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War Stories: A History of the *Qui Tam* Provisions of the False Claims Act, The 1986 Amendments to the False Claims Act, and Their Application in the *United States ex rel. Gravitt v. General Electric Co.* Litigation

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"There is no kind of dishonesty into which otherwise good people move easily and frequently fall than that of defrauding the government."

—Benjamin Franklin
(1706-1790)

I. THE ORIGINS AND DEVELOPMENT OF THE FALSE CLAIMS ACT

In 1863, the United States of America was in deep trouble. Rebel forces again threatened to move on Washington, D.C.[1] Although vastly outnumbered in terms of men and materials, rebel armies had fought the Union army to a standstill in virtually every campaign.[2] The situation was so grave that Abraham Lincoln confided to several of his colleagues that he did not believe he could win re-election for President of the United States in the following year.[3]

Amidst this backdrop, the Congress of the United States was receiving alarming reports from the battlefield.[4] These reports concerned Union soldiers opening crates of muskets only to find them filled with sawdust instead of arms.[5] Reports of the same horses and mules being sold to the United States cavalry three and four times further demonstrated a serious problem with war profiteers.[6] Not having a Federal Bureau of Investigation [herinafter FBI], a Department of Justice [hereinafter DOJ], a Defense Contract Audit Agency, or virtually any other governmental investigative agency, Abraham Lincoln turned to a solution which he knew best. As a small town lawyer, Lincoln knew that the private bar could be an enormous ally to the government in combating defense procurement fraud.[7]

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1. "A terrible weariness afflicted the North. Newspapers and politicians decried the lack of victories, the terrible cost of the war, the incompetence of Lincoln. The President privately despaired of his chances for reelection, and began laying plans for turning over to his successor a fatally diminished office—President of the Divided States." THOMAS A. LEWIS, THE GUNS OF CEDAR CREEK 24 (1988).
2. *Id.*
3. *Id.*
4. 132 CONG. REC. H6482 (daily ed. Sept. 9, 1986) (statement of Rep. Berman).
5. *Id.*
6. *Id.*
7. *Id.*

A. *The Enactment of the False Claims Act: Commissioning the Citizenry to Combat Defense Contractor Fraud*

In response to the deprivations suffered by the Union Army, Congress passed the False Claims Act of 1863.[8] The Act originally provided both civil and criminal penalties for fraudulent claims submitted to the United States.[9] In 1874, the civil sanctions were codified in one section and the criminal provisions were separately enacted in another.[10] The Act was designed to combat defense procurement fraud by providing to any private citizen the right to file a civil action against anyone who had submitted a false claim for payment to the United States Government.[11] Under the Act, the private citizen became, in effect, a bounty hunter or private attorney general. The private citizen was rewarded for his efforts in prosecuting the civil suit by receiving fifty percent of all the monies recovered in the suit.[12] In addition, the Act provided that the defendant who defrauded the United States must pay double damages caused by the fraud as well as a $2,000 civil penalty for every false claim submitted to the United States.[13] The civil penalty was collectible even if no proof existed of actual loss or damage caused by the fraudulent claim.[14] In addition,

8. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. The False Claims Act was re-enacted as sections 3490-94 of the Revised Statute, U.S. REV. STAT. tit. 36, §§ 3490-94 (1875), section 5438, *id.* tit. 70, § 5438, which was later codified under sections 231 to 235 of title 31 of the United States Code, 31 U.S.C. §§ 231-35 (1976), and finally recodified in 1982 under sections 3729 to 3731 of title 31 of the United States Code, 31 U.S.C. §§ 3729-31 (1982). Although enacted in response to deprivations suffered at the hands of profiteers during the Civil War, the False Claims Act addressed a problem of defense contractor fraud which had plagued the United States Army seventy years earlier. *Id.* In 1791, during a campaign against Indians in the Northwest Territory, General Arthur St. Clair led United States forces in a disastrous, ill-equipped campaign against allied Indian forces led by Shawnee war chief, Blue Jacket, and Miami war chief, Little Turtle. BIL GILBERT, GOD GAVE US THIS COUNTRY 145-52 (1989). After a month of cutting through the Ohio forests, the U.S. troops were engaged by the Indian forces. *Id.* at 149. The battle lasted just three hours and claimed the lives of 623 Army personnel, with 271 severely wounded, compared to 21 Indians killed and 40 wounded. *Id.* at 152. No doubt a contributing factor to the decisive Indian victory, which "stands as the most one-sided defeat ever suffered by the United States [A]rmy," was the fraud practiced upon the Army by unscrupulous profiteers. *Id.* Among the deprivations suffered by U.S. troops were boots that came apart at the seams after less than a week, and tents which were not waterproofed as required by Army specifications. *Id.* at 146. Ironically, one of the principal profiteers was William Duer, former Secretary of the United States Treasury, and, at the time of the 1791 campaign, a partner of the Secretary of War, Henry Knox, in a New England real-estate deal. *Id.* at 145.

9. Act of Mar. 2, 1863, *supra* note 8.

10. U.S. REV. STAT. tit. 36, § 3490 (1875) (civil); U.S. REV. STAT. tit. 70, § 5438 (1875) (current version at 31 U.S.C. §§ 3729, 3730 (1988)) (criminal).

11. 132 CONG. REC. H6482, *supra* note 4.

12. Act of Mar. 2, 1863, *supra* note 8, § 6, 12 Stat. at 698.

13. *Id.* § 3, 12 Stat. at 698.

14. Fleming v. United States, 336 F.2d 475, 478 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965); United States v. Rohleder, 157 F.2d 126, 129 (3d Cir. 1946).

multiple civil penalties could be awarded against the same contractor.[15]

The concept of using private citizens to recover money due the government was deeply embedded in English and American law. Such suits were known by the Latin phrase *qui tam pro domino rege quam pro si ipso in hac parte sequitur*, which translated means he "[w]ho sues on behalf of the King as well as for himself."[16] The First Continental Congress of the United States, which contained several individuals who participated in the drafting of the United States Constitution and the Bill of Rights, passed several statutes that contained *qui tam* provisions.[17] Such provisions also played an important role in English law.[18] Over the years, most *qui tam* provisions have been repealed; several provisions, however, continue to be carried in United States statutes.[19] Furthermore, Congress has recently considered *qui tam* legislation to address fraud in the wake of the savings and loan scandal.[20]

The original False Claims Act worked very well. As noted by one court in 1885:

> [The False Claims Act] is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory . . . that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting . . . under the strong stimulus of personal ill will or the hope of gain.[21]

Under the original Act, any private citizen[22] who brought the *qui tam* action had a vested right in the outcome of the lawsuit which could not be preempted or voided by any government action.[23] That vested right was to change dramatically in 1943.

15. United States v. Bornstein, 423 U.S. 303, 313 (1976); Toepleman v. United States, 263 F.2d 697, 699 (4th Cir. 1959), *cert. denied*, 359 U.S. 989 (1959).

16. BLACK'S LAW DICTIONARY 1251 (6th ed. 1990).

17. *See, e.g.*, Adams v. Woods, 6 U.S. (2 Cranch) 336, 341 (1805). "Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt [by a *qui tam* plaintiff] as well as by information [by a public prosecutor]." *Id.*

18. *See* 2 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 142-47 (1956). *See also* Dan D. Pitzer, Note, *The* Qui Tam *Doctrine: A Comparative Analysis of its Application in the United States and the British Commonwealth*, 7 TEX. INT'L L.J. 415, 417-18 (1972).

19. 46 U.S.C. app. § 723 (1988) (forfeiture of vessels taking undersea treasure from the Florida coast to foreign nations); Act of Jul. 8, 1870, ch. 230, 16 Stat. 198, 203 (current version at 35 U.S.C. § 292(b) (1988)) (false making of patented articles); Act of Jun. 30, 1834, ch. 161, § 27, 4 Stat. 729, 733-34 (current version at 25 U.S.C. § 201 (1988)) (regulating Indian trade).

20. 136 CONG. REC. S9477 (daily ed. Jul. 11, 1990) (statement of Sen. Simon).

21. United States v. Griswold, 24 F. 361, 366 (D. Or. 1885).

22. Private citizens who brought *qui tam* actions were known as relators. United States v. Griswold, 30 F. 762, 763 (C.C.D. Or. 1887).

23. *Id.*

B. *The 1943 Amendments to the False Claims Act: The Dawn of the Imperial Perspective on Combating Public Contracting Fraud*

In 1943, the United States Government, in preparing for World War II, was again besieged by defense contract profiteers. However, in contrast to the Civil War, the Attorney General of the United States was vigorously prosecuting war profiteers.[24] A few enterprising citizens with knowledge of the False Claims Act waited in federal courthouses for criminal indictments to be brought against defense contractors, then immediately filed civil actions pursuant to the Act against the same contractors.[25] These civil actions were only based on information that was contained in the original indictment or in newspaper articles reporting the indictment.[26]

Such actions, known as "parasitic lawsuits," enraged Attorney General Francis Biddle.[27] Attorney General Biddle went to Congress and demanded that the *qui tam* provisions of the False Claims Act be repealed.[28] He pointed to the Supreme Court's 1943 decision in *United States ex rel. Marcus v. Hess*[29] as an example of such a lawsuit.[30] The *Marcus* case, however, worked exactly as the original False Claims Act was designed. The United States Government had criminally prosecuted a defense contractor and recovered a $54,000 criminal fine.[31] In addition, the private citizen relator, who had brought the civil suit under the Act, recovered another $315,000 for the government.[32]

Citing *Marcus*, the House of Representatives moved to repeal the *qui tam* provisions of the False Claims Act of 1863.[33] The United States Senate, however, opted for a less drastic, yet significant change in the *qui tam* provisions.[34] The Senate version was adopted and the Act incurred its first substantial amendment in eighty years.[35]

The purpose of the 1943 amendment was twofold. First, the Act was amended to discourage private litigants from initiating *qui tam*

24. *See generally* S. REP. No. 345, 99th Cong., 2d Sess. 10-12, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5275-76.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. 317 U.S. 537 (1943), *reh'g denied*, 318 U.S. 799 (1943).
30. S. REP. No. 345, *supra* note 24, 1986 U.S.C.C.A.N. at 5275-76.
31. *Marcus*, 317 U.S. at 545.
32. *Id.* at 540.
33. S. REP. No. 345, *supra* note 24, 1986 U.S.C.C.A.N. at 5276.

actions based on newspaper reports of indictments and investigations.[36] Second, the Act was redesigned to eliminate races to the courthouse between the government and private litigants.[37]

Under the 1943 amendment, "parasitic lawsuits" were no longer tolerated. The Act now specifically provided that if the government had any knowledge of the fraud at the time the action was initiated, the private citizens' lawsuit had to be dismissed.[38] In addition, the amendment required any citizen, who desired to bring a False Claims Act suit, to present all the evidence to the United States Government at the time the lawsuit was filed.[39] The government had sixty days to decide whether to prosecute the case.[40] If the government elected to prosecute, the *qui tam* relator was relegated to the sidelines as an observer, while the case was handled by the DOJ.[41] If the government elected not to prosecute, the *qui tam* relator could then continue the action in the name of the United States.[42] However, all expenses incurred in the prosecution by the relator were the responsibility of the relator and not the United States.[43]

The 1943 amendments also substantially curtailed the reward for the relator. If the United States took over the case, the relator could recover no more than ten percent of the amount recovered by the government.[44] If the relator proceeded with the action after the declination by the government, he could recover no more than twenty-five percent of the damages.[45] Under either scenario, a court was left with absolute discretion as to awarding a lower amount or no amount at all to the relator. Thus, the guaranteed fifty percent bounty of all funds recovered was eliminated from the statute.[46]

The 1943 amendments virtually eliminated the *qui tam* suit as an effective weapon in combating fraud upon the United States Government. While the elimination of the guaranteed bounty may well have discouraged citizens who might have otherwise brought such a suit,

36. United States *ex rel.* Bayarsky v. Brooks, 210 F.2d 257, 259 (3d Cir. 1954); United States *ex rel.* Sherr v. Anaconda Wire & Cable Co., 57 F. Supp. 106, 107-08 (S.D.N.Y. 1944), *aff'd*, 149 F.2d 680 (2d Cir. 1945), *and cert. denied*, 326 U.S. 762 (1945).
37. United States v. Baker-Lockwood Mfg. Co., 138 F.2d 48, 53 (8th Cir. 1943), *vacated*, 321 U.S. 744 (1944).
38. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (codified as amended at 31 U.S.C. § 232 (1976)).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*

the most devastating effect of the amendment was the provision that no suit could be brought unless the government lacked all knowledge of the fraud. Defense contractors were almost always able to find a government official somewhere who had knowledge of the fraudulent activities in which the contractor was engaging. In addition, decisions by several courts indicated that even if the government's knowledge of the fraud came as a result of whistleblowing by the relator, if the relator had not first filed his *qui tam* suit, the government was deemed to have knowledge of the fraud and the suit was barred.[47] Congress, thus, had moved from a situation in which the private citizen controlled the civil action against the defrauding contractor to the opposite extreme. The government, in taking over the prosecution and eliminating the relator, had total control over the action. The untoward results of this change were acknowledged by Congress in the legislative history of the 1986 amendments, which noted that government authorities often lacked the political will or the resources to combat fraud practiced by large defense contractors.[48]

Another factor in the destruction of the *qui tam* action as a viable tool for combating fraud was the decision by many courts of appeals that such civil actions be proven by "clear and convincing" evidence rather than by the less stringent "preponderance of the evidence" standard applicable to most civil actions.[49] This issue will be discussed in greater detail in connection with the 1986 amendments to the False Claims Act.

C. *The Gravitt Case: A Prelude to the 1986 Amendments to the False Claims Act*

The largest military peacetime buildup in the United States occurred in the 1980's.[50] Like the Civil War and World War II, the vast sums spent on military hardware presented enormous opportunities for defense contractors to cheat the government. Once again, Congress was receiving alarming reports, although not from the battlefield. The

47. United States *ex rel.* Wis. v. Dean, 729 F.2d 1100, 1103 (7th Cir. 1984); Safir v. Blackwell, 579 F.2d 742, 746 (2d Cir. 1978), *cert. denied*, 441 U.S. 943 (1979); Pettis *ex rel.* United States v. Morrison-Knudsen Co., 577 F.2d 668, 669 (9th Cir. 1978); United States v. Aster, 275 F.2d 281, 283 (3d Cir. 1960), *cert. denied*, 364 U.S. 894 (1960); United States *ex rel.* Lapin v. IBM, 490 F. Supp. 244, 246 (D. Haw. 1980).

48. 132 CONG. REC. H6483 (daily ed. Sept. 9, 1986) (statement of Rep. Bedell). *See* S. REP. No. 345, *supra* note 24, 1986 U.S.C.C.A.N. at 5269, 5273.

49. *Compare* United States v. Ueber, 299 F.2d 310, 314 (6th Cir. 1962) (requiring clear and convincing evidence) *and* United States v. Shapleigh, 54 F. 126, 134 (8th Cir. 1893) (requiring proof beyond a reasonable doubt) *with* Federal Crop Ins. Corp. v. Hester, 765 F.2d 723, 727 (8th Cir. 1985) (applying a preponderance of the evidence standard).

50. 136 CONG. REC. S15459 (daily ed. Oct. 17, 1990) (statement of Sen. Sasser).

reports centered on $400 hammers and $7,000 coffee pots.[51] Against this backdrop, in 1984, a private citizen, sickened by his personal observations of defense contracting fraud at the General Electric aircraft engine facility in Evendale, Ohio, instituted an action under the False Claims Act.

John M. Gravitt, a decorated Vietnam War Veteran, had been a machinist foreman for the General Electric Company.[52] Mr. Gravitt had been "laid-off" by General Electric in the summer of 1983 after he had submitted a detailed, written complaint to the vice-president in charge of operations concerning time card cheating at the Evendale General Electric facility.[53] Mr. Gravitt had been instructed by his superiors to falsify time vouchers used by General Electric to record the number of hours spent by its workers on their assignments.[54] The time voucher falsification was not a subtle scheme. It largely consisted of either the hourly employee mischarging time to the wrong job, or a superior altering the time card by writing in a new assignment number over the old one after the card was turned in.[55] Both practices clearly violated government accounting procedures and allowed General Electric to shift labor costs. At times, the effect was to shift costs from commercial work to various government projects such as the B1 Bomber program.[56]

Mr. Gravitt had opposed such practices and refused to participate in them.[57] He had been warned by his supervisors that his failure to "get with the program" would have dire consequences for him.[58] When he took his complaints up the chain of command at General Electric, he learned that his superiors either ignored what was occurring or supported and participated in the scheme.[59]

In October of 1984, Mr. Gravitt filed a *qui tam* suit in the United States District Court for the Southern District of Ohio.[60] The case was assigned to Chief Judge Carl B. Rubin. Despite intense lobbying

51. 131 CONG. REC. H5135 (daily ed. Jun. 27, 1985) (statement of Rep. Weiss).

52. *A Bill to Amend the False Claim Act, and Title 18 of the United States Code Regarding Penalties for False Claims, and for Other Purposes: Hearing on S. 1562 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (statement of John M. Gravitt).

53. *Id.* at 51.

54. *Id.* at 50-51.

55. *Id.*, 63-79.

56. *Id.*

57. *Id.*

58. Interview with John M. Gravitt, former employee of the General Electric Co., in Cincinnati, Ohio (Sept. 1984).

59. *Id.*

60. Gravitt v. General Elec. Co., 680 F. Supp. 1162 (S.D. Ohio 1988), *appeal dismissed*, 848 F.2d 190 (6th Cir. 1988), *and cert. denied*, 488 U.S. 901 (1988).

by the defendant, the DOJ entered the case in December of 1984. The DOJ obtained a stay of the civil discovery initiated by Mr. Gravitt and began a criminal investigation into the charges.[61]

The DOJ learned that some United States Air Force personnel may have been aware of the misvouchering as a result of the intra-company complaints initiated by Mr. Gravitt.[62] The DOJ proceeded with its criminal investigation and obtained a further stay of civil discovery.[63] The DOJ took no civil discovery itself.[64] Having stayed Mr. Gravitt's discovery and deposition requests, the DOJ did not take a single deposition or statement under oath and did not serve any document requests or interrogatories upon General Electric.[65]

In the summer of 1985, Judge Rubin refused to grant any further stay of discovery to the DOJ and set the case for trial on his November 1985 docket. At this point, the DOJ ceased its criminal investigation and negotiated a settlement agreement with General Electric for $234,000.[66] The negotiation consisted of General Electric offering to pay a $2,000 civil penalty for each of 117 "public vouchers" submitted to the government for payment during the period 1981 to 1983, some of which may have been supported by work done at the shop where Mr. Gravitt had been employed.[67]

The DOJ accepted General Electric's offer and notified Mr. Gravitt that the case had been settled.[68] The DOJ refused to provide Mr. Gravitt with any back-up information to support the settlement until ordered to do so by the court.[69] They warned Mr. Gravitt that if he resisted the settlement in any way, the DOJ would make sure that he would not receive a ten percent reward for bringing the case.[70] In addition, Mr. Gravitt would be forced to pay for the DOJ's expenses in obtaining approval of the settlement.[71]

The DOJ's threats and lack of civil discovery were brought to Judge Rubin's attention. Judge Rubin promptly scheduled a hearing

61. *Id.* at 1163-64.
62. Affidavit of Paul D. Lynch, Attachment to United States' Proffer, Gravitt v. General Elec. Co., No. C-1-84-1610 (S.D. Ohio 1988) (Doc. 43).
63. *Gravitt*, 680 F. Supp. at 1163.
64. *Id.* at 1164.
65. *Id.*
66. *Id.* at 1165.
67. Affidavit of Vincent B. Terlep, Jr., Attachment of United States' Proffer, ¶¶ 40-41, Gravitt v. General Elec. Co., No. C-1-84-1610 (S.D. Ohio 1988) (Doc. 43).
68. *Gravitt*, 680 F. Supp. at 1165.
69. Order dated Mar. 14, 1986, Gravitt v. General Elec. Co., No. C-1-84-1610 (S.D. Ohio 1988) (Doc. 35).
70. Meeting between John M. Gravitt, his counsel, and DOJ representatives in Cincinnati, Ohio (Nov. 22, 1985).
71. *Id.*

to determine if the DOJ and the defendant could settle the case. With respect to *qui tam* actions, the False Claims Act provides that "an action may be dismissed only if the court and the Attorney General give written consent and their reasons for consenting."[72] However, the DOJ and General Electric argued that they could settle the dispute without the approval of the court or the knowledge or consent of the relator. The DOJ and General Electric filed a written dismissal of Mr. Gravitt's action moments before the hearing commenced.

After the hearing, Judge Rubin set aside the dismissal entry and settlement. He urged the parties to seek an immediate appeal to the United States Court of Appeals for the Sixth Circuit. Although the relator, General Electric, and DOJ all appealed, the Sixth Circuit refused to accept the certified appeal and returned the matter to Judge Rubin for further proceedings.

At this point, Judge Rubin appointed a United States Magistrate to serve as a special master to hold hearings, determine whether the $234,000 settlement should be accepted, and determine whether the action should be dismissed.[73] Mr. Gravitt was granted status as a relator and permitted to conduct very limited discovery into the merits of the settlement. Mr. Gravitt deposed the DOJ attorney-in-charge, an agent of the Defense Control Audit Agency, and the chief investigator of the Federal Bureau of Investigation. Mr. Gravitt's attempt to depose one of General Electric's managers, who participated in the fraud, was thwarted when the deponent asserted his Fifth Amendment privilege against self-incrimination to virtually every question.[74] The DOJ refused Mr. Gravitt's request to grant the deponent immunity from prosecution even though the DOJ claimed that the criminal investigation had ceased.[75]

Meanwhile, both Mr. Gravitt and his counsel were subpoened to appear and testify before panels of the United States Senate and House of Representatives, who were considering amendments to the False Claims Act in light of mounting evidence of widespread defense contract cheating.[76] Mr. Gravitt's testimony regarding the *qui tam* action was the only evidence Congress heard by an individual who faced the hurdles of the 1943 amendments.

72. 31 U.S.C. § 3730(b)(1) (1988).
73. *Gravitt*, 680 F. Supp. at 1163.
74. *Id.* at 1164.
75. *Id.*
76. *Hearings on S. 1562 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 9th Cong., 1st Sess. 49, 53 (1985) (statements of John M. Gravitt and James B. Helmer, Jr., Esq.); *Hearings on H.R. 4827 Before the Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986) (statements of John M. Gravitt and James B. Helmer, Jr., Esq.).

D. *The Effect of the 1986 Amendments on the Gravitt Case: Recommissioning the Citizenry to Fight Fraud Against the Government*

Congress amended the False Claims Act and President Reagan signed the amendments into law in October of 1986.[77] Subsequent to the 1986 amendments taking effect, the special master in the *Gravitt* case issued an opinion.[78] The magistrate approved the settlement between the DOJ and General Electric, and ordered that the case be dismissed.[79] Once again, Mr. Gravitt objected, and Judge Rubin held a hearing, where he heard testimony from a special agent of the FBI.[80] After a two-day hearing, Judge Rubin ruled that the $234,000 settlement proposed by General Electric, which was accepted by the DOJ, was inadequate.[81] Accordingly, the *Gravitt* case was restored to Judge Rubin's trial docket, largely because of the 1986 amendments and their retroactive application. General Electric appealed Judge Rubin's order to the Sixth Circuit for a second time, and the Sixth Circuit dismissed the appeal.[82] General Electric unsuccessfully sought a writ of certiorari in the United States Supreme Court.[83] A settlement was ultimately reached between General Electric and the DOJ.[84]

II. The Substance of the 1986 Amendments and Other Recent Amendments to the False Claims Act

The 1986 amendments strengthened the False Claims Act in several significant respects. First, the amendments made clear that the applicable standard of proof was a preponderance of the evidence and not a clear and convincing or clear and unequivocal standard as applied by some courts.[85] Second, the amendments clarified the degree of knowledge and intent necessary to file a claim under the False Claims Act.[86] Determining the degree of knowledge and intent eliminated an existing conflict among the circuit courts of appeals as to whether a specific intent to defraud was necessary to support a claim.[87] Third, the 1986 amendments increased the *qui tam* relator's role in

77. 31 U.S.C. §§ 3729-31 (Supp. IV 1986).
78. *Gravitt*, 680 F. Supp. at 1163.
79. *Id.*
80. *Id.* at 1163-64.
81. *Id.* at 1165.
82. Gravitt v. General Elec. Co., 848 F.2d 190 (6th Cir. 1988), *cert. denied*, 488 U.S. 901 (1988).
83. General Elec. Co. v. United States, 488 U.S. 901 (1988).
84. The Gravitt action settled in March, 1989, together with three other *qui tam* False Claims Act cases against General Electric for a total of $3.5 million. Mr. Gravitt and the other whistleblowers shared an award to *qui tam* plaintiffs of $770,000.
85. S. Rep. No. 345, *supra* note 24, 1986 U.S.C.C.A.N. at 5272.
86. *Id.*
87. *Id.*

actions in which the government intervened as well as the relator's share of proceeds recovered.[88] Finally, the 1986 amendments increased the damages and penalties recoverable under the False Claims Act.[89]

A. *Elimination of the "Specific Intent to Defraud" Requirement to Prove a False Claims Act Violation: Decriminalizing Civil False Claim Act Cases*

Prior to the 1986 amendments, the False Claims Act held a person liable who "knowingly" intended to defraud the government.[90] Courts, which construed the term "knowingly" in these provisions, disagreed as to the requisite degree of knowledge necessary to prove a False Claims Act violation, and thus created a split of authority among the federal circuit courts of appeals.[91] In some circuits, the knowledge requirement was elevated to a specific intent to defraud standard.[92] To resolve the conflict and prevent further judicial misconstruction of the knowledge requirement, Congress amended the statute. The amended False Claims Act states:

> (b) Knowing and knowingly defined
> For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—
> (1) has actual knowledge of the information;
> (2) acts in deliberate ignorance of the truth or falsity of the information; or
> (3) acts in reckless disregard of the truth or falsity of the information.[93]

Currently, no proof of specific intent to defraud is required.[94]

B. *Increased Damages and Penalties Provisions: Boosting the Bounty*

Prior to the 1986 amendments, the False Claims Act provided that fraudulent public contractors were "liable to the . . . [g]overnment for a civil penalty of $2,000, [and] an amount equal to 2 times the

88. 31 U.S.C. § 3730 (Supp. IV 1986).
89. *Id.* §§ 3730-31.
90. Section 3729 of the 1982 amendments to the False Claims Act establishes liability for a person who:
> (1) [K]nowingly presents, or causes to be presented, to an officer or employee of the [g]overnment or a member of an armed force a false or fraudulent claim for payment or approval;
> (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;
> (3) conspires to defraud the [g]overnment by getting a false or fraudulent claim allowed or paid.

31 U.S.C. § 3729(1)-(3) (1982).
91. *Compare* United States v. Hughes, 585 F.2d 284, 286-88 (7th Cir. 1978) (no specific intent to defraud required) *with* United States v. Mead, 426 F.2d 118, 122-23 (9th Cir. 1970) (requiring specific intent to defraud).
92. *Mead*, 426 F.2d at 122-23.
93. 31 U.S.C. § 3729(b) (Supp. IV 1986).
94. *Id.*

amount of damages the [g]overnment sustain[ed], because of the act of that person and costs of the civil action . . . ."[95] Up until 1986, the damages and penalty provisions of the False Claims Act had not been amended since the adoption of the Act in 1863. In considering the 1986 amendments, Congress recognized that the damages and penalties provisions had become outdated and served as a slight deterrence to unscrupulous contractors.[96] Consequently, the 1986 amendments provide that a violator of the False Claims Act "is liable to the . . . [g]overnment for a civil penalty of not less than $5,000 and not more than $10,000 plus 3 times the amount of damages which the [g]overnment sustains because of the act[s] of that person . . . ."[97] While the 1986 amendments provide that violators may limit their liability to double instead of treble damages, provided that they meet stringent self-reporting requirements, the amendments significantly increase a violator's liability for damages and penalties.[98]

C. *Enhancing the* Qui Tam *Provisions of the False Claims Act: Recommissioning the Invisible Army*

1. *The Continuing Role of the Relator in Actions in Which the Department of Justice Intervenes*

The 1986 amendments altered the *qui tam* provisions of the False Claims Act in several other significant respects. First, prior to the 1986 amendments, the *qui tam* relator had no continuing role if the DOJ took over the prosecution of the action.[99] Indeed, the only check or balance upon the DOJ's conduct prior to the 1986 amendments was the statutory requirement that such actions be dismissed only with the written consent of the court and the attorney general.[100] While this provision certainly implied that the court should entertain objections from the *qui tam* relator prior to issuing such consent, the former version of the statute did not expressly confer a right to object.[101] This ambiguity in the former version of the statute became

95. 31 U.S.C. § 3729 (1982).
96. 132 CONG. REC. H6478-79 (daily ed. Sept. 9, 1986) (statement of Rep. Glickman).
97. 31 U.S.C. § 3729(a)(7) (Supp. IV 1986). The 1986 amendments also provide that the court has the discretion to assess only double damages for False Claims Act violations if the violator meets several standards of self-reporting and cooperates with the government in the investigation of such claims. *Id.* § 3729(a)(7)(C).
98. *Id.* §§ 3729-30.
99. 31 U.S.C. § 3730(b)(3) (1982).
100. *Id.* § 3730(b)(1).
101. *Id.* Despite the clarification of the relator's role in settlement of *qui tam* actions, some controversy remains. In United States *ex rel.* McCoy v. California Medical Review, Inc., 133 F.R.D. 143 (N.D. Cal. 1990), the *qui tam* relators objected to a settlement proposed by the government and the defendants who sought an *in camera* hearing with a sealed record. *Id.* at 144. The court disagreed, holding that the 1986 amendments were intended to give *qui tam* relators a significant role in settlement hearings and an attendant right of limited discovery to give meaning to such role. *Id.* at 148-49.

an issue in the *Gravitt* case when both the DOJ and General Electric argued that the relator had no standing to object to the proposed settlement. Judge Rubin, however, precluded further debate and resolved the standing issue by granting the relator's motion to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure.

The 1986 amendments resolved this issue by explicitly acknowledging the relator's continuing role in actions taken over by the DOJ.[102] Specifically, the amendments provide that if the DOJ takes over the action, the DOJ assumes primary responsibility for prosecuting the action and will not be bound by any act of the *qui tam* relator.[103] The amendments further provide that the relator remains a party to the action, notwithstanding the DOJ's intervention, subject to several limitations.[104] These limitations include a provision that the government may dismiss the action over the relator's objections if the relator is notified of the motion to dismiss and the court has provided an opportunity for a hearing.[105] Further, the statute provides that the government may settle the action over the relator's objections if the court determines after a hearing that the proposed settlement is fair, adequate and reasonable.[106] Other limitations on the relator's role include court-imposed discretionary limitations. Either the government or the defendant must show that such limitations are necessary to prevent harassment, undue burden, delay or unnecessary expense, and in the case of the government, interference with the prosecution of the case.[107]

The 1986 amendments thus serve the policy objective of encouraging *qui tam* relators to come forward and prosecute the action. In doing so, damages and penalties are recovered to the federal treasury for fraud practiced on the taxpayer. Moreover, the relator is no longer relegated to an inferior role when the government intervenes in a False Claims Act proceeding. Only when a need for limitation is demonstrated to the court will the relator's participation as a party be inhibited.[108]

102. 31 U.S.C. § 3730 (Supp. IV 1986).
103. *Id.* § 3730(c)(1).
104. *Id.* § 3730(c).
105. *Id.* § 3730(c)(2)(A).
106. *Id.* § 3730(c)(2)(B).
107. *Id.* § 3730(c)(2)(C), (D).
108. The careful balance which the Act strikes between giving the relator a sufficient role to act as a spur and to supplement governmental enforcement, and leaving enough control in the DOJ to permit it to fulfill its duties to enforce the law, gains constitutional proportions when False Claims Act defendants claim that the Act violates the Separation of Powers Clause of the United States Constitution. *See* United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1086 (C.D. Cal. 1989).

2. *Increasing the Relator's Share of the Proceeds*

The 1986 amendments also increased the relator's share of the proceeds in a *qui tam* action. Under the former statute, a court had the discretion to award the relator an amount not greater than ten percent of the proceeds if the government conducted the action, and not greater than twenty-five percent if the government did not intervene.[109] Furthermore, the former statute guaranteed no minimum share of the proceeds, and the decision to award the relator any amount at all was left to the court's discretion. The 1986 amendments increase the relator's stake and establish minimum percentages of recovery. A relator shall be awarded not less than fifteen and not more than twenty-five percent of the proceeds if the government conducts the action.[110] If the government does not proceed with the action, then a relator shall be awarded not less than twenty-five or more than thirty percent of the proceeds.[111]

3. *Eliminating the Jurisdictional Bar of Prior Government Knowledge*

The most significant and controversial aspect of the 1986 amendments is the elimination of what may be termed the "prior government knowledge" jurisdictional bar. The 1943 amendments to the Act created a jurisdictional bar to any *qui tam* action that the government did not join, where the action was "based on evidence or information the [g]overnment had when the action was brought."[112] While this jurisdictional bar was enacted to cure the problem of "parasitic" lawsuits brought by relators who did little more than recast criminal indictments into civil actions,[113] the cure proved worse than the disease. Under this ill-defined jurisdictional bar, contractors could make vague and limited disclosures to government officials which would support a claim of prior government knowledge, thereby discouraging

109. 31 U.S.C. § 3730(c)(1), (2) (1982).

110. 31 U.S.C. § 3730(d)(1), (2) (Supp. IV 1986).

111. *Id.* The 1986 amendments also provide for a discretionary award of not more than ten percent of the proceeds to the relator who brings an action "based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media . . . ." *Id.* § 3730(d)(1). When read in conjunction with section 3730(e)(4)(A), it is apparent that this ten percent maximum figure will apply to a limited number of marginal "original source" *qui tam* plaintiffs, who serve as a significant but not a primary source of information concerning the fraud.

112. 31 U.S.C. § 3730(b)(4) (1982).

113. *See* S. REP. No. 345, *supra* note 24, 1986 U.S.C.C.A.N. at 5272.

any investigation by the government.[114] Similarly, the 1943 amendments permitted government contractors to take advantage of overburdened federal agencies by providing a modicum of information to officials who had neither the time nor the resources to investigate and prosecute the fraud. Under the old statute, by taking advantage of these practical realities, unscrupulous contractors could immunize themselves from any *qui tam* suit.

Moreover, the jurisdictional bar prevented *qui tam* actions by individuals who reported the fraud to the government before filing the action.[115] Since the bar did not distinguish between the government's prior knowledge from a third party or from the *qui tam* relator himself, the jurisdictional bar was applied in either situation.[116] The breadth of the bar was illustrated by one court, which held that the government's intervention in an existing *qui tam* action would not confer jurisdiction upon the court.[117] This, however, seems to be in direct contradiction to the express terms of the statute.[118]

The 1986 amendments addressed the unreasonableness of the 1943 amendments and significantly curtailed the jurisdictional bar of prior government knowledge.[119] The 1986 amendments apply only to

114. *See* United States *ex rel.* Weinberger v. Florida, 615 F.2d 1370, 1371 (5th Cir. 1980) (information or evidence in the possession of the United States need not be "the mirror image" of information upon which a *qui tam* relator bases suit to invoke jurisdictional bar; rather, jurisdictional bar is invoked if the government had knowledge sufficient to enable it to conduct an investigation and decide whether to prosecute).

115. 31 U.S.C. § 3730(b)(4) (1982).

116. *See* Pettis *ex rel.* United States v. Morrison-Knudsen Co., 577 F.2d 668, 669 (9th Cir. 1978); United States *ex rel.* Lapin v. IBM, 490 F. Supp. 244, 248 (D. Haw. 1980).

117. United States *ex rel.* Sherr v. Anaconda Wire & Cable Co., 57 F. Supp. 106, 108-09 (S.D.N.Y. 1944), *aff'd*, 149 F.2d 680 (2d Cir. 1945), *and cert. denied*, 326 U.S. 762 (1945).

118. *Compare Sherr*, 57 F. Supp. at 108-09 *with* 31 U.S.C. § 3730(b)(4) (1982), which provided that "*/u/nless the [g]overnment proceeds with the action*, the court shall dismiss an action brought by the person [up]on discovering the action is based on evidence or information the [g]overnment had when the action was brought." (emphasis added).

119. The False Claims Act provisions concerning this jurisdictional bar provides as follows:

> (e) CERTAIN ACTIONS BARRED.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.
>
> (2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a [m]ember of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the [g]overnment when the action was brought.
>
> (b) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in section 201(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).
>
> (3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the [g]overnment is already a party.
>
> (4)(A) No court shall have jurisdiction over an action under this section based

actions brought by former or present members of the armed forces against another member of the armed forces, or against members of Congress, the judiciary, or senior and executive branch officials.[120] In addition, actions may be brought if the claim is based on public disclosure, where the relator is not an original source of the information as defined by the Act.[121] The 1986 amendments, thus, remain faithful to the spirit of the 1943 amendments in preventing parasitic lawsuits. However, the 1986 amendments, unlike the 1943 amendments, fulfill that purpose without frustrating the goals of the *qui tam* provisions themselves.

D. The 1988 Amendments to the False Claims Act

The False Claims Act was amended again in 1988.[122] Aside from several technical changes, the 1988 amendments added the following paragraph to section 3730(d) of the United States Code:

> Whether or not the [g]overnment proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the [DOJ].[123]

The legislative history makes clear that the 1988 amendments were intended to eliminate a guaranteed share of the recovery for a *qui tam* plaintiff who was the "principal architect" of a scheme to defraud the government. The 1988 amendments also eliminate any share for a *qui tam* plaintiff who was convicted of criminal conduct for having any part in the fraudulent practice at issue.[124] The amendments also reaffirm congressional acknowledgment that it is necessary to grant participants a benefit in order to encourage the disclosure of fraud. Additionally, congressional intent emphasizes that the 1988 amendments are to apply narrowly, and not to *qui tam* plaintiffs with minor roles in the false claims conduct.[125]

upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the [g]overnment before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(1)-(4) (Supp. IV 1986).

120. *Id.*
121. *Id.*
122. 31 U.S.C. § 3730(d)(3) (1988).
123. *Id.*

III. Government Contractors' Counterattacks on the 1986 Amendments to the False Claims Act

The 1986 amendments to the False Claims Act dramatically transformed the circumstances of fraudulent government contractors. Prior to the 1986 amendments, fraudulent contractors could immunize themselves from *qui tam* actions by making vague and limited disclosures to government officials, and then move to dismiss any subsequent *qui tam* action on the basis of "prior government knowledge."[126] Under the 1986 amendments, dishonest government contractors must now recognize that nearly anyone with knowledge of their fraudulent activity may proceed, and is given incentive to proceed, with a civil action to redress the fraud. Furthermore, government contractors face the prospect of treble damages and increased penalties if found liable of fraud, and cannot avoid liability by claiming a lack of specific intent to defraud.

With increased liability for fraud on the government, public contractors have adopted one short-term and two long-term strategies to avoid the impact of the 1986 amendments. The short-term strategy is to attack the retroactive application of the 1986 amendments.[127] The long-term strategies are to attack the constitutionality of the *qui tam* provisions and to seek further amendments to the Act to recreate some of the past advantages enjoyed by the contractors.[128] Each of these strategies has been largely unsuccessful to date.[129]

False Claims Act defendants have made broad attacks on the Act by urging that the imposition of civil remedies, after the imposition of criminal punishment, violates the constitutional Double Jeopardy

124. 134 Cong. Rec. S16704-05 (daily ed. Oct. 18, 1988) (statement of Sen. Grassley).
125. *Id.*
126. *See* Weinberger v. Florida, 615 F.2d 1370 (5th Cir. 1980).
127. *See* United States *ex rel.* Stinson v. Provident Life & Accident Ins. Co., 721 F. Supp. 1247, 1250-52 (S.D. Fla. 1989).
128. *See* United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615 (C.D. Cal. 1989).
129. *See infra* notes 132-281 and accompanying text.

Clause.[130] This argument has met with limited success as the Supreme Court has recognized that, in the rare case, the imposition of civil remedies provided for by the Act may violate the Double Jeopardy Clause.[131]

A. *Attacks on the Retroactive Application of the 1986 Amendments*

The arguments against the retroactive application of the 1986 amendments generally concern three areas: (1) The provisions which make clear that no specific intent to defraud is required to prove False Claims Act violations, (2) the increased damages and penalties provisions, and (3) the enhanced role of the relator created by the amendments to the *qui tam* provisions.

The analysis of whether the 1986 amendments should be applied retroactively is guided by the Supreme Court's decision in *Bradley v. Richmond School Board*.[132] The *Bradley* analysis begins with a presumption favoring the retroactive application of a statute.[133] In this regard, the Court, in *Bradley*, stated: "[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[134]

In determining whether "manifest injustice" will result from the retroactive application of a statute, the Supreme Court, in *Bradley*, applied a three-factor analysis.[135] The first factor concerns the nature of the parties. The retroactive application of a statute to matters concerning the individual rights of private parties is inappropriate when it will result in manifest injustice.[136] The second factor concerns the nature of the rights involved. Rights that have matured or become unconditional should be protected against the retroactive application of a new law.[137] The third factor concerns "new and unanticipated obligations" that result from retroactive application.[138] Parties should be protected from the retroactive application of a new law which would result in "new and unanticipated obligations" being imposed without notice or an opportunity to be heard.[139] The overwhelming

130. *See* United States v. Halper, 490 U.S. 435 (1989).
131. *Id.* at 440-52.
132. 416 U.S. 696 (1974).
133. *Id.* at 711.
134. *Id.*
135. *Id.* at 717.
136. *Id.* at 721.
137. *Id.* at 720.
138. *Id.*
139. *Id.*

majority of courts which have addressed the issue of retroactive application have applied the *Bradley* analysis and concluded that the various provisions are to be applied retroactively.

1. *Challenges to the Retroactive Application of the "No Specific Intent to Defraud" Provisions of the 1986 Amendments*

The 1986 amendments define the terms "knowing" and "knowingly" to eliminate any argument that a specific intent to defraud the government is a necessary element of a False Claims Act violation.[140] When enacting these definitions, the sponsors made clear that the legislative purpose was to redress judicial misconstruction of the level of knowledge required to establish a False Claims Act violation.[141] Despite the clearly expressed legislative intent, several defendants in recent cases have challenged the retroactive application of the provisions which define the terms "knowing" and "knowingly."[142]

Most challenges are advanced under the second and third factors in the *Bradley* "manifest injustice" analysis. Under the second factor, defendants urge that the amendment, which defines the term "knowingly," works a substantive change in the law. Defendants contend that the amendment violates the protection of rights which have matured or become unconditional.[143] Under the third *Bradley* factor, defendants argue that the amendment imposes new and unanticipated obligations upon persons who submit fraudulent claims to the government without a specific intent to defraud.[144] Both challenges have been universally rejected by the courts.

In rejecting the argument that the definitions of "knowing" and "knowingly" effect a change in the substantive rights of defendants and infringe upon rights which have matured or become unconditional, the courts emphasize that the definition of the requisite mental state does not effect a change in the law and does not affect substantive rights.[145] Not surprisingly, such an analysis relies heavily upon the legislative history which made clear that the purpose was to clarify the standard and prevent any further misconstruction of the degree of knowledge required to support a violation.[146]

140. 31 U.S.C. § 3729(b) (Supp. IV 1986).
141. *See* 132 CONG. REC. H6480 (daily ed. Sept. 9, 1986) (statement of Rep. Fish); 132 CONG. REC. S11243-44 (daily ed. Aug. 11, 1986) (statement of Sen. Grassley).
142. *See, e.g.*, United States *ex rel.* Stinson v. Provident Life & Accident Ins. Co., 721 F. Supp. 1247, 1250-52 (S.D. Fla. 1989); United States v. Ettrick Wood Prod., Inc., 683 F. Supp. 1262, 1267-68 (W.D. Wis. 1988).
143. *Stinson*, 721 F. Supp. at 1254-56.
144. *Ettrick Wood Prod.*, 683 F. Supp. at 1266-67.
145. *Id. See* United States *ex rel.* McCoy v. California Medical Review, Inc., 723 F. Supp. 1363, 1369-70 (N.D. Cal. 1989).
146. *See McCoy*, 723 F. Supp. at 1367 (citing S. REP. No. 345, *supra* note 24, 1986 U.S.C.C.A.N. at 5271-72).

The argument that the definitions of "knowing" and "knowingly" violate the third *Bradley* factor by imposing new and unanticipated obligations on defendants, without providing a meaningful opportunity to be heard, has likewise fallen on deaf ears.[147] In rejecting the argument, the leading case of *United States v. Hill*[148] focused on the lack of any "plausible suggestion of likely significant and justified reliance on the prior law. . . ."[149] The court flatly rejected the defendant's contention that the fraudulent conduct would have been altered or averted if the defendants had known that the government would not be required to prove a specific intent to defraud.[150]

However, the retroactive application of the amendments defining "knowing" and "knowingly" has been challenged successfully under a legal analysis different from that set forth in *Bradley*. In a False Claims Act civil action brought by the DOJ against an individual defendant, the United States Court of Appeals for the Sixth Circuit ruled that such amendments could not be applied retroactively.[151] In so ruling, the Sixth Circuit rejected *Bradley* as inconsistent with the United States Supreme Court's recent pronouncement in *Bowen v. Georgetown University Hospital*,[152] that retroactivity is not favored and that statutes should not be given retroactive application absent statutory language requiring the same.[153] The Sixth Circuit emphasized that, prior to the 1986 amendments, controlling authority required "a clear showing of the actual falsity of the claims that were submitted."[154] Thus, the holding in *Murphy* is limited in application to those circuits which required a showing of specific intent to defraud prior to the 1986 amendments.[155]

2. *Challenges to the Retroactive Application of the Increased Damages and Penalties Provisions of the 1986 Amendments*

Predictably, defendants in recent False Claims Act cases have argued against the retroactive application of the increased damages and penalties provisions of the 1986 amendments. While courts have

147. *See Stinson*, 721 F. Supp. at 1254-56; *Ettrick Wood Prod.*, 683 F. Supp. at 1266-68; United States v. Hill, 676 F. Supp. 1158, 1170-72 (N.D. Fla. 1987).
148. 676 F. Supp. 1158 (N.D. Fla. 1987).
149. *Id.* at 1170.
150. *Id.* at 1171.
151. United States v. Murphy, 937 F.2d 1032, 1038 (6th Cir. 1991).
152. 488 U.S. 204 (1988).
153. *Id.* at 208.
154. *Murphy*, 937 F.2d at 1038 (citing United States v. Ekelman & Ass'n, 532 F.2d 545, 548 (6th Cir. 1976)).
155. *See supra* notes 92-93 and accompanying text.

not unanimously rejected these arguments, the claims have met with relatively little success.[156]

In resisting the increased damages and penalties provisions, defendants have urged similar arguments to those advanced against the amendments' definitions of "knowing" and "knowingly." Specifically, the defendants claim that the increase from double to treble damages, in conjunction with an increase in civil penalties, affect their substantive rights and impose new and unanticipated obligations without providing a meaningful opportunity to be heard.[157] The provisions, therefore, are said to be contrary to the second and third factors in the *Bradley* analysis.[158]

Most courts have rejected the argument against the retroactive application of the increased damages and penalties provisions.[159] Only two reported decisions, *United States v. Murphy*,[160] and *United States v. Bekhrad*,[161] have held that the increased damages provisions are not to be applied retroactively. The *Bekhrad* court, moreover, did not consider the *Bradley* analysis and the *Murphy* court rejected such analysis in denying a retroactive application of the increased damages and penalties provisions of the 1986 amendments. Accordingly, the weight of authority is greatly in favor of a retroactive application of the increased damages and penalty provisions.

3. *Challenges to the Retroactive Application of the* Qui Tam *Provisions of the 1986 Amendments*

The curtailment of the "prior government knowledge" jurisdictional bar in the 1986 amendments has been a central issue in litigation concerning the retroactivity of the *qui tam* provisions of the amendments. While the district courts are split on the issue of *qui tam* provisions, the better reasoned opinions hold that the *qui tam* provisions, like the other provisions of the 1986 amendments, should be applied retroactively.[162]

The argument against a retroactive application of the *qui tam* provisions centers on the contention that the curtailment of the "prior

156. *See, e.g.*, *Ettrick Wood Prod.*, 683 F. Supp. at 1266-67; *McCoy*, 723 F. Supp. at 1369-70; *Stinson*, 721 F. Supp. at 1254. *But see* United States v. Bekhrad, 672 F. Supp. 1529, 1530 (S.D. Iowa 1987).
157. *Ettrick Wood Prod.*, 683 F. Supp. at 1266-67.
158. *Id.*
159. *See supra* note 156 and accompanying text.
160. 937 F.2d 1032 (6th Cir. 1991).
161. 672 F. Supp. 1529 (S.D. Iowa 1987).
162. *See* United States v. Rockwell Int'l Corp., 730 F. Supp. 1031, 1333-34 (D. Colo. 1990); United States *ex rel.* LaValley v. First Nat'l Bank, 707 F. Supp. 1351, 1356-66 (D. Mass. 1988), *appeal denied*, 1990 U.S. Dist. LEXIS 9913 (D. Mass. Jul. 30, 1990).

government knowledge" jurisdictional bar deprives a defendant of a substantive material defense which vested prior to the 1986 amendments.[163] As advanced in *United States ex rel. Boisvert v. FMC Corp.*,[164] such an argument reflects an interpretation of *Bradley* which is fundamentally different from that given by courts that applied the 1986 amendments retroactively. A comparison of *Boisvert* and *United States ex rel. LaValley v. First National Bank*[165] is illustrative.

Whereas *LaValley* interpreted *Bradley* as controlling on the issue in support of a presumption of retroactivity, the *Boisvert* court dismissed *Bradley* as an isolated case and utilized *Winfree v. Northern Pacific Railway Co.*[166] as support for a presumption *against* the retroactive application of a statute.[167] Beginning with the presumption against retroactivity, the *Boisvert* court viewed the *qui tam* provisions as removing a material defense.[168] The *Boisvert* court held that such provisions could not be applied retroactively under the *Winfree* analysis.[169] The *Boisvert* court applied *Bradley* but construed it as having been significantly narrowed by *Bennett v. New Jersey*.[170] The court concluded that the *qui tam* provisions do not apply retroactively, since the provisions divest the substantive right of the "prior government knowledge defense."[171]

In contrast, at least two district courts have held that the *qui tam* provisions of the 1986 amendments apply retroactively.[172] The *LaValley* decision is the most extensively reasoned opinion in support of a retroactive application of the provisions.[173] *LaValley* held that the Supreme Court's opinion in *Bradley* is controlling and directs a presumption of retroactive application, unless either manifest injustice will result or the statutory language or legislative history instruct otherwise.[174] The court acknowledged that the 1986 amendments were silent on the issue of retroactivity, and concluded that the statutory language "does not rebut the *Bradley* presumption of retroactive

163. *See, e.g.*, United States *ex rel.* Boisvert v. FMC Corp., No. C-86-20613 WAI, 1987 U.S. Dist. LEXIS 13549, at *3 (N.D. Cal. Sept. 8, 1987).
164. No. C-86-20613 WAI, 1987 U.S. Dist. LEXIS 13549 (N.D. Cal. Sept. 8, 1987).
165. 707 F. Supp. 1351 (D. Mass. 1988), *appeal denied*, 1990 U.S. Dist. LEXIS 9913 (D. Mass. Jul. 30, 1990).
166. 227 U.S. 296 (1913).
167. *Boisvert*, No. C-86-20613 WAI, slip op. at 5-8.
168. *Id.*
169. *Id.*
170. 470 U.S. 632 (1985).
171. *Boisvert*, No. C-86-20613 WAI, slip op. at 8-12.
172. *See* United States v. Rockwell, 730 F. Supp. 1031 (D. Colo. 1990); United States *ex rel.* LaValley v. First Nat'l Bank, 707 F. Supp. 1351 (D. Mass. 1988), *appeal denied*, 1990 U.S. Dist. LEXIS 9913 (D. Mass. Jul. 30, 1990).
173. LaValley, 707 F. Supp. at 1356-66.
174. *Id.* at 1359.

application."[175] Although the legislative history was also silent on the issue[176] of retroactivity, the *LaValley* court discerned from the legislative history "that fraud against the [g]overnment was apparently so rampant and difficult to identify that the [g]overnment could use all the help it could get from private citizens with knowledge of fraud."[177] Fearing that "another restrictive interpretation by a court . . . might discourage other prospective plaintiffs from coming forward," the *LaValley* court concluded that the legislative history contained no indications of legislative intent which would displace the presumption of retroactivity.[178]

In addition to examining the legislative history of the 1986 amendments, the *LaValley* court applied the three factors in the *Bradley* manifest injustice analysis. Regarding the first factor, the *LaValley* court concluded that the nature of the parties "weighs heavily in favor of retroactivity where the statute manifests an important public policy."[179] In analyzing the second factor, concerning the nature of the rights affected, the court carefully and persuasively refuted the reasoning in *Boisvert*.[180] First, the *LaValley* court noted that *Bennett* does not limit the *Bradley* presumption of retroactivity as *Boisvert* urged.[181] Rather, the *Bennett* opinion was simply an example of how the second prong of the *Bradley* test would govern to prohibit the retroactive application of a statute where it was applied to defeat matured and vested rights.[182] Regarding the third factor in the *Bradley* analysis, the *LaValley* court was not persuaded that injustice would result from "new and unanticipated obligations."[183] The court stated that the defendant would not have altered its conduct if the defendant was aware that the new amendments were applicable.[184]

The *LaValley* court also distinguished *Winfree*, upon which *Boisvert* so heavily relied. As the *LaValley* court noted, the material

175. *Id.*
176. The legislative history of the False Claims Act addresses the issue of the retroactivity of the 1986 amendments, but only after their enactment. The False Claims Act was amended again in 1988 to reduce or eliminate the share of proceeds to be paid to any *qui tam* relator who planned or initiated the fraud upon which the action was based. 31 U.S.C. § 3730(d)(3) (1988). In declaring the legislative intent that the 1988 amendments be applied retroactively, several legislators remarked that a similar legislative intent was present when the 1986 amendments were enacted. *See, e.g.*, 134 CONG. REC. S16705 (daily ed. Oct. 18, 1988) (statements of Sen. Grassley and Sen. DeConcini).
177. *LaValley*, 707 F. Supp. at 1355.
178. *Id.* at 1360.
179. *Id.* at 1361.
180. *Id.* at 1361-62.
181. *Id.*
182. *Id.* at 1362.
183. *Id.* at 1363.
184. *Id.*

defenses removed in *Winfree* were eliminated by the enactment of a statute which "provided that every common carrier engaged in interstate commerce shall be liable in damages for injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of the carrier."[185] The court reasoned that the critical distinction between *Winfree* and the retroactive application of the 1986 amendments was that the defendant's conduct in *Winfree* was tailored to defenses available at the time of the actions which formed the basis of the suit.[186] In contrast, the defendants in a case involving the False Claims Act do not tailor their fraudulent conduct in reliance on a defense.[187]

Additionally, the *LaValley* court observed that the changes in the *qui tam* provisions of the 1986 amendments did not affect the relationship between the relator and defendant. Rather, the changes in the *qui tam* provisions related entirely to the relationship between the United States and the relator seeking to act on its behalf.[188] The court also emphasized that a defendant's liability and substantive defenses remain the same, notwithstanding the 1986 amendments, since the defendants have always had an unaltered obligation not to defraud the government.[189] In so ruling, the *LaValley* court rejected the argument that the defendants relied upon the pre-1986 *qui tam* provisions in disclosing to the government the allegations upon which the suit was based.[190]

The *LaValley* court's rejection of the reliance argument is significant both practically and theoretically. Practically, the reliance argument permitted the defrauder to make a scant disclosure to the government, and then use the disclosure as a means to prevent any subsequent action by a *qui tam* relator. The reliance argument appears to be the approach attempted by the defendant in *LaValley*. The court noted that the disclosure letter advanced as a bar to the *qui tam* action "contained allegations, not evidence. Standing alone, such allegations would be insufficient to form the basis of a suit against the [defendant] for [any] misrepresentations . . . ."[191] In light of the unlimited resources enjoyed by defense contractors in comparison to the vastly overburdened resources of the federal government, the

185. *Id.* (quoting Winfree v. Northern Pacific Ry., 173 F. 65, 66 (9th Cir. 1909), *aff'd*, 227 U.S. 296 (1913)).
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*

Boisvert analysis severely undermined the legislative intent of encouraging *qui tam* actions.

In addition to the careful application of *Bradley* to the *qui tam* provisions of the 1986 amendments, the *LaValley* court rejected additional arguments against the retroactive application of those provisions. Specifically, the court rejected the defendant's argument that "courts do not favor interpretations of jurisdictional statutes that give them retroactive effect."[192] The court also rejected the DOJ's argument that all provisions of the 1986 amendments are to be applied retroactively except the *qui tam* provisions.[193] The *LaValley* court had little difficulty in rejecting the DOJ's argument that the *qui tam* provisions could not be retroactively applied simply because the action had to be filed *in camera* for sixty days.[194]

4. The Retroactivity Issue in the Gravitt Action

The retroactivity issue proved to be critical in the *Gravitt* action.[195] The issue arose when Judge Rubin considered the adequacy of the $234,000 settlement proposed by the DOJ and General Electric.[196] The judge also had to determine whether the settlement should be measured by the False Claims Act prior to the 1986 amendments or as amended in 1986.[197] At the time of the judge's decision, the only cases that had decided the retroactivity issue were *Boisvert*, *Bekhrad*, and *Hill*. Judge Rubin adopted the reasoning in *Hill* and applied the *Bradley* analysis, holding that the 1986 amendments were to be applied retroactively.[198]

The magnitude of the retroactivity issue in *Gravitt* was substantiated by Judge Rubin's order to reject the proposed settlement.[199] Judge Rubin declared that under a clear and convincing standard of proof, as previously required, the proposed settlement would have been adequate.[200] He concluded, however, that in light of the 1986 amendments' preponderance of the evidence standard and elimination of the specific intent to defraud requirement, the proposed settlement was inadequate.[201] Thus, the retroactive application of the 1986 amendments kept the *Gravitt* action alive.

192. *Id.*
193. *Id.* at 1365-66.
194. *Id.*
195. Gravitt v. General Elec. Co., 680 F. Supp. 1162, 1163 (S.D. Ohio 1988), *appeal dismissed*, 848 F.2d 190 (6th Cir. 1988), *and cert. denied*, 488 U.S. 901 (1988).
196. *Id.* at 1163-65.
197. *Id.*
198. *Id.*
199. *Id.* at 1165.
200. *Id.* at 1164.
201. *Id.* at 1165.

B. *Attacks on the Constitutionality of the* Qui Tam *Provisions of the 1986 Amendments*

In addition to the short-term strategy of attacking the retroactive application of the 1986 amendments, government contractors have employed a long-term strategy of attacking the constitutionality of the amendments. Defense contractors contend that the *qui tam* provisions of the 1986 amendments violate Article III standing requirements, the separation of powers doctrine, and the Appointments Clause of Article II.[202] To date, each court to address these contentions has upheld the constitutionality of the 1986 amendments.[203]

1. *The* Qui Tam *Provisions of the 1986 Amendments Meet Article III Standing Requirements*

Article III, Section 2 of the United States Constitution extends the judicial power of the federal courts only to "cases" and "controversies."[204] From this language, the doctrine of standing has evolved. As summarized by one court which decided the standing issue in the False Claims Act context, the standing doctrine provides:

> To have standing under Article III, a plaintiff must show actual or threatened injury that is likely to be redressed if the requested relief is granted. This injury must be concrete to ensure that the litigant has a personal stake in the outcome of the litigation. The purpose of this requirement is to ensure "that concrete adverseness which sharpens the presentation of issues." Vigorous litigation, however, "is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself." To this end, while Congress may confer standing statutorily, it may not waive the constitutional minimum of injury-in-fact.[205]

In challenging the constitutionality of the 1986 amendments, defendants have urged that *qui tam* relators lack standing because they have suffered no injury-in-fact.[206] The defendants support their argument by citing cases which have held that, in the absence of demonstrating a personal injury-in-fact, standing will not extend to

202. *See, e.g.*, United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615 (C.D. Cal. 1989); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607 (N.D. Cal. 1989); United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084 (C.D. Cal. 1989).
203. *See supra* note 202.
204. U.S. CONST. art. III, § 2.
205. *Truong*, 728 F. Supp. at 616-17 (citations omitted).
206. *Id.* at 617.

taxpayers or private parties who seek to challenge actions of the government.[207]

In response, *qui tam* relators have urged the historical fact that numerous *qui tam* actions were authorized by the First Congress, as evidence that the framers of the Constitution contemplated no Article III standing problem.[208] Moreover, relators argue that Supreme Court Justices with restrictive views about Article III standing have indicated that *qui tam* statutes do not violate constitutional principles.[209] The relators support this historical argument by noting that federal courts which have addressed the issue of standing under the False Claims Act prior to the 1986 amendments have indicated that the Act meets constitutional requirements.[210] Relators further contend that the inadequacy of government resources for prosecuting fraud also supports a finding that they have standing to sue under the Act.[211]

While courts have agreed that *qui tam* relators have standing to sue under the False Claims Act, their analyses have been different. Whereas the court in *United States ex rel. Stillwell v. Hughes*,[212] and the court in *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*[213] emphasized the historical invulnerability of the *qui tam* provisions against constitutional attack, the court, in *United States ex rel. Truong v. Northrop Corp.*,[214] discounted the historical arguments entirely. Instead, *Truong* focused on the injury suffered by the government and reasoned that whenever the government undertakes prosecutorial action it designates a party to act on its behalf.[215] The designated party in cases involving the False Claims Act is the *qui tam* relator.[216] The *Truong*[217] court noted that the False Claims Act is not the only legislation in which private citizens are engaged in assisting government enforcement efforts. In these instances, "standing is based on the existence of a clearly defined, adversarial relationship between the government and the defendant, not between the defendant and the United States' particular legal representative."[218]

207. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216-18 (1974).
208. *See supra* note 17 and accompanying text.
209. *Truong*, 728 F. Supp. at 618 (citation omitted).
210. *Id.* at 618 & n.4.
211. *Id.* at 618.
212. 714 F. Supp. 1084 (C.D. Cal. 1989).
213. 722 F. Supp. 607 (N.D. Cal. 1989).
214. 728 F. Supp. 615 (C.D. Cal. 1989).
215. *Id.* at 619.
216. *Id.* at 618-19.
217. *Id.* at 619.
218. *Id.*

In short, *Truong* recognized that the injury-in-fact analysis has little application to a *qui tam* relator in a False Claims Act proceeding. Since the relator acts as the representative of the United States in bringing the action, and the United States clearly meets the injury-in-fact requirement, the injury-in-fact analysis is inappropriate.[219]

Other courts which have held that *qui tam* relators have standing to bring suits involving the False Claims Act use rationales that are both comparable to and different from the *Truong* court. A common thread in the reasoning between the courts is that Congress can determine who may act as a party to such a suit as long as a justiciable issue exists.[220] In this sense, the *Stillwell* court's reasoning was closest to that found in *Truong*. The court in *Stillwell* reasoned that "[t]he False Claims Act essentially creates, by legislative fiat, a *de facto* assignment of a portion of the government's interest in the action."[221] The *Newsham* court similarly recognized congressional authority to designate a proper plaintiff, provided that a justiciable controversy exists.[222] In fact, *Newsham* was the most deferential to congressional authority and seemingly held that as long as the issue is justiciable, and not a political question, Congress may confer standing to bring suit.[223]

The main difference in the analyses of the various courts centers on the meaning of a legally cognizable injury-in-fact. Whereas *Truong* declined to identify a legally cognizable injury suffered by the relator, the *Stillwell* court found several factors persuasive.[224] These factors included the potential denial of statutory bounty, the jeopardy to employment status upon disclosure, and exposure to liability in future litigation in the event of non-disclosure.[225] In doing so, the *Stillwell* court noted that the likely consequence of filing a *qui tam* complaint, notwithstanding the protection against retaliation contained in the statute,[226] is the termination of the employment relationship or "a

219. *Id.* at 618-19. The *Truong* court specifically rejected the arguments that *qui tam* relators are injured by the potential denial of statutory bounty, the potential jeopardy to their employment and the possibility of exposure to liability in future litigation in the event of non-disclosure. *Id.* at 619 n.5. The court did acknowledge that the relator has a "personal stake" in the outcome of the litigation by reason of the bounty to which he is entitled if victorious. *Id.* at 619 n.7.

220. *See id.* at 618-20; United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 614 (N.D. Cal. 1989); United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1098-99 (C.D. Cal. 1989).

221. *Stillwell*, 714 F. Supp. at 1098.

222. *Newsham*, 722 F. Supp. at 614.

223. *Id.*

224. *Stillwell*, 714 F. Supp. at 1099.

225. *Id.* at 1098-99.

226. 31 U.S.C. § 3730(h) (Supp. IV 1986).

compromised opportunity for future advancement."[227] Indeed, *Stillwell* recognized the real possibility that a *qui tam* relator might become blackballed in the entire defense contracting industry.[228] Similarly, the court recognized that relators are often knowing participants in the fraud and will be liable in subsequent False Claims Act prosecutions if they do not come forward themselves.[229] In finding injury-in-fact, the *Stillwell* court was unwilling to impose upon potential relators the "choice of participating [in the fraud] and facing future liability, or exiting quietly from the offending company and forfeiting . . . seniority and job security."[230]

The court in *United States ex rel. Hyatt v. Northrop Corp.*,[231] agreed with the reasoning in *Stillwell* that the statutory bounty *in conjunction with* employment jeopardy is sufficient to demonstrate the constitutionally required injury-in-fact.[232] However, the court in *Hyatt* expressly reserved ruling on the issue of whether the statutory bounty alone would satisfy constitutional requirements. The *Hyatt* court expressed concern about "the type of frivolous statutory bounty hunting which the act may encourage."[233] If adopted broadly, this reasoning would limit standing in *qui tam* actions to employees of the fraudulent public contractor. This result seems inconsistent with the legislative purpose of encouraging anyone with knowledge of fraud to come forward and file *qui tam* actions.

2. *The* Qui Tam *Provisions of the 1986 Amendments Do Not Violate the Separation of Powers Doctrine*

The United States Constitution states that the President "shall take [c]are that the [l]aws be faithfully executed."[234] Defendants involved in *qui tam* actions argue that the *qui tam* provisions of the 1986 amendments undermine the separation of powers doctrine upon which the Constitution is based. The defendants contend that the *qui tam* provisions unconstitutionally undermine the executive branch's authority to investigate and prosecute violations of federal law by vesting litigative discretion with private plaintiffs and the judiciary.[235]

227. *Stillwell*, 714 F. Supp. at 1099.

228. *Id.*

229. *Id.*

230. *Id.*

231. No. CV 87-6892 KN (C.D. Cal. 1989).

232. *Id.* at 11.

233. *Id.*

234. U.S. CONST. art. II, § 3.

235. *See, e.g.*, United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1085 (C.D. Cal. 1989).

Courts which have considered the separation of powers argument have rejected it uniformly.[236] Every court relied heavily upon the Supreme Court's opinion in *Morrison v. Olson*.[237] In the *Morrison* case, the Court rejected a constitutional attack on the independent counsel provisions of the Ethics in Government Act of 1978.[238] According to the *Morrison* court, the standard to be applied in separation of powers cases is whether the challenged legislation gives the executive branch sufficient, but not exclusive control, to ensure that the President is able to perform his constitutionally assigned duties.[239] Applying this standard to the *qui tam* provisions of the 1986 amendments, the courts weighed the control given to the executive branch by the *qui tam* provisions against the control given in the independent counsel provisions of the Ethics in Government Act.[240] The courts have noted that at each step of the litigation process, the executive branch possessed significant means to control the *qui tam* relator.[241] The courts further recognized that the degree of executive branch control provided for in the False Claims Act is significantly greater than that provided for by the independent counsel provisions of the Ethics in Government Act.[242] Based on the degree of executive control, courts which have addressed the separation of powers issue have held that the *qui tam* provisions of the False Claims Act do not violate the separation of powers doctrine.[243]

The *Stillwell* court's disposition of the separation of powers argument places the issue in an interesting historical perspective. The *Stillwell* court noted that the 1986 amendments to the False Claims Act are a continuation in "the evolution of greater executive control over *qui tam* lawsuits."[244] In other words, the original Act did not grant the government the right to take over an action initiated by a *qui tam* relator.[245] While the 1943 amendments to the Act permitted the government to take over such actions, the amendments only provided a sixty-day period for the government to review the complaint and decide whether to enter the action.[246] Once the government initially declined to participate, it had no right to reenter the action after the expiration of sixty days.[247] In contrast, the *Stillwell* court noted that under the 1986 amendments, the government has sixty days to determine whether to take over the action.[248] Review may be extended, however, upon a showing of good cause.[249] Moreover, if the government intervenes in the action, it may limit the relator's authority to participate upon application to the court.[250] If the government does not intervene or withdraws from the action, it is still entitled to receive copies of all pleadings and deposition transcripts, and can apply to reenter the suit at any time.[251] Additionally, whether the government intervenes or not, it may obtain an order from the court to stay the relator's discovery by demonstrating that such discovery will interfere with an ongoing investigation.[252] Thus, while the 1986 amendments broadened the role of a *qui tam* relator, they also provided for a corresponding increase in executive branch control.

236. *See* United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 610-13 (N.D. Cal. 1989); *Stillwell*, 714 F. Supp. at 1086-93.
237. 487 U.S. 654 (1988).
238. *Id.* at 659-60.
239. *Id.* at 696.
240. *See, e.g.*, *Truong*, 728 F. Supp. at 620-21.
241. *Id.*
242. *Id.* at 622.
243. *Id. See* United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 612 (N.D. Cal. 1989); United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1093 (C.D. Cal. 1989).
244. *Stillwell*, 714 F. Supp. at 1090.
245. *Id.*
246. *Id.* (citing 31 U.S.C. § 3730(b)(2)(A) (1988)).
247. *Id.*
248. *Id.* at 1091.
249. *Id.* (citing 31 U.S.C. § 3730(b)(2), (3) (Supp. IV 1986)).
250. *Id.* (citing 31 U.S.C. § 3730(c)(2)(C)(i)-(iii) (Supp. IV 1986)).
251. *Id.* (citing 31 U.S.C. § 3730(c)(3) (Supp. IV 1986)).
252. *Id.* (citing 31 U.S.C. § 3730(c)(4) (Supp. IV 1986)). However, the *Stillwell* court's interpretation of section 3730(c)(4) is not universal. At least one court has held that once the government intervenes it may no longer petition the court for an extension of the time the action remains under seal and may not call a complete halt to the relator's discovery actions. United States *ex rel.* McCoy v. California Medical Review, 715 F. Supp. 967, 968-70 (N.D. Cal. 1989).
253. *Stillwell*, 714 F. Supp. at 1092.

The *Stillwell* examination of the separation of powers issue was also significant for its practical analysis of how the authority granted by the *qui tam* provisions of the 1986 amendments struck a realistic balance between the court, the government, and the *qui tam* relator. In response to the defendant's complaint that the False Claims Act only provided the government with a right of permissive intervention, instead of intervention as a matter of right after expiration of the initial sixty-day review, the *Stillwell* court noted that it was unlikely that permissive intervention would present a problem.[253] As stated by the court:

> One cannot realistically predict that a heavily docketed federal court, confronted with a major piece of litigation in which a sophisticated and well-resourced defendant squares off against an oft overmatched plaintiff, will not be quick to allow the government to reenter the suit. Such a disparity in litigative experience and capacity, without government involvement, can unnecessarily overburden the court as

> well as the plaintiff. On the other hand, if the plaintiff's counsel is experienced and competent, the government will gain a formidable ally, thus making intervention a cooperative act or an unnecessary undertaking.[254]

In short, the *Stillwell* court did not find any unconstitutional encroachment upon the powers of the executive branch. This conclusion is supported by the fact that the DOJ has not argued that its constitutional power was being infringed upon. Significantly, as noted by the *Stillwell* court and the United States Senate appearing therein as *amicus curiae*, "no reported decision has ever invalidated a statute because of undue intrusion on executive branch authority when the executive has expressly declined to oppose the law."[255]

3. *The* Qui Tam *Provisions of the 1986 Amendments Do Not Violate the Appointments Clause of the United States Constitution*

Closely related to the separation of powers argument advanced by False Claims Act defendants is the argument that the *qui tam* provisions violate the Appointments Clause of Article II of the United States Constitution.[256] Defendants urge that because government litigation is controlled by officers of the United States who must be appointed in compliance with the Appointments Clause, the *qui tam*

254. *Id.*

255. *Id.* at 1086-87. The DOJ's failure to take a position on the constitutionality of the *qui tam* provisions of the 1986 amendments is intriguing when its conduct during the legislative process is contrasted with their more recent ambivalence. During the legislative process the DOJ expressed concern about the breadth of the *qui tam* provisions in an early version of the proposed amendments. Thereafter, it was active in proceedings before the Senate Judiciary Committee, which addressed the DOJ's concerns about the provisions and modified the proposed amendments in light of those concerns. *See generally* S. REP. No. 345, *supra* note 24, 1986 U.S.C.C.A.N. at 5279-82. While the DOJ continued to object to strengthened *qui tam* provisions, it supported the enactment of the 1986 amendments. At no time during its involvement in the legislative process did it urge that the *qui tam* provisions were unconstitutional. Following the enactment of the 1986 amendments, the DOJ has not taken a public position on the constitutionality of the *qui tam* provisions, despite litigation of this significant issue in several actions brought pursuant to the amendments.

256. The Appointments Clause provides as follows:

> The President shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.

provisions of the False Claims Act improperly usurp to Congress the appointment of such officers.[257]

Courts thus far have rejected this argument. Such rejection has occurred notwithstanding the general acknowledgment that *Buckley v. Valeo*[258] provides superficially appealing authority for defendants' contentions.[259] In *Buckley*, the Supreme Court struck down provisions of an act whereby Congress appointed federal election commissioners with a specified tenure and salary, whose primary responsibility was to conduct civil litigation and enforce federal law.[260] Courts scrutinizing the False Claims Act carefully distinguished *Buckley*, noting that *qui tam* relators have no "primary responsibility to enforce the False Claims Act," serve no specific term, and receive no federal salary.[261] Instead, relators are involved in individual cases and are not charged with setting the United State's False Claims policy.[262] In addressing this issue, the courts have considered *Buckley* as inapplicable to the issue of private citizen enforcement of public laws.[263] As stated by the *Stillwell* court:

> The broad reading of *Buckley* . . . that the defendants propose would result in the implicit overruling of all *qui tam* and private attorneys general statutes. It is beyond dispute that the Supreme Court would not engage in such a sweeping revision of federal legislation without expressly stating so. This Court believes that *Buckley* . . . is more reasonably interpreted as preventing Congress from attempting to enforce federal law.[264]

The Appointments Clause argument, like the separation of powers and Article III standing arguments, has been rejected unanimously by courts.[265]

C. *A Successful Constitutional Challenge to the False Claims Act: In a Rare Case the Imposition of Full Civil Penalties and Damages after Criminal Conviction and Sentencing May Violate the Double Jeopardy Clause of the United States Constitution*

Although defendants involved in *qui tam* actions have largely failed in attacking the constitutionality of the *qui tam* provisions of

257. *See, e.g.*, *Stillwell*, 714 F. Supp. at 1093-96.

258. 424 U.S. 1 (1976).

259. *See* United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 622-24 (C.D. Cal. 1989); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 613 (N.D. Cal. 1989); *Stillwell*, 714 F. Supp. at 1093-96.

260. *Buckley*, 424 U.S. at 140.

261. *E.g.*, *Stillwell*, 714 F. Supp. at 1095.

262. *Id.*

263. *Id.*

264. *Id.*

265. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976).

the 1986 amendments, one constitutional infirmity in the application of the Act has been recognized by the United States Supreme Court. In *United States v. Halper*,[266] the Court held that the application of the False Claims Act may constitute a violation of the Double Jeopardy Clause's prohibition against multiple punishments for the same offense.[267] Such would be the case where the full measure of damages and penalties are imposed against a defendant who had previously been convicted and sentenced for the same false claim.[268] This holding, however, "is a rule for the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused."[269] The Supreme Court specifically emphasized that its holding should not be read to undermine the application of "reasonable liquidated damages clauses" or "fixed-penalty-plus-double-damages provisions" in the ordinary case.[270]

While the *Halper* decision will have little impact in most cases, it is interesting from another perspective. It emerged from a line of cases in which the DOJ hurled the awesome power of the state against an individual in successive criminal and civil proceedings.[271] Ironically, while vigorously pursuing these defendants for sums which likely strained their ability to pay, the DOJ in *Gravitt* did not pursue General Electric, which is one of the four largest defense contractors in the country.

D. *Government Contractors' Proposed Amendments to the Qui Tam Provisions of the 1986 Amendments: Contractors Seek Congressional Protection from the Invisible Army*

In addition to largely unsuccessful constitutional attacks, the government contracting industry has repeatedly lobbied Congress to amend the *qui tam* provisions of the 1986 amendments. Generally, the proposed amendments attempt to roll back the enhanced *qui tam* provisions of the 1986 amendments and permit contractors to enjoy once again past advantages over the government. Specifically, the proposed amendments seek special treatment for defense contractors that voluntarily disclose evidence of fraud to government officials. For example, in early 1989, the defense contracting industry lobbied

266. 490 U.S. 435 (1989).
267. *Id.* at 448-51.
268. *Id.*
269. *Id.* at 449.
270. *Id.*
271. *See* United States v. Howell, 702 F. Supp. 1281 (S.D. Miss. 1988); United States v. Diamond, 657 F. Supp. 1204 (S.D.N.Y. 1987).

Congress to amend section 3730(e)(3) of title 31 of the United States Code to read as follows:

> (3) [I]n no event may a person bring an action under subsection (b) [i.e., a *qui tam* action] which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the [g]overnment is already a party, including allegations or transactions which have been the subject of a prior disclosure to the [g]overnment under the Voluntary Disclosure Program by the defendant in the action, or the subject of a similar disclosure to federal law enforcement authorities.[272]

Fortunately, the proposed amendment gained little acceptance on Capitol Hill and was never enacted. One principal ramification of the proposed amendment, had it been adopted, would have been to recreate the "prior government knowledge" jurisdictional bar which was eliminated by the 1986 amendments. The resurrection of this jurisdictional bar would revive a battlefield upon which defense contractors could wage war against relators by contending that the information upon which a *qui tam* suit was based had been previously disclosed to the government. If the amendment had passed, contractors would once again be able to voluntarily make scant disclosures, and bar any *qui tam* action. All parties involved in the action would become mired in protracted discovery centered on government knowledge of the fraud. Shifting the focus to discovery issues distracts from the real issue of the contractor's fraud and further insulates the contractor from liability.

In seeking immunity from *qui tam* actions and preferential treatment under the False Claims Act, the defense contracting industry has proposed another amendment.[273] Fortunately, this proposed

272. Interview with Peter J. Coniglio, Counsel to the United States Senate Committee on the Judiciary, Subcommittee on Courts and Administrative Practice (Mar. 22, 1989).

273. This second proposal provides that a *qui tam* action in which the government has not intervened may be dismissed by a defendant's motion showing by clear and convincing evidence:

> (A) [T]hat the cause of action is based on conduct disclosed in writing by the corporation defendant to the Department of Defense under the voluntary disclosure program of that department and that the disclosure was made before the action was commenced;
> (B) that the corporation defendant's disclosure was not motivated by imminent detection of such conduct by the [g]overnment or the imminent report of such conduct to the [g]overnment by any third party;
> (C) that the corporation defendant has taken prompt and complete remedial action in the case of such conduct, including restitution to the [g]overnment and appropriate disciplinary action against the officers and employees of the corporation defendant involved in the conduct;
> (D) that the corporation defendant, after making the disclosure referred to in sub-

with defense department officials.[280] The claim of privilege clouded the extent of the fraudulent practices involved.[281]

Under these amendments, the public would be forced to rely on the defrauder to disclose the fraud, describe the extent of the fraud, identify the proceeds of the fraud to be returned to the government, and determine the appropriate punishment for the individual perpetrators involved. Such a system places altogether too much discretion in the hands of corporate entities who have the most to gain by minimizing the fraud in their reports, understating the damages resulting from the fraud, and leniently disciplining the individual perpetrators of the fraud. In short, the amendments proposed by the defense contracting industry put the fox in charge of guarding the chicken coop. The proposed amendments simply urge a return to the circumstances which made the 1986 amendments necessary.

IV. Future Uses of the *Qui Tam* Provisions of the False Claims Act

The 1986 amendments significantly broadened the *qui tam* provisions of the False Claims Act and provided additional incentives for whistleblowers to step forward and disclose fraud against the government. Consequently, the *qui tam* provisions of the False Claims Act are likely to be used by an increasing number of people in a variety of ways.

The most significant issue to arise regarding the increase in potential *qui tam* plaintiffs is whether government employees may bring *qui tam* False Claims Act cases. The issue evolves from the language of section 3730(e)(4) of title 31 of the United States Code which provides in pertinent part:

> (e) Certain Actions Barred . . . (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the [g]overnment before filing an action under this section which is based on the information.[282]

This issue has been addressed by a handful of federal courts, each of which held that the 1986 amendments do not automatically exclude government employees from bringing *qui tam* actions.[283] However, the First Circuit's opinion in *United States ex rel. LeBlanc v. Raytheon Co.*[284] indicated that not all government employees may bring *qui tam* actions.[285] Although the *LeBlanc* court declined to outline all of the scenarios that would permit government employees to maintain such actions, the limitations appear to be confined to circumstances in which the employee learns of the fraud through "information acquired during the course of their [government] employment."[286] Consequently, most government employees with duties consisting primarily of investigating and reporting fraud, like the plaintiff in *LeBlanc*, would be prevented from bringing a *qui tam* action under the First Circuit's reasoning. The First Circuit also noted that such employees were not "original sources" of the fraud, since the information gleaned through investigations in their official capacities belonged to the government and not to themselves individually.[287]

The increase in the variety of ways that *qui tam* provisions will be used to encourage private whistleblowing remains to be seen. Since the passage of the 1986 amendments, the False Claims Act has been employed to challenge alleged misrepresentations by nuclear power plants to public utility commissions,[288] to challenge alleged bid rigging of moving contracts with agencies of the United States Government,[289] to challenge insurers' claims-handling practices for allegedly violating federal law regarding Medicare payments,[290] to challenge alleged viol-

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. . . & Milo Geyelyn, *U.S. Charges GE Officials, Lawyers Gave False Data*

282. 31 U.S.C. § 3730(e)(4) (Supp. IV 1986).
283. *See* United States *ex rel.* LeBlanc v. Raytheon Co., 913 F.2d 17 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1312 (1991), *and reh'g denied*, 1991 U.S. LEXIS 4086 (Aug. 2, 1991). Erickson *ex rel.* United States v. American Inst. of Biological Sciences, 716 F. Supp. 908 (E.D. Va. 1989).
284. 913 F.2d 17 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1312 (1991), *and reh'g denied*, 1991 U.S. LEXIS 4086 (Aug. 2, 1991).
285. *Id.* at 20.
286. *Id.*
287. *Id.*
288. County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407 (E.D.N.Y. 1989).
289. United States v. Bonanno Org. Crime Family, 695 F. Supp. 1426 (E.D.N.Y. 1988).
290. United States *ex rel. Stinson v. Prudential Ins. Co. of Am.*, 736 F. Supp. 614 (D.N.J. 1990); United States *ex rel.* Stinson v. Provident Life & Accident Ins. Co., 721 F. Supp. 1247 (S.D. Fla. 1989).

ations of the Buy American Act,[291] to challenge alleged violations of the Anti-Kickback Act,[292] to challenge alleged failures to test products sold to the government,[293] and to challenge alleged fraudulent practices under the Foreign Military Sales Program.[294]

Additionally, many observers and commentators in the government contracting field believe that the amended *qui tam* provisions will have ramifications far beyond fraud procurement issues. For example, one commentator has noted that the *qui tam* provisions will likely be used to challenge government contractors' non-compliance with environmental regulations.[295] Others have observed that the expansion of *qui tam* suits will likely include areas of labor law, scientific testing, and employment discrimination.[296] In addition to the variety of applications of the *qui tam* provisions of the False Claims Act, *qui tam* litigation in general may soon increase, as Congress is considering the possibility of *qui tam* legislation to address the fraud involved in the savings and loan crisis.[297]

V. Conclusion

Qui tam litigation under the False Claims Act is enjoying a resurgence resulting directly from the 1986 amendments to the Act. Through fiscal year 1990, 350 *qui tam* actions had been filed since the enactment of the 1986 amendments.[298] Presently, there is every indication that the 1986 amendments will be given the broad reading that Congress intended. This will increase the number of potential *qui tam* plaintiffs and enhance the utility of the Act for recovering money to the federal treasury.[299] No doubt, the defense contracting industry will continue its lobbying efforts to persuade Congress to

291. United States v. Rule Indus. Inc., 878 F.2d 535 (1st Cir. 1989).

292. United States *ex rel.* McGuire v. General Elec. Co., No. C-1-88-1070 (S.D. Ohio) (dismissed as settled Feb. 28, 1989).

293. United States *ex rel.* DiVincenzo v. General Elec. Co., No. C-1-89-010 (S.D. Ohio) (dismissed as settled Feb. 28, 1989).

294. United States *ex rel.* Taxpayers Against Fraud v. General Elec. Co., No. C-1-90-792 (S.D. Ohio) (pending).

295. Major John C. Kunich, USAF, Qui Tam: *White Knight or Trojan Horse*, 33 A.F. L. Rev. 31, 47 (1990).

296. Ron Simon, *Fraud in Government Contracting*, in The Lawyer's Brief, Dec. 31, 1990, at 13.

297. 136 Cong. Rec. S9477, *supra* note 20.

298. Stuart M. Gerson, Assistant Attorney General, Civil Division, United States Department of Justice, Remarks at the 1991 Annual Meeting of the American Bar Association, Public Contracts Section Concerning the False Claims Act (Aug. 12, 1991) (Atlanta, Ga.). Seventy-eight *qui tam* actions have been filed during the first eight months of fiscal year 1991. *Id.*

299. The utility of the increased number of *qui tam* actions as a spur as well as a supplement to government action is evidenced by the fact that the increase in *qui tam* recoveries is part of an overall increase in money recovered by the DOJ in civil fraud actions. DOJ recoveries in civil fraud actions have climbed steadily from $83 million in fiscal year 1987 to $260 million in fiscal year 1990, with fiscal year 1991 well ahead of that pace. *id.*

cut back on the 1986 amendments. If those efforts remain ineffective, however, the *qui tam* provisions of the False Claims Act will become an increasingly important tool to assist in recovering money for the federal government.