the court determines that the relator filed a complaint based primarily on information brought to light in a public source, however, the relator may still recover.[34] In such instances, the relator may recover up to 10% of the proceeds, depending on the value of the information the relator provided and her role in advancing the case.[35] Regardless of whether the government proceeds with the action, the court will also award the relator reasonable attorneys' fees, expenses, and costs.[36]

The framework of the Act, as reflected by the 1986 revisions, has achieved the goal of its congressional architects.[37] The revised FCA

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27. 31 U.S.C. § 3730(b)(1).

28. *Id.* § 3730(d).

29. *Id.* § 3730(b)(2).

30. *Id.* § 3730(b)(4). The Government may move the court to extend this period for good cause. *Id.* § 3730(b)(3).

31. *Id.* § 3730(d)(2).

32. *Id.* § 3730(d)(1).

33. *Id.*

34. Such sources include "allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media . . . ." *Id.*

35. *Id.*

36. *Id.* § 3730(d)(1)-(2).

37. *See False Claims Act Implementation: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,*

has encouraged hundreds of potential whistleblowers to come forward. Prior to the 1986 revisions, plaintiffs brought about six FCA claims per year.[38] From 1986 through February of 1995, plaintiffs filed 921 cases and defendants paid approximately $880 million in settlements and judgments.[39] Although the majority of the actions have been against defense contractors,[40] plaintiffs have also brought FCA claims in such varied contexts as Medicare,[41] food stamps,[42] disaster relief,[43]

101st Cong., 2d Sess. 1, 1-2 (1990) [hereinafter *1990 Hearing*] (statement of Senator Grassley) ("The 1986 amendments . . . enhanced, encouraged and expanded citizen involvement in fighting fraud against the taxpayers. . . . " The amendments encouraged "private attorneys general in the war on fraud").

38. France, *supra* note 25, at 48.

39. Telephone Interview with Office of Public Affairs, United States Department of Justice (June 2, 1995). Of the 921 cases, 243 were still under seal and the government had not decided whether to take over prosecution. In 144 cases where a decision had been made, the Government joined the *qui tam* plaintiff, an intervention rate of approximately 21.2%. Ninety-seven of the cases the Government entered were settled or tried to judgment. This resulted in a total recovery of approximately $864 million. Relators have received about 18% of this amount. *Id.*

The government declined to join 504 cases. Three hundred seventy-five of these cases are no longer active because the court dismissed them or because the relator decided not to pursue them. In the 22 private relator cases which were resolved, either by settlement or judgment, the government recovered approximately $16.6 million. Where it has been determined, the average relator share in these recoveries was approximately 29%. *Id.*; *see also* Josh Chetwynd, *Recoveries by U.S. From Civil Fraud Surged in Fiscal '94*, WALL ST. J., Oct. 12, 1994, at B16 (discussing 1994 fraud recovery statistics).

A number of FCA defendants have settled the cases against them for significant amounts of money. United Technologies Corporation agreed to a record-setting payment of $150 million. The *qui tam* plaintiff, a former United Technologies vice president, will receive $22.5 million. *See Largest False Claims Act Settlement Pays Ex-Executive Who Reviewed Billing*, 12 Employee Rel. Wkly. (BNA) 402 (Apr. 11, 1994). In July, 1994, Litton Systems, Inc. agreed to pay an $82 million settlement. *See $82 Million Settlement Paid for Alleged Shifting of Costs*, 12 Employee Rel. Wkly. (BNA) 850 (Aug. 1, 1994). Teledyne Industries, Inc., tentatively settled two cases for $112.5 million. *See Teledyne to Pay $112 Million to Settle Qui Tam Cases Alleging False Tests, Costs*, 12 Employee Rel. Wkly. (BNA) 487 (May 2, 1994). Overall, FCA penalties for the fiscal year ending September 30, 1994 totaled $378 million. This is more than twice the total for the previous year. Harvey Berkman, *A Few Big Penalties Make for a Record Year*, NAT'L. L.J., Oct. 24, 1994, at A16.

40. *See, e.g.*, *Boeing Pays $75 Million to Settle U.S. Overcharging Case*, N.Y. TIMES, Apr. 30, 1994, at 41; Dan Kane, *Ex-Worker Sues GE over Radar*, SYRACUSE HERALD AM., Apr. 10, 1994, at A1; Calvin Sims, *Teledyne to Pay Big Fine to U.S.*, N.Y. TIMES, Apr. 22, 1994, at D1, D6; *United Technologies to Pay Fine in Whistleblower Case*, N.Y. TIMES, Mar. 31, 1994, at D3.

41. *See* United States v. CAC-Ramsay, Inc., 744 F. Supp. 1158 (S.D. Fla. 1990) (charging a violation of FCA by accepting Medicare overpayments).

scientific misconduct,[44] telecommunications,[45] and municipal improvement.[46] The 1986 amendments relating to jurisdiction, however, have provided fertile ground for defendants and, in some instances, Justice Department attorneys seeking to impede *qui tam* suits.

III. JURISDICTION UNDER THE FALSE CLAIMS ACT

A. *Generally*

When Congress originally enacted the FCA in 1863, it provided for a universal class of potential relators.[47] Indeed, the legislative history reveals that Congress anticipated *qui tam* suits by government prosecutors.[48] In 1943, however, the Supreme Court's decision in *United States* ex rel. *Marcus v. Hess*[49] prompted Congress to make significant revisions to the Act's jurisdiction section.

In *Marcus*, the relator brought a *qui tam* action against electrical contractors who were employed to work on Public Works Administration projects.[50] The defendants and the Federal Government claimed that

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42. *See* Blusal Meats, Inc. v. United States, 638 F. Supp. 824 (S.D.N.Y. 1986) (alleging FCA violation through knowing acceptance and presentation of stolen food stamps), *aff'd*, 817 F.2d 1007 (2d Cir. 1987).

43. *See* United States v. Killough, 625 F. Supp. 1399 (M.D. Ala. 1986) (alleging a kick-back scheme where non-official defendants inflated their bids on emergency housing contracts in order for the official defendants to receive a kick-back).

44. *See* Steven Burd, *Government Uses Anti-Fraud Law to Push 2 Universities to Settle Misconduct Suit*, CHRON. HIGHER EDUC., Aug. 3, 1994, at A29 (reporting $1.6 million settlement in a case where the government alleged a researcher, in completing a grant application, made false statements regarding previous research results).

45. *See* United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493 (11th Cir. 1991) (alleging bid-rigging by a corporation pursuing federal telecommunications contracts).

46. *See* United States v. Board of Educ., 697 F. Supp. 167 (D.N.J. 1988) (alleging illegal scheme resulting in a misappropriation of federal funds designated for school improvement).

47. The law provided that "suit may be brought and carried on by any person, as well for himself as for the United States." An Act to Prevent and Punish Frauds upon the Government of the United States, ch. 67, 12 Stat. 696, 698 (1863) (current version at 31 U.S.C. §§ 3729-3733 (1994)).

48. *See* CONG. GLOBE, 37th Cong., 3d Sess. 955 (1863) (statement of Senator Howard) ("Even the district attorney, who is required to be vigilant in the prosecution of such cases, may be also the informer.").

49. 317 U.S. 537 (1943).

50. *Id.* at 539.

Marcus should not be permitted to file a *qui tam* action because he allegedly based his complaint on a publicly available criminal fraud indictment.[51] The Government strenuously objected to the Court's FCA jurisdiction over the case and argued that the relator had "contributed nothing to the discovery of th[e] crime."[52] Nonetheless, the Court held that Marcus could recover, and indicated that the legislature should address the Government's argument.[53]

Congress quickly responded to the Supreme Court's holding in *Marcus*. It revised the law less than a year later to exclude "parasitical"[54] FCA suits.[55] As amended in 1943, the Act prohibited FCA claims "whenever it . . . appear[ed] that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."[56]

Over time, it became apparent that the 1943 amendments were perhaps too effective. Although they barred parasitical suits, the amendments also excluded claims brought by parties who had provided the government with information about a false claim but had not yet filed a suit.[57] Because such actions were "based upon evidence or information in the possession of the United States,"[58] the courts rejected

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51. *Id.* at 545.

52. *Id.*

53. *Id.* at 546-47 & n.9.

54. *See, e.g.*, United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100, 1104 (7th Cir. 1984) (describing the *qui tam* suit in *Marcus* as "parasitical" because the plaintiff supported the claim with publicly available information).

55. Act of Dec. 23, 1943, Pub. L. No. 78-213, 57 Stat. 608 (current version at 31 U.S.C. §§ 3729-3733 (1994)).

56. An Act to Limit Private Suits for Penalties and Damages Arising out of Frauds Against the United States, ch. 377, 57 Stat. 608, 609 (1943) (amending 31 U.S.C. § 3491(C)).

57. The Act also precluded suits by potential relators who brought to light information coincidentally possessed by the government. HOUSE COMM. ON THE JUDICIARY, FALSE CLAIMS AMENDMENTS ACT OF 1992, H.R. REP. NO. 837, 102d Cong., 2d Sess. 4 (1992) [hereinafter HOUSE COMM. ON THE JUDICIARY].

58. 57 Stat. 608, 609.

them.[59] As a result, discouraged individuals did not disclose evidence of misconduct to the government so that they could file *qui tam* suits.[60]

In the 1980s, the views of congressional representatives became aligned with those of frustrated potential *qui tam* plaintiffs. In order to encourage citizen assistance with what many considered an appalling level of fraud against the government,[61] Congress amended the jurisdictional provisions of the FCA. The 1986 amendments guaranteed minimum recoveries for *qui tam* plaintiffs,[62] and implemented other revisions.[63]

Structurally, the current Act does not identify characteristics or classes of appropriate relators. Rather, it addresses this issue by establishing four categories of cases over which a court is forbidden to exercise jurisdiction.[64] The Act bars certain actions brought by current or former military personnel against members of the armed forces, actions brought against federal legislators, judges, and senior officials, and actions factually related to legal or administrative proceedings in

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59. *See* United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100, 1103-04 (7th Cir. 1984) (holding state's *qui tam* action barred by language of 1943 FCA Amendments, even though state was original source of information possessed by the federal government regarding Medicaid fraud, and state had prosecuted responsible physician); United States *ex rel.* Weinberger v. Florida, 615 F.2d 1370, 1371 (5th Cir. 1980) (dismissing suit where plaintiff disclosed substantially all the evidence to the United States Attorney General prior to bringing suit); Pettis *ex rel.* United States v. Morrison-Knudsen Co., 577 F.2d 668, 669-70 (9th Cir. 1978) (dismissing action where plaintiff previously supplied the government with information).

60. Patrick W. Hanifin, *Qui Tam Suits by Federal Government Employees Based on Government Information*, 20 PUB. CONT. L.J. 556, 569 (1991) (denying the government valuable information concerning misconduct weakened law enforcement).

61. SENATE COMM. ON THE JUDICIARY, *supra* note 1, at 2, *reprinted in* 1986 U.S.C.C.A.N., at 5266-67.

62. *See supra* notes 31-36 and accompanying text (outlining FCA award provisions).

63. For a summary of the 1986 revisions to the Act, see Callahan & Dworkin, *supra* note 14, at 305-18.

Congress further amended the FCA in 1988 to permit courts to reduce rewards below the percentage established by the Act in cases where the relator helped plan the fraud upon which the claim was based, "taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation." Major Fraud Act of 1988, Pub. L. No. 100-700, § 9(a)(2), 102 Stat. 4638 (amending 31 U.S.C. § 3730(d)).

64. 31 U.S.C. § 3730(e)(1)-(4).

which the government is a party.[65] The fourth category of prohibited actions includes those based on publicly disclosed information:

> No court shall have jurisdiction over an action . . . based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.[66]

The FCA defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."[67]

B. *Government Employees*

Although the FCA originally authorized suits by government employees,[68] courts applying the FCA after the 1943 amendments consistently barred government employees from bringing suit.[69] Although the congressional reformers in 1943 focused on the source of

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65. The three pertinent subsections of the jurisdictional section provide:

> (1) No court shall have jurisdiction over [a *qui tam*] action brought by a former or present member of the armed forces . . . against a member of the armed forces arising out of such person's service in the armed forces.
>
> (2)(A) No court shall have jurisdiction over an action brought . . . against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought . . . .
>
> (3) In no event may a person bring an action . . . which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

Id. § 3730(e)(1)-(3).

66. *Id.* § 3730(e)(4)(A).

67. *Id.* § 3730(e)(4)(B).

68. *See supra* notes 47-48 and accompanying text.

69. *See, e.g.*, United States *ex rel.* McCans v. Armour & Co., 146 F. Supp. 546, 550 (D.D.C. 1956) ("[T]he [] statute was intended to prevent a former government employee from bringing an action . . . where the information upon which the suit is founded was obtained by reason of his government employment."), *aff'd*, 254 F.2d 90 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 834 (1958).

the information rather than the employment circumstances of the information-bearer, the language of the revisions cut a broader swath.[70]

After Congress amended the FCA in 1986, it neither expressly permitted nor precluded government employees from filing suit,[71] and the legislative history concerning this issue is unclear.[72] Nevertheless, parties have made arguments that the FCA bars government employees from initiating FCA actions based on the public disclosure exception to jurisdiction[73] as well as policy considerations.

In the absence of definitive legislative history, courts have utilized several statutory interpretation devices to respond to jurisdictional challenges regarding government employee relators. The most straightforward analysis characterizes Congress' failure, in 1986, to preserve the 1943 limitation on "information already in the possession of the United States" as a repeal of the quoted language.[74] Further, courts presume that the legislators involved in the 1986 revisions had knowledge that Congress amended the provision in 1943 because of the Supreme Court's expansive interpretation of the FCA in *Marcus*.[75] Courts perceived this as relevant because the language adopted in 1986 is similar to that of the original Act, which permitted government employees to file suits.[76]

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70. See *supra* text accompanying note 56 for the language of the 1943 amendment. The *qui tam* plaintiff in the case that provided the catalyst for the 1943 congressional reform was presumably not a government employee. United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943).

71. *See supra* notes 64-67 and accompanying text.

72. *See* Erickson *ex rel.* United States v. American Inst. of Biological Sciences, 716 F. Supp. 908, 912 (E.D. Va. 1989) (noting that the question of whether government employees may maintain *qui tam* actions "must be sought indirectly through the statute's . . . history").

73. 31 U.S.C. § 3730(e)(4). For the language of § 3730(e)(4), see *supra* text accompanying note 66.

74. United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1501-02 (11th Cir. 1991) (rejecting the Government's argument that the 1986 amendments did not repeal the 1943 amendments). See *supra* text accompanying note 56 for the 1943 amendment, and *supra* text accompanying note 66 for the 1986 amendment.

75. United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1420 (9th Cir. 1991). *See Williams*, 931 F.2d at 1501-03 (discussing and refuting Justice Department's argument that the bar to government employee actions imposed by the 1943 amendments was not repealed in 1986); *Erickson*, 716 F. Supp. at 914 n.10 (comparing the language of the 1943 and 1986 revisions).

76. *See supra* text accompanying note 47.

Courts have also examined how the legislature drafted the jurisdictional provisions: "Congress . . . could have chosen to make eligible as *qui tam* relators only certain defined groups of persons and exclude all others or it could have chosen to include all persons as eligible *qui tam* relators with specific exceptions."[77] Because Congress adopted the second format, the courts have inferred that it intended an expansive approach toward potential *qui tam* plaintiffs including, presumably, government employees.[78] Several courts have also observed that the jurisdictional bar to disclosures by military personnel would be superfluous if legislators had intended to prohibit all government employee suits.[79] On the basis of considerations such as these, in combination with the absence of explicit statutory language, the only reported decision concluding that all government employee *qui tam* suits are barred by the post-1986 FCA was overruled on this point on appeal.[80]

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77. *Erickson*, 716 F. Supp. at 912.

78. *Williams*, 931 F.2d at 1502 ("We cannot infer an additional exception absent a clear indication by Congress . . . it also meant to bar all government employees."); *Erickson*, 716 F. Supp. at 913 ("[C]ongress' choice of structure is compelling: Government employees are . . . permissible *qui tam* plaintiffs.").

79. *Williams*, 931 F.2d at 1502 (excluding army personnel would be unnecessary if Congress intended to exclude all government employees); *Erickson*, 716 F. Supp. at 913-14 (noting that the armed forces exclusion is not a blanket exclusion of all government employees).

80. United States *ex rel.* LeBlanc v. Raytheon Co., 729 F. Supp. 170 (D. Mass. 1990), *aff'd*, 913 F.2d 17, 20 (1st Cir. 1990). Although it disagreed with the district court's conclusion that no government employee may sue as a *qui tam* plaintiff under the Act, the First Circuit agreed with the district court's decision to bar suit on the facts of the case, which a government quality assurance specialist had filed. 913 F.2d at 18, 19-20. The court wrote: "It was LeBlanc's responsibility, a condition of his employment, to uncover fraud. The fruits of his effort belong to his employer—the government." *Id.* at 20. Thus, LeBlanc did not have "independent knowledge of the information," which the statute requires. *Id.*

Authorities have questioned the circuit court's analysis because the evaluation whether LeBlanc was an original source was unnecessary, given the court's prior conclusion that the information in question had not been publicly disclosed. *See Williams*, 931 F.2d at 1500-01 n.13 (stating that the *Raytheon* court went one step too far); Kenneth D. Brody, *Recent Developments in the Area of "Qui Tam" Lawsuits*, 37 FED. B. NEWS & J. 592, 596 (1990) ("the court's analysis of the original source issue was unnecessary").

Government employees have also been permitted to bring suit under the post-1986 Act in the following reported cases: United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 39 F.3d 957 (9th Cir. 1994) (reversing the district court's holding that all inspector general auditors are prohibited from bringing *qui tam* actions); *Williams*, 931 F.2d 1493, 1494 (stating no specific limitations on government employee suits); United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1420 (9th Cir. 1991) (stating

Judicial efforts to ascertain legislative intent regarding this issue were apparently undertaken with greater care and deliberation than Congress itself exercised in 1986. Key participants in the process of drafting the amendments have stated that they did not consider the issue of government employee suits at that time.[81] Implementation of the amendments, however, has led Congress to focus directly on this issue.

In 1990, the Subcommittee on Administrative and Governmental Relations of the House Judiciary Committee held the first oversight hearings on the FCA, as amended in 1986.[82] Several witnesses addressed the propriety of granting access to the FCA to current and former federal workers. They focused primarily on the concern that such individuals might withhold information from government investigators and use it to support their *qui tam* claims.[83] The Justice Department,[84]

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the 1943 language barring government employee suits disappeared from the statute in 1986); United States *ex rel.* Fine v. MK-Ferguson Co., 861 F. Supp. 1544, 1549 (D.N.M. 1994) (ruling that employees of Inspector Generals' offices are not barred from bringing FCA suits); United States v. Stern, 818 F. Supp. 1521, 1522 (M.D. Fla. 1993) (holding that a government employee is not precluded from obtaining a reward by constructive trust); United States *ex rel.* Givler v. Smith, 760 F. Supp. 72, 74 n.5 (E.D. Pa. 1991) (implying that government employee suits are permissible when it is not the relator's job to investigate the matters upon which the action is based); United States *ex rel.* McDowell v. McDonnell Douglas Corp., 755 F. Supp. 1038, 1040 (M.D. Ga. 1991) (requiring the court to determine whether the plaintiff received her information from independent efforts or from her job description prior to dismissing *qui tam* action), *aff'd*, 999 F.2d 1583 (11th Cir. 1993); United States v. CAC-Ramsay, Inc., 744 F. Supp. 1158, 1161 (S.D. Fla. 1990) (permitting suit by former Medicare fraud investigator on basis of information gained during his employment), *aff'd*, 963 F.2d 384 (11th Cir. 1992); Erickson *ex rel.* United States v. American Inst. of Biological Sciences, 716 F. Supp. 908, 912-18 (E.D. Va. 1989) (finding no specific limitations on government employee suits).

81. *See* HOUSE COMM. ON THE JUDICIARY, *supra* note 57, at 5 (the issue was "simply not contemplated"). *See also* Howard Mintz, *Qui Tam on Campus: DOJ Policy Stiffs Stanford Whistleblower*, LEGAL TIMES, Jan. 20, 1992, at 2, 3 (quoting Representative Howard Berman, one of the sponsors of the legislation resulting in the 1986 amendments to the Act, as stating, "I'm embarrassed to say we did not spend any time ... contemplating this question.").

82. *See 1990 Hearing*, *supra* note 37. The subcommittee received a positive progress report. As the subcommittee chairman noted at the end of the hearing, "the basic news is good." *Id.* at 101. *See also 1990 Hearing*, *supra* note 37, at 10 (statement of Assistant Attorney General Gerson that "the new provisions have been a useful stimulus for citizens to come forward with allegations of fraud against the Government"); *id.* at 30 (statement of Inspector General Kusserow that his "experience thus far with *qui tam* indicates that it is a successful program.").

83. *1990 Hearing*, *supra* note 37, at 7 (statement of Senator Grassley); *id.* at 28 (statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, Department

the Inspector General of the Department of Health and Human Services,[85] and John R. Phillips, an attorney who participated in drafting the amendments and currently specializes in *qui tam* litigation, proposed limits on FCA actions by federal employees.[86]

In early 1992, implementation concerns led Representative Howard Berman, the principal House sponsor of the 1986 FCA amendments, to introduce H.R. 4563 to revise the Act.[87] Among other things, H.R. 4563 would have established limitations on government employees who file *qui tam* suits based on information gained during the course of their employment.[88] The bill would have placed a ten percent cap on the recoveries available to such relators.[89] The actual reward amount would have been subject to the court's discretion, depending on the relator's contribution to the litigation as well as the diligence and success of his

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of Justice); *id.* at 32 (statement of Richard P. Kusserow, Inspector General, Department of Health and Human Services); *id.* at 75-76 (testimony of John R. Phillips, Esq.).

Witnesses also raised a number of other issues. For example, witnesses expressed concerns regarding judicial interpretations of the Act's prohibition on claims based on "publicly disclosed information." *1990 Hearing*, *supra* note 37, at 5-6 (statement of Senator Grassley); *id.* at 47-48 (statement of Inspector General Kusserow). Assistant Attorney General Gerson spoke of potential and actual interference with ongoing investigations caused by the filing of related *qui tam* actions. *Id.* at 12-14. Inspector General Kusserow requested clarification of the scope of inspector generals' investigative authority under the Act. *Id.* at 50-53.

84. *1990 Hearing*, *supra* note 37, at 16, 28 (stressing that government investigators or attorneys report misconduct through official channels).

85. *Id.* at 30, 32 (noting that a government employee should proceed with a *qui tam* action only if the employee tried to funnel the information through the appropriate channels and was thwarted).

86. *Id.* at 72, 75-76 (permitting a government employee to pursue a *qui tam* action only after the court concludes the employee reasonably and in good faith notified the appropriate officials).

87. *False Claims Act Technical Amendments of 1992: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 2-4 (1992) [hereinafter *1992 Hearing*] (containing the proposed legislation, H.R. 4563).

88. See *id.* at 2-4 for H.R. 4563 § 2. The Justice Department, however, had previously introduced legislation which would have prohibited *qui tam* actions by government employees altogether. *Id.* at 17; HOUSE COMM. ON THE JUDICIARY, *supra* note 57, at 5, 8.

89. *1992 Hearing*, *supra* note 87, at 2.

efforts to report the misconduct through government channels prior to filing suit.[90]

The House of Representatives subcommittee charged with FCA oversight held a hearing on H.R. 4563 the month after Representative Berman introduced it.[91] Following the hearing, the legislators amended H.R. 4563 to require a government employee who seeks to file an FCA action to give written disclosure of "substantially all material evidence and information that relates to the alleged violation"[92] to a designated official, and submit a written notification of the disclosure to the employee's supervisor.[93] A federal relator would have been permitted to file suit one year after the notification requirements were met, if the Attorney General had not filed an action during that period.[94] The government would have been permitted to file a motion for a single twelve-month extension of the waiting period, however, in cases where it needed additional time to determine whether to file an action itself.[95] In addition, the final version of H.R. 4563 would have empowered the government to move to dismiss from the case a federal employee who had not complied with these prerequisites.[96] The subcommittee,

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90. The proposed legislation provided as follows:

> [T]he court may award such sums as it considers appropriate . . . taking into account the extent to which prior to filing the action, the [government employee] reasonably and in good faith attempted to bring the violation to the attention of the Government authorities responsible for pursuing such violation, [and] whether the authorities failed to diligently investigate and prosecute the violation. . . .

Id.

91. *1992 Hearing*, *supra* note 87. The subcommittee heard testimony from representatives of the Departments of Justice and Defense, three government employee relators, and attorney John R. Phillips. *Id.* at (III).

92. HOUSE COMM. ON THE JUDICIARY, *supra* note 57, at 2.

93. *Id.* In cases where the agency employing the potential claimant had an Inspector General (IG), the bill specified the IG as the official. Where the employing agency did not have an IG, the bill designated the Attorney General as a substitute. The bill defined "supervisor" as "the officer or employee of the next highest rank to that of the [whistleblower], who has supervisory authority over [the whistleblower], and who [the whistleblower] believes is not culpable of the violation upon which the action under this subsection is brought." *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 1.

however, abandoned the proposed ten percent cap on government relators' recoveries.[97]

Although the Judiciary Committee report accompanying H.R. 4563 does not explain the basis for the amended provisions, the hearing record reveals that the subcommittee chair, Representative Barney Frank, favored a framework including such prerequisites for suits by government employees.[98] Witnesses at the hearing also charged that a maximum limit on recoveries by government employees would be a significant disincentive to file a suit because of the enormous resources required to pursue most FCA actions.[99] The witnesses perceived this disincentive to be exacerbated by the discretionary nature of the award.[100] Additionally, the witnesses criticized the original version for its potential to engender internal litigation between the Justice Department and the relator regarding the amount of the award to be paid to the *qui tam* plaintiff.[101] The key House sponsor of FCA reform "adamantly opposed" the complete ban on federal employee suits included in the government's proposal because he viewed the vigilance of federal workers as "a valuable check on government inaction."[102] Four months after Representative Berman introduced H.R. 4563, the Judiciary

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97. For a textual explanation of the portion of H.R. 4563 covering government employees, see *id.* at 10.

98. *See 1992 Hearing, supra* note 87, at 47-48 (quoting Rep. Frank that he "would like to see some sort of exhaustion remedy").

99. *See id.* at 70, 105 (statements of James M. Hagood, a current FCA plaintiff and former employee, U.S. Army Corps of Engineers).

100. *See id.* at 129 (statement of Arthur P. Williams, an FCA claimant and former employee, United States Air Force); *see also* Dworkin & Callahan, *supra* note 14, at 305-07 (discussing the likelihood that the 1986 amendments guaranteeing minimum recoveries and reducing role of judicial discretion in award assessments would spur FCA *qui tam* suits, in light of social-psychological research on financial rewards for performance).

101. *See 1992 Hearing, supra* note 87, at 18 (statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, Department of Justice); *id.* at 106 (statement of James M. Hagood); *see also Congress Grapples With Whistleblower Law*, NAT'L L.J., Apr. 27, 1992, at 7 (noting that the discretionary award mechanism was characterized by opponents and acknowledged by supporters as "a prescription for sticky internal litigation").

102. *Congress Grapples With Whistleblower Law, supra* note 101, at 7 (discussing views of Rep. Howard L. Berman); *see also False Claims Amendments Act of 1993: Hearing Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. 10 (1993) [hereinafter *1993 Hearing*] (statement of Rep. Berman).

Committee reported it, as amended, to the House of Representatives.[103] Although the House subsequently passed it,[104] the 102d Congress came to an end without Senate action to amend the FCA.

Senators introduced legislation with language substantially identical to the amended version of H.R. 4563 in the 103d Congress,[105] and the Senate held hearings on its version in September, 1993.[106] However, neither branch of the Congress took any further action.[107]

IV. DOUBLE DIPPERS OR BUREAUCRACY BUSTERS?

Litigants have advanced numerous arguments regarding the propriety and practical implications of allowing *qui tam* suits by government employees. Although the courts have quickly and nearly universally rejected a few of the objections pressed by the Department of Justice in litigated cases,[108] more compelling problems have been identified by both the Justice Department and other observers.

Since President Clinton took office in 1993, the Department of Justice (DOJ or Justice) has not taken a formal position on the question of whether all government employees should be barred from filing FCA suits.[109] Nonetheless, Justice has argued that an employee of the

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103. *See* HOUSE COMM. ON THE JUDICIARY, *supra* note 57, at 3.

104. 138 CONG. REC. H7978, H7980 (1992).

105. *See* S. 841, 103d Cong., 1st Sess. (1993); H.R. 2915, 103d Cong., 1st Sess. (1993).

106. *See 1993 Hearing, supra* note 102.

107. Telephone Interview with Bari Schwartz, Legislative Assistant to Rep. Howard Berman (Aug. 3, 1994) (expecting no action during the remainder of the 103d Congress). Efforts by a coalition of defense industry representatives to weaken the FCA may explain the 103d Congress' failure to amend it. Senator Charles Grassley, the principal Senate sponsor of the legislation, complained that the lobbyists were "trying to use my bill to destroy *qui tam*." Sheila Kaplan, *Whistleblower Law Under Attack*, LEGAL TIMES, Feb. 14, 1994, at 5; *see also* John Mintz, *Contractors Target Whistle-Blowers*, WASH. POST, May 5, 1994, at B11 (reporting that "defense firms are using Grassley's bill to propose their own changes to" the FCA).

108. *See infra* notes 112-15 and accompanying text.

109. Telephone Interview with Office of Public Affairs, *supra* note 39. During her confirmation hearing, Deputy Attorney General Jaime S. Gorelick testified that the Clinton administration would oppose attempts to weaken the FCA's *qui tam* provisions. *See* Charley Roberts, *Qui Tam Survival is Seen: Gorelick Says Limits on Actions to Be Resisted*, LOS ANGELES DAILY J., Mar. 17, 1994, at 5; *see also* Marcia Chambers, *Sua Sponte*, NAT'L L.J., June 21, 1993, at 15, 16 (characterizing the DOJ during the Reagan and Bush administrations as resistant to *qui tam* claims, and predicting a shift in this

Inspector General's office in the Department of Energy should be precluded from filing *qui tam* actions because it was his job to uncover the information on which he based his claims.[110]

Under previous administrations, Justice aggressively argued that all current and former government employees should be barred from filing *qui tam* actions.[111] The DOJ's zeal on this point was matched by the creativity, and in some instances, the absurdity of its arguments. For example, in several cases Justice asserted that the relator triggered the FCA's "public disclosure" potential bar to a suit[112] "when [the relator] as a government employee 'disclosed' to himself as a member of the public the information on which he based his suit."[113] The courts have consistently rejected this contention.[114] Judges have also found

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position by Attorney General Janet Reno).

110. *See, e.g.*, United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 39 F.3d 957 (9th Cir. 1994), *rev'g* 821 F. Supp. 1356 (N.D. Cal. 1993); United States *ex rel.* Fine v. MK-Ferguson Co., 861 F. Supp. 1544 (D.N.M. 1994).

111. *See, e.g., 1993 Hearing, supra* note 102, at 5 (statement of Rep. Howard L. Berman) (characterizing the DOJ's attitude under earlier administrations as "very antagonistic"); Gail D. Cox, *Qui Tam Suit is Heavy on Technicalities*, NAT'L L.J., Mar. 15, 1993, at 8 (reporting that the DOJ "released on Jan. 15—Attorney General William Barr's last day in office—a 38-page memo written in 1989 by Mr. Barr to then-Attorney General Dick Thornburgh that argues the *qui tam* provisions are an unconstitutional violation of the separation of powers doctrine" and characterizing this action as "[v]alidating those who complain that the Bush administration was hostile to the suits").

112. See *supra* text accompanying notes 66-67 for a discussion of the "public disclosure" jurisdictional provision.

113. United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1419 (9th Cir. 1991); *see also* DEF. CONT. LITIG. REP., July 16, 1990, at A-1807, 1811 (reprinting Brief for the United States at 16-17, United States *ex rel.* LeBlanc v. Raytheon Co., 913 F.2d 17 (1st Cir. 1990) (No. 90-1246) (discussing the public disclosure argument)).

114. United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1500 (11th Cir. 1991) ("[W]e find no 'public disclosure'"); *Hagood*, 929 F.2d at 1419 (holding no public disclosure); *LeBlanc*, 913 F.2d at 20 (allowing government employees to file *qui tam* actions based on information obtained during employment); United States v. CAC-Ramsay, Inc., 744 F. Supp. 1158, 1160 (S.D. Fla. 1990) (concluding the *qui tam* suit was not barred by public disclosure). Several *qui tam* cases brought by government employees, however, have involved application of the Act's public disclosure requirement. *See, e.g.*, Fine v. Chevron, U.S.A., Inc., 39 F.3d 957, 961 (9th Cir. 1994), *rev'g* 821 F. Supp. 1356 (N.D. Cal. 1993).

In other FCA cases, the public disclosure provision has been well litigated since 1986. *See* United States *ex rel.* Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 651 (D.C. Cir. 1994) (applying the original source provision of 31 U.S.C. § 3730(e)(4)(B)); United States *ex rel.* Barajas v. Northrop Corp., 5 F.3d 407, 409 (9th Cir. 1993) (applying the original

unpersuasive the argument that the preparation of a contract by a government attorney constituted engaging in an "administrative investigation," thus meeting the public disclosure criteria.[115]

Justice also protested that the FCA outlet was simply unnecessary for government employees because there were several well established channels available to report misconduct.[116] During congressional

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source provision), *cert. denied*, 114 S. Ct. 1543 (1994); *see also* Kevin W. Daley, *A Qui Tam Action Under the False Claims Act*, 22 COLO. LAW. 229, 236 (1993) (discussing the original source and public disclosure exceptions).

115. *Hagood*, 929 F.2d at 1419 (characterizing the Justice Department's assertions in this regard as "tortured").

116. Federal whistleblowers have enjoyed statutory protection from retaliation since the enactment of the Civil Service Reform Act of 1978 (CSRA), which defined as a prohibited personnel practice the taking or failing to take a personnel action in reprisal for an employee's disclosure of a violation of any law or an employee's disclosure of "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety." 5 U.S.C. § 2302(b)(8)(A)(ii) (1988 & Supp. V 1993). The CSRA created the Merit Systems Protection Board (MSPB), 5 U.S.C. §§ 1201-09 (1988 & Supp. V 1993), and the Office of Special Counsel (OSC), 5 U.S.C. § 1211 (Supp. V 1993), which were charged with investigating and resolving violations of the CSRA's anti-retaliation provisions. The law had little practical effect, however, in overcoming federal employees' fear of reprisal for disclosing governmental misconduct. *See* H.R. REP. NO. 274, 100th Cong., 1st Sess. 19 (1987) (noting results of two of the surveys discussed *infra* in text at notes 121-30). Government workers viewed the OSC as indifferent, if not hostile, to employees' claims. *See id.* at 19-21; S. REP. NO. 413, 100th Cong., 2d Sess. 7-11 (1988). Restrictive court and MSPB decisions were determined to have impeded whistleblower relief, as well. *See id.* at 11-16; H.R. REP. NO. 274, at 25-29.

Congress designed the Whistleblower Protection Act of 1989 (WPA) to address these concerns. Congress explicitly stated the Act's objectives within the law:

> [T]o strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by—
>
> (1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and
>
> (2) establishing—
>
> (A) that the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices;
>
> (B) that the Office of Special Counsel shall act in the interests of employees who seek assistance from the Office of Special Counsel; and
>
> (C) that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.

Pub. L. No. 101-12, 103 Stat. 16 (1989). Although the WPA's provisions addressed a number of criticisms that had been leveled by the CSRA, commentators characterize the protection it offers as "illusory," in that it "carries forward the managerial bias of previous law and results, with some exceptions, in only marginal improvement in whistleblower

hearings in 1992, Assistant Attorney General Stuart M. Gerson stated that "[i]n every one of the government employee cases where there has been a recovery, the government *was* taking action on the allegations at the time the *qui tam* suit was filed."[117] *Qui tam* relators in several of these cases, however, bitterly contested his characterizations.[118]

In fact, the Act's substantial financial incentives may be necessary to overcome potential government whistleblowers' fears of retaliation for reporting misconduct that might otherwise remain undisclosed.[119] Although federal employees enjoy statutory protection against retaliation for whistleblowing,[120] such concerns are persistent and widespread. The federal Merit Systems Protection Board (MSPB) has documented these apprehensions in ongoing research. Approximately 8,600 federal workers responded to the first study, distributed in 1980.[121] About 45% of the respondents indicated that they had observed at least one instance of illegal or wasteful activity in the prior year.[122] Of this

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protections." Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 RUTGERS L. REV. 355, 358 (1991). Recent survey data confirm these misgivings. *See infra* notes 131-35 and accompanying text.

117. *1992 Hearing*, *supra* note 87, at 17.

118. *Id.* at 75 (statement of James M. Hagood) (describing the Justice Department as an "advocate for defendants" in FCA suits); *id.* at 114-16, 119-20, 145-47 (statements of Leon Weinstein) (describing supervisor's and DOJ's failure to respond to evidence of alleged fraud).

119. *See generally 1992 Hearing*, *supra* note 87, at 65 (testimony of John R. Phillips) (detailing the risks faced by whistleblowers, including threats, harassment, isolation within their employing organizations, lack of employability elsewhere, and deterioration of personal relationships).

120. *See supra* note 116. The U.S. Department of Energy recently recognized the inadequacy of existing whistleblower protection mechanisms when it announced a plan to shield its government and contract employees from retaliation for expressing criticism. Citing the need to bring agency critics "back into the fold," Energy Secretary Hazel R. O'Leary stated: "We have zero tolerance for reprisals. It's as simple as that." Whistleblowers and their advocates praised the plan. A proposal to "explore the possible reopening of past disagreements with an eye to righting old wrongs" is viewed as particularly noteworthy. *See* William J. Broad, *Energy Dept. Giving Critics More Voice*, N.Y. TIMES, Oct. 16, 1994, at 29 (discussing the agency's plans to protect whistleblowers).

121. OFFICE OF MERIT SYSTEMS REVIEW AND STUDIES, UNITED STATES MERIT SYSTEMS PROTECTION BOARD, WHISTLEBLOWING AND THE FEDERAL EMPLOYEE: BLOWING THE WHISTLE ON FRAUD, WASTE, AND MISMANAGEMENT—WHO DOES IT AND WHAT HAPPENS i-ii (1981).

122. *Id.* at 1.

group, 70% did not blow the whistle on the misconduct they had witnessed.[123] Nineteen percent of those who chose not to report the misconduct based that decision on the fear of reprisal.[124] Approximately 20% of those who had disclosed wrongful activity indicated that they had experienced or been threatened with retaliation.[125]

The MSPB undertook a follow-up survey of nearly 5,000 government employees in 1983.[126] Although the percentage of respondents who had recently witnessed wrongful activity declined to 25%, the proportion of those who failed to report their observations remained nearly constant, at 69%.[127] This result was both remarkable and discouraging, in light of the government's actions taken before and after the 1980 study to encourage whistleblowing among federal workers.[128] The study revealed further cause for concern with the nearly two-fold increase, to 37%, in the percentage of respondents who claimed that fear of reprisal had led to their decisions not to disclose information about misconduct they had witnessed.[129] In addition, 23% of the respondents who disclosed wasteful or illegal activity experienced actual or threatened retaliation.[130]

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123. *Id.* at 2.

124. *Id.* Fifty-three percent of the respondents did not report the misconduct because they believed no action would be taken. *Id.*

125. *Id.* at 3. The report noted that:

> The most frequently cited forms of reprisal were more subjective, discretionary actions, such as poor performance appraisal, assignment of less desirable or less important duties, and denial of promotion. On the other hand, the least frequently cited forms of reprisal were more overt, objectively negative actions, such as grade level demotion, suspension from one's job, and reassignment to a different geographic area.

Id.

126. *See* OFFICE OF MERIT SYSTEMS REVIEW AND STUDIES, UNITED STATES MERIT SYSTEMS PROTECTION BOARD, BLOWING THE WHISTLE IN THE FEDERAL GOVERNMENT: A COMPARATIVE ANALYSIS OF THE 1980 AND 1983 SURVEY FINDINGS 4 (1984) [hereinafter 1984 MSPB STUDY]. Congress noted these results during its consideration of the 1986 amendments to the Act. *See* SENATE COMM. ON THE JUDICIARY, *supra* note 1, at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269-70.

127. 1984 MSPB STUDY, *supra* note 126, at 5.

128. *Id.* at 1-3 (outlining legislative and executive efforts to encourage whistleblowing by federal employees); *see also supra* note 116 (discussing earlier congressional efforts to encourage whistleblowing).

129. 1984 MSPB STUDY, *supra* note 126, at 5-6.

130. *Id.* at 6.

Recent MSPB research, undertaken in late 1992 to update the earlier findings, evaluated the responses of more than 13,000 employees of the federal government.[131] The results indicate that 18% percent of the respondents had recently acquired direct knowledge of misconduct.[132] One-half of these employees stated that they had reported this information.[133] Although this represents an increase in the proportion of employees who were willing to make disclosures, the study also revealed that fear of retaliation remains a major deterrent to whistleblowing by federal employees. Thirty-three percent of respondents who had observed wrongful conduct reported that the threat of retaliation prevented them from revealing it.[134] Moreover, the results reflect that 37% of whistleblowers experienced or were threatened with reprisal for their disclosures.[135]

These statistics belie the assertions of those who claim that it is not only unwise but also unnecessary to allow federal workers to file *qui tam* suits under the FCA.[136] Taken together, the statistics demonstrate that government employees' fears of retaliation have increased over time and are grounded in experience.[137] Further, these circumstances persist despite concerted efforts by Congress and others to establish disclosure channels and provide protection from reprisal.[138]

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131. *See* OFFICE OF POLICY AND EVALUATION, U.S. MERIT SYSTEMS PROTECTION BOARD i (1993).

132. *Id.* at ii.

133. *Id.*

134. *Id.*

135. *Id.*

136. *See, e.g., 1993 Hearing, supra* note 102, at 66 (statement of Robert D. Wallick, former member, Advisory Panel on Streamlining and Codifying Acquisition Laws) (enumerating alternative, existing outlets for federal employee disclosures).

137. Indeed, one government employee relator has suggested that such individuals might deserve higher recoveries than their counterparts in the private sector, given the barriers they face. See *1992 Hearing, supra* note 87, at 116 (statement of Leon Weinstein).

138. *See, e.g.*, 1992 *Hearing, supra* note 87, at 129 (statement of Arthur P. Williams) (describing retribution experienced by former government attorney in response to disclosures, and noting that "despite the whistleblower protection law, government employees still face a stark threat to their career [sic] in retaliation for exposing fraudulent claims."). *See generally* Terry M. Dworkin & Janet P. Near, *Whistleblower Statutes and Reality: Is There a Need for Realignment?*, 1990 PROC. PAC. SW. BUS. L. ASS'N 73 (discussing additional problems legislators need to consider); Terry M. Dworkin & Janet P. Near, *Whistleblowing Statutes: Are They Working?*, 25 AM. BUS. L.J. 241 (1987)

Government workers' disclosures should be viewed as an important resource in efforts to deter and detect fraud against the United States.[139] No other group of individuals is more likely to have access to information regarding misconduct by federal contractors.[140] The opportunity to make a claim under the Act is especially critical in circumstances where recourse through more usual channels has been unavailing.[141] As noted by the Senate Judiciary Committee,

> [t]here are many reasons why government officials may fail to act appropriately when faced with [evidence of fraud]: bureaucratic corruption, inertia, incompetence, or lack of adequate resources; the potential for political embarrassment; and the perception that exposure of wrongdoing may undercut overall support for the program that is involved.[142]

In such cases, the FCA provides a method to detect wrongdoing that might not otherwise come to light. The enhanced possibility of exposure provided by government employees' access to the FCA framework may also deter misconduct.[143]

At the same time, however, a persuasive argument may be made for imposing limits on government employees' access to the FCA. Any opportunity for personal financial gain, while performing a public duty, presents a conflict of interest.[144] This concern is most clearly implicat-

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(reporting the results of studies which concluded that state anti-retaliation statutes are ineffective in encouraging whistleblowing).

139. *See* Callahan & Dworkin, *supra* note 14, at 310-11.

140. *See, e.g.*, Callahan & Dworkin, *supra* note 14, at 311; *1993 Hearing*, *supra* note 102, at 107 (letter of James M. Hagood); *id.* at 128 (statement of Thomas Devine and Jeff Ruch, Government Accountability Project).

141. *See 1992 Hearing*, *supra* note 87, at 62 (statement of John R. Phillips).

142. HOUSE COMM. ON THE JUDICIARY, *supra* note 57, at 5. *See also 1992 Hearing*, *supra* note 87, at 117-18 (statement of Leon Weinstein) (observing that disclosing information regarding fraud through existing government bureaucracies is sometimes a futile effort).

143. *See 1992 Hearing*, *supra* note 87, at 118 (statement of Leon Weinstein). Weinstein observed that "recent rulings by appellate courts giving federal workers the right to bring [FCA] suits has [sic] sent shivers down the spine of many bureaucrats, and sent shock-waves throughout the federal bureaucracy. The ability of these bureaucrats to ignore or cover-up fraud is now severely threatened." *Id.*

144. *See id.* at 40-41 (statement of Dennis H. Trosch, Deputy General Counsel, Acquisitions and Logistics, United States Department of Defense) (cautioning that "[a]n employee's efforts to seek a share of the Government's recovery is [sic] in conflict with

ed in the present context where a *qui tam* action is brought by a government employee whose job responsibilities include the investigation or prosecution of fraudulent claims. Obviously, it would be improper to permit an individual to use information that she should have reported through official channels to support an FCA action. The chance for individual profit might also discourage disclosures via traditional channels by those employees who have a more general obligation to discover and report fraud against the government.[145]

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his responsibility to place the Government's interests above his own"). *See generally 1992 Hearing, supra* note 87, at 42 (statement of Mr. Trosch) (government employee suits must be prohibited to maintain fair dealing and the appearance of fair dealing). In the past, moreover, the government has taken the position that an employee who receives payment for his role in an FCA action has contravened "numerous executive orders, federal regulations, and policy statements, and . . . the common law of agency." *Id.* at 11 (statement of Stuart M. Gerson, Assistant Attorney General). In his statement, Mr. Gerson also called attention to "criminal statutes . . . forbidding government employees from receiving more than their salaries for work that they are already required to perform and for working on matters in which they have a financial interest." *Id. See generally* Exec. Order No. 12,731, 3 C.F.R. 306 (1990) *reprinted in* 5 U.S.C. § 7301 (Supp. V 1993) (Standards of Ethical Conduct for Employees of the Executive Branch).

145. *See 1992 Hearing, supra* note 87, at 8 (statement of Stuart M. Gerson, Assistant Attorney General) (arguing that "unlike private persons, [government workers] are already required by law to report fraud and are paid by the taxpayers to do so; by giving these employees *qui tam* rewards the taxpayers are essentially paying them for information that the government rightfully already possesses").

Conflict of interest concerns in this context are somewhat similar to those raised with reference to law enforcement personnel who seek rewards for information leading to the successful prosecution of criminals, or for recovering lost property. Contract doctrine establishes that such individuals may not claim a reward publicly offered by a private party because they have a pre-existing duty to investigate and enforce the law. Thus, the officer's performance of his or her job responsibilities is insufficient consideration to enforce the reward offer. *See* ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 180, at 261 (1952). This approach is driven by public policy concerns. *See* Maryland Casualty Co. v. Mathews, 209 F. Supp. 822, 825 (S.D. W. Va. 1962) (denying County investigator an offered reward); Gray v. Martino, 103 A. 24 (N.J. 1918) (denying police officer reward in theft of diamonds); Somerset Bank v. Edmund, 81 N.E. 641 (Ohio 1907) (denying constable reward in bank robbery). Such cases are distinguished from those involving "an ordinary contractual duty in that the public are more directly interested in the officer's performance, and also that public officers may be more likely to scamp their jobs in the hope of extorting special compensation from individuals." CORBIN, *supra*, § 180. The concern that an officer will shirk his or her duties in order to reap a personal benefit is obviously comparable to objections raised regarding FCA claims by government employees.

The exceptions to the common law approach are pertinent, as well: Rewards paid by government agencies and those based on conduct outside the scope of an individual's official duties are permissible. *Id.* These exceptions are justified because "the public

Yet, the federal treasury is the primary beneficiary of successful FCA actions. Thus, the benefits available to *qui tam* plaintiffs are distinguishable from other instances in which employees enjoy personal financial gain based on information acquired through their jobs.[146] Further, the existence of other laws in which Congress has specifically authorized monetary rewards for government workers, including those with responsibility for discovering fraud, illustrates the fundamental legitimacy of programs offering financial incentives to government employees.[147]

Other concerns regarding FCA actions by government employees are equally valid with reference to a *qui tam* lawsuit filed by a private citizen. Critics raise the specter of government employee relators racing to the courthouse, and competing with their colleagues to collect a *qui tam* bounty.[148] In addition, federal prosecutors investigating fraud may be forced to file their suits prematurely, thus jeopardizing their cases from the outset.[149] Finally, potential defendants may be forewarned of

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policy involved is determined by the representatives of the public duly empowered for the purpose." *Id. See also* United States v. Matthews, 173 U.S. 381, 385 (1899) (noting that the distinction "between the right of an officer to take from a private individual a reward or compensation for the performance of his official duty, and the capacity of such officer to receive a reward expressly authorized by competent legislative authority . . . is too obvious to require anything but [a] statement"). Clearly, this reasoning would permit government employee FCA claims, as long as Congress authorizes them.

Under the exception for conduct outside the scope of official duties, consideration to support a reward offer is supplied by performance of services beyond the officer's job description. CORBIN, *supra*, § 180. FCA actions by government employees who are not responsible for investigating and prosecuting fraud are supported by this exception, which applies if "any part of the service" is outside the scope of the employee's responsibilities. *Id.*

146. Hanifin, *supra* note 60, at 605.

147. *See 1992 Hearing, supra* note 87, at 12 (statement of Stuart M. Gerson, Assistant Attorney General) (noting that "[t]here are several award provisions in current law that permit rewards to government employees for conduct that would encompass reporting fraud"); *see also* Callahan & Dworkin, *supra* note 14, at 326-27 (discussing historical reward statutes).

148. *1992 Hearing, supra* note 87, at 13 (statement of Stuart M. Gerson).

149. *Id.* at 13. Assistant Attorney General Gerson stated:

> Given the adverse Circuit Court decisions, we are now unable to conduct investigations without the distinct possibility that some federal employee either working on the investigation or who obtains knowledge of it will see the obvious possibility of a personal reward and will race us to the courthouse before the case is ready to be prosecuted. If government employees are permitted to bring *qui tam* suits, the lawsuits that *we* would otherwise bring will

government action, and could take steps to destroy evidence or otherwise impede ongoing investigations into their activities.[150]

The government has a legitimate interest in controlling the course of its investigations, but the concerns noted above are not dependent on the identity of the relator's employer. For instance, while it is surely inconvenient for a federal prosecutor, in the midst of a fraud investigation, to deal with a related *qui tam* action,[151] it is unlikely that the relator's status as a federal employee will interfere with the government's case.

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be brought by a federal employee who gets to the courthouse first.

Id. The time frame of this statement suggests that Gerson was referring to the decisions of the circuit courts in United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493 (11th Cir. 1991) and United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991).

150. *Williams*, 931 F.2d at 1503; *1993 Hearing*, *supra* note 102, at 129 (statement of Thomas Devine and Jeff Ruch, Government Accountability Project); *see* HOUSE COMM. ON THE JUDICIARY, *supra* note 57, at 8-9 (summarizing hearing testimony regarding these arguments). In addition to the primary concerns discussed in the text, the Justice Department has cautioned that prosecutions may be jeopardized when government employee witnesses' testimony is impeached on the basis of their financial interests, due to their status as *qui tam* plaintiffs. *1992 Hearing*, *supra* note 87, at 14. The possibility that an investigating federal worker, enticed by the opportunity to file his or her own FCA action, might minimize the wrongful conduct he discovered, thus discouraging follow-up by others, was also decried at the hearing on H.R. 4563. *Id.* at 15-16. Further, the government warned against "morale problems in government service among employees assigned to non-fraud investigations or smaller dollar value investigations; and the misallocation of government resources through individual decisions by government employees to spend official time on cases they hope could lead to potential recoveries rather than on other assigned duties." *Id.* at 15. See *1992 Hearing*, *supra* note 87, at 43 (statement of Dennis H. Trosch, Deputy General Counsel, Acquisitions and Logistics, United States Department of Defense) ("There is also the potential for severe morale problems within the Department among employees who are not assigned to investigative or audit jobs that give access to the type of information upon which a *qui tam* case could be based as they see their colleagues reaping large windfalls merely for doing their jobs."). Finally, the specter of retaliatory FCA suits filed against former colleagues by disgruntled, properly discharged employees, *id.* at 15-16 (statement of Mr. Gerson), or against officials by subordinates who disagreed with management decisions, *id.* at 43 (statement of Mr. Trosch), were presented.

Government officials gave no illustrations of cases in which these difficulties had, in fact, arisen. In fact, an attorney who helped draft the 1986 amendments and whose practice focuses on FCA actions testified that he had "seen no evidence that any significant problem now exists" with reference to suits by government employees. *Id.* at 62 (statement of John R. Phillips).

151. *See supra* notes 149-50 and accompanying text.

Because the courts calculate FCA damages on a per-claim basis,[152] commentators have raised the concern that government employees could be "tempt[ed] . . . to increase the amount of their personal profit by temporarily ignoring conduct that might be or might become fraudulent."[153] Delays that prolong wrongful conduct and hinder or prevent investigations are a significant concern.[154] Presumably, however, a privately-employed potential *qui tam* plaintiff might be similarly enticed. Thus, this argument does not provide a compelling basis to distinguish among classes of potential relators.[155]

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152. *See supra* note 21 and accompanying text.

153. Hanifin, *supra* note 60, at 612. This concern has been raised by a Department of Defense representative, who stated:

> We have a number of people involved in contract administration. They may come across deficiencies in contractor's [sic] performance. It's important, from our point of view, that we follow up with these deficiencies. Some of them are far from false claims at the time they occur. The very large potential dollar recovery could motivate an employee not to pursue the job standards that we expect of him, and we can't have that. It is most important, from our point of view, that deficiencies in contract performance be brought to the attention of the employee's supervisor or the contractor in some cases, and the process for resolving contractor deficiencies be followed.

1992 Hearing, *supra* note 87, at 39 (statement of Dennis H. Trosch, Deputy General Counsel, Acquisition and Logistics, United States Department of Defense); *see also id.* at 42-43. *See generally* Mintz, *supra* note 107, at B14 (noting concerns raised by defense contractors that "employees may allow the financial damage to the government to mount before informing authorities, so they can collect a larger award for kicking off a probe").

154. In a statement submitted to the Senate Judiciary Committee, a representative of the Aerospace Industries Association of America asserted that Chester Walsh, a successful *qui tam* plaintiff, "delayed reporting fraudulent acts in at least 11 different programs for years. . . . As a result, the damages associated with this fraud more than doubled." *1993 Hearing*, *supra* note 102, at 80 (statement of Charles F.C. Ruff, Esq.). Walsh's attorney portrayed his client's efforts to bring wrongdoing to light in more heroic terms. *Id.* at 16 (statement of John R. Phillips, Esq.).

155. Mr. Hanifin illustrates his concerns regarding delayed disclosures by noting that "[e]rror caused by ignorance or negligence might be prevented by a timely warning from a government inspector, saving the government as well as the contractor from much trouble and expense." Hanifin, *supra* note 60, at 613. In such cases, however, there would be no basis for a FCA suit, as the contractor would not have the requisite intent to defraud the government. See *supra* note 23 for a definition of knowledge.

Mr. Hanifin also argues that "turning bureaucrats into bounty hunters could destroy the working relationships [between government officials and private contractors] essential to long-term contracts." Hanifin, *supra* note 60, at 613. While acknowledging a key competing consideration (that "government inspectors must maintain the independence necessary to ensure that the equipment and services supplied meet specifications"), he fears that "[a] few well-publicized *qui tam* suits by government employees could persuade

Finally, the fear that throngs of government employees will file FCA suits of dubious value is groundless.[156] FCA actions are often highly complex[157] and litigating *qui tam* cases requires the relator to invest an enormous amount of time and money.[158] These considerations, which are well known to attorneys who evaluate these cases, provide a substantial disincentive to spurious claims.[159] Such deterrents are further buttressed by the Act's provision indicating that a court may order an unsuccessful relator pursuing a case on his or her own to pay the defendant's attorneys' fees and expenses if it concludes that the action "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."[160]

Thus, the main impediments to fraud prosecutions identified by opponents of government employee suits—tip-offs to potential defendants, the forced filing of immature cases resulting from the

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contractors that almost any government official, whether or not he is an inspector, is a hostile potential plaintiff looking for the *qui tam* jackpot. Government workers would be tempted to view every contractor as a potential defendant." *Id.* Mr. Hanifin provides no evidence, anecdotal or otherwise, to support these concerns. If valid, they may well be outweighed by the importance of independence on the part of officials responsible for contract management and oversight.

156. *See 1992 Hearing, supra* note 87, at 11, 13 (testimony of Stuart M. Gerson, Assistant Attorney General, Civil Division, United States Department of Justice).

157. Callahan & Dworkin, *supra* note 14, at 326; *see also 1992 Hearing, supra* note 87, at 65 (statement of John R. Phillips) (observing that "[f]alse claims defendants routinely field a phalanx of attorneys to represent them thoroughly and aggressively").

158. *See 1992 Hearing, supra* note 87, at 65 (statement of John R. Phillips) (describing his representation of a private employee relator in pending case. In the course of five years, his firm had spent three million dollars, including expenses, and 15,000 hours in preparation).

159. *See id.* at 58 (statement of John R. Phillips) ("I want to stress, based on our experience, regarding the concern of the Department of Justice that government employees will file these cases because they will be possibly the recipient of great fortune, . . . that 90 percent of those cases will be screened out by lawyers."); *see also 1993 Hearing, supra* note 102, at 90-91 (statement of Senator Charles E. Grassley) (noting disincentives to filing frivolous suits).

160. 31 U.S.C. § 3730(d)(4); *see also Qui Tam Plaintiff is Ordered to Pay Contractor $147,000 in Attorney Fees*, 12 Employee Rel. Wkly. (BNA) 598 (May 30, 1994) (imposing fees when privately employed *qui tam* plaintiff refused to drop case despite receiving uncontroverted evidence that his claims were meritless). *See generally 1993 Hearing, supra* note 102, at 90-91 (statement of Senator Charles E. Grassley) (noting that defendants have sought attorney's fees in few cases, thus inferring that few frivolous suits have been brought).

initiation of FCA actions,[161] and the withholding of important information from prosecutors by persons planning to file FCA claims—are equally likely to occur in relation to private *qui tam* actions. In addition, several of the Act's procedural provisions operate to minimize these threats to prosecution. The requirement that the *qui tam* complaint and supporting data be served on the government and remain under seal while the government evaluates the case[162] is particularly noteworthy in this regard.[163]

Nonetheless, the conflict of interest inherent in *qui tam* cases brought by government workers, especially those whose job responsibilities include investigating or prosecuting false claims, presents a compelling basis for distinguishing them among the groups of potential relators.[164] Although citizens may have a *general moral obligation* to report wrongdoing affecting society, employees have a *specific duty* to protect the interests of their employers.[165] An employee who fails to report wrongdoing affecting the employer presumably breaches this duty.

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161. *See* United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1503 n.16 (11th Cir. 1991) ("[C]oncerns articulated by the United States describe administrative difficulties that might arise when any private *qui tam* plaintiff files suit prior to the completion of a government investigation.").

162. *See* 31 U.S.C. § 3730(b)(2). The statute states that "[t]he complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." *Id.* The DOJ may move for extensions of the 60-day period "for good cause shown." *Id.* § 3730(b)(3). Indeed, Congress added this provision to the Act in 1986, explicitly "in response to Justice Department concerns that *qui tam* complaints filed in open court might tip off targets of ongoing criminal investigations." SENATE COMM. ON THE JUDICIARY, *supra* note 1, at 16, *reprinted in* 1986 U.S.C.C.A.N. at 5281.

163. In addition to the requirement that the relator file the case under seal, the Act allows the government to dismiss an action if it gives the relator notice, and the relator has an opportunity to be heard on the motion. 31 U.S.C. § 3730(c)(2)(A). Further, the government can ensure that an action is properly litigated by exercising its right to intervene. *Id.* § 3730(b)(2).

164. *But see* HOUSE COMM. ON THE JUDICIARY, *supra* note 57, at 5 (noting whistleblower advocates' argument that the FCA's jurisdictional bar on actions based on publicly disclosed information sufficiently addresses conflict of interest concerns). See *supra* notes 66-67 and accompanying text for a discussion of the public disclosure requirement.

165. RESTATEMENT (SECOND) OF AGENCY § 387 (1958) (duty of loyalty).

These expectations are enhanced in the context of government workers, who are obligated to serve the public as well as their employer.[166]

These concerns suggest an approach that increases the detection and deterrence of wrongdoing by stimulating whistleblowing on one hand, and encouraging government workers completely to discharge their job responsibilities on the other. The primary components of the framework recently considered by Congress—notification requirements plus a waiting period during which the government may file suit—address these objectives.[167] The proposed legislation would be improved, however, by establishing different filing prerequisites for those federal workers responsible for investigating or prosecuting fraud. Claims in which a government investigation is already in progress and those which are based on new allegations should be distinguished. Further, Congress should reduce the number of persons to whom notification must be made, and create an incentive for the whistleblower to support fully the government's development of the potential claim.

V. A FRAMEWORK FOR ACCESS

Federal employees who are responsible for uncovering fraud have an acute obligation to disclose evidence of misconduct without regard to personal benefit. They are also more likely routinely to have access to information regarding false claims. Therefore, a self-serving decision about the handling of evidence has a direct and immediate impact on government efforts to uncover and eradicate fraud.[168] Accordingly,

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166. *See* Exec. Order No. 12,731, 3 C.F.R. 306 (1990) *reprinted in* 5 U.S.C. § 7301 (Supp. V 1993) (Standards of Ethical Conduct for Employees of the Executive Branch).

167. *See supra* text accompanying notes 92-96.

168. Courts and other observers have expressed the view that access to the FCA should be limited, or eliminated altogether, for federal employees who are responsible for detecting and prosecuting fraud. *See, e.g.*, United States *ex rel.* LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990) (noting that "[i]t was LeBlanc's responsibility, a condition of his employment, to uncover fraud. The fruits of his effort belong to his employer—the government"); *1993 Hearing*, *supra* note 102, at 43, 47 (statement of Donald J. Kinlin, Chairman, Section of Public Contract Law, American Bar Association) (urging that "auditors, investigators, attorneys, and contracting officers not be allowed" to file claims under the Act); *see supra* note 145 (recognizing an exception in contract law permitting the enforcement of a private party's promise to pay a reward to a law enforcement official if the conduct at issue is outside the scope of the individual's job responsibilities). *But see* United States v. CAC-Ramsay, Inc., 744 F. Supp. 1158 (S.D. Fla. 1990) (permitting *qui tam* recovery for former employee of the Department of Health and Human Services whose principal job responsibility was conducting fraud investigations).

federal workers whose responsibilities include investigating or prosecuting fraud, or both ("responsible employees"), should be permitted to file a *qui tam* action only in instances where the case would otherwise not be pursued.[169]

To achieve this objective, responsible employees should be required to disclose, in writing, all information regarding suspected and confirmed fraud through the proper reporting channels available to them in the ordinary course of their jobs.[170] In cases where the responsible employee believes that the person or persons to whom the employee would ordinarily report the information is involved in the alleged misconduct, the employee should then be permitted to make full disclosure to the Attorney General.[171]

There are several reasons why notification to a single authority is preferable to the multi-level requirement imposed in recent legislative proposals. First, it encourages, to the extent possible, performance of job responsibilities within the context of existing reporting relationships. Second, it minimizes the administrative burden on the person making the disclosure and decreases the likelihood that the person may inadvertently fail to comply with a prerequisite to suit. Third, it reduces the possibility that a potential defendant will destroy evidence and cover-up the fraud.[172] Most importantly, it reduces the perceived, as well as the actual, threat of retaliation against the whistleblower, thus increasing the likelihood that a report will be made.[173]

Following the responsible employee's disclosure, the report recipient should have twelve months from the date of the disclosure to initiate

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169. A responsible employee is any person whose duties include the detection, investigation, or prosecution of fraud against the government and any person whose job involves assisting or supporting such activities.

170. For a discussion of the benefits of intra-organizational whistleblowing, see Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 AM. BUS. L.J. 267, 299-307 (1991).

171. The Attorney General is recommended because she is charged with enforcing the FCA under existing law. 31 U.S.C. § 3730(a).

172. Whistleblower advocates have raised the additional concern that a multi-level reporting requirement will increase the likelihood that potential defendants may become aware of the investigation and take steps to thwart it. *1993 Hearing, supra* note 102, at 129 (statement of Thomas Devine and Jeff Ruch, Government Accountability Project).

173. *See generally* MYRON P. GLAZER & PENINA M. GLAZER, THE WHISTLEBLOWERS: EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY (1989) (describing the consequences suffered by whistleblowers).

prosecution or propose a resolution of the matter. The recipient should be authorized to seek one twelve-month extension of this period.[174] If resolution of the matter is initiated prior to the expiration of the twelve or twenty-four month period, the responsible employee should not be permitted to file an FCA lawsuit on the basis of the disclosed information, and should not share in any recovery based on the FCA. If resolution of the matter has not been initiated by that time, however, the responsible employee should be allowed to initiate a *qui tam* lawsuit on the same basis, and with the same rights, as any other relator. At this point, any conflict between the interests of the government and the responsible employee would be minimal.

Government employees who do not have specific anti-fraud responsibilities ("other employees") should be given more immediate access to the FCA's financial incentives for providing information. Here, conflict of interest considerations are not as significant as they are with reference to responsible employees. There will also be less interference with the government's interest in managing investigations. Therefore, other employees should be authorized to serve *qui tam* complaints to the Justice Department, under seal, in the same manner as private sector relators.[175]

In cases where Justice or another government agency is already investigating the matter, however, the federal employee should be obligated to delay his claim to reduce the impediments to successful prosecution that might otherwise result.[176] Therefore, the sixty-day period within which the DOJ is normally required to respond to the complaint should be increased to twelve months, subject to opportunities for extension included in existing law.[177] Regardless of whether the government initiates prosecution at the expiration of this period, the employee should be permitted to file a *qui tam* lawsuit on the same basis, and with the same rights, as any other relator. In cases where the matter was not already under investigation when the employee served his

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174. The process for requesting an extension set forth in previously introduced legislation should be retained: the motion would be filed in camera, and would require a showing "that the additional period is necessary for the Government to decide whether or not to file such action." *See, e.g.*, H.R. 2915, 103d Cong., 1st Sess. 4 (1993).

175. *See supra* text accompanying notes 29-30.

176. *See supra* notes 149-50 and accompanying text.

177. *See supra* note 30 and accompanying text.

complaint on the Justice Department, the employee should have the same rights as a relator employed in the private sector.

Former federal employees who seek to file *qui tam* actions based on information gained during their tenure with the federal government should be subject to similar limitations. Although disclosures by prior responsible employees should be made directly to the Attorney General, as there would be little need to preserve previous reporting relationships, the remaining restrictions outlined above as to current responsible employees should apply. FCA actions by other former federal employees should be handled as if the relators were still employed by the government.

In addition, an FCA award otherwise available to any current or former federal employee should be subject to reduction by the court if the relator did not cooperate fully in the investigation and prosecution of the matter. Full cooperation would include the complete and timely disclosure of any pertinent information about the claim available to the relator. Given the substantially reduced effectiveness of financial incentives for whistleblowing when they are made discretionary,[178] the burden of demonstrating the employee's failure to cooperate should be borne by the government.

VI. CONCLUSION

Allowing federal workers to file *qui tam* actions may well enhance the detection and deterrence of misconduct. The FCA's financial incentives are needed to overcome potential whistleblowers' pervasive and apparently realistic fears of retribution. Yet, important considerations support the imposition of limits on such suits by government employees.

The proposed framework makes FCA rewards available to government employees, thus providing an incentive to counteract the personal and professional risks faced by potential whistleblowers. The proposed prerequisites to filing a *qui tam* action may reduce somewhat the effectiveness of the Act's whistleblowing incentive because the time between the disclosure and the relator's recovery will increase.[179] This

178. *See supra* text accompanying note 100.

179. *See* Callahan & Dworkin, *supra* note 14, at 298 & n.92 (arguing that the motivational effects of financial incentives decrease as the time between the act and its reward increase).

framework, however, ameliorates concerns regarding inappropriate impediments to prosecution by the notification/delay requirements and by the full cooperation limitation. Conflict of interest concerns are addressed, albeit not entirely eliminated, by the distinctions drawn between categories of employees. In sum, bureaucracy busters are supported, and double-dippers are dissuaded by this framework. Thus, by striving for the reduction of fraud against the federal government, this proposal effectively serves the primary objective of the 1986 amendments.