The Pebble in the Shoe: Making the Case for the Government Employee

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Recommended Citation
The Pebble in the Shoe: Making the Case for the Government Employee

JOAN R. BULLOCK*

I. INTRODUCTION

In March of 1990, an eagle-eyed auditor by the name of Paul Biddle upset the status quo at Stanford University. As the on-campus representative of the federal government's Office of Naval Research, he uncovered and reported to his superiors several instances of improper charges by Stanford. Since his discovery, Stanford University has become the subject of a criminal investigation for committing fraud against the United States, the president of the university has resigned, the university has returned approximately two million dollars to the federal coffers, and the university entered its 1991 fiscal year with approximately $20 million less as a result of the Defense Contract Audit Agency's reduction of its overhead rate from 74 to 55.5 percent. To add insult to injury, Paul Biddle brought suit against Stanford University seeking to use the information he acquired in his position as contract administrator for the Office of

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1. Dennis Kelly, The Accountant Who Opened the Books on Stanford, USA TODAY, Aug. 6, 1991, at 6D.
Naval Research as the basis for maintaining a *qui tam* action under the False Claims Act (Act). If he is successful, he stands to reap a profit numbering in the tens of millions of dollars. Needless to say, Stanford is not amused. Moreover, the government, represented by the United States Department of Justice, has sided with Stanford University in contending that Biddle does not have standing to sue under the Act because he acquired the information that forms the basis of his cause of action during the course of his employment. Biddle, who describes himself as contentious and a very principled person, considers himself a pebble in the shoe and stated that, "We [the government] need more starch in the shorts; we need more pebbles in shoes like Paul Biddle. If we get more of these, then there will be change."

This Article addresses the issue of whether federal government employees should be able to use the False Claims Act, also known as the "federal whistleblower statute," to personally benefit from uncovering fraud against the government during the course of their employment. The Article addresses, therefore, the apparent collision between two policies: on the one hand, the federal government has a compelling interest in vigorously pursuing those contractors who defraud it; on the other hand, the government has an interest in not encouraging its own investigators to enrich themselves by bringing personal suits for damages against the target of their investigations.

The False Claims Act was signed into law in 1863 by President Abraham Lincoln as a response to cases of contractor fraud perpetrated on the Union Army during the Civil War. This Act has become the federal government’s primary tool for combatting fraud perpetrated against it. The current Act permits the United States to

6. "*Qui tam*" is an abbreviation for the Latin phrase, "*qui tam pro domino rege quam pro si ipso in hac parte sequitur,*" which translates as he "[w]ho sues on behalf of the King as well as for himself." BLACK'S LAW DICTIONARY 1251 (6th ed. 1991). By statute, a *qui tam* action permits an individual to become a "private attorney general" with a right to share in the recovery with the Government. See 31 U.S.C. § 3730(b) (1988).


9. See id.


12. Kelly, *supra* note 1, at 6D.


15. See generally, Richard J. Oparil, *The Coming Impact of the Amended*
recover treble damages plus an amount ranging from $5,000 to $10,000 for each fraudulent or false claim. Although the government has always been able to pursue common law contract remedies, the government has not been very successful in detecting fraud. Consequently, the False Claims Act gives an incentive to private individuals who have either a direct or independent knowledge of fraud being committed by contractors against the government to come forward or "blow the whistle." These whistleblowers or "relators" can bring a *qui tam* action and are able to recover at least fifteen percent but not more than thirty percent of the proceeds recovered by the government.

Paul Biddle's case graphically raises the issue of whether government employees should have standing as relators and be allowed to initiate a *qui tam* action when they uncover fraud against the government as part of their job responsibilities. Prior to its amendment in 1986, the False Claims Act prohibited both current and former government employees from initiating *qui tam* actions based on information acquired while a government employee. Section 3730(b)(4) of the former Act provided that courts had no jurisdiction over *qui tam* actions "based on evidence or information the government had when the action was brought." This effectively precluded government employees from bringing the action since the government

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20. 31 U.S.C. § 3730(b)(4) (1982). The Act provided, in pertinent part: Unless the government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the government had when the action was brought.

*Id.* The prior version of this particular section stated that:

[The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.]

had the information by virtue of the government employee uncovering the fraud. The 1986 amendment deleted this clause leading some courts to hold that government employees are no longer precluded from maintaining a *qui tam* action. These courts reached this conclusion as a result of the statute's omission rather than an affirmative statement of change in the statute. Under these circumstances, the courts' conclusion that government employees were not barred from instituting and maintaining *qui tam* actions was predicated on the underlying assumption that the omission of any reference to government employees as an excluded group was a deliberate one.

Nevertheless, the Department of Justice has refused to make this assumption. Instead, it came to the opposite conclusion, namely, that the absence of any reference to government employees as an excluded group was unintentional on the part of the statute draftsmen. As a consequence of being at odds with the courts, the Department of Justice is currently urging Congress to amend the statute to specifically exclude government employees from benefitting under the statute.

This present controversy, therefore, is one of casus omissus. In particular, the question is whether such omission should be viewed as intentional, thus allowing government employees to maintain the action or whether such omission should be disposed of according to the law as it existed prior to the Act's amendment.

II. BACKGROUND TO THE PRESENT CONTROVERSY

A. The False Claims Act

In 1863, President Abraham Lincoln signed into law the False Claims Act, then also known as the "Lincoln Law," to encourage the private citizenry to assist in ferreting out unscrupulous defense contractors who committed fraud against the Union army by deliv-

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23. *See* H.R. 4563, 102nd Cong., 2d Sess. (1992); S. 2785, 102nd Cong., 2d Sess. (1992). The House and Senate are currently considering revisions to the False Claims Act that would address the rights of the government employee. *See id.*

24. *Casus omissus* is defined as "[a] case omitted; an event or contingency for which no provision is made." *Black's Law Dictionary* 219 (6th ed. 1991).

erating bullets loaded with sawdust.\textsuperscript{26} The original Act assessed both civil and criminal penalties against a person who was found to knowingly have submitted a false claim to the government.\textsuperscript{27} The civil penalty required the person committing the fraud to pay double the amount of damages suffered by the United States as a consequence of the false claim and an additional $2,000 forfeiture for each false claim submitted.\textsuperscript{28} The criminal penalty provided that the person could be fined not less than $1,000 nor more than $5,000 or imprisoned for not less than one nor more than five years.\textsuperscript{29} The private relator or whistleblower who initiated the \textit{qui tam} action was entitled to fifty percent of the damages and forfeitures recovered and collected by the government plus an award for litigation costs, if successful. Once the action was underway, no one, not even the government, could join in or take over the case.\textsuperscript{30} In fact, the legal system considered the relator's interest a property right which could not be divested by the United States.\textsuperscript{31}

In 1943, the Act was amended to reduce the involvement of the private citizenry. This amendment, made at the behest of the Department of Justice, was in response to a wave of parasitic suits beginning in the 1930s and culminating in 1943 with the United States

\textsuperscript{26} See CONG. GLOBE, 37th Cong., 3rd Sess., 952, 955 (1863).
\textsuperscript{27} See REV. STAT. § 3490 (1874); REV. STAT. § 5438 (1874).
\textsuperscript{28} REV. STAT. § 3490 (1874). Section 3490 provided in pertinent part: Any person . . . who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained . . . .
\textsuperscript{29} REV. STAT. § 5438 (1874). Section 5438 provided in pertinent part: Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States . . . knowing such claim to be false . . . or who . . . causes to be made . . . any false bill . . . or who enters into agreement . . . to defraud the Government . . . or who, having charge . . . of any money . . . conceal[s] such money . . . shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand dollars nor more than five thousand dollars.
\textsuperscript{30} United States v. Griswold, 30 F. 762, 763 (C.C.D.Or. 1887).
Supreme Court decision of *United States ex rel. Marcus v. Hess.*

In these parasitic suits, the relators brought *qui tam* actions based upon information copied from government files and indictments. In *Marcus v. Hess,* the United States contended that a relator who based his *qui tam* action on information in a government indictment should be precluded from recovering under the False Claims Act because he did not contribute anything to the discovery of the alleged fraud. In holding for the relator, Justice Black, speaking for the majority of the Court, stated that neither the language of the statute nor its history could support the government's contention that the application of the statute was limited to those who provided new information of fraud. There was "no reason why Congress could not, if it had chosen to do so, have provided specifically for the amount of new information which the informer must produce to be entitled to reward." In response to the government's contention that conditions had changed since the Act was passed in 1863, Justice Black retorted that, although conditions may have changed, the statute had not been altered, and consequently, the government selected the wrong forum in which to air its grievances.

In response to the *Marcus v. Hess* decision, then Attorney General Francis Biddle urged Congress to repeal the *qui tam* provisions of the Act. In a letter to Senator Frederick Van Nuys, Chairman of the Senate Judiciary Committee, the Attorney General wrote:

The result of [the Hess] decision is that whenever a grand jury returns an indictment charging fraud against the Government there may be a scramble among would-be informers to see who can be the first to file civil suit based on charges in the indictment. There are now pending 19 such suits. In 18 of these suits the basic allegations of the informers' pleadings were copied from the in-

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32. 317 U.S. 537 (1943). "[In September] 1943, there were approximately twenty-five informer suits pending, constituting a total demand of almost $150,000,000—a potential recovery of $75,000,000 to the informers. According to the Attorney General, almost all of these suits were of the 'parasitic' type." (Footnote omitted). United States *ex rel.* Weiss v. Schwartz, 546 F. Supp. 422, 425 (N.D. Cal. 1982).

33. See 89 Cong. Rec. 10,846 (1943).

34. 317 U.S. at 546, n.9.

35. See id. at 547. In his dissent, Justice Jackson stated that: the Senator [urging enactment of the statute] was then speaking of law enforcement in a nation which had not yet established a Federal Department of Justice, which did not then have a Federal Bureau of Investigation, or a Treasury investigating force, and in which the activities of the Federal Government were so circumscribed that they had not been found necessary. *Id.* at 560.

36. *Id.* at 547.


38. *Id.*
dictments.

To offset this condition the Department of Justice has undertaken to file civil actions at the same time that indictments are returned. But this has been found impractical. The exact time an indictment will be returned can rarely be anticipated. Moreover, this make-shift practice does not give adequate time in which to prepare proper pleadings.

I believe that Congress should by legislation put a stop to this unseemly and undignified scramble. The Government should have sufficient time in which carefully to consider the advisability of bringing such suits and the nature and contents of the pleading to be filed, instead of being forced to proceed in the hasty manner which alone is now available. 39

In response, the House of Representatives passed repeal legislation, but the Senate amended the House bill to retain *qui tam* actions, but with restrictions. 40 Specifically, the Senate provided that the courts' jurisdiction would be barred on *qui tam* suits based on information already in the government's possession unless the relator was the original source of that information. Without explanation, the resulting conference report deleted the clause regarding original sources. 41 Subsequent court decisions strictly interpreted this jurisdictional bar to prohibit any private suit based on information already known to the government regardless of the source. 42 The 1943 amendment therefore purged the courts not only of parasitic suits but also of suits by "honest" informers who provided new information to the government. 43 For example, in *United States ex rel. Wisconsin v. Dean*, 44 the United States Court of Appeals for the Seventh Circuit found that the State of Wisconsin was not a proper *qui tam* relator in a Medicaid fraud action because the government was already in

39. Id. There is evidence that the number of parasitic suits increased dramatically after the decision of *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). As Representative Clarence Hancock pointed out, "that since the decision . . . was rendered informer suits have multiplied very rapidly and are continuing to multiply." 89 Cong. Rec. 10,847 (1943).


41. The Conference Report stated that jurisdiction would be denied to the court to proceed with a *qui tam* action "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought. 89 Cong. Rec. 10,845 (1943).

42. See e.g., United States v. Pittman, 151 F.2d 851, 853 (5th Cir. 1946).

43. See Erickson v. American Institute of Biological Sciences, 716 F. Supp. 908, 916 (E.D. Va. 1989). This purging effect, plus the reduction of the relator's award from fifty percent to ten percent if the government chose to intervene and to 25 percent if the government declined to intervene, resulted in the initiation of fewer *qui tam* actions. See id.

44. 729 F.2d 1100 (7th Cir. 1984).
possession of the information (albeit as a result of the State’s required disclosure under federal law regarding Medicare programs) at the time the action was brought.\footnote{Id. at 1103.} Despite the filing of a brief by the federal government indicating its belief that the State of Wisconsin was a proper relator, the Seventh Circuit noted that “[i]f the State of Wisconsin desires a special exemption to the False Claims Act because of its requirement to report Medicaid fraud to the federal government, then it should ask Congress to provide the exemption.”\footnote{Id. at 1106.} In reaction to this decision, the National Association of Attorneys General adopted a resolution in June of 1984 to urge Congress to amend the False Claims Act: “to prohibit sovereign states from becoming qui tam plaintiffs because the U.S. Government was in possession of information provided to it by the State and declines to intercede in the State’s lawsuit, unnecessarily inhibits the detection and prosecution of fraud on the Government.”\footnote{S. REP. No. 345, \textit{supra} note 14, at 13 (quoting the National Association of Attorneys General).}

As a consequence of the plight of the State of Wisconsin and other “honest” informers, Congress subsequently amended the Act. The False Claims Amendments Act of 1986 was signed into law on October 27, 1986.\footnote{Pub. L. No. 99-562, 100 Stat. 3153 (1986) (codified at 31 U.S.C. §§ 3729-33 (1988))).} The 1986 amendments liberalized the False Claims Act in an attempt to “enhance the Government’s ability to recover losses sustained as a result of fraud against the Government.”\footnote{S. REP. No. 345, \textit{supra} note 14, at 1. The 1986 amendment has caused a resurgence of private attorneys general. Although the Department of Justice has intervened in approximately 25 percent of the qui tam actions since 1986, the government has recovered $260 million in fiscal 1990, up from $83 million in fiscal 1987. W. John Moore, \textit{Windfalls for Whistle-Blowers}, 17 Nat’l J. 48, 48 (1992).} The Act now requires a defendant found liable under the Act to pay treble damages and a forfeiture of not less than $5,000 and not more than $10,000 for each false or fraudulent claim.\footnote{31 U.S.C. § 3729(a) (1988). Liability is limited to not less than double damages and not less than a penalty of $5,000 for those defendants who made disclosure of their wrongdoing to investigating authorities prior to the commencement of the action. \textit{Id.}} The 1986 amendments also make it easier for private individuals to sue on behalf of the government. The 1986 amendments do not bar a relator from initiating a suit based on information already in the possession of the government. Instead, the amendments bar the relator from initiating a qui tam action only if it is based on information already disclosed publicly in a criminal, civil, administrative, or congressional hearing or in news media reports.\footnote{31 U.S.C. § 3730(e)(4)(A) (1988).} Notwithstanding this bar, an
individual who is the original source of the information remains a proper relator. The relator’s share of the proceeds when the government intervenes was increased under the 1986 amendments from ten percent to not less than fifteen percent and not more than twenty-five percent. If the government does not intervene, the amendments permit the relator to recover not less than twenty-five percent and no more than thirty percent. The former version of the Act gave a maximum award of only twenty-five percent in this case. Regardless of whether the government intervenes, the successful qui tam plaintiff has a right to reasonable attorney fees, expenses, and costs.

B. Blowing the Whistle on Stanford University

In March of 1991, Paul Biddle, the Office of Naval Research’s resident representative at Stanford University, testified before the House Energy and Commerce Subcommittee on Oversight and Investigations regarding abuses by Stanford that he discovered while a Navy auditor. He had alleged that Stanford had overcharged the federal government in excess of $200 million for research in the 1980s and for projects that had nothing to do with government.

52. 31 U.S.C. § 3730(e)(4)(B). “[A]n individual with direct and independent knowledge of the information on which the allegations are based and [who] has voluntarily provided this information to the government before filing an action....” Id.

53. 31 U.S.C. § 3730(d)(1) (1988). In certain situations where the essential elements of the case were not provided by the relator, the relator may receive not more than 10 percent. See also United States v. CAC-Ramsay, Inc. 744 F. Supp. 1158, 1161 (S.D. Fla. 1990).


56. The Office of Naval Research is one of the primary auditing arms of the federal government regarding research projects. It currently monitors federal research financing at 39 universities and colleges. Financial Responsibility at Universities - Part 2, supra note 2, at 12. One commentator reports:

The Office of Naval Research monitors federal research contracts at many universities as a result of a [sic] historical accident. After World War II, the Navy was the first government agency to pay for basic university research, and the Navy expanded its role to monitor all government contracts, in addition to Navy research, because it had the expertise to do so.


sponsored research. For example, the General Accounting Office confirmed several instances of improper charges at Stanford, including an orientation for freshman students that included a trip to the beach, $185,000 for operation of a shopping center on Stanford property. $184,000 for depreciation on a 72-foot Jacuzzi-equipped yacht, $4,000 for the president's wedding reception in 1987, $2,000 a month in floral arrangements, $400 for flowers for the dedication of the Stanford horse stables and ornate furnishings for the president's residence including the cost of enlarging the president's bed, $7,000 for table linens and bed sheets for the enlarged bed, $1,200 for an early nineteenth century Italian fruitwood commode, $1,500 each for two Voltaire chairs from Pierre Deux, $1,284 for a pair of George II lead urns, $2,500 to refurbish a grand piano, $10,000 for a set of silverware, and $3,000 for a cedar-lined closet.6 The government also footed the bill for a reception to introduce President Donald Kennedy's new wife to the campus.6 Of the Subcommittee on Oversight and Investigations hearing, Chairman John Dingell, Democratic representative from Michigan, questioned the level of involvement by the Stanford Board of Trustees in this scandal: "We would ask where they were during these events? Well, it turns out that they were enjoying the sufferings and tribulations of a retreat at Stanford Sierra Camp at Lake Tahoe, which cost $45,250 and was again subsidized by the taxpayers of the United States." Stanford has denied any deliberate attempt to overcharge and has repaid the United States about $2 million in improper charges. Although conceding that the charges were not necessarily appropriate, Stanford continues to maintain that they were legal. Stanford was able to bill the government for these nonresearch costs because the university's accounting system did not separate allowable from unallowable costs in determining research overhead. Prior to the scandal, Stanford had one of the highest reimbursement rates for overhead costs—seventy-four percent. For every $100 received from

59. See Financial Responsibility at Universities, supra note 57, at 34.
60. Id. at 3-4.
64. Stanford officials "described the current accounting system as a conveyor belt that dumps expenditures—allowed or not—into overhead accounts unless employees take special steps to remove them." Kenneth J. Cooper, Stanford to Change Grant Accounting, Wash. Post, Jul. 23, 1991, at A19.

Stanford, which normally conducts about $200 million worth of research annually, had its reimbursement rate cut to 55.5 percent at a cost of approximately $20 million to the institution. See also U.S. Investigates Stanford on New Overbilling Charges, L.A. Times, Nov. 16, 1991 at A17.
the government by Stanford researchers, the university got $74 more for overhead. This reimbursement rate, negotiated on a case-by-case basis between each university and the federal auditors, is set to cover costs of indirect research. Although it had not been audited for ten years, Stanford contended that none of the questionable costs were hidden from the auditors, and the research money was spent under rules that the auditors had certified as legal at the time. In fact, Stanford claimed that it requested the Navy to conduct audits of the university's accounting system, but the Navy never responded. At the heart of the scandal are 125 memoranda of understanding that Stanford negotiated with the Office of Naval Research. These memoranda of understanding, signed off by government auditors, none of whom were accountants prior to Biddle, permitted the cost recovery of these questionable expenses. In many cases, the sign-off was perfunctory and was seen as a paper-pushing function rather than a cost-containment measure. Paul Biddle has estimated that these special accounting exemptions cost the taxpayers as much as $200 million during the 1980s. The Defense Contract Audit Agency, whose audit had confirmed much of Biddle's allegations, maintained that the memoranda of understanding evidencing these special ac-
counting exemptions were invalid. Converse, Stanford contended that they were valid contracts that could not be unilaterally revoked. President Kennedy and Board of Trustees President James Gaiher have intimated that Stanford would sue if the government attempted to revise the memoranda of understanding retroactively. 

In the middle of this melee stands Paul Biddle. A certified public accountant with a Masters in International Management from The American Graduate School of International Management in Glendale, Arizona, he stands to personally profit by up to $30 million. In September 1991, Paul Biddle filed suit against Stanford under the False Claims Act. Stanford has retorted that not only should Biddle not be able to recover any monies for his trouble of uncovering the fraud as a federal employee, but also that Biddle should not be able to continue his auditing function at Stanford now that he has filed suit. At the prompting of Stanford officials, Representative Don Edwards of California and Senator Jeff Bingamon of New Mexico (both Stanford alumni) wrote letters to the Bush Administration charging that Biddle was violating conflict-of-interest laws by continuing to monitor the university while pursuing a potentially lucrative qui tam action against the university. Biddle, who was considering leaving his Stanford post in January of 1992 to run for political office, subsequently decided to stay and indicated that he "had planned to leave, but it [was] obvious that Stanford [was] just as manipulative, devious and as hell-bent to serve its interests apart

75. Financial Responsibility at Universities, Part 2, supra note 2, at 73-86.
76. See Financial Responsibility at Universities, supra note 57, at 162; Financial Responsibility at Universities, Part 2, supra note 2, at 61. "The heart of Stanford’s dispute (with the government) is not yachts and flowers," said Peter Van Etten, the university’s chief financial officer, pointing out that Stanford had voluntarily withdrawn those costs several months ago. ‘Rather, the dispute is about the fair, actual costs of supporting research and the government’s contractual agreements to pay for those costs.’ Louis Freedberg, Report Says Stanford Overbilled Agency Seems to Confirm Whistle-Blower’s Charges, S. F. CHRON., Jan. 3, 1992, at A15.


79. Larry Horton, the Stanford official who contacted Edwards and Bingamon, stated that “[n]o man or woman who is an active litigant can be considered impartial and make decisions that can have a material impact on a case.” Louis Freedberg, Congressmen Seek Transfer of Auditor in Stanford Probe; Whistle-Blower Accused of Having Conflict, S. F. CHRON., Dec. 20, 1991, at A27 [hereinafter Cong. Transfer].

from those of the public as it was two years ago and 12 years ago."

However, Biddle did resign from his Navy post on February 29, 1992, in order to run for the House of Representatives as a replacement for Republican Tom Campbell who relinquished his seat in order to run for the United States Senate.

III. JUDICIAL INTERPRETATION AND LEGISLATIVE INTENT

Paul Biddle is not the first government employee who, by bringing a private enforcement action against an alleged wrongdoer, has raised the issue of whether government employees can be proper relators in a *qui tam* action where the fraud alleged was uncovered during the course of their employment. Since the Act's amendment in 1986, a number of courts have dealt squarely with this issue. The courts are in agreement that the Act as presently written does not present...
an absolute jurisdictional bar to government employees as relators.\textsuperscript{84} Akin to Justice Black's remarks in \textit{United States ex rel. Marcus v. Hess},\textsuperscript{85} the courts are in unison that the proper forum for the government's grievance regarding the standing of government employees as relators is Congress.\textsuperscript{86} More importantly, the United States Court of Appeals for the Eleventh Circuit in \textit{United States ex rel. Williams v. NEC Corp.}, correctly perceived that the government's grievance spoke to administrative difficulties in implementing the Act rather than substantive contentions of violations of the Act by government relators.\textsuperscript{87} In presenting its grievance regarding the propriety of allowing former or current government employees to sue as relators under the Act, the United States set out three contentions: first, it contended that the public disclosure provision\textsuperscript{88} of the Act was violated when individuals used information they compiled as government employees in their private capacities as citizens in a \textit{qui tam} action. Characterizing such relators as occupying a dual status, the government claimed that as long as employees used the information in their official capacity, no public disclosure occurred. However, when employees used this information as private citizens, they expropriated the government's work product and therefore disclosed it to members of the public, albeit via self-disclosure.\textsuperscript{89} The United States District Court for the District of Massachusetts found this argument to be persuasive in \textit{United States ex rel. LeBlanc v. Raytheon}.\textsuperscript{90}

Moreover, the court was persuaded by the government's second contention that government employees could not qualify under the original-source exception under the Act\textsuperscript{91} because they do not provide

\textsuperscript{84} However, the United States District Court for the District of Massachusetts found the Justice Department's argument that policy reasons as well as legislative intent precluded all government employees from suing as relators to be persuasive. \textit{United States ex rel. LeBlanc v. Raytheon Co.}, 729 F. Supp. 170, 177 (D. Mass. 1990), \textit{aff'd in result}, 913 F.2d 17 (1990), cert. denied, 111 S. Ct. 1312 (1991).

\textsuperscript{85} See supra note 34 and accompanying text.

\textsuperscript{86} See, e.g., \textit{United States ex rel. Williams v. NEC Corp.}, 931 F.2d at 1504.

\textsuperscript{87} Id.

\textsuperscript{88} Section 3730(e)(4)(A) provides,

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


\textsuperscript{89} See, e.g., \textit{United States ex rel. Williams v. NEC Corp.} 931 F.2d at 1499; \textit{United States ex rel. LeBlanc v. Raytheon}, 913 F.2d at 20.


\textsuperscript{91} Section 3730(e)(4)(B) provides,

\[ \text{For purposes of this paragraph, "original source" means an individual} \]
information voluntarily. Instead, they provide information to the government as a requirement of their employment.\textsuperscript{92} Although affirming the district court’s holding in \textit{LeBlanc}, the United States Court of Appeals for the First Circuit discredited the “dual status” theory because the theory assumed that government employees “lead schizophrenic lives and can publicly disclose information to themselves.”\textsuperscript{93} The court went on further to say that a court’s jurisdictional power over a \textit{qui tam} action is not divested merely because the information was made available to the public. Rather, section 3730(e)(4)(A) only prohibits courts from hearing \textit{qui tam} actions based on information made available to the public during the course of a government hearing, investigation, or audit or from the news media.\textsuperscript{94} Therefore, the First Circuit held that government employees were allowed to initiate \textit{qui tam} actions based upon information acquired during the course of their employment so long as it was not acquired from a government hearing, investigation, or audit or through the news media.\textsuperscript{95}

Nevertheless, the First Circuit affirmed the district court’s holding and dismissed the \textit{qui tam} action because LeBlanc did not qualify for the original-source exception to section 3730(e)(4)'s jurisdictional bar. The court agreed with the lower court’s analysis that LeBlanc had an affirmative duty to provide the government with the information and, therefore, since the fruit of his efforts was the government’s workproduct, he was not an entity indistinguishable from the government to have independent knowledge of the information forming the basis of the action.\textsuperscript{96}

This decision has been criticized by later courts that correctly pointed out that the original-source exception to the jurisdictional bar need not be invoked once a court finds that the information upon which the \textit{qui tam} action was based was not publicly disclosed as delineated in section 3730(e)(4)(A). In other words, once relators successfully overcome the public disclosure jurisdictional bar, \textit{qui tam} plaintiffs need not prove that they were an original source of the information.\textsuperscript{97}

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.

\begin{itemize}
  \item 92. 729 F. Supp. at 176.
  \item 93. 913 F.2d at 20.
  \item 94. This prohibition also bans private citizens from bringing \textit{qui tam} actions if the information forming the basis of the action was acquired during the course of a government hearing, investigation or audit or from the news media. See 31 U.S.C. § 3730(e)(4)(A) (1988).
  \item 95. 913 F.2d at 20.
  \item 96. \textit{Id}.
  \item 97. \textit{See}, \textit{e.g.} United States \textit{ex rel.} Williams v. NEC Corp., 931 F.2d at 1500, n. 13.
\end{itemize}
The government's third contention was that the 1986 amendment did not repeal the comprehensive bar against *qui tam* suits by government employees as found in the 1943 version of the False Claims Act.98 Instead, the United States argued that the failure of the 1986 amendment to explicitly include government employees as proper relators was an indication that Congress had no intention of changing the law as it applied to them.99

As a consequence of Congress' failure to state explicitly its intentions with regard to government employees, the courts have had to invoke various rules of statutory construction in order to determine the merits of the government's position. In general, courts are reticent to infer congressional intent where the language of the statute appears clear and plain on its face:

"Where the language of a statute is a clear expression of congressional intent [a court] need not resort to legislative history." The search for legislative intent begins and ends with the language of a statute unless: (a) the language of the statute is ambiguous; (b) legislative history shows that Congress clearly expressed an intent contrary to the plain language of the statute; or (c) the apparent clarity of language leads to an absurd result when applied.100

The comprehensive bar provision in Section 3730(b)(4) of the 1943 version of the Act was replaced by Section 3730(e), which, in addition to barring suits based on public disclosure in certain proceedings, listed three other types of suits which would invoke the jurisdictional bar: (1) suits between members of the military; (2) suits against members of Congress, the judiciary, or senior executive officials if the action was based on evidence or information known to the government when the action was brought; and (3) suits based on allegations that were the subject of a civil suit in which the United States was already a party.101 As one court observed, Congress had

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98. *Id.* at 1501.
99. *See supra* note 22 and accompanying text.
101. In pertinent part, the Act provides:

(e) **Certain Actions Barred.** (1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in section 210(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).
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a choice in how it structured the statute: it could have chosen to make eligible as *qui tam* relators only certain defined groups of persons and exclude all others, or it could have chosen to include all persons as eligible *qui tam* relators with specific exceptions. Because Congress chose the latter scheme, courts have reasonably inferred that government employees are included in the general universe of eligible *qui tam* relators unless they fall into one of the four specifically excluded groups noted above. Moreover, this inference is consistent with the rule of statutory construction that the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically enumerated.

In response to the Department of Justice’s contention that Congress did not realize that by changing the statutory language it might allow *qui tam* suits by government employees, the courts noted that there was no extraordinary showing of contrary intention that would justify an alteration of the plain meaning of the statutory language. To infer such contrary intent would be to violate the rule of statutory construction that states Congress is assumed to act with deliberation rather than by inadvertence. However, Congress did not contemplate the issue of whether government employees could sue as *qui tam* relators. In fact, one of the drafters of the 1986 amendment indicated that it was convenient not to have the issue surface in Congress because of the complexities of “trying to differentiate the types of situations where it may be appropriate to allow a government employee to bring a false-claims suit and those situations where they may be accused of simply cashing in on their government-assigned task—which was never intended by law.”

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(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.


103. See id. at 913.


107. See supra note 105.

overcome the restrictive effect of the 1943 amendment and enhance
the ability of persons to bring fraud to light. As Justice Scalia
observed while interpreting a different statute, "Congress often acts
'only one step at a time,' to eliminate one abuse that has become
the focus of its attention but not all allied abuses . . . ." Consequently, it is quite plausible that the current Act as literally applied
does not correspond to what Congress would have intended if it had
considered all allied abuses. Needless to say, Congress is the proper
forum for fleshing out what Congress intended. The remainder of
this Article addresses some of the policy concerns underlying the
ability of government employees to become relators and proposes
recommendations for changes in the statute.

IV. POLICY CONCERNS

Investigators and auditors like . . . Stanford-assigned Navy auditor
Paul Biddle have a conflict of interest and an unacceptable incentive
to self-deal if they are allowed to participate in substantial recoveries
simply for doing their job. Their duty to ferret out fraudulent
claims competes with their financial incentive to sue on behalf of
the government and share up to 30 percent of the recovery. We
think it's simply wrong for government's own watchdogs, whether
GAO auditors, Justice Department lawyers or FBI agents, to use
information they learned on the job for their own financial benefit
rather than allowing the government to use the information as the
basis of its own prosecution. There are several legitimate policy concerns that present obstacles
to the ability of government employees to sue as qui tam relators
under the False Claims Act. First, critics argue that to permit
government employees to sue under the Act using information they
acquired during the course of their jobs would be to reward them
twice for their investigative efforts. Second, recovery under the Act
would encourage such employees to focus their investigative efforts
only on those jobs that have a potential of a high financial pay-
off. A corollary of this is that the employee may put off investi-

111. Senator Charles Grassley and Representative Howard Berman, Finding a
112. "Why should Mr. Biddle, who is already being paid to audit Stanford's
books and who has been able to obtain information, question university officials
and rely on public support services only because he is working for the federal
government, be able to claim this additional bonanza?" Qui Tam Scam, WASH.
POST, Dec. 26, 1991, at A22. See also United States ex rel. Williams v. NEC Corp,
931 F.2d 1493, 1503 (11th Cir. 1991).
113. See Erickson v. American Inst. of Biological Sciences, 716 F. Supp. 908,
916, n.18 (E.D. Va. 1989).
gative efforts where fraud is suspected to allow the "pay-off" to get large enough to sue under the Act:

Indeed, a blanket ruling allowing government employees to bring *qui tam* suits could prove catastrophic, potentially paralyzing investigative bodies like the offices of the inspectors general and the Justice Department. In their official capacity, investigators might pursue cases half-heartedly, so that as private plaintiffs—entitled to a percentage of the recovery—they might later, enrich themselves by bringing the same cases.\(^{114}\)

A second corollary is that a conflict of interest arises if a government employee is allowed to file a *qui tam* action and remain on the case to continue investigative efforts. For example, Representative Don Edwards of California and Senator Jeff Bingaman of New Mexico wrote letters to the Bush Administration urging the removal of Paul Biddle from his post at Stanford because he was violating conflict of interest laws\(^ {115}\) by continuing to monitor the university while pursuing a potentially lucrative lawsuit against the institution.\(^ {116}\) An editor at the Washington Post stated that "[t]he conflict of interest here is as clear as it would be if judges were empowered to set fines and keep a percentage of everything they collect."\(^ {117}\)

A third concern in allowing government employees to sue under the statute is that mistrust could be created among government employees who may see their peers as overzealous and self-seeking in their efforts to become relators in *qui tam* suits. A fourth concern is that unscrupulous government investigators might steal fraud claims that private parties bring to the government's attention.\(^ {118}\) These particular concerns are not new. While urging fellow lawmakers to adopt the conference report regarding the 1943 amendment to the Act, Representative Clarence Hancock stated:

The temptation and the opportunity is tremendous under the [original] law for renegotiators, contracting officers of the various purchasing agencies of the Government, and agents for collectors of


\(^{115}\) Federal law provides that no government employee can serve in a post in which he has a conflict of interest. As the Office of Naval Research's resident Administrative Contracting Officer (ACO), Biddle was responsible for negotiating and establishing the indirect cost rates at Stanford. *See generally Financial Responsibility at Universities, Part 2, supra* note 2, at 66. As indicated earlier, a central allegation of Biddle was that the previously agreed upon indirect rates as evidenced by the memoranda of understanding entered into by Stanford and prior ACOs were improper.


internal revenue to take advantage of the information they discover in the course of the business to enrich themselves by instigating informer's suits. That is a temptation we wish to remove.119

In fact, Congress also was concerned that government employees would try to circumvent the prohibition against their serving as relators by providing information to their friends.120

Despite the legitimacy of these policy concerns, the point must still be made that fraud against the government is pervasive.121 The government's ability to detect fraud is handicapped without the cooperation of those who are either close observers or otherwise involved in the fraudulent activity.122 In this respect, government employees may be in the best position to ascertain and expose fraudulent activity. However, the United States Merit Systems Protection Board conducted a survey in 1983 that found sixty-nine percent of government employees who believed they had direct knowledge of illegalities failed to report the information.123

Those employees who chose not to report fraud were then asked why they failed to come forward. The most frequently cited reason given (53 percent) was the belief that nothing would be done to correct the activity even if reported. Fear of reprisal was the second most cited reason (37 percent) for nonreporting.124

The validity of these fears is found in two cases involving government employees. In United States ex rel. Hagood v. Sonoma,125 James Hagood, an Army Corps of Engineers attorney, initiated a qui tam action after he was removed from his position and transferred to Alaska. This removal and transfer was prompted by his refusal to approve a contract between the Corps and the Sonoma County Water Agency in California "on the basis that it violated a variety of federal fiscal and environmental regulations and statutes."126 The suspect contract was subsequently approved by his superiors.127 In United States ex rel Williams v. NEC Corp.,128 Arthur Williams, a
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A civilian Air Force attorney, detected a bid-rigging scheme among a consortium of Japanese contractors and reported it to his superiors: "For his efforts, Williams was placed under investigation. In disgust, he retired to Florida and filed a *qui tam* action." The United States won a $34 million settlement against the Nippon Electric Company, but Williams did not get a cent.

These cases are not the only examples. In the case of Paul Biddle, Representative John Dingell remarked that "[t]he record shows he was treated rather shamefully by Stanford and by his superiors." He was put on probation for more than eighteen months, received no merit increases or bonuses, suffered "downgraded personnel reviews and numerous other attempts by Stanford—through his superiors—to gag him, destroy his credibility and remove him permanently from Stanford." Leon Weinstein, a Miami investigator in the Inspector General's office of the United States Department of Health and Human Services, initiated more than 50 *qui tam* actions against health care providers, alleging false billing and other illegal practices. Prior to filing these actions, Weinstein, to no avail, had urged Inspector General Richard Kusserow to prosecute a number of the providers. Weinstein retired in frustration and brought these actions. While challenging Weinstein's right to sue under the statute, the Department of Justice joined the actions and has already settled three of them recovering approximately $600,000. As a consequence of challenges by the Department of Justice, no government employees, to date, who have filed *qui tam* actions have received any money for their investigative efforts.

The government contends that the removal of the comprehensive bar would encourage an explosion of *qui tam* actions by government employees. However, as has been noted by attorneys for Paul Biddle, "there has been no great invasion of the courts by government employees seeking to get rich from the statute. Nor has there been

131. Kelly, *supra* note 1, at 6D; see also *Financial Responsibility at Universities, supra* note 57, at 3.
135. *Id*.
136. *Id*.
137. *Id*.
any evidence of government employees' sandbagging information obtained during performance of their governmental duties in hopes of filing *qui tam* suits before the government acts.\textsuperscript{140}

In general, government employees are no different than private sector employees who blow the whistle.\textsuperscript{141} As the cases\textsuperscript{142} and the statistics of the Merit Systems Protection Board\textsuperscript{143} bear out, government employees can be subject to stone-walling, reprimanding, and firing by superiors. For example, Pentagon whistleblower Ernie Fitzgerald was fired at the request of Richard Nixon after Fitzgerald testified before Congress in 1969 about the added costs on the C-5 transport plane. It took Fitzgerald fourteen years and $1 million in legal fees to obtain a position similar to his old job.\textsuperscript{144}

[W]hile whistleblowers don't exist exclusively in the private sector. Rank-and-file government employees who are not investigators or auditors may . . . become whistleblowers if, because of bureaucratic corruption, malaise or politics, their superiors decline to pursue meritorious fraud cases. In these cases, the government and taxpayers can only benefit from the filing of a False Claims action that exposes fraud that would otherwise have gone undiscovered or unprosecuted.\textsuperscript{145}

An additional reason for not restricting government employees under the Act is that many allegations of fraud are currently going unaddressed because of resource and budgetary constraints on the part of the government. Allegations that could possibly develop into significant cases are frequently left unaddressed because of a judgment by federal auditors, investigators, and attorneys that devoting scarce resources to a questionable case may not be efficient.\textsuperscript{146} Government employees who assist or initiate the investigations on these unaddressed cases should be allowed to pursue them through a private *qui tam* action. It has already been established that "assistance from the private citizenry can make a significant impact on bolstering the government's fraud enforcement efforts."\textsuperscript{147} This is a major reason

\textsuperscript{140} Hafif & Benson, *supra* note 126, at A21.


\textsuperscript{142} See *supra* notes 125-38 and accompanying text.

\textsuperscript{143} See *supra* note 124 and accompanying text. See also, Bruce D. Fong, *Whistleblower Protection and the Office of Special Counsel: The Development of Reprisal Law in the 1980s*, 40 Amer. U.L. Rev. 1015 (1991).

\textsuperscript{144} Payoffs Challenged, *supra* note 130, at A1.

\textsuperscript{145} Grassley & Berman, *supra* note 111, at C6.


\textsuperscript{147} *Id.* at 8.
why the *qui tam* provisions were revitalized in 1986.\textsuperscript{148} It has been argued that to allow government employees to recover under the Act would appeal to their sense of greed.\textsuperscript{149} Even if this premise is accepted, one need only consider the alternative if government employees are not allowed to sue—the continuation of unchecked, rampant fraud. Indeed, personal enrichment may be the primary motivation behind an employee’s desire to bring a *qui tam* action; however, the government is enriched as well by recovering up to 100 percent of misappropriated funds plus penalties. Further, those involved in fraudulent schemes may be effectively deterred if they knew that they could not rely on the ineptitude or malaise of government employees in ferreting out illegal activity.\textsuperscript{150} As a consequence of not placing a jurisdictional bar against government employees’ ability to sue under the False Claims Act, all are winners—the government recoups money it would not have otherwise, and government employees are compensated for taking risks and “going the distance” in their investigative efforts.

\section*{V. Recommendations}

The False Claims Act should be revised to clarify the eligibility status of government employees to sue as *qui tam* plaintiffs. Congress should also recognize the interests of the government in assuring that the *qui tam* provisions of the False Claims Act not be reduced to a mere vehicle for early retirement by government employees. In general, the statute should be revised to limit, if not prevent, avarice from being the primary motivator for government employees doing their jobs. In particular, the statute should address the situation where government employees are either concentrating their investigative efforts or impeding their own or others’ investigative efforts in order to subsequently file cases that offer the potential of a high financial pay-off. In addition, the statute should address the employment consequences of the government employee who brings this private enforcement action but who still has a position overseeing the operations of the alleged wrongdoer. Accordingly, it is important to establish procedural safeguards to assure that the potentially conflicting interests of the government and the government employee are both heard.

\begin{footnotesize}
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149. See supra note 119 and accompanying text.

150. The social benefits of a private enforcement suit can outweigh its private benefits to the relator. See John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 672, n.6 (1986).
\end{footnotes}
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When government employees become aware of illegalities committed by contractors, they should provide a written report of these findings to their immediate supervisor. The report should include a standard cover sheet, which would require that the superior, or a designee, sign and date the sheet as evidence of the time of the employee's submission. Also noted on this cover sheet would be the date by which time the contracting agency would have to respond to the facts alleged in the report. A period of one year to give the contracting agency an opportunity to determine its course of action seems reasonable in this regard. Once the employee's superior has received the report, the superior would be required to notify the head of the contracting agency, who would in turn consult with the cognizant Office of Inspector General or the Attorney General if no Office of the Inspector General exists for that agency.

If the contracting agency intends to investigate further, it should document its intended course of action and forward a copy of this determination to the employee. The employee could then choose to initiate a *qui tam* cause of action if the employee believes that the investigative efforts undertaken by the contracting agency are insufficient in deterring the illegal activity or represents an undue compromise of the government's recovery potential in relation to the harm caused it by the contractor's breach. Further, if the agency, in writing, declines to pursue the matter or simply does not respond to the employee-submitted report within the one-year time frame, the employee should be allowed to sue. In either case, regardless of the agency's disposition on the employee-submitted report, the Act should require the employee who does choose to bring the *qui tam* cause of action to put in writing the reasons why the employee believes that the contracting agency's determined course of action is insufficient to protect the government's interest. When the government employee initiates the *qui tam* action by filing a claim in court, the filed documents should include not only the allegations forming the basis of the cause of action, but should also include the signed and dated cover sheet, the correspondence, if any, from the con-

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151. Cognizance is determined on the basis of the contractor's location. See, e.g., 48 C.F.R. § 442.102(b) (1992).

152. This procedure is similar to that already in place for the Department of Health and Human Services (see, e.g., 48 C.F.R. §§ 303.104-11 (1992)), and the Department of Agriculture (see, e.g., 48 C.F.R. §§ 403.203-.204; 48 C.F.R. § 442.102 (1992)). See also, 48 C.F.R. § 501.602-3 (1992); 48 C.F.R. § 503.303 (1992) (regarding the General Services Administration).

153. Of course, if the agency needs an extension of time, this should also be communicated in writing to the employee.

154. The employee should also be allowed to initiate a *qui tam* action if the agency has sought an extension based on the insufficiency of resources to adequately address the allegations in the employee-submitted report. See infra note 158. This would prevent an agency from stonewalling the employee.
tracting agency regarding its disposition of the employee-submitted report, and the employee's reasons for pursuing this cause of action.

In reviewing the filed documents, the government needs to have a procedure whereby it can determine (1) whether there is a government interest sufficiently compelling to override the interests of the government employee in pursuing the *qui tam* cause of action; and (2) whether the cause of action is parasitic.

It is only proper in the first regard that the government have the opportunity to challenge the government employee's right to sue if national security or some other compelling government interest is threatened by the bringing of the *qui tam* action. Even so, the provision in the current Act that requires the *qui tam* plaintiff's complaint to be filed in camera and to remain under seal for at least sixty days should allow the government sufficient time to object and suppress the employee's right to sue if a compelling government interest is indeed at issue. Congress intended this sixty-day time period to allow the government a sufficient opportunity to fully evaluate the *qui tam* suit and "determine both if that suit involves matters the government is already investigating and whether it is in the government's interest to intervene and take over the . . . action." A court can extend this sixty-day evaluatory period if the government so petitions and shows good cause. In addition, the *qui tam* action can be dismissed if the court and the Attorney General give written consent to the dismissal and state their reasons for consenting. If a government interest is truly compelling, a court

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155. A compelling government interest would be found to bar the cause of action if the employee has not fully complied with the procedures as laid out above. Moreover, in determining whether there is an overriding public interest that would extinguish the government employee's right to sue, the Department of Justice can take under advisement any reasons that the contracting agency indicated in its correspondence to the employee regarding government interests that would be threatened if the employee initiated the *qui tam* cause of action.


158. 31 U.S.C. § 3730(b)(3) (1988). According to the legislative history, good cause would not be established by a mere showing that the government was overburdened and did not have an opportunity to address the complaint. S. Rep. No. 345, supra note 14, at 25, reprinted in 1986 U.S.C.C.A.N. at 5290. However, a pending criminal investigation would often establish good cause but would not be considered an automatic bar to lifting the seal from the civil complaint. *Id.*

159. 31 U.S.C. § 3730(b)(1) (1988). Currently, if the government does not seek dismissal, but merely declines to join in the suit, the *qui tam* plaintiff is free to pursue the cause of action alone and at his or her own risk and expense. 31 U.S.C. § 3730(d)(2) & (4) (1988).
would arguably consent to the government’s petition for dismissal.

If the government is unable to demonstrate a compelling interest that would suppress the government employee’s right to sue, the government should then be afforded an opportunity to discern whether the cause of action is parasitic. In this instance, a determination should be made as to (1) whether the employee is the original source of the information; (2) whether the employee alerted superiors and other appropriate personnel to the alleged illegality prior to bringing suit; and (3) whether sufficient time was given the government to pursue the matter. This analysis should be more perfunctory if the completed cover sheet and other agency correspondence regarding the matter were filed with the court. If an employee waited the requisite one year as evidenced by the signed and dated cover sheet, the government should find that the cause of action is not parasitic. However, this finding is not automatic. If the employee is not the original source of the information, the Department of Justice should make additional inquiries to determine how the employee came upon the information and whether the government had an appropriate time in which to respond to the allegations before deciding whether the suit is parasitic. Moreover, a distinction should be made between those employees whose job it is to investigate fraud and other illegalities against the government and those employees who have non-investigative positions. The potential for abuse in the use of their positions for personal enrichment is greatest among those whose job it is to ferret out illegal activity. However, this is not to say that there should be a blanket prohibition against those employees whose job encompasses investigative functions. These individuals are the very ones who have the greatest opportunity to detect and report fraud and yet run the risk that superiors will not act on their claims because of scarce resources, ineptitude, or general malaise. Instead, these claims should be scrutinized more closely by the system for any evidence that could point to a reasonable conclusion that such employees have abused the privileges afforded their position in order to personally profit.

By utilizing the above procedures, government employees would benefit because they would submit the claim once to their superior without any concern as to whether the appropriate personnel was alerted to the alleged abuse. Further, if no action is taken on the matter or no response is given the employee within a certain time by the agency, the employee should be free to pursue the matter privately via a *qui tam* action. Since the one-year time limit within which the agency has to act or respond to the employee presents an objective standard, the employee should not have to second-guess whether he or she has waited long enough before pursuing the matter privately.

160. Moreover, inquiry should be made to insure that the employee is not stealing fraud claims that private parties bring to the government’s attention.
Consequently, it would be efficient if the contracting agency considered all allegations of illegality by government employees as potentially becoming the subject of a *qui tam* action. Therefore, during this one-year and sixty day time frame for the agency and the Department of Justice, respectively, these organizations should make assessments to determine whether any compelling government interest exists that conflicts with the employee's right to sue, and if not, whether the claim, if the subject of a *qui tam* action, would be parasitic. It would appear that one year should provide a realistic time frame in which the agency would have time to assess the situation and determine a course of action or inaction in the matter. In the same vein, it appears realistic for the Department of Justice to be able to determine its course of action or inaction in relation to its resources within the sixty days as provided currently in the Act.

If a government employee, who is an original source of the information, is successful in a *qui tam* action in which the government declines to intervene, a recovery based on a sliding scale indicative of the level of effort the plaintiff put into pursuing the cause of action would be appropriate. In no event should this award exceed ten percent. If the government does choose to intervene, recovery should be reduced to a maximum of five percent. If a government employee is not an original source and the government declines to intervene, a court should award the relator a recovery, again using a sliding scale, indicative of the extent to which the relator's efforts resulted in an award to the government. In no event should this award exceed five percent. If the government chooses to intervene, the maximum recovery should be reduced to two percent.

VI. Conclusion

Government employees should have standing as relators in order to initiate a *qui tam* action against contractors who commit fraud against the United States. Basing the cause of action on information acquired as a part of the employee's job responsibility should not preclude the employee from recovery. With its scarce resources, the federal government is not in a position to effectively curb the pervasive and rampant fraud committed against it. The False Claims

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161. Arguably, a government employee should be required to withdraw as relator once the government chooses to intervene. However, by allowing the employee the option to remain as a party to the suit, the relator has the opportunity to object to any proposed settlement amounts that are thought to be too low.

162. A question may be raised as to why the Act should allow a government employee who is not an original source to maintain the *qui tam* action. Even in this case the government is benefitted if it would not have pursued the claim in its own right. Further, by permitting the *qui tam* action, it prevents the wrongdoer from falling through the cracks and thus serves as an effective deterrent against contractor fraud.
Act was enacted, and subsequently strengthened, in order to assist the government in its policing and enforcement efforts. Private citizens, compelled by greed or the need to do what is right, have managed to put money back into the United States Treasury. Government employees, as members of the public citizenry, may be in the best position to detect and expose fraudulent activity. Their proximity, which allows them to closely observe illegal activity, and their position, which allows them to audit the organization and direct questions to various levels of personnel, provide them with a unique opportunity for detecting fraud. Akin to the plight suffered by many private sector employees who blow the whistle on their employers, coming forward with information that fraud has been committed against the government involves risk to the government employee. Coming forward with such information can underscore ineptitude, malaise, or corruption within the federal agency. In terms of adverse risk scenarios, coming forward can result in reprisal against the employee as a worst case, or in general frustration and hopelessness as a better case. In either scenario, government interests are not furthered and are, in fact, hindered. Allowing government employees to maintain qui tam actions would compensate them for these risks and would provide a sense of hope and vindication that coming forward was, indeed, worth it. Placing the burden on agencies to take action or risk a qui tam suit will create the best incentive to ferret out fraud.


164. See supra note 123 and accompanying text.