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INTERESTED, BUT NOT INJURED: THE
 COMPROMISED STATUS OF QUI TAM PLAINTIFFS
 UNDER THE AMENDED FALSE CLAIMS ACT
 AND THE RETURN OF THE CITIZEN SUIT

A.G. Harmon

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I. INTRODUCTION

When defendants find themselves in lawsuits, they naturally want to know what they have done to aggrieve the opposing party. How has the plaintiff been hurt? In what way? Did the defendant cause the alleged harm, and what remedy does the plaintiff propose as a remedy?

These are natural determinants of any lawsuit from which litigants can assess the relative strengths and weaknesses of their adversaries' case. Any less-than-clear answers to these questions deprive the defendant, especially in criminal litigation, of the prerequisites for framing his or her defense.

The answers to these questions, however, beg yet another question that is inextricably intertwined with the others and equally fundamental to the conflict: who exactly *is* the plaintiff? With any potential litigation, there are a limited number of people who can bring an action. Only those whose profiles are brightly defined by the portrait painted in the statute can rightly raise a claim.¹ Only one who has been impermissibly touched can bring an action for battery.² Only one negligently injured can sue in tort.³ Only the state, wronged by extortion, embezzlement, or other criminal action, can prosecute and deprive him of his freedom.⁴ Those who do not meet such profiles cannot call the defendant into a court of law; they are disinterested at best, intermeddlers at worst.⁵ These things all seem forgone conclusions—the stuff of the most basic justiciability concerns.⁶

But what if a law was written so that a defendant could never know clearly who his adversary would be? What if the long-established rules determining the potential adversary and how an adversary can bring an action against the defendant were only provisionally applicable? What if the applicability of those rules turned upon a decision made using unstated criteria? And what if that decision could be made, not at the discretion of the courts, but at

1. See, e.g., *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

2. See, e.g., *McCarthy v. Barrett*, 804 F. Supp. 2d 1126, 1146 (W.D. Wash. 2011).

3. See, e.g., *Rudisill v. Taxicabs of Tampa, Inc.*, 147 So. 2d 180, 184 (Fla. Dist. Ct. App. 1962) (stating what a plaintiff must generally allege to show “actionable negligence”).

4. See, e.g., 18 U.S.C. § 1951(a) (2012).

5. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

6. See *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (asserting that the question of standing is the “threshold question in every federal case”).

the discretion of another of the defendant's adversaries? Would not something seem amiss, particularly if the plaintiff stood to receive a large recovery for an injury not personally suffered and if his recovery would come from damages owed to those actually injured?

Amendments to the federal False Claims Act (FCA) in 2010, which were made as part of the Patient Protection and Affordable Care Act (ACA),⁷ have effectively manifested the scenario just described. The FCA, which awards up to thirty percent of recovered funds to "whistleblowers" who provide the government with information of fraud,⁸ has long been one of the most powerful *qui tam*,⁹ or "informer," statutes in America. By changing the statute's long-established "public disclosure bar," which historically led to the dismissal of an action on jurisdictional grounds if the whistleblower was not an original source of information already publicly disclosed, Congress has not only transformed the nature of the FCA from an informer's statute into a "repeater's statute," but has also compromised the standing of *qui tam* plaintiffs altogether.¹⁰ Indeed, the 2010 amendments raise new constitutional, policy, and pragmatic issues that not only undermine the benefits of the antifraud statute, but also reward the very behavior that the statute was meant to discourage. The harm can be rectified, but it must be rectified by way of a precise repeal of the offending language. Otherwise, those who sought to strengthen the effect of the FCA will have worked only to undo it.

Part II of this Article will first explain the history behind *qui tam* actions in general, particularly the FCA, and the history of the public disclosure bar. Part II also will detail the history of the challenge regarding standing that *qui tam* actions have faced and the answer promulgated by the U.S. Supreme Court. Finally, Part II will summarize how the 2010 amendments to the FCA changed the statute's fundamental nature, such that the Supreme Court's opinion as to the status of *qui tam* plaintiffs bringing suit is no longer applicable.

Part III will examine the legal problems created by the ACA's amendment of the FCA, including justiciability concerns, standing and advisory opinions, separation of powers concerns, due process and equal protection concerns, vagueness challenges, and the rule of lenity. Considering the FCA's evolution, Part IV will argue that the amended FCA reintroduces "citizen suits," disal-

7. Patient Protection and Affordable Care Act, Pub. L. No. 11-148, § 10104(j)(2), 124 Stat. 901 (2010) (codified as amended at 42 U.S.C. § 18033).

8. 31 U.S.C. § 3730(d) (2012). If the government "intervenes" in the suit, i.e., takes over the prosecution of the action, the award is up to twenty-five percent. *Id.* § 3730(d)(1). If it does not intervene, thereby leaving the relator to pursue the claim, the award maximum is thirty percent. *Id.* § 3730(d)(2). The term "whistleblower" as used here is not to be confused with the myriad of distinguishable non-FCA whistleblower statutes discussed *infra* Part V.C.

9. *Qui tam* is the shortened form of *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means "who as well for the king as for himself sues in this matter." BLACK'S LAW DICTIONARY 1368 (9th ed. 2009).

10. See *infra* Part III.

lowed by the Supreme Court's ruling in *Lujan v. Defenders of Wildlife*, and potentially turns qui tam plaintiffs into the beneficiaries of what amount to private bills.

Part V will scrutinize the many practical and policy problems created by the amended FCA: the propriety concerns that have historically plagued in-former statutes, allowing "parasitic" plaintiffs to seek damages for which they have provided no service; logistical complications that beset the public disclosure bar's application; charges of champerty and maintenance to which the FCA is now subject; questions of parity and interstatutory consistency; and the potential impact the FCA's new problems create for other whistleblower statutes. Part VI will recommend remedies for the aforementioned errors.

II. THE PHILOSOPHICAL AND HISTORICAL BACKGROUND OF QUI TAM ACTIONS

The 2010 amendments to the FCA's public disclosure bar are set out below in order to provide ease of reference:

- (4)(A) *The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—*
- (i) in a *Federal* criminal, civil, or administrative hearing in which the Government or its agent is a party;
 - (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
 - (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
- (B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is *independent of and materially adds to the publicly disclosed allegations or transactions*, and who has voluntarily provided the information to the Government before filing an action under this section.¹¹

The five italicized changes made to the FCA's public disclosure bar are of two kinds: procedural and substantive. The procedural amendments include changing the disclosure bar from a question of subject matter jurisdiction—which deprives a court of authority to hear the claim—into what is effectively

11. Compare 31 U.S.C. § 3730(e)(4)(A)–(B) (2012), with The Patient Protection and Affordable Care Act, Pub. L. No. 11-148, § 10104(j)(2), 124 Stat. 901 (emphasis added).

an affirmative defense that must be asserted by the defendant and allowing the government to oppose the bar's implementation altogether.¹² The substantive amendments relate to the type of information that will trigger the bar and the way a qui tam plaintiff achieves "original source" status: (1) only federal hearings will now serve as source information; (2) the information in the complaint must be "substantially the same" as the publicly disclosed information; and (3) the plaintiff's knowledge must have been derived "independent of and materially add[] to the publicly disclosed allegations or transactions."¹³

The focus of this Article is on what the two procedural changes have done to both the nature of the FCA as a qui tam suit and to the status of the qui tam plaintiff filing an action under it. As such, the impact of those changes requires an understanding of the philosophy behind informer statutes as well as their history here and abroad, especially with regard to the tensions they have created from a constitutional perspective. This history is well-analyzed and much-related¹⁴ and will be synopsized in the first subsection below.

A. Anglo-American History

The *raison d'être* of an informer's statute is to provide the state with information regarding fraud that it would not otherwise have.¹⁵ In England, as early as the seventh century, the idea of rewarding informers for turning in scofflaws was understood as a means of enhancing enforcement efforts.¹⁶ A battery of statutes was passed with a variety of objects, all including the qui tam mechanism.¹⁷ Earning a bounty meant providing useful information, and though the practice was held in a poor light and considered destructive

12. Although the language is clear under 31 U.S.C. § 3730(e)(4)(A) that the court shall dismiss the action and not consider it as beyond its jurisdiction, some courts still treat the argument as a jurisdictional one. *E.g.*, *United States ex rel. Beauchamp v. Academi Training Ctr., Inc.*, 933 F. Supp. 2d 825, 839 (E.D. Va. 2013) (holding, *inter alia*, that the bar remains jurisdictional because it "is contained in a subsection entitled 'certain actions barred'"); *see* 31 U.S.C. § 3730(e)(4)(A).

13. 31 U.S.C. § 3730(e)(4)(B); *see* 1 JOHN T. BOESE, *CIVIL FALSE CLAIMS AND QUI TAM ACTIONS* § 1.09, at 1-73, 1-74 (4th ed. 2013) (discussing the substantive changes to the public disclosure bar).

14. *See, e.g.*, A.G. Harmon, *Bounty Hunters and Whistleblowers: Constitutional Concerns for False Claims Actions After Passage of the Patient Protection and Affordable Care Act of 2010*, 2 AM. U. LAB. & EMP. L. F. 1, 3-10 (2011); J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 553-608 (2000).

15. *See* CHARLES DOYLE, CONG. RESEARCH SERV., R40785, *QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES* 10 (2009).

16. *See* Beck, *supra* note 14, at 566-67. A statute of King Wihtred of Kent read, "[i]f a freeman works during the forbidden time [between sunset on Saturday evening and sunset on Sunday evening], he shall forfeit his *healsfang*, and the man who informs against him shall have half the fine, and [the profits arising from] the labour." *Id.* at 567 (citing *THE LAWS OF THE EARLIEST ENGLISH KINGS* 3, 27 (F.L. Attenborough ed. & trans., 1963)). "'Healsfang' was a fine to avoid punishment." *Id.* at 567 n.126 (citations omitted). Professor Beck traces qui tam actions back to Roman times. *Id.* at 566.

17. *Id.* at 566-73.

of communal relationships¹⁸—turning as it did upon betrayal¹⁹—the effectiveness of such measures was undoubted.²⁰

But concurrent with the use of the qui tam suits was the predictable abuse to which they lent themselves. Whenever money is involved, profiteers will rise to claim it. Old statutes were dragged out and employed purely for bounty-hunting purposes; procedural obstacles were thrown up by informers and the law was tortured by vexatious suits.²¹ Bounties were claimed for things that were of no benefit to the state, frustrating the purpose of the whole business.²² As a template for what has taken place with the American version of the qui tam suit, reforms were proposed to bring the practice back under control.²³ Ultimately, the informer statutes were abolished in the United Kingdom in 1951.²⁴

In the United States, however, the qui tam action was brought over and employed during colonial times,²⁵ was reinvigorated during the Civil War,²⁶ and has only grown stronger and more varied since.²⁷ True to form, the problems that plagued the English statutes traveled to the New World and

18. *Id.* at 579. Sir Edward Coke was an early critic of the statute. See Gerald Hurst, *The Common Informer*, CONTEMP. REV., Jan. 1, 1935, at 189–90. One of his criticisms resonates with a modern American criticism of qui tam actions, *viz.*, that they are unconstitutional delegations of executive power: “[T]he King cannot commit the sword of his justice or the oil of his mercy concerning any penal statute to any subject. . . .” See 4 EDWARD COKE ET AL., THE REPORTS OF SIR EDWARD COKE, KNT.: IN THIRTEEN PARTS 125 (1826); Gerald Hurst, *supra*, at 189–90.

19. In contrast to Coke’s view, American counterparts sought to use the power of betrayal for the good of the government. Compare CONG. GLOBE, 37th Cong., 3d Sess. 955–56 (1863), with COKE ET AL., *supra* note 18, at 125. In sponsoring the qui tam legislation, Civil War-era Senator Jacob M. Howard—the father of what came to be known as the “Lincoln Law”—stated that the idea was to take advantage of base motives: “The effect of them is simply to hold out to a confederate a strong temptation to betray his coconspirator, and bring him to justice. . . . [s]etting a rogue to catch a rogue,” which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.” CONG. GLOBE, 37th Cong., 3d Sess. 955–56; see also *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885) (stating that the power of informer statutes operates on the “strong stimulus of personal ill will or the hope of gain”).

20. See, e.g., *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. 1 (2008) [hereinafter *Hearing on S. 2041*] (statement of Hon. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary).

21. Beck, *supra* note 14, at 583–85.

22. *Id.* at 574; see also DOYLE, *supra* note 15, at 2 (quoting 4 SIR WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 356 (1903)) (“[Qui tam actions] brought with them . . . unintended consequences. They gave rise to a class of bounty hunters who unscrupulously exploited weaknesses in the system. ‘Old Statutes which had been forgotten were unearthed and used as means to gratify ill-will. Litigation was stirred up simply in order that the informer might compound [i.e., settle] for a sum of money. Threats to sue were easy means of levying blackmail.”).

23. Beck, *supra* note 14, at 574–76, 587–89.

24. See Common Informers Act, 1951, 14 & 15 Geo. 6, c.39 (Eng.).

25. DOYLE, *supra* note 15, at 3. For early American cases involving informer statutes, see *United States v. Simms*, 5 U.S. 252 (1803), and *Brown v. United States*, 12 U.S. 110 (1814).

26. Fraudulent claims made upon the Union Army prompted enactment of the early form of the False Claims Act (FCA). See Harmon, *supra* note 14, at 1; CONG. GLOBE, 37th Cong., 3d Sess. 952 (1863) (explaining the types of fraud perpetrated).

27. See DOYLE, *supra* note 15, at 6–8 (chronicling amendments).

measures to address abuses were taken in 1943.²⁸ Attorney General Frances Biddle called for an outright abolition of the claim due to particularly egregious abuses by bounty hunters who supplied no information.²⁹

A sympathetic Congress was all but ready to oblige Biddle when the Supreme Court decided the highly controversial case of *Marcus v. Hess*.³⁰ Justice Black opined that there was nothing in the original statute that required an informer to give information at all, let alone a qualification as to the kind of information given; as such, complaints to that end were to be addressed by Congress, not the Court.³¹

In a move that would foreshadow the back-and-forth relationship to come between the legislature and the judiciary, Congress addressed the *Marcus* decision by passing the first amendments to the FCA in 1943.³² But rather than abolish the FCA, as had been called for, Congress added what came to be known as the “government knowledge bar” to the statute to cut back on profiteers.³³ From then on, the plaintiffs, or “relators” as they are called in qui tam actions, had to disclose the evidence to the government and wait sixty days for an intervention decision.³⁴ In addition, no claim could be based on information that the government already possessed.³⁵ The relator’s share of the recovery was also scaled back.³⁶

28. See *id.* at 6.

29. S. REP. NO. 77-1708, at 2 (1942); H.R. REP. NO. 78-263, at 2 (1943). Biddle complained that

plaintiffs in informers’ suits not only fail to furnish to the United States the information which is the basis of their actions, but on the contrary, at times base the litigation on information which has been secured by the Government in the regular course of law enforcement. Such plaintiffs at times not only use information contained in indictments returned against the defendant, but also seek to use [g]overnment files to prove their cases. Consequently, informers’ suits have become mere parasitical actions, occasionally brought only after law-enforcement offices have investigated and prosecuted persons guilty of a violation of law and solely because of the hope of a large reward.

S. REP. NO. 77-1708, at 2; H.R. REP. NO. 78-263, at 2. The term “parasitical” has been used ever since to refer to informer claims that seek a share of the recovery without providing information necessary to secure it. See, e.g., *Hearing on S. 2041, supra* note 20, at 24.

30. United States *ex rel.* *Marcus v. Hess*, 317 U.S. 537 (1943).

31. *Id.* at 545–47 & n.9. For criticisms of Justice Black’s logic in *Marcus* and an analysis of Justice Jackson’s prescient dissent regarding the crucial importance for informer’s statutes to require actual information and the possibility of collusion, see Harmon, *supra* note 14, at 6–10.

32. Act of December 23, 1943, Pub. L. No. 78-213, 57 Stat. 608.

33. Frederick M. Morgan Jr. & Julie Webster Popham, *The Last Privateers Encounter Sloppy Seas: Inconsistent Original-Source Jurisprudence Under the Federal False Claims Act*, 24 OHIO N.U. L. REV. 163, 169 (1998).

34. The word “relator” is synonymous with “narrator” and since the early nineteenth century has referred specifically to one who brings an action “at the relation of” the attorney general. OXFORD ENGLISH DICTIONARY 553 (2d ed. 1989). These concepts are reflected in modern practice under the FCA, lawsuits pursuant to which are uniformly styled “United States *ex rel.* John Doe v. XYZ Corp.” See Morgan & Popham, *supra* note 33, at 185.

35. Morgan & Popham, *supra* note 33, at 169.

36. DOYLE, *supra* note 15, at 7.

The congressional debate following *Marcus* also highlighted an important philosophical difference about law enforcement and accountability when it comes to qui tam actions. Two sides emerged:

One held that law enforcement was too important to entrust exclusively to law enforcement officers who, after all, ultimately were influenced by political considerations. Advocates of this position viewed the Act as creating a valuable “check” on the political process by empowering private citizens to overrule prosecutorial decisions by proceeding with causes of action on behalf of the United States when the United States, through its Department of Justice, declined to act. The opposing, and ultimately prevailing, viewpoint was that if the United States failed to proceed, the responsible political officials would be held accountable through the political process.³⁷

This same tension that existed in 1943 was also part of the later 1986 amendments and was ultimately resolved in the same way.³⁸ This Article will discuss, *infra*, how the 2010 amendments broke with this conservative philosophy, empowering the relator to the point that he or she is now, in essence, a private attorney general.³⁹

With the passage of the 1943 amendments, the public disclosure bar served its purpose for a forty-three-year unamended stretch—but perhaps too well, as it effectively put an end to qui tam actions altogether.⁴⁰ The pendulum had swung too far and fraud had regained a foothold in government contracts.⁴¹ In addition, controversy arose over judicial decisions excluding legitimate claims from those that were original sources of information. For example, in *United States ex rel. Wisconsin v. Dean*, the state disclosed its investigation of Medicare fraud to the Federal Government due to a Social Security mandate.⁴² The government had not known of the fraud.⁴³ Despite this fact, the U.S. Court of Appeals for the Seventh Circuit held the disclosure triggered the bar and that there was a lack of subject matter jurisdiction.⁴⁴ Congress then set upon the process that has swung the pendulum back in the other direction, leading to the current attenuated status of the public disclosure bar.⁴⁵

B. Efforts to Narrow the Public Disclosure Bar: 1986 Amendments

The overhaul of the FCA began with the False Claims Reform Act of 1985, which barred only suits based on information that the government

37. Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 PUB. CONT. L.J. 237, 243–44 (1995). The enforcement debate from 1943 is one of the first intimations of the Article III “Take Care” clause argument against qui tam action constitutionality.

38. See *id.* at 256.

39. See *infra* Parts II.D & IV.

40. Salcido, *supra* note 37, at 258.

41. According to Robert Salcido, Congress acted in part to address the military contract fraud symbolized by bills for “\$100 screwdrivers.” *Id.*

42. 729 F.2d 1100, 1104 (7th Cir. 1984).

43. *Id.* at 1102 n.2.

44. *Id.* at 1105–07.

45. Salcido, *supra* note 37, at 241–42.

or media had actually disclosed; claims could even be brought if the government failed to act on the information in its possession.⁴⁶ After a volley of changes from the Senate Judiciary Committee, the House, and the full Senate, the bar was expanded, disallowing *publicly* disclosed information from a set of enumerated sources and adding the “Original Source” language.⁴⁷ Its final form was as follows:

- (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
- (B) For purposes of this paragraph, “original source” means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.⁴⁸

The institution of the bar provided balance to a statute intended to encourage the reporting of fraud by private parties, while at the same time excluding recovery by profiteers who made no contribution to the case. Robert Salcido summarized its importance for all parties:

The . . . construction of the “public disclosure” bar is of great significance to all parties in a *qui tam* action. For example, if the Government does not intervene in the action, the defendant may move to dismiss the case at the pleading stage by proving that the relator’s action is based upon information in the public domain and that relator is not the original source of that information. Further, even when the Government intervenes, the defendant is interested in a broad construction of the jurisdictional bar because, by having the relator dismissed from the action, the defendant is not obligated to pay relator’s attorney fees. . . . Similarly, the [g]overnment is interested in a broad construction of the jurisdictional bar, when it

46. *Id.* at 250–51 (citing *False Claims Reform Act: Hearing on S. 1562 Before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary*, 99th Cong. 6–7 (1985)).

47. *Id.* at 253. The Senate also removed language from its judiciary committee’s version of the bill that provided a reward—albeit the lowest level of reward—to relators whose claims were “solely” based on disclosed information. *Id.* Instead, on the sliding scale of recoveries, the lowest reward would go to those whose claims were “primarily” based on disclosed information. *Id.* at 254 (quoting 132 CONG. REC. 20,536 (1986)). Apparently, the urge to reward noninformant relators has had a history as long as the act but was resisted in the final version of the law.

48. 31 U.S.C. § 3730(e)(4)(A)–(B) (2006). Salcido points out that though the 1986 public disclosure bar was thought to be a great change from the 1943 government knowledge bar, the two were actually very similar:

It is broader in scope in that it covers not only information that the [g]overnment has disclosed, as was true with the 1943 bar, but also information that private persons have disclosed. . . . [It is] narrower in scope in that it protects original sources and “honest” relators who bring an action based upon independent information which the [g]overnment also happened to possess but upon which it has failed to act.

Salcido, *supra* note 37, at 259.

properly applies, because if the relator is dismissed, the [g]overnment retains all of the recovery, a significant portion of which it otherwise would have paid to the relator. Finally, the relator is interested in a narrow construction of the jurisdictional bar in order to preserve his stake in the action.⁴⁹

This scheme provided a system of checks and balances upon the FCA, so that even if one party was remiss in calling for the bar's application, another party—or even the court, acting *sua sponte*, as the pre-2010 bar was jurisdictional in nature—could call for a testing of the information in the relator's claim.⁵⁰ The bar acknowledged that

once a public disclosure has occurred, there is no need for “whistleblowers” (and hence the broader aspect of the bar covering disclosures by even private persons). This is true because after a public disclosure, the [g]overnment has two choices (1) to act upon the disclosure or (2) to suffer the political consequences of failing to act. . . .⁵¹

This point resonates with the philosophical debate that occurred in Congress during the consideration of the 1946 amendments.⁵² At that time, two sides contested whether it would be better to have a weaker bar—thereby vesting more power in the relator to bring actions, supplementing government enforcement resources, and providing a “political” check on government inaction that might be due to collusion—or, alternatively, to have a stronger bar, entrusting enforcement to the discretion of the government and allowing the voters to drive them from office if they failed to do their jobs.⁵³ Both times, in 1946 and 1986, Congress chose the latter.⁵⁴

The decision was prudent in two ways. First, it made the bar a matter of subject matter jurisdiction; as such the court itself could enforce the bar, weeding out informationless claims and consequently protecting the public fisc from divestment by way of undeserved rewards.⁵⁵ Second, it acknowledged that politics can often factor into prosecutorial discretion.⁵⁶ That is, while the Department of Justice (DoJ) could refuse to prosecute a case of fraud for political reasons, it could also fail to bar a relator for political reasons; for example, by refusing to regain a defendant's fraudulently obtained funds or by sharing retained funds with a relator who had done nothing to earn them.⁵⁷ Thus, the defendant's power to call for the public disclosure bar's testing of relator information was sufficient protection against potential abuse.

Above all, the 1986 iteration of the public disclosure bar served the overall objective of balancing, on the one hand, incentivizing suits by those who

49. Salcido, *supra* note 37, at 239–40 (citations omitted).

50. *Id.* at 259.

51. *Id.*

52. *Id.* at 243–44.

53. *Id.*

54. *Id.* at 259.

55. *Id.* at 239.

56. *Id.*

57. *See id.* at 243–44.

bring to the government news of fraud that it did not possess and, on the other hand, discouraging those who would profit from this encouragement without contributing anything to the case.⁵⁸ The legislative history of the 1986 amendments underscores that encouraging news of fraud—“news” in the sense of information not already possessed by the government—was the force behind the FCA.⁵⁹

One of the major points in the FCA’s history is the pattern of congressional reaction to judicial interpretation. After *Marcus*, which frustrated the notion of information as a prerequisite to the FCA,⁶⁰ Congress enacted the 1943 amendments, overruling *Marcus* by instituting the government knowledge bar.⁶¹ Then, after *Dean*, which dismissed the suit of a state relator who qualified as what came to be known as an “original source,”⁶² Congress enacted the 1986 amendments and overruled *Dean* by inserting the original source exception.⁶³ Finally, when the Supreme Court in *Allison Engine Co. v. United States ex rel. Sanders* required proof that the defendant intended a false record or statement to be material to the government’s decision to pay or approve a false claim,⁶⁴ Congress enacted the Fraud Enforcement and Recovery Act (FERA),⁶⁵ overruling *Allison Engine* by removing several statutory conditions to liability.⁶⁶ This pattern continued up to the 2010 amendments, which resulted from the Supreme Court’s decisions in *Rockwell International Corp. v. United States*⁶⁷ and *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*.⁶⁸ An examination of the Supreme Court’s resolution, preceding the 2010 amendments, of one of the constitu-

58. *Id.* at 256–57.

59. The law was meant to “deputize ready and able people who have *knowledge of fraud* against the government to play an active and constructive role through their counsel to bring to justice those contractors who overcharge the government.” 132 CONG. REC. H9388 (daily ed. Oct. 7, 1986) (emphasis added) (statement of Rep. Howard Berman). Distinctions between the quality of information in the discovery of fraud was also acknowledged: “Detecting fraud is usually very difficult without the cooperation of individuals who are either *close observers* or otherwise involved in the fraudulent activity.” S. REP. NO. 99-345, at 4 (1986) (emphasis added).

60. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 537 (1943); see *supra* notes 30–31 and accompanying text.

61. Salcido, *supra* note 37, at 240.

62. See *United States ex rel. Wisconsin v. Dean*, 729 F.2d. 1100, 1100–01 (7th Cir. 1984).

63. See *supra* notes 45–47 and accompanying text.

64. 553 U.S. 662, 672–73 (2008) (holding that the conspiracy provision of the FCA requires that it “be established that [conspirators] agreed that the false record or statement would have a material effect on the [government’s] decision to pay the false or fraudulent claim”).

65. Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, 123 Stat. 1617.

66. *Id.* at 1621–23. FERA also expanded the definition of “conspiracy” under the FCA, expanded liability for overpayments, removed some statute of limitations concerns, expanded anti-retaliation provisions, and broadened the attorney general’s use of civil investigative demands. See *id.*; BOESE, *supra* note 13, § 1.09; see also 31 U.S.C. § 3733 (2012).

67. 549 U.S. 457 (2007).

68. 130 S. Ct. 1396 (2010). To overrule *Graham County*, Congress eliminated state and local administrative reports, audits, and investigations as enumerated sources from which public disclosures might be made. See *id.* at 1400 n.1 (acknowledging the congressional measure nullifying the *Graham County* holding).

tional objections to qui tam actions is central to understanding how the amendments have affected the FCA.

C. Pre-2010 Constitutional Challenges to the FCA

Because of the strange nature of qui tam actions—claims brought by private third-party plaintiffs that effectuate an enforcement of federal law in exchange for a bounty—they have historically been subject to constitutional challenges.⁶⁹ Those challenges have typically rested on three grounds: (1) the plaintiff is not related to the suit in any personal way and therefore lacks Article III standing;⁷⁰ (2) the plaintiff is arguably an unappointed “Officer of the United States,” and therefore runs afoul of the Article II Appointments Clause;⁷¹ and (3) (following from the Appointments Clause argument) the plaintiff is a private citizen prosecuting a public action, and therefore contravenes the Article II “Take Care” clause.⁷² In 2000, the Supreme Court decided *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, addressing the first of these arguments.⁷³

In *Stevens*, the relator alleged that the Vermont Agency of Natural Resources submitted false claims to the Environmental Protection Agency (EPA).⁷⁴ Justice Scalia delivered the opinion in the case and addressed the issue of Article III standing.⁷⁵ He began by stating the requirements for standing in an Article III court: that the plaintiff must be injured in fact,

69. For contemporary analysis of the constitutional arguments for and against qui tam standing, as well as arguments on other grounds, see James T. Blanch, Note, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 HARV. J.L. & PUB. POL'Y 701, 708–31 (1993) (discussing Article III standing); John D. Bressler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 550–97 (1994) (discussing constitutional issues with regard to private prosecutors); Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 354–87 (1989) (discussing Articles II and III); Sean Hamer, *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, 6 KAN. J.L. & PUB. POL'Y 89, 93–98 (1997) (discussing general constitutional arguments); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2251–62 (1999) (discussing standing issues generally).

70. Article III, section 2 of the U.S. Constitution limits the authority of the judiciary to the decision of cases and controversies; without an injury in fact, the relator is said to lack standing, which keeps the action from being a case or controversy. U.S. CONST. art. III, § 2.

71. Article II, section 2 of the U.S. Constitution relates to the doctrine of nondelegable duties. *Id.* art. II, § 2, cl. 2.

72. Article II, section 3 of the U.S. Constitution requires that the president “shall take Care that the Laws be faithfully executed.” *Id.* art. II, § 3.

73. 529 U.S. 765, 787–88 (2000). The relationship between the *Stevens* Court's holding on standing and the 2010 amendment to the FCA, whereby the latter effectively changed the nature of the FCA and effectively negated the *Stevens* rationale for standing, is discussed at length in a previous article. See Harmon, *supra* note 14, at 13–17.

74. The agency moved to dismiss the claim on the grounds that a state and/or state agency is not a “person” under the statute. *Stevens*, 529 U.S. at 770–71.

75. *Id.* at 787–88. For scholarship analyzing standing in the qui tam area post-*Stevens*, see Pamela H. Bucy, *Private Justice and the Constitution*, 69 TENN. L. REV. 939, 973–78 (2002); Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159 (2011); Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1023 (2009).

that is, he must allege that the defendant caused the injury in some “fairly traceable” connection, and that the injury must be one that a favorable decision would be likely to redress.⁷⁶ Because in FCA claims the government has undoubtedly been injured in fact, the issue turns to the injury to the relator: “Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party.”⁷⁷

The argument that the relator is an agent of the United States and entitled to a bounty did not establish an “injury in fact” for Article III standing:

[T]he statute gives the relator himself an interest *in the lawsuit*, and not merely the right to retain a fee out of the recovery. Thus, it provides that “[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government,” § 3730(b) (emphasis added); gives the relator “the right to continue as a party to the action” even when the [g]overnment itself has assumed “primary responsibility” for prosecuting it, § 3730(c)(1); entitles the relator to a hearing before the Government’s voluntary dismissal of the suit, § 3730(c)(2)(A); and prohibits the Government from settling the suit over the relator’s objection without a judicial determination of “fair[ness], adequa[cy] and reasonable[ness],” § 3730(c)(2)(B). For the portion of the recovery retained by the relator, therefore, some explanation of standing other than agency for the [g]overnment must be identified.⁷⁸

While Justice Scalia rejected the argument that the relator has standing based on his interest in the potential recovery⁷⁹—an argument entertained in dicta by the Court in *Marcus*⁸⁰—he found a sufficient argument for Article III standing in a rationale that consisted of two parts: the Court’s past history of recognizing “representational” standing, possessed by “assignees” or “subrogees” of those injured in fact and the history of *qui tam* actions themselves.⁸¹

As to the latter, early British law permitted *qui tam* actions that “allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves.”⁸² Moreover, *qui tam*

76. *Stevens*, 529 U.S. at 771 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

77. *Id.* at 771–72 (quoting *Warth v. Seldin*, 422 U.S. 490 (1975)) (internal quotation marks omitted).

78. *Id.* at 772.

79. *Id.* (citations omitted). The interest in the bounty was held to be merely a byproduct of the suit, not a cognizable injury in fact. *Id.* at 773.

80. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 545–46 (1943).

81. *Stevens*, 529 U.S. at 773–74.

We are confirmed in this conclusion by the long tradition of *qui tam* actions in England and the American Colonies. That history is particularly relevant to the constitutional standing inquiry since, as we have said elsewhere, Article III’s restriction of the judicial power to “Cases” and “Controversies” is properly understood to mean “cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.”

Id. at 774 (citations omitted).

82. *Id.* at 775 (citing Statute Prohibiting the Sale of Wares After the Close of Fair, 5 Edw. III, ch. 5 (1331) (Eng.); and generally Common Informers Act, 14 & 15 Geo. VI, ch. 39, sched. (1951) (emphasis added) (listing informer statutes)). The Court also took note of the many abuses of the informer statutes that plagued English law. *Id.* at 775–76.

actions were prevalent in America in the era of the Constitution's framing.⁸³ This history, Justice Scalia said, was

well nigh conclusive with respect to the question before us here: whether *qui tam* actions were "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." When *combined* with the theoretical justification for relator standing discussed earlier, it leaves no room for doubt that a *qui tam* relator under the FCA has Article III standing.⁸⁴

This history, set out at length by the court, highlighted the obvious about such statutes—that the informer provided *information* to the government, and as such received an assignment of the claim to redress the injury in fact suffered *not by him*, but by the government.⁸⁵ Thus, while the injury in fact requirement is necessary for standing in every other instance,⁸⁶ *qui tam* actions are the exception: the injured party, the government, can assign its claim *in exchange for the information*. That is the *raison d'être* for the *qui tam* statute.⁸⁷ Through this provision, the plaintiff gains standing to enforce the claim in federal court.

Granting the Court's logic, there must be a *quid pro quo* to the assignment of an FCA claim—information in exchange for a bounty, which acts as consideration for the agreement. It is not to be made for free, as the contractual concept of an exchange is at the very heart of a *qui tam* action. Indeed, the assignment of the claim without anything in return would present a situation in which the government gives away a property interest to a private citizen, essentially appropriating funds.⁸⁸ The impact of this point will be revisited after an explanation of immediate history leading up to the 2010 amendments to the FCA.

D. *The 2010 Amendments to the FCA and Their Precursors*

Stability in the FCA never lasts for long. Although the 1986 amendments had reinvigorated the bar⁸⁹ and the Supreme Court resolved the issue of Article III standing in *Stevens*, Congress set about the task of amending the statute yet again in 2007. And in keeping with past patterns, congressional hear-

83. *Id.* at 776–77 & n.6 (citations omitted).

84. *Id.* at 777–78 (emphasis added) (citations omitted). The Court did not consider the questions of whether *qui tam* suits violate the Article II Appointments Clause or the Article III "Take Care" Clause because the petitioner did not raise those arguments. *Id.* at 778 n.8. The *qui tam* relator was said to sue as a "partial assignee" of the United States. *Id.* at 773 n.4.

85. *Id.* at 775–76.

86. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

87. See Letter from Keith B. Nelson, Principal Deputy Assistant Att'y Gen., to Rep. John Conyers Jr., H. Comm. on the Judiciary 2 (July 15, 2008) (on file with author) (noting that "the underlying purpose of the *qui tam* provisions . . . is to give incentives to relators to disclose wrongdoing of which the [g]overnment would otherwise be unaware").

88. See Thomas R. Lee, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543, 564 (1990).

89. Statistics show that between 1988 and 2007, about \$12.6 billion was recorded by the Department of Justice (DoJ) in settlements and judgments from *qui tam* actions. CIVIL DIV., U.S. DEP'T OF JUSTICE, FRAUD STATISTICS (2013), available at http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.

ing testimony reveals that another Supreme Court decision was the impetus behind this new effort. As *Marcus* prompted the 1946 amendments instituting the government knowledge bar,⁹⁰ as *Dean* prompted the 1986 amendments instituting the public disclosure bar,⁹¹ and as *Allison Engine* prompted FERA,⁹² the proposed legislative attempts of 2008 and 2009 that preceded the 2010 amendments were in part prompted by *Rockwell International Corp. v. United States ex rel. Stone*.⁹³

The relator in *Rockwell*, Stone, claimed that the defendant, a nuclear weapons plant, had submitted false claims to the government.⁹⁴ The defendant was required to comply with federal and state environmental laws; Stone alleged that the defendant knew its toxic material disposal method did not work during the time it collected government “award fees” pertaining to the safe management of those materials.⁹⁵ The Court barred Stone’s claim, holding that he had merely predicted that the disposal method would not work.⁹⁶ Stone made his prediction prior to his dismissal and the discovery of the method’s failure and subsequent report in the media.⁹⁷ As such, he did not have “‘direct and independent’” knowledge that would entitle him to original source status.⁹⁸ The government’s brief even supported the relator’s original source argument, contrary to the idea that the government’s natural interest is in excluding a relator who has not provided news of fraud.⁹⁹

Rockwell was specifically criticized in the legislative history of the House’s False Claims Act Correction Act of 2007 and its Senate counterpart, the False Claims Act Correction Act of 2008 (2007/08 Proposed Legislation),¹⁰⁰ and the False Claims Act Correction Act of 2009 (2009 Proposed Legislation),¹⁰¹ both of which failed to pass. *Rockwell* was particularly censured with regard to the Court’s refusal to recognize the relator’s original source status despite the government’s strong support of the same.¹⁰² The propo-

90. See *supra* notes 30–31 and accompanying text.

91. See *supra* notes 45–47 and accompanying text.

92. See *supra* notes 64–66 and accompanying text.

93. 549 U.S. 457 (2007); see also *infra* notes 100–02 and accompanying text.

94. *Rockwell Int’l Corp.*, 549 U.S. at 462–64.

95. *Id.* at 462. Defendant *Rockwell* moved to dismiss the action on subject matter jurisdiction three years after the filing. *Id.* at 464. The government did not intervene in Stone’s claim until seven years after the suit was filed. *Id.*

96. See *id.* at 475.

97. See *id.* at 475–76.

98. *Id.* at 475.

99. Brief for the Respondent at 15, 18, *Rockwell Int’l Corp. v. United States*, 549 U.S. 457 (2007) (No. 05-1272), 2006 WL 3381295.

100. False Claims Act Correction Act of 2007, H.R. 4854, 110th Cong.; False Claims Act Correction Act of 2008, S. 2041, 110th Cong.

101. False Claims Act Correction Act of 2009, H.R. 1788, 111th Cong.

102. H.R. REP. NO. 111-97, at 6–7 (2009); S. REP. NO. 110-507, at 22 (2008); *False Claims Act Correction Act of 2007: Joint Hearing on H.R. 4854 Before the Subcomm. on the Courts, the Internet, & Intellectual Prop. & the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 23, 55 (2007) [hereinafter *Joint Hearing on H.R. 4854*] (statements of Rep. John Conyers Jr. and Shelly Slade, Partner, Vogel, Slade, & Goldstein, LLP); *Hearing on S. 2041, supra* note 20, at 3, 8.

nents of the legislation argued that the FCA public disclosure bar was being misconstrued by the courts, which had led to the discouragement of willing relators and to the frustration of the government's crackdown on fraud.¹⁰³

In both the 2007/08 Proposed Legislation and the 2009 Proposed Legislation, the sponsors sought to weaken disclosure requirements¹⁰⁴ and to eliminate the courts' and the defendants' power to move for the dismissal of the action on jurisdictional grounds by placing that power solely at the discretion of the government, to be made as a motion to dismiss.¹⁰⁵ It was argued that the government alone knew what was best for protecting its interest and the public fisc:

Many of these cases [of too narrowly construing the bar] arose as a result of a motion by defendants because of the jurisdictional nature of the public disclosure bar. However, the best source for determining whether a relator has provided meaningful, new information to the [g]overnment is the [g]overnment itself. *Only the [g]overnment has an interest in ensuring that its resources are not squandered on litigation that does no more than duplicate a fraud matter already under investigation.* In fact, the incentive is strongest with the [g]overnment to ensure that monies recovered based upon an internal [g]overnment investigation are not split or shared with qui tam relators who file truly parasitic suits. This is especially true when the law allows the [g]overnment to proceed against the defendant for the same damages even after a relator is dismissed. Despite this, defendants continue to raise this jurisdictional defense in virtually all FCA cases, while searching in court filings across the country hoping to find that one piece of information the [g]overnment would never have found that may deny the court jurisdiction. In fact, in one case a court declared the [g]overnment could not intervene to collect a judgment despite the fact that a jury had awarded the judgment, all because the defendant successfully argued that the relator should be dismissed on public disclosure grounds.¹⁰⁶

This claim for exclusive application of the bar was checked somewhat by the acknowledgment that too much discretion could lead to impropriety. As such, an argument was made to assuage such fears:

To help guard against the [g]overnment misusing the provision to dismiss cases for political or other inappropriate reasons, the amendment requires that the [g]overnment's investigation or audit be open and active. The Committee anticipates that courts will question and look critically at the [g]overnment's representations that it is conducting an "open" and "active" investigation and audit of the matter. Courts should ask for factual support for the [g]overnment's representa-

103. S. REP. NO. 110-507, at 22-23; *Hearing on S. 2041, supra* note 20, at 33.

104. Among the proposed changes to the public disclosure bar in both the 2007/08 and 2009 versions of the False Claims Act Correction Act were the following: (1) dismissal of an action would occur only if "all essential elements" of the relator's allegations were "based exclusively on the public disclosure" of allegations or transactions from enumerated sources; (2) "public disclosure" was narrowly defined as only a disclosure "on the public record" or that had been "disseminated broadly to the general public"; and (3) a relator would only be held to have based his claim on a public disclosure if he derived his knowledge of "all essential elements of liability" from the disclosure. H.R. REP. NO. 111-97, at 22; *Joint Hearing on H.R. 4854, supra* note 102, at 14. Another substantial suggested change involved allowing federal employees to be whistleblowers. S. REP. NO. 110-507, at 31.

105. H.R. REP. NO. 111-97, at 22; S. REP. NO. 110-507, at 40.

106. S. REP. NO. 110-507, at 24 (emphasis added) (citations omitted).

tion. In some cases, courts may see merit in permitting such information to be submitted under seal or pursuant to a protective order to ensure that the [g]overnment investigation is not compromised.¹⁰⁷

This, however, is only a concession related to the refusal to prosecute. No similar concession was made regarding the refusal to seek the dismissal of a case for political reasons. As stated in Part II.B, *supra*, the possibility of political collusion is real in two potential omissions: a refusal to prosecute a defendant *and* a refusal to bar a relator.¹⁰⁸ Congress only acknowledged the former.

There was a plethora of opposition to the changes to the FCA for both the 2007/08 and 2009 proposed legislation. First, the DoJ objected to the 2007/08 Proposed Legislation via letters to the respective committee chairmen.¹⁰⁹ In a letter to Congressman John Conyers regarding H.R. 4854, Deputy Assistant Attorney General Keith Nelson stated:

The Department strongly opposes these changes. If enacted, these changes would severely narrow the circumstances where the bar would apply in a way that would reward relators with no firsthand knowledge and who do not add information beyond what is in the public domain, as well as relators in a broad range of cases where the government already is taking action. If these changes were implemented, then even if there is an open Government investigation into the same matter, a relator could file suit and reduce the taxpayers' recovery even though he or she has not contributed anything new to the Government's case. We think this is fundamentally at odds with the underlying purpose of the qui tam provisions, which is to give incentives to relators to disclose wrongdoing of which the Government would otherwise be unaware. . . .¹¹⁰

The Assistant Attorney General argued that the changed standards with regard to disclosure and original source would reward relators who provided practically nothing to the prosecution of the case.¹¹¹

The counterpart letter sent to Senator Patrick Leahy with regard to S. 2041 echoes the concern that the proposed legislation was at odds with the underlying purpose of the qui tam provision:

[I]t is our view that a relator who has no firsthand information about fraud and brings nothing new to the suit should not be entitled to reap the rewards of a False Claims Act suit. Second, where the government is already pursuing a matter, the reward only harms the taxpayers by diverting up to [thirty] percent to the private plaintiff.

We strongly object to the proposal in Section 4 because it severely narrows the circumstances where the bar would apply in a way that would reward relators with no firsthand knowledge and who do not add information beyond what is

107. *Id.* at 25.

108. See discussion *supra* Part II.B.

109. Letter from Keith B. Nelson, Principal Deputy Assistant Att'y Gen., to Rep. John Conyers, Chairman, H. Comm. on the Judiciary, Department of Justice's Views on H.R. 4854, at 9 (July 15, 2008), available at <http://www.justice.gov/archive/ola/views-letters/110-2/07-15-08-hr4854-false-claims-act-correction-act.pdf>.

110. *Id.* at 9.

111. *Id.* at 10.

in the public domain, as well as relators in a broad range of cases where the government already is taking action.¹¹²

In both letters to the House and Senate, the DoJ suggested alternative language that “remains faithful to the fundamental principle that taxpayer dollars should be used to reward only those relators who supplement, *not duplicate*, the Government’s fraud enforcement efforts.”¹¹³

Other objections to the 2007/08 Proposed Legislation included claims that the amendments would not “equal the playing field” between “small-resource” relators and “big-resource” defendants.¹¹⁴ Statistics showed that only 1.4% of FCA recoveries over the twenty-one years since the 1986 amendments involved “cases handled by private counsel.”¹¹⁵ As such, the suggested amendments were really only a boon for relators and their lawyers:

These amendments, which are to encourage qui tam enforcement really without [DoJ], benefit only those qui tam plaintiffs and their lawyers, and not the U.S. taxpayer. . . . By effectively eliminating the public disclosure and original source defense, the bill will force American businesses and institutions to defend themselves against qui tam plaintiffs who are not true whistleblowers. And it will allow individuals to use public information to take [twenty-five] percent of [g]overnment recoveries simply because they are the first to file a qui tam case.¹¹⁶

Further, by denying the defendant the ability to raise the public disclosure bar, the 2007/08 Proposed Legislation would encourage parasitic actions, deleteriously affecting some of the government’s best contracting partners: nonprofits, small businesses, and universities.¹¹⁷

The point was also made that the defendant, not the DoJ, had the real incentive to investigate the relator’s claim and to challenge its value:

Defendants have the ability and the incentive to determine which of the whistleblowers or qui tam plaintiffs who come forward in fact have true, fresh new information of fraud, and which ones are merely parasites or echoing information already in the public domain or already known to the Government.

It simply makes sense to allow the public disclosure provision of the statute to be policed effectively by defendants who have the tools of discovery and other tools available to them to determine which whistleblowers really are bringing the kind of information forward that the Congress has said they want to reward.¹¹⁸

112. *Hearing on S. 2041, supra* note 20, at 69 (Letter of Brian A. Benczykowski, Principal Deputy Assistant Att’y Gen.).

113. *Id.* at 70 (emphasis added).

114. *Id.* at 24 (statement of John T. Boese).

115. *Id.*

116. *Id.*

117. *Joint Hearing on H.R. 4854, supra* note 102, at 66 (statement of Peter B. Hutt Jr.).

118. *Id.* at 77, 121. This argument was supplemented by that of the U.S. Chamber of Commerce, who wrote that “[t]he [g]overnment has consistently demonstrated that it lacks the resources and the willingness to challenge a relator’s satisfaction of the jurisdictional bar. . . . By placing the burden solely on the [DoJ], S. 2041 places yet another burden on the limited resources of the [DoJ].” *Hearing on S. 2041, supra* note 20, at 93 (written statement of the Chamber of Commerce and The U.S. Chamber Institute for Legal Reform in Opposition to S. 2041 The False Claims Act Corrections Act of 2007).

The argument is important because it demonstrates the checks and balances that the public disclosure bar was crafted to include and the *set* of incentives—not *one single* incentive—that the bar provides. Just as the bounty was meant to encourage whistleblowers to come forward with news that benefits the government in its recovery of funds, the public disclosure bar was meant to encourage defendants to expose a lack of that news, which benefits the government by preventing the wasteful distribution of recovered funds.

The Chamber of Commerce, regarding the 2007/08 Proposed Legislation, raised a constitutional objection to the FCA on Article II grounds: the delegation of prosecutorial duty ran afoul of the separation of powers doctrine.¹¹⁹ Since the 2007/08 Proposed Legislation effectively eviscerated the public disclosure bar and original source requirements, those constitutional concerns would only be heightened.¹²⁰

Finally, objections to the 2009 Proposed Legislation came from the House Judiciary Committee Report, highlighting the merely slight benefit to taxpayers, the great cost to recoveries, and the particularly troubling unearned boon to relators and their attorneys that the bill would bring about:

The Federal Government investigates every qui tam filing and has consistently declined to intervene in about [eighty percent] of the cases filed by private plaintiffs. This selectivity is indicative of genuine discernment. Of the \$21.5 billion in FCA recoveries since 1986, only three percent was recovered in qui tam cases in which the Department of Justice declined to intervene.

Put differently, it is suspect that the qui tam provisions in this bill will increase the Federal Government's ability to recover taxpayer dollars. Rather, it is possible that these provisions will encourage private plaintiffs to file unfounded and parasitic lawsuits that benefit no one but the plaintiffs and their attorneys.

By encouraging unfounded and parasitic qui tam suits, this bill will actually make it harder for the [g]overnment to recover funds under the FCA. These additional suits will add to the Justice Department's burden and detract from its ability to focus on meaningful cases. Simply put, the qui tam provisions in this bill may, in fact, be counterproductive.¹²¹

The dissenting voices in both pieces of legislation won their respective days, as each proposal was defeated. The FERA revisions to the FCA of 2009 were to follow, but they did not affect the public disclosure bar.¹²² But then, after three years of attempts to bring about revisions, supporters of a weakened bar found their chance in the tumultuous early months of 2010.

119. *Hearing on S. 2041, supra* note 20, at 94.

120. *Id.* The Chamber also reiterated another of its long-held constitutional challenges to qui tam actions:

Qui tam enforcement also violates the Due Process Clause because the provisions authorize representation of the United States by parties whose financial interest in the cases they prosecute unavoidably conflicts with the duty of a government to seek a just and fair result.

Id. (citations omitted).

121. H.R. REP. NO. 111-97, at 28 (2009).

122. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617.

Senator Chuck Grassley, the key proponent of amending the FCA to empower the relator since 1986, introduced S. 2964¹²³ via a “Managers Amendment” four days before the enactment of the ACA.¹²⁴ The Strengthening Program Integrity and Accountability in Health Care Act amended the public disclosure bar to read as it does in its present form: with the jurisdictional requirement recast as a motion to dismiss, with changed substantive language as to the workings of the bar and the original source requirement, and with the “government veto” over the bar.¹²⁵ In the turmoil that accompanied the passage of ACA, little notice was given to the changes; the legislative history has yet to be reported.¹²⁶

Though the legislative history is nonexistent, it can be convincingly reconstructed by means of the preceding legislative attempts. The proposals of the three-year quest sought to weaken the bar substantively and procedurally; it was effectively accomplished in the 2010 amendments to the FCA.¹²⁷ The measure to give the government the exclusive power to dismiss an action found in the earlier two attempts was simply reformulated.¹²⁸ Although the defendant in an FCA qui tam suit can still move for the relator’s dismissal under the public disclosure bar when the relator is not the original source of the publicly disclosed information, the government can trump this request by exercising its “veto” over the court’s dismissal.¹²⁹ In addition, since the bar is no longer jurisdictional, the court cannot move for its application *sua sponte*; the defendant must raise its objection as an affirmative defense.¹³⁰

The debate of the public disclosure bar, long contested, is not finished. In adding the government veto to the statute, the 2010 amendments effectively transformed the nature of the FCA from a qui tam action into a private attorney general action or, more precisely, a citizen suit.¹³¹ With no requirement that the relator provide information in exchange for his bounty, the re-

123. Strengthening Program Integrity and Accountability in Health Care Act, S. 2964, 111th Cong. § 303 (2010).

124. Richard O. Duvall & Gregory R. Hallmark, *The New Public Disclosure Bar Under the False Claims Act*, Fed. Cont. Rep. (BNA), Sept. 14, 2010, at 2.

125. See *supra* notes 11–13 and accompanying text.

126. Duvall & Hallmark, *supra* note 124, at 3; see also Peter B. Hutt II, *Beware the Indefatigable Qui Tam Plaintiffs’ Bar*, METRO. CORP. COUNSEL, June 2010, at 16.

One of the most unfortunate aspects of PPACA is that the changes to the public disclosure bar were made outside the normal legislative process. There were no hearings, no explanatory Senate or House reports, and no significant floor statements—in short, no legislative process at all. There was no opportunity for other stakeholders in the False Claims Act, including the Department of Justice and the corporate and non-profit community, to suggest improvements.

Id.

127. See 31 U.S.C. § 3730(e)(4) (2012).

128. *Id.*

129. *Id.* § 3730(b)(1), (e)(4).

130. For a discussion on the procedural problems created by the Patient Protection and Affordable Care Act’s (ACA) amendments to the FCA, see *infra* Part III.

131. See discussion *infra* Part IV.

lator is no longer a qui tam plaintiff as that term has been traditionally understood in Anglo-American jurisprudence for fourteen centuries.¹³² The representational standing granted the relator by way of a claims assignment does not exist when the relator no longer needs to provide such information in order to receive a complimentary stake in the recovery. It cannot seriously be argued that a qui tam statute—an informer’s statute—is not at root meant to be a type of contract in which a claim to part of the recovery is granted as consideration for the grant of information in return. The point is implicitly conceded in the argument, rejected by the Supreme Court, that the relator’s interest in the bounty he would receive in return for the information gives him standing.¹³³ As such, the constitutional objections to relators that, at least in part, had been put to rest by *Stevens* now resurface.¹³⁴

III. THE FCA AFTER THE ACA: LEGAL PROBLEMS

The statutory amendment that made the public disclosure bar only provisionally applicable, at the discretion of the government, has transformed the FCA from a true informer’s statute into a private attorney general statute.¹³⁵ That is, a defendant can still go through the time and expense of demonstrating to the court that the relator’s information has already been publicly disclosed from one of the listed sources and that therefore the relator is not an original source of that information, but the court cannot dismiss the action on such grounds if the dismissal is “opposed by the Government.”¹³⁶ Given this change, the relator’s action is subject to both old and new concerns related to justiciability, the separation of powers, and equal protection.

A. *Justiciability Problems*

1. Standing

a. *Theory Behind Necessity of the Doctrine*

In Part II.B, *supra*, it was noted that the challenge to a qui tam relator’s standing to bring an action had been put to rest by the Supreme Court in *Stevens*. The problems with that doctrine have been reawakened by the 2010 amendments and are best understood in the context of the theory that supports it in the first place.

The doctrine of standing serves three primary purposes. The first purpose is fundamental—even commonsensical—in that by its very definition a court

132. Even those critical of the *Lujan* standing requirements vis-à-vis citizen suits concede as a defensible position that “as originally understood, the Constitution permitted stranger actions only if dollars were to change hands.” Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries” and Article III*, 91 MICH. L. REV. 163, 176 (1992).

133. See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000).

134. See *supra* Part II.C.

135. John H. Beisner et al., *Class Action “Cops”: Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1442–43 (2005).

136. 31 U.S.C. § 3730(e)(4)(A) (2012).

case can only involve those who have a real stake in the dispute.¹³⁷ The second is constitutional, in that the separation of powers can only be preserved if courts are restricted as to what cases they can hear and as to what matters they can pronounce upon.¹³⁸ The third is practical, in that the court's maintenance of its role can best be achieved by controlling who comes before it.¹³⁹

Standing's practical purpose includes "serv[ing] judicial efficiency by preventing a flood of lawsuits by those who have only an ideological stake in the outcome."¹⁴⁰ Indeed, decisions with precedential impact are keener, more precise, and more limited when they are made by litigants who have a personal stake in the matter:

The Supreme Court has frequently quoted its words from *Baker v. Carr*, that standing requires that a plaintiff allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."¹⁴¹

Other practical considerations include "conserving the court's political capital"¹⁴² and improving judicial decision making.

All three of these concerns are impacted by the 2010 amendments to the FCA. Noninformant plaintiffs in FCA actions have the potential to increase the number of court cases based on purely ideological concerns, at best (though with more than a purely ideological benefit to the plaintiff and his attorney); and both dull the sharpness and dim the brightness of issues before

137. Standing is "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

138. See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 56 (2012).

139. *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring) ("The public confidence essential to the [judiciary branch] and the vitality critical to the [legislative branch] may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches."). Justice Powell noted, "It merits noting how often and how unequivocally the Court has expressed its antipathy to efforts to convert the Judiciary into an open forum for the resolution of political or ideological disputes about the performance of government." See *id.* at 192–93.

140. See CHERMERINSKY, *supra* note 138, at 56 (citing *Richardson*, 418 U.S. at 192 (Powell, J., concurring)).

141. *Id.* at 57 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). But see Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 891–92 (1983). Scalia wrote,

[I]f the purpose of standing is "to assure that concrete adverseness which sharpens the presentation of issues," the doctrine is remarkably ill designed for its end. Often the very best adversaries are national organizations such as the NAACP or the American Civil Liberties Union that have a keen interest in the abstract question at issue in the case, but no "concrete injury in fact" whatever. Yet the doctrine of standing clearly excludes them, unless they can attach themselves to some particular individual who happens to have some personal interest (however minor) at stake.

Id. (citations omitted).

142. See CHERMERINSKY, *supra* note 138, at 56 ("Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories. Such abuse of judicial power would properly meet rebuke and restriction from other branches." (quoting *United Pub. Workers v. Mitchell*, 330 U.S. 75, 90–91 (1947))).

the court because the plaintiff would have no personal, but only an ideological, at best (mercenary, at worst), stake in the matter.¹⁴³ The only one of the three practical reasons for standing that is not impacted by the 2010 amendments is the waste of political capital, but that is only because the court is now subject to the executive's own expense of political capital when it exercises the government veto.

Standing can be seen as a means by which the court matches a "profile" to a plaintiff. That is, if the plaintiff is not recognizable according to the profile, he has no place before the court; the court cannot hear the case because *the plaintiff* is not the right person to bring it. The outlines of that profile are determined by the standing requirements related in the major and contentious jurisprudence of the last century. Justice Scalia, pivotal in finding standing for the qui tam plaintiff in *Stevens*, is equally important in the consideration of standing as the author of the most important opinion on the doctrine in recent years, *Lujan v. Defenders of Wildlife*.¹⁴⁴ His views on standing, which impacted that case, are especially resonant with the argument made herein—that post-2010, the ACA has transformed the nature of the FCA to such an extent that the *Stevens* holding no longer speaks to the newly drawn profile of an FCA relator.

In an essay on the doctrine, Justice Scalia established his position that "standing is a crucial and inseparable element of that principle [separation of powers], whose disregard will inevitably produce . . . an over-judicialization of the processes of self-governance."¹⁴⁵ As such, standing keeps courts within their prescribed "undemocratic role of protecting . . . minorities against impositions of the majority" and prevents them from the further undemocratic role of deciding how the other branches should administer their duties in service of the majority.¹⁴⁶ An individual has standing as a matter of right when he is the specific object of the law's focus; the specificity of his interest in the matter is proportionate to the specificity of the law's interest in him.¹⁴⁷ In the modern age of public interest law, unfortunately, the specificity of the traditional standing case has not always presented itself for a court's review. Indeed, Justice Scalia criticizes these cases because these "majoritarian" plaintiffs with access to the political process are no more individually harmed than any other citizen, stating, "That explains, I think, why 'concrete injury'—an injury apart from the mere breach of the social contract, so to speak, effected by the very fact of unlawful government action—is the indispensable prerequisite of standing."¹⁴⁸

143. See *infra* Part IV.

144. 504 U.S. 555, 555, 560 (1992).

145. Scalia, *supra* note 141, at 881.

146. *Id.* at 894.

147. See *id.*

148. See *id.* at 894–95 (discussing "the increasingly frequent administrative law cases in which the plaintiff is complaining of an agency's unlawful *failure* to impose a requirement or prohibition upon *someone else*" (alterations in original)).

And while it is true that Congress can, through statute, create a new injury, and thereby create a new profile, Congress cannot remove the requirement that there *be* an injury.¹⁴⁹ However slight an injury that Congress creates, it must be suffered by a party before he can bring his case to court. Harms must be particular, not general; they must manifest in a personal way. Someone must be bruised and the bruise must show itself in more than offended conscience or hurt sensibilities. As Justice Scalia says with regard to an “allegedly wrongful governmental action that affects ‘all who breathe.’ . . . There is surely no reason to believe that an alleged governmental default of such general impact would not receive fair consideration in the normal political process.”¹⁵⁰

This last statement resonates with the philosophical debate that occurred in the consideration of the FCA amendments as well as with the vagueness of a current FCA relator’s relationship to the injury of such an action.¹⁵¹ The wrong in the FCA *qui tam* has not gone unnoticed; the plaintiff has brought it to the government’s attention and it is now subject to the government’s prosecutorial discretion.¹⁵² The government’s discretion to not address said action, and other such actions, is something for which the populace can hold the government actors accountable via the political process. In no sense is the relator any more harmed by the alleged fraud than other citizens.¹⁵³ As Justice Scalia argues in *Lujan*, the fact that a plaintiff cares more about the subject of the action—is more *interested* in it—does not relieve him of the requirement that he must be injured.¹⁵⁴

b. Standing After Lujan v. Defenders of Wildlife

In *Lujan*, a set of environmental groups challenged a regulation promulgated by the Secretary of the Interior requiring conferral with the Secretary for federally funded projects in the United States and on the high seas.¹⁵⁵ The Secretary moved for their dismissal on standing grounds;¹⁵⁶ the case, ultimately, came before the Court for consideration.¹⁵⁷ Justice Scalia set out the rule for the “irreducible constitutional minimum of standing”:

149. The concept of “prudential standing”—that the court can grant or decline to grant standing based on what it deems wise, as long as there is injury in fact—can be overcome by congressional conferral of standing by statute. See William A. Fletcher, *The Structure of Standing*, 98 *YALE L.J.* 221, 252 (1988).

150. Scalia, *supra* note 141, at 896.

151. See generally Beck, *supra* note 14, at 543 & n.15.

152. The relator in an FCA action is required to relate his information to the government under seal. See 31 U.S.C. § 3730(b)(2) (2012).

153. Blanch, *supra* note 69, at 717.

154. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (citations omitted).

155. *Id.* at 557–58.

156. The Secretary won at the district court level, lost on appeal, and then lost on remand at both the district court and appellate levels. See *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1044 (8th Cir. 1988); *Defenders of Wildlife v. Hodel*, 658 F. Supp. 43, 44, 47–48 (D. Minn. 1987).

157. *Lujan*, 504 U.S. at 560 (citations omitted).

- First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical’”¹⁵⁸;
- Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court”¹⁵⁹; and
- Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”¹⁵⁸

The Court’s elaboration on each of these requirements will be examined, *infra*, in terms of their impact on the current status of plaintiff standing in FCA actions.

i. Injury in Fact

The centrality of the injury in fact requirement for both standing and the separation of powers arguments is best articulated by Erwin Chemerinsky:

Requiring an injury is a key to assuring that there is an actual dispute between adverse litigants and that the court is not being asked for an advisory opinion. The judicial role in the system of separation of powers is to prevent or redress particular injuries. Judicial resources are thought to be best saved for halting or remedying concrete injuries. An injury is said to give the plaintiff an incentive to vigorously litigate and present the matter to the court in the manner best suited for judicial resolution. An injury assures that the plaintiff is not an intermeddler, but rather someone who truly has a personal stake in the outcome of the controversy.¹⁵⁹

It is this role of the requirement in the justiciability issue that the *Lujan* opinion elucidates. In *Lujan*, the plaintiffs’ injury in fact argument was the hypothetical that extinction of overseas species could increase because the new rule eliminated any consultation requirement for funding overseas activities, thereby impacting the plaintiff’s chances of viewing them in the future.¹⁶⁰ Although the Court agreed that this was a legally cognizable interest,¹⁶¹ that alone would not suffice for injury in fact:

[T]he party seeking review [must] be himself among the injured.[] To survive the Secretary’s summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents’ members would thereby be directly affected apart from their special interest in th[e] subject.¹⁶²

158. *Id.* (citations omitted).

159. CHEMERINSKY, *supra* note 138, at 60.

160. *Lujan*, 504 U.S. at 562.

161. According to Chemerinsky, “[n]o formula exists for determining what types of injuries are adequate to allow a plaintiff standing to sue in federal court. The law is clear that injuries to common law, constitutional, and statutory rights are sufficient for standing.” CHEMERINSKY, *supra* note 138, at 67.

162. *Lujan*, 504 U.S. at 563 (citations omitted) (internal quotation marks omitted).

The Court went on to hold that the injury must come from the plaintiff's specific *use* of the subject.¹⁶³ That is, the harm alleged had to be not only concrete, but also actual or imminent.¹⁶⁴ Because the plaintiffs could not show that they had made plans that were altered by the ruling, but only that their prospective plans could be affected, there was no injury.¹⁶⁵

Neither would express statutory authorization to sue to establish standing in lieu of a particular injury in fact.¹⁶⁶ Such an attempt by Congress would allow a generalized interest that belongs to all citizens to trump the Article III case or controversy requirement.¹⁶⁷

The injury in fact requirement as articulated in *Lujan* comports with the Court's prior holdings. Standing is not "an ingenious academic exercise in the conceivable" but requires, at the summary judgment stage, a factual showing of "perceptible harm."¹⁶⁸ Further, the Court has held that "[stigmatic] injury accords a basis for standing only to those persons who are personally denied equal treatment."¹⁶⁹ The Court goes on to state that "[i]f the abstract stigmatic injury were cognizable, standing would extend *nationwide* to all members of the particular racial groups against which the [government] was alleged to be discriminating."¹⁷⁰

Again, while interests may be created or broadened by statute, so that a plaintiff can thereby suffer injury to them,¹⁷¹ that fact does not in any way diminish that the plaintiff must himself have suffered injury.¹⁷²

The core issue is this: the FCA relator, no longer required to supply any information at all, is stripped of the representational standing found in *Stevens*. Moreover, at the government's decree, he need provide no information to receive a share of the action in exchange for his underwriting it;¹⁷³ therefore, he is not an informer nor is the FCA an informer's statute. Thus, the FCA relator should have to prove injury in fact just as any other plaintiff

163. *Id.* at 564.

164. *Id.*

165. *Id.* at 567.

166. *See id.* at 573.

167. *Id.* at 573–74. For a discussion on this prohibition of "citizen-suit" standing, see *infra* Part IV.A.

168. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973).

169. *Allen v. Wright*, 468 U.S. 737, 738 (1984).

170. *Id.* at 755–76 (emphasis added).

171. *Lujan*, 504 U.S. at 578 (citations omitted); see also *Flast v. Cohen*, 392 U.S. 83, 88 (1968) (finding that taxpayer does have standing to sue for infringement of the Establishment Clause based on her tax bill); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377–79 (1982) (finding standing in an African-American political "tester" on the grounds that the Fair Housing Act protected him from false statements made about housing). Chemerinsky asks and answers the question: "[c]an Congress, by statute, create a right to clean air, the violation of which is a sufficient injury for standing purposes? The Court's recent decision in [*Lujan*] indicates that such broad authorizations for standing will not be allowed." See CHEMERINSKY, *supra* note 138, at 70.

172. *Lujan*, 504 U.S. at 578.

173. The Supreme Court rejected the argument that the relator's interest in the recovery achieved standing for him. See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772–73 (2000).

would have to do. Of course, that is one of the most significant things that he manifestly cannot do. The injury is the government's, or, more precisely, the taxpayer's. A relator without information has no more of a concrete, actualized injury than any other citizen. As such, he is once again subject to the traditional Article III standing challenge that *Stevens* had put to rest.¹⁷⁴ The FCA plaintiff with no information is not even akin to the *unsuccessful, let alone successful*, public interest plaintiffs in earlier Supreme Court precedent.¹⁷⁵ The *successful* plaintiffs in such cases were able to establish a concrete, actual injury, however slight; but both the successful *and* the unsuccessful plaintiffs were seeking mandamus remedies—only the enforcement of a law, not a personal gain from it.¹⁷⁶

Under the new FCA, whether an injury is conceivable, actual, or imminent does not appear to be an academic interest. An injury in fact to the relator is nonexistent and made statutorily irrelevant by the 2010 amendments. Indeed, what would an FCA defendant allege in his answer regarding the prior public disclosure of information or the plaintiff's knowledge of it, thereby triggering the bar? In fact, the court is in the peculiar position of having to ask the DoJ whether legal precedent interpreting the bar's application is relevant at all, a point that introduces the separation of powers argument *infra*.¹⁷⁷

ii. Causation

Although the *Lujan* Court does not have a holding explicitly on causation, it makes a cursory remark about this requirement in conjunction with redressability¹⁷⁸—the finding on causation is implied from the finding on injury in fact.¹⁷⁹ That is, without injury in fact as a first condition to the other standing requirements, the *Lujan* Court could easily find that there was also no causation. Obviously, without an injury, there is nothing for the court to redress. Because the FCA plaintiff has been shown to lack an injury in fact—as that sufferance belongs to the government—there is consequently no causal link between that injury and anything that is not also suffered by every other citizen in the country. Causation cannot be established by showing an injury to third parties—here, the government.¹⁸⁰ The lack of the first requirement easily undoes the second and the third.

174. *Stevens*, 529 U.S. at 771.

175. *E.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 363 (1982); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 205 (1972); *Flast*, 392 U.S. at 83.

176. *See Havens Realty Corp.*, 455 U.S. at 371 (seeking declaratory, injunctive, and monetary relief); *Flast*, 392 U.S. at 85 (seeking injunctive relief).

177. *See infra* Part III.B.1.

178. The Court said that because the plaintiffs did not allege a violation of law, but rather challenged the programs that the agency established to carry out its mandate, causation and redressability were as problematic in *Lujan* as they were in all challenges. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568 (1992).

179. *See id.* at 560–61, 563, 570–71.

180. *See Warth v. Seldin*, 422 U.S. 490, 499, 509 (1975). The Supreme Court has said that “requiring people to assert only their own injuries improves the quality of litigation and judicial

iii. Redressability

Without injury in fact or causation, an action is not redressable by the courts. Although the redressability facts in *Lujan* differ from those in a typical FCA case, the Court has reiterated that redressability of an action depends upon the facts as they exist at the time the complaint is filed.¹⁸¹ This point has been criticized because of a paradox: because “redressability is inherently a factual question—how likely is it that a favorable court decision will have a particular effect—[a decision about it] should not be made at the outset of a lawsuit.”¹⁸² Redressability facts can, in certain cases, only be alleged after discovery.¹⁸³ In the FCA scenario, this criticism highlights a disadvantage to the defendant rather than the plaintiff. While the defendant’s efforts may be made moot by the government’s veto,¹⁸⁴ it is impossible for the defendant to know what facts to utilize at the pleadings stage to trigger the bar. Indeed, even equipped with the argument that the plaintiff is not an informer and therefore does not enjoy *Stevens* standing, the defendant still cannot gather enough facts to challenge the plaintiff’s injury in fact, causation, or redressability until after discovery, at which time the government may make the whole argument moot by exercising its veto.

The lack of *Stevens* standing for the new FCA plaintiff puts him in an ironically poorer position vis-à-vis standing than he was before the 2010 amendments. The FCA is no longer strictly an informer’s statute; therefore, the FCA plaintiff cannot claim *Stevens* standing; and because he cannot claim *Stevens* standing, he must achieve it by the same means as other plaintiffs do—by meeting the *Lujan* requirements of injury in fact, causation, and redressability.¹⁸⁵ But those requirements can only be met by the government and not by the relator.¹⁸⁶ Even in a situation where the barred FCA plaintiff

decision-making.” CHEMERINSKY, *supra* note 138, at 84 (citing *Singleton v. Wulff*, 428 U.S. 106, 114 (1976)). This point helps make another one, argued *infra*—that an informationless plaintiff in an FCA action can, by being the first to file his claim, defeat the competing claim of a plaintiff who had an actual contribution to make by way of unbarred information; this is at odds with the whole purpose of the FCA. See *infra* Part V.

181. *Lujan*, 504 U.S. at 569 n.4 (citing *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)).

182. CHEMERINSKY, *supra* note 138, at 79; see *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42–43 (1976) (illustrating plaintiff’s allegations disadvantaged by lack of pre-discovery information).

183. See *Simon*, 426 U.S. at 51.

184. 31 U.S.C. § 3730(c)(2)(a) (2012).

185. See *Lujan*, 504 U.S. at 560–61.

186. Although the “zone of interest” standing requirement articulated in *Ass’n of Data Processing Service Organizations, Inc. v. Camp* properly applies only to requests for review of agency decisions under the APA, even so, the new FCA plaintiff would fail the test. See 397 U.S. 150, 153 (1970); CHEMERINSKY, *supra* note 138, at 107. Under the test, the plaintiff must be “within the zone of interests to be protected or regulated by the statute.” *Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 153. The informationless FCA plaintiff stands within the statutory zone no more than any other citizen. And while private attorneys general given standing by statute are argued not to fall outside this requirement, since they have a statutorily created injury in fact, they would fall outside if the statute relieved them of the need for any injury, as is the case here. See Robert A. Anthony, *Zone-Free Standing for Private Attorneys General*, 7 GEO. MASON

could conceivably show that the alleged fraud hurt him in some way—for instance in the case of an FCA “kickback”¹⁸⁷ situation—and alleged the scheme defrauded both the government and the plaintiff’s business, it would be questionable whether the fraud directly caused the business damages, let alone whether it was actually the fraud that injured him or only its remote consequences. As to a plaintiff who has suffered retaliation for his whistleblower action, there is already a statutory remedy.¹⁸⁸ Regardless, the FCA is designed to be a statute of general application; privileging such FCA kickback plaintiffs over other relators is suspect.

2. Advisory Opinions

As stated, *supra*, regarding the injury in fact requirement,¹⁸⁹ a companion justiciability concern to standing is the prohibition against the court writing advisory opinions.¹⁹⁰ The court’s voice must speak to specific matters before it and to address a harm that has happened, not to conjectural circumstances or hypothetical situations.¹⁹¹ This also provides a control for the application of the law and keeps it from being used, however unintentionally, as a weapon that prohibits a free society.¹⁹²

New FCA opinions that contemplate the bar, however, are placed in an unparalleled position. The court’s ruling on whether the bar should apply is subject to the government’s veto, a *de facto* overruling by the executive. The court, therefore, cannot know whether its ruling on the bar will be respected or overturned by the government, which makes its role purely advisory at best, unnecessary at worst.¹⁹³

The gravity of this unique set of circumstances created by the ACA amendments to the FCA is an appropriate introduction to the separation of powers problems created by those amendments.

B. Separation of Powers Concerns

Some of these arguments have been previously laid out at length in an earlier article¹⁹⁴ but will be discussed in summary in this subsection.

L. REV. 237, 242–44 (1999). This point calls into question whether the informationless FCA plaintiff is any kind of private attorney general at all, but rather a citizen with a suit. *See infra* Part IV.

187. The ACA made a violation of the federal anti-kickback statute a false claim under the FCA. 42 U.S.C. § 1320a-7b(g) (Supp. IV 2011).

188. 31 U.S.C. § 3730(h) (2012).

189. CHEMERINSKY, *supra* note 138, at 60.

190. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

191. *See* CHEMERINSKY, *supra* note 138, at 46.

192. *See Preiser*, 422 U.S. at 401.

193. *See supra* notes 129–30 and accompanying text (discussing the application of the government veto as an affirmative defense that cannot be raised *sua sponte* by the court).

194. *See* Harmon, *supra* note 14, at 17–21.

1. Judicial Review Subjected to Executive Discretion

The 2010 amendments to the public disclosure bar have removed from the courts the decision as to whether legal precedent will apply.¹⁹⁵ If the government disagrees with the court's decision as to the bar's applicability in a certain situation, the government can oppose it.¹⁹⁶ Indeed, the statute as amended gives no guidance to when, how, or on what grounds the government can exercise its veto.¹⁹⁷ The government may give any reason or none at all and as early or late in the process as it deems wise.¹⁹⁸

Consequently, any particular DoJ official, regardless of rank, may in theory oppose a decision that the bar should apply, regardless of what court renders the ruling. As the statute is written, any DoJ official, at any level, may in theory oppose the ruling of the U.S. Supreme Court barring an FCA relator. This creates a separation of powers problem, one where Congress and the executive have usurped the authority of the judiciary and effectively appointed the Department of Justice as a "Court Supreme" in such matters.

2. Article II Appointments Clause

The Article II Appointments Clause challenge relates to the doctrine of nondelegable duties. Article II of the Constitution states that the president shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.¹⁹⁹

Qui tam relators are not appointed by the president and not approved by the Senate.²⁰⁰ Clarity on this issue was provided by *Freytag v. Commissioner of Revenue*, challenging a statute that allowed the chief judge of the U.S. Tax Court to appoint special trial judges.²⁰¹ The petitioner argued that a special trial judge is an "inferior Office[r]" and, therefore, the Appointments Clause required he be appointed by the president, courts of law, or heads of departments.²⁰²

The Supreme Court held that the Appointments Clause could be violated by both an arrogation and a diffusion of its powers:

The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the

195. See *supra* Part III.A.2.

196. 31 U.S.C. § 3730(e)(4)(A) (2012).

197. See *id.*

198. See *id.*

199. U.S. CONST. art. II., § 2, cl. 2.

200. See Blanch, *supra* note 69, at 737–38; Caminker, *supra* note 69, at 374.

201. 501 U.S. 868, 872 (1991).

202. *Id.* at 878.

Executive's interests. For example, the Clause forbids Congress to grant the appointment power to inappropriate members of the Executive Branch. Neither Congress nor the Executive can agree to waive this structural protection. "The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review."²⁰³

The rationale regarding diffusion of powers applies to the amended FCA. Congress has delegated to the DoJ a right to appoint informationless plaintiffs, without either *Stevens* or *Lujan* standing. Those appointed plaintiffs can pursue an FCA claim and share in the benefit of recovery. Further, "Heads of Departments" has been interpreted to mean the Secretary of Labor,²⁰⁴ the Chief Justice of the Tax Court,²⁰⁵ and cabinet members, not "mere Bureau head[s]."²⁰⁶ It is unclear whether "Heads of Departments" applies to an array of district attorneys granted the supreme authority to decide whether years of judicial precedent about the bar will apply or not.

Furthermore, Congress has delegated this power to the DoJ to create standing without an intelligible principle. In *Mistretta v. United States*, the Supreme Court sanctioned a limit on the delegation of congressional power, but only up to a point.²⁰⁷ The Court said that delegation of legislative power is not forbidden "so long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform'"²⁰⁸

Worse than no *intelligible* standard for determining when, how, and why the DoJ can exercise its veto over the courts, Congress has provided *no standard at all*. Justice Scalia's dissent in *Mistretta* speaks to the current set of circumstances surrounding the FCA:

As John Locke put it almost 300 years ago, "[t]he power of the *legislative* being derived from the people by a positive voluntary grant and institution, can be no other, than what the positive grant conveyed, which being only to make *laws*, and not to make *legislators*, the *legislative* can have no power to transfer their authority of making laws, and place it in other hands." . . . Or as we have less epigrammatically said: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."²⁰⁹

Any criteria the DoJ developed in applying the veto would be legislative in nature; therefore, it would violate the Appointments Clause.

203. *Id.* at 880 (quoting *INS v. Chadha*, 462 U.S. 919, 942 (1983)). The Court went on to hold that a "tax court" is a "Court[] of Law" in the sense contemplated by Article III. *Id.* at 892.

204. *Varnadore v. Sec'y of Labor*, 141 F.3d 625, 631 (6th Cir. 1998).

205. *Samuels, Kramer & Co. v. Comm'r*, 930 F.2d 975, 990 (2d Cir. 1991).

206. *Brooks v. United States*, 33 F. Supp. 68, 69 (E.D.N.Y. 1939); *see also* *Surowitz v. United States*, 80 F. Supp. 716, 718–19 (S.D.N.Y. 1948) (considering whether a war department attorney prosecuting war crimes is an "inferior officer" under Article II).

207. 488 U.S. 361, 372, 411–12 (1989).

208. *Id.* at 372 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

209. *Id.* at 419–20 (Scalia, J., dissenting) (citations omitted).

3. Appropriation of Funds by the Executive

Funds recovered from an FCA action are to be distributed by statute, at the DoJ's discretion.²¹⁰ For example, 42 U.S.C. § 1395i creates the Federal Hospital Insurance Trust Fund and provides for the allocation of monies recovered in health care fraud cases:

The Managing Trustee shall transfer to The Trust Fund, under rules similar to the rules in section 9601 of the Internal Revenue Code of 1986, an amount equal to the sum of the following: . . .

- iv) Penalties and damages obtained and otherwise creditable to miscellaneous receipts of the general fund of the Treasury obtained under sections 3729 through 3733 of Title 31 (known as the False Claims Act), in cases involving claims related to the provision of health care items and services (other than funds awarded to a relator, for restitution or otherwise authorized by law).²¹¹

While a relator is to receive his share of the funds in a successful FCA action, the statute was written before there was a change in the definition, i.e., at a time when the term "relator" meant what it has always meant: one who has received the assignment of an action, with its consequent reward, in return for information provided to the sovereign.²¹²

Indeed, now the FCA plaintiff does not need to be a relator at all and is certainly not the same kind of relator under the traditional meaning in other qui tam statutes. At the government's discretion, the FCA plaintiff may simply be a private citizen who has provided nothing to the suit whatsoever when judged against the public disclosure bar standard but who is given a share of the recovery nevertheless. This amounts not only to a parasitic claim, the historic bane of qui tam actions, but also to a misappropriation of taxpayer money: recovery in favor of private parties designated under a scheme known only to the executive.

4. Article II "Take Care" Clause

In Article II, the Constitution requires that the President "shall take Care that the Laws be faithfully executed."²¹³ Because the executive branch loses control of the litigation when the relator files his semi-prosecutorial action, qui tam suits have been argued to violate the Take Care Clause and adversely affect prosecutorial discretion.²¹⁴

The amended FCA's problems related to standing and the appointments clause, taken in conjunction with a new power to trump judicial review by means of unstated criteria, amount to an arguable abdication of the government's duty to take care that the laws are faithfully executed.²¹⁵ As in *Freytag*, the new FCA diffuses executive power even further than its critics had his-

210. See 31 U.S.C. § 3730(d) (2012).

211. 42 U.S.C. § 1395i(k)(2)(C)(iv) (2006).

212. See *supra* note 34 and accompanying text.

213. U.S. CONST. art. II, § 3.

214. See *Riley v. St. Luke's Episcopal Hosp.*, 196 F.3d 514, 524–26 (5th Cir. 1999).

215. Cf. *id.* at 525–26.

torically challenged.²¹⁶ Now the power to prosecute the FCA action may be in favor of one whose only stake in the suit is in the possible recovery he may enjoy and whose only contribution to the suit is in finding an attorney to finance his action on a contingency basis.

The *Lujan* decision deplored one branch's transference of another branch's powers:

To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."²¹⁷

In a similar vein, Congress can no more transfer its own duties or that of the judiciary *to* the executive branch than it can transfer duties *from* the executive branch to an individual.²¹⁸

5. Due Process and Equal Protection

Due process problems exist under the current FCA, from both the plaintiff's side and the defendant's side.²¹⁹ Even if all of the other constitutional concerns were overcome, on what grounds does the DoJ pick the winners and losers among parties? Would not a barred plaintiff be entitled to know why his potentially valuable claim was allowed to be dismissed when a similarly situated plaintiff was rescued from such a fate? With no obligation to explain its standard, how would a plaintiff ever know if he were the right kind of relator?

Similarly, how would a defendant know why his property interest must continue in peril despite his showing that the plaintiff should be barred when a similarly situated defendant did not have to labor under such a risk? Valuable property interests are at stake without any discernible standard for determining the risk of their loss. This matter gives rise to a set of policy and propriety problems.²²⁰

Finally, the lack of a discernible standard presents another fundamental problem: how can a defendant in an FCA action know his opponent? Is he to concede the bar, not even attempt to litigate it himself, and defend himself against the government *and* the relator, with the relator's considerable attorney fees added to sum that he could lose? If he does not make that concession, and tries to limit his losses by raising the issue of the bar, he must go to even more expense through discovery even if the government exercises its veto.²²¹

216. See *Freytag v. Comm'r*, 501 U.S. 868, 880 (1991).

217. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

218. See *Mistretta v. United States*, 488 U.S. 361, 419–20 (1989) (Scalia, J., dissenting).

219. Another due process challenge to *qui tam* actions is made on the grounds that the United States' action is prosecuted by a private party who has a stake in the recovery, creating an impermissible conflict of interest that interferes with the fair administration of justice. See *supra* note 165.

220. See *infra* Part V.A.

221. See *Hamer*, *supra* note 69, at 92.

This places the defendant at a distinct disadvantage when it comes to settlement negotiations:²²² the defendant's opponents are never clear and could change at any time.

Statutes have traditionally been found unconstitutional for "vagueness" regarding to whom the statute applies²²³ or to what behavior is prohibited.²²⁴ Here, the defendant cannot know who his opponent may be or how to proceed with litigation strategy because the law that has traditionally governed the bar is now only provisionally applicable.

Another constitutional objection to the amended FCA is that the public disclosure bar is written in such a way that a certain class of plaintiffs will be granted a recovery in an action at the executive's choosing. This is tantamount to private legislation and runs afoul of the equal protection clause.²²⁵ That argument will be discussed in Part IV *infra*.²²⁶

Finally, since the FCA is quasi-prosecutorial, in that a defendant is subject to both civil and criminal action for fraud,²²⁷ concerns arise since "penal statutes should be strictly construed against the government."²²⁸ The Rule of Lenity calls for any ambiguity in a criminal statute to be resolved in favor of the defendant.²²⁹ The multitude of ambiguities in the amended FCA—as to who the plaintiff will be, how he will be determined, when and if he will be barred, on what grounds a defendant can raise the issue, and when and how he may do so, to name only a few—would suggest the defendant in the new FCA action is entitled to the rule.²³⁰ This is especially crucial as the issues are close, but the penalties, fees, and attendant consequences are great.

IV. THE FCA AFTER THE ACA: EXISTENTIAL PROBLEMS

This set of problems arises from the fact that the FCA is no longer strictly a *qui tam* informer statute.²³¹ What exactly the FCA *is* at this point, existentially, is still an open question.

222. *See id.*

223. *See, e.g.,* Toms v. Bureau of Prof'l & Occupational Affairs, 800 A.2d 342, 349 (Pa. Commw. Ct. 2002).

224. *See, e.g.,* Fairchild v. Liberty Indep. Sch. Dist., 597 F.3d 747, 761 (5th Cir. 2010).

225. *Private Bills in Congress*, 79 HARV. L. REV. 1684, 1684-85 (1966).

226. *See infra* Part IV.

227. The FCA reads:

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

18 U.S.C. § 287 (2012).

228. 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 59:3 (6th ed. 2001); *see* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 885 (2004).

229. Price, *supra* note 228, at 885.

230. *See* Christopher M. Alexion, Note, *Open the Door, Not the Floodgates: Controlling Qui Tam Litigation Under the False Claims Act*, 69 WASH. & LEE L. REV. 365, 398-99 (2012).

231. *See* Harmon, *supra* note 14, at 2.

A. *The New FCA as a Citizen Suit*

The argument that the FCA is now a citizen suit underscores the plethora of overlapping constitutional problems created by the 2010 amendments. For example, the FCA plaintiff's lack of an injury in fact not only creates a justiciability problem, but also a separation of powers problem, a due process problem, and, as shall be seen, policy and practical problems as well. Likewise, some of the procedural problems discussed *infra* related to pleadings and discovery highlight the constitutional problems. Whether the analytical approach taken is "top-down" or "bottom-up," the composite profile is a picture of muddled rights, obscure rules, conflicting duties, encroaching powers, and abdicated responsibilities.²³²

The kind of pure citizen-suit standing rejected in *Lujan* explains a set of facts that are directly analogous to those in the amended FCA since the plaintiff cannot claim *Stevens* standing as an information provider.²³³ At the appellate level, the *Lujan* petitioners had been granted "procedural standing" by way of an Endangered Species Act provision.²³⁴ That provision authorized a "citizen suit" to any person who "may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter."²³⁵

The Supreme Court marveled at the Court of Appeals holding because the plaintiffs were not seeking to enforce a procedural requirement that would impact their concrete interest if disregarded, were not members of a mass tort action, and were not the beneficiaries of a congressionally created concrete private interest in the outcome of a suit against a private party "for the government's benefit, by providing a cash bounty for the victorious plaintiff."²³⁶

The last-stated standing argument would be the *qui tam* situation—dependent upon the suit being *for the government's benefit*; in the amended FCA, there is neither a concrete private interest—as it applies generally to all citizens—nor any benefit to the government in allowing the participation of a plaintiff who cannot pass the public disclosure bar.²³⁷ The *Lujan* court went on to reject the court of appeals' allowance of standing based on a citizen suit:

[T]he court held that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental "right" to have the Executive observe the procedures required by law. We reject this view.

We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in

232. *See id.*

233. *See id.* at 12–17; *see also* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571–74 (1992).

234. *Lujan*, 504 U.S. at 571–72 (quoting 16 U.S.C. § 1540(g)).

235. *Id.*

236. *Id.* at 573.

237. *See* Harmon, *supra* note 14, at 14, 16.

proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.²³⁸

This pronouncement speaks both to what the amended FCA action is not, an informer's statute, and to what it has become, a citizen suit. Even a statutorily prescribed right to create a citizen suit cannot get around the *Lujan* requirements for injury in fact:

Lujan forecloses “pure” citizen suits. In these suits, a stranger with an ideological or law-enforcement interest initiates a proceeding against the government, seeking to require an agency to undertake action of the sort required by law. Many environmental statutes now allow such actions, and plaintiffs have brought many suits of this kind. Under *Lujan*, these suits are unacceptable. Congress must at a minimum “identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.” If Congress has simply given standing to citizens, this requirement has not been met. The plaintiff must point to a concrete injury, not merely to a congressional grant of standing.²³⁹

The new FCA plaintiff cannot manifestly show a concrete injury that is not also shared by every other citizen, nor can he seek a relief that directly and tangibly benefits him in any way more than it does the public at large. Finally, another problem exists: a pure citizen suit in its typical form seeks mandamus action to enforce a rule; a citizen suit in an FCA action seeks a bounty, which makes the case against standing all the more pronounced.

B. *The New FCA Creates Private Bills*

Another argument against the new FCA is that the public disclosure bar now creates a mechanism for creating private legislation in contravention of customary procedures. The government veto in the new public disclosure bar provides no guidelines as to who the beneficiary of the government's largesse is to be, nor the grounds for granting that largesse. The veto is open-ended, not only allowing the executive to create standing where it will, on any terms that it deems just (or on no terms at all), but also allowing the executive to finish “writing” the legislation—in effect filling in the name of the party in whose benefit it will oppose the court's decision about the bar.²⁴⁰ Hence, the beneficiary is the subject of a private bill.²⁴¹

But private bills are anomalies, an exception to the norm that laws should apply to all equally.²⁴² In modern times,²⁴³ there are of two types of acceptable private bills:

238. *Lujan*, 504 U.S. at 573–74 (citations omitted).

239. Sunstein, *supra* note 132, at 226; see also CHEMERINSKY, *supra* note 138, at 66–67.

240. See *supra* notes 129–31 and accompanying text.

241. See *Private Bills in Congress*, *supra* note 225, at 1684 (noting that private bills do not apply generally to the public but rather specifically to an individual or group).

242. *Id.*

243. Due to the inherent potential for scandal in the areas of private legislation, Congress has narrowed the subjects that they can address and has created administrative agency functions to deal with areas that in the past would have called for private legislation. See Matthew Mantel, *Private Bills and Private Laws*, 99 LAW LIBR. J. 87, 91–93 (2007).

(1) those dealing with claims against the United States, including waiver of claims by the [g]overnment against individuals; and (2) those excepting individuals from certain immigration and naturalization requirements. Bills dealing with relations between private persons, formerly enacted on occasion, are no longer passed. . . . Indeed, if Congress were to pass such a private law today it probably would be unconstitutional as a denial of *equal protection*, and might well be a bill of attainder against the individual suffering detriment under it.²⁴⁴

The constitutional problems created by the bar—due process and equal protection—are met with a third issue in the private bill context, separation of powers: “In dealing with private bills, Congress acts much like a court; it is not only making law, but is in effect applying it to individual cases. More specifically, it resembles an ancient court of equity: private legislation may be said without distortion to represent an exercise of congressional ‘conscience.’”²⁴⁵

In short, the open-ended nature of the government veto, allowing for “floating status” plaintiffs, has in itself created a knot of constitutional problems. The private nature of the power allows the creation of individual-specific benefits, appropriated by the executive, that at the very least flouts the process for writing private laws.

V. THE FCA AFTER THE ACA: POLICY, ETHICAL, AND PRACTICAL PROBLEMS

In addition to the legal and existential problems discussed above, the amended FCA creates, and in many ways reawakens, problems from policy, ethics, and practical standpoints.

A. Policy Problems

An obvious policy problem is that, without a functioning public disclosure bar, parasitic claims become more likely—a problem that has always plagued *qui tam* actions and was the reason for the bar’s institution in the first place.²⁴⁶ The whole purpose of the *qui tam* action was to encourage private citizens to come forward with information of fraud that the government did not have.²⁴⁷ Their usefulness was rewarded with a partial assignment of the claim and its attendant bounty.²⁴⁸ But now, for the first time in the history of informer statutes, the FCA has remarkably institutionalized the very abuse that it previously prevented. Under the new public disclosure bar, the relator does not necessarily need to provide information in exchange for the

244. *Private Bills in Congress*, *supra* note 225, at 1684–85 (emphasis added; citations omitted).

245. *Id.* at 1686 (citing 1 JOHN NORTON POMEROY, *EQUITY JURISPRUDENCE* §§ 48–50, 55–61 (4th ed. 1918)).

246. *See supra* Part II.A.

247. *See, e.g.*, Daniel C. Lumm, *The 2009 “Clarifications” to the False Claims Act of 1863: The All-Purpose Antifraud Statute with the Fun Qui Tam Twist*, 45 WAKE FOREST L. REV. 527, 528–29 (2010).

248. *Id.*

bounty.²⁴⁹ He needs only to win the approval of the district attorney.²⁵⁰ This creates a policy that rewards a plaintiff without commensurate service and discourages those true informers who either were not fast enough under the first-to-file bar²⁵¹ or were not fortunate enough to curry the favor of the district attorney.

In addition, as previously discussed, the veto creates a distinct disadvantage for the defendant in settlement negotiations.²⁵² Never sure whether his opponent will be the government or the government *and* the relator, he cannot gauge his expenses or predict whether his costs incurred in litigating the bar will be sunk in the event the government exercises the veto. If he does litigate the bar, and even if he is successful, he will have to pay the considerable fees owed to the plaintiff's attorney in the event the bar is trumped by the veto and his own considerable litigation expenses.²⁵³ The defendant is in a losing position from the start, unsure whether to settle now or settle later, and unable to calculate his costs to make that determination. In fact, the plaintiff and government are incentivized to encourage the defendant's litigation of the bar, since it will only drive up the defendant's costs, making him more vulnerable at settlement. Meanwhile, the plaintiff and the government are guaranteed the winning hand.

B. Ethical Problems

In addition to the negative policy effects, the government veto has introduced circumstances that give rise to a new array of troublesome possibilities.²⁵⁴ One stems from the aforesaid fact that the relator's *qui tam* action is in practically every case financed by his attorney; FCA actions are almost always argued on a contingency basis.²⁵⁵ But that means that the greatest incentive to try the FCA cases comes from the relator's attorney.²⁵⁶ With billions of dollars recovered over the past few years,²⁵⁷ the incentive to represent such lucrative cases is multiplied exponentially.

249. 31 U.S.C. § 3730(d)(1) (2012) (explaining that the plaintiff will receive an award "depending on the extent to which the person substantially contributed to the prosecution of the action").

250. 31 U.S.C. § 3730(d)(2) (allowing the person bringing the action or settling the claim to receive an award even if the government does not proceed with its action).

251. 31 U.S.C. § 3730(b)(5) ("When a person brings an action under this subsection, no person other than the [g]overnment may intervene or bring a related action based on the facts underlying the pending action.")

252. With judgment comes a \$5000–\$10,000 penalty per violation, plus treble damages. 31 U.S.C. § 3729(a)(1). When attorney fees and program exclusion are included, settlement is often the defendant's best choice. That would be even more likely if the risk of the government veto is figured into the calculations.

253. See 31 U.S.C. § 3730(d)(2).

254. Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 PUB. CONT. L.J. 813, 843 (2012).

255. *Id.* at 842–43, 851.

256. *Id.*

257. Over \$11.8 billion in DoJ settlements and judgments have been recorded since 2010. CIVIL DIV., *supra* note 89.

The ethical problem of attorney-driven lawsuits created here is analogous to the history of class action lawsuits.²⁵⁸ Just as one of the chief arguments of the FCA amendments' proponents has been that the private sector serves to supplement the limited reserves of the government by rooting out fraud, so too have class action attorneys argued that the large share of the recoveries they receive compared to that actually paid to the plaintiff is because their role is to "police" big business: "As the theory goes, what matters is that class action lawyers will punish and deter corporate misconduct."²⁵⁹ The attorneys argue that they are like private attorneys general in this respect, filling an enforcement gap.²⁶⁰ But the opposite argument highlights the age-old problem of the relator and his attorney in *qui tam* "parasitic" actions:

The principal problem with this contention is that, in most cases, class action lawyers do not fill any such enforcement gap. Empirical data show that, far from filling gaps, class action lawyers predominantly file "copycat" or "coattail" lawsuits that follow on the heels of *government* investigations. A "recurring pattern is evident under which the private attorney general simply piggybacks on the efforts of public agencies—such as the Securities and Exchange Commission (SEC), the [Federal Trade Commission (FTC)], and the Antitrust Division of the Department of Justice—in order to reap the gains from the investigative work undertaken by these agencies." The result is that the "filing of the public agency's action serves as the starting gun for a race between private attorneys, all seeking to claim the prize of lucrative class action settlements, which public law enforcement has gratuitously presented them."²⁶¹

There is no reason to defer action, since the FCA case has the wrong incentive:²⁶² the government can exercise the bar and put resources elsewhere, gaining a recovery that the plaintiff and his attorney are motivated to drive higher.²⁶³

The FCA government veto also raises the possibility of political collusion. The appearance of impropriety—of granting favors on partisan grounds—is rife when there is no check on the exercise of discretion. A recent use of the

258. Cf. Elameto, *supra* note 254, at 845 (analogizing FCA litigation with private securities class actions).

259. Beisner et al., *supra* note 135, at 1451. Ironically, this article praises the FCA for curtailing parasitic actions through the public disclosure bar:

When it appeared, for example, that "coattail" *qui tam* lawsuits were enriching relators without furthering the False Claims Act's intended purposes, Congress specifically amended the statute to prohibit lawsuits based on information the federal government already possessed and also to reduce the "bounty" a relator could obtain.

Id. at 1458–59.

260. The article goes on to make the point that even if there was an analogy between the plaintiff's attorney and law enforcement, the "massive financial incentives for attorneys bringing class actions" destroy any comparison: "[I]f class actions are law enforcement mechanisms, the counsel who bring them should be paid like law enforcers . . . not . . . sharing the fruits of whatever recovery they obtain." *Id.* at 1443.

261. *Id.* at 1453 (citations omitted).

262. *Id.* at 1454.

263. See Elameto, *supra* note 254, at 824, 842–43.

FCA in an alleged kickback scheme illustrates the real danger.²⁶⁴ In a joint staff report of the Senate and House Judiciary Committees, the details of an alleged quid pro quo arrangement were laid out between Labor Secretary nominee and DoJ Civil Division Head Thomas Perez and the City of St. Paul.²⁶⁵ According to the report, Perez agreed not to intervene in a whistleblower action against the City of St. Paul, which charged that tens of millions of dollars were wrongfully paid in community development and stimulus funds, in exchange for St. Paul's withdrawing a suit slated to be heard by the U.S. Supreme Court involving the theory of disparate impact.²⁶⁶ The reversal in the support of the whistleblower's FCA action was also said to be the subject of a departmental cover-up.²⁶⁷ Considering the lack of any standards for implementing the government veto, the potential for political influence is heightened.²⁶⁸

Another ethical dilemma involved in the amended FCA is that of champerty and maintenance. The terms are old charges for stirring up litigation.²⁶⁹ "Maintenance" is generally the encouragement of litigation by a stranger to the action in order to keep it going.²⁷⁰ "Champerty" is when an individual invests in a lawsuit to receive a share of the recovery.²⁷¹ An associated term, "barratry," is the professional maintenance of scurrilous actions.²⁷² The abuses were means of keeping alive actions in hopes of driving a defendant into submission by resisting settlement,²⁷³ among other things.²⁷⁴ These charges were initially brought against contingency fee practices, and ten states have laws against inciting groundless proceedings.²⁷⁵

Reformation occurred during the Civil Rights era after some states used the legislation barring champerty and maintenance to combat public interest suits contesting the enforcement of integration.²⁷⁶ The charges rose again in

264. See STAFFS OF H. COMM. ON OVERSIGHT & GOV'T REFORM, S. COMM. ON THE JUDICIARY, & H. COMM. ON THE JUDICIARY, 113TH CONG., DOJ'S QUID PRO QUO WITH ST. PAUL: HOW ASSISTANT ATT'Y GEN. THOMAS PEREZ MANIPULATED JUSTICE AND IGNORED THE RULE OF LAW 1-4 (Comm. Print 2013) (Joint Staff Report).

265. *Id.* at 7.

266. *Id.* at 7-8.

267. *Id.* at 44.

268. See *id.* at 1-4. Model Rule 7.6 of the Model Rules of Professional Conduct is also implicated: "A lawyer or law firm shall not accept a government legal engagement . . . if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment." MODEL RULES OF PROF'L CONDUCT R. 7.6; cf. Beisner et al., *supra* note 135, at 1469 (discussing the problem in the class action attorney context).

269. Ari Dobner, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1546 (1996).

270. Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity?*, 30 AM. BUS. L.J. 485, 485 (1992).

271. *Id.*

272. *Id.*

273. *Id.* at 487.

274. See Dobner, *supra* note 269, at 1549.

275. Martin, *supra* note 270, at 488-90.

276. *Id.* at 491; see also Scalia, *supra* note 141, at 893 (referencing the "narrowing . . . [of] laws against champerty and maintenance" as partly responsible for the rise of public interest law firms).

the area of class action and patent litigation when syndicated lawsuits became common.²⁷⁷ Arguments about the ethics of financing litigation for resource-challenged plaintiffs entered the fray.²⁷⁸ Creative means of litigation risk maintenance, such as “Gallagher Covenants” and “Mary Carter Agreements,” in which a potentially liable party guarantees the covenantee/plaintiff a certain amount of recovery as long as he proceeds against a co-defendant first, have also met with charges of champerty and maintenance.²⁷⁹ Two primary arguments against such arrangements are (a) the likelihood that some will finance litigation only to harass defendants and jeopardize their finances and (b) the fact that investors/financiers, who are “less adverse to risk than a typical plaintiff, will discourage settlements in favor of engaging in trials.”²⁸⁰

With the amount of recoveries in FCA suits totaling in the billions and with the contingency fee arrangement at the heart of FCA actions, the amendments to the FCA have created the potential for yet another employment of these dusty legal doctrines.

C. Practical Problems

The amended FCA also presents a set of practical problems related to the procedure, parity, and statutory consistency and coherence.

First, because the 2010 amendments changed the bar from a jurisdictional consideration²⁸¹ to a simple motion to dismiss,²⁸² the defendant is put at a procedural disadvantage in addition to his negotiation disadvantage. Unless the defendant raises the issue of the public disclosure bar as an affirmative defense in the pleadings, or at least reserves the right to raise additional affirmative defenses as need be, he will have waived the right to do so.²⁸³ But as admitted in a DoJ letter about the 2007/08 Proposed Legislation, the gov-

277. See Dobner, *supra* note 269, at 1529.

278. Martin, *supra* note 270, at 493.

279. *Id.* at 494–95.

280. *Id.* at 509–10.

281. The spectrum of statutes that can disqualify plaintiffs on jurisdictional grounds has included the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346 (2012), and the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–09 (2006). In these actions, the government is the defendant, not the plaintiff or party in whose behalf the suit is brought, as is the case with the FCA. See 28 U.S.C. § 1346; 41 U.S.C. § 7104(b). However, whereas the FTCA can deny the plaintiff grounds to sue based on the fact that the issue is a policy matter, decisions about which are discretionary (and about which the government does not waive its sovereign immunity), the CDA and the FCA had always denied the plaintiff grounds to sue either because his claim was not certified correctly, in the case of the CDA, or because he did not provide information not already disclosed, in the case of the FCA. See 28 U.S.C. § 1346; 41 U.S.C. § 7103(b). Of the three, only the FTCA still bars the plaintiff on jurisdictional grounds. See 28 U.S.C. § 1346. Both the CDA and the FCA are now only subject to dismissal grounds, after assertion of an affirmative defense. 31 U.S.C. § 3730(c)(2); 41 U.S.C. § 7103(b).

282. 31 U.S.C. § 3730(e)(4)(A).

283. Jeremy Friedman et al., *Revisiting the Public Disclosure Bar & Its Original Source Exception*, 43 FALSE CL. ACT & QUI TAM Q. REV. 113, 116 (2006) (“It is important to address at the outset whether a particular alleged disclosure in fact even occurred in one of the enumerated fora, as not every public disclosure triggers the bar, and failure to raise this argument can waive it.”).

ernment would need sufficient time to gather facts related to the bar.²⁸⁴ If so, then the defendant would certainly need as much time or more. He would not have the facts relating to the bar at the outset of the case, nor could he ethically plead facts he does not have under the Model Rules of Professional Conduct.²⁸⁵

In addition, as there is no guidance as to when the government must exercise its veto, or as to what form that right must take, the defendant would obviously be disadvantaged by delay. Conversely, the government and the plaintiff would benefit from such a deferral and could exploit that disadvantage. The relator has a statutory right to a hearing on the government's motion to dismiss his claim,²⁸⁶ but the defendant has no such right to hear why the plaintiff was not dismissed,²⁸⁷ even though precedent, or even the court at issue, has determined that he should be. The efficiency of the judicial system is also at the mercy of the government's exercise of its veto; the long process in trying the bar takes up the court's time and consideration, potentially all for naught.

Statutory consistency and coherence are also adversely affected by the 2010 amendments to the FCA. The statute currently includes a sliding scale of reward amounts, based upon how much the relator's information contributed to the recovery.²⁸⁸ It gives the least amount to one whose information is *primarily* based on information already publicly disclosed.²⁸⁹

Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or adminis-

284. The DoJ wrote the following:

[W]ith respect to the [g]overnment seeking the dismissal of a relator on public disclosure grounds, we think it is important that the [g]overnment be given adequate time to file such a motion, and recommend that the proposed legislation expressly provide for such a motion to be filed "on or before service of a complaint on the defendant pursuant to Section 3730(h), or thereafter for good cause shown." This change is particularly important if the current language of the proposed legislation is enacted, since it may require substantial investigation, including discovery of the relator to determine where the relator derived his or her knowledge.

Letter from Keith B. Nelson, *supra* note 109, at 9.

285. MODEL RULES OF PROF'L CONDUCT R. 3.1, 3.3, 8.4.

286. 31 U.S.C. § 3730(c)(2)(A); *see* United States *ex rel.* Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1143 (9th Cir. 1998) (holding that plaintiff had a right to judicial review of a motion to dismiss his claim). *But see* Swift v. United States, 318 F.3d 250, 253 (D.C. Cir. 2003) (disagreeing with holding in *Sequoia*).

287. *See* 31 U.S.C. § 3730(c)(2)(A) (only stating that the court must provide the relator with an opportunity for a hearing on the government's motion to dismiss without the mention of any similar right of the defendant).

288. 31 U.S.C. § 3730(d)(1) ("[S]uch person shall . . . receive at least [fifteen] percent but not more than [twenty-five] percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.").

289. One version of the 1986 amendments actually rewarded those whose information was solely based on publicly disclosed information. S. REP. NO. 99-345, at 29, 42-43 (1986). The provision was changed to require at least some information. 31 U.S.C. § 3730(d)(1); *see* 132 CONG. REC. 28,580 (1986) (statement of Sen. Grassley).

trative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than [ten] percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation.²⁹⁰

A line of cases has interpreted this provision, including cases in which the relator whose claims were subject to dismissal wanted the higher awards because the government took over the action prior to dismissal. In *United States ex rel. Merena v. SmithKline Beecham Corp.*, such a relator contested the ten percent award, but the government prevailed:

[T]he relators' position produces results that we do not think that Congress intended. First, this interpretation provides a potentially huge windfall—[fifteen to twenty-five percent] of the total recovery—for most relators whose claims would have been dismissed under section 3730(e)(4) if the government had not intervened. It is hard to see why Congress might have wanted the fortuity of government intervention to make such a difference—or why Congress might have wanted to provide such a large reward to such a relator, who provides little if any public service.²⁹¹

The U.S. Court of Appeals for the Third Circuit went on to say that Congress could not have meant for those who were entitled to the highest award, in that they provided a “substantial public service,” to receive the *same* amount as those who contributed the least.²⁹² Such an interpretation would make the scale meaningless.²⁹³

Obviously, the common sense of these opinions has been turned on its head with the 2010 amendments to the public disclosure bar.²⁹⁴ Now, a relator who contributes absolutely nothing of “substantial public service” to the claim may receive any amount of reward—as much as a relator in a

290. 31 U.S.C. § 3730(d)(1).

291. *United States ex rel. Merena v. Smithkline Beecham Corp.*, 205 F.3d 97, 105 (3d Cir. 2000) (interpreting statute and agreeing with the government “that a relator who asserts a claim that is subject to dismissal” is not entitled to any award even if the government intervenes).

292. *See id.*

293. *See id.* The lower court in *Merena* was of the opinion that “[i]f a qui tam relator . . . was found by the court to have contributed nothing of value, a zero award would appear to be appropriate.” *United States ex rel. Merena v. Smithkline Beecham Corp.*, 114 F. Supp. 2d 352, 362 (E.D. Pa. 2000). *See also United States ex rel. Eitel v. Reagan*, 35 F. Supp. 2d 1151, 1159 (D. Ariz. 1998) (“If the United States proceeds with the action then the award to the relator is less because the government’s effort and expense is greater and the relator’s contribution is less, and when a case is based *primarily* on publicly disclosed information the relator’s contribution is even less significant, and the available award reflects that[.]”); *Alderson v. United States*, 718 F. Supp. 2d 1186, 1190–91 (C.D. Cal. 2010) (“As stated by the Ninth Circuit: ‘the extent of the recovery is tied to the importance of the relator’s participation in the action and the relevance of the information brought forward.’” (quoting *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 964 (9th Cir. 1995))).

294. *See generally* Robert T. Rhoad & Jason C. Lynch, *New Questions Regarding the Jurisdictionality of the FCA’s Public Disclosure Bar: Potential Hurdles and Increased Costs in Defending Against Parasitic Qui Tam Actions*, 55 GOV’T CONTRACTOR ¶ 92, Mar. 27, 2013, at 1, 3 (stating that “the very nature of the bar may have changed such that it no longer concerns a court’s subject matter jurisdiction” and that this change “would drastically change the way in which it is litigated”).

case in which the information provided was undisclosed.²⁹⁵ In yet another example of ironic incoherence, the determination of the award according to the statute depends upon the *court's* determination of whether the information was primarily based on disclosed material,²⁹⁶ but the ultimate determination has been transferred to the executive.²⁹⁷ This presents an additional separation of powers problem.

Lastly, there are presently nearly one hundred federal whistleblower and whistleblower retaliation statutes²⁹⁸ entitling a private citizen who provides information disclosing fraud to some reward.²⁹⁹ Why do these statutes require more from whistleblowers than the amended FCA does of its relators? On what grounds will their public service be questioned in the future if the FCA is any indication of future congressional action vis-à-vis qui tam suits?³⁰⁰

VI. CONCLUSION

Whatever the intentions were behind the 2010 amendments to the False Claims Act, their supporters have compromised the position of qui tam relators. Those amendments have not only changed the nature of the action from an informer's suit to a "repeaters" suit, but have also reawakened a panoply of problems: constitutional—justiciability, separation of powers, due process, and equal protection; existential—citizen suits and private bills; and practical—procedural, ethical, and statutory coherence. With the addition of a four-word government veto to the bar, the drafters initiated this dilemma. Only by repeal of those words can the damage be undone.

295. See 31 U.S.C. § 3730(d); Harmon, *supra* note 14, at 22.

296. 31 U.S.C. § 3730(d)(1).

297. This effectively gives the DoJ the unilateral power to veto a public disclosure defense. *Id.* § 3730(e)(4)(A) (emphasis added) (stating that "[t]he court shall dismiss an action or claim under this section, *unless opposed by the Government*, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed").

298. See *Federal Whistleblower Laws*, TATE & RENNER ATT'YS AT LAW, <http://www.taterenner.com/fedchart.php>.

299. See, e.g., 26 U.S.C. § 7623(b) (2006).

300. For a discussion on the "back and forth" between Congress and the judiciary, see *supra* notes 60–68 and accompanying text.