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FALSE CLAIMS ACT: INCENTIVIZING INTEGRITY FOR 150 YEARS FOR ROGUES, PRIVATEERS, PARASITES AND PATRIOTS

*James B. Helmer, Jr.**

The Federal Government buys hundreds of billions of dollars worth of goods and services each year. Such purchases are typically made pursuant to written agreements with specific terms and conditions often supplied by regulations called out by a number in the agreement. But the government does not always get its bargain. Goods are delivered of lesser quality than agreed upon or not delivered at all. Services, if performed, may not be done as specified. In such a case the United States has been cheated.

Cheating the government has been historically wide-spread, has endangered lives, and has even put the future of the nation at risk. Catching and preventing government contract thieves is difficult, expensive, and often unsuccessful.

Many Congresses have wrestled with how best to protect the public finances. Should nefarious contractors be court-martialed as war criminals? How can the citizens be confident the executive branch is pursuing and prosecuting those who would steal from the public? What is the best way to catch those contract cheaters?

In colorful language one court describes the answer as “Congress has let loose a posse of *ad hoc* deputies to uncover and prosecute frauds against the government. [Defendants] may prefer the dignity of being chased only by the regular troops; if so, they must seek relief from Congress.”¹ Because of the wild successes of the posse of *ad hoc* deputies, it is unlikely Congress will be providing relief anytime soon to those who cheat the government.

This article will review the history of the Federal False Claims Act. The False Claims Act was originally enacted in 1863 and has become the primary tool by which the federal treasury is now protected.²

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1. *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Center*, 961 F.2d 46, 49 (4th Cir. 1992).

2. *United States ex rel. Roby v. Boeing Co.*, 302 F.3d 637, 641 (6th Cir. 2002), *reh'g denied*,

Indeed, it has proven so successful that its tenets have been adopted by numerous states³ and have served as the basis for numerous government reforms of statutes dealing with income tax cheating⁴ and securities law violations.⁵ The overriding theme of the False Claims Act is virtually to deputize an army of insiders to uncover, inform, and pursue those government contractors who knowingly cheat in their agreements with the government. Such persons are called “relators.” If a relator’s efforts are successful in returning money to the United States, the law provides for generous rewards and protections for the relator and stiff penalties and disgorgement of gains by the offending contractors.

I. ORIGINS OF THE POSSE

As we will see, the False Claims Act originated from war-time necessity. But the concept of enlisting members of the public to protect the King’s property is actually hundreds of years old. Such actions have been traced to as early as 1335.⁶

Such suits are called *qui tam* actions because they are brought by a person *qui tam pro domino rege quam pro si ipso in hac parte sequitur*, that is, “[w]ho sues on behalf of the king as well as for himself.”⁷

Qui tam actions were common in England. They were often based on a private citizen’s statutory right to share in the Government’s recovery from wrongdoers. By the 14th century “[m]uch reliance was placed on common informers to secure the enforcement of laws effecting public order and safety.”⁸

2003 U.S. App. LEXIS 1275 (6th Cir. Jan. 24, 2003), *cert. denied*, 539 U.S. 969 (2003).

3. JAMES B. HELMER, JR., FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION, ch. 22 § 1 (BNA/Bloomberg, 6th ed. 2012).

4. The Tax Relief and Health Care Act of 2006 enacted significant changes in the IRS award program for whistleblowers. 26 U.S.C. § 7623 (2006). Since 1867, Congress had provided that rewards in the discretion of the Secretary could be made to those detecting and bringing to trial persons guilty of violating internal revenue laws. Before 2006, such awards were discretionary and IRS policy determined the amount. Now, 26 U.S.C. § 7623(b) (2006) establishes the conditions that qualify a whistleblower to an award. These requirements generally require that \$2 million must be in dispute. There are no *qui tam* provisions for allowing the whistleblower to participate in the prosecution after making his tip to the IRS. In fact, because of the confidentiality laws regarding taxes, the whistleblower is largely kept in the dark.

5. Section 922 of the Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(a), 124 Stat. 1841 (2010), amended the Securities Exchange Act of 1934, 15 U.S.C. § 78(a) by adding Section 21F, entitled “Securities Whistleblower Incentives and Protection.” While this is not a *qui tam* provision permitting whistleblower participation it does provide for rewards to whistleblowers whose voluntary original information leads to successful enforcement actions by the Commission.

6. 9 Edward III ch. 1 (1335).

7. BLACK’S LAW DICTIONARY 1251 (6th ed. 1990); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 769 n.1 (2000).

8. LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION

The English statutes gave forfeitures

[a]t large to any common informer; or in other words, to any such person or persons as will sue for the same: and hence such actions are called *popular* actions, because they are given to the people in general. Sometimes one part [of the recovery] is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor: and then the suit is called a *qui tam* action⁹

The English tradition of *qui tam* provisions continued into the Anglo-American system of law. In fact, the first Continental Congress of the United States (which included several members who later drafted the United States Constitution and the Bill of Rights) enacted several statutes containing *qui tam* provisions.¹⁰ Of the fourteen penalty statutes enacted by the First Congress, between ten and twelve authorized *qui tam* suits.¹¹ Other early Congresses continued this tradition so that by 1805 “[a]lmost every fine or forfeiture under a penal statute, may be recovered by an action of debt [i.e., by a *qui tam* relator] as well as by information [by a public prosecutor].”¹² In fact, the landmark decision

FROM 1750 143 (1948).

9. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 161–62 (George Sharswood ed., J.B. Lippincott Co. 1889).

10. *See* *Adams v. Woods*, 6 U.S. 336, 341 (1805) (“Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt [by a *qui tam* relator] as well as by information [by a public prosecutor].”). It is therefore doubtful that the framers of the Constitution believed *qui tam* suits to be unconstitutional under any provision of the Constitution.

11. *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1086 and n.2 (C.D. Cal. 1989), *perm. app. denied*, No. 89-80201 (9th Cir. July 31, 1989).

12. *See Woods*, 6 U.S. at 341. The First Congress passed several statutes allowing injured parties to sue for damages on both their own and the United States’ behalf. *See* Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124–25 (allowing author or proprietor to sue for and receive half of penalty for violation of copyright); cf. Act of Mar. 1, 1790, ch. 2, § 6, 1 Stat. 103 (allowing census taker to sue for and receive half of penalty for failure to cooperate in census); Act of July 5, 1790, ch. 25, § 1, 1 Stat. 129 (extending same to Rhode Island); *see also*, Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 102 (allowing informer to sue for, and receive half of fine for, failure to file census return); Act of July 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131–33 (allowing private individual to sue for, and receive half of fine for, carriage of seaman without contract or illegal harboring of runaway seamen); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137–38 (allowing private individual to sue for, and receive half of goods forfeited for, unlicensed trading with Indian tribes); Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 209 (allowing person who discovers violation of spirits duties, or officer who seizes contraband spirits, to sue for and receive half of penalty and forfeiture, along with costs, in action of debt); cf. Act of Apr. 30, 1790, ch. 9, §§ 16, 17, 1 Stat. 116 (allowing informer to conduct prosecution, and receive half of fine, for criminal larceny or receipt of stolen goods). Act of July 31, 1789, ch. 5, § 29, 1 Stat. 44–45 (giving informer full penalty paid by customs official for failing to post fee schedule); Act of Aug. 4, 1790, ch. 35, § 55, 1 Stat. 173; Act of July 31, 1789, ch. 5, § 38, 1 Stat. 48 (giving informer quarter of penalties, fines and forfeitures authorized under a customs law); Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 60 (same under a maritime law); Act of Aug. 4, 1790, ch. 35, § 69, 1 Stat. 177 (same under another customs law); Act of Sep. 2, 1789, ch. 12, § 8, 1 Stat. 67 (providing informer half of penalty upon conviction for violation of conflict-of-interest and bribery provisions in Act establishing treasury Department); Act of Mar. 3, 1791, ch. 38, § 1, 1 Stat. 215 (extending same to additional Treasury employees); Act of Feb. 25, 1791, ch. 10, §§ 8, 9, 1 Stat. 195, 196 (providing informer half or fifth of fines resulting from improper trading

establishing the authority of the American courts, *McCulloch v. Maryland*,¹³ was itself based on a *qui tam* action.¹⁴

Eventually all of these early *qui tam* statutes would be repealed.¹⁵ But the English concept of enlisting persons to seek recovery for their government and rewarding them for so doing had made it to American shores.¹⁶

II. CIVIL WAR ORIGIN OF THE FALSE CLAIMS ACT: ENLISTING A ROGUE TO CATCH A ROGUE

At the same time that the Union Army was suffering defeat after bloody defeat from rebel forces the Congress was receiving alarming reports of misappropriation of money supposedly spent to aid the war effort. Such reports included:

- The same mules being sold over and over again to Army quartermasters.¹⁷
- Rotted ship hulls freshly painted to appear new then sold as new vessels to the NAVY.¹⁸
- Infantry boots made of cardboard which wore out after a mile of marching.¹⁹
- Uniform cloth made from recycled rags, which disintegrated when it became wet.²⁰

or lending by agents of Bank of United States); *cf.* Act of Aug. 4, 1790, ch. 35, § 4, 1 Stat. 153 (apportioning half of penalty for failing to deposit ship manifest to official who should have received manifest, and half to collector in port of destination).

13. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

14. *See Worcester v. Georgia*, 31 U.S. 515, 537 (1832) (discussing *McCullough v. Maryland*).

15. In addition to the False Claims Act, there are three other *qui tam* statutes in the federal code: 46 U.S.C. § 80103 (1988) (forfeiture of vessels taking undersea treasure from the Florida coast to foreign nations); Act of July 8, 1870, ch. 230, 16 Stat. 198, 203 (current version at 35 U.S.C. § 292(b)(1988)) (false making of patented articles) (revised Sept. 16, 2011 to eliminate the *qui tam* provisions); Act of June 30, 1884, Ch. 161, § 27, 4 Stat. 729, 733–34 (current version at 25 U.S.C. § 201 (1988)) (regulating Indian trade).

16. The long tradition of *qui tam* actions in both England and the American colonies would prove to be “particularly relevant” when the United States Supreme Court in 2000 determined such actions to be constitutional. *Vt. Agency of Natural Res. v. United States ex rel. Schumer*, 529 U.S. 765, 774 (2000).

17. 132 Cong. Rec. H6482 (daily ed. Sept. 9, 1986) (statement of Rep. Berman).

18. WAYNE ANDREWS, *THE VANDERBILT LEGEND* 77–84 (1941).

19. CONG. GLOBE, 37TH CONG., 3D SESS. 955 (1863).

20. Shoddy cloth was made from recycled rags. When the Civil War started Brooks Brothers glued together shredded, often decaying rags, and pressed them into a semblance of cloth. Uniforms were then made from this result, which would literally melt on soldiers wearing them in the first rainstorm. Ron Soodalter, *The Union's 'Shoddy Aristocracy'*, N.Y. TIMES OPINIONATOR (May 9, 2011), <http://opinionator.blogs.nytimes.com/2011/05/09/the-unions-shoddy-aristocracy>; CLINT JOHNSON, *A VAST AND FIENDISH PLOT: THE CONFEDERATE ATTACK ON NEW YORK CITY* 77 (Citadel 2010); BARNET SCHECTER, *THE DEVIL'S OWN WORK: THE CIVIL WAR DRAFT RIOTS AND THE FIGHT TO RECONSTRUCT AMERICA* 17 (Walker & Co. 2007); *Shoddy Army Contracts*, SACRAMENTO DAILY

- Gunpowder barrels that when opened contained sawdust.²¹

Such reports led Senator Henry Wilson of Massachusetts to introduce on January 16, 1863, Senate Bill 467 “to prevent and punish frauds upon the Government of the United States.”²² Senator Wilson summarized the need to act:

[T]hese Halls have rung with denunciations of the frauds of contractors upon the Government of the United States. Investigating committees in both Houses of Congress have reported the grossest frauds upon the Government. The Government is doing what it can to stop these frauds and punish the persons who commit them. The Government finds however, that it has no law adequate to punish them . . . [T]he War Department says there is now no law adequate to meet these cases of fraud upon the Government. This bill is reported for the purpose of ferreting out and punishing these enormous frauds upon our Government; and, for one, my sympathies are with the Government, and not with the men who are committing these frauds. We have all of us seen enough, since this rebellion broke out, of frauds perpetrated upon the Government, and above all, and more than all, perpetrated upon our soldiers in the field; and I trust that the Senate will pass this bill, or some bill that will put fraudulent contractors in a position where they may be punished for their frauds.²³

The bill moved quickly through the Senate with stirring words of support:

It is one of the crying evils of the period, if report is in any degree to be credited, that our Treasury is plundered from day to day by bands of conspirators, who are knotted together in this city and other large cities for the purpose of defrauding and plundering the Government.²⁴

. . . .

I do not think that there is any class of culprits who deserve more certain and speedy punishment than many of the classes of persons who are provided for, or attempted to be provided for, in this bill, and who have failed to perform their duties in the execution of contracts made with the Government.²⁵

The concept of paying a 50% reward of the amount recovered was seen as a strong temptation to get conspirators to turn on each other:

UNION, Sept. 27, 1861, at 4. (“Garments furnished [to Union soldiers] have literally resolved themselves into their original elements within a week after being put on by the soldier.”).

21. CONG. GLOBE, 37TH CONG., 3D SESS. 955 (1863).

22. *Id.* at 348 (statement of Sen. Wilson).

23. *Id.* at 956.

24. *Id.* at 955 (statement of Sen. Howard).

25. *Id.* at 956 (statement of Sen. Davis).

The bill offers, in short, a reward to the informer who comes into court and betrays his co-conspirator, if he be such; but it is not confined to that class. Even the district attorney, who is required to be vigilant in the prosecution of such cases, may be also the informer, and entitled himself to one half the forfeiture under the *qui tam* clause, and to one half of the double damages which may be recovered against the person committing the act. In short, sir, I have based the fourth, fifth, sixth, and seventh sections upon the old-fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.²⁶

Congress held spirited debates about what to do about such shenanigans. Making such conduct a crime was easy. But Congress wanted to go further. Thus, adding *qui tam* provisions to a civil/criminal False Claims Act was decided as appropriate.²⁷ The civil False Claims Act allowed anyone—including U.S. Attorneys—to bring an action on behalf of the United States against a government contractor who knowingly submitted false claims for payment to the Government. If the suit was successful the offending contractor was required to pay double damages and a \$2,000 per false claim penalty. The successful relator would receive 50% of the amount recovered. Thus, the concept was to make the United States whole even after the 50% reward was paid.

The Senate version was passed and forwarded to the House on February 16, 1863. The House made a single amendment concerning the criminal penalty. When returned to the Senate for approval it was promptly passed. The False Claims Act was sent to President Lincoln who signed it the same day, March 2, 1863.²⁸

There are few reported *qui tam* cases after President Lincoln signed

26. *Id.* at 955–56 (statement of Sen. Howard). Senator Howard's remarks about the district attorney qualifying for a reward often echo today given the Department of Justice's long crusade to prevent government employees from bringing *qui tam* suits. See HELMER, *supra* note 3, at ch. 1, § IV(C).

27. Making such an offense a court martial matter was rejected. CONG. GLOBE, 37TH CONG., 3RD SESS. 956. As Senator Davis remarked:

I then came to the conclusion that forces, soldiers, troops, armed men, and not the followers of an army, are subject to military law and military courts; that it is only men of war who are to be tried by that stern code, and by men whose rule is arbitrary power and implicit obedience rather than the just principals of law.

Id.

28. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. The False Claims Act was reenacted as §§ 3490–94 of the Revised Statutes with the criminal provisions moved to another location. U.S. Rev. Stat. Tit. 36, § 3490–94 (1875) (civil) and § 5438 of the Revised Statutes, U.S. Rev. Stat. Tit. 70, § 5438 (1875) (criminal). The Civil False Claims Act was later codified under § 231–35 (1976), and finally recodified in 1982 under §§ 3729–31 of Title 31 of the United States Code, 31 U.S.C. §§ 3729–31 (1982). President Lincoln also signed the "Military Conscription Act" for drafting military men this same week on Mar. 3, 1863.

the 1863 original version of the False Claims Act. One case demonstrated that the private citizen alone prosecuted the action and the Government had no right to intervene or to void or preempt the relator's vested right in the outcome of the lawsuit.²⁹ But no such action could be discontinued without written consent of the United States District Attorney and the Court.³⁰

The original False Claims Act worked very well. As noted by one court in 1885:

[The False Claims Act] is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory . . . that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting . . . under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.³¹

III. PARASITIC LAWSUITS NEARLY END THE FALSE CLAIMS ACT

Unleashing a posse of rogues and enterprising privateers was one thing. But encouraging an army of parasites did not sit well with Congress.

As a result of WWII, a whole new class of war profiteers surfaced. But unlike 1863, by 1943 the federal government had a Department of Justice, including the Federal Bureau of Investigation, which pursued criminal prosecutions against some government contractors.

The Attorney General largely ignored the civil False Claims Act.³² He usually did not file companion civil False Claims Act cases at the same time that criminal indictments were returned. This delay gave rise to a growth industry in *qui tam* False Claims Act litigation. A few enterprising citizens with knowledge of the False Claims Act would lurk in federal courthouses for criminal indictments to be brought against defense contractors then immediately file a civil False Claims Act case based on the indictment against the same contractor. Such actions, known as “parasitic lawsuits,” infuriated the Attorney General Francis Biddle.

29. *United States ex rel. Dowell v. Griswold*, 30 F. 762, 763 (D. Or. 1887).

30. *Id.*

31. *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885). This statement was later quoted with approval by the United States Supreme Court in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943), and again in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).

32. See *infra* note 41 and accompanying text.

It so happened that one such lawsuit made its way to the United States Supreme Court when an electrical contractor on a public works administrative project in Pittsburg, Pennsylvania was hit by a jury verdict from a *qui tam* suit. The Supreme Court requested an amicus curiae brief from the United States. General Biddle seized this opportunity to challenge the 1863 law.

In *United States ex rel. Marcus v. Hess*,³³ the United States had indicted some electrical contractors for collusive bidding in a government project. The defendants pled *nolo contendere* and were fined \$54,000. In the *qui tam* case arising from the same conduct, the relators—after a lengthy trial—obtained a verdict for \$315,000. Thus, it appears the *qui tam* provisions worked exactly as contemplated by Congress: the relators who bore the entire risk of the civil action obtained a net recovery for the United States of \$150,000, some three times the amount of fines the Department of Justice had recovered in the criminal case.

Despite the effectiveness of the *qui tam* provisions in the *Marcus* case, General Biddle used the amicus curiae opportunity to challenge the *qui tam* provisions. He told the Supreme Court that *qui tam* actions should be eliminated because effective law enforcement required that control of litigation involving the United States should be left to the sole discretion of the Attorney General. And despite the civil recovery in *Marcus*, General Biddle argued that *qui tam* actions might hurt the war effort.³⁴

The Supreme Court rejected General Biddle's arguments as policy matters appropriately addressed to and dealt with by the Congress. The Court unanimously upheld the relators' verdict.³⁵

Qui tam suits have been frequently permitted by legislative action, and have not been without defense by the courts . . . Congress has power to choose this method to protect the Government from burdens fraudulently imposed on it; to nullify the . . . statute because of the dislike of the independent informer sections would be to exercise a veto power which is not ours. Sound rules of statutory interpretation exist to discover and not to direct the Congressional will.³⁶

So General Biddle's attack on the *qui tam* provisions of the False Claims Act shifted to another front—he sought legislative action to abolish totally the *qui tam* provisions. He went to Congress and cited the

33. 317 U.S. at 537.

34. *Id.* at 546–47.

35. *Id.* at 547, 552–53.

36. *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1155 (2d Cir. 1993) (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541–42 (1943)), *cert. denied*, 508 U.S. 973 (1993).

Marcus ruling and pointed to nineteen other pending *qui tam* actions as warranting repeal of the False Claims Act's *qui tam* components.

The House of Representatives hastened to do General Biddle's bidding. On April Fools Day, 1943, with only twenty-three members present, the House passed a resolution to amend the False Claims Act by abolishing all *qui tam* actions.³⁷ No debates were held and no witnesses were called.³⁸

But the 1943 efforts to kill *qui tam* met strong resistance in the United States Senate.³⁹ Hearings were held and at least one *qui tam* relator, Gordon Coates, testified against repeal of the *qui tam* provisions.⁴⁰

37. 89 Cong. Rec. 7570, 7571 (1943). One Congressman referred to the practice of filing *qui tam* cases based on information developed by the governments as a "racket." 89 Cong. Rec. 7578 (1943) (statement of Rep. Walter). When the Senate refused to repeal the *qui tam* provisions and sent the House a revised bill, members of the House squabbled over whether the real "shysters" were the lawyers who brought the *qui tam* cases or the defense contractors who cheated the government. See 89 Cong. Rec. 10849 (daily ed. Dec. 17, 1943).

38. 89 Cong. Rec. 7578 (1943) (statement of Sen. Langer). After the Senate rejected the attempt by the House to repeal the *qui tam* provisions, the House did have a rather heated discussion between Representative Walter who complained of parasitic lawsuits and Representative Miller who believed the disclosure of fraud should be encouraged and financially incentivized. Miller quoted Abraham Lincoln:

Worse than traitors in arms are the men who pretend loyalty to the flag, feast and fatten on the misfortunes of the Nation while patriotic blood is crimsoning the plains of the South and their countrymen are mouldering in the dust. The leniency of the Government towards these men is a marvel which the present cannot appreciate and history never explain.

The author has been unable to find a contemporaneous citation for the quote ascribed to Lincoln. Rather, the quote seems to be from a report by the House Select Committee on Government Contracts on Mar. 3, 1863 (the day after Lincoln signed the False Claims Act). See 3 GUSTAVUS MYER, HISTORY OF THE GREAT AMERICAN FORTUNES (1910).

39. Interestingly, the year before in 1942, based on the Third Circuit Court of Appeals decision in *United States ex rel. Marcus v. Hess*, 127 F. 2d 233 (3d Cir. 1942), *rev'd*, 317 U.S. 537 (1943), the Senate had passed legislation repealing the *qui tam* provisions with little debate at the close of the 77th Congress. 88 Cong. Rec. 9138 (1942) (discussing S.2707). After the Supreme Court reversed the Third Circuit decision opposition to the repeal developed in the Senate.

40. Gordon Coates' experience as a *qui tam* relator and a witness before the Senate Judiciary Committee demonstrates the ever-present danger of being a whistleblower. Mr. Coates' family business was low bidder on building materials for a war ordnance plant in St. Louis, Missouri. The Coates' company was originally awarded the contract, but was displaced after making its first shipment when the contract was awarded to another contractor associated with former Kansas City political boss Tom Pendergast. The other contractor submitted a bid fourteen days beyond the bid deadline for \$100,000.00 more. 89 Cong. Rec. 10698 (1943) (remarks of Sen. Langer). After the new contractor failed to deliver timely and delayed completion of the plant, Coates disclosed this information to the Attorney General. For nine months, Mr. Coates requested, in vain, that the DOJ pursue the matter. Consequently, Mr. Coates brought a *qui tam* action. Thereafter, Mr. Coates appeared before the Senate Judiciary Committee while it was deliberating the proposed amendments. He was assured by Assistant Attorney General Tom Clark that he could prosecute his case to conclusion. Before the year was out, Representative Costello, the chairman of an investigating committee of the House Military Affairs Committee, requested Mr. Coates' Selective Service file for a review of his draft classification. Mr. Coates (who enjoyed a draft deferment classification as a producer of vital products for the war effort) was then reclassified to 1-A. See 89 Cong. Rec. 7572 (1943) (statement of Sen. Van Nuys); see also, 89 Cong. Rec. 10698-99 (1943) (remarks of Sen. Langer). Representative Miller, the Congressman from

The Senate debate focused on what deference should be provided to the Attorney General. It was pointed out that between 1863 and 1942 the Attorney General had never brought a civil False Claims Act action.⁴¹ In addition to the Coates case, the Senate considered a scandal involving the Democratic National Committee Chairman who had in 1935 been prosecuted by the Attorney General for overcharging the government on a public works project but who avoided conviction. A rare government civil suit for \$1.2 million was dismissed on statute of limitation grounds.⁴² The Senate considered language that would have permitted a *qui tam* case to be pursued only if the Attorney General had failed to act on information giving rise to the suit for 6 months.⁴³ But such language was rejected.

The eventual Senate version, which was adopted by the House and enacted into law by President Franklin Roosevelt's signature on December 23, 1943⁴⁴ destroyed *qui tam* as an effective fraud-fighting tool. The 1943 amendments to the False Claims Act eliminated the guaranteed 50% bounty to the successful relator. But, more importantly, they also in practical affect eliminated not only so-called "parasitic lawsuits" but all *qui tam* cases. If the Government possessed any knowledge of the fraud at the time the action was filed, then the *qui tam* suit had to be dismissed.⁴⁵ Since someone in the Government could always be found who knew something of the fraud, this single change effectively eliminated *qui tam* cases for the next forty years.

The 1943 Amendments also required the relator to provide all evidence he had to the government at the time the action was filed⁴⁶ and

Coates' district, caused the Congressional Record to publish a letter from Coates complaining of what Coates referred to as "gestapo methods" by the Congress to repeal the Lincoln Law and have his case thrown out of Court. See 89 Cong. Rec. 10848 (daily ed. Dec. 17, 1943). Whether Mr. Coates then became a user of war materials rather than a producer of war materials is not clear. It appears he did file a False Claims Act case, which applied the 1943 amendments. *United States ex rel. Coates v. St. Louis Clay Products Co.*, 65 F. Supp. 645 (E.D. Mo. 1946).

41. 89 Cong. Rec. 10697 (1943).

42. 89 Cong. Rec. 7442, 7577, and 10746-47 (1943). Fortunately for the United States, a so-called "parasitic" *qui tam* suit had been filed before the statute of limitations expired which the Attorney General settled for \$225,000. *United States ex rel. Bayarsky v. Brooks*, 110 F. Supp. 175, 182 (D.N.J. 1953), *aff'd* 210 F.2d 257, 259 n.1 (3d Cir. 1954) (The DOJ had later intervened in the case pursuant to the 1943 Amendments).

43. 89 Cong. Rec. 7598 (1943).

44. Pub. L. No. 78-213, 57 Stat. 608 (1943).

45. 31 U.S.C. § 232(c) (1943).

46. *Id.* If the relator provided his information to the government *before* he filed suit, then the government had knowledge of the fraud and the case had to be dismissed. Such an event happened in *United States ex rel. Wis. Dept. of Health & Servs. v. Dean*, 729 F.2d 1100 (7th Cir. 1984); *Safir v. Blackwell*, 579 F.2d 742, 746 (2d Cir. 1978), *cert. denied*, 441 U.S. 943 (1979); *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 669 (9th Cir. 1978); *United States v. Aster*, 275 F.2d 281, 283 (3d Cir. 1960), *cert. denied*, 364 U.S. 894 (1960); *United States ex rel. Lapin v. Int'l Bus. Machs. Corp.*, 490 F. Supp. 244, 246 (D. Haw. 1980).

then gave the United States sixty days to elect whether it would prosecute the case.⁴⁷ If the government so elected, then the relator became merely an observer. If the government elected not to proceed, the relator could do so at his own expense. The 1863 version's 50% guarantee of the recovery to the successful relator was reduced to no more than 10% if the government elected to proceed,⁴⁸ or no more than 25% if the government allowed the relator to handle the case.⁴⁹ The Court was provided absolute discretion to set the amount of the share below those numbers including to award the relator nothing.

Congressman Miller from Mr. Coates district, prophetically warned that the 1943 amendments were an “infamous conspiracy, this subtle scheme to set aside the only guaranty that has lasted for 80 years against unmitigated frauds perpetrated upon the government and to substitute in its stead a feeble statute that does nothing but paralyze the efforts of an honest informer.”⁵⁰

Feeble indeed. The 1943 amendments stood the False Claims Act on its head. Instead of the private citizen controlling the civil action against the contractor, the Government now assumed total control over the lawsuit. The *qui tam* suits that were brought were quickly dismissed on the Government's motion raising the “any government knowledge” defense. *Qui tam* virtually disappeared from the legal landscape.

IV. THE 1986 AMENDMENTS TO THE FALSE CLAIMS ACT: THE RETURN OF THE PRIVATEERS

But fraud against the government did not disappear. Once again, it was the defense industry that was the catalyst for invigorating the False Claims Act.

In the 1980's, President Reagan committed to a plan of enormous national defense spending. The Soviet Union was unable to match such expenditures and virtually went bankrupt trying. The vast sums being spent by the Department of Defense presented opportunities to cheat the Government, which proved irresistible to many.

As had happened during the Civil War, the Congress again began receiving alarming reports of fraud, waste, and abuse:

- \$400 for hammers and \$7,000 for coffee pots for the NAVY.⁵¹
- \$660 for ashtrays and \$400 for socket wrenches to the NAVY.⁵²

47. 31 U.S.C. § 232(c) (1943).

48. 31 U.S.C. § 232(E)(1) (1943).

49. 31 U.S.C. § 232(E)(2) (1943).

50. 89 Cong. Rec. 10848 (1943).

51. 131 Cong. Rec. 17818 (1985).

52. Bill Keller, *Navy Pays \$660 Apiece for Two Ashtrays*, N.Y. TIMES, May 29, 1985, at A-14.

- \$16,571 for a three-cubic-foot refrigerator for NAVY air crew lunches.⁵³
- \$640 for NAVY aircraft toilet seats.⁵⁴

Complaints of profit gouging by the defense industries were made by Secretary of the Air Force, Verne Orr,⁵⁵ by the Secretary of the NAVY, John Lehman,⁵⁶ and by the Secretary of Defense, Casper Weinberger.⁵⁷

Recall that the 1943 amendments to the False Claims Act had been passed largely on the unsupported assumption that the Attorney General and Department of Justice were able and willing to do an adequate job of prosecuting fraud against the public treasury. Unlike the 1943 Congress, both chambers of the 1985–86 Congress held extensive hearings and considered much factual analysis to determine how best to protect public funds. The analysis demonstrated that while the DOJ was prosecuting some fraud cases, it was simply being overwhelmed by the level of fraud against the taxpayers. By 1985, four of the largest defense contractors (General Electric, Rockwell, GTE and Gould) had been convicted of criminal fraud offenses. Another major defense contractor, General Dynamics, had been indicted for fraud. And forty-five of the 100 largest defense contractors were under investigation for multiple fraud offenses.⁵⁸ Fraud against the Government was on the rise.⁵⁹

And as difficult and unusual as detecting fraud was, prosecution and recovery was even rarer. As found by the United States General Accounting Office: “For those who are caught committing fraud, the chances of being prosecuted and eventually going to jail are slim The sad truth is that crime against the Government often *does* pay.”⁶⁰

As it turns out, at the same time Congress was digesting this alarming

53. Fred Hiatt, *Now, the \$600 Toilet Seat*, WASHINGTON POST, Feb. 5, 1985, at A5.

54. *Id.* Based on a deposition taken in *United States ex rel. Sanders v. Allison Engine Co.*, 196 F.R.D. 310 (S.D. Ohio 2000) by the author’s partner, Paul B. Martins, it appears the same NAVY admiral was responsible for all or most of these purchases.

55. Richard Halloran, *Contractor Penalties Harsher*, N.Y. TIMES, Mar. 29, 1985, at D4.

56. *Id.*

57. *Navy Investigating Bills for \$660 Ashtrays, \$400 Wrenches*, ASSOCIATED PRESS NEWS ARCHIVE (May 28, 1985), [http://www.apnewsarchive.com/1985/Navy-Investigating-Bills-For-\\$660-Ashtrays-\\$400-Wrenches/id-24fa49472f8896be342ea5fac09c8a4a](http://www.apnewsarchive.com/1985/Navy-Investigating-Bills-For-$660-Ashtrays-$400-Wrenches/id-24fa49472f8896be342ea5fac09c8a4a).

58. Sen. Rep. No. 99-345, at 2–3 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267.

59. H.R. Rep. No. 99-660, at 18 (1986); *see also* S. Rep. No. 99-345, *reprinted in* 1986 U.S.C.C.A.N. 5266 (Department of Defense Fraud investigations rose 30% between 1982 and 1984). From 1983 to 1986 the Department of Health and Human Services tripled its prosecution referrals for fraud. H.R. Rep. No. 99-660, at 18 (1986). During the same time frame the United States General Accounting Office (GAO) identified over 77,000 fraud cases. S. Rep. No. 99-345, at 3, *reprinted in* 1986 U.S.C.C.A.N. at 5268.

60. GAO Report to Congress, “Fraud in Government Programs: How Extensive Is It? How can it be Controlled?” (1981) *quoted in* S. Rep. No. 99-345 at 3, 1986 U.S.C.C.A.N. 5268 (emphasis in original).

information there was a single *qui tam* case pending in the United States in Cincinnati, Ohio. The author had brought a *qui tam* suit in 1984 against the General Electric Company for mischarging labor vouchers. General Electric performed work on fixed-price commercial aircraft engines and then charged the work to identical cost-plus-profit engines being constructed for the recently configured B-1B “Lancer” bomber. The author had rediscovered the False Claims Act buried in the banking regulations of the United States Code in attempting to fashion a remedy for a General Electric machinist foreman who had been fired for refusing to falsify the time cards in his department to overcharge the taxpayers as requested by his superiors.⁶¹ When Congress became aware of this lawsuit, both the author and his client were subpoenaed to present testimony before the United States Senate and the House of Representatives on how to amend the False Claims Act to make it an effective fraud fighting device.⁶² While Congress heard other testimony, ours was the only evidence from anyone who had faced the hurdles of the 1943 Amendments, or had a *qui tam* case pending, or had ever brought a *qui tam* case. Eventually, every recommendation we made was adopted. President Reagan signed the 1986 False Claims Act amendments into law on October 27, 1986.

The 1986 amendments recognize that the magnitude of the fraud problem is such that a solid partnership needs to be forged between government prosecutors and private whistleblowers and their counsel. To that end, the 1986 amendments encourage, incentivize, and protect relators in numerous ways. While the guaranteed 50% of any recovery from the 1863 version was not reinstated, the 1986 amendments did alter the miserly rewards of the 1943 amendments. Now the successful relator receives between 15 to 25% of the recovery if the United States prosecuted the case and 25 to 30% if the relator handles the case without government intervention.⁶³ The United States recovery (and thus the sum from which the relator share percentages is calculated) was increased from double to treble damages.⁶⁴ The penalties per each false claim were increased for the first time since the 1863 version of \$2,000

61. James B. Helmer Jr. & Robert C. Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application to the United States ex rel. Gravitt v. General Elec. Co. Litigation*, 18 OHIO N.U.L. REV. 35 (1991).

62. *False Claims Reform Act: Hearing on S. 1562 Before the Subcommittee on Administrative Practice and Procedure of the S. Comm. on the Judiciary*, 99th Cong. 49–61 (1985) (statements of John M. Gravitt and James B. Helmer, Jr., Esq.); *False Claims Act Amendments: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the H. Judiciary Comm.*, 99th Cong. 339–92 (1986) (statements of John M. Gravitt and James B. Helmer, Jr., Esq.).

63. 31 U.S.C. § 3730(d)(1) and (2) (1986). For exceptions to these percentages, see James B. Helmer, Jr., *How Great is Thy Bounty: Relator's Share Calculations Pursuant to the False Claims Act*, 68 U. CIN. L. REV. 737, 750, 755 (2000).

64. 31 U.S.C. § 3729(a) (1986).

to now \$5,000 to \$10,000 per false claim.⁶⁵ For the first time, the successful relator's attorney fees and expenses became recoverable from the contractor⁶⁶ and relators were provided with protection from retaliation in their employment.⁶⁷

Other substantial changes include the relator's right to continued participation in the litigation even if the United States elects to prosecute the case itself,⁶⁸ a clarification of the degree of intent required to establish a False Claims Act violation,⁶⁹ and setting forth a civil standard for the burden of proof.⁷⁰

Perhaps the most significant change in 1986 was the elimination of the "any prior government knowledge" defense, which in the 1943 amendments led to the dismissal of any suit in which some government official could be found who knew something about the fraud. In its place was added a "public disclosure" exception designed to prevent parasitic lawsuits. This provision bars any *qui tam* case which is based on a prior public disclosure of the allegations by the media or a criminal, civil or administrative hearing unless the relator is an "original source" with direct and independent knowledge of the information on which the allegations are based and who voluntarily provided such information to the government before filing suit.⁷¹ The public disclosure/original source exception would become the most litigated provision of the 1986 False Claims Act, second only to the ever present defense challenge that a relator's complaint did not possess sufficient particularity to satisfy Federal Rule of Civil Procedure 9(b).⁷²

65. 31 U.S.C. § 3729(a) (1986). In accord with Section 5 of the Federal Monetary Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, these penalties are now adjusted to not less than \$5,500 and not more than \$11,000 per false claim occurring after Sept. 29, 1999. 28 C.F.R. § 85.3(a)(9) (2002); Cook County, Ill. v. United States *ex rel.* Chandler, 538 U.S. 119, 123 n.1 (2003). Had the original \$2,000 per false claim penalty been adjusted for inflation since 1863, the amount of the penalty today would be a whopping \$18,000 per false claim. H. Rep. No. 99-660, at 17 (1988).

66. 31 U.S.C. § 3730(d)(1) and (2) (1986).

67. 31 U.S.C. § 3730(h) (1986).

68. 31 U.S.C. § 3730(e).

69. 31 U.S.C. § 3729(b) (1986). This provision resolved a circuit court split. *Compare* United States v. Hughes, 585 F.2d 284, 286-87 (7th Cir. 1978) (no specific intent to defraud required), *with* United States v. Mead, 426 F.2d 118, 122-23 (9th Cir. 1970) (requiring specific intent to defraud).

70. 31 U.S.C. § 3731(c). The burden of proof is the simple preponderance of the evidence standard. Previously, various courts had determined the burden to range from civil preponderance all of the way to beyond a reasonable doubt. *Compare* Federal Crop Ins. Corp. v. Hester, 765 F.2d 723, 727 (8th Cir. 1985) ("preponderance of the evidence"), *with* United States v. Ueber, 299 F.2d 310, 315 (6th Cir. 1962) ("clear and convincing"), *and* Hageny v. United States, 570 F.2d 924, 933 (Ct. Cl. 1978) ("clear and convincing"), *and* United States v. Shapleigh, 54 F. 126 (8th Cir. 1893) ("beyond a reasonable doubt").

71. 31 U.S.C. § 3730(e)(4) (1986).

72. There was also an amendment to the False Claims Act in 1988 that was intended to eliminate a guaranteed share of the recovery in a *qui tam* action where the relator was the "principal architect" of a scheme to defraud the government. 31 U.S.C. § 3730(d)(3) (1988). For the "super rogue" who is

The Department of Justice (DOJ) supported the 1986 amendments for the increased damages and penalties and the clarification of the intent standard and burden of proof. But the DOJ opposed any other amendment to the *qui tam* provisions, asserting similar arguments to what it had presented in 1943: the government did not need any help.⁷³ The primary sponsor of the Senate version of the 1986 amendments chastised both the DOJ and Department of Defense as having “chosen to satisfy their obsession with looking good, rather than deal forthrightly with a clear and growing danger.”⁷⁴

Most of the Congress agreed. The 1986 amendments were enacted not only to encourage whistleblowers and to protect their financial stake in *qui tam* actions but also to act “as a check that the Government does not neglect evidence, cause undu[e] delay, or drop the False Claims case without legitimate reason.”⁷⁵ President Reagan signed the Amendments into law on October 27, 1986.⁷⁶

The DOJ’s antagonism toward *qui tam* cases did not end with the enactment of the 1986 Amendments. For 9 years after the passage of the 1986 amendments the DOJ refused to defend the constitutionality of the False Claims Act *qui tam* provisions, even when requested to do so by various federal judges. Instead that role was left to the private bar. The privateers achieved an undefeated record without DOJ help in defending the amendments from a plethora of constitutional challenges.⁷⁷

The 1986 amendments to the False Claims Act revitalized *qui tam* cases. Nearly 8,000 have been filed and over \$3 billion of stolen taxpayer dollars recovered.⁷⁸ In contrast, in 1985, the year before the

convicted of criminal conduct for his role in the fraudulent conduct at issue there is to be no share. This amendment is not to apply to those whose role in the false claims conduct is minor. 134 Cong. Rec. S16704–05 (daily ed. Oct. 18, 1988) (statement of Sen. Grassley).

73. S. Rep. No. 99-345, at 36 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5301 (letter from Phillip Brady, acting Assistant Attorney General); H.R. Rep. No. 99-660, at 64 (1986) (letter from John Bolton, Assistant Attorney General). The DOJ’s stance was at odds with the statements from its own Economic Crime Council that defense procurement fraud prosecution was inadequate. *See* 132 Cong. Rec. 20535 (daily ed. Aug. 11, 1986) (statement of Sen. Grassley).

74. *How to Deter Future Fraud and Corruption In National Defense Procurement: Hearings on S. 588 Before the Subcomm. on Administrative Practice and Procedure of the S. Comm. on the Judiciary*, 99th Cong. 1–2 (1985) (statement of Sen. Grassley).

75. S. Rep. No. 99-345, at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.

76. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified as amended at 31 U.S.C. §§ 3729–33) (1994).

77. For a description of all the various constitutional challenges, see HELMER, *supra* note 3, at ch. 4.

78. Taxpayers Against Fraud is the best source for recovery statistics. *Fraud Statistics-overview*, TAXPAYERS AGAINST FRAUD, <http://www.taf.org/FCA-stats-2010.pdf>. While the DOJ keeps statistics and reports to Congress it has always under reported the effects of *qui tam* cases. For example, the DOJ does not include in its statistics the billions of dollars recovered due to *qui tam* filed cases for criminal

enactment of the 1986 amendments, the entire Department of Justice infrastructure managed to recover a measly \$54 million under the False Claims Act.⁷⁹

There is an adage in life that friends come and go but enemies accumulate. As if the Department of Justice as an enemy of *qui tam* cases was not enough, the smashing recoveries under the 1986 amendments led to the accumulation of other skillful opponents. Most of the major defense contractors banded together to form something called the Defense Industry Initiative in an unsuccessful attempt to lobby Congress to abrogate *qui tam* cases in return for the defense contractors self-policing themselves.⁸⁰ The American Hospital Association also unsuccessfully lobbied Congress to rewrite the False Claims Act for violations involving health care programs.⁸¹ And the United States Chamber of Commerce has thrown its influence as America's protector of business to fight every effort by the various states to implement their own False Claims Act.⁸²

In addition, a large bar of defense lawyers has been attracted by the hundreds of millions of dollars expended by government contractors attempting to extricate themselves from False Claims Act liability. This defense bar has challenged every provision and nearly each of the 3,000 or so words of the False Claims Act. There are now thousands of

finances and dollars earmarked to be returned to various states. For other examples of why DOJ's statistics are faulty and misleading, see HELMER, *supra* note 3, at ch. 21, § II(D). Current statistics from the DOJ are available at http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf. Such statistics are criticized at *DOJ Hides its Light Under a Barrel*, TAXPAYERS AGAINST FRAUD, TAXPAYERS AGAINST FRAUD EDUC. FUND, <http://taf.org/blog/doj-hides-its-light-under-barrel> (last visited May 24, 2013).

79. S. Rep. No. 110-507, at 6 (2008).

80. According to its website, the Defense Industry Initiative was formed after President Reagan's "Blue Ribbon Commission on Defense Management" excoriated the defense industry's integrity in the acquisition process, some thirty-two major defense contractors pledged to adopt certain core principles of conduct, including encouraging internal reporting of violations of self-imposed conduct codes. The organization now claims eighty-two member companies. See DEFENSE INDUSTRY INITIATIVE <http://www.dii.org/about-us> (last visited May 24, 2013).

81. See HELMER, *supra* note 3, at ch. 21, § II(F). For examples of American Hospital Association's efforts to water down the *qui tam* provisions, see correspondence at <http://www.aha.org/advocacy-issues/letter/2008/080618-let-fca-coalition-house.pdf> and <http://www.aha.org/advocacy-issues/letter-2009/090421-fca-Rep-ltr.pdf>. For examples of the dozens of amicus curiae briefs filed by the American Hospital Association against *qui tam* cases see *Legal Resources: Amicus Briefs*, AM. HOSPITAL ASS'N, <http://www.aha.org/advocacy-issues/letter/2009/090421-FCA-Rep-ltr.pdf> (last visited May 24, 2013).

82. The Chamber continues to enjoy some success in convincing state legislators to oppose state versions of the False Claims Act, including in Ohio. But most states have recognized the public policy benefits of the False Claims Act and the incentive enacted by the federal Congress to allow states that have enacted False Claims Act to keep a higher percentage of the dollars recovered in federal medicaid/medicare cases. To date thirty-one states, the District of Columbia, and some major cities such as New York have enacted their own versions of the False Claims Act. See HELMER, *supra* note 3, at ch. 22.

published decisions on the 1986 amendments. Many of those decisions misinterpreted what Congress was trying to do. Congress finally had had enough. In 2008 it began the process of major clarifications to the False Claims Act.

V. CONGRESS IS SPURRED TO ACTION WHEN *ALLISON ENGINE* THROWS A ROD INTO THE FALSE CLAIMS ACT

With thousands of published judicial decisions on the 1986 amendments it is foreseeable that some decisions would be at cross-purposes with what Congress is trying to do.⁸³ The final straw, which triggered Congressional action, was the United States Supreme Court's decision in *Allison Engine Co. v. United States ex rel. Sanders*, another Cincinnati *qui tam* case.⁸⁴

In *Sanders* a trial judge improperly added language to the second liability provision⁸⁵ of the False Claims Act, imposing a “presentment to the government” requirement. As a result, he then granted a judgment for several defense subcontractors after a five-week jury trial.⁸⁶ The evidence demonstrated that the subcontractors knowingly had failed to follow precise NAVY specifications while building the electrical generator power units for the *Arleigh Burke* class destroyers.⁸⁷ The

83. As the legislative history indicates:

The effectiveness of the FCA has recently been undermined by court decisions limiting the scope of the law and allowing subcontractors and non-governmental entities to escape responsibility for proven frauds. In order to respond to these decisions, certain provisions of the FCA must be corrected and clarified in order to protect the Federal assistance and relief funds expended in response to our economic crisis.

Sen. Rep. No. 111-10, at 10 (2009). “However, over the two decades since legislation last addresses the False Claims Act, court decisions have created a complex patchwork of procedural and jurisdictional hurdles that have often derailed meritorious actions and discouraged private citizens from filing *qui tam* actions.” H.R. Rep. No. 111-97, at 2 (2009).

84. 553 U.S. 662 (2008); S. Rep. No. 111-10, at 10 (2009) (“This section amends the FCA to clarify and correct erroneous interpretations of the law that were decided in *Allison Engine Co. v. United States ex rel. Sanders*”); H.R. Rep. No. 111-97, at 5–6 (2009) (“More recently, in 2008, the Supreme Court held that plaintiffs must prove that the defendant intended for its false statements to cause the Federal Government itself to rely on the false statements as a condition of payment.”) (citing *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008)). The author has been trial counsel for the *Sanders* relators for eighteen years and argued the case before the Supreme Court. See James B. Helmer Jr., *Supreme Effort: One Lawyer's Odyssey to the United States Supreme Court in a False Claims Act Case*, 49 FALSE CLAIMS ACT & QUI TAM Q. REV. 193 (2008).

85. “Any person who . . . (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 . . . is liable to the United States Government” 31 U.S.C. § 3729(a)(2) (1986).

86. The trial court followed an opinion by then Judge John Roberts while he was serving on the D.C. Court of Appeals. *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 492 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005), *rev'd by*, *Allison Engine Co.*, 553 U.S. 662 (2008).

87. *United States ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610, 623 n.7 (6th Cir. 2006), *reh'g en banc denied*, 2007 U.S. App. LEXIS 10114 (6th Cir. Apr. 20, 2007).

relators submitted all of the subcontractors' invoices into evidence but neither sued the prime contractor shipyards nor submitted the shipyards' invoices to the NAVY as evidence. The trial court ruled that "presentment to the government" of the invoices of the non-defendants was a requirement of the False Claims Act.

The United States Court of Appeals for the Sixth Circuit disagreed that the word "presentment" should be added to the second liability provision of the False Claims Act and reversed the trial court.⁸⁸

The United States Supreme Court, with John Roberts now serving as Chief Justice of the United States, ruled unanimously that the Sixth Circuit was correct that "presentment" was not an element of the second liability provision. But the Court went beyond the issue upon which it had granted certiorari and then found that the words "to get" in the second liability provision were meant by Congress to require that a subcontractor must have intended by its conduct to obtain federal money.⁸⁹ The Court then vacated the Sixth Circuit's opinion and the case was remanded to the original trial court to apply this heretofore unknown standard to the case.

The *Sanders* decision immediately became the focus of Congressional scrutiny. As a Senate Committee found:

In *Allison Engine*, the Court held that the FCA contained an intent requirement in sections 3729 (a)(2) and (a)(3) that had not previously been required to prove for FCA liability to attach. The *Allison Engine* decision created a significant question about the scope and applicability of the FCA to certain false claims, effectively limiting FCA coverage for some Government programs and funds. As a result, defendants across the country have cited *Allison Engine* in seeking dismissal of certain FCA claims that the FCA no longer applies to Government programs traditionally covered.⁹⁰

The author was again called to testify about the Supreme Court's ruling as well as about other suggestions to clarify the 1986 language.⁹¹

In a showing of rare and remarkable bi-partisanship, Congress overwhelming enacted a series of amendments to the False Claims Act that set aside several judicial decisions—including the Supreme Court's *Allison Engine* ruling.⁹² These amendments were all signed by President

88. *Allison Engine Co.*, 471 F.3d 610.

89. *Allison Engine Co.*, 553 U.S. 662. A detailed description of the decision can be found at HELMER, *supra* note 3, at ch. 33, § III(F).

90. S. Rep. No. 111-10, at 11-12 (2009).

91. H.R. 4854 the "False Claims Correction Act": Joint hearing Before Both the H. Subcomm. on Courts, the Internet, and Intellectual Property and the H. Subcomm. on Commercial and Administrative Law, 110th Cong., 1-179 (June 19, 2008) (testimony of James B. Helmer, Jr.), available at <http://judiciary.house.gov/hearings/pdf/Helmer080619.pdf>.

92. Fully 86% of the House of Representatives voted to override the Supreme Court's new

Obama and were spread over three statutes.

In the Fraud Enforcement and Recovery Act (known as FERA)⁹³ the “to get” language the Supreme Court had relied upon in *Allison Engine* to arrive at a heretofore unknown intent requirement was stricken.⁹⁴ Congress further amended the definition of “claim” to mean any demand for money or property if it is to be spent or used on behalf of the Government or to advance a Government program on interest.⁹⁵ The second liability clause now makes any person liable who makes or uses a false statement material to a false claim—that is, having a natural tendency to influence, or be capable of influencing payment.⁹⁶ Furthermore, the whistleblower protection clause was modified to cover acts done not just by an employee but also a contractor, agent, or associated others in furtherance of a False Claims Act action.⁹⁷ The statute of limitations for any complaint submitted by the Government is to relate back to the original filing date of the relator if the Government’s claims arise out of the conduct or transaction, set forth in any prior complaint.⁹⁸ Finally, the False Claims Act now provides that the seal provision of the Act does not prohibit service of the complaint on any state or local government named as a co-plaintiff.⁹⁹ The Attorney General may designate someone else to issue a civil investigative demand and may share the information obtained from such demand with the relator.¹⁰⁰

Next, the Patient Protection and Affordable Care Act¹⁰¹ addressed the chaos that had arisen surrounding the public disclosure/original source provisions. These provisions, enacted in 1986 to replace the “any government knowledge” defense and to deal with parasitic *qui tam* actions, had been so wildly interpreted by the courts that a four-way split in the Circuit Courts existed. To bring some sanity to the area the provisions were rewritten to clarify that only a public disclosure by a *federal* hearing or report or from the news media could deprive the court of jurisdiction over the case.¹⁰² Even such disclosures could be over-ridden if the Government opposed a motion to dismiss on such public

interpretation of the Act (367 to 59). 155 Cong. Rec. H5689 (daily ed. May 18, 2009). The Senate vote was not even that close (92 to 4). 155 Cong. Rec. S4776–77 (daily ed. Apr. 28, 2009).

93. Pub. L. No. 111-21 § 4, 123 Stat. 1617, 1621–25 (2009).

94. *See* 31 U.S.C. § 3729(a)(1)(B) (2009).

95. *See id.* § 3729(b)(2).

96. *See id.* § 3729(b)(4).

97. *See id.* § 3730(h)(1).

98. *See id.* § 3731(c).

99. *See id.* § 3732(c).

100. *See id.* § 3733(a)(1).

101. Pub. L. No. 111-148 § 10104(j)(2), 124 Stat. 119, 901–02 (2010).

102. *See* 31 U.S.C. § 3730(e)(4)(A)(i) (2010).

disclosure grounds.¹⁰³ This change overruled another Supreme Court opinion that had determined that public disclosures in non-federal matters also could serve as a basis to revoke jurisdiction in a *qui tam* case.¹⁰⁴

Finally, the Dodd–Frank Wall Street Reform and Consumer Protection Act¹⁰⁵ overturned another Supreme Court ruling, this one concerning what the appropriate statute of limitations is for a whistleblower retaliation case. The Supreme Court had left a sea of confusion in this area by ruling that the appropriate statute of limitations for a federal retaliation claim was to be determined by consulting a comparable statute in the state in which the retaliation occurred.¹⁰⁶ Congress clarified that the correct limitation period for all retaliation cases would be three years after the date of the retaliation.¹⁰⁷

Not surprisingly, the Obama amendments have already spurred a new round of judicial challenges as defense counsel probe all of the language searching for ways to derail *qui tam* cases. One of the first such major challenges arose in the remanded *Sanders* case which had led to the amendments in the first place.

To ensure that the Supreme Court decision in *Sanders* did not impact any cases, Congress specifically provided in FERA that the effective date of the changes to the second liability provision, i.e., the elimination of the “to get” language, would be June 7, 2008—2 days before the Supreme Court’s *Sanders* decision—and apply to “all claims under the False Claims Act (31 U.S.C. § 3729 *et seq.*) that are pending on or after that date.” It seems clear enough from the reports of both the House and Senate that nullifying the Supreme Court’s newly discovered intent standard was at the top of the list of Congress’s clarification amendments.¹⁰⁸

But the same trial court which had added the word “presentment” in 2005 to the 1986 version of the False Claims Act, now attempted to rewrite the 2009 amendments. First, the trial court subtracted the words “under the False Claims Act” from the retroactivity provision. Then the trial court added the words “for payment” after “claims” in place of the phrase “under the False Claims Act.” This led the Court to conclude that the amendments did not apply to the very case which was their

103. *See id.* § 3730(e)(4)(A).

104. *Graham Co. Soil & Water Conserv. District v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1411 (2010).

105. Pub. L. No. 111-203, § 1079A(c), 124 Stat. 1376, 2077 (2010).

106. *Graham Co. Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 414 (2005).

107. 31 U.S.C. § 3730(h)(3) (2010).

108. *See supra* note 79.

genesis because no claims for payment in the eighteen year-old case were still pending on June 7, 2008. Furthermore, the trial court ruled that it would be an unconstitutional violation of the ex post facto clause to apply the FERA amendments to the *Allison Engine* case.¹⁰⁹

Once again the case ambled to the United States Court of Appeals for the Sixth Circuit.¹¹⁰ The same panel that had previously reversed the trial court was assigned and again reversed the trial judge. The Court of Appeals determined that both the statutory construction finding as well as the constitutional ruling by the trial court were wrong. As a result, the Court determined that the retroactivity language of FERA applies to all civil actions pending as of June 7, 2008 and remanded the case for further proceedings.¹¹¹ The same issue has been addressed, though not with the same detailed analysis as performed by the Sixth Circuit, by several other courts.¹¹²

Thus, just as occurred after the passage of the 1986 Amendments, there will be a period of time when the constitutionality of the 2009–10 amendments, beginning with retroactivity,¹¹³ are challenged. The debate over the False Claims Act will then move to the statutory language itself. Because of the vast amounts of money at stake in *qui tam* cases we can expect the courts to remain busy for some time.

The False Claims Act and its modifications have been signed by Presidents Abraham Lincoln, Franklin Roosevelt, Ronald Reagan, and Barack Obama. The American Defense Industry is largely responsible for where this Statute has been and what it has become. Now, however, massive fraud against the Medicare system has overshadowed defense cases brought pursuant to the False Claims Act.¹¹⁴

It is clear that the underlying premise of the False Claims Act of enlisting the public to assist their government in combating fraud by

109. *United States ex rel. Sanders v. Allison Engine Co.*, 667 F. Supp.2d 747 (S.D. Ohio 2009), *rev'd*, 703 F.3d 930 (6th Cir. 2012), *reh'g en banc denied*, 2012 U.S. App. LEXIS 26758 (6th Cir. Dec. 5, 2012), *cert. denied*, 2013 U.S. Dist. LEXIS 4850 (June 24, 2013).

110. Both the trial court and Court of Appeals granted the motions of the relator and the United States to certify the matter for an interlocutory appeal. *In re Sanders*, 2010 U.S. App. LEXIS 27431 (6th Cir. July 2, 2010).

111. *Sanders and United States v. Allison Engine Co.*, 703 F.3d 930 (6th Cir. 2012), *reh'g en banc denied*, 2012 U.S. App. LEXIS 26758 (6th Cir. Dec. 5, 2012), *cert. denied*, 2013 U.S. Dist. LEXIS 4850 (June 24, 2013).

112. *See Gonzalez v. Fresenius Med. Care N. Am.*, 689 F.3d 470, n.4 (5th Cir. 2012); *United States ex rel. Yannacopoulos v. General Dynamics*, 652 F.3d 818, 822 n.2 (7th Cir. 2011); *United States ex rel. Cafasso v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1051 n.1 (9th Cir. 2011); *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 267 n.1 (5th Cir. 2010); *United States ex rel. Kirk v. Elevator Corp.*, 601 F.3d 94, 113 (2d Cir. 2010), *rev'd on other grounds*, 131 S. Ct. 1885 (2011); *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1327 n.3 (11th Cir. 2009).

113. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997).

114. S. Rep. No. 110-507, at 7 (2008) (Healthcare cases have accounted for approximately 40% of the False Claims Act recoveries).

incentivizing such activity with potentially large rewards has proven wildly successfully. We should not expect Congress to remove this technique in the near future despite the cries of less-than-scrupulous government contractors that the sky is falling.