Note

Deterring Fraud to Increase Public Confidence: Why Congress Should Allow Government Employees to File *Qui Tam* Lawsuits

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Six-hundred-dollar toilet seats, $748 pliers, and $7000 coffeepots are outrageous expenditures for most individuals—but they are inexplicable outlays for the federal government.[1] These expenses are only examples of costs that contractors have fraudulently charged to the government and ultimately the American taxpayer.[2] Fraud accounts for an estimated loss of up to ten percent of the entire U.S. federal budget.[3] In 2008,

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1. *See* Lisa Estrada, Note, *An Assessment of* Qui Tam *Suits by Corporate Counsel Under the False Claims Act*: United States *ex rel.* Doe v. X Corp., 7 GEO. MASON L. REV. 163, 166 (1998); Robert E. Johnston, Note, *1001 Attorneys General: Executive-Employee* Qui Tam *Suits and the Constitution*, 62 GEO. WASH. L. REV. 609, 609 (1994); *see also* H. COMM. ON THE JUDICIARY, FALSE CLAIMS AMENDMENTS ACT OF 1986, H.R. REP. NO. 99-660, at 18 (1986) ("Evidence of fraud in Government programs and procurement is on a steady rise."); S. COMM. ON THE JUDICIARY, FALSE CLAIMS AMENDMENTS ACT OF 1986, S. REP. NO. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267.

2. *See* Senator Claire McCaskill, Statement Before the Commission on Wartime Contracting in Iraq and Afghanistan, Lessons from the Inspectors General: Improving Wartime Contracting (Feb. 2, 2009), http://www.wartimecontracting.gov/images/download/documents/hearings/20090202/Statement_of_Sen_McCaskill.pdf ("Hundreds of billions of dollars have disappeared. Everything has been stolen from money to heavy equipment to guns.").

3. S. REP. NO. 99-345, at 3. The Department of Justice estimated fraud as draining one to ten percent of the entire federal budget, costing taxpayers valuable money and "erod[ing] public confidence in the Government's ability to efficiently and effectively manage its programs." *Id.*; *see also* U.S. GEN. ACCOUNTING OFFICE, FRAUD IN GOVERNMENT PROGRAMS: HOW EXTENSIVE IS IT?

the federal government spent $532 billion on contracts,[4] an amount vastly disproportionate to the funding given to the government to ensure the veracity of these agreements.[5] Under the current system, contractors routinely overcharge the government for their services, knowing that law enforcement agencies do not have the resources to verify contractors' stated costs and expenses.[6] As a result, companies often perpetrate massive fraud against the government. Examples include contractors who sell defective body armor to police, health care companies that overcharge Medicare and Medicaid for their services, and insurance companies that illegally shift their losses to the federal government.[7]

Fred Burns, a former federal government employee, uncovered fraud against the government and fought to stop it.[8] When working for the government as a construction represent-

HOW CAN IT BE CONTROLLED? *passim* (1981) (noting that fraud erodes public confidence that government can efficiently run its programs).

4. Senator Susan M. Collins, Statement Before the Commission on Wartime Contracting in Iraq and Afghanistan, Lessons from the Inspectors General: Improving Wartime Contracting (Feb. 2, 2009), http://www.wartimecontracting.gov/images/download/documents/hearings/20090202/Statement_of_Sen_Collins.pdf [hereinafter Senator Collins's Statement].

5. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 3(a)(1), 123 Stat. 1617, 1619 (2009) (authorizing $165 million a year for fraud prosecution and investigation at the Justice Department for each of the fiscal years 2010 and 2011); *see also Proposals to Fight Fraud and Protect Taxpayers*: *Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 8 (2009) [hereinafter *Proposals to Fight Fraud*] (statement of Rita Galvin, Acting Assistant Att'y Gen., Criminal Division, U.S. Department of Justice) (stating that the Justice Department needs more resources to prosecute fraud cases).

6. *See False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 1 (2008) [hereinafter *2008 Senate Hearings*] (statement of Sen. Leahy, Chairman, S. Comm. on the Judiciary), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:42809.wais.pdf.

7. *See id.* One of the most common forms of fraud against the government occurs when contractors inflate the cost of their services, or submit claims for goods or services not provided, thereby overcharging the government for their work. *See* Carl Pacini & Michael Bret Hood, *The Role of* Qui Tam *Actions Under the False Claims Act in Preventing and Deterring Fraud Against Government*, 15 U. MIAMI BUS. L. REV. 273, 292 (2007); *see also* Emily R. D. Pruisner, Comment, *The Extent of a Corporation's Ability to Constitute an Original Source Under the False Claims Act*—Minnesota Ass'n of Nurse Anesthetists v. Allina Health System Corp., 87 MINN. L. REV. 1247, 1247 (2003).

8. United States *ex rel.* Burns v. A.D. Roe Co., 186 F.3d 717, 719 (6th Cir. 1999).

ative, Burns supervised construction projects performed by private contractors.[9] While monitoring the construction sites, Burns witnessed firsthand fraudulent activities by government contractors and repeatedly urged his supervisors to investigate this disturbing trend.[10] Outraged by the lack of oversight and accountability, Burns filed lawsuits in federal court to expose the massive abuse against the government.[11]

Burns filed these suits as a *qui tam*[12] relator under the federal False Claims Act (FCA),[13] a statute that creates liability for anyone who knowingly submits a false or fraudulent claim for payment to the government.[14] The FCA is the government's most successful civil litigation tool for combating fraud,[15] and FCA proceeds amount to nearly $22 billion, with *qui tam* lawsuits responsible for almost $14 billion of that amount.[16] As a relator, Burns had not personally suffered an injury; rather, he brought these suits to vindicate the rights of the government.[17] Yet, the FCA provides that if the relator is successful in his claim, he is entitled to up to thirty percent of awarded damages.[18] This number can be quite large as the judge can double or treble the damages in these cases as a

9. *Id.* at 720 ("Burns was employed by the United States as the Construction Representative . . . .").

10. *Id.* at 721 ("Burns also claims that prior to filing this action, he reported all instances of fraud alleged in the complaint to either the NIS [Naval Investigative Service], the contracting officer, the assistant officer in charge of construction, or a naval detective."); *see also* Final Brief of the Appellant at 10–11, *Burns*, 186 F.3d 717 (No. 97-6044) ("The record further demonstrates that the Appellant's allegations were based on his own first-hand and personal observations during construction on the project.").

11. *Burns*, 186 F.3d at 719.

12. *Qui tam* is an abbreviation for the Latin phrase "*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).

13. 31 U.S.C. §§ 3729–3733 (2006).

14. *See id.* § 3729(a)(1); *see also* John M. Degnan & Sally A. Scoggin, *Avoiding Health Care* Qui Tam *Actions*, 74 DEF. COUNS. J. 385, 385 (2007).

15. Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control* Qui Tam *Litigation Under the Civil False Claims Act*, 76 U. CIN. L. REV. 1233, 1235 (2008).

16. Civil Division, U.S. Dep't of Justice, Fraud Statistics—Overview, October 1, 1986–September 30, 2008, http://www.usdoj.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm (last visited Mar. 14, 2010) [hereinafter Fraud Statistics].

17. *See* United States *ex rel.* Burns v. A.D. Roe Co., 186 F.3d 717, 719 (6th Cir. 1999).

18. 31 U.S.C. § 3730(d).

means to deter fraud.[19] Therefore, when Burns filed his lawsuit, he could have won millions of dollars, giving him an undeniable personal stake in the claim.

Burns's personal interest raises public policy issues about whether government employees,[20] when acting in their individual capacities as agents of the government, should be able to profit personally by litigating claims of fraud against the government.[21] Courts divide on whether government employees should be able to stand as relators: some courts question the propriety of allowing an individual to recover for essentially doing his job, while other courts recognize that *qui tam* actions by government employees are not explicitly barred under the plain language of the FCA.[22] Additionally, Congress recognizes that the issue of government employee relators needs further clarification. Recently, Senator Charles Grassley introduced legislation to grant these employees the right to bring *qui tam* lawsuits under the FCA.[23]

Fraudulent conduct by contractors, coupled with the recent economic crisis facing the United States,[24] necessitates a rethinking of the rights of government employees by Congress and the Obama Administration. This Note argues that Congress should pass legislation to allow federal government employees to act as relators to save the government money, deter fraud, and increase the American citizenry's trust of govern-

19. *Id.* § 3729(a).

20. This Note uses the terms "government employee" and "federal employee" interchangeably to refer to employees of the United State Federal Government.

21. *See* Virginia C. Theis, Note, *Government Employees as* Qui Tam *Plaintiffs*: *Subverting the Purposes of the False Claims Act*, 28 PUB. CONT. L.J. 225, 226 (1999) (stating that the FCA "raised many practical and policy issues about the appropriateness of permitting government employees to benefit from knowledge of fraudulent activity gained at work").

22. *Compare* United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1494 (11th Cir. 1991) (holding that a government employee may bring a *qui tam* lawsuit), *with* United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 72 F.3d 740 (9th Cir. 1995) (finding that a government employee does not qualify as an "original source" under the FCA).

23. *See* False Claims Act Clarification Act of 2009, S. 458, 111th Cong. § 3 (2009).

24. *See* David W. Chen, *Economists' Forecast: Chance of Change 100%*, N.Y. TIMES, Feb. 16, 2009, at A17 (discussing impacts of the economic recession); Gretchen Morgenson, *Blank Check for Banks, Pink Slips for Detroit*, N.Y. TIMES, Dec. 14, 2008, at BU1 (commenting on congressional responses to the economic crisis).

ment.[25] Congress should explicitly allow government employees to bring *qui tam* actions for fraud uncovered in their professional capacities.[26] Part I provides a historical background of the FCA, specifically describing the major changes to the statute since enactment, and outlining the current split among circuit courts as to the rights of government employees under the statute. Part II argues that Congress must allow government employee relators to bring FCA *qui tam* actions to save the government money and increase the public support of government projects. Finally, Part III urges Congress to pass legislation amending the FCA to allow government employee relators.

I. THE CHANGING FACE OF THE FALSE CLAIMS ACT

An examination of the origins of the FCA and its subsequent amendments is essential to understanding the current controversy surrounding government employee relators. This Part explores the historical background of the FCA and discusses the related circuit split.

A. THE ORIGINAL ACT AND SUBSEQUENT AMENDMENTS

In 1863, President Abraham Lincoln proposed the FCA to protect the U.S. Treasury from fraud and abuse by Civil War defense contractors.[27] Congress, angered by the number of defense contractors cheating the government during a time of need,[28] adopted the Act.[29] The 1863 Act aided federal enforce-

25. *See* S. COMM. ON THE JUDICIARY, FALSE CLAIMS AMENDMENT ACT OF 1986, S. REP. NO. 99-345, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5268 ("[F]raud erodes public confidence in the Government's ability to efficiently and effectively manage its programs."); *see also* S. COMM. ON THE JUDICIARY, FALSE CLAIMS ACT CORRECTION ACT OF 2008, S. REP. NO. 110-507, at 8 (2008) ("As the [Government Accountability Office] pointed out, fraud erodes public confidence in the Government's ability to efficiently and effectively manage its programs. This is why the FCA is so important to not just the Government, but to American taxpayers." (footnote omitted)).

26. *Cf.* Gita F. Rothschild & Moon Kim, *Increasing Use of* Qui Tam *Claims*, ALI-ABA Course of Study (2008), *available at* WL SN066 ALI-ABA 501, 505 ("Proposed amendments to strengthen the Act have been introduced in Congress and are expected 'to energize the *qui tam* bar and generate a next wave of False Claims Act litigation activity.'" (citation omitted)).

27. *See* H. COMM. ON THE JUDICIARY, FALSE CLAIMS ACT CORRECTION ACT OF 2009, H.R. REP. NO. 111-97, at 2–3 (2009) ("President Lincoln implored Congress to pass legislation to address . . . incidences of fraud.").

28. *See id.* at 2 ("During the Civil War, fraud by Government contractors had become so prevalent that the United States Army was often delivered de-

ment efforts by encouraging individuals to "blow the whistle" if they knew of plans to defraud the government.[30] During the 1930s and 1940s, the New Deal and World War II greatly expanded the role of the federal government in the national economy, thereby increasing the opportunities for contractors to defraud the government.[31] The number of *qui tam* suits initiated by relators increased dramatically during this period, resulting in abuse of the system.[32]

Specifically, individuals with knowledge of the FCA began waiting for prosecutors to file criminal indictments against defense contractors in federal court and then immediately filing *qui tam* actions against the same contractors.[33] The suits angered members of Congress and the Department of Justice (DOJ) because relators often brought actions based on information obtained from external sources such as indictments, newspapers, and other public records.[34] The DOJ thought that these

crepit horses, or sold the same horse twice, and packages of gunpowder often arrived filled with sawdust.").

29. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696–99 (current version at 31 U.S.C. §§ 3729–3733 (2006)); *see also* S. REP. NO. 110-507, at 1 (discussing the historical foundations of the FCA); 132 CONG. REC. 22,335 (1986) (statement of Rep. Glickman) ("This act, sometimes referred to as the 'Abraham Lincoln Law,' was enacted amid reports of widespread corruption and fraud . . . ."); 89 CONG. REC. 10,741 (1943) (statement of Sen. Langer) (describing the FCA's popular name as "the Lincoln statute").

30. Johnston, *supra* note 1, at 613; *see also* CONG. GLOBE, 37th Cong., 3d Sess. 956 (1863) (statement of Sen. Howard) ("I have based the [enforcement] sections upon the old-fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rouges to justice.").

31. Richard A. Bales, *A Constitutional Defense of* Qui Tam, 2001 WIS. L. REV. 381, 389 ("[T]he New Deal and World War II greatly expanded the role of the federal government in the national economy, and commensurately expanded the opportunities for unscrupulous contractors to defraud the government.").

32. Theis, *supra* note 21, at 227 ("During the 1930s and 1940s, opportunistic plaintiffs brought a series of 'parasitic' civil suits."); *see also* S. COMM. ON THE JUDICIARY, FALSE CLAIMS AMENDMENTS ACT OF 1986, S. REP. NO. 99-345, at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5275 ("In the early 1940s, several *qui tam* actions were brought regarding World War II defense procurement fraud. Some suits brought by private citizens appeared to be based on criminal indictments brought by the Government.").

33. *See generally* JAMES B. HELMER, JR., FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION §§ 2–5 (3d ed. 2002) (discussing the abuse of *qui tam* actions that eventually led to the 1943 amendments to the FCA).

34. 89 CONG. REC. 10,846 (1943).

"parasitical suits" only served to decrease the proceeds that the government could otherwise recover on its own.[35]

The House of Representatives responded to the DOJ's concerns by attempting to repeal the entire *qui tam* provision of the FCA.[36] The Senate, however, rejected such a draconian measure.[37] It instead proposed legislation by which an "honest informer," defined as an individual who contributed "original information" to the government,[38] could maintain a *qui tam* lawsuit.[39] Congress, in 1943, eventually enacted new *qui tam* provisions to the FCA, prohibiting relators from bringing actions based on evidence or information possessed by the United States.[40]

Notably, the 1943 amendments to the FCA effectively barred *qui tam* suits by federal government employees.[41]

35. *See* United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100, 1104 (7th Cir. 1984).

36. *See* Susan G. Fentin, Note, *The False Claims Act—Finding Middle Ground Between Opportunity and Opportunism: The "Original Source" Provision of 31 U.S.C. § 3730(e)(4)*, 17 W. NEW ENG. L. REV. 255, 260 (1995) ("Attorney General Francis Biddle requested that Congress repeal the entire *qui tam* provision. The House of Representatives followed his direction.").

37. 89 CONG. REC. 10,845 (1943); *see also* Fentin, *supra* note 36, at 260 ("The Senate, however, was reluctant to eliminate the provision altogether, citing fears of governmental delay and inadequate enforcement if the *qui tam* provision were totally repealed.").

38. *See* H. COMM. ON THE JUDICIARY, FALSE CLAIMS AMENDMENTS ACT OF 1992, H.R. REP. NO. 102-837, at 4 (1992) (discussing the 1943 amendment and noting two types of honest informer actions: "(1) suits by those who had independent information of fraud that the government also happened to possess; and (2) suits by those who had given the information to the government before they sued and then found themselves barred by having done so").

39. 89 CONG. REC. 7572 (1943).

40. *See* United States *ex rel.* LeBlanc v. Raytheon Co., 729 F. Supp. 170, 174 n.6 (D. Mass. 1990) ("That jurisdictional bar was included in the False Claims Act in 1943, in order to stem the tide of 'parasitical actions' in which relators would base their litigation on information already secured by the government in the regular course of law enforcement."); Tammy Hinshaw, *Construction and Application of "Public Disclosure" and "Original Source" Jurisdiction Bars Under 31 USCS § 3730(e)(4) (Civil Actions for False Claims)*, 117 A.L.R. FED. 263, 275 (1995) ("Congress . . . amended the *qui tam* provisions of the FCA to bar all *qui tam* actions based on information that the government already possessed."); Theis, *supra* note 21, at 227–29 (discussing congressional action prohibiting parasitic suits).

41. *See* 89 CONG. REC. 10,846 (1943) (statement of Rep. Walter) ("We feel that by enacting this compromise legislation . . . there will not be this ever-present invitation . . . for dishonest and unscrupulous [government] investigators to turn over information to their friends or co-conspirators for the purpose of bringing suit against our citizens on information that . . . comes to them in their official capacity as a representative of the United States."); Patrick W.

Courts interpreted the statute as prohibiting private *qui tam* suits when the government already possessed the information, regardless of the source.[42] Passage of these amendments caused a sharp decline in the use of the FCA's *qui tam* provision.[43]

A large federal budget deficit and continued illegal procurement of government funds led Congress to amend the FCA once again in 1986.[44] Congress rushed to action after receiving alarming media reports of contractor abuse and adopted amendments to strengthen the government's ability to prosecute civil fraud.[45] The most significant change concerned the understanding of the *qui tam* relator.[46] Congress promoted private enforcement of the FCA by authorizing any "person" standing to file a *qui tam* action with limited exceptions.[47] In the 1986 amendments, Congress removed the language from the 1943 amendments that precluded government employees from standing in court as relators.[48]

The 1986 amendments represented the last substantive modification to the FCA relating to the role of *qui tam* relators. Currently, under the FCA, a relator must provide a copy of the complaint, and all the information that forms the basis for the

Hanifin, Qui Tam *Suits by Federal Government Employees Based on Government Information*, 20 PUB. CONT. L.J. 556, 557 (1991) ("For many years the Act clearly barred federal government employees from bringing private action.").

42. *See* Theis, *supra* note 21, at 229–30 ("Although parasitic suits were successfully barred, so too were claims brought by parties who had provided the Government with information about a false claim but had not yet filed a suit.").

43. *See* Bales, *supra* note 31, at 389–90 ("[T]hese changes all but eliminated the use of the FCA *qui tam*."); Theis, *supra* note 21, at 229 ("After the 1943 amendments, the use of the *qui tam* provision as a weapon to combat fraud against the Government declined substantially.").

44. *See* S. COMM. ON THE JUDICIARY, FALSE CLAIMS ACT CORRECTION ACT OF 2008, S. REP. NO. 110-507, at 4 (2008); 131 CONG. REC. 17,818 (1985) (statement of Rep. Weiss); *see also* Gravitt v. Gen. Elec. Co., 680 F. Supp. 1162, 1164 (S.D. Ohio 1988), *appeal dismissed sub nom.* United States *ex rel.* Gravitt v. Gen. Elec. Co. 848 F.2d 190 (6th Cir. 1988), *cert. denied,* 488 U.S. 901 (1988).

45. *See* H. COMM. ON THE JUDICIARY, FALSE CLAIMS AMENDMENTS ACT OF 1986, H. REP. NO. 99-660, at 16 (1986); *see also* S. COMM. ON THE JUDICIARY, FALSE CLAIMS AMENDMENTS ACT OF 1986, S. REP. NO. 99-345, at 23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267.

46. Major David Wallace, *Government Employees as* Qui Tam *Relators*, 1996 ARMY LAW. 14, 16.

47. *Id*. at 18.

48. Miro Kovacevic, *The False Claims Act: Government Employees as* Qui Tam *Plaintiffs in the Tenth Circuit*, 80 DENV. U. L. REV. 625, 628 (2003).

action, to the DOJ.[49] The DOJ keeps the complaint under seal for the first sixty days after the relator files it.[50] During this time, the DOJ must investigate the case and determine whether the government should intervene.[51] If the government chooses to intervene, then it has the primary responsibility for prosecuting the case.[52] If the DOJ declines intervention, then the relator may proceed with the action independent of the government.[53]

Congress has substantively altered the role of *qui tam* relators under the FCA twice since enacted in 1863. Because the 1986 amendments to the FCA did not explicitly address whether federal employees have standing as relators, courts struggle when interpreting the legality of these types of cases.

B. FEDERAL CIRCUIT COURT DISAGREEMENT OVER GOVERNMENT EMPLOYEE RELATORS

The legality of government employee relators divides courts.[54] All courts conclude that Congress's 1986 amendments to the FCA did not explicitly exclude government employees from prosecuting *qui tam* actions.[55] Nonetheless, federal circuit courts differ as to whether the FCA permits government employees to bring *qui tam* suits based on information obtained in the course of their employment.[56]

On the one hand, some courts favor granting federal employees standing under the FCA.[57] For example, under the Eleventh Circuit's interpretation, the FCA allows government employees to bring *qui tam* actions, subject to the same

49. JAMES T. BLANCH ET AL., CITIZEN SUITS AND *QUI TAM* ACTIONS: PRIVATE ENFORCEMENT OF PUBLIC POLICY 60 (1996).

50. *Id.*

51. *Id.* ("The purpose of this sixty-day sealing requirement is to give DOJ an opportunity to review the complaint and accompanying information and to decide whether it wishes to intervene in the action."); *see also* Avco Corp. v. U.S. Dep't of Justice, 884 F.2d 621, 626 (D.C. Cir. 1989); United States *ex rel.* Kreindler & Kreindler v. United Techs., 777 F. Supp. 195, 198 (N.D.N.Y. 1991), *aff'd*, 985 F.2d 1148 (2d. Cir. 1993), *cert. denied*, 508 U.S. 973 (1993).

52. *See* 31 U.S.C. § 3730(b)(2) (2006); BLANCH, *supra* note 49, at 60.

53. *See* BLANCH, *supra* note 49, at 60.

54. *Id*.

55. *See id*. at 56.

56. *See* Hanifin, *supra* note 41, at 557.

57. *See* United States *ex rel.* Holmes v. Consumer Ins. Group, 318 F.3d 1199, 1215 (10th Cir. 2003) (en banc); United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1501 (11th Cir. 1991).

requirements as all other relators.[58] In *United States ex rel. Williams v. NEC Corp.*,[59] the Eleventh Circuit held that the plain language of the original source requirement,[60] which lists individuals who are prohibited from acting as *qui tam* relators, is exhaustive.[61] The court refused to give the statute a broader reading than necessitated by this plain language and, since government employees are not unambiguously excluded as relators in the original source requirement, the court held that they are entitled to standing under the Act.[62] The Sixth Circuit, Tenth Circuit, and many district courts also employ this reasoning.[63]

On the other hand, the First and Ninth Circuits have affirmed the dismissal of federal employee *qui tam* actions using a statutory interpretation analysis of the "original source" exclusion of the FCA.[64] The First Circuit, in *United States ex rel. LeBlanc v. Raytheon Co.*,[65] held that a government employee could not bring a *qui tam* action based upon information that he obtained in his government employment.[66] The court stated

58. *Holmes*, 318 F.3d at 1199.

59. 931 F.2d 1493.

60. The specific language of the FCA provides:

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

31 U.S.C. § 3730(e)(1) (2006) (emphasis added).

61. *Williams*, 931 F.2d at 1502–03.

62. *Id.* at 1449–1500.

63. The Sixth Circuit explained its holding in *United States ex rel. Burns v. A.D. Roe Co.*, 186 F.3d 717, 723–26 (6th Cir. 1999), and the Tenth Circuit agreed in *Holmes*, 318 F.3d at 1202–12, and in *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 570 (10th Cir. 1995). The Eastern District of Virginia came to the same conclusion in *Erikson ex rel. United States v. American Institute of Biological Sciences*, 716 F. Supp. 908, 918 (E.D. Va. 1989). The Middle District of Georgia agreed in *United States ex rel. McDowell v. McDonnel Douglas Corp.*, 755 F. Supp. 1038, 1040 (M.D. Ga. 1991), the Southern District of Florida in *United States v. CAC-Ramsay*, 744 F. Supp. 1158, 1160 (S.D. Fla. 1990), *aff'd,* 963 F.2d 384 (11th Cir. 1992), and the Eastern District of Pennsylvania in *United States ex rel. Givler v. Smith*, 760 F. Supp. 72, 74 (E.D. Pa. 1991).

64. *See* United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 72 F.3d 740, 743–44 (9th Cir. 1995); United States *ex rel.* LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990).

65. 913 F.2d at 17.

66. *Id.* at 18.

that any government employee responsible for exposing fraud as a condition of his job does not qualify as an "original source" under the FCA.[67] Specifically, the court found that government employees cannot overcome the independent knowledge bar of the FCA.[68] The court limited its holding, however, by stating that its decision did "not mean that there is no government employee who could qualify to bring a *qui tam* action."[69] Nevertheless, the court noted that it did not intend to "draft a litigation manual" explaining when government employees are allowed to bring these lawsuits.[70] The Ninth Circuit applies the same interpretation as the First Circuit.[71] Several district courts also have adopted the First and Ninth Circuits' approach to the issue.[72] The diverse interpretations of the legality of federal employee relators under the FCA have led to proposals by Congressmen to reassess whether to explicitly allow government employees to serve as *qui tam* relators.

C. CONGRESSIONAL ATTEMPTS TO RECTIFY THE GOVERNMENT EMPLOYEE RELATOR CONUNDRUM

Since 1986, Congress has dealt with the issue of whether to allow federal employees to serve as *qui tam* relators on several occasions. Though the goal in the 1986 amendments was to increase the number of *qui tam* lawsuits,[73] the congressional record is silent as to whether Congress even considered *qui tam*

67. *Id.* at 20.

68. *Id.* at 17.

69. *Id.* at 20.

70. *Id.*

71. *See* United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 72 F.3d 740, 740 (9th Cir. 1995).

72. These courts include the Western District of Washington in *United States ex rel. Tipton v. Niles Chemical Paint Co.*, No. C98-5177RJB, 1999 U.S. Dist. LEXIS 21604, at *12 (W.D. Wash. May 6, 1999); the Southern District of New York in *United States ex rel. Pentagen Technologies International Ltd. v. CACI International Inc.*, No. 96 Civ. 7827, 1997 WL 724553, at *1 (S.D.N.Y. Aug. 15, 1997); the Southern District of Texas in *United States ex rel. Wercinski v. IBM Corp.*, 982 F. Supp. 449, 456 (S.D. Tex. 1997); and the District of Columbia in *United States ex rel. Schwedt v. Planning Research Corp.*, 39 F. Supp. 2d 28, 34 (D.D.C. 1999), and *United States ex rel. Foust v. Blue Cross Blue Shield*, 26 F. Supp. 2d 60, 66 (D.D.C. 1998).

73. Marianne Lavelle & Fred Strasser, *OSHA Penalties Up, But Still Below Limits*, NAT'L L.J., Apr. 27, 1992, at 7 ("When Congress revised the False Claims Act in 1986, the goal was to give whistleblowers an incentive to expose fraud against the government . . . . Simple enough.").

actions brought by government employees.[74] Indeed, it appears that government employee *qui tam* actions were an unintended result of the 1986 amendments.[75] In 1990, the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee held the first oversight hearing on the 1986 amendments and called Senator Grassley—the lead sponsor of the 1986 amendments—as a witness to testify about whether Congress intended to allow government employee relators.[76] Senator Grassley testified that the courts should allow government employees to prosecute a *qui tam* action "as long as [the employee] can show that he first made a good faith effort within the proper channels [to internally report fraud]."[77] Although Congress did not introduce amendments to the FCA regarding relators in that session, the 1990 hearing demonstrates that Congress was aware of the issue of federal employee *qui tam* actions.[78]

In 1992, Senator Grassley and Representative Berman introduced bills that explicitly granted government employees standing to prosecute *qui tam* actions.[79] Under these bills, government employee relators would be required to make a written disclosure to their agency of all material evidence and information that relates to the violation of the FCA prior to filing a *qui tam* action.[80] If the Attorney General did not file a lawsuit within one year of that report, then the employee could file a *qui tam* action on his own.[81] Additionally, the bill would have placed a ten-percent cap on federal employees' *qui tam* recov-

74. *See False Claims Act Technical Amendments of 1992: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 102d Cong. 55 (1992) (statement of Rep. Berman, Member, H. Comm. on the Judiciary) ("[N]o thought was given to the question of government employees. I cannot say it was our intent to cover them or to exclude them, because we never thought about the question.").

75. Dan L. Hargrove, *Soldiers of* Qui Tam *Fortune: Do Military Service Members Have Standing to File* Qui Tam *Actions Under the False Claims Act?*, 34 PUB. CONT. L.J. 45, 64 (2004) ("Government employee *qui tam* actions appeared to be an unforeseen result of the 1986 Amendments.").

76. *False Claims Act Implementation: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary,* 101st Cong. 1 (1990).

77. *Id.* at 7.

78. Hargrove, *supra* note 75, at 66.

79. Lavelle & Strasser, *supra* note 73, at 7 (discussing the views of Rep. Berman).

80. H. COMM. ON THE JUDICIARY, FALSE CLAIMS AMENDMENTS ACT OF 1992, H.R. REP. NO. 102-837, at 2 (1992).

81. *Id.*

ery.[82] The House passed Representative Berman's bill and the Senate considered it, but ultimately the bill died in the Senate Committee on the Judiciary.[83]

In 2007, Senator Grassley proposed additional amendments to the FCA in a bill entitled the "False Claims Act Correction Act of 2007."[84] Significantly, the bill outlined the circumstances under which a government employee could serve as a relator in a *qui tam* lawsuit.[85] Section 3 of the bill authorized a government employee to file suit based on information learned during the course of the employee's duties unless: (1) the employee derived "all the necessary and specific material allegations" underlying the action "from an open and active fraud investigation," or (2) the employee failed to disclose "substantially all material evidence" in his possession to certain designated federal officials prior to filing the suit.[86] According to this bill, a government employee could bring a FCA *qui tam* action only if the Attorney General failed to bring a claim based on the disclosed information within twelve months.[87] Even though this bill passed out of the Senate Committee on the Judiciary, it never made it to a floor vote.[88]

Two years later, Senator Grassley reintroduced legislation to allow government employee relators called the "False Claims Act Clarification Act of 2009."[89] This bill has many notable differences from the 2007 version. First, it expands the definition of a federal government employee to include "immediate family member[s]."[90] Second, the bill increases the length of time that the government can move to dismiss the lawsuit from 60 to 120 days.[91] Third, it gives the attorney general eighteen rather than twelve months to initiate a *qui tam* action based on a re-

82. *Id.*

83. *See* Hargrove, *supra* note 75, at 67–68. Senator Grassley introduced S. 841, which was the companion version of Representative Berman's bill. *Id.* at 68 n.158. Although S. 841 was referred to committee and hearings were held, it was never voted out of committee. *Id.*

84. False Claims Act Correction Act of 2007, S. 2041, 110th Cong. § 2 (2007).

85. S. COMM. ON THE JUDICIARY, FALSE CLAIMS ACT CORRECTION ACT OF 2008, S. REP. NO. 110-507, at 12 (2008).

86. S. 2041 § 3.

87. *Id.*

88. *See* S. REP. NO. 110-507, at 13.

89. False Claims Act Clarification Act of 2009, S. 458, 111th Cong. § 1 (2009).

90. *Id.* § 3.

91. *Id.*

port by a government employee.[92] As of early 2010, this bill is currently pending in the Senate Committee on the Judiciary.[93]

Thus, the 1986 amendments increased opportunities for all relators to bring claims under the FCA. The sponsors of the amendments, however, did not specify whether government employees could file *qui tam* suits based on information obtained in the course of their employment. As such, federal courts divide on the issue of whether government employees have standing as relators in FCA *qui tam* cases. Congressmen have attempted to address the issue of federal employee relators by introducing amendments to the FCA, but Congress has not passed legislation relating to this predicament. Part II of this Note explains why Congress must take action to allow government employee *qui tam* relators.

II. FRAUD AND GOVERNMENT RELATORS

Contractors routinely perpetuate fraud against the U.S. government.[94] This fraud, coupled with a nearly unprecedented economic crisis, has contributed to public opinion of government competence sinking near an all time low.[95] This Part ar-

92. *Id.*

93. The Library of Congress, THOMAS, http://hdl.loc.gov/loc.uscongress/legislation.111s458 (reporting bill status as "referred to the Committee for Judiciary" on February 24, 2009) (last visited Mar. 14, 2010).

94. *See, e.g.*, Statement of Michael Thibault & Grant Green, Co-Chairs, Statement Before the Commission on Wartime Contracting in Iraq and Afghanistan, Lessons from the Inspectors General: Improving Wartime Contracting (Feb. 2, 2009), http://www.wartimecontracting.gov/images/download/documents/hearings/20090202/Joint_Statement_MichaelThibault_GrantGreen.pdf ("America's wars in Afghanistan and Iraq have . . . involved billions of dollars in waste, fraud, and abuse [by contractors].").

95. *See* Senator Jim Webb, Statement Before the Commission on Wartime Contracting in Iraq and Afghanistan, Lessons from the Inspectors General: Improving Wartime Contracting (Feb. 2, 2009), http://www.wartimecontracting.gov/images/download/documents/hearings/20090202/Statement_of_Senator_Jim_Webb.pdf [hereinafter Senator Webb's Statement] (noting that decreasing fraudulent conduct by government contractors is needed "to restore public trust in [the] process"); *see also* S. COMM. ON THE JUDICIARY, FALSE CLAIMS ACT CORRECTION ACT OF 2008, S. REP. NO. 110-507, at 8 (2008) ("[F]raud erodes public confidence in the Government's ability to efficiently and effectively manage its programs. . . . [The FCA] offers an opportunity for the Government to win back the hearts and minds of taxpayers who believe the Government does not care how taxpayer dollars are spent."); Jeffrey M. Jones, et al., *The Decade in Review: Four Key Trends*, GALLUP, Dec. 23, 2009, http://www.gallup.com/poll/124787/Decade-Review-Four-Key-Trends.aspx (discussing the public's perception of problems facing the United States and changes in the public's approval of Congress and the President).

gues that if Congress grants government employees standing as relators, the government will save money and the public's confidence in government will increase.[96]

A. ALLOWING GOVERNMENT EMPLOYEES TO FILE *QUI TAM* ACTIONS WILL RESULT IN THE PROSECUTION OF MORE FRAUD CASES AND SAVE THE GOVERNMENT MONEY

Congress should allow government employees to act as relators because the government lacks resources to properly combat fraud.[97] Currently, many fraud allegations remain unaddressed because the federal government faces budgetary constraints.[98] The DOJ has not dedicated enough lawyers and investigators to pursue fraud cases and has a backlog of more than one thousand FCA cases.[99] Assuming relators bring no new FCA cases to the DOJ, it would take over ten years to resolve the cases currently pending at the present pace of investigation and enforcement.[100] Allegations of fraud against the government that could possibly develop into significant FCA cases often remain unaddressed because the DOJ lacks staff to analyze which cases are the most efficient to pursue.[101] Moreover, the recent bailouts of the financial industry[102] and the gloomy economic forecast[103] mean that there will be less money for the government to give to attorneys, auditors, and investigators to address fraud against the government.[104]

96. Aaron R. Petty, *How* Qui Tam *Actions Could Fight Public Corruption*, 39 U. MICH. J.L. REFORM 851, 876 (2006) ("People will have more faith in a system that they feel they have more influence over, corrupt acts will be deterred as a result of the *qui tam* actions . . . .").

97. Joan R. Bullock, *The Pebble in the Shoe: Making the Case for the Government Employee*, 60 TENN. L. REV. 365, 386 (1993); *see also* sources cited *supra* note 5.

98. S. COMM. ON THE JUDICIARY, FALSE CLAIMS AMENDMENTS ACT OF 1986, S. REP. NO. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272; Bullock, *supra* note 97, at 386.

99. *See 2008 Senate Hearings*, *supra* note 6, at 2 (statement of Sen. Leahy, Chairman, S. Comm. on the Judiciary).

100. *Id.* ("Now, assuming no new cases were brought, at the current pace that would take 10 years to resolve. That is assuming no new cases.").

101. *See* S. REP. NO. 99-345, at 7 ("Allegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient.").

102. *See, e.g.*, Morgenson, *supra* note 24.

103. *See, e.g.*, Chen, *supra* note 24, at A17.

104. *See* 111 CONG. REC. S1682 (daily ed. Feb. 5, 2009) (statement of Sen. Leahy). Senator Leahy stated that "[t]he Federal Government has spent hun-

Additionally, there may be political motivations for why the DOJ has resisted pursuing FCA cases. Indeed, there is a discrepancy between the number of FCA settlements in the defense industry compared with those in other industries.[105] Over the past five years, the DOJ participated in more than six hundred false claims settlements nationwide and recovered more than $10 billion.[106] Since 2002, the government contracted for over $500 billion of goods and services to support the United States' conflicts in Iraq and Afghanistan.[107] News reports estimate that billions of taxpayer dollars have been lost to fraud, waste, and abuse in these conflicts.[108] During that time, however, the DOJ participated in only five settlements involving contracting fraud in Iraq and Afghanistan and has recovered only $16 million—an amount that is less than two tenths of one percent of the overall total of FCA recoveries.[109] Even more striking, the DOJ has only initiated a few cases involving fraud from defense contractors during engagement of the United States in Afghanistan and Iraq, and investigations into defense contracts worth billions remain pending.[110]

dreds of billions of dollars to stabilize our banking system, and . . . even more to restart our economic recovery. But to date, we have paid far too little attention to investigating and prosecuting the mortgage and corporate frauds that has [sic] so dramatically contributed to this economic collapse." *Id.* The Senator then urged "Congress [to] move quickly to pass this legislation so the American taxpayers can be confident that those who are criminally responsible for contributing to this economic disaster are caught and held fully accountable and to ensure that the money we are now spending to restore America is protected from fraud in the future." *Id.*

105. *See* S. COMM. ON THE JUDICIARY, FALSE CLAIMS ACT CORRECTION ACT OF 2008, S. REP. NO. 110-507, at 8 (2008) ("Of the over 5,800 *qui tam* FCA cases filed since 1986, more than half (roughly 3,117) have focused on fraud against Government health care programs. These cases have recovered over $9 billion of the $12.6 billion recovered through *qui tam* cases since 1986 (nearly 72 percent). Frauds against the Department of Defense ranked second with over $1.6 billion of *qui tam* recoveries (nearly 13 percent).").

106. *2008 Senate Hearings*, *supra* note 6, at 2 (statement of Sen. Leahy, Chairman, S. Comm. on the Judiciary).

107. *See id.*

108. *See id.* at 2–3; *see also* Senator Collins's Statement, *supra* note 4 (describing instances of contractor misuse and abuse of funds).

109. *2008 Senate Hearings*, *supra* note 6, at 2 (statement of Sen. Leahy, Chairman, S. Comm. on the Judiciary) ("[T]he Justice Department participated in only five settlements involving contracting fraud in Iraq and Afghanistan, recovered a mere $16 million—less than two tenths of 1 percent of the overall total.").

110. *See* S. COMM. ON THE JUDICIARY, WARTIME ENFORCEMENT OF FRAUD ACT OF 2008, S. REP. NO. 110-431, at 2 (2008) ("The Department of Justice . . . has only initiated a few cases involving less than $30 million lost to

Many legislators argue that this small recovery is due to the politicalization of the DOJ in recent years.[111] These legislators are concerned that the DOJ has maintained an unspoken policy that pursuing unscrupulous defense contractors would be a distraction from its goals in Iraq and Afghanistan.[112] Currently, there are over 230 FCA cases involving defense contractor fraud under seal at the DOJ.[113] Politicians worry that the DOJ has been protecting these defense contractors—who are often politically well-connected and represented by lobbyists—and bilking the taxpayers as a result.[114] Usually, government employees are the first individuals to learn of fraud and waste by defense contractors, but have limited avenues to encourage the DOJ to prosecute these cases.[115] As such, Congress should recognize that allowing government employees to bring *qui tam* actions would help decrease the risk of politics meddling in the prosecution of fraudulent contractors.

Congress should also recognize that allowing government employees to serve as relators may save the government money and hold contractors accountable. In enacting the FCA, Congress recognized that "assistance from the private citizenry can

fraud, while hundreds of investigations into contracts worth billions remain pending . . . .").

111. *See, e.g.*, *2008 Senate Hearings*, *supra* note 6, at 2 (statement of Sen. Leahy, Chairman, S. Comm. on the Judiciary) ("In light of the politicalization of the Justice Department, many wonder whether it has resisted pursuing certain false claims cases for political reasons—most notably those involving contracting fraud related to the war in Iraq and Afghanistan."); *see also* Jay Bookman, *Gonzales' Lies Give Justice a Dirty Name*, ATLANTA J.-CONST., Mar. 19, 2007, at A11 (describing the firing of U.S. attorneys for political reasons).

112. *See, e.g.*, *2008 Senate Hearings*, *supra* note 6, at 3 (statement of Sen. Leahy, Chairman, S. Comm. on the Judiciary) ("The administration has apparently decided that pursuing unscrupulous defense contractors would be embarrassing, and aggressively pursuing these frauds is not their priority."); Hargrove, *supra* note 75, at 88 ("There is also a concern that the Defense department has some incentive to shield its contractors from reports of fraud . . . .").

113. *2008 Senate Hearings*, *supra* note 6, at 8–9 (statement of Sen. Leahy, Chairman, S. Comm. on the Judiciary) ("The AG says there are 230 false claim cases involving defense procurement fraud under seal at the Justice Department.").

114. *See, e.g.*, *id.* at 3 (noting that the DOJ ought to be recovering money from fraudulent contractors, rather than protecting the "politically connected people who are bilking the taxpayers").

115. *See id.* at 9 ("[A] Government employee [is] . . . usually, the first one who can see fraud and waste, you know, the trucks get a flat tire, and they just leave the trucks behind, the huge amounts of money that Halliburton was spending on hotels and things like this. They are the ones who are going to see it.").

make a significant impact on bolstering the Government's fraud enforcement effort."[116] In fact, this was a major reason why Congress amended the FCA's *qui tam* provision in 1986.[117] Though personal financial gain may be the motivating factor for a government employee to bring a *qui tam* action, the government stands to recover at least seventy percent—if not one-hundred percent of the recovery.[118] As one Senator recently noted, for every single dollar spent enforcing the law in FCA health care cases, the government recovers fifteen.[119] Further, allowing government employees to bring FCA claims will likely deter unscrupulous contractors attempting to defraud the government because they can no longer rely on the ineffectiveness of government employees tasked with searching for illegal activity.[120] Accordingly, there is a strong policy justification for allowing government employees to vigorously pursue these cases.

B. ALLOWING GOVERNMENT EMPLOYEES TO FILE *QUI TAM* ACTIONS WILL RESTORE THE PUBLIC'S FAITH IN GOVERNMENT

Allowing government employees to serve as *qui tam* relators will save the government money, which will restore the public's faith in government. Recent cases involving FCA fraud include hospitals overstating Medicare reimbursements,[121] people submitting false proof of loss claims to the Federal Emergency Management Agency (FEMA),[122] defense contrac-

116. S. COMM. ON THE JUDICIARY, FALSE CLAIMS AMENDMENTS ACT OF 1986, S. REP. NO. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273.

117. Bullock, *supra* note 97, at 386–87.

118. 31 U.S.C. § 3730 (2006); Bullock, *supra* note 97, at 386–87.

119. *2008 Senate Hearings*, *supra* note 6, at 2 (statement of Sen. Leahy, Chairman, S. Comm. on the Judiciary).

120. Bullock, *supra* note 97, at 387.

121. *See, e.g.*, United States v. Rogan, No. 02 C 3310, 2005 WL 2861033, at *1 (N.D. Ill. Oct. 27, 2005) (involving Defendant's alleged falsification of annual reports to Medicare). Additionally, American International Group's (AIG) use of government funds to provide bonuses to its employees has left many people believing that the federal government does not know how to manage their taxpayer dollars. *See* Carla Marinucci, *Obama Outraged at AIG: President Tells Californians He'll Take Responsibility for Bailout-Bonus Scandal*, S.F. CHRON., Mar. 19, 2009, at A1.

122. Mary Vallis, *Katrina Spirit Drowns in Fraud: False Claims, Bribery: Charges Add to Frustration of U.S. Charities*, NAT'L POST, Dec. 4, 2006, at A3.

tors inflating the cost of their goods and services,[123] and construction contractors overcharging the government in their contracts.[124] A particularly relevant example of such fraud is *United States ex rel. DRC, Inc. v. Custer Battles, L.L.C.*,[125] a case that involved a *qui tam* action under the FCA against a company accused of defrauding the American government during the Iraq War by providing false invoices and failing to perform contracts.[126] Cases such as *Custer Battles* have garnered front-page news coverage across the country,[127] which has angered taxpayers and decreased their trust in government programs.[128] Allowing government employees to become relators is a meaningful solution to the wide-scale distrust in government.

1. Government Employees Are in a Unique Position to Expose Fraud

The government clearly lacks the resources to root out fraud. Paying for two wars, a stimulus bill,[129] and possibly a healthcare reform bill[130] means that the government is a bit

123. *See* Senator Webb's Statement, *supra* note 95 (noting the importance of decreasing fraudulent conduct by defense contractors in order "to restore public trust" in war support contracting).

124. *See, e.g.*, United States v. Ehrlich, 643 F.2d 634 (9th Cir. 1981) (involving intentional overstatement of construction costs by the builder of a federally subsidized housing project).

125. 376 F. Supp. 2d 617 (E.D. Va. 2005), *aff'd in part*, *rev'd in part*, 562 F.3d 295 (4th Cir. 2009).

126. *Id.* at 619. For example, Custer Battles used shell companies to falsely charge for costs never incurred. Custer Battles was also accused of fraudulently receiving payment for "services and facilities . . . [that were] never provided." *Id.*

127. *See, e.g.*, James Glanz, *Contractor Must Pay in Iraq Fraud, Court Rules*, N.Y. TIMES, Apr. 11, 2009, at A6.

128. *See* S. COMM. ON THE JUDICIARY, FALSE CLAIMS ACT CORRECTION ACT OF 2008, S. REP. NO. 110-507, at 8 (2008) ("As the GAO pointed out, fraud erodes public confidence in the Government's ability to efficiently and effectively manage its programs." (footnote omitted)).

129. *See* Edmund L. Andrews, *Economists See a Limited Boost from Stimulus*, N.Y. TIMES, Aug. 7, 2009, at A1. ("[S]timulus program was only one component of a broader effort to combat the financial crisis. . . . The Federal Reserve printed vast amounts of additional money . . . . It is in the process of buying up $1.25 trillion worth of mortgage-backed securities . . . ."). Moreover, the economic stimulus plan doles out a lot of money "over a short period of time" which is associated with people trying "to exploit the system and criminally profit." *See Proposals to Fight Fraud*, *supra* note 5, at 7 (statement of Rita Galvin, Acting Assistant Att'y Gen., Criminal Division, U.S. Department of Justice).

130. *See* David M. Herszenhorn & Robert Pear, *While Confident Health Care Will Pass This Year, Democrats Still Search for a Plan*, N.Y. TIMES, Jan.

strapped for cash. Therefore, it is even more reliant on the cooperation of those who are close observers of the fraudulent activity to successfully uncover fraud.[131] In this respect, government employees are in a unique position to ascertain and expose fraud given their proximity and access to government contractors.

For example, in *United States ex rel. Williams v. NEC Corp.*,[132] Arthur Williams, a government employee for the Air Force, detected that Japanese contractors were overcharging for their services and reported the fraud to his superiors.[133] His supervisors, instead of investigating the alleged fraud, started an investigation into Mr. Williams.[134] As a result, Mr. Williams filed a complaint under the *qui tam* provision of the FCA,[135] resulting in the United States winning a $34 million settlement against the Japanese company.[136] As this case demonstrates, government employees have access to information relating to fraudulent conduct by contractors and thus have a unique opportunity to stop it.

2. Government Employees Currently Fear Retribution and Lack Avenues to Report Fraud

Government employees currently lack appropriate avenues to report fraud.[137] The U.S. Merit Systems Protection Board

29, 2010, at A11 ("Democratic leaders in Congress voiced resolute optimism . . . that they would adopt major health care legislation this year . . . .").

131. *See* S. COMM. ON THE JUDICIARY, FALSE CLAIMS AMENDMENTS ACT OF 1986, S. REP. NO. 99-345, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269 ("Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity.").

132. 931 F.2d 1493 (11th Cir. 1991).

133. *Id.* at 1495.

134. Herbert Hafif & Phillip E. Benson, *'Qui Tam': No Scam*, WASH. POST, Jan. 28, 1992, at A21.

135. *Williams*, 931 F.2d at 1495–96.

136. Louis Freedberg, *Payoffs Challenged: Blowing a Whistle on Whistle-Blowers*, S.F. CHRON., Feb. 1, 1992, at A1. This case is not the only example. In another case, Leon Weinstein, a Miami investigator in the Inspector General's office of the U.S. Department of Health and Human Services, initiated a *qui tam* action against heath care providers alleging that they overcharged the government for their services. United States v. CAC-Ramsay, Inc., 744 F. Supp. 1158, 1159 (S.D. Fla. 1990). Because of the inaction of the Inspector General, Weinstein retired and brought a case under the FCA. *Id.* at 1160. The DOJ challenged Weinstein's right to sue as a former government employee relator, but nonetheless joined in the action and recovered $160,000 in a settlement. *Id.* at 1159.

137. *See* Bullock, *supra* note 97, at 386–87 (noting that despite the exis-

(MSPB), an independent agency in the executive branch,[138] conducted a survey of government employees in 2000 to discover the way federal employees respond to suspicions of fraud.[139] The MSPB found that only seven percent of government employees made formal disclosures of unlawful behavior, fraud, waste, or abuse in the previous two years.[140] Of the seven percent of federal employees who reported fraud, waste, or abuse, however, forty-four percent reported experiencing retaliation.[141] According to the study, government employees often fail to report information of fraud, waste, or abuse because they fear retaliation from their superiors and sense that they will have limited protection after they file a report.[142]

The MSPB survey results show that when government employees know of fraud they often are unable to report it because they fear retribution.[143] Indeed, "[w]histleblowers frequently risk everything when bringing false claim cases."[144] Although the FCA protects *qui tam* relators from adverse employment actions,[145] there are significant risks facing a government em-

tence of pervasive fraud against the government, employees are unwilling or unable to report it).

138. The MSPB is an independent, quasijudicial agency in the executive branch that serves as the guardian of federal merit systems. About MSPB, http://www.mspb.gov/sites/mspb/pages/About%20MSPB.aspx (last visited Mar. 14, 2010). MSPB is responsible for studying the efficiency and effectiveness of federal merit systems and ensuring they are free of prohibited personnel practices. U.S. Merit Systems Protection Board, http://www.mspb.gov/ (last visited Mar. 14, 2010).

139. U.S. MERIT SYS. PROT. BD., THE FEDERAL WORKFORCE FOR THE 21ST CENTURY: RESULTS OF THE MERIT PRINCIPLES SURVEY 2000, at x, 33–35, 34 tbl.6 (2003), http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253631&version=253918&application=ACROBAT.

140. *Id*. at x.

141. *Id.* at x, 35. Notably, the percentage of federal employees who say they have experienced reprisal for reporting fraud, waste, or abuse remained at nearly the same levels for a decade. *Id.* at 34 & tbl.6.

142. *Id.* at 35.

143. *Id.* at 33–35; *see 2008 Senate Hearings, supra* note 6, at 8 (statement of Sen. Leahy, Chairman, S. Comm. on the Judiciary) (stating that many times when government employees report fraud "it is reported to the detriment of the career of the person doing the reporting"); Elletta Sangrey Callahan, *Double Dippers or Bureaucracy Busters? False Claims Act Suits by Government Employees*, 49 WASH. U. J. URB. & CONTEMP. L. 97, 117–19 (1996) (discussing various MSPB studies of government employees' reluctance to report corruption for fear of retaliation).

144. *Medicaid Waste, Fraud, and Abuse: Threatening the Health Care Safety Net: Hearing Before the S. Comm. on Finance*, 109th Cong. 44 (2005) (opening statement of Sen. Charles Grassley, Chairman, S. Comm. on Finance).

145. The FCA prohibits discharge, demotion, suspension, and harassment

ployee who becomes a *qui tam* relator.[146] Filing an FCA lawsuit may hurt the employee's chances of getting a promotion, or alternatively, if the complaint results in suspension of a government contract, the relator may have difficulty gaining work elsewhere in the same industry.[147] Therefore, a potential relator will likely only initiate a *qui tam* action if the expected gains from the lawsuit outweigh the expected gain from a continued government career.[148]

Many commentators disagree with allowing government employees to serve as *qui tam* relators and argue that permitting federal government employees to bring *qui tam* suits conflicts with their official duties.[149] If government employees can bring *qui tam* actions, opponents argue, they may spend all their time examining government contracts that are likely the most lucrative target of *qui tam* actions, while ignoring other official duties.[150] Government investigators may have an incentive to conceal or minimize information about fraud so that they can capitalize on it for personal gain.[151] Further, commentators worry that granting government employees the right to sue under the FCA could create mistrust among government

resulting from an employee's status as a relator. *See* 31 U.S.C. § 3730(h) (2006).

146. Petty, *supra* note 96, at 873.

147. *Id.*; *see, e.g.*, United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1099 (C.D. Cal. 1989) ("[T]he disclosure of the discovery of the alleged fraud to the superior or the government may create difficulty in finding future employment in the same industry."); *see also False Claims Act Technical Amendments of 1992: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 102d Cong. 94 (1992) (testimony of James M. Hagood) ("It was obvious to me while I was a federal employee that one did not enhance his federal career by reporting fraud or getting involved in actions to rectify civil fraud against the United States . . . .").

148. *See* Edward T. Ackerman, Note, *A Partnership with the Government?: How the Inclusion of Attorney Contingency Fees in a Plaintiff's Gross Income Negatively Impacts* Qui Tam *Litigation*, 70 BROOK. L. REV. 213, 230–31 (2004).

149. *See, e.g.*, John T. Boese & Shannon L. Haralson, *Courts Must Bar* Qui Tam *Suits by Government Employees*, 11 LEGAL BACKGROUNDER 1, 4 (1996); Hanifin, *supra* note 41, at 611; Wallace, *supra* note 46, at 14; Johnston, *supra* note 1, at 635–38; Kovacevic, *supra* note 48, at 638 (discussing concern about federal employee conflicts of interest in *qui tam* suits); Theis, *supra* note 21, at 226.

150. *See, e.g.*, Rothschild & Kim, *supra* note 26, at 505–06 (discussing financial incentives).

151. Investigators may make minimal disclosures to the inspector general, attorney general, or supervisors, in hopes that the DOJ does not file any action. *See id.* at 514.

employees who see their peers as overzealous in their efforts to become *qui tam* relators.[152]

These commentators' arguments are unpersuasive. Since the 1986 amendments to the FCA, not a single government employee discovered fraud in the course his employment and used that information to file a *qui tam* suit without first reporting that information to his supervisors.[153] Additionally, Congress has previously designed programs that give federal employees money for reporting fraud.[154] For instance, 5 U.S.C. § 4512 grants an inspector general the authority to give employees whose "disclosure of fraud . . . has resulted in cost savings" an award of one percent of the cost savings to the government or $10,000, whichever is less.[155] Further, 5 U.S.C. § 4513 allows the President to pay up to $20,000 to any employee whose "disclosure of fraud" has resulted in "substantial cost savings" to the government.[156] These programs do not exclude federal employees, such as investigators, who have a special duty to detect fraud.[157] Indeed, Congress recognized that such rewards are necessary to encourage government employees to come forward to report fraud.[158]

3. Now Is the Moment to Curb Fraud and Regain the Trust of American People by Allowing Government Employees to Serve as *Qui Tam* Relators

The United States is currently in the middle of an economic crisis and the government's budget deficits are at the highest

152. *See* Bullock, *supra* note 97, at 384–85.

153. Brief of Appellant at 31, United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 72 F.3d 740 (9th Cir. 1995) (No. 93-15728), 1993 WL 13103212 ("[Between 1986 and 1993] there is not one reported instance of a government employee's discovering fraud in the course and scope of his employment and using that information to file suit without first reporting the fraud and diligently attempting to have his or her superiors pursue the fraud according to regulations."); *see also* United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1495–96 (11th Cir. 1991) (Air Force attorney first reported fraud to superiors); United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1417–18 (9th Cir. 1991) (Army Corps of Engineers attorney first reported fraud to supervisors).

154. *See* Hanifin, *supra* note 41, at 604–05.

155. 5 U.S.C. § 4512 (2006).

156. *Id.* § 4513.

157. *See* Hanifin, *supra* note 41, at 604–05.

158. *See* S. COMM. ON THE JUDICIARY, FALSE CLAIMS AMENDMENTS ACT OF 1986, S. REP. NO. 99-345, at 4–5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269–70 (discussing the MSPB survey of federal employees demonstrating that many were afraid to report fraud).

level ever.[159] To stimulate the economy, Congress and the Obama Administration passed the American Recovery and Reinvestment Act, "which provides $787 billion in tax cuts and federal spending to preserve and create jobs, assist those most harmed by the recession, and reinvest in [the] . . . country."[160] As a consequence of this legislation, the government is spending an exorbitant amount of money on contractors over a short period of time.[161] Unscrupulous government contractors will use this opportunity to "exploit the system and criminally profit."[162] Fraud experts estimate the United States government loses seven percent of revenues to waste or fraud, which is approximately $55 billion when applied to the $787 billion stimulus package.[163] This Congress and the Obama Administration have a unique opportunity to hold contractors accountable for fraud perpetrated against the United States.

An effective way to accomplish this goal is to allow government employees to bring *qui tam* lawsuits. By granting standing to government employees, the number of frauds against the government will likely decrease and, with time, public trust in government will strengthen.[164] Opponents may criticize this argument because it fails to appreciate how many *qui tam* actions will be brought by government relators and

159. *See generally* Carl Hulse, *Senate Passes Spending Bill Amid Debate on Raising Debt Limit*, N.Y. TIMES, Dec. 14, 2009, at A22 (discussing the deficit and stimulus bill); David E. Sanger, *A Red-Ink Decade*, N.Y. TIMES, Feb. 2, 2010, at A1 ("[T]he projected deficit in the coming year [is] nearly 11 percent of the country's entire economic output. . . . American deficits will not return to what are widely considered sustainable levels over the next 10 years.").

160. *Preventing Stimulus Waste and Fraud: Who Are the Watchdogs?: Hearing Before the H. Comm. on Oversight and Government Reform*, 111th Cong. 4 (2009) [hereinafter *Preventing Stimulus Waste and Fraud*] (statement of Rep. Towns, Chairman, H. Comm. on Oversight and Government Reform).

161. *See id.*

162. *See Proposals to Fight Fraud*, *supra* note 5, at 7 (statement of Rita Galvin, Acting Assistant Att'y Gen., Criminal Division, U.S. Department of Justice).

163. *See Preventing Stimulus Waste and Fraud*, *supra* note 160, at 4 (statement of Rep. Towns, Chairman, H. Comm. on Oversight and Government Reform) ("Fraud experts estimate that U.S. organizations lose 7% of revenues to fraud and waste. When applied to the stimulus package, that amounts to a whopping $55 billion in American tax dollars potentially wasted."). This is consistent with DOJ estimate that fraud drains one to ten percent of the entire federal budget. S. REP. NO. 99-345, at 3.

164. *See* Petty, *supra* note 96, at 876 ("On the whole, state and local governments will be more cleanly run, and individuals will have more faith in democracy because everyone is empowered and nearly everyone would be willing to bring a *qui tam* action if they encountered public corruption.").

whether those actions will be publicized.[165] Although these critiques may have some merit, the current economic situation undermines their importance.[166] Government employees have information that could help the government recover billions of dollars.[167] In the current environment, allowing federal employees to initiate *qui tam* actions is a necessity.

At a recent hearing held by the Commission on Wartime Contracting in Iraq and Afghanistan, a bipartisan commission created to study defense contractor fraud, Senator Jim Webb stated that there is an "urgent need right now" to try to combat contractor fraud.[168] He argued that rampant fraud by contractors negatively affects public trust in government and public perception of Congress.[169] Amending the FCA "offers an opportunity for the Government to win back the hearts and minds of taxpayers who believe the Government does not care how taxpayer dollars are spent."[170] Allowing *qui tam* actions by public employees will increase public trust in government and save the government money.[171]

165. *Cf.* Rothschild & Kim, *supra* note 26, at 505 ("Multi-million dollar recoveries against big name corporate defendants are always headline grabbers.").

166. *See* Chris Isidore, *It's Official: Recession Since Dec. '07*, CNNMONEY.COM, Dec. 1, 2008, http://money.cnn.com/2008/12/01/news/economy/recession/?postversion=2008120115; *see also* News Release, Bureau of Labor Statistics, The Employment Situation—2009 (Jan. 8, 2010), at 7 tbl.C, *available at* http://www.bls.gov/news.release/pdf/empsit.pdf. Forty eight states face budget deficits in fiscal year 2010. ELIZABETH MCNICHOL & NICHOLAS JOHNSON, RECESSION CONTINUES TO BATTER STATE BUDGETS; STATE RESPONSES COULD SLOW RECOVERY 3–4, 5 tbl.2 (2010), http://www.cbpp.org/files/9-8-08sfp.pdf. The largest deficit belongs to California, which projects a $52 billion gap for the 2010 fiscal year. *Id.* at 5 tbl.2.

167. *Cf.* Rothschild & Kim, *supra* note 26, at 507 (suggesting that increased awareness of the potential reward of *qui tam* actions will encourage such lawsuits).

168. Senator Webb's Statement, *supra* note 95.

169. *See id.* ("Without it, without that kind of [public] trust, it impacts every other thing we're trying to do and every piece of legislation that we vote on.").

170. S. COMM. ON THE JUDICIARY, THE FALSE CLAIMS ACT CORRECTION ACT OF 2008, S. REP. NO. 110-507, at 8 (2008).

171. *See 2008 Senate Hearings*, *supra* note 6, at 12 (statement of Sen. Richard Durbin, Member, S. Comm. on the Judiciary) ("[T]he American public would be less scandalized by the notion that a Federal employee might end up with 10 percent or 20 percent of the outcome and find millions, if not billions of dollars being saved from being defrauded."); Petty, *supra* note 96, at 876 ("People will have more faith in a system that they feel they have more influence over, corrupt acts will be deterred as a result of the *qui tam* actions . . . .").

This historic moment, combined with employees who are in a distinctive position to ascertain the existence of fraudulent contracts, provides strong arguments that government employees should be able to bring *qui tam* actions. If the government holds contractors accountable, public confidence in the government will increase.[172] Additionally, taxpayers will feel secure knowing that if a corporation is defrauding the government, the government is more likely to prosecute it for substantial money damages. If Congress grants government employees standing as relators, then contractors will be less likely to attempt to defraud the government because they will know that government employees would have a personal interest in discovering their fraudulent acts.[173] Overall, allowing government employees to serve as *qui tam* relators will save the government money and enhance the public's perception of the government. As such, it is imperative that Congress gives government employees this much-needed power.

III. CONGRESS SHOULD IMMEDIATELY PASS LEGISLATION GRANTING GOVERNMENT EMPLOYEES STANDING AS *QUI TAM* RELATORS

Even though the 1986 FCA amendments are ambiguous on the issue of government employee relators,[174] the current circuit split and Congressional bills on the subject raise its prominence in the national discourse.[175] By explicitly removing any jurisdictional bar against government employees' ability to sue under the FCA, the government will recoup money otherwise unobtainable and deter contractors from overcharging the government for its services.[176] Accordingly, Congress should enact

172. *See* S. REP. NO. 110-507, at 8 ("[F]raud erodes public confidence in the Government's ability to efficiently and effectively manage its programs. . . . [The FCA] offers an opportunity for the Government to win back the hearts and minds of taxpayers who believe the Government does not care how taxpayer dollars are spent.").

173. *See* Rothschild & Kim, *supra* note 26, at 507 ("*Qui tam* awards are their own best advertisement. As more people become aware of the law, more lawsuits follow.").

174. *See* Hargrove, *supra* note 75, at 65 (quoting Rep. Howard Berman).

175. *See id.* at 68–69 (describing different approaches to determining whether federal employees can be *qui tam* relators).

176. *See generally* 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, 669–72 (1986) (discussing private enforcement of law).

a federal statute allowing all public employees to bring *qui tam* actions under the FCA.

A. CONGRESS SHOULD AMEND THE FALSE CLAIMS ACT TO ALLOW GOVERNMENT EMPLOYEE *QUI TAM* ACTIONS, NOT THE COURTS

Though the Supreme Court could explore the issue by hearing a case involving a government employee relator, the best route to solve this problem is through Congress. Instead of the courts trying to interpret the ambiguous language in the federal FCA, Congress, through legislative action, can provide specific language addressing when government employees will qualify as relators. Courts could then consistently implement Congress's vision for government employees. Such legislation would harmonize the conflicting reasoning among the circuits on this significant issue.

B. CONGRESS SHOULD USE THE FALSE CLAIMS ACT CLARIFICATION ACT OF 2009 AS A BLUEPRINT TO ADDRESS THE ISSUE OF GOVERNMENT EMPLOYEE RELATORS

On February 24, 2009, Senator Grassley introduced the False Claims Act Clarification Act of 2009.[177] Under Grassley's proposed Act, government employees may bring a *qui tam* action based upon information learned in the course of their employment if (1) the employee first discloses the fraud to a supervisor, an inspector general of the agency, or the Attorney General, and (2) the employee waits eighteen months without government action prior to bringing his lawsuit as a relator.[178] The Act also restricts a government employee from bringing a FCA claim if the employee derived information for his case in a criminal indictment or any ongoing criminal, civil, or administrative investigation.[179] Further, the bill restricts government employees, such as government auditors, investigators, or attorneys, from filing a *qui tam* action since these employees have a duty to investigate fraud as part of their jobs.[180]

Senator Grassley's bill provides key language that should be included in any congressional amendment to the FCA. In-

177. *See* False Claims Act Clarification Act of 2009, S. 458, 111th Cong. (2009). Senator Grassley was also a sponsor of the 1986 FCA amendments. *See* Charles E. Grassley & Howard Berman, Letter to the Editor, *Finding a Middle Ground in* Qui Tam *Suits*, WASH. POST, Feb. 2, 1992, at C6.

178. S. 458 § 3.

179. *Id.*

180. *Id.*

deed, the proposal does not grant standing to federal employee auditors, investigators, and attorneys, whose employment specifically includes a duty to report fraud.[181] These employees have the most significant risk of a conflict of interest and, as such, they should not be able to commingle their employment responsibilities with the potential of private damage recovery.[182] Therefore, Grassley's Act effectively addresses the concern that allowing government employees to serve as *qui tam* relators will result in conflicts of interest.

Grassley's bill, however, should clarify some matters. First, Congress should give government employees who do not have fraud reporting responsibilities more immediate access to the FCA's financial incentives to bring *qui tam* lawsuits. With these employees, conflict of interest considerations are not as significant.[183] Allowing these employees to serve as *qui tam* relators will motivate public employees to detect instances of overcharging by contractors.[184] By allowing employees with no fraud reporting responsibilities to file *qui tam* actions, Congress will deter companies from attempting to defraud the government because they will fear repercussions.[185] Senator Grassley's Act, which provides a blanket proscription of procedural safeguards for all government employees, is not strong enough. Rather, the amendment to the FCA should explicitly allow government employees without investigative duties to serve as *qui tam* relators immediately.

Second, Congress should enumerate strict procedures for *former* government auditors, investigators, and attorneys whose job description specifically included investigating

181. *Id.*

182. *See* Bullock, *supra* note 97, at 387–89 ("[I]t is important to establish procedural safeguards to assure that the potentially conflicting interests of the government and the government employee are both heard."); Grassley & Berman, *supra* note 177.

183. *See* Grassley & Berman, *supra* note 177. ("[T]he government and taxpayers can only benefit from the filing of a False Claims action [by a government employee] that exposes fraud that would otherwise have gone undiscovered or unprosecuted."); *see also* Callahan, *supra* note 143, at 129 ("Government employees who do not have specific anti-fraud responsibilities . . . should be given more immediate access to the FCA's financial incentives for providing information.").

184. *See* Bullock, *supra* note 97, at 387 (noting that government employee relators may deter fraudulent conduct by contractors because they could no longer rely on the "ineptitude or malaise of government employees in ferreting out illegal activity"). *See generally* Grassley & Berman, *supra* note 177 (discussing interests of taxpayers).

185. *See generally* Grassley & Berman, *supra* note 177.

fraud.[186] Any amendment to the FCA should not encourage federal employees to quit so that they may immediately bring a *qui tam* suit based on the information obtained in their government job.[187] To ensure that government auditors, investigators, and attorneys cannot retire as a means to bypass any restrictions on their ability to serve as *qui tam* relators, the amendment to the FCA must specifically prohibit government auditors, investigators, and attorneys from serving as *qui tam* relators for at least five years after they retire.[188] This type of prohibition will alleviate conflict of interest concerns[189] without undercutting the ability of other government employees to prosecute fraud.

Finally, the amendment should allow the DOJ to challenge a government employee's right to sue if a compelling government interest is at risk because of the *qui tam* action.[190] For example, if the information obtained by the government employee would have a significant impact on national security, then Congress should prohibit the employee from proceeding with the lawsuit.[191] Because this section of the bill would likely be subject to controversy, Congress should hold congressional hearings to debate this provision. By debating this issue, Congress can determine what circumstances justify the DOJ to challenge a government employee's right to sue under the FCA when there is a compelling government interest at stake.[192]

186. *See* Callahan, *supra* note 143, at 130 (arguing that Congress should limit the ability of former government employees to file *qui tam* actions based on information gained during their tenure with the federal government).

187. *See* Petty, *supra* note 96, at 870–71 (arguing that private citizens should be allowed to bring *qui tam* actions against public officials for violations of criminal statutes).

188. *See id.* at 887–88 (suggesting that the pool of potential relators should have appropriate limits). The False Claims Act Clarification Act of 2009 establishes a ten-year limitation period for bringing a civil action under the False Claims Act. *See* False Claims Act Clarification Act of 2009, S. 458, 111th Cong. § 6 (2009).

189. *See* Bullock, *supra* note 97, at 387–89 ("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.").

190. *See id.* (suggesting a standard for assessing government employee *qui tam* causes of action).

191. *See id.*

192. *See* George E. Connor & Bruce I. Oppenheimer, *Deliberation: An Untimed Value in a Timed Game*, *in* CONGRESS RECONSIDERED 315, 317–18 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 5th ed. 1993).

Amending Grassley's bill in accordance with these suggestions will serve as a key tool in saving the government money and transforming public opinion of the U.S. government. Passing a bill with the proposed suggestions confronts public policy concerns because it requires government employees to first report any suspected abuse to their superiors and does not allow government employees whose jobs require them to investigate fraud to file *qui tam* actions. At the same time, this bill gives federal employees with no antifraud responsibilities access to *qui tam* awards, allowing them to serve as a useful check on contractors attempting to defraud the government. Accordingly, passing Senator Grassley's bill with the suggestions proposed above will deter contractors from defrauding the government and increase public confidence in government.

CONCLUSION

Government employees should have standing to bring *qui tam* actions as relators against contractors who commit fraud against the government. Currently, the government does not have enough resources to stop all fraud committed against it. The FCA is a tool to help the government in this fight. Government employees are in a unique position to detect and expose fraud committed by government contractors and Congress should explicitly grant government employees this ability. Indeed, such actions serve the ultimate purpose of the FCA, which is to combat fraud against the government.

The government should motivate these individuals to detect fraud when it occurs and to stop it before it starts. Currently, public confidence in government projects is at an all time low and headlines continue to flash across the nation's newspapers exposing instances of government contractors defrauding the government by overcharging for services. To provide another level of deterrence and gain more funds for the current budget deficits, Congress should enact a statute that explicitly grants public employees standing in court to act as relators. Allowing government employees the right to bring *qui tam* actions will motivate these individuals to detect and report fraud committed against the federal government while compensating them for their efforts. The United States is fighting two wars and holding off an economic collapse—now is the time to embrace measures that will save the American taxpayer money and augment the image of the U.S. government.