Testimony of

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TESTIMONY OF JOHN E. CLARK
BEFORE THE SENATE JUDICIARY COMMITTEE
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Tool Against Fraud in the 21st Century"
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As a long-time False Claims Act practitioner, I submit this testimony in support of Senate Bill 2041, the False Claims Act Correction Act of 2007 ("S. 2041").1 I am a member of the qui tam bar, the unofficial term for the attorneys who specialize in representing private parties who bring cases under the federal False Claims Act ("FCA") on behalf of the United States. For more than 15 years, my practice has consisted almost exclusively of qui tam cases.

I have been a member of legal teams representing qui tam plaintiffs whose claims have resulted in recoveries exceeding half a billion dollars ($500,000,000) for the United States. The cases have involved both health care fraud and defense contracting fraud, the two primary areas of fraud against the government today. Many of the defendants have been publicly traded companies, including such familiar names as HealthSouth Corporation, SmithKline Beecham Clinical Laboratories, Science Applications International Corporation, and prescription drug manufacturers Bayer, Aventis, Bristol Myers Squibb, and GlaxoSmithKline. I have also represented qui tam plaintiffs in cases brought under the Texas Medicaid Fraud Prevention Act, which is patterned after the federal FCA, that have resulted in recoveries of approximately $70 million for Texas and the United States to date.

My whistleblower clients have included physicians and other health care professionals; corporate executives; clerical and administrative personnel; non-executive salaried employees; hourly skilled workers; a competitor of a corporate health care provider; and, an 83-year-old physical therapy patient (a veteran of World War II, Korea, and Vietnam) who saw and understood that Medicare was being systematically cheated by a major corporate health care provider.

The clients who were employees of the entities sued have all had one thing in common: before seeking the assistance of a qui tam attorney, each had tried, without success, to get his or her employer to cease its unlawful conduct. Even the physical therapy patient tried first, without success, to get the corporate provider to change its conduct voluntarily.

Currently, I practice law at Goode Casseb Jones Riklin Choate & Watson, a San Antonio, Texas law firm that I helped found in 1991. I also serve on the Board of Directors of Taxpayers Against Fraud (TAF), the non-profit public interest organization dedicated to combating fraud against the Federal Government through the promotion and use of the Federal FCA and its qui tam

provisions.
My views on S. 2041 are informed by my previous government service as well as by my current career representing qui tam plaintiffs. From 1969 to 1977, as a litigation attorney in the Justice Department's Criminal Division, as an Assistant U.S. Attorney, and finally as the United States Attorney for the sprawling Western District of Texas, I handled and oversaw a wide variety of civil and criminal litigation for the United States. I served as U.S. Attorney for the Western District of Texas from 1975 to 1977. In addition, I served as a Justice on the Texas Fourth Court of Appeals, the state counterpart to the federal circuit courts, in 1981-1982.

S. 2041 is important to remedy and deter fraud on U.S. government programs. The Bill's proposed amendments to the FCA - many of which are clarifications of the existing statute - are needed to correct a number of decisions by courts that have misconstrued the statute and limited its effectiveness. A number of unfortunate, judicial rulings inhibit the law from operating as Congress intended when it enacted the law in 1863 to combat fraud in Civil War defense contracts. Other rulings hinder the law from working as Congress intended when it amended the law in 1986 to put in place sufficient incentives to encourage private citizens to come forward. In my testimony, I will address my reasons for supporting each of the key provisions of S. 2041 and I will discuss two other areas that are badly in need of legislative correction:

The permissible uses of Civil Investigative Demand material in FCA proceedings need to be clarified so that Department of Justice attorneys will use this tool when appropriate; and,
The procedural provisions need to be clarified to confirm that qui tam plaintiffs need not plead the specifics of billing documentation to survive a motion to dismiss.

I. Provisions in the Current Bill

A. Fixing the "Public Disclosure" Jurisdictional Bar

Perhaps the most critical aspect of this bill is its amendment of the so-called "public disclosure bar" - a provision that has been misinterpreted by too many courts. The case law has veered so far off the course Congress intended that it has seriously handicapped the fight against fraud. After setting out the legislative history of this provision and summarizing the state of the case law, I will offer examples from my own experience that demonstrate the need for legislative action.

1. Summary of Legislative History

Congress amended the FCA to add the public disclosure bar in 1986. This provision deprives a court of jurisdiction over any qui tam action "based upon" the "public disclosure" of "allegations or transactions" in the news media, or in an administrative, congressional or judicial report, audit or proceeding, unless the qui tam plaintiff is an "original source" of the information and has disclosed it to the government before filing suit.
When Congress added the "public disclosure bar" to the FCA in 1986, it deliberately removed another jurisdictional bar, colloquially referred to as the "government knowledge bar." The government knowledge bar, which was added to the statute in 1943, had deprived courts of jurisdiction over qui tam actions "based on evidence or information the Government had when the action was brought." Congress had added the "government knowledge bar" to the statute in

1943 to address concerns about "opportunistic" or "parasitic" relators who brought no information of any value to the Government, but merely lifted public materials, such as an indictment, into their complaints.

In practice, however, the "government knowledge bar" had not worked as intended. It was far too sweeping, disqualifying meritorious and non-meritorious actions alike, and potential whistleblowers were unwilling to put their careers on the line when facing the risk that their cases would be barred if information about the apparent false claims lay dormant somewhere in the government's vast files. As a result, the government knowledge bar deterred qui tam filings, and the qui tam cause of action fell into virtual disuse for over forty years. (In eight years of service as a federal prosecutor, from 1969 to 1977, I never heard of the FCA.) Meanwhile, defense procurement fraud ran rampant, and was inadequately redressed by the government.

By 1986, Congress had determined to eliminate the so-called "government knowledge bar" in light of its stated concern about cases in which "the Government knew of the information that was the basis of the qui tam suit, but in which the Government took no action." See H.R. REP. NO. 660, 99th Cong., 2d Sess. 22-23 (1986). Congress wished to "encourage more private enforcement suits" and consequently amended the statute to eliminate the government knowledge bar in 1986. S. REP. NO. 345, 99th Cong., 2d Sess. 23-24 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5266, 5288-89. Congress remained concerned, however, about "parasitic" or "opportunistic" relators such as those filing complaints simply copied from a government indictment.

To address the continued concern about the opportunistic relator, Congress' 1986 amendments created a jurisdictional bar that was intended to strike a balance between "encouraging people to come forward with information and . . . preventing parasitic lawsuits."2 As well stated by the Court of Appeals for the District of Columbia: Seeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own, Congress has frequently altered its course in drafting and amending the qui tam provisions since initial passage of the FCA over a century ago.3

The result of Congress' 1986 effort to find the right balance between providing adequate incentives for relators with inside information and discouraging those that add nothing to the government's efforts was the current "public disclosure bar." This bar precludes a qui tam plaintiff's action if his complaint is "based upon" publicly disclosed allegations or transactions, unless the plaintiff is an "original source of the information." The jurisdictional bar no longer focuses on whether the government is on notice of the fraud. Importantly, Senator Grassley, who sponsored these amendments, explained that the new jurisdictional bar would apply only to actions based "solely" on public disclosures. Cong. Record, S. 11244 (August 11, 1986)

2. State of the Case Law

Although it was intended to benefit the government, the "public disclosure bar" unfortunately has evolved into little more than a cudgel for defendants seeking to escape judgment for their misdeeds. The Department of Justice rarely invokes the clause. Defendants, however, can be counted on to assert it on even the flimsiest pretext, and all too many courts seem eager to seize

upon it as if indulging a presumption that whistleblower claims are not favored and should be discouraged. Armed with the best defense counsel in the country and virtually unlimited financial resources for litigation, large defense contractors and health care providers have brought hundreds of jurisdictional challenges to qui tam cases under the public disclosure provision. They have exploited what some courts have characterized as ambiguities in the provision, arguing that "based upon" means "similar to" and that "public" disclosures include even those disclosures made in private settings. These challenges have led to case law that, in effect, has restored aspects of the "government also have depleted the financial resources of whistle-blowers, wasted precious judicial resources, and led to a confounding array of conflicting interpretations of the terms "based upon" and "public disclosure."
To give the Senate Judiciary Committee a sense of the scope of the problem, I point out the following:

*The United States Code Annotated currently reports nearly 200 published and unpublished rulings in 103 separate cases on questions relating to the proper interpretation of the "public disclosure" bar and its "original source" exception.

*In a case that reached the Supreme Court last year, Rockwell International, Inc. successfully used the public disclosure bar to deny an award to a whistle- blower over the strong objections of the United States.4
*Most of the Courts of Appeals that have looked at the issue have agreed with defendants that the term "based upon" should be interpreted to mean "similar to" rather than "derived from." 5 In doing so, they have determined that the proper inquiry is whether the information in the public domain is sufficient to put the government "on notice" of the alleged misconduct, in effect restoring - - as the first part of the "public disclosure" jurisdictional analysis - - the "government knowledge" bar that Congress tried to remove in 1986.6 *On the other hand, the Courts of Appeals for the Fourth, Seventh and Eleventh Circuits have interpreted the term "based upon" as used in the public disclosure bar to mean "derived from."7
*Several Courts of Appeals have ruled that private exchanges of information, such as those between a government investigator and a potential fact witness, constitute "public disclosures" even when a relator is not part of the information exchange.8

*One Court of Appeals has ruled that production of documents or information during the discovery phase of a lawsuit is a "public disclosure" even if the material is not put on the public record of the judicial proceeding.9
*At least three Courts of Appeals have ruled that responses to FOIA requests are "public disclosures" that can deprive a court of jurisdiction even if the relator relies exclusively on his status as an insider to establish requisite elements of the fraud.10

*On the other hand, the Court of Appeals for the 9th Circuit has held that a response to a FOIA request is not a "public disclosure" within the meaning of the statute.11

3. My Experience with the Public Disclosure Bar

The many court decisions that have interpreted the terms "public disclosure" and "based upon" in unduly broad terms have made relators reluctant to take otherwise prudent steps to confirm their allegations prior to filing suit, as these steps could generate disclosures from outside parties that might be deemed "public." Moreover, these decisions have led lower courts to bar meritorious allegations that never would have been uncovered or pursued by the government on its own.

For example, I have been consulted by clients and prospective clients with knowledge of a defendant's culpable practices, but without access to the inculpatory documents submitted to the government, who have suggested filing a FOIA request to obtain copies of the documents in question and thus confirm that the defendant actually submitted false claims. I have counseled such clients against filing FOIA requests because of the case law that poses a significant risk that the government's compliance with a FOIA request could be found to constitute a "public disclosure," potentially barring the client's lawsuit.

Case law that deters whistleblowers from confirming key facts before filing suit is not in the public interest. If flawed cases are filed as a result of incomplete or inaccurate understandings of the facts, executive and judicial branch time and resources, as well as the time and resources of the whistleblower, will be expended needlessly, and the whistleblower's career may be jeopardized. Moreover, this case law can prevent clients from meeting the requirements of other cases that require whistleblowers not only to allege how someone is defrauding the government, but also to present copies of the actual invoices or other claim documents submitted to the government.

In one instance our client assisted in the government's investigation, after we filed his qui tam action, by identifying categories of documents to be subpoenaed that would corroborate his allegations. When the government obtained the documents, the client reviewed and analyzed them at the government's request, in the privacy of a secure federal office. The documents corroborated the client's claims and furthered the investigation, and with the government's acquiescence the still-sealed complaint was amended to reflect specific examples of the corroborative facts. The court unsealed the case before the government's investigation was completed. Although the government's attorneys anticipated electing to intervene, they were not prepared to do so at that time and hoped we would be able to prosecute the case alone until the government was ready to intervene. After the complaint was unsealed, the court dismissed the case on the defendant's motion, ruling that a disqualifying "public disclosure" occurred when the client reviewed the documents to aid in the government's investigation.

The court's interpretation of "public disclosure" as encompassing post-filing disclosures by the government to the relator is particularly troubling in light of the Supreme Court's recent decision in Rockwell Int'l Corp. v. U.S., supra. In that decision, the Supreme Court looked to the final articulation of the legal claim that led to the judgment against the defendant to determine whether that claim was based upon publicly disclosed information. When qui tam plaintiffs pursue cases declined by the United States, however, the final articulation of the legal claim will almost always encompass billing documentation that the qui tam plaintiff obtained from either the defendant or the government during discovery. Few insiders to fraud have access to all of the pertinent billing documentation. If the reasoning of the Rockwell court is ever combined with the reasoning of the judge in the case I just discussed, it could be the death knell for declined qui tam cases.

In my practice, I have seen how the courts' conflicting and unduly restrictive readings of this provision have been exploited to the fullest by defendants - parties that have no legitimate interest in the public disclosure question. The public disclosure provision was adopted for the government's benefit - i.e., to encourage to avoid sharing a recovery with an opportunistic relator who merely repeats in pleadings what is already widely known. It has nothing whatever to do with the defendant's culpability. It was not intended to shield defendants from liability merely because their misconduct was publicly exposed before the relator filed his lawsuit, and it flies in the face of the public interest to allow it to serve that distorted purpose.

Moreover, because courts consider "public disclosure" a jurisdictional bar, a defendant can use it to attack a relator regardless of whether the government considers the relator an opportunist from whom it wants to be protected, or a valued ally whose assistance and resources the government wishes to have on its side in the litigation. The government, for whose benefit the "public disclosure" bar was intended, should have - and exercise - the sole discretion to make that strategic decision. Again and again, defendants have raised this jurisdictional bar to force qui tam plaintiffs to incur the risk and expense of litigating this threshold issue, to delay adjudications of the merits of cases, and ultimately to avoid liability for defrauding the government. I have also had the experience of responding to "public disclosure" motions so lacking in merit as to suggest that they were filed either without a basic understanding of the law or with the hope of confusing or misleading the court. Congress could do no greater service in furtherance of the FCA than to amend this provision in the manner proposed in Senate Bill 2041.

4. The Proposed Amendments to the Public Disclosure Provision
The proposed amendments empower the government, and not the defendant, to seek the dismissal of opportunistic actions that merely repeat allegations already on the public record. Under the amendments, a FCA action could be dismissed due to a public disclosure only upon "timely" motion of the Attorney General. "Public disclosure" would be defined to include only disclosures on the public record and those that have been "disseminated broadly to the general public," with responses to Freedom of Information Act requests and exchanges with law enforcement expressly excluded from the definition. An action would be deemed to be "based upon" a public disclosure only when all elements of liability are "derived exclusively from" the public disclosure. The much-litigated "original source" language would drop out of the provision, as the new definition of "based upon" would have the effect of carving out complaints by original sources.

These changes, which endorse the interpretations in several of the opinions cited above, will conform the statute to original Congressional intent, leaving in place incentives for all but merely opportunistic relators. They will permit potential qui tam plaintiffs and their counsel to investigate diligently the merits of a potential case before filing suit without concern that such investigation will trigger the public disclosure bar. These changes will prevent defendants from delaying or obstructing litigation of the merits and wasting the resources of the government and the judiciary by repeated, often frivolous, challenges to the court's jurisdiction. Finally, they will empower the government, and not the defendant, to decide whether it is in the public interest for the relator to pursue a qui tam action notwithstanding public knowledge of the defendant's wrongdoing. As the recently decided Rockwell case illustrates, the government does not always favor a dismissal on "public disclosure" grounds but can be powerless to prevent it and retain the benefit of the relator's efforts and resources when the option to squelch the case lies with the

defendant.
B. Clarifying that the FCA Protects All U.S. Government Money and Property

1. The Bill's Proposed Amendment of the Liability Provisions

The statute currently imposes liability on anyone who, among other things:
(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; or
(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.
31 U.S.C. § 3729(a)(1) and (2).
The statute defines the term "claim" to mean "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c).

Notwithstanding the definition of "claim" set forth above, the Court of Appeals for the District of Columbia has ruled that FCA liability will lie only when the false claim has actually been presented to an employee or official of the United States. U.S. ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 492-493 (D.C. Cir. 2004), cert. denied, 544 U.S. 1032 (2005). In the opinion of the D.C. Circuit, false claims submitted to a federal government agent, contractor or grantee are not claims presented to the United States even if the agent, contractor or grantee pays the claims with federal funding in order to carry out the goals of a federal program.

In Section Two, through amendments to 31 U.S.C. § 3729(a), S. 2041 would clarify that the FCA imposes liability for any knowing false claim that would inflict financial damage on the United States, regardless of whether the false claim is "presented" to a U.S. Government employee. Key to liability would be whether the defendant's misconduct ultimately would result in a loss to the United States, with false claims on government grantees, contractors and administrative agents considered within the ambit of the Act whenever the United States would suffer an economic loss as a result of the defendant's malfeasance.

Thus, revised Section 3729(a) expressly would protect "Government money or property" from knowing false claims, false statements made to get false claims paid, and the other categories of misconduct set forth in Section 3729. In new Section 3729(b)(2), the proposed amendments would define "Government money or property" to include not only money "belonging" to the United States, but also money that the United States provides a contractor, grantee, agent or other recipient "to be spent or used on the Government's behalf or to advance Government programs."

This amendment would overrule U.S. ex rel. Totten, supra, and its progeny. The amendment would embrace several recent judicial decisions that have held that the FCA should reflect Congress' intent to make a false claim actionable "although the claims were made to a party other than the Government, if the payment therefore would ultimately result in a loss to the United States." S. REP. 345 at 10. (See notes 11 and 12, infra.)

2. Congressional Intent Behind the 1986 Amendments

As noted above, the FCA defines the claims subject to the Act to include those "made to a contractor, grantee, or other recipient if the United States provides any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c). In the legislative history to this provision, which Congress enacted in 1986, the Senate Judiciary Committee explained that the definition was added to clarify that:

[a] false claim for reimbursement under the Medicare, Medicaid, or similar program is actionable under the act . . . A claim upon any Government agency or instrumentality, quasi-governmental corporation, or non-appropriated fund activity is a claim upon the United States . . . a claim is actionable although the claims or false statements were made to a party other than the Government, if the payment therefrom would ultimately result in a loss to the United States . . . a false claim to a recipient of a grant from the United States or to a State under a program financed in part by the United States, is a false claim to the United States.

S. REP. 345 at 9-10.
Moreover, the FCA applies to "circumstances where claims are submitted to state, local or private programs funded in part by the United States where there is significant Federal regulation and involvement." S. REP. 345 at 19-20.

3. The Totten Decision

Notwithstanding Congress' efforts in 1986 to make crystal clear that the FCA covers claims on grantees and quasi-governmental corporations, a divided panel of the Court of Appeals for the D.C. Circuit in U.S. ex rel. Totten, supra, ruled to the contrary, ignoring the the legislative history behind the definition of "claim." The court held in Totten that Sections 3729(a)(1) and (a)(2) of the FCA do not impose liability for false claims submitted to a government grantee or quasi-governmental corporation even if the entity paying the false claims uses federal money to do so. According to that court, such liability will arise only if the false claims are then resubmitted to a government official or employee. At issue in the Totten case were alleged false claims submitted to Amtrak, a quasi-governmental corporation that is also a federal government grantee that has received billions of dollars from the federal government.
Justice Roberts, the author of the Totten court's majority opinion, has acknowledged that this was a difficult decision for the Court of Appeals that reasonably could have gone either way. During his Senate confirmation hearings for the position of Supreme Court Justice, Senator Grassley grilled Justice Roberts on why he had ignored the 1986 legislative history when ruling as he did. Justice Roberts acknowledged:

[I]t's certainly possible that the majority in that case didn't get it right. And the dissent, that was a very strong dissent, did get it right. . . . I'm happy to concede that it was among the more difficult cases I've had over the past two years. Any time Judge Garland disagrees, you know you're in a difficult area. . . it's obviously to me, a case on which reasonable judges can disagree.12

The Totten decision has led a number of lower courts to rule that the FCA may not be used to remedy misconduct involving knowing false claims unless the defendant is dealing directly with a U.S. government official. These lower court rulings effectively create "fraud free zones" in a vast array of situations in which the federal government uses an outside entity - such as an insurance company or a state agency - to administer its programs. These decisions fly directly in the face of the expressed legislative intent in that they hold that the FCA is not against defense subcontractor fraud,14 or against fraud on local and state programs, even those "funded in part by the United States where there is significant Federal regulation and involvement."15 S. REP. 345 at 19-20 (citing an area in which Congress intended the FCA to be applicable.)

4. The Impact of Totten

As a result of the Totten decision, not only are the courts dismissing cases that involve significant financial losses for the United States, they also are discouraging the qui tam bar from bringing such cases. I can speak from personal experience. In 2007, due in large part to the Totten ruling, I considered and rejected a case involving a federally-funded project that was to be carried out by a local governmental entity. The general contractor had submitted allegedly false claims to the local government entity, which had paid the claims without knowing of the fraud. Likewise, in 2006, I considered and rejected a case involving a state agency program with substantial federal funding for reasons that included the difficulty of proving that the state agency passed on the principal contractor's allegedly false claims to the United States.

With an increasing amount of our federal government's operations "outsourced" to private contractors, it is more important than ever that Congress clarify that the FCA is designed to protect federal assets - whether disbursed by a U.S. government official or by a third party. As the Department of Justice warned the Court of Appeals in its briefs in the Totten case, interpreting the Act to require presentment of the false claim to a federal employee leaves "'vast sums of federal monies' without FCA protection." 380 F.3d 488 at 502 (2004).

The proposed definition of "government money and property" is a sound one: the focus is on the intended use of the assets as much as the source of the assets - not only must the assets originate with the United States, they must also be assets that are being held by an outside entity specifically to be used on the Government's behalf or to advance government programs. Contrary to the spurious arguments raised by the defense bar in opposition to this provision, the definition does not encompass the salaries of government employees or Social Security checks paid to the aged. Once paid to government employees and Social Security recipients, funds that originated with the United States are no longer being held "on behalf of" the government or "to advance a government program."

5. Judicial Decisions Supporting the Proposed Clarification

This proposed amendment to the liability provisions, which would overrule the Totten Court's ruling that "presentment" to the United States is a precondition of FCA liability, finds support in compelling opinions issued by several highly respected federal judges. For example, in his dissent in the Totten case, Judge Merrick Garland opined that the Court's interpretation of Section 3729(a)(2) was "inconsistent" with the plain text of the statute, and "irreconcilable" with the legislative history. He noted that:

Under the Court's interpretation, the government cannot recover against a contractor that obtains money by presenting a false claim to a federal grantee - even if every penny paid to the contractor comes out of an account comprised wholly of federal funds - unless the grantee 're-presents' that false claim to a federal employee.

380 F.3d 488 at 502-03. Writing the majority opinion for the court, Judge Julia Gibbons of the 6th Circuit Court of Appeals also rejected the analysis of the majority in Totten. The case before the 6th Circuit involved alleged false claims by Allison Engine, Inc. as a subcontractor on a Department of Defense (DOD) contract. Overruling the district court's dismissal of the case due to the fact that the subcontractor was not in contractual privity with the federal government, Judge Gibbons ruled that:

Congress intended the 1986 amendments to overrule restrictive judicial interpretations of the FCA and increase the reach of the statute. By re-wording the statute and adding subsection (c), Congress accomplished this expansion, including making the FCA applicable to cases in which the government sustains a financial loss, regardless of whether the false claim is actually presented to the government. Reading a presentment requirement into subsections (a)(2) and (a)(3) is contrary to this purpose and contradicts the plain language of the statute.16

The Supreme Court will consider the defendant's appeal of this Sixth Circuit ruling in its upcoming term.17

C. Clarifying That the FCA Extends to Claims Against U.S.-Administered Funds

The language of the FCA is silent on whether it protects funds administered by the United States. As noted above, the Act speaks of claims "presented to" the United States "for payment or approval" and claims "paid or approved by the Government." 31 U.S.C. §3729(a)(1) and (2). As a matter of practice, the qui tam bar and the Department of Justice have interpreted the Act to protect U.S.-administered funds, and have enforced the Act accordingly. The United States has utilized the FCA to recover hundreds of millions of dollars from oil, gas and 18 mining companies that have underreported the royalties owed under leases on Indian land.18

The availability of the Act as a remedy in these circumstances is now at risk. In a recent decision in a high profile case involving Iraq reconstruction fraud, a United States district court held that the FCA does not reach false claims on money administered but not owned by the U.S. Government. See U.S. ex rel. DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617, 636-641 (E.D. Va. 2005). This decision not only inhibits the use of the FCA to address Iraq reconstruction fraud, it also could negatively affect the ability of the government to pursue the many false claims cases involving fraud on oil, gas, mining and other leasehold interests administered by the U.S. on behalf of Native American tribal authorities.

In Section Two, S. 2041 would clarify that the FCA covers funds administered by the United States, such as funds of the Coalition Provisional Authority or Native American funds. The amendments do this by defining the "Government money or property" protected by the Act to include not only funds belonging to the United States or provided to a third party to be spent on the Government's behalf, but also funds managed by the United States for an administrative beneficiary, as that term is defined in new paragraph (b)(4).

When the Government affirmatively takes on the role of administering the assets of another entity, it does so because it sees its interests and goals as inextricably intertwined with the interests and goals of that other entity. In those situations, the FCA should apply since false claims on the administered fund damage the interests and goals of the United States. If

Government-administered funds are not protected by the FCA, the interests of both parties are deprived of the protection of the Government's primary remedy against fraud. D. Knowing Retention of U.S. Overpayments and Unauthorized Diversion of Government Funds or Property In addition to imposing liability on those who knowingly make or cause false claims, or false statements in support of false claims, the FCA also imposes liability on anyone who:

has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt.
31 U.S.C. § 3729(a)(4).

Through long term practice under the Act, qui tam counsel such as I have seen that this provision could be improved by express reference to those situations in which a recipient of government funds learns after receiving the money that it was overpaid or was ineligible to receive the money in the first place, and, knowing this, fails to report the overpayment or return the funds to the government. This situation comes up most frequently in the health care context, in which providers learn from employees that they have been overcharging the government for years (by using the wrong billing code, for example).

This provision also could be improved by addressing those situations in which a company submits a proper claim for government funds, and then diverts the funds for unauthorized purposes. Examples would include research institutions using government grant money for expenditures unrelated to the grant or defense contractors using up-front payments by the military to pay bribes or kickbacks.

By adding language to the liability provision found at 31 U.S.C. Section 3729(a)(4), the bill would clarify that the FCA covers situations in which a person who already has obtained government funds either diverts the funds to unauthorized uses after obtaining the funds, or holds onto the funds after learning that they were not entitled to receive them in the first place. Thus, the bill would amend Section 3729(a)(4) so that it imposes liability on anyone who:
has possession, custody, or control of Government money or property and, intending . . . to retain overpayment [sic] or knowingly to convert the money or property, permanently or temporarily, to an unauthorized use, fails to deliver or return, or fails to cause the return or delivery of the money or property, or delivers, returns or causes to be delivered, or returned less money or property than the amount due or owed.

I support this amendment because it wisely anticipates the need for the Department of Justice to have a statutory mechanism in place to recover funds that have been advanced to an entity for one purpose, and are then employed for a second, unauthorized purpose, including, for example, bribes, kickbacks or personal enrichment. During wartime, funds are often disbursed on an emergent basis in advance of the work being performed, and without the usual required certifications of performance under the contract. This amendment would give the United States a means to recover from a contractor that knowingly used government money for an unauthorized purpose.

I also support the amendment because it implements the Supreme Court's admonition that Americans should "turn square corners" when doing business with the Government.19 Health care providers and others who learn after the fact that they have obtained government money to which they are not entitled should be required by law to return the money, and should be held accountable under the FCA if they fail to do so. With our Medicare, Medicaid and other Social Security programs struggling for financial solvency, it is imperative that we put in place all available checks on fraud.

E. Prohibiting Release of FCA Claims by Private Parties

The proposed legislation is aimed at a new tactic used by companies subject to internal accusations of fraud: terminating potential informants with severance packages that include covenants not to sue. While most jurisdictions strike down these covenants as contrary to public policy when a company tries to use them to bar a FCA action, the lack of clear language on this issue in the FCA creates opportunities for companies to discourage potential whistleblowers from coming forward. It also provides companies with an avenue to retaliate against those who do come forward, and to delay the progress of the FCA prosecutions they initiate, by seeking to enforce these covenants.

In my own practice, I have seen the chilling effect that these covenants can have on those considering suits under the FCA. I have been contacted by attorneys representing individuals who either have signed, or have been asked to sign, a covenant not to sue, and who were unsure whether such a covenant would bar their contemplated qui tam lawsuit. I am confident that many individuals never make that initial call to a lawyer due to their incorrect assumption that these covenants prevent them from suing their company even when doing so on behalf of the United States.

To address this issue, the bill adds a new provision stating that: "No claim for a violation of section 3729 may be waived or released by any action of any person, except insofar as such action is part of a court approved settlement of a false claim civil action brought under this section."

I strongly support this provision. First and foremost, it alerts potential whistleblowers early on - when they are considering whether even to call a lawyer - that private covenants cannot interfere with their ability to bring a FCA lawsuit on behalf of the United States. Prior to hiring a lawyer, potential informants are much more likely to consult the text of the FCA than they are likely to research and review the case law on contracts that violate public policy. As a result of this statutory change, more potential informants will come forward in the first instance. Second, with this amendment, once a case has been filed, defendants cannot rely on conflicting case law, or case law that they might try to distinguish, to penalize or bar a qui tam lawsuit. F. Protecting Company Contractors and Agents from Retaliation and Protecting Steps Taken to Stop FCA Violations and Association with Whistle- Blowers

The FCA protects employees from retaliation through discrimination in the terms of their employment as a result of steps they have taken to further a qui tam action. Thus, the statute currently provides for monetary damages and other relief for:

"Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under [Section 3730]. . . ."

S. 2041 would expand the class of protected persons to include contractors and agents, as well as employees. It also would expand the class of protected activity to include: i) steps taken towards stopping the violation of the FCA and, ii) association with those filing FCA actions or attempting to stop violations of the FCA.

These changes are badly needed. Many potential whistleblowers learn of violations of the FCA as contractors or agents of the defendant, rather than as employees. For example, many of the cases alleging fraud on Medicare or Medicaid are brought by physicians against the hospitals and clinics who employ them through contracts. These individuals are as deserving of protection from retaliation as those who fall strictly within the definition of an "employee." Moreover, the anti-retaliation provision encourages informants to come forward. While informants recognize they will become unemployable within their industries once it becomes known that they have blown the whistle, the anti-retaliation provision of the Act provides somewhat of an "insurance policy" against financial devastation and may serve to deter retaliation.

It is also good public policy to amend this provision so that it protects those who try to stop misconduct from the inside, by using internal compliance programs, for example. Whistleblowers should be supported in their efforts to seek to correct the defendant's misdeeds through appropriate corporate channels before taking the more extreme step of bringing a qui tam lawsuit. Most of the whistleblowers I have represented or considered representing were employees who observed improper practices, tried to put an end to them within the company or organization, and were ignored, rebuffed, threatened with termination, or terminated. Typically, they explored the possibility of a FCA lawsuit only after failing to bring about change from within.

The wording of S. 2041 regrettably drops some of the prior language of the statute which provided protection against retaliation for those who take steps toward filing a qui tam lawsuit. This language should be restored to the bill so that the existing protections are not inadvertently removed.

G. FCA's Statute of Limitations Applicable to Section 3730(h) Actions
Another important clarification in S. 2041 pertains to the appropriate statute of limitations for lawsuits brought under the FCA against those who retaliate against whistleblowers by discriminating against them in the terms of employment. Section 3730(h) of the FCA provides a remedy for whistleblowers suffering such retaliation. Section 3731(b)(1) of the Act permits any "civil action under Section 3730" to be brought by the later of six years from the violation of Section 3729, or three years from government discovery of the violation, not to exceed ten years from the violation.

The Supreme Court recently held that the language in the FCA's statute of limitations that provides that the period to bring a claim begins to run on the date of "the violation of Section 3729" means that Congress did not intend the FCA's statute of limitations to apply to anti-retaliation claims, which arise under Section 3730 rather than under Section 3729. See Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 545 U.S. 409, 415 (2005). The Supreme Court so ruled notwithstanding the fact that Congress drafted Section 3731 so that it expressly applies to "any" civil action brought under Section 3730. Identifying a number of state statutes of limitations as examples, the Supreme Court held that individuals bringing Section 3730(h) claims must comply with the state statute of limitations applicable to the most "analogous" sort of action available under state law.

The bill amends Section 3731(b) to provide expressly that the statute of limitations for anti-retaliation claims brought under Section 3730(h) of the Act is the same as the statute of limitations for qui tam actions brought on behalf of the United States. The proposed amendment is advisable to protect the viability of the anti-retaliation remedy in Section 3730(h). It is also advisable to alleviate the pressure on whistleblowers to file qui tam actions prematurely to comply with the extremely short statutes of limitations for wrongful discharge found in state law.

The effect of the Graham County decision is that many whistleblowers who have suffered retaliation will have to file their anti-retaliation claims within an extremely short period following the retaliatory action in order to invoke the FCA's remedy. State statutes of limitation for unlawful discharge are ordinarily quite short. In fact, in Texas, where I practice, it is possible that the 90 day statute of limitations for causes of action based on retaliation against public employees might apply; in Graham County, Justice Thomas, who wrote the majority opinion, identified this state statute along with one other as "the likely analogous state statutes of limitations." 545 U.S. at 419, n. 3 (citing to TEX. GOVT. CODE ANN. § 554.005 (West 2004)). Examples of other extremely short statutes of limitations considered analogous by the Graham County Court are the following:

*Connecticut's 90 day statute of limitations for retaliation actions by whistleblowers (CONN. GEN. STAT. 31-51m (2007)),
*Florida's 180 day statute of limitations for retaliation actions by public whistleblowers (FLA. STAT.§§ ch. 112.3187(8)(a) (2007), ch. 448.103(2007));
* Michigan's 90 day statute of limitations for retaliation actions by whistleblowers (MICH. COMP. LAWS ANN. § 15.363(1) (West 2008));
* New York's one year statute of limitations for actions to enforce a statute "given wholly or partly to any person who will prosecute" (N.Y. CIV. PRAC. LAW ANN. § 215(4) (West 2003)); and *Ohio's six month statute of limitations for retaliation actions by whistleblowers. (OHIO REV. CODE ANN. § 4113.52(D) (Lexis 2008)).

The reason this decision reduces the effectiveness of the anti-retaliation remedy is that it will force many potential whistleblowers to give up this remedy so that they do not forfeit their ability to pursue a qui tam action in the manner contemplated by the statute. Individuals with causes of action under Section 3730(h) ordinarily have potential causes of action under Section 3729. However, the investigation and preparation of a qui tam complaint almost always requires much more time and work than the preparation of an anti-retaliation complaint.

In my experience, it is the extremely rare qui tam case that can be put together from "soup to nuts" in the short periods of time found in many of the state statutes of limitations for retaliatory discharge. To file a qui tam case, an individual must first locate counsel who specializes in qui tam law. Given the significant financial risks of taking on these complex cases, potential qui tam plaintiffs often find it necessary to present their information to several successive attorneys over a period of many months before finding one who will take the case. During the process of trying to retain counsel, and thereafter, considerable effort is expended researching applicable program or contract rules, which are often complicated and difficult to identify. In addition, potential relators may spend months locating, assembling and analyzing the evidence of the false claims. Often these individuals approach other witnesses to ask for their cooperation in obtaining additional documents or testimony. With the federal government's investigative resources as overburdened as they are, skilled qui tam counsel always endeavor to present the government with as much evidence as possible at the time of the qui tam filing. The chances of government interest in the case increase exponentially with the quantity of probative evidence submitted alongside the filing.

While in theory a potential qui tam relator could file his wrongful termination case in a timely fashion, and then continue to work on preparing a possible qui tam case, this course of action has serious disadvantages. First and foremost, the Section 3730(h) action, which inevitably would discuss the misconduct about which the individual had complained internally, would have to be filed on the public record. The FCA does not provide for a seal on anti-retaliation claims. As a result, the defendant would learn that the individual had "blown the whistle" before the Department of Justice had had an opportunity to investigate the allegations using covert means, as contemplated by the seal on qui tam actions. Second, the public disclosure rulings discussed above pose a serious risk that the anti-retaliation case would be viewed as a "public disclosure" barring a later qui tam case "based" on the allegations set forth in the anti-retaliation case.

Accordingly, unless this proposed legislation is enacted, the Graham County decision will limit many potential informants to three undesirable alternatives: i) file a wrongful discharge case in open court, thereby prejudicing the ability of the U.S. government to investigate any later-filed qui tam action and risking the effect of the "public disclosure bar"; ii) forego the wrongful discharge claim so that the allegations of misconduct can be filed under seal as part of a carefully-prepared qui tam case; or, iii) rush to file a qui tam action before the running of the state statute of limitations on the anti-retaliation claim, without engaging in adequate investigation and research to substantiate the merits of the qui tam claim.

H. Relation Back of Government Complaints

The FCA provides for qui tam plaintiffs to file their cases under seal so that the United States may investigate the allegations and decide whether to intervene while the matter remains confidential. The statute provides for a sixty day period for the intervention decision, unless the court grants an extension of this time for "good cause shown." As a practical matter, the Government rarely, if ever, makes its intervention decision within sixty days. The Government ordinarily applies for repeated extensions of the seal, and makes its decision within two to five years of the original filing. The lengthy period of Government investigation is a product of several factors: i) the complicated and inherently secret nature of financial frauds, which often requires the Government to use multiple subpoenas and review hundreds of boxes of documents to uncover or confirm the truth; ii) the tendency of defendants to engage counsel who employ sophisticated tactics to delay the investigation and postpone the day of reckoning; and, iii) the increasingly scarce resources available to the Government to investigate the hundreds of qui tam cases filed every year.

When the Government does decide to intervene in a case, it typically files an amended complaint that reflects some of the additional information and evidence gathered in its investigation, and, in some cases, refines the legal theories set forth in the relator's complaint. Since the overall statutory scheme provides for the relator to sue "on behalf of" the United States, it has been reasonable, until recently, to assume that the Government's amended complaint "relates back" to the qui tam filing, for statute of limitations purposes, just as if the original filing had been filed by the Government itself. Federal Rule of Civil Procedure 15(c)(2) allows amended pleadings to relate back when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

A recent Court of Appeals decision, however, casts doubt on the relation-back assumption. In U.S. v. Baylor Univ. Med. Ctr., 469 F.3d 263, 268-70 (2nd Cir. 2006), the Second Circuit ruled that the United States may not avail itself of Fed. R. Civ. P. 15(c)(2) when amending a qui tam plaintiff's complaint. The implication of this ruling is that the United States sometimes will be forced to forego a thorough investigation of the merits of qui tam allegations in order to ensure that it does not lose claims due to the running of the statute of limitations. No public policy purpose is served by such a rule if the defendant is on notice of the alleged wrongdoing, as it almost always is once the government's investigation is launched through subpoenas and witness interviews.

S. 2041 would add a new paragraph (b)(3) to Section 3731 to clarify that, when the United States intervenes in a qui tam action and files a complaint embodying allegations that arise out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original qui tam pleading, the United States' complaint "relates back" to the date of the qui tam complaint for statute of limitations purposes. The new statutory language would be consistent with the rules on "relation back" of pleadings in non-qui tam cases, as set forth in Federal Rule of Civil Procedure 15(c)(2). As a practical matter, this amendment is necessary to preserve the FCA as an effective tool. With the shortage of investigative resources, it is now common for qui tam cases to remain under seal without a government intervention decision for three to five years. I have represented clients in at least two cases that remained under seal even longer. During this period of time, the statute of limitations is likely to run on many of the claims alleged in the qui tam complaint unless they are, in effect, tolled for the United States by the filing of the relator's claim on its behalf.

I. Delegation of CID Authority

The FCA was amended in 1986 to give the Department of Justice an investigative tool: civil investigative demands, or "CIDs," which are administrative subpoenas for documents, interrogatory responses and sworn testimony that may be used to investigate allegations of potential violations of the FCA. See 31 U.S.C. § 3733. Under the current statute, the Attorney General must review and issue every CID. 31 U.S.C. § 3733(a)(1). The Attorney General may not delegate this authority. Id.

The use of some form of Department of Justice compulsory process is increasingly necessary for effective investigation of FCA allegations. Program agencies are short on resources and often are unable to assign investigators even to patently meritorious cases, let alone issue Office of Inspector General subpoenas. Congress has enacted statutory restrictions on interviewing former and current employees of defendants without going through counsel, thereby making it difficult for the government's investigators to interview many of the key witnesses.

Regrettably, however, due to the statutory requirement that the Attorney General must personally issue every CID, the Department of Justice very rarely uses this investigatory tool. My understanding is that Assistant U.S. Attorneys and Main Justice trial attorneys are disinclined to request the issuance of CIDs because they have heard of CID request memos that languished in the bureaucracy for months without action. At one point just a few years ago, attorneys in the Commercial Litigation Branch advised one of my colleagues that CIDs sent to the Attorney General for approval and signature were not being acted upon; for over a year, they were neither reviewed nor approved. I am aware of very few instances in which the Department of Justice issued or even considered issuing a CID to investigate my clients' allegations.

S. 2041 would permit the Attorney General to delegate the authority to issue CIDs. This is a badly needed "fix" to the FCA that I understand is desired by both the qui tam bar and the Department of Justice.

II. Other Needed Changes

A. Permissible Uses of CID Material

There is a second reason why the Department of Justice has been reluctant to employ the CID authority. My understanding is that Department attorneys are concerned about language in the FCA that limits access to CID material to government "custodians" and "false claims law investigators." They see a risk that a court might conclude that such this language implicitly precludes them from showing the CID material to fact and expert witnesses, consultants and the parties. This is unfortunate because the qui tam relator and other witnesses and experts often are uniquely qualified to assess whether a defendant has responded fully to a CID, or to explain the meaning, function or context of a produced document. I have consistently been told by government attorneys, however, that they can not disclose materials obtained through CIDs to me or to my clients, even though they covet our assistance in reviewing the often voluminous materials for responsiveness and completeness, and need our help in analyzing the meaning and significance of the materials.

While statutory language does permit Department of Justice attorneys to make "official use" of CID material in "other cases and proceedings," they are disinclined to rely on this language since it references "other" cases and proceedings rather than "False Claims Act" cases and proceedings. Without express authority to disclose the CID material to fact witnesses, experts and the parties to an FCA proceeding, they fear that they may be unable to interpret accurately and efficiently the documents and information produced and, accordingly, that time spent on CID requests may be largely unproductive.

I urge the Committee to expand the bill to define the uses that the Department of Justice may make of CID material in false claims law proceedings. Surely, Congress intended the Department of Justice to use the material to develop further evidence, to litigate the case and/or to resolve the allegations. Accordingly, the statute should state clearly that the Department of Justice may use CID material for those purposes.

B. Clarifying that Qui Tam Cases May Proceed Without Billing Documents
The majority of Circuits have ruled that FCA complaints contain averments of fraud, and consequently must be pled with particularity pursuant to Federal Rule of Civil Procedure 9(b). Unfortunately, however, in addressing the question whether qui tam complaints satisfy Rule 9(b), many of these Circuit Courts have required a degree of detail that could not be known to anyone outside a defendant's billing or audit department, insisting that qui tam complaints not only describe the fraud scheme with particularity, but also describe the false claims submitted to the Government in such detail as essentially to require access to billing documents in order to provide claim numbers, dates, patient names, procedure codes, etc.20

These rulings significantly undercut the viability of the FCA, rendering it extraordinarily difficult for many insiders with reliable knowledge of fraud to bring cases that will survive a motion to dismiss. For example, because compartmentalization of functions is common in most organizations, operational personnel who are knowledgeable about the organization's fraud scheme and how it works often have no involvement with the billing process and thus cannot provide such details as the dates on which the defendant sent false invoices to the government. Without such details, that person's qui tam complaint would be vulnerable to dismissal for lack of particularity under many court decisions. Courts apply the particularity requirements of traditional fraud cases to False Claims Act pleadings, but there is an important distinction between those two kinds of cases that should be noted and addressed. In a traditional fraud case, the plaintiff complains of the fraud perpetrated on him by the defendant. It is not surprising, therefore, that he is expected to allege in some detail the defendant's fraudulent interactions with him. In a False Claims Act case, on the other hand, the plaintiff complains of the fraud perpetrated by the defendant on a third party - the government. In that circumstance the plaintiff may be very knowledgeable about the fraud scheme and how it works, but he may quite understandably lack access to some of the transactional details he would possess if he were the defrauded party. Defendants are entitled to fair notice of the transgressions they are alleged to have committed, but hyper-technical pleading requirements that serve no purpose but to defeat False Claims Act actions without regard to the merits of a claim disserve both the remedial purposes of the Act and the public interest.

Congress should amend the Act to overrule these strict application decisions. Congress could do so without placing FCA cases outside the ambit of Fed. R. Civ. P. 9(b), by providing that a qui tam case may proceed so long as the particulars alleged in the complaint are sufficient to put the defendant on notice of the nature of the alleged misconduct, and that the specifics of the claims documentation need not be pled if other information serves this purpose.

1 S. 2041, 110th Cong., 1st Sess. (2007).

2 FCA Implementation 1990, Hearing Before the Subcomm. on Admin. Law and Gov. Relations of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 3 (1990) (statement of Sen.

Grassley).

3 U.S. ex rel. Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994).

4 Rockwell Int'l Corp. v. U.S., 127 S. Ct. 1397 (2007).

5 See U.S. ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys., 384 F.3d 168, 176 (5th Cir. 2004); Minn. Ass'n of Nurse Anesthetists v. Allina Health System Corp., 276 F.3d 1032 (8th Cir.), cert. denied, 537 U.S. 944 (2002); U.S. v. Board of Trustees of the Leland Stanford, Jr. Univ., 161 F.3d 533 (9th Cir. 1998), cert. denied, 526 U.S. 1066 (1999); U.S. ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675 (D.C. Cir.), cert. denied, 522 U.S. 865 (1997); U.S. ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 552 (10th Cir. 1992), cert. den. 507 U.S. 951 (1993); United States ex rel. Doe v. John Doe Corp., 960 F.2d 318, 324 (2nd Cir. 1992).

6 If the court finds both that there has been a public disclosure and that the qui tam plaintiff has based his complaint on the public disclosure, then the next step of the public disclosure analysis involves looking to see whether the qui tam plaintiff qualifies as an "original source" and is therefore exempt from the jurisdictional bar. To qualify as an "original source," the qui tam plaintiff must jump over more hurdles than necessary to just establish that he did not derive his lawsuit from the public data. He must: i) prove his "direct" knowledge of the information; ii) prove his "independent" knowledge of the information; iii) establish that he disclosed the information to the government before filing suit; and, iv) in some circuits, show that, prior to the public disclosure, he also disclosed the information to the entity that made the public disclosure.

7 See Battle v. Bd. of Regents, 468 F.3d 755 (11th Cir. 2006); U.S. v. Bank of Farmington, 166 F. 3d 853 (7th Cir. 1999); U.S. ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1347-48 (4th Cir.), cert. den. 513 U.S. 928 (1994).

8 See U.S. v. Bank of Farmington, 166 F.3d 853, 861 (7th Cir. 1999) (disclosure by defendant to public official with managerial responsibility for the allegedly false claims); U.S. ex rel. Doe v. John Doe Corp., 960 F.2d 318 (2nd Cir. 1992)(disclosures by government investigators to employees of defendant.)

9 See U.S. ex rel. Paranich v. Sorgnard, 396 F.3d 326, 333-334 (3rd Cir. 2005); U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1158 (3rd Cir. 1991).

10 See, e.g., U.S. ex rel. Grynberg v. Praxair, Inc., 389 F.3d 1038, 1051 (10th Cir. 2004), cert. denied, 545 U.S. 1139 (2005); U.S. ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys., 384 F.3d 168, 175-176 (5th Cir. 2004); U.S. ex rel. Mistick PBT v. Housing Auth., 186 F.3d 376, 383 (3rd Cir. 1999), cert. denied, 529 U.S. 1018 (2000).

11 U.S. v. Catholic Healthcare W., 445 F.3d 1147, 1153-56 (9th Cir.), cert. denied, 127 S. Ct. 730 (2006).

12 Roberts, John. Confirmation hearing on the nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary, testimony before

the U.S. Senate Committee on the Judiciary, 109th Congress, 1st Sess. September 12-15, 2005 on September 14, 2005. Washington, D.C.: Congressional Quarterly Inc., CQ Transcriptions. Available on: Lexis Nexis, U.S. Congress, Committee Hearing Transcripts; Accessed: 1/23/08.

13 See U.S. ex rel. Atkins v. McInteer, 345 F. Supp. 2d 1302, 1305-06 (N.D. Ala. 2004), aff'd, 470 F.3d 1350 (11th Cir. 2006) (dismissing case involving nursing home claims on state Medicaid agency); U.S. ex rel. Brunson v. Narrows Health & Wellness, LLC, 469 F. Supp. 2d 1048, 1053 (N.D. Ala. 2006), (dismissing Medicare claims submitted to an insurance company hired by the federal government to administer the Medicare program.)

14 See U.S. ex rel. Sanders v. Allison Engine Co., 364 F. Supp. 2d 710 (S.D. Ohio 2003), rev'd by, 471 F.3d 610 (6th Cir. 2006), cert. granted, 128 S.Ct. 491 (2007).

15 See, e.g., U.S. ex rel. Rutz v. Village of River Forest, 2007 West Law 3231439 (N.D. Ill. Oct. 25, 2007)(federal Bureau of Justice Assistance block grant to county); U.S.DOT ex rel. Arnold v. CMS Eng'g, 2007 U.S. Dist. LEXIS 9118 (W.D. Pa. Feb. 6, 2007) (U.S. Department of Transportation grant to Pennsylvania Department of Transportation); U.S. v. City of Houston, 2006 U.S. Dist. LEXIS 57741 (S.D. Tex. Aug. 16, 2006) (U.S. Department of Housing funding of City of Houston housing authority); U.S. ex rel. Rafizadeh v. Cont'l Common, Inc., 2006 U.S. Dist. LEXIS 18164 (E.D. La. April 10, 2006) (U.S. grants to state Department of Social Services and state Department of Health & Hospitals.)

16 U.S. ex rel. Sanders v. Allison Engine Co., 471 F.3d 610, 615 (6th Cir. 2006), cert. granted, 128 S.Ct. 491 (2007.)

17 Other supportive opinions by esteemed judges are those by Judge Paul Cassell in U.S. ex rel. Maxfield v. Wasatch Constructors, 2005 U.S. Dist. LEXIS 10162 at * 22 (D. Utah May 27, 2005) and by Judge Harry D. Leinenweber in U.S. ex rel. Tyson v. Amerigroup Illinois, Inc., 2005 U.S. Dist. LEXIS 24032 at *9 (N.D. Ill. Oct. 17, 2005).

18 See, e.g., Kennard v. Comstock Res., Inc., 363 F.3d 1039 (10th Cir. 2004), cert. denied, 545 U.S. 1139 (2005); U.S. v. Chevron, 186 F.3d 644 (5th Cir. 1999); U.S. ex rel. Wright v. Agip Petroleum Co., 2006 U.S. Dist. LEXIS 93415 (E.D. Tex. Dec. 27, 2006); U.S. ex rel. Koch v. Koch Indus., 57 F. Supp. 2d 1122 (N.D. Okla. 1999).

19 Heckler v. Community Health Servs., 467 U.S. 51, 63 (1984), citing Rock Island, A & L.R. Co. v. U.S., 254 U.S. 141, 143 (J. Holmes).

20 See U.S. ex rel. Bledsoe v. Cmty. Health Sys., et al., 501 F.3d 493, 504-505 (6th Cir. 2007); U.S. ex rel. Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 559 (8th Cir. 2006), cert. denied, 127 S. Ct. 189 (2006); U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield, 472 F.3d 702, 727 (10th Cir. 2006); Sanderson v. HCA-The Healthcare Co., 447 F.3d 873, 877 (6th Cir. 2006), cert. denied, 127 S. Ct. (2006); U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 226-234 (1st Cir.), cert. denied, 543 U.S. 820 (2004); In re Genesis Health Ventures, Inc., 112 Fed. Appx. 140, 144 (3rd Cir. 2004); U.S. ex rel. Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1308-1309 (11th Cir. 2002), cert. denied, 537 U.S. 1105 (2003).