

2011

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Recommended Citation

David Baker, *A Whole New World of False-Claims-ACT Liability: The 2009 Amendments and Learning Where to Draw the Line*, 61 Cath. U. L. Rev. 201 (2012).

Available at: <https://scholarship.law.edu/lawreview/vol61/iss1/5>

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Cover Page Footnote

J.D. Candidate, May 2012, The Catholic University of America, Columbus School of Law; M.A., 2007, Queen's University of Belfast; B.A., 2006, Queen's University of Belfast. The author would like to thank Tom Holliday for his expertise and invaluable insight, Jen Siegel for her feedback, and Jack Raffeto for his recommendations and guidance throughout the writing process. He would also like to thank his wife, Adrienne, for her loving support, patience, and encouragement, and the members of the Catholic University Law Review for their diligent work.

A WHOLE NEW WORLD OF FALSE-CLAIMS-ACT LIABILITY: THE 2009 AMENDMENTS AND LEARNING WHERE TO DRAW THE LINE

David Baker⁺

Justice Stephen Breyer described the danger of reading the False Claims Act (FCA) expansively when he stated, “government money today is in everything. So if it’s in everything, then everything is going to become subject to this False Claims Act.”¹ To limit the scope of the FCA, the Supreme Court unanimously held in *Allison Engine Co. v. United States ex rel. Sanders* that the FCA applies only to those who intentionally defraud the government.² However, Congress opposed the Court’s decision and amended the FCA through the Fraud and Enforcement Recovery Act of 2009 (FERA),³ which allow entities with no nexus to the government to face FCA liability.⁴ This latest iteration of the statute creates problems of vagueness and overbreadth and perverts the statute’s original purpose of combating fraud against the government.⁵

The Supreme Court based its *Allison Engine* decision on the “presentment clause” in the FCA, which required that a false claim be presented to the government itself for an individual to be prosecuted under the auspices of the Act.⁶ When Congress amended the statute, however, it removed the language and eliminated the presentment requirement.⁷ Rather, the current version of

⁺ J.D. Candidate, May 2012, The Catholic University of America, Columbus School of Law; M.A., 2007, Queen's University of Belfast; B.A., 2006, Queen's University of Belfast. The author would like to thank Tom Holliday for his expertise and invaluable insight, Jen Siegel for her feedback, and Jack Raffeto for his recommendations and guidance throughout the writing process. He would also like to thank his wife, Adrienne, for her loving support, patience, and encouragement, and the members of the *Catholic University Law Review* for their diligent work.

1. Transcript of Oral Argument at 36, *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008), *superseded by statute*, Fraud Enforcement and Recovery Act (FERA) of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (codified as amended in scattered sections of 18 and 31 U.S.C.) (No. 07-214). Justice Scalia echoed this sentiment, and stated that the FCA “doesn’t have to cover every ill in the world.” *Id.* at 37.

2. 553 U.S. at 671–72.

3. FERA, §4(a)(1), 123 Stat. at 1621–25.

4. *See infra* note 126 and accompanying text.

5. *See* S. REP. NO. 99-345, at 1–2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266–67 (stating the purpose of the FCA is to combat fraud and “recover losses sustained as a result of fraud against the Government”); *see also* CONG. GLOBE, 37TH CONG., 3D SESS. 956 (1863).

6. 31 U.S.C. § 3729(a)(1) (2006).

7. FERA, § 4(a)(1), 123 Stat. 1617 at 1621 (codified as amended at 31 U.S.C. § 3729(a)(1)(B) (Supp. III 2009)). Currently, liability attaches under this section when a person “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.” 31 U.S.C. § 3729(a)(1)(B). The section’s predecessor originally read: “knowingly makes, uses, or causes to be made or used, a false record or statement *to get* a false or

the FCA predicates liability on the submission of a false claim to recipients of government money where a government interest is advanced.⁸

The FCA's amendments are reminiscent of those made to the mail-fraud statute, which Congress enacted to combat fraud perpetrated through the U.S. Postal Service.⁹ After the Supreme Court limited the scope of the mail-fraud statute,¹⁰ Congress expanded its applicability through ambiguous amendments,¹¹ contributing to decades of arbitrary prosecutions.¹² Decades elapsed before the Supreme Court addressed the problems created by Congress's overzealousness and the resulting legal chaos caused by disparate lower-court rulings under the mail-fraud statute.¹³ The Supreme Court—or Congress—must now act swiftly to avoid the same result in relation to the FCA, lest entire industries endure decades of uncertainty regarding the rules governing their business conduct.¹⁴

fraudulent claim *paid or approved by the Government.*" *Id.* § 3729(a)(2) (2006) (emphasis added).

8. FERA, § 4(a)(2), 123 Stat. 1617 at 1623 (codified as amended at 31 U.S.C. § 3729(b)(2) (Supp. III 2009)).

9. Act of June 8, 1872, ch. 335, §§ 149 and 301, 17 Stat. 302, 323 (repealed 1909) (criminalizing the use of the mail system for "any scheme or artifice to defraud"). Enacted in 1952, the wire-fraud statute, 18 U.S.C. § 1343, is a descendant of the mail-fraud statute, with nearly identically wording and construction. See Peter R. Ezersky, *Intra-Corporate Mail and Wire Fraud: Criminal Liability for Fiduciary Breach*, 94 YALE L.J. 1427, 1429 n.8 (1985) (explaining that "[t]he mail and wire fraud statutes have been identically construed"); Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 772 n.6 (1980). These two statutes combined target a "full range of consumer frauds, stock frauds, land frauds, bank frauds, insurance frauds, and commodity frauds, [and also] . . . such areas as blackmail, counterfeiting, election fraud, and bribery." Rakoff, *supra*, at 772. Because the mail- and wire-fraud statutes are so similar, and judicial decisions addressing one are usually applicable to the other, this Comment will concentrate on the more frequently used mail-fraud statute. See, e.g., *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to [the mail and wire fraud] offenses here.").

10. *McNally v. United States*, 483 U.S. 350, 360 (1987) (noting the statute should be "limited in scope to the protection of property rights"), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (codified as amended at 18 U.S.C. § 1346 (2006)).

11. See Anti-Drug Abuse Act, § 7603(a), 102 Stat. at 4508 (codified at 18 U.S.C. § 1346 (2006)) ("For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services.").

12. See *infra* Part I.H. Although the mail-fraud statute is a criminal statute and the FCA is a civil statute, the FCA's hefty fines and treble damages resemble criminal sanctions. See 31 U.S.C. § 3729(a) (2006 & Supp. III 2009).

13. See *infra* Part I.H.

14. See Robert J. Wagman, *The Risks of Doing Business with the Government Are Getting Riskier*, 47 ADVOC. 62, 62-68 (2009) (discussing the unique challenges presented by doing business with the government). An expansive application of the FCA poses a particular problem for defense contractors, as defense contracts are often very large and complex and the contractors themselves often subcontract with other companies. See *Allison Engine Co. v. United States ex*

This Comment advocates limiting the FCA to reflect its *core* purpose—combating the fraudulent presentment of false claims to the government. Part I provides a legislative and statutory history of the FCA, examines the FCA’s purpose, and summarizes both the Supreme Court’s *Allison Engine* decision and the subsequent FERA amendments. In addition, this Part offers a brief history of the mail-fraud statute and describes the issues that arose when the Supreme Court remedied the statutory vagueness. Part II explores the consequences of FCA overbreadth by comparing the FCA to the mail-fraud statute and outlining the significance of the economic and judicial costs of the amendments. Part III argues for a legislative or judicial remedy to prevent expansion of the FCA’s scope. It proposes two legislative solutions: either eliminating current ambiguities in the FCA’s definition of “claim,” or including a mandatory arbitration or mediation requirement before the commencement of litigation. Finally, in the absence of a legislative remedy, the Supreme Court should narrowly interpret the ambiguous term “claim” in the FCA.

I. THE FCA AND THE MAIL-FRAUD STATUTE

Both the FCA and the mail-fraud statute originated in the latter half of the nineteenth century.¹⁵ This Part traces the statutes from their beginnings to their current iterations and highlights relevant milestones along the way.

A. The Purpose of the FCA

During the last twenty-five years, the FCA has been the foremost civil-enforcement tool in combating fraud against the government.¹⁶ The statute gained popularity as an antifraud weapon because of its treble damages and heavy penalty provisions.¹⁷

1. Origins of the FCA and Concerns About Waste in Wartime

Congress first enacted the FCA in 1863 against the backdrop of the American Civil War.¹⁸ Known as the Informer’s Act, the statute permitted private *qui tam* informers to initiate fraud actions on behalf of the

rel. Sanders, 553 U.S. 662, 671–72 (2008), *superseded by statute*, FERA, Pub. L. No. 111-21, § 4(a)(1), 123 Stat. 1617, 1621–25 (codified as amended in scattered sections of 18 and 31 U.S.C.).

15. See JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 1-6 (4th ed. 2011) (noting the FCA’s origin); Ezersky, *supra* note 9, at 1428 (discussing the purpose of the mail-fraud statute, which Congress enacted in 1870).

16. See BOESE, *supra* note 15, at 1-5 to 1-6 (noting the 1986 amendments helped make the FCA the potent force that it is today). Between 1987 and 2010, FCA judgments and settlements totaled over \$27 billion. *Fraud Statistics-Overview: October 1, 1987–September, 30 2010*, U.S. DEP’T OF JUST., http://www.justice.gov/civil/docs-forms/C_FRAUDS_FCA_Statistics.pdf (last visited Sept. 4, 2011).

17. BOESE, *supra* note 15, at 1-5.

18. See *id.* § 1.01[A], at 1-8 (providing a brief overview of the origins of the FCA).

government.¹⁹ The statute was “aimed at bringing to punishment those who commit frauds upon the Government and to recover money that has been obtained by fraud from the U.S. Government under contracts between the Government and private citizens.”²⁰ Although the Act “was applicable to fraud by government claimants generally,” it primarily targeted military-procurement fraud.²¹

Private military contractors contributed to widespread abuse and fraud during this time²²—a problem magnified by the complexity of the Union government’s wartime spending.²³ Recognizing the enormity of the problem, the legislative debates before the statute’s enactment focused on “ferreting out and punishing these enormous frauds upon [the] Government.”²⁴

As government spending fell after the Civil War, so did interest in the FCA.²⁵ However, during the 1930s and 1940s, with the passage of the New Deal and increased military spending preceding World War II, the FCA once again drew Congress’s attention.²⁶ Congress’s amendments to the statute in

19. See BOESE *supra* note 15, § 1.01[A], at 1-9. The original statute required qui tam litigants to pay their legal costs and fees; this provision aimed to prevent frivolous qui tam lawsuits from overburdening the courts. *Id.* § 1.01[A], at 1-12. See *infra* Part I.D. for an explanation of qui tam actions.

20. 89 CONG. REC. 7596 (1943) (statement of Sen. William Chapman Revercomb).

21. BOESE, *supra* note 15, § 1.01[A], at 1-12 (citations omitted).

22. See *United States ex rel. Newsham v. Lockheed Missiles & Space Co. Inc.*, 722 F. Supp. 607, 609 (N.D. Cal. 1989) (“For sugar it [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories.” (quoting FRED ALBERT SHANNON, *THE ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY, 1861–1865*, at 58 (1965))); see also J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 555 (2000) (revealing that contractors provided the Union Army with “artillery shells filled with sawdust rather than explosives”).

23. BOESE, *supra* note 15, § 1.01[A], at 1-8.

24. CONG. GLOBE, 37TH CONG., 3D SESS. 956 (1863) (statement of Sen. Henry Wilson). Senator Jacob M. Howard, the principal sponsor of the bill, called it a “crying evil[] of the period . . . that [the] 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.” *Id.* at 955–56 (statement of Sen. Jacob Howard). The text of the Act itself also reflected the specific purpose of combating fraud against the government:

[The Act targeted persons] who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States . . . knowing such claim to be [sic] false, fictitious, or fraudulent . . . for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim

An Act to Prevent and Punish Frauds upon the Government of the United States, ch. 67, 12 Stat. 696, 696 (1863).

25. See BOESE, *supra* note 15, § 1.01[B], at 1-13.

26. *Id.* (stating that this increase in spending created opportunity, once again, for fraud against the government).

1943 left the traditional purpose of the FCA unchanged, while shifting the FCA's focus to "'parasitic' *qui tam* suits"—a change that made it more difficult for private individuals to bring suits on behalf of the government.²⁷

2. *A Large National Deficit and New Concerns About Waste: The 1986 Amendments*

The "growing pervasiveness" of fraud against the government led to further amendments in 1986.²⁸ Fear, caused by the dramatically increased national deficit, provided the impetus for the amendments²⁹ and contributed to an atmosphere analogous to when Congress first passed the Act in 1863—a time when fraud against the government "was seen as posing a severe threat to national interests."³⁰

The 1986 amendments to the FCA reflected the perceived danger to the national purse.³¹ Among other changes, Congress lowered the standard of intent for certain violations of the FCA, lengthened the statute of limitations, increased the severity of the damages and penalty provisions, and increased the *qui tam* litigants' percentage of successful recoveries.³² These amendments turned the FCA into the federal government's foremost antifraud statute.³³

Despite these amendments, the historic purpose of the FCA remained intact, as evidenced by an accompanying Senate report, which explicitly stated that the amendments were intended "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government."³⁴ The

27. See Brief for the Washington Legal Foundation as Amicus Curiae in Support of Petitioners at 11 & n.2, *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008), superseded by statute, Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (codified as amended in scattered sections of 18 and 31 U.S.C.) (No. 07-214).

28. S. REP. NO. 99-345, at 2 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5266. The number of fraud investigations conducted by the Department of Defense rose thirty percent between 1982 and 1984; similarly, from 1983 to 1986, the Department of Health and Human Services "nearly tripled the number of entitlement program fraud cases referred for prosecution." *Id.*, 1986 U.S.C.C.A.N. at 5267.

29. See BOESE, *supra* note 15, § 1.04[A], at 1-20; see also *Summary of Receipts, Outlays, and Surpluses or Deficits (-): 1789-2016*, OFFICE OF MGMT. & BUDGET, <http://www.whitehouse.gov/omb/budget/Historicals> (last visited Aug. 20, 2011) [hereinafter *Summary of Budget Receipts*]. In 1979, the budget deficit was \$40.7 billion dollars; six years later it stood at \$221.2 billion. *Id.*

30. See BOESE, *supra* note 15, § 1.04[A], at 1-20 to 1-21.

31. *Id.* § 1.04[A], at 1-19 to 1-21.

32. See False Claims Amendments Act (FCAA) of 1986, Pub. L. No. 99-562, § 2, 100 Stat. 3153, 3153-54 (codified as amended at 31 U.S.C. § 3729(c) (2006)); see also BOESE, *supra* note 15, § 1.04[B], 1-21 to 1-25 ("The amendments for the first time defined the term 'knowingly' to make clear that a showing of 'specific intent to defraud is no longer required.'" (internal footnote omitted)).

33. See *Fraud Statistics-Overview*, *supra* note 16. In 1987, relators filed only thirty new *qui tam* cases and failed to collect any rewards. *Id.* Ten years later, *qui tam* litigants filed 547 new cases and collected over \$67.5 million in rewards. *Id.*

34. S. REP. NO. 99-345, at 1-2 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5266-67.

report further noted that “[t]he False Claims Act is intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services.”³⁵ The report also quoted Justice Hugo Black, who called the statute “a remedial one . . . intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side.”³⁶ Similarly, the House report accompanying the amendments emphasized the need to recoup government losses given the country’s financial situation.³⁷

3. *The FERA Amendments: An Even Bigger Economic Crisis*

The factors instigating the 2009 FERA legislation were very similar to the circumstances giving rise to both the original FCA in 1863 and the 1986 amendments. High government spending and worries about defrauders exploiting the country during crisis motivated legislative action.³⁸ This time,

35. *Id.* at 9, 1986 U.S.C.C.A.N. at 5274.

36. *Id.* at 11, 1986 U.S.C.C.A.N. at 5276 (quoting *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885)) (internal quotation marks omitted).

37. H.R. REP. NO. 99-660, at 18 (1986).

[A]ctive enforcement of this statute will not only result in a recovery of losses resulting from fraud, but that it will also serve as a deterrent to those who otherwise might consider defrauding the Government. Moreover, given the current budgetary situation, it is imperative that the Government recoup these fraud losses and deter future fraudulent activities that result in further losses to the Government.

Id.

38. See S. REP. NO. 111-10, at 1–2 (2009), reprinted in 2009 U.S.C.C.A.N. 430, 431. The Senate report began with an explanation of how the existing environment actually invited fraud, and thus necessitated legislative intervention:

Our Nation is in the midst of its most serious economic crisis since the Great Depression. With each passing week, tens of thousands more Americans lose their jobs to layoffs, and many thousands more are losing their homes to foreclosure. As we learn more and more each day about the causes of this debacle, it is clear that unscrupulous mortgage brokers and Wall Street financiers were among the contributors to this economic collapse. With the new tools and resources in this bill, it will be easier to ensure that all of those responsible for these financial crimes are held accountable.

While the full scope of the fraud that helped trigger the economic crisis is still unknown, we do know a great deal about what went wrong. As banks and private mortgage companies relaxed their standards for loans, approving ever riskier mortgages with less and less due diligence, they created an environment that invited fraud. Private mortgage brokers and lending businesses came to dominate the home housing market, and these companies were not subject to the kind of banking oversight and internal regulations that had traditionally helped to prevent fraud. We are now seeing the results of this lax supervision and accountability.

....

Of course, the problem is not limited to mortgage frauds. As is so common in today’s financial markets, home mortgages were packaged together and turned into securities that were bought and sold in largely unregulated markets on Wall Street. Here again, the environment invited fraud. As the value of the mortgages started to decline with falling housing prices, Wall Street financiers began to see these mortgage-backed securities unravel. Unfortunately, some were not honest about these securities, leading to even more fraud and victimizing investors nationwide.

however, the amendments exclusively emphasized the need to rein in the financial sector and to recover money lost to fraud.³⁹ Despite this purported goal, neither the Act itself nor the legislative history reflected any limitations along those lines.

Before the 2009 amendments, Representative Howard L. Berman, an author of both the 1986 and 2009 legislation, delivered mixed messages regarding the bill's purpose.⁴⁰ Berman stated that the amendments updated the law to incorporate modern fraud schemes that drain the public purse.⁴¹ He then explained that the FCA protects "all Government funds and property, without qualification or limitation."⁴² Together, these statements suggest that he believes the FCA's scope should be limitless in its pursuit of fraud against the government, rather than limitless in the type of fraud to which it applies.

Id. The 2009 amendments came at a time of high government spending and outsourcing. *See Summary of Budget Receipts, supra* note 29 (showing that the 2010 federal budget was an estimated \$3.8 trillion—the largest since the Office of Management and Budget (OMB) recording began). The combined cost to the U.S. government of the Iraq and Afghanistan wars is nearly \$1 trillion. Richard Wolf, *Afghan War Costs Now Outpace Iraq's*, USA TODAY, May 13, 2010, http://www.usatoday.com/news/military/2010-05-12-afghan_N.htm#. American military action abroad has increased opportunities for business transactions with the American government. *See* MOSHE SCHWARTZ & JOYPRADA SWAIN, CONG. RESEARCH SERV., R40764, DEPARTMENT OF DEFENSE CONTRACTORS IN AFGHANISTAN AND IRAQ: BACKGROUND AND ANALYSIS 6–7 (2011), available at <http://www.fas.org/sgp/crs/natsec/R40764.pdf> (noting that the number of contractors in Iraq and Afghanistan is nearly equal to the number of the Department of Defense's uniformed personnel).

39. S. REP. NO. 111-10, at 3–4, 2009 U.S.C.C.A.N. at 433. The Senate report explicitly states that the 2009 amendments are designed to "protect from fraud the Federal assistance and relief funds expended in response to our current economic crisis." *Id.* at 4, 2009 U.S.C.C.A.N. at 433. The report later refers to the need to protect the \$1 trillion spent on stabilizing the banking system from "fraud or abuse." *Id.*, 2009 U.S.C.C.A.N. at 432. Furthermore, FERA's legislative history repeatedly refers to the FCA in the context of *recovering* federal funds lost to fraud. *See id.* at 1, 9–10, 2009 U.S.C.C.A.N. at 436–37. Indeed, the title of the legislation is the Fraud Enforcement and *Recovery* Act. *Id.* at 1, 2009 U.S.C.C.A.N. at 430 (emphasis added).

40. 155 CONG. REC. E1295 (daily ed. June 3, 2009) (statement of Rep. Howard Berman).

41. *Id.* at E1295–300.

42. *Id.* at E1296. Representative Berman further noted:

In defining the word "claim" so broadly, Congress intended in 1986 to make sure that the FCA would impose liability even if the claims or false statements were made to a party other than the Government, if the payment thereon could potentially result in a loss to the Government or cause the Government to wrongfully pay out money. For example, because any fraud that reduces the effectiveness of programs and initiatives the Government has sought to advance also undermines the Government's purpose in supplying funding support, Congress intended for a false claim to the recipient of a grant from the United States or to a State under a program financed in part by the United States, to be considered a false claim to the United States.

Id.

4. *Judicial Interpretations of the FCA's Purpose*

The Supreme Court recognized that the primary purpose of the FCA naturally placed restraints on its scope. In 1943, the Court in *United States ex rel. Marcus v. Hess* articulated that the FCA's purpose was "to provide for restitution to the government of money taken from it by fraud."⁴³ The Court believed that Congress had included the then-double damages provisions to ensure that the government was completely reimbursed.⁴⁴ Fifteen years later, however, the Supreme Court stated in *United States v. McNinch* that although "Congress wanted to stop this plundering of the public treasury . . . it is equally clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government."⁴⁵ The Court recognized that Congress wanted to protect government money and property, but only from fraudulent claims against the government.⁴⁶

The circuit courts agree with the Supreme Court's reading of the FCA's purpose. The Third Circuit noted that the FCA targets "fraudulent activity which attempts to or actually causes economic loss to the United States government."⁴⁷ Similarly, the Eighth Circuit has connected liability under the Act to fraudulent claims intended to deprive the government of money,⁴⁸ and the Eleventh Circuit has held that liability hinges on "actionable damage to the public fisc."⁴⁹ Likewise, the Fourth Circuit requires a "call upon the government fisc" for liability to attach.⁵⁰

B. *The "Presentment Clause"*

Since its inception, the FCA has required the presentation of a false claim to the government.⁵¹ Section 3729(a)(1) of the *United State Code* makes this requirement an explicit prerequisite for liability,⁵² and the judiciary had

43. 317 U.S. 537, 551 (1943), *superseded by statute* Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (repealed 1968).

44. *Id.* at 551–52.

45. *United States v. McNinch*, 356 U.S. 595, 599 (1958) (internal footnote omitted); *cf.* *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968) (explaining that the FCA reaches "all fraudulent attempts to cause the Government to pay out sums of money").

46. *See Rainwater v. United States*, 356 U.S. 590, 592 (1958).

47. *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 184 (3d Cir. 2001).

48. *See Costner v. URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998) ("[O]nly those actions by the claimant which have the purpose and effect of causing the United States to pay out money it is not obligated to pay, or those actions which intentionally deprive the United States of money it is lawfully due, are properly considered 'claims' within the meaning of the FCA." (citations omitted)).

49. *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002).

50. *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999).

51. *See An Act to Prevent and Punish Frauds upon the Government of the United States*, ch. 67, 12 Stat. 696 (1863).

52. *See* 31 U.S.C. § 3729(a)(1)(A) (2006 & Supp. III 2009).

implicitly included it in § 3729(a)(1)(B)⁵³ until the FERA amendments in 2009.⁵⁴ Even when Congress recodified the FCA in 1982,⁵⁵ it intentionally preserved the substance of the Act.⁵⁶

The circuit courts have highlighted the relationship between the presentment of a false claim, the FCA's purpose of combating fraud against the government, and the scope of the Act.⁵⁷ In *United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*, the Eleventh Circuit held that “[w]ithout the *presentment* of such a claim, while the practices of an entity that provides services to the Government may be unwise or improper, there is simply no actionable damage to the public fisc as required under the False Claims Act.”⁵⁸ In *United States v. Rivera*, the First Circuit similarly explained that “the statute attaches liability, not to the underlying fraudulent activity or to the government’s wrongful payment, but to the ‘*claim for payment*.’”⁵⁹ Quoting this language, the Fourth Circuit later agreed and added that “a central question in FCA cases is whether the defendant ever presented a ‘false or fraudulent claim’ to the government.”⁶⁰

Most recently, in *United States ex rel. Totten v. Bombardier Corp.*, the U.S. Court of Appeals for the District of Columbia held that the presentment requirement applied to § 3729(a)(2) of the FCA.⁶¹ In an opinion authored by then-Chief Judge John Roberts, the D.C. Circuit noted that § 3729(a)(1) unambiguously requires presentment of a false claim; therefore, the court did not need to “debate the legislative history” to interpret the statute.⁶² Furthermore, the court read a presentment requirement into § 3729(a)(2), and noted that the explicit presentment requirement in § 3729(a)(1) would be

53. See *infra* note 127 and accompanying text.

54. See *infra* note 127 and accompanying text.

55. See BOESE, *supra* note 15, § 1.02[A], at 1-16.

56. H.R. REP. NO. 97-651, at 3 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1897.

57. See *supra* notes 47–50 and accompanying text.

58. 290 F.3d 1301, 1311 (11th Cir. 2002) (citing *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999)).

59. 55 F.3d 703, 709 (1st Cir. 1995) (emphasis added).

60. *Harrison*, 176 F.3d at 785. The Supreme Court concurred based on a slightly different rationale in *Allison Engine*, and argued that such an interpretation of 31 U.S.C. § 3729(a)(2) “protect[s] the Government from loss due to fraud but also ensures that ‘a defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct.’” *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 672 (2008) (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 470 (2006)), *superseded by statute*, FERA, Pub. L. No. 111-21, 123 Stat. 1617 (2009) (codified as amended in scattered sections of 18 and 31 U.S.C.).

61. 380 F.3d 488, 500–01 (D.C. Cir. 2004), *superseded by statute*, FERA, 123 Stat. 1617.

62. *Id.* at 492–96.

otherwise meaningless.⁶³ District courts in several circuits have since followed the *Totten* rationale.⁶⁴

The *Totten* court foresaw the dangers of an FCA unfettered by a presentment requirement.⁶⁵ Abolition of the presentment clause, the court reasoned, would render “the potential reach of the Act almost boundless.”⁶⁶ The court explained that without such a clause, liability could attach to any institution—such as a college—that had received some federal funding.⁶⁷ Furthermore, deciding the amount of federal money needed to cross the liability threshold is “an imprecise line of demarcation” and would likely result in increased collateral litigation under the FCA.⁶⁸

C. The Definition of “Claim” for the Purposes of the FCA

Without a “claim,” there can be no liability under the FCA.⁶⁹ Although the FCA is arguably restricted to fraudulent attempts to acquire government money or property,⁷⁰ the definition of “claim” has expanded since the Act was amended in 1986.

Before the 1986 amendments, little Supreme Court case law existed that defined “claim.”⁷¹ In *United States v. Cohn*, the Court held that the fraud must involve “a ‘claim upon or against’ the United States and the Treasury Department.”⁷² The Supreme Court later strengthened the idea that a “claim” involved a demand for government money in *McNinch*, and stated that “the concept[] of a claim against the government normally connotes a demand for money or for some transfer of public property.”⁷³

63. *Id.* at 501.

64. *See, e.g.*, *United States v. City of Hous.*, No. H-03-03713, 2006 WL 2382327, at *6 (S.D. Tex. Aug. 16, 2006) (finding that the City’s use of previously approved and allocated Housing and Urban Development funds did not constitute the presentment of a claim to the government under the FCA); *United States v. Sequel Contractors, Inc.*, 402 F. Supp. 2d 1142, 1150 (C.D. Cal. 2005) (explaining that *Totten* “did not require that the defendants themselves directly present the false claim to the federal government . . . [but rather] that *someone* must directly present [the] false claim”); *United States ex rel. Tyson v. Amerigroup III, Inc.*, No. 02-C-6074, 2005 WL 2667207, at *3 (N.D. Ill. Oct. 17, 2005) (holding that false claims submitted to a Medicaid intermediary satisfied the presentment requirement).

65. *Totten*, 380 F.3d at 496.

66. *Id.*

67. *Id.*

68. *Id.* at 497.

69. *See* 31 U.S.C. § 3729(b)(2) (Supp. III 2009).

70. *See United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968) (stating that the FCA applies to “all fraudulent attempts to cause the Government to pay out sums of money”).

71. *See* BOESE, *supra* note 15, § 2.02[A], at 2-85 (stating that the Supreme Court addressed this issue only three times before 1986).

72. 270 U.S. 339, 346–47 (1926).

73. *United States v. McNinch*, 356 U.S. 595, 599 (1958) (quoting *United States v. Tieger*, 234 F.2d 589, 591 (3d Cir. 1956)) (internal quotation marks omitted).

Then, with the 1986 amendments, Congress defined “claim” for the first time.⁷⁴ This definition significantly expanded the term beyond prior interpretations,⁷⁵ by extending FCA liability to those who submit false claims to recipients of government money.⁷⁶

Since the 1986 amendments were enacted, courts have held that the term “claim” applies to a wide variety of submissions,⁷⁷ including: progress reports on the status and success of a software system,⁷⁸ a primary contractor’s false billing certifications for subcontractors,⁷⁹ false certifications of compliance with Medicare,⁸⁰ and false representations by a university to secure federal education subsidies.⁸¹

More recently, just before the FERA amendments, the Fourth Circuit held in *United States ex rel. DRC, Inc. v. Custer Battles, LLC* that a false claim made to a grantee of government funding is a “claim” under § 3729(c), “so long as ‘any portion’ of the claim is or will be funded by U.S. money given to the grantee.”⁸² The Fourth Circuit’s holding foreshadowed the FERA amendments by expanding the term “claim” to encompass false claims for property—regardless of whether the government had control of the property.⁸³

D. The Private-Citizen Enforcement Mechanism

The FCA permits private citizens to bring lawsuits on behalf of the United States (qui tam lawsuits) on a contingency-fee basis.⁸⁴ This enforcement

74. BOESE, *supra* note 15, § 2.02[B], at 2-88 to 2-89.

75. FCAA, Pub. L. No. 99-562, § 2, 100 Stat. 3153, 3153–54 (1986) (codified as amended at 31 U.S.C. § 3729(c) (2006)).

For purposes of this section, “claim” includes any request or demand, whether under a contract or otherwise, for money or property which is 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 other recipient for any portion of the money or property which is requested or demanded.

Id.

76. *Id.* § 2, 100 Stat. at 3154.

77. See BOESE, *supra* note 15, § 2.02[B][1]-[3], at 2-88 to 2-92.

78. *United States ex rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196, 199 (D.C. Cir. 1995).

79. *Lamb Eng’g & Constr. Co. v. United States*, 58 Fed. Cl. 106, 111–12 (Fed. Cl. 2003).

80. *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1046 (S.D. Tex. 1998).

81. *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916–17 (7th Cir. 2005).

82. 562 F.3d 295, 303 (4th Cir. 2009) (quoting 31 U.S.C. § 3729(c) (2006)).

83. *Id.* at 303–04.

84. See 31 U.S.C. § 3730(b)(1) (2006) (“A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.”); Beck, *supra* note 22, at 541 (describing the mechanics of a qui tam statute).

model is important because it provides private parties with standing to sue, regardless of whether the private litigant suffered any harm.⁸⁵

Qui tam actions arise when private parties—relators—receive the statutory right to sue for damages in place of the U.S. government.⁸⁶ When such suits are successful, the relator and the government divide the proceeds according to the statute.⁸⁷

Although Congress provided qui tam provisions in the first iteration of the FCA, private plaintiffs were uncommon until after the 1986 amendments.⁸⁸ These amendments helped encourage qui tam litigation, as Congress intended.⁸⁹ The amended provisions guaranteed relators repayment of expenses and attorneys' fees, plus up to thirty percent of the government's recovery.⁹⁰ Furthermore, the government's preexisting knowledge of the alleged fraud underlying the relator's lawsuit could no longer provide a jurisdictional bar, unless the information had been publicly disclosed and the relator was not an original source of the information forming the suit's basis.⁹¹ The 1986 amendments also provided protection for individuals who assisted in bringing the qui tam lawsuit by creating a cause of action for victims of employer retaliation.⁹²

85. See Beck, *supra* note 22, at 543–44. The impact of the qui tam model is illustrated by FCA statistics: of 712 new FCA matters in 2010, only 138 were not qui tam suits, compared to 574 qui tam actions. *Fraud Statistics-Overview*, *supra* note 16. As one enthusiastic congressional supporter of the FCA queried, “What harm can there be if 10,000 lawyers in America are assisting the Attorney General of the United States in digging up war frauds?” BOESE, *supra* note 15, § 1.02, at 1–15 (quoting 89 CONG. REC. S7606 (1943) (statement of Sen. Langer)).

86. “Qui tam” is part of the Latin phrase “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*” meaning “who as well for the king as for himself sues in this matter.” BLACK’S LAW DICTIONARY 1368 (9th ed. 2009).

87. See 31 U.S.C. § 3730(d)(1) (2006).

88. See BOESE, *supra* note 15, at 1–6.

89. S. REP. NO. 99-345, at 23–24 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5288–89.

90. See 31 U.S.C. § 3730(d)(1)–(2). The relator receives a smaller award when the suit is based primarily on publicly disclosed information or when the relator plans and initiates the conduct giving rise to the claim. See *id.* § 3730(d)(1), (3).

91. See *id.* § 3730(e)(4).

92. FCAA, Pub. L. No. 99-562, § 4, 100 Stat. 3153, 3157–58 (1986) (codified as amended at 31 U.S.C. § 3730(h)).

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an

The strengthened qui tam provisions not only helped the Department of Justice prosecute fraud,⁹³ but also created a new cause of action by eliminating prior government knowledge as a defense.⁹⁴ The government extended the reach of the FCA through the qui tam model because relators were more likely than the government to pursue alleged frauds based on technical violations that did not damage the public purse.⁹⁵

E. Penalties and Damages Under the FCA

The 1986 amendments also increased the penalties for violating the FCA.⁹⁶ Previously, the 1863 FCA levied penalties of \$2000 for each false claim submitted, in addition to twice the government's losses.⁹⁷ The 1986 amendments increased the available damages to three times the government's losses, as well as \$5000 to \$10,000 per false claim.⁹⁸ Because civil penalties

action in the appropriate district court of the United States for the relief provided in this subsection.

Id.

93. The increasing number of qui tam cases illustrates the effectiveness of the private-citizen enforcement model. In 1987, qui tam relators filed thirty cases in federal district courts. *Fraud Statistics-Overview*, *supra* note 16. In 2010, by comparison, relators filed 574 claims, bringing the total number of qui tam cases filed by the end of 2010 to over 7000. *Id.*

94. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997).

95. *Id.* at 949

96. FCAA, § 2, 100 Stat. at 3153 (codified as amended at 31 U.S.C. § 3729(a)). Under the more stringent statutory provisions:

[A person] is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

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

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

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

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

Id. (internal quotation marks omitted).

97. S. REP. NO. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. The 1863 equivalent of \$2,000 would have been more than \$18,000 in 1986. 132 CONG. REC. 22,335 (1986) (statement of Rep. Daniel Glickman).

98. FCAA, § 2, 100 Stat. at 3153..

must be adjusted for inflation, the penalties have since increased to a minimum of \$5500 and a maximum of \$11,000.⁹⁹

Although the FCA provides for reduced damages in voluntary-disclosure cases,¹⁰⁰ no court has yet applied them.¹⁰¹ FCA penalties appear to be mandatory on the statute's face,¹⁰² and when courts have imposed damages, they have awarded treble damages.¹⁰³ Notwithstanding the language of the statute, deciding the claims to which penalties apply provides leeway to courts when imposing penalties.¹⁰⁴

The government can also recover penalties and damages from the defendant for the costs of the civil action.¹⁰⁵ Moreover, § 3730(d) provides that qui tam plaintiffs can recoup expenses and "reasonable attorneys' fees and costs" from the defendant.¹⁰⁶

F. The Presentment Requirement and Allison Engine Company v. United States ex rel. Sanders

In *Allison Engine Co. v. United States ex rel. Sanders*, former employees of General Tool Company (GTC) brought suit, alleging that invoices submitted to naval shipyards by subcontractors Allison Engine Company, GTC, and Southern Ohio Fabricators (SOFCO), were fraudulent.¹⁰⁷ The claims asserted that the relators work on the generator sets had not been completed in accordance with the Navy's specifications, and the three subcontractors issued false certifications declaring that the work had been done properly.¹⁰⁸ The former employees sought to recover damages under three FCA sections:

§ 3729(a)(1), which concerns direct presentment of a false claim to the government; § 3729(a)(2), which creates liability for using a false record or

99. 28 C.F.R. § 85.3(a) (2010).

100. 31 U.S.C. § 3729(a)(2) (Supp. III 2009).

101. BOESE, *supra* note 15, § 1.04[E], at 1-23 to 1-24.

102. *See* 31 U.S.C. § 3729(a)(1)(G); BOESE, *supra* note 15, § 3.05[B], at 3-94.

103. BOESE, *supra* note 15, § 1.04[E], at 1-23 to 1-24; *see, e.g.*, *United States v. Mackby*, 339 F.3d 1013, 1018-19 (9th Cir. 2003) (affirming the imposition of treble damages and penalties).

104. BOESE, *supra* note 15, § 3.05[B], at 3-94.

105. 31 U.S.C. § 3729(a)(3) (Supp. III 2009).

106. 31 U.S.C. § 3730(d) (2006).

107. 553 U.S. 662, 665-66 (2008), *superseded by statute*, FERA, Pub. L. No. 111-21, 123 Stat. 1617 (2009) (codified as amended in scattered sections of 18 and 31 U.S.C.). The United States Navy contracted with two shipyards, Bath Iron Works and Ingalls Shipbuilding, to build a new fleet of over fifty guided missile destroyers. *Id.* The shipyards in turn contracted with Allison Engine Company to build ninety generator sets for the destroyers, and Allison Engine Company contracted with GTC to assemble the generator sets. *Id.* GTC then subcontracted with SOFCO to manufacture parts of the generator sets. *Id.* at 666. Each subcontractor—Allison Engine Company, GTC, and SOFCO—entered into an agreement that required the parties to build ship parts to meet the Navy's standards. *Id.* The contracts also required that a "certification of conformance" be delivered with each generator. *Id.*

108. *Id.* at 666-67.

statement to get a claim paid or approved; and § 3729(a)(3), which prohibits conspiring to defraud the Government.¹⁰⁹ At trial, the relators did not introduce evidence that the shipyards submitted false claims to the Navy; rather, they showed that false statements had been presented by the three subcontractors to the shipyards.¹¹⁰

A divided Sixth Circuit panel held that liability could attach under 31 U.S.C. § 3729(a)(2) and (3) without the presentment of a false claim to the government.¹¹¹ “The FCA,” the majority explained, “covers all claims to government money, even if the claimant does not have a direct connection to the government.”¹¹² The court’s holding created a circuit split, as the Sixth Circuit disagreed with the D.C. Circuit’s *Totten* decision, in which the court had held that the presentment clause applied to both § 3729(a)(1) and (2).¹¹³

The Supreme Court granted certiorari and agreed with the Sixth Circuit that § 3729(a)(2) had no presentment requirement.¹¹⁴ In the unanimous decision, however, the Court overturned the Sixth Circuit’s holding that liability under § 3729(a)(2) attached merely because a contractor paid a subcontractor’s false claim using government funds.¹¹⁵ The Court noted that the statutory language created liability when a defendant submitted a false record or statement “to get” a claim “paid or approved by the government.”¹¹⁶ The Court interpreted “to get” as an indication that the defendant must intend for the government to pay the false claim, and not merely for a private third party to pay the claim using government funds.¹¹⁷

Although the Court rejected the D.C. Circuit’s interpretation of the presentment requirement in § 3729(a)(2),¹¹⁸ it expressed concerns over an unchecked FCA.¹¹⁹ Without intent to defraud the government, the Court stated, the “direct link” between a subcontractor’s false statement and the

109. *Id.* at 666.

110. *Id.* at 667.

111. *United States ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610, 615–16 (6th Cir. 2006), *rev’d on other grounds*, 533 U.S. 662 (2008), *and superseded by statute*, FERA, Pub. L. No. 111-21, 123 Stat. at 1617–31.

112. *Id.* at 618.

113. *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 492 (D.C. Cir. 2004). *See supra* Part I.B. for an in-depth discussion of *Totten*.

114. *Allison Engine*, 533 U.S. at 671.

115. *Id.* at 665.

116. *Id.* at 668–69 (quoting 31 U.S.C. § 3729(a)(2) (2006)) (internal quotation marks omitted).

117. *Id.* Similarly, for liability under § 3729(a)(3), a plaintiff “must show that the conspirators agreed to make use of the false record or statement to achieve this end.” *Id.* at 665.

118. *Id.* at 671.

119. *Id.* at 669 (stating that a broad interpretation of the statute would allow liability to “attach for any false claim made to any college or university . . . [that] received some federal grants” (quoting *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 496 (D.C. Cir. 2004))).

government's decision to pay a false claim was too attenuated to prove liability.¹²⁰ This broader interpretation, the Court observed, "would expand the FCA well beyond its intended role" and result in a statute whose reach was "almost boundless."¹²¹

G. FERA and the 2009 Amendments

In May 2009, President Barack Obama signed into law the Fraud Enforcement and Recovery Act of 2009,¹²² which expanded liability under the FCA.¹²³ By passing the FERA, Congress singled out the *Allison Engine* and *Totten* decisions as incorrect interpretations of the FCA.¹²⁴

1. The "Presentment Clause" and Intent to Defraud the Government

Before the FERA amendments, liability did not attach under § 3729(a)(1) unless a defendant presented a false claim for payment or approval to an "employee of the United States Government or a member of the Armed Forces of the United States."¹²⁵ The 2009 amendments changed this requirement; now, the false claim for compensation or approval can be presented to anyone for payment, as long as the federal government has or will provide part of the money to pay the claim.¹²⁶

The amendments also removed language from § 3729(a)(1)(B) that the Supreme Court relied on in *Allison Engine* to hold that a defendant must intend for his false claim or statement to be material to the government's decision to pay or approve the claim.¹²⁷ FERA also removed similar language from § 3729(a)(1)(C) and (G).¹²⁸

120. *Id.* at 672 ("Recognizing a cause of action under the FCA for fraud directed at private entities would threaten to transform the FCA into an all-purpose antifraud statute.").

121. *Id.* at 669 (quoting *Totten*, 380 F.2d at 496) (internal quotation marks omitted).

122. FERA, Pub. L. No. 111-21, 123 Stat. 1617 (2009) (codified as amended in scattered sections of 18 and 31 U.S.C.).

123. Congress renumbered and modified all seven liability provisions of the FCA. Compare 31 U.S.C. § 3729(a)(1)–(7) (2006), with 31 U.S.C. § 3729(a)(1)(A)–(G) (Supp. III 2009).

124. S. REP. NO. 110-21, at 10 (2009), reprinted in 2009 U.S.C.C.A.N. 430, 438. From Congress's perspective, "[t]he effectiveness of the FCA ha[d] been recently undermined by court decisions limiting the scope of the law and allowing subcontractors and non-governmental entities to escape responsibility for proven frauds." *Id.* at 10, 2009 U.S.C.C.A.N. at 437. The FERA amendments were a correction and clarification of these judicial interpretations so as to protect "the Federal assistance and relief funds expended in response to our current economic crisis." *Id.* at 4, 2009 U.S.C.C.A.N. at 433.

125. 31 U.S.C. § 3729(a)(1) (2006).

126. 31 U.S.C. § 3729(a)(1) (Supp. III 2009).

127. Compare 31 U.S.C. § 3729(a)(1)(B) (Supp. III 2009), with *id.* § 3729(a)(2) (2006); see *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 665 (2008), superseded by statute, FERA, 123 Stat. at 1617–31.

128. See 31 U.S.C. § 3729(a)(1)(C), (G) (Supp. III 2009).

Congress stated that it intended the amendments to uphold the FCA's original purpose, and that the amendments targeted subcontractors who knowingly submitted false claims to general contractors for payment in government money.¹²⁹ Congress did not specify whether liability attaches to a subcontractor who knowingly submits a false claim to another subcontractor and is paid with government funds.¹³⁰

2. "Claim" Redefined

Under the new definition of "claim",¹³¹ a false claim to any recipient of government money triggers liability if the money is intended for "the Government's [use] or to advance a Government program or interest."¹³² This phrase was not explained by the amendments and remains for courts to define.¹³³

3. New *Qui Tam* Protections

The FERA amendments notably widened protections for relators.¹³⁴ Before FERA, § 3730(h) only protected employees from retaliation by their employers.¹³⁵ Now, § 3730(h)(1) extends protection to contractors and agents.¹³⁶

Perhaps the most significant change to the whistle-blower protections is the removal of statutory language that required retaliatory actions from the

129. S. REP. NO. 111-10, at 10–11 (2009), *reprinted in* 2009 U.S.C.C.A.N. 430, 438.

130. *Id.*

131. As defined in the most recent version of the *United States Code*, the term "claim":
 (A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—
 (i) is presented to an officer, employee, or agent of the United States; or
 (ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or *used on the Government's behalf or to advance a Government program or interest*, and if the United States Government—
 (I) provides or has provided any portion of the money or property requested or demanded; or
 (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and
 (B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property[.]

31 U.S.C. § 3729(b)(2) (Supp. IV 2010) (emphasis added).

132. *Id.*

133. *See id.*

134. *See infra* notes 136–39 and accompanying text.

135. *See supra* note 92 and accompanying text.

136. *See* 31 U.S.C. § 3730(h)(1)–(2) (Supp. III 2009).

employer.¹³⁷ The statute, which previously provided a cause of action only when the employer discriminated against the whistle-blowing employee,¹³⁸ extended the bases of employer mistreatment that would give rise to a suit.¹³⁹

H. *The Mail-Fraud Statute and Vagueness Concerns*

Congressional reactions to similar amendments to the mail-fraud statute¹⁴⁰ provide an example of the dangers of vagueness and overbreadth.¹⁴¹ First enacted in 1872—only nine years after the first FCA—the statute has often been wielded by federal prosecutors¹⁴² in conjunction with the newer wire-fraud statute.¹⁴³ Described as the government’s primary weapon in the

137. Compare 31 U.S.C. § 3730(h) (2006), with 31 U.S.C. § 3730(h)(1) (Supp. III 2009).

138. 31 U.S.C. § 3730(h) (2006).

139. 31 U.S.C. § 3730(h)(1) (Supp. III 2009).

140. See 18 U.S.C. § 1341 (Supp. III 2009). The mail-fraud statute provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

Id.

141. See *Skilling v. United States*, 130 S. Ct. 2896, 2935–41 (2010) (Scalia, J., concurring) (stating that the honest-services statute was too vague to be saved by the Court’s interpretation); *Sorich v. United States*, 129 S. Ct. 1308, 1308–11 (2009) (Scalia, J., dissenting) (“If the ‘honest services’ theory . . . is taken seriously and carried to its logical conclusion, presumably the statute also renders criminal a state legislator’s decision to vote for a bill because he expects it will curry favor with a small minority essential to his reelection; a mayor’s attempt to use the prestige of his office to obtain a restaurant table without a reservation; a public employee’s recommendation of his incompetent friend for a public contract; and any self-dealing by a corporate officer.”).

142. See *United States v. Maze*, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting) (“Section 1341 of Title 18 U.S.C. has traditionally been used against fraudulent activity as a first line of defense. When a ‘new’ fraud develops—as constantly happens—the mail fraud statute becomes a stopgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil.”).

143. See *supra* note 9.

fight against crime,¹⁴⁴ prosecutors have used § 1341 and § 1343 as “catch-all” statutes.¹⁴⁵ Between them, these statutes cover issues ranging from mailing fraudulent prize-giveaway schemes,¹⁴⁶ to sport-association rule violations¹⁴⁷ and citizens’ rights to honest and fair government protection.¹⁴⁸

The Supreme Court temporarily halted the expansion of liability under the mail-fraud statute in *McNally v. United States* in 1987.¹⁴⁹ In *McNally*, the Court held that “[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government.”¹⁵⁰ The Court interpreted the original purpose of the statute as protecting only people’s money or property.¹⁵¹

Congress immediately responded to the *McNally* decision by enacting the “honest services” statute—§ 1346—in 1988.¹⁵² This section defined the term “scheme or artifice to defraud,” as “a scheme or artifice to deprive another of the intangible right of honest services.”¹⁵³ Through this language, the amendment specifically covered “the intangible right to honest services” protected by the lower courts.¹⁵⁴

144. Brian C. Behrens, *18 U.S.C. § 1341 and § 1346: Deciphering the Confusing Letters of the Mail Fraud Statute*, 13 ST. LOUIS U. PUB. L. REV. 489, 491 (1993).

145. *Id.* at 498.

146. *Id.*

147. *United States v. Walters*, 997 F.2d 1219, 1221–22 (7th Cir. 1993).

148. Behrens, *supra* note 144, at 498. One former prosecutor went so far as to describe the mail-fraud statute as “our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law ‘darling,’ but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity.” Rakoff, *supra* note 9, at 771 (internal citations omitted).

149. 483 U.S. 350, 361 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, § 7603, 102 Stat. 4181, 4508 (codified as amended at 18 U.S.C. § 1346 (2006)).

150. *Id.* at 356. Through its reasoning, the Court made clear:

[When] there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. . . . Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.

Id. at 359–60.

151. *Id.* at 356.

152. Anti-Drug Abuse Act § 7603, 102 Stat. at 4508. As with previous mail-fraud amendments, the legislative history of § 1346 is quite limited. From the timing of the amendment and the pre-enactment debates, though, it is clear that the amendment was largely intended to overturn the Supreme Court’s decision in *McNally*. See, e.g., 134 CONG. REC. 32,727, 33,297 (1988) (statement of Rep. Conyers) (“This amendment restores the mail fraud provision to where that provision was before the *McNally* decision.”).

153. Anti-Drug Abuse Act § 7603, 102 Stat. at 4508.

154. See *Cleveland v. United States*, 531 U.S. 12, 19–20 (2000). Academics have heavily criticized the intangible-rights doctrine. See, e.g., John C. Coffee, Jr. *The Metastasis of Mail*

In 2010, the Supreme Court discussed the matter of honest-services fraud for the first time since its 1987 *McNally* decision.¹⁵⁵ Writing for the Court in *Skilling v. United States*, Justice Ruth Bader Ginsburg limited the application of § 1346 to bribery and kickback schemes—the core pre-*McNally* honest services offenses.¹⁵⁶ A broader reading of the statute, the Court argued, could “render the statute impermissibly vague.”¹⁵⁷

In a concurring opinion, Justice Antonin Scalia argued that the honest-services statute was void for vagueness, as it failed to provide fair notice and encouraged arbitrary discrimination.¹⁵⁸ He stated that the Court should not dabble in statutory construction, but instead reverse the § 1346 conviction because the statute “fail[ed] to define the conduct it prohibits.”¹⁵⁹

In both *McNally* and *Skilling*, the Court applied the doctrine of lenity to resolve ambiguities in the mail-fraud statute.¹⁶⁰ That doctrine accounts for

Fraud: The Continuing Story of the “Evolution” of a White-Collar Crime, 21 AM. CRIM. L. REV. 1, 3 (1983) (arguing for statutory reform); Ezersky, *supra* note 9, at 1427 (contending that the statute harms its supposed beneficiaries and offends principles of federalism); Daniel J. Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 424–26 (1983) (advocating for a redrafted statute with “a precise definition of a ‘scheme to defraud’”); Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 225 (1992) (arguing for a legislative amendment of the statute and strict judicial interpretation to curb the wide applicability of the statute); Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137, 168–70 (1990) (cautioning against the use of the honest-services statute without guidelines to direct its application); W. Robert Gray, Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562, 562–63 (1980) (questioning the use of the intangible-rights doctrine in political corruption cases).

155. See generally *Skilling v. United States*, 130 S. Ct. 2896 (2010). Over the two decades before it accepted certiorari in *Skilling*, the Court had various opportunities to construe the statute, but it turned down these requests. Lisa L. Casey, *Twenty-Eight Words: Enforcing Corporate Fiduciary Duties Through Criminal Prosecution of Honest Services Fraud*, 35 DEL. J. CORP. L. 1, 4 (2010); see also *Sorich v. United States*, 129 S. Ct. 1308, 1308 (2009) (denying certiorari).

156. 130 S. Ct. at 2928. The Court focused on the congressional intent in enacting § 1346, concluding that Congress “meant to reinstate the body of pre-*McNally* honest-services law.” *Id.* at 2929. Surveying the pre-*McNally* case law, the Court observed that although the Court of Appeals had disagreed over the honest-services doctrine, the core of cases “involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes.” *Id.* at 2930. Therefore, the Court reasoned, Congress must have “intended § 1346 to reach at least bribes and kickbacks.” *Id.* at 2931.

157. *Id.* at 2931 n.42.

158. *Id.* at 2935 (Scalia, J., concurring in part and concurring in the judgment).

159. *Id.* at 2940.

160. See *Skilling*, 130 S. Ct. at 2933 (“Holding that honest-services fraud does not encompass conduct more wide-ranging than the paradigmatic cases of bribes and kickbacks, we resist the Government’s less constrained construction absent Congress’ clear instruction otherwise.”); *McNally v. United States*, 483 U.S. 350, 360 (1987) (“Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights.”), *superseded by statute*, Anti-Drug

ambiguities in criminal statutes by narrowly construing the offending language¹⁶¹ to provide citizens with fair notice of punishable conduct.¹⁶² As in *Skilling*, courts use lenity to avoid invalidating a statute.¹⁶³

II. THE DANGER OF AN OVERBROAD FCA

Since Congress attempted to clarify the FCA in 2009,¹⁶⁴ potential liability under the FCA is broader than ever before.¹⁶⁵ Previously, legislative history accompanying the amendments targeted subcontractors who knowingly submitted a false claim to a general government contractor;¹⁶⁶ however, the new world of liability created by the amendments does not stop with that subcontractor.¹⁶⁷ Instead, any person—including a subcontractor—who knowingly submits a false claim for payment to a private entity, or uses a false statement that is material to a false claim, may be liable under the Act.¹⁶⁸ Furthermore, liability no longer hinges on whether the government has title to the money for which the claim is being paid.¹⁶⁹ The statute only requires that (1) at some point, the government provided the money to pay the claim or will reimburse the money, and (2) the money was spent to advance a government interest or program.¹⁷⁰ Under the statute's broad scope, the fungibility of money will create a long chain of liability under the FCA.¹⁷¹

Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (codified as amended at 18 U.S.C. § 1346).

161. See *McElroy v. United States*, 455 U.S. 642, 657–58 (1982). The Supreme Court has also used lenity in civil contexts. See, e.g., *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 (1992) (applying the rule of lenity to a tax statute that the Court construed in a civil setting, but which also had criminal applications); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (stating that where a standard in a civil statute is “set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute’s coverage”).

162. *McNally*, 483 U.S. at 375 (Stevens, J., dissenting).

163. See *Skilling*, 130 S. Ct at 2907.

164. S. REP. NO. 111-10, at 4 (2009), reprinted in 2009 U.S.C.C.A.N. 430, 433 (“The False Claims Act must be corrected and clarified in order to protect from fraud the Federal assistance and relief funds expended in response to our current economic crisis.”).

165. See *infra* Part II.A.

166. S. REP. NO. 111-10, at 10, 2009 U.S.C.C.A.N. at 438.

167. See 31 U.S.C. § 3729(a)(1)(A)–(B), (b)(2) (Supp. III 2009) (providing no internal limits to liability); S. REP. NO. 111-10, at 10, reprinted in 2009 U.S.C.C.A.N. at 438 (noting that limitation of the FCA’s scope has curbed the statute’s effectiveness).

168. 31 U.S.C. § 3729(a)(1)(A)–(B), (b)(2).

169. *Id.* § 3729(b)(2).

170. *Id.*

171. See *infra* Part II.A.

A. Effect of Amendments

The Supreme Court's fears regarding consequences of the relator's arguments in *Allison Engine* have been fully realized.¹⁷² In oral arguments for *Allison Engine*, Chief Justice Roberts outlined the Supreme Court's concerns over an expanded FCA in a short hypothetical:

The government gives money to the State to build a school. The school has to be painted as part of that, so the school contractor, the prime contractor, takes some of the money from the Federal Government and pays the painter. The painter needs to buy paint. So the painter takes some of the Federal money and pays the paint company. The paint company has to get the chemicals from somebody. So the paint company takes some of the money and pays the chemical company. And at that point, the chemical companies fraudulently added, you know, a dollar on to the cost of the chemicals. So that dollar goes all the way through. So the Government ends up paying a dollar more because of the fraud five, six, seven times down the line.¹⁷³

The Chief Justice then asked whether a relator could bring an FCA suit against the chemical company in this scenario; the Assistant to the Solicitor General responded with a qualified "yes."¹⁷⁴

Chief Justice Roberts's hypothetical is not unrealistic.¹⁷⁵ In *Allison Engine*, the relators sued three tiers of subcontractors out of hundreds that constructed the warships.¹⁷⁶ If a third-tier subcontractor can be held liable under the FCA, then a sixth-, seventh-, or eighth-tier subcontractor can also be liable—the current FCA contains no clear internal limits to liability.¹⁷⁷

172. See *supra* text accompanying notes 118–21.

173. Transcript of Oral Argument, *supra* note 1, at 33.

174. *Id.*

175. The plain language of 31 U.S.C. § 3729 provides no obvious limits to liability, except subsection (b)(2)'s requirement that the money at issue is "used on the Government's behalf or to advance a Government program or interest." See 31 U.S.C. § 3729(b)(2).

176. Petition for a Writ of Certiorari at 5, *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008), *superseded by statute*, FERA, Pub. L. No. 111-21, 123 Stat. 1617 (2009) (codified as amended in scattered sections of 18 and 31 U.S.C.) (No. 07-214).

177. See 31 U.S.C. § 3729(a)(1); *supra* text accompanying note 126. FCA liability comes with a price. Although calculating damages and penalties can become complex, their significance is easily grasped. See BOESE, *supra* note 15, § 3.01 for a detailed discussion of the application of the FCA's penalty and damage provisions. A Department of Justice attorney illustrated how quickly damages and penalties can accrue:

Triple damages are substantial enough; but couple that with the \$5,000–\$10,000 in penalties for each request . . . for reimbursement, and the government's potential damages mount very quickly. The math is easy to do: for every 100 false claims a . . . provider submits, it can face liability for \$1 million in penalties alone.

BOESE, *supra* note 15, at 1-15 (footnote omitted) (quoting Stuart M. Gerson, Assistant Attorney Gen., Civil Div., U.S. Dep't of Justice, Address of the Annual Meeting of the A.B.A., Public Contracts Section: Increasing Criminalization of Health Care (Aug. 11, 1991).

B. The FCA is Overbroad, Vague, and Punitive

By expansively defining “claim” and eliminating any presentment requirement, Congress created a statute with almost limitless reach.¹⁷⁸ The FCA now effectively transforms garden-variety fraud into fraud against the government, thus betraying the statute’s intended purpose of protecting the Department of Treasury from fraudulent claims for government money or property.¹⁷⁹

The lack of clear limits in the FCA raises questions of overbreadth and vagueness.¹⁸⁰ Vagueness voids a statute when its prohibitions are

To illustrate the potential reach of the new FCA through its damages and penalties provisions, consider the following scenario: A small sixth-tier defense subcontractor knowingly submitted a false claim for payment to a fifth-tier defense subcontractor as part of a private contract in which the sixth-tier subcontractor provided machine-cleaning widgets. If any part of the sixth-tier subcontractor’s false claim is paid or will be paid with money that was once released by the Federal Treasury, and those widgets will be used to ultimately “advance a government interest or program,” then the sixth-tier subcontractor is liable under the FCA.

To take the example further, imagine the sixth-tier subcontractor manufactured machine-cleaning widgets that the fifth-tier subcontractor purchased to clean its shop-floor machinery. Those widgets in turn are used to create components for a fourth-tier subcontractor. A general government contractor eventually uses these components in some product for the U.S. Army. The sixth-tier subcontractor does not realize, however, that its widgets are used to create a product for the U.S. Army. Over a five-year contract with the fifth-tier contractor, the sixth-tier subcontractor provided 540 widgets, at a true value of \$200 each. However, in its biweekly invoice, the sixth-tier subcontractor overcharged the fifth-tier subcontractor by \$50 for each widget. This amounts to an overbilling by \$27,000 and the submission of 130 false claims for payment.

Under § 3729(a)(1)(G), there is a penalty of \$5000 to \$11,000 for each of these false claims, plus triple the amount of damages suffered by the government. *See* 31 U.S.C. § 3729(a)(1). Even without any actual harm to the government, the sixth-tier subcontractor is potentially liable for \$1.43 million in penalties. If the government suffers financial harm, then the sixth-tier subcontractor may have to pay an additional \$81,000 in damages. Furthermore, the sixth-tier subcontractor’s government contracting license may be revoked.

Before the most recent FCA amendments, the sixth-tier subcontractor would not be liable under § 3729(a)(1)(A), as it did not directly present its false claims to the government. *See* § 3729(a)(1)(A) (2006). Under *Allison Engine*, the sixth-tier subcontractor would also not be liable under § 3729(a)(1)(B) because it had no intent to defraud the government. *See Allison Engine*, 553 U.S. at 671–73.

178. *See supra* Part I.G.1–2.

179. *See supra* notes 43–50 and accompanying text.

180. One commentator considers vagueness and overbreadth to be indistinguishable. *See* A. G. A., Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75–85 (1960). Indeed, the Supreme Court often speaks of the doctrines together. *See, e.g.,* Kolender v. Lawson, 461 U.S. 352, 358–59, 358 n.8 (1983) (“[W]e have traditionally viewed vagueness and overbreadth as logically related and similar doctrines.”); *Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967) (“Where statutes have an overbroad sweep, just as where they are vague . . . those covered by the statute are bound to limit their behavior” (internal citations omitted)); *NAACP v. Button*, 371 U.S. 415, 432–33 (1963) (“The objectionable quality of vagueness and overbreadth . . . [depends] . . . upon the danger of tolerating . . . the existence of a penal statute susceptible of sweeping and improper application.” (footnote omitted)). Even if

unclear.¹⁸¹ Instead, laws must have sufficient clarity to provide “the person of ordinary intelligence a reasonable opportunity to know what is prohibited.”¹⁸² This certainty prevents arbitrary and discriminatory enforcement of the law.¹⁸³ These standards, however, are applied less strictly to civil enactments than to criminal statutes, and a scienter requirement may “mitigate [the] law’s vagueness.”¹⁸⁴

Here, the FCA presents a fair-notice problem. Although the chemical company in Chief Justice Robert’s hypothetical knowingly defrauded the paint manufacturer, the chemical company was likely unaware that its actions also defrauded the government under the FCA.¹⁸⁵ As Justice Samuel Alito, Jr. stated in the *Allison Engine* opinion:

In such a situation, the direct link between the false statement and the Government’s decision to pay or approve a false claim is too attenuated to establish liability. Recognizing a cause of action under the FCA for fraud directed at private entities would threaten to transform the FCA into an all-purpose antifraud statute.¹⁸⁶

Although fair-notice requirements are less stringent because the FCA is a civil statute, the FCA’s punitive characteristics and unique qui tam enforcement mechanism suggest it should be treated more like a criminal statute, similar to the mail-fraud statute.¹⁸⁷ Therefore, the severity of the civil punishment meted out under the FCA indicates that the void-for-vagueness doctrine applies.¹⁸⁸

vagueness and overbreadth are treated separately, and one successfully argues that the FCA’s language is not vague, the statute is still astoundingly overbroad. *See generally supra* Part II.A; *see also supra* note 173 (describing the FCA’s overbreadth).

181. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (“Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” (footnotes omitted)).

182. *Id.* at 108.

183. *See id.* at 108–09.

184. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982).

185. *See Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 672 (2008), *superseded by statute*, FERA, Pub. L. No. 111-21, 123 Stat. 1617 (2009) (codified as amended in scattered sections of 18 and 31 U.S.C.).

186. *Id.*

187. *See infra* Part II.B.

188. *See Jordan v. De George*, 341 U.S. 223, 231 (1951) (stating that the severity of deportation as a punishment is cause to consider the void-for-vagueness doctrine in a civil context).

Legislative blurring of criminal and civil statutes has not gone unnoticed.¹⁸⁹ Although courts and Congress have interpreted the FCA as a remedial statute,¹⁹⁰ one commentator argued that when a “statutory scheme [is] so punitive” one questions whether the legislature “negate[d] that intention.”¹⁹¹

The Supreme Court has treated civil fines and criminal fines similarly when considering possible violations of the Eighth Amendment, which prohibits excessive fines.¹⁹² The Court has stated that “a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.”¹⁹³ Furthermore, in *United States v. Bornstein*, the Court recognized the partly punitive nature of the FCA¹⁹⁴—a view echoed by lower courts.¹⁹⁵ Specifically, the Ninth Circuit held that although the FCA does not specify whether its penalties are punitive or remedial, the “sanction clearly has a punitive purpose.”¹⁹⁶

The FCA’s treble damages further advance its punitive nature.¹⁹⁷ In *Cook County, Illinois v. United States ex rel. Chandler*, the Supreme Court acknowledged the dual remedial and punitive nature of the treble damages provision.¹⁹⁸ Moreover, the Court held that treble damages imposed by other

189. See generally Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991) (harmonizing criminal and civil statutes).

190. See *supra* Part I.A.1–4. (discussing the FCA’s purpose); see also *infra* Part II.B. (analyzing the punitive and remedial nature of FCA).

191. David S. Rudstein, *Civil Penalties and Multiple Punishment Under the Double Jeopardy Clause: Some Unanswered Questions*, 46 OKLA. L. REV. 587, 591 (1993) (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362–63 (1984)).

192. *Hudson v. United States*, 522 U.S. 93, 103 (1997) (“The Eighth Amendment protects against excessive civil fines . . .”). A fine is unconstitutionally excessive if the payment to the government constitutes punishment for an indiscretion, and the payment “is grossly disproportional to the gravity of a defendant’s offense.” *United States v. Bajakajian*, 524 U.S. 321, 327–28, 334 (1998).

193. *United States v. Halper*, 490 U.S. 435, 448 (1989).

194. 423 U.S. 303, 309–10, 309 n.5 (1976) (“According to its sponsor, the False Claims Act was adopted ‘for the purpose of punishing and preventing . . . frauds.’” (citations omitted)).

195. See, e.g., *United States v. Mackby*, 261 F.3d 821, 830 (9th Cir. 2001).

196. *Id.*

197. As one commentator explained, “The penalty provisions are intended to deter fraudulent conduct, especially when actual damages would be nominal. Where actual damages are not nominal, the trebling of those damages deters as well as compensates, with the result that the deterrence is multiplied without any consideration of the impact of such multiplied deterrence . . .” *The False Claims Amendments Act of 1993: Hearing Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 103d Cong., 62 (1993) (statement of Rand L. Allen, U.S. Chamber of Commerce).

198. 538 U.S. 119, 130 (2003). The assessment of both the penalty and treble damages are automatic. See *United States v. Killough*, 848 F.2d 1523, 1533–34 (11th Cir. 1988). Consequential damages and pre-judgment interest, however, are not recoverable under the Act.

statutes were also partly punitive.¹⁹⁹

Although defendants liable under the FCA clearly do not face the harsh jail sentences meted out to defendants convicted under §§ 1341 and 1343,²⁰⁰ the lack of a requirement that the government show damages makes the FCA seem punitive rather than remedial, especially in conjunction with the penalties, treble damages, and costs provisions.²⁰¹ Moreover, a government contractor might be barred from future government contracting if it is found to have violated the FCA.²⁰² If a contractor commits fraud, it must also contend with the associated stigma, regardless of whether it was consequently disbarred.²⁰³ This loss of reputation alone can severely limit future contracting opportunities.²⁰⁴

Furthermore, considering the FCA's scienter requirements reemphasizes the punitive nature of the statute. Section 3729 requires no showing of specific intent to defraud.²⁰⁵ Instead, "deliberate ignorance of the truth" or "reckless disregard of the truth" satisfies the intent element.²⁰⁶ In contrast, under the mail and wire-fraud statutes, the government has to prove beyond a reasonable

See Cook County, 538 U.S. at 131; *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1011 (5th Cir. 1972).

199. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) (describing treble damages in antitrust statutes as a "crucial deterrent to potential violators").

200. People who have violated the mail- or wire-fraud statutes can be fined up to \$1 million and imprisoned up to thirty years. 18 U.S.C. §§ 1341, 1343 (2006 & Supp. III 2009). However, not all punishment necessarily entails incarceration. *See Mandatory Victims Restitution Act of 1996*, Pub. L. 104-132, § 204, 110 Stat. 1214, 1227 (requiring that courts order defendants to pay restitution to victims in the case of certain crimes).

201. *See United States v. Halper*, 660 F. Supp. 531, 532 (S.D.N.Y. 1987), *vacated by United States v. Halper*, 490 U.S. 435 (1989) (holding the FCA's penalty violates the Double Jeopardy Clause). *Halper*, a manager of a New York medical laboratory, routinely overcharged the government by overbilling Medicare for patient treatment. *Id.* He was convicted of sixty-five falsely submitted claims, inflated by a maximum of \$9 for each submission, totaling \$585. *Id.* at 532-33. The Government, however, sought \$130,000 in penalties under the FCA. *Id.* at 533. Under the increased penalties of the 1986 amendments, his fine would have increased to between \$325,000 and \$650,000. *See BOESE, supra* note 15, § 3.06[A], at 3-109 n.463. For his criminal conviction under the FCA, he received two years in jail. *Halper*, 660 F. Supp. at 532.

202. *See, e.g., Stacy & Witbeck, Inc. v. City and County of S.F.*, 44 Cal. Rptr. 2d 472, 475 (Cal. Ct. App. 1995) (upholding the right of the San Francisco Public Utilities Commission to disbar a public-works contractor from bidding on projects for five years, after the Commission determined the contractor had filed a false claim and had acted irresponsibly).

203. Frank LaSalle, Comment, *The Civil False Claims Act: The Need for a Heightened Burden of Proof as a Prerequisite for Forfeiture*, 28 AKRON L. REV. 497, 522-23 (1995).

204. *Id.* at 523-25.

205. 31 U.S.C. § 3729(b)(1)(B) (Supp. III 2009). To continue the example in note 177, *supra*,—if a sixth-tier subcontractor submits false claims to a fifth-tier subcontractor with a reckless disregard of the truth but no intent to defraud the government, the sixth-tier subcontractor could be fined \$1.43 million dollars for defrauding the government. *See supra* note 177.

206. 31 U.S.C. § 3729(b)(1)(A)(ii)-(iii).

doubt²⁰⁷ that the defendant knowingly made false representations or that the scheme was “reasonably calculated to deceive persons of ordinary prudence and comprehension.”²⁰⁸

In light of the FCA’s punitive nature, Congress and the courts must take the statute’s overbreadth concerns seriously. The FCA deserves to be treated as a quasi-criminal statute because of the severity of its damages and forfeitures.

C. Strain on Judicial Resources

Even if the FERA amendments are not unconstitutionally overbroad, the potential strain on the federal court system could be immense. The extended reach of the FCA, coupled with the greater protection afforded to qui tam relators,²⁰⁹ has created a situation ripe for the proliferation of qui tam suits.²¹⁰

Already, the FCA is “the fastest growing area of federal litigation.”²¹¹ At the outset of 2011, the Department of Justice had over 1300 qui tam cases awaiting review.²¹² In the first quarter of 2011, there were thirty-nine newly filed FCA cases.²¹³

The number of cases is likely to grow as qui tam relators begin to appreciate both the new opportunities to bring FCA suits and the increase in federal budgets for enforcement actions.²¹⁴ The government’s 2011 budget proposal requested a \$234.6 million increase from 2010 to be used in the Department of Justice’s fight against fraud.²¹⁵ This includes an additional 708

207. See *In re Winship*, 397 U.S. 358, 364 (1970) (holding that proof beyond a reasonable doubt is required to establish guilt for any criminal charge).

208. *United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978); see also *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1415 (3d Cir. 1991).

209. See 31 U.S.C. § 3730(h) (Supp. III 2009).

210. See *infra* text accompanying notes 213–16.

211. Program Guide, Am. Bar. Assoc., *The Eighth Annual National Institute on the Civil False Claims Act and Qui Tam Enforcement* (June 2, 2010), available at http://new.abanet.org/calendar/civil-false-claims-act-and-qui-tam-enforcement-2010/Documents/cen0cfc_Website_Brochure_5-7-10.pdf.

212. Letter from Jim Esquea, Assistant Sec’y, U.S. Dep’t of Health & Human Servs., and Ronald Weich, Assistant Attorney Gen.l, U.S. Dep’t of Justice, to Senator Charles E. Grassley (Jan. 24, 2011), available at <http://www.taf.org/DOJ-HHS-joint-letter-to-Grassley.pdf>.

213. *2011 Mid-Year False Claims Act Update*, GIBSON DUNN (July 14, 2011) <http://www.gibsondunn.com/publications/pages/2011Mid-YearFalseClaimsActUpdate.aspx>. In the first half of 2010 alone, the U.S. Supreme Court and lower federal courts issued more than 200 decisions citing the FCA. *2010 Mid-Year False Claims Act Update*, GIBSON DUNN (July 9, 2010), <http://www.gibsondunn.com/publications/pages/2010Mid-YearFalseClaimsActUpdate.aspx>.

214. See *infra* text accompanying notes 215–16.

215. See Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, Department of Justice FY 2011 Budget Request (Feb. 1, 2010), available at <http://www.justice.gov/opa/pr/2010/February/10-ag-109.html>.

jobs—including positions for agents and attorneys—all assigned to tackling fraud.²¹⁶ An increased budget and staff should add to the number of FCA suits brought by the Department of Justice.

D. Economic Costs of the FERA Amendments

The FERA amendments will also increase the cost of business for government contractors and subcontractors. As the scope of potential liability increases, more potential defendants will take measures to avoid litigation.²¹⁷ In an effort to recover their costs, contractors facing a greater possibility of qui tam actions will likely pass the increased business costs to consumers, which includes the government.²¹⁸

Moreover, expanding the FCA to cover all transactions paid with money traceable to the government will hinder the reasonable and expeditious resolution of contract disputes, as relators will intervene in private contractual relationships, and cause longer, more costly litigation.²¹⁹ Although FCA lawsuits have proliferated over the past two decades, the government declined to intervene in nearly two-thirds of these lawsuits, leaving them to be prosecuted only by relators.²²⁰ When the government declines to intervene, an “overwhelming majority” of cases result in no recovery,²²¹ and although a substantial number are dismissed, they still result in lengthy and expensive litigation.²²²

216. *Id.*

217. See, e.g., Charles R. Ching, Harry R. Silver & Laura Laemmle-Weidenfeld, *In-House Counsel Beware: The False Claims Act Might Impact Your Business*, ACC DOCKET, NOV. 2009, AT 57, 65 (2009) (exhorting companies to be diligent in their FCA compliance efforts after FERA broadened the statute).

218. See Jonathan T. Broilier, Note, *Mutiny of the Bounty: A Moderate Change in the Incentive Structure of Qui Tam Actions Brought Under the False Claims Act*, 67 OHIO ST. L.J. 693, 705–07 (2006) (noting that the legal costs associated with FCA claims varies between \$250,000 and \$500,000, but can be over \$10 million depending on the complexity of the case).

219. See *id.* at 70 (“In a survey of defense contractors . . . [that examined] thirty-eight *qui tam* claims which the government did not join, the firms’ average costs in external legal fees per case was \$1,431,660, whereas the mean governmental recovery under the False Claims Act in these cases was just \$97,223.”(footnote omitted)); see also Brief for Chamber of Commerce et al. as Amici Curiae Supporting Petitioners at 5–6, *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008), *superseded by statute*, FERA, Pub. L. No. 111-21, 123 Stat. 1617 (codified as amended in scattered sections of 18 and 31 U.S.C.) (No. 07-214).

220. See *Fraud Statistics-Overview*, *supra* note 16.

221. See Brief for Chamber of Commerce, *supra* note 219, at 6 (discussing healthcare cases).

222. *Id.*

III. THE SOLUTION: A LIMITING LEGISLATIVE REGULATION OR JUDICIAL SOLUTION

The presentment clause falls into the category of the adage, “you don’t know what you’ve got till it’s gone.”²²³ Described as the *sine qua non* of the FCA,²²⁴ the requirement that a false claim actually be submitted defined the FCA’s scope by establishing clear outer limits.²²⁵ Because of the punitive consequences of FCA liability, the bright-line function fulfilled by the presentment requirement and utilized by the Supreme Court in *Allison Engine* was particularly important.²²⁶ Whether or not Congress foresaw the potential impact of the FERA amendments,²²⁷ the FCA now applies to a class of entities that should not be liable under the Act, and who will need protection from the statute. The absence of the presentment requirement and the presence of the expanded definition of “claim,”²²⁸ provide no mechanism to prevent Chief Justice Roberts’s slippery-slope scenario from unfolding.²²⁹

A. A Legislative or Judicial Limitation

A legislative amendment to the FCA would prevent a battle between Congress and the Supreme Court, such as the one that occurred over the mail- and wire-fraud statutes.²³⁰ Congress has two available solutions: change the language of the FCA so that the statute’s reach has clear outer boundaries, or provide for alternative-dispute-resolution options to weed out frivolous *qui tam* cases.

1. Legislative Solution

Congress, in drafting the FERA amendments, not only reacted to the depressed economic climate, but also to a small number of cases with unusual

223. JONI MITCHELL, *Big Yellow Taxi*, on LADIES OF THE CANYON (Reprise Records 1970).

224. United States *ex rel.* Clausen v. Lab. Corp. of Am., 290 F.3d 130, 1311 (11th Cir. 2002) (stating that the submission of a claim is not merely a “ministerial act” (internal quotation marks omitted)).

225. See United States *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 496 (D.C. Cir. 2004) (noting the consequences of the FCA remains the presentment clause), *superseded by statute*, FERA, Pub. L. No. 111-21, 123 Stat. 1617 (codified as amended in scattered sections of 18 and 31 U.S.C.).

226. See *supra* Part I.F.

227. Some lawmakers were clearly concerned about the FERA amendments. See 155 CONG. REC. S4559 (daily ed. Apr. 22, 2009) (statement of Sen. Coburn) (calling FERA a “typical knee-jerk reaction”).

228. See *supra* Part I.G.1–2.

229. See *supra* Part II.A.

230. See *supra* Parts I.G. and I.M. Senator Patrick Leahy recently sponsored the Honest Services Restoration Act, which clarifies and expands the definition of a “scheme or artifice to defraud” with respect to mail- and wire-fraud. Honest Services Restoration Act, S. 3854, 111th Cong. (2010), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s3854is.txt.pdf.

facts.²³¹ Congress eliminated specific language from the statute,²³² and created a vague limiting condition for liability to ensue: that the government money or property involved be “used on the Government’s behalf or to advance a Government program or interest.”²³³ Although Congress believed these FERA amendments would bring the FCA into the twenty-first century,²³⁴ it failed to grasp the complexities of conducting business in the modern age. These amendments, which apply to the entire spectrum of FCA cases, prevent businesses from clearly discerning when they have violated the FCA and thus subjected themselves to damages and fines.

Any amendment must reflect the real difference between doing business directly with the government and operating a business that has an attenuated connection to the government. Further, such an amendment must also account for the complexities of government contracting.

First, Congress must define the ambiguous condition that the money or property at issue “advance a Government program or interest.”²³⁵ Any definition must answer several questions. For example, what is a government interest? How significant must the interest be? And, how should such money or property advance this government interest? A definition that covered these points would give greater notice of the statute’s reach to contractors and members of the public. Ideally, Congress would also introduce an intent element to § 3729(a)(1)(A), similar to the requirement inferred by the Supreme Court in *Allison Engine*.²³⁶ Ultimately, any amendment to the FCA needs to

231. *The False Claims Act Correction Act (S. 2041): Strengthening the Government’s Most Effective Tool Against Fraud for the 21st Century: Hearing on S. 2041 Before the S. Comm. on the Judiciary*, 110th Cong. 25 (2008) [hereinafter *Hearing*] (statement of John T. Boese) (arguing that the amendment “is intended to overrule *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D. Va. 2005). [This] decision . . . concerned allegedly false claims to the Coalition Provisional Authority (“CPA”) in Iraq, an international entity that ceased to exist in 2004. This is one case out of thousands brought under the FCA since 1986. Even if published reports of other sealed cases involving allegedly false claims to the CPA are true, amending the False Claims Act so drastically to allow it to apply to a small category of cases that are so unique—and incapable of repetition—is simply unnecessary and threatens the viability of American businesses” (footnotes omitted)).

232. See *supra* notes 127–28 and accompanying text.

233. See 31 U.S.C. § 3729(b)(2)(A)(ii) (Supp. III 2009).

234. See *Hearing supra* note 231, at 3 (statement of Sen. Leahy) (“So I hope all Senators will join us to honor the legacy of Lincoln’s law and take action now to strengthen and improve the False Claims Act for the next century.”); 155 CONG. REC. S4775 (daily ed. Apr. 28, 2009) (statement of Sen. Durbin) (“This legislation will help keep Lincoln’s Law strong for the 21st century.”).

235. 31 U.S.C. § 3729(b)(2)(A)(ii).

236. See *supra* Part I.F. The introduction of a second scienter requirement is unlikely, however, because Congress specifically overruled *Allison Engine*’s holding in FERA. See *supra* notes 126–27 and accompanying text.

send a clear message that the statute does not and should not apply to every kind of fraud.²³⁷

As an alternative to a statutory amendment, Congress could mandate arbitration or mediation.²³⁸ Such a requirement could mitigate the expense and time of litigation, while weeding out meritless qui tam cases,²³⁹ because when the government has agreed to arbitration in its contract, it is obliged to participate in the arbitration process just as any private party.²⁴⁰ Therefore, the government cannot avoid its contractual obligations merely by an FCA suit.²⁴¹ The Supreme Court has recognized that federal statutory claims are resolvable through arbitration,²⁴² yet no provision exists requiring parties to FCA claims

237. The Supreme Court in *Allison Engine* expressed concern that if fraud directed at private entities was recognized as a cause of action under the FCA, the statute would become an “all-purpose antifraud statute.” See *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 672 (2008), , *superseded by statute*, FERA, Pub. L. No. 111-21, 123 Stat. 1617 (codified as amended in scattered sections of 18 and 31 U.S.C.); see also *supra* note 120 and accompanying text. In oral arguments for *Allison Engine*, Justice Scalia commented that the FCA “doesn’t have to cover every ill in the world,” and Justice Breyer suggested that under the Government’s interpretation of the FCA, everything would become subject to the statute. Transcript of Oral Argument, *supra* note 1, at 36–37. The Supreme Court made a similar argument in *Skilling*, ruling that 18 U.S.C. § 1346 only applied to kickbacks and bribery schemes. *Skilling v. United States*, 130 S. Ct. 2896, 2906 (2010).

238. Although arbitration and mediation both come under the umbrella of alternative dispute resolution (and produce non-binding resolutions unless otherwise agreed upon), they are different processes. *Black’s Law Dictionary* defines arbitration as “[a] method of dispute resolution involving one or more neutral third parties who are [usually] agreed to by the disputing parties and whose decision is binding.” BLACK’S LAW DICTIONARY 119 (9th ed., 2009). Mediation is defined as “[a] method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.” *Id.* at 1070–71. Mediation is not binding unless agreed upon, and, like arbitration, there is no universal recognition for mediation in FCA cases. See 31 U.S.C. § 3730(c)(5) (2006).

239. Nothing in this concept is meant to prevent a criminal prosecution by the government of the presentment of false claims pursuant to 18 U.S.C §§ 286–87. Sections 286 and 287 are for egregious cases and any suggestion that arbitration should preclude criminal prosecution is beyond the scope of this Comment. See 18 U.S.C. §§286–87 (2006 & Supp. III 2009).

240. *United States v. Bankers Ins. Co.*, 245 F.3d 315, 324 (4th Cir. 2001).

241. *Id.*

242. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (“[E]ven claims arising under a statute designed to further important social policies may be arbitrated because ‘so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,’ the statute serves its functions.” (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991))). The FCA provides the government with authority to use arbitration or mediation. 31 U.S.C. § 3730(c)(5) (2006) (“[T]he Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty.”); see also *Bankers*, 245 F.3d at 326 (“A plain reading of these provisions [SS 3730(b),(c)(5)] reveals that Congress has granted the Attorney General authority to elect arbitration at his or her discretion, at least in cases wherein a private party has initiated the action.”).

to go through initial arbitration or mediation before litigation.²⁴³ However, mediation in FCA cases is not uncommon, and courts may order mediation for the parties to agree on a settlement.²⁴⁴ Moreover, the Attorney General can, under § 3730(c)(5), resolve FCA disputes by arbitration or mediation if he so chooses.²⁴⁵

Requiring alternative dispute resolution before litigation would mitigate the economic costs of the FERA amendments and act as a de minimis hurdle for cases that should not be in the formal judicial process. Creating a buffer for federal courts will be particularly important as qui tam suits multiply.

2. *A Judicial Solution: A Narrow Interpretation*

The alternative to a legislative solution is a judicial remedy—the Supreme Court could act as it did in *Skilling* to prevent the FCA from being unconstitutionally vague.²⁴⁶ Already, the FCA presents serious fair-notice concerns, as it has never been clear whether subcontractors who have a more attenuated relationship with the government are liable under the Act.²⁴⁷ The Supreme Court should clarify liability as the FCA was not designed to police the chemical company in Chief Justice Roberts’s hypothetical or the defense subcontractor who manufactures nuts and bolts for the U.S. Army.²⁴⁸

The Supreme Court can limit the FCA by narrowly interpreting the Act’s new language. FERA amended the definition of “claim” to include the requirement that the government’s money or property be “used on the Government’s behalf or to advance a Government program or interest.”²⁴⁹ The plain language of this addition is not indicative of its potential application, as it is ambiguous and statutorily undefined.

In interpreting this term, the courts should look to the language of the statute, the statute’s design and objective,²⁵⁰ and the relevant legislative

243. An exception does exist for employment agreements that lawfully prohibit FCA antiretaliation suits by requiring arbitration. *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 380–81 (4th Cir. 2008). Arbitration in employment agreements aside, nothing obligates qui tam litigants to participate in arbitration where the Government and defendant have a contract containing an arbitration clause.

244. *See, e.g.*, *Miller v. Holzmann*, 575 F. Supp. 2d 2, 29 (D.C. Cir. 2008) (discussing previous court-ordered mediation for settlement); *United States ex rel. Alderson v. Quorum Health Grp., Inc.*, 171 F. Supp. 2d 1323, 1330 (M.D. Fla., 2001) (noting that the court referred parties to mediation after several years of litigation).

245. *See* 31 U.S.C. § 3730(c)(5).

246. *See Skilling v. United States*, 130 S. Ct. 2896, 2931 (2010).

247. *See supra* Part II.A.

248. *See supra* text accompanying notes 173–74, 177.

249. 31 U.S.C. § 3729(b)(2)(ii) (Supp. III 2009).

250. *Crandon v. United States*, 494 U.S. 152, 158 (1990) (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.”)).

history.²⁵¹ If ambiguity still remains, the court may turn to the principle of lenity in favor of a narrower interpretation.²⁵² Although the principle of lenity is usually reserved for criminal statutes, the Supreme Court has used it in civil contexts.²⁵³ Although the FCA's criminal and civil provisions have been technically separated since 1982, the Tenth Circuit pointed out that the language of the civil statute has not materially changed and concluded "there is no reason to believe that the language should be interpreted any differently now than it should have been in 1909 (or 1982)."²⁵⁴

Furthermore, given the Supreme Court's recognition of the punitive nature of the FCA,²⁵⁵ extending the rule of lenity to the FCA makes sense. Regardless of the lenity doctrine, the Act's legislative history and purpose provide the Court with sufficient support to construe the statute narrowly. The legislative history reveals the FCA's very specific purpose: protecting the U.S. Treasury against fraudulent claims,²⁵⁶ excluding garden-variety frauds.²⁵⁷ A common-sense interpretation of the government's motive supports the position that Congress did not intend for the FCA to apply to every type of fraud.

IV. CONCLUSION

In amending the FCA to reflect modern fraudulent conduct against the government, Congress hastily changed the statute, designed to protect the Federal Treasury, to instead cover fraudulent behavior with little or no connection to the government.

The FCA's unique inclusion of punitive damages and fines provisions, and its *qui tam* enforcement mechanism, demand that the consequences of any amendments be seriously considered.

251. *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (endeavoring to examine "the language and structure, legislative history, and motivating policies of the Act" to determine the meaning of a statute).

252. *See Moskal v. United States*, 498 U.S. 103, 108 (1990) ("[W]e have always resolved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute" (quoting *Bifulco*, 447 U.S. at 387 (1980))).

253. *See, e.g., United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517–18 (1992).

254. *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 734 (10th Cir. 2006); *see also Cook County Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003) (refusing to infer that Congress redefined the term "person," simply because Congress was silent on the matter in the 1986 amendments).

255. *See Austin v. United States*, 509 U.S. 602, 610 (1993); *supra* Part II.B.

256. *See supra* Part I.A.

257. *See, e.g.,* 155 CONG. REC. S4540 (daily ed. Apr. 22, 2009) (statement of Sen. Jon Kyl) ("[T]he government does not intend to make actionable under the FCA any garden-variety dispute between a general contractor and a subcontractor simply because the general receives some federal money. On the other hand, if the transaction is still predominantly Federal in character, and the false claim results in a loss to the government, recovery under the FCA should not be precluded simply because the claim was not directly presented to the government . . .").

Although the consequences of the FERA amendments cannot be predicted with certainty, the experience of the mail- and wire-fraud statutes serve as a clear warning of potential pitfalls. Given the similarity between the FCA and those two statutes, Congress or the Supreme Court should act to protect parties that have not intentionally committed fraud against the government.