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WHISTLEBLOWER BOUNTY LAWSUITS AS MONITORING DEVICES IN GOVERNMENT CONTRACTING

William E. Kovacic*

I. INTRODUCTION

The past quarter century has yielded a substantial literature concerning the mechanisms by which public legal commands such as statutes and regulations are enforced. Research in the enforcement of public law has taken diverse paths. Prominent topics of inquiry have included private rights of action and reliance on private monitoring to supplement investigation and prosecution by government bodies;¹ competition among different government entities to elicit desired levels of enforcement;² procedural rules to facilitate public and congressional monitoring of government enforcement

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² See John C. Coffee, Jr., Competition Versus Consolidation: The Significance of Organizational Structure in Financial and Securities Regulation, 50 BUS. LAW. 447 (1995); Richard S. Higgins et al., Dual Enforcement of the Antitrust Laws, in PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 154 (Robert J.
agency decision making; controls upon judicial discretion to determine punishment for illegal conduct; the impact of adjustments in the severity and types of penalties upon the efforts of affected parties to comply with the law; and incentives to discourage sloth and corruption and spur optimal monitoring by individual public employees such as inspectors.

Since 1980 Congress has enacted numerous measures to improve enforcement of the legal controls by which the federal government buys goods and services. Among other initiatives, Congress has increased the incentives for—and the ability of—parties other than government authorities to police adherence to procurement statutes and regulations. Decentralizing enforcement in public contracting has taken two forms. The first is enhancing the ability of suppliers to attack flaws in the processes by which government agencies define purchasing requirements and award contracts. Adjustments in the "bid protest" process—chiefly through the Competition in Contracting


Act of 1984—have increased the number and success rate of supplier challenges to purchasing agency decisions.

The second decentralization measure has been to reinvigorate a Civil War vintage device that gives citizens bounties for attacking contractor misconduct. In 1986 Congress increased the availability and attractiveness of *qui tam* lawsuits by which citizens can enforce the False Claims Act on behalf of the United States. The 1986 reforms broadened the universe of individuals who can bring bounty actions and raised the awards for successful *qui tam* "relators." Before 1986, limits on whistleblower standing had cut the number of new *qui tam* suits to a handful per year. By contrast, from the effective date of the 1986 amendments through September 1995, over 1105 *qui tam* actions were filed. Table 1 traces the substantial increase in filings since 1986:

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12. Limitations on *qui tam* standing and remedies that antedated the 1986 reforms are treated extensively in Caminker, *supra* note 11, at 380-87; Major John C. Kunich, *Qui Tam: White Knight or Trojan Horse*, 33 A.F. L. REV. 31 (1990); Michael L. Waldman, *The 1986 Amendments to the False Claims Act: Retroactive or Prospective?*, 18 PUB. CONT. L.J. 469 (1989). Among other restrictions, the pre-1986 *qui tam* regime virtually precluded suits by government employees, barred actions based upon information already in the government's possession, and authorized smaller bounties.
TABLE 1
Qui Tam Case Filings for Fiscal Years 1987-199515

<table>
<thead>
<tr>
<th>FISCAL YEAR</th>
<th>NUMBER OF CASES FILED</th>
<th>FISCAL YEAR</th>
<th>NUMBER OF CASES FILED</th>
</tr>
</thead>
<tbody>
<tr>
<td>1987</td>
<td>33</td>
<td>1992</td>
<td>119</td>
</tr>
<tr>
<td>1988</td>
<td>60</td>
<td>1993</td>
<td>131</td>
</tr>
<tr>
<td>1989</td>
<td>95</td>
<td>1994</td>
<td>221</td>
</tr>
<tr>
<td>1990</td>
<td>82</td>
<td>1995</td>
<td>274</td>
</tr>
<tr>
<td>1991</td>
<td>90</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The 1986 reforms stemmed chiefly from fears of rampant defense procurement fraud.16 As Table 2 shows, most qui tam recoveries have involved the defense industry.17 Table 2 also indicates that a growing number of qui tam recoveries have involved alleged improprieties by health care providers whose services are reimbursed through federal insurance programs such as Medicare.18 Federally funded academic research institutions likewise have emerged as noteworthy targets of qui tam scrutiny.19

15. DOJ, Qui Tam Recoveries, supra note 14.
In the coming years three developments promise to spur continued growth in the number of *qui tam* suits and the range of federally funded entities targeted as *qui tam* defendants. One factor is the likely increase in the number of private attorneys specializing in *qui tam* litigation. The expansion of the *qui tam* plaintiffs' bar will come both from private practitioners who retrain themselves to bring *qui tam* cases, and from attorneys who have left the government after working in legal departments—such as the Civil Division of the Department of Justice (DOJ)—that investigate and prosecute

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procurement fraud.\textsuperscript{21} Since 1986 the expansion of \textit{qui tam} filings and the substantial publicity surrounding successful practitioners have fostered the recognition of \textit{qui tam} litigation as a distinctive and potentially lucrative practice area.\textsuperscript{22}

A second source of growth in \textit{qui tam} filings will be greater public awareness of the \textit{qui tam} mechanism, caused largely by publicity concerning the size of relator bounties. According to data compiled by the DOJ Civil Division, recoveries in \textit{qui tam} cases from 1986 through September 1995 have totalled approximately $1.06 billion, of which nearly $185 million has been paid in bounties to \textit{qui tam} relators.\textsuperscript{23} Table 3 displays the increase in recoveries over time. Though such awards are hardly routine, there have been a number of well-publicized bounties of $1 million or more.\textsuperscript{24} In 1988, before any

\begin{itemize}
\item \textsuperscript{21} See France, \textsuperscript{supra} note 17; see also W. John Moore, \textit{Citizen Prosecutors}, NAT'L L.J., Aug. 18, 1990, at 2006, 2008-09 (describing the growth in participation by established law firms in representing \textit{qui tam} relators). The Justice Department's Civil Division is responsible for determining whether the government will intervene in \textit{qui tam} lawsuits. \textit{Id.} at 2009 (discussing growth in Civil Division resources devoted to reviewing \textit{qui tam} complaints); see also infra notes 78-84 and accompanying text (describing the Justice Department's role in \textit{qui tam} litigation under the False Claims Act).
\item \textsuperscript{23} DOJ, \textit{Qui Tam Recoveries}, \textsuperscript{supra} note 14. From 1986 through September 1995, DOJ intervened in or settled \textit{qui tam} cases resulting in recoveries of $1,058,177,522. \textit{Id.} Of this amount, relators received bounties of $184,470,378, or 17.87\%, of the government's proceeds. \textit{Id.} In cases in which DOJ declined to participate, relators obtained settlements or judgments of $15,597,141. \textit{Id.} In these matters, relators received bounties of $3,412,661, or 28\% of the government's proceeds. \textit{Id.}
\item \textsuperscript{24} The largest bounty to date is a reward of $22.5 million to a relator whose \textit{qui tam} suit led to the recovery of $150 million from United Technologies for overstating progress payments submitted by its Sikorsky Aircraft Division to the Department of Defense. \textit{Id.; see also Kunich, \textsuperscript{supra} note 12, at 47-48 (describing \textit{qui tam} bounty of $1.4 million as part of a total settlement of $14.3 million with Industrial Tectonics); Moore, \textsuperscript{supra} note 21, at 2006 (reporting \textit{qui tam} bounty of $2.7 million as part of settlement with manufacturer of engines for installation on Coast Guard helicopters); Rich, \textsuperscript{supra} note 19 (describing payment of \textit{qui tam} bounties of $5.97 million and $15 million to relator whose \textit{qui tam} suit challenged fraudulent billing on blood tests reimbursed by Medicare); Sims, \textsuperscript{supra} note 19, at D1 (recounting multimillion dollar \textit{qui tam} bounties); \textit{GE Agrees to Pay $7.2 Million to U.S. to Settle Engine Suit}, WALL ST. J., Aug. 11, 1995, at A2 (reporting payment of $1.7 million bounty to relator whose suit resulted in payment of $7.2 million to government to
million-dollar bounties had been paid, one plaintiffs’ attorney predicted that, once the first large bounties were realized, the public’s interest in the *qui tam* mechanism would “explode like the appeal of the lottery.”

**TABLE 3**
Trends in Recoveries in *Qui Tam* Cases for Fiscal Years 1988-1994

<table>
<thead>
<tr>
<th>FISCAL YEAR</th>
<th>RECOVERIES (APPROX.) (MILLIONS)</th>
<th>FISCAL YEAR</th>
<th>RECOVERIES (APPROX.) (MILLIONS)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1988</td>
<td>2</td>
<td>1992</td>
<td>124</td>
</tr>
<tr>
<td>1989</td>
<td>32</td>
<td>1993</td>
<td>193</td>
</tr>
<tr>
<td>1990</td>
<td>40</td>
<td>1994</td>
<td>379</td>
</tr>
<tr>
<td>1991</td>
<td>36</td>
<td>1995</td>
<td>243</td>
</tr>
</tbody>
</table>

The third source of increased *qui tam* filings will be an expanded awareness of the full range of contractor conduct that might be deemed “fraudulent” and thus the basis for a *qui tam* claim. Principally through broad readings of contractor cost accounting and information disclosure obligations, government law enforcement agencies in the past decade have increased the types of contractor behavior that might be denominated false claims. The growth of

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26. *Id.*


28. *See* PAUL M. TRUEGER, *ACCOUNTING GUIDE FOR GOVERNMENT CONTRACTS* 1095 (9th ed. 1988) (discussing a handbook prepared by the Department of Defense...
the plaintiffs' *qui tam* bar and the success of some relators in obtaining substantial recoveries have provided the means and incentive to explore the application of far-reaching theories of fraud to a wider range of contractor conduct.

The 1986 reforms sought to cure two perceived agency problems: that contractors exploit private information to shirk their commitments to government customers, and that government law enforcement bodies fail to attack fraud as aggressively as taxpayers would prefer. Many observers have concluded that the application of the amended *qui tam* mechanism has been an unmixed blessing for taxpayers. Reviewing experience with the 1986 False Claims Act amendments, Frank W. Hunger, Assistant Attorney General for the DOJ Civil Division, recently observed that "'[t]he recovery of over $1 billion demonstrates that the public-private partnership encouraged by the statute works and is an effective tool in our continuing fight against fraudulent use of public funds.'"\(^2^9\) Noting that "'[t]he *qui tam* amendments were intended to encourage private citizens to come forward with information about fraud against the federal government,'" Hunger concluded, "'[o]bviously they are working very well.'"\(^3^0\)

However, sanguine assessments of the *qui tam* mechanism tend to ignore two closely related disadvantages of the enforcement structure established by the 1986 False Claims Act amendments. First, attempting to curb agency costs in government procurement by deputizing private individuals can create serious agency problems of its own. Employees of government contractors, government agencies,
and private firms—all of whom have standing to sue as *qui tam* relators—may not invariably act to maximize taxpayer interests. To evaluate the whistleblower bounty suit as a monitoring device, one must compare the agency costs of the *qui tam* process with the agency costs of alternative monitoring techniques. The likely costs of *qui tam* monitoring have yet to receive careful attention in the debate about bounty hunting as an enforcement tool.

The second disadvantage is the potential of *qui tam* monitoring to undermine the attainment of important procurement reform objectives. A number of observers who endorse the existing False Claims Act mechanism praise *qui tam* monitoring for establishing a “public-private partnership” to punish and deter procurement fraud. The formation of this “partnership” is, however, likely to impede the development of the purchaser-supplier partnership and the government’s adoption of “commercial practices” that are key aims of reform initiatives such as the National Performance Review (NPR). As articulated by the NPR, Clinton Administration procurement policy officials, and a number of congressional officials, government purchasing agencies should more closely emulate the contracting techniques of private sector purchasers and establish a more cooperative relationship with private sector suppliers which do business with the government. This approach would substitute a partnership model for relationships characterized by routine adversarial confrontation. The public-private partnership embodied in the existing system of False Claims Act *qui tam* monitoring and the purchaser-supplier partnership envisioned by the NPR reforms cannot coexist. Private purchasers do not routinely—if ever—condition their

31. See, e.g., id. (quoting Assistant Attorney General Hunger as saying that the recovery of more than $1 billion in *qui tam* suits since 1986 “demonstrates that the public-private partnership encouraged by the statute works.”) Id.

32. NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS, REPORT OF THE NATIONAL PERFORMANCE REVIEW (1993) [hereinafter NPR REPORT]. One goal of the NPR is to rewrite the Federal Acquisition Regulations (FAR) to “foster competitiveness and commercial practices.” Id. at 28; see also Agencies Asked to Test Evaluation Subfactor to Reward Contractors Who Suggest Ways to Improve RFPs, 63 Fed. Cont. Rep. (BNA) 10 (Jan. 9, 1995) (describing efforts by Office of Federal Procurement Policy administrator Steven Kelman to improve government-industry communications during the procurement process because such communications enhance the partnership relationship between the government and its suppliers); Agencies Signing Up to Make Past Performance an Evaluation Factor on Selected Procurements, 60 Fed. Cont. Rep. (BNA) 605 (Dec. 13, 1993) (describing goal of Office of Federal Procurement Policy administrator Steven Kelman to foster a partnership between the government and its suppliers).
willingness to buy upon the supplier's willingness to deputize its own workforce, and all others who have contact with the supplier, to detect deviations from contractual terms and sue the supplier on the purchaser's behalf. For a private purchaser even to suggest such a device for monitoring contractual compliance almost certainly would cause the vast majority of prospective suppliers to walk away. So long as the government insists on the existing scheme of qui tam monitoring, which grants standing to supplier and government employees, it will never form the type of partnerships to which the NPR aspires.

This Article considers the efficiency consequences of whistleblower bounty suits in four Parts. It begins in Part II by presenting the efficiency aims of the procurement process and qui tam monitoring. Part III outlines the qui tam mechanism and judicial interpretations of its chief provisions. Part IV describes the efficiency costs and benefits of qui tam monitoring. The Article concludes by presenting a framework for determining the qui tam system's net efficiency effects and by proposing adjustments in the existing scheme of qui tam incentives and administration.

II. THE EFFICIENCY GOALS OF THE PUBLIC CONTRACTING REGULATORY SCHEME AND THE QUI TAM CAUSE OF ACTION

Although efficiency has received great attention in recent proposals to reform the procurement process, to discuss the efficiency implications of qui tam monitoring does not mean that efficiency is the sole or paramount concern of the procurement process. Efficiency is but one of a number of goals that federal procurement regulations attempt to achieve. The objective of achieving the highest quality goods and services at the lowest possible price coexists with a number of other objectives, notably wealth redistribution.

To the extent that efficiency matters in public procurement, the 1986 qui tam reforms might serve essentially three efficiency-related purposes. The first is to punish and deter corruption that decreases the amount and quality of goods and services that the government receives for a given level of outlays. The second is to sustain taxpayer

33. See infra notes 53-64 and accompanying text.
34. See NPR REPORT, supra note 32, at 1-9.
35. See Kovacic, Sorcerer's Apprentice, supra note 7, at 110-11.
support for needed public programs by signalling that the government is aggressively trying to obtain full value for its expenditures. The third is to reduce the cost of oversight by relying more heavily on private parties who can perform monitoring functions at lower cost than government authorities. This Article examines the *qui tam* reforms in light of their ability to attain these efficiency objectives.

III. THE *QUI TAM* MECHANISM OF THE FALSE CLAIMS ACT: CONTENTS AND INTERPRETATION

Oversight devices that give third parties bounties to monitor compliance with public legal requirements are not unique to government contracting. Among other areas, decentralized monitoring and enforcement are important elements of federal statutes and regulations dealing with antitrust,\(^{36}\) consumer protection,\(^{37}\) environmental policy,\(^{38}\) equal employment opportunity,\(^{39}\) securities,\(^{40}\) and taxation.\(^{41}\) These decentralized enforcement regimes share important characteristics of *qui tam* monitoring for public contracts. However, the procurement *qui tam* system has features that, taken as a whole, are unique in decentralized enforcement. The *qui tam* mechanism is distinctive because it applies to an especially wide range of conduct, it deputizes an unusually broad universe of individuals to sue on the government’s behalf, and it offers successful relators more generous bounties. The 1986 *qui tam* reforms created the most potent decentralized monitoring system in American public law.

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37. See id. § 2060(a) (citizen-suit provision of the Consumer Product Safety Act).
41. See 26 C.F.R. § 301.7623-1 (1995) (allowing payment of bounties to individuals who provide information leading to recovery of underpaid taxes).
As a foundation for assessing its efficiency consequences, this Part describes the *qui tam* mechanism and indicates how courts have interpreted its chief operative features.42 The treatment of judicial views does not present each nuance or competing perspective that has emerged in the courts since 1986, nor does it analyze the extensive litigation that has focused on the constitutionality of the amended False Claims Act.43 Rather, the discussion addresses various judicial interpretations of the 1986 amendments that have especially important incentive and efficiency consequences.

**A. Prohibited Conduct**

The False Claims Act creates civil liability for any person who knowingly submits a false claim for payment to the federal government, knowingly uses a false statement to induce the government to pay a false claim, conspires to defraud the government to pay a false claim, or knowingly uses a false statement to decrease an obligation to pay money to the government.44 “Claims” include all requests for payment of money or property where the federal government pays for

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any part of the money or property in question.\textsuperscript{45} “Knowing” conduct embraces actual knowledge of a falsehood, as well as “deliberate ignorance” or “reckless disregard” of the truth.\textsuperscript{46}

The \textit{qui tam} mechanism's significance depends largely upon what conduct constitutes a false claim. Implementation of the 1986 \textit{qui tam} reforms coincided with a major expansion of the types of conduct regarded as fraudulent under the False Claims Act. This expansion has two sources. The first is a large increase, through administrative interpretation and enforcement policy, of contractor obligations under existing statutes. For example, the Truth in Negotiations Act\textsuperscript{47} requires firms to disclose cost and pricing data prior to the agreement on price for certain negotiated contracts.\textsuperscript{48} Violations of this disclosure obligation are commonly treated as evidence of civil or criminal fraud.\textsuperscript{49}

The second formative development is the creation of new regulatory requirements of which an infraction may constitute a false claim. Modern procurement reforms often compel contractors to submit certificates attesting to compliance with regulatory commands.\textsuperscript{50} Signing a certificate whose underlying representations are known to be incorrect can not only be prosecuted as a false statement to a federal agency,\textsuperscript{51} but each request for payment under a contract for which a false certificate is signed can be attacked as a false claim. Since 1980 the number and complexity of mandatory certifications has risen dramatically.\textsuperscript{52} This trend has produced a corresponding

\textsuperscript{45} \textit{Id.} § 3729(c).
\textsuperscript{46} \textit{Id.} § 3729(b).
\textsuperscript{47} 10 U.S.C. § 2306a (1994).
\textsuperscript{50} See William E. Kovacic, \textit{Regulatory Controls as Barriers to Entry in Government Procurement}, 25 POL'Y SCI. 29, 31-32 (1992) [hereinafter Kovacic, \textit{Regulatory Controls}].
\textsuperscript{51} 18 U.S.C. § 1001 (1994) (prohibiting the knowing or wilful submission of false declarations to federal departments or agencies).
increase in the number of events that could elicit scrutiny by a *qui tam* relator.

**B. Relator Standing**

The *qui tam* mechanism allows any "private person" to bring a civil action to remedy violations of the False Claims Act.\(^3\) In general, the statute's language, legislative history, and interpretation by federal judges appear to give standing to private citizens, employees of government contractors, employees of government agencies, and private companies.\(^4\) Thus, a recipient of federal funds is subject to *qui tam* monitoring and lawsuits by the recipient's own employees (such as managers, assembly line workers, secretaries, and research assistants), government employees (including auditors, inspectors, attorneys, and purchasing agency program managers), and private firms (including suppliers and competitors).

The permissive *qui tam* standing requirements contrast with other decentralized schemes for monitoring compliance with federal laws. Antitrust doctrine imposes formidable standing limitations upon private plaintiffs\(^5\) and typically denies standing to employees who allege that their employers have engaged in conduct that restricts competition in product markets in which the employers sell their goods.\(^6\) The private cause of action for employment discrimination

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\(^4\) See Kenneth D. Brody, Recent Developments in the Area of "Qui Tam" Lawsuits, 37 Fed. B. News & J. 592, 592 (1990); Kunich, supra note 12, at 33, 40-41.

\(^5\) William Page demonstrates that judicial retrenchment of modern antitrust doctrine has resulted less from direct adjustments in substantive liability standards and more from the imposition of restrictive standing and injury tests for private plaintiffs. See William H. Page, The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency, 75 VA. L. REV. 1221, 1268-78 (1989). This development was possible because the general terminology of the principal antitrust statutes gives courts broad discretion to expand or contract liability, standing, and injury requirements. See William E. Kovacic, The Influence of Economics on Antitrust Law, 30 ECON. INQUIRY 294, 295 (1992). By contrast, the public procurement regulatory regime, including the 1986 *qui tam* reforms, gives federal judges considerably less discretion to interpret important provisions.

\(^6\) See II PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 312 (rev. ed. 1995) (observing that, in antitrust cases, "[e]mployees have usually been denied standing to challenge restraints on competition in the downstream market in which their employers sell"). The logic of this approach is that employees of antitrust violators benefit from, and
under Title VII of the Civil Rights Act of 1964\textsuperscript{57} limits private standing to individuals who have wrongfully been denied employment.\textsuperscript{58} Internal Revenue Service tax regulations that authorize bounties for informers deny eligibility to employees of the Department of the Treasury or any other federal employee who acquired information relating to tax underpayments in the course of their official duties.\textsuperscript{59}

Government contractors have tried unsuccessfully to persuade the federal courts to place comparably restrictive standing hurdles in the path of \textit{qui tam} litigants. In particular, courts have rejected the argument that the 1986 \textit{qui tam} reforms improperly purported to give standing to relators who do not satisfy constitutional standing requirements of injury in fact and causation.\textsuperscript{60} As interpreted by the courts, the \textit{qui tam} mechanism grants standing to an incomparably broad range of individuals, including employees of government contractors and employees of government agencies alike.

The broad grant of \textit{qui tam} standing in the False Claims Act is subject to four qualifications. The statute requires courts to reject jurisdiction over suits:

1. "[B]rought by a former or present member of the armed forces . . . against a member of the armed forces arising out of such person's service in the armed forces."

2. "[B]rought . . . against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information are not injured by, anticompetitive conduct. See Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1352 (6th Cir. 1989) (denying standing to employees who challenge their employer's alleged antitrust violations, observing that employees would have been economic beneficiaries of their employer's anticompetitive conduct), \textit{cert. denied}, 493 U.S. 809 (1989)."


4. Id. § 2000e-5(f)(1).


known to the Government when the action was brought.\textsuperscript{62}

(3) "[B]ased upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party."\textsuperscript{63}

(4) "[B]ased upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."\textsuperscript{64}

The "original source" exception to the last of these limitations applies to an individual who has "direct and independent knowledge of the information on which the allegations are based, and has voluntarily provided such information to the Government before filing an action" which is based on the information.\textsuperscript{65}

\textsuperscript{62} Id. § 3730(e)(2)(A).

\textsuperscript{63} Id. § 3730(e)(3).

\textsuperscript{64} Id. § 3730(e)(4)(A). The courts have given a broad reading to the meaning of civil "hearing" in interpreting the reach of the public disclosure bar in § 3730(e)(4)(A). The courts of appeals uniformly have concluded that any information disclosed through civil litigation and placed on file with the clerk's office should be considered a public disclosure. United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1350 (4th Cir.), cert. denied, 115 S. Ct. 316 (1994); United States ex rel. Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 651 (D.C. Cir. 1994); United States ex rel. Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148, 1158 (2d Cir.), cert. denied, 113 S. Ct. 2962 (1993); United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1154-56 (3d Cir. 1991); see United States ex rel. Precision Co. v. Koch Indus., 971 F.2d 548, 554 n.5 (10th Cir. 1992), cert. denied, 507 U.S. 951 (1993). The courts also have ruled that § 3730(e)(4)(A) neither bars the use of evidence "publicly disclosed" for the first time during the discovery phase of the \textit{qui tam} suit, Wang v. FMC Corp., 975 F.2d 1412, 1416 (9th Cir. 1992), nor precludes the use of evidence disclosed in the course of a criminal investigation initiated by the government on the basis of information provided by the \textit{qui tam} relator, see United States ex rel. Barajas v. Northrop Corp., 5 F.3d 407, 411-12 (9th Cir. 1993), cert. denied, 114 S. Ct. 1543 (1994).

\textsuperscript{65} 31 U.S.C. § 3730(e)(4)(B). \textit{Compare} United States ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13, 16 (2d Cir. 1990) (finding that to be an "original source" within the meaning of § 3730(e)(4)(A), \textit{qui tam} plaintiffs must have "direct and independent knowledge of information on which the allegations are based," must have provided that information to the government, and must have been a "source to the entity that publicly disclosed the allegations" on which the \textit{qui tam} suit was based); Wang, 975 F.2d at 1418 (same) with United States ex rel. Siller, 21 F.3d at 1351-55 (rejecting view of Second and
The “public disclosure” restriction has proven to be the greatest jurisdictional barrier for qui tam relators. Courts have used this restriction to refuse jurisdiction over suits when the information supporting the relator’s complaint already is in the public domain and the relator lacks direct, independent knowledge of the information. For example, courts have dismissed qui tam lawsuits grounded chiefly on information obtained from discovery in other lawsuits, complaints filed in other lawsuits, or trial records of other cases.

9th Circuits that qui tam relator cannot be an original source unless the relator was a source to the entity that publicly disclosed the information on which the qui tam suit was based).


67. The majority interpretation of the public disclosure bar views qui tam actions as "based upon" a public disclosure whenever the factual basis for the relator’s suit has been revealed in the public domain, regardless of whether the relator in fact derived knowledge of the facts from that disclosure. See United States ex rel. Springfield Terminal Ry., 14 F.3d at 652-55; United States ex rel. Kreindler & Kreindler, 985 F.2d at 1158; United States ex rel. Precision Co., 971 F.2d at 552; United States ex rel. Doe v. John Doe Corp., 960 F.2d 318, 324 (2d Cir. 1992). The minority view entertains an inquiry into whether the relator derived knowledge from sources other than the previous public disclosure. See United States ex rel. Siller, 21 F.3d at 1348-50.

68. See United States ex rel. Stinson, 944 F.2d at 1159-60. In Stinson the qui tam relator was a law firm that had obtained information concerning an insurance company’s participation in a Medicaid fraud scheme. Id. at 1150-51. The law firm obtained the information through discovery in an unrelated lawsuit. Id. at 1151. The court ruled that because the Federal Rules of Civil Procedure ordinarily permit public scrutiny of data collected in discovery—even if such scrutiny never actually occurs—the information in question had been publicly disclosed within the meaning of the False Claims Act. Id. at 1159-60. The court also found that the law firm was not an original source of the Medicaid fraud information because it had obtained the data fortuitously through discovery and not through a deliberate search for the data. Id. at 1161.

69. See, e.g., United States ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13 (2d Cir. 1990). In Long Island Lighting the qui tam relators were employees of an architecture-engineering firm responsible for designing the Shoreham Nuclear Power Station. Id. at 14. The relators alleged that the utility lied to the New York Public Service Commission about Shoreham's construction status. Id. This falsehood was said to have gained the Commission's consent to higher rates, which defrauded the federal government as one of the utility's ratepayers. Id. The court concluded that the relators' qui tam complaint largely copied allegations from an earlier RICO complaint that Suffolk County had filed against the Long Island Lighting Company. Id. The court also said the relators did not qualify for the "original source" exception because they were not the source of the information to the entity—Suffolk County—that first disclosed the data. Id. at 18. But cf. United States ex rel. Siller, 21 F.3d at 1347-55 (refusing to assume that relator's qui tam allegations were based on disclosures contained in complaint in separate, earlier lawsuit against defendant solely on basis that relator's allegations were similar to those made in the earlier lawsuit).
The public disclosure restriction seeks to discourage "parasitic" lawsuits that constitute additional, cumulative assaults upon contractor conduct that is already the target of legal challenge.\textsuperscript{71}

One of the most contentious standing issues has been whether government employees may bring \textit{qui tam} suits based on information obtained during their public employment.\textsuperscript{72} The DOJ has argued that government employees should be precluded from pursuing such suits.\textsuperscript{73} Although some judicial decisions have disfavored \textit{qui tam} suits by current or former government employees,\textsuperscript{74} most courts have declined to bar government employees from bringing \textit{qui tam} actions so long as the information supporting the allegations was not in the public domain when the suit was filed.\textsuperscript{75} One important court of appeals decision concluded that the 1986 \textit{qui tam} reforms do not compel government employees to await the end of a nonpublic, internal government investigation before starting \textit{qui tam} actions.\textsuperscript{76} Without avail, the DOJ argued that permitting such lawsuits would trigger races to the courthouse in which government employees seek

\textsuperscript{70} See Houck \textit{ex rel.} United States v. Folding Carton Admin., 881 F.2d 494, 504-05 (7th Cir. 1989) (dismissing \textit{qui tam} suit because the information supporting the complaint was derived from earlier litigation resulting in a reported decision), \textit{cert. denied}, 494 U.S. 1026 (1990).

\textsuperscript{71} See \textit{United States ex rel. Stinson}, 944 F.2d at 1154 (discussing congressional intent to discourage suits based on previous disclosures of fraud).


\textsuperscript{73} See \textit{United States ex reL. Fine} v. Chevron, U.S.A., 72 F.3d 740, 745 (9th Cir. 1995) (barring employee of Inspector General's office from bringing \textit{qui tam} relators). In adopting the 1986 False Claims Act amendments, Congress appears not to have anticipated the possibility that government employees would seek to act as relators. Mintz, \textit{supra}, at 21 (quoting Rep. Howard Berman: "I'm embarrassed to say we did not spend any time . . . contemplating this question.").


\textsuperscript{76} \textit{United States ex rel. Williams}, 931 F.2d at 1503-04.
to file *qui tam* lawsuits based on information acquired in their official duties before the government can start a civil or criminal case in its own right.\textsuperscript{77}

### C. The Government's Role in a Qui Tam Suit

The relator begins a *qui tam* action by serving the DOJ with a copy of the complaint and "written disclosure of substantially all material evidence and information the person possesses."\textsuperscript{78} The complaint is placed under seal with the court for at least sixty days and is not served on the defendant until sixty days elapse.\textsuperscript{79} The waiting period allows the DOJ to investigate and evaluate the relator’s allegations. The DOJ may seek—and often obtains—extensions of the sixty-day waiting period.\textsuperscript{80} After reviewing the relator’s complaint, the DOJ has four options: take over the suit and prosecute the action;\textsuperscript{81} decline to participate and allow the relator to proceed independently, while retaining the right to intervene at a later stage of the proceedings;\textsuperscript{82} move that the court dismiss the action following notice to the relator and an opportunity for the relator to be heard;\textsuperscript{83} and, subject to the court’s approval, settle the action following notice to the relator and an opportunity for the relator to critique the proposed settlement terms.\textsuperscript{84}

Relators have initiated 1229 suits since the effective date of the 1986 *qui tam* reforms through March 15, 1996.\textsuperscript{85} The DOJ has settled or intervened in and prosecuted 198 *qui tam* suits.\textsuperscript{86} In 688 cases the DOJ declined to participate and allowed the relator to proceed independently.\textsuperscript{87} The remaining 343 matters are under

\textsuperscript{77} Id. at 1503.


\textsuperscript{79} Id.

\textsuperscript{80} Id. § 3730(b)(3)-(4).

\textsuperscript{81} Id. § 3730(b)(4)(A).

\textsuperscript{82} Id. § 3730(b)(4)(B).

\textsuperscript{83} Id. § 3730(c)(2)(A).

\textsuperscript{84} Id. § 3730(c)(2)(B). For a discussion of the Justice Department’s role in the prosecution of *qui tam* suits, see Michael Lawrence Kolis, Comment, *Settling for Less: The Department of Justice’s Command Performance Under The 1986 False Claims Amendments Act*, 7 ADMIN. L.J. AM. U. 409 (1993).


\textsuperscript{86} Telephone Interview with Joseph Krovisky, *supra* note 14. The total of 198 cases includes 151 completed matters and 47 active matters.

\textsuperscript{87} Id. In 463 of the 688 cases in which the Justice Department declined to participate, the court subsequently dismissed the *qui tam* claims with no recovery to the
investigation, and the DOJ has not yet decided whether to intervene. The DOJ appears, in effect, to have adopted a policy of seeking dismissal of a *qui tam* suit only when there is a jurisdictional flaw in the relator's suit—for example, reliance on publicly available information. There has been only a single reported instance in which the DOJ has sought to dismiss a *qui tam* suit on the ground that the suit lacked substantive merit or otherwise contradicted the interests of the United States.

**D. The Relator's Bounty**

The False Claims Act penalizes violations with (1) a civil penalty between $5000 and $10,000 for each violation and (2) three times the actual damage the government has sustained from the defendant's misconduct. The relator's share in the recovery depends chiefly upon whether the DOJ intervenes to prosecute the case and whether the relator participated in the conduct that forms the basis of the *qui tam* suit. If the DOJ prosecutes the *qui tam* action, the relator receives fifteen to twenty-five percent of the recovery, plus reasonable attorneys' fees, costs, and expenses. The size of the bounty within this range depends upon "the extent to which the person substantially

relator. In 31 of the 688 cases, the relator achieved a recovery by way of settlement or judgment. 117 cases remain in litigation.

88. Id.

89. See infra note 160 and accompanying text (describing testimony by Stuart M. Gerson, Assistant Attorney General for the Civil Division, outlining the Justice Department's opposition to *qui tam* suits by government employees).


91. 31 U.S.C. § 3729(a) (1994). Each invoice submitted for payment under a fraudulently obtained or fraudulently priced contract is a separate violation. If the contractor submits monthly vouchers for payment under a tainted contract, each voucher is a separate offense against which the fixed civil penalty can be assessed.

92. Id. The False Claims Act provides for double damages in some instances where the defendant voluntarily discloses fraud to the government. Id. § 3729(a)(7).

93. Id. § 3730(d)(1).
contributed to the prosecution of the action."\(^9\)\(^4\) The court may limit the bounty to ten percent or less of the recovery if the action rested mainly on public disclosures of information—other than information provided by the relator—concerning "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."\(^9\)\(^5\) If the DOJ does not prosecute the action, the bounty rises to twenty-five to thirty percent of the recovery, plus reasonable attorneys’ fees, costs, and expenses.\(^9\)\(^6\)

A generous bounty may be necessary to induce some relators to liquidate their investment in a career with their current employer. As described below, the False Claims Act’s anti-retaliation safeguards give relators some protection against retribution from their employers. Such safeguards may shield a relator from outright dismissal, but they will not quell the institutional hostility that filing a *qui tam* suit likely will arouse. A potential relator probably must assume that filing a *qui tam* case will preclude future advancement in the firm and, perhaps, in the industry. A relator with a promising professional future is unlikely to sue unless the prospective gain from the suit exceeds the expected gains from continued service with the firm or in the profession. At the same time, there is another pool of potential relators who probably would require a less generous bounty. The dramatic contraction of the defense industry since the late 1980s has displaced hundreds of thousands of workers and put the jobs of many others at risk.\(^9\)\(^7\) Employees who have been dismissed, or face imminent layoffs, have less to lose in pursuing a *qui tam* suit and are likely to demand a smaller return from a *qui tam* suit than employees who otherwise anticipate an extended career with the firm.

The 1986 *qui tam* reforms sought to protect employees who are "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others" in pursuing a *qui*
Protected conduct includes investigating, initiating, testifying for, or otherwise assisting in a qui tam action. The statute entitles the retaliation target “to all relief necessary to make the employee whole.”\(^9\) Such relief includes restoring seniority, two times back pay, interest on back pay, special damages, litigation costs, and reasonable attorneys fees.\(^10\)

The False Claims Act curtails, and sometimes precludes, recoveries by relators who participate in misconduct that supports the qui tam complaint. The relator cannot recover a bounty if convicted of criminal conduct that also violates the False Claims Act.\(^1\) In the absence of a criminal conviction, the court may reduce the bounty of relators who plan and initiate violations.\(^2\) The reduction must account for the relator's role "in advancing the case to litigation and any relevant circumstances pertaining to the violation."\(^3\)

### E. Controls Upon Baseless, Abusive, or Frivolous Actions

The 1986 qui tam reforms provide several deterrents to the filing or continuation of meritless, abusive, or frivolous cases. As suggested earlier, the statute gives the DOJ an important gatekeeping function by permitting the DOJ to move to dismiss suits it deems meritless.\(^4\) Nonetheless, the DOJ seldom has moved to dismiss a qui tam suit on the ground that the underlying substantive allegations were threadbare. Short of seeking outright dismissal, the DOJ also can move to restrict the relator's participation where the DOJ chooses to prosecute the case.\(^5\) This option lets the DOJ prevent the relator from pursuing duplicative or fruitless evidentiary paths.

The 1986 reforms also allow defendants to move to restrict abusive or frivolous relator conduct. The court may limit the relator's participation if the defendant shows that unrestricted participation "would be for the purposes of harassment or would cause the defendant undue burden or unnecessary expense."\(^6\) In addition, if the DOJ does not prosecute the case and the relator proceeds

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98. 31 U.S.C. § 3730(h).
99. Id.
100. Id.
101. Id. § 3730(d)(3).
102. Id.
103. Id.
104. See supra notes 79-84 and accompanying text.
106. Id. § 3730(c)(2)(D).
independently, the court may award the defendant reasonable attorneys' fees and expenses "if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." Through September 1995 there has been only a single reported instance in which a defendant has successfully invoked either of these provisions.

IV. EFFICIENCY CONSEQUENCES OF QUI TAM ACTIONS

Congressional sponsors of the 1986 qui tam reforms saw bounty hunting as a valuable spur for efficiency in public procurement. The prospect of increasing the amount and quality of goods and services for a given level of expenditures provided crucial impetus for enhancing the qui tam mechanism. This Section examines the efficiency considerations that weigh in favor of and against the enhanced bounty hunting provisions.

A. Benefits of Qui Tam Actions

The 1986 qui tam reforms arose largely from the widespread perception that contractors often overcharged government agencies for goods and services and routinely shirked in performing contractual quality inspections. Sponsors of the reforms believed that the frequency of overcharging and quality shirking stemmed from deficient government monitoring and enforcement of compliance with procurement regulations and statutes. The qui tam reforms seek to improve the detection and deterrence of contractor fraud by reducing agency costs associated with, respectively, purchasing agency-contractor and enforcement agency-taxpayer relationships.

1. Proximity to relevant information

The chief efficiency advantage of qui tam bounty hunting is that it gives oversight and enforcement powers to those closest to the
relate relevant information. Principal-agent models used to analyze public contracting often feature a supplier with private information about its costs and its efforts to provide quality. Typically, information asymmetries are greatest for suppliers with sole-source contracts to provide nonstandard products such as weapons systems. The government relies extensively upon ex-ante and ex-post audits and inspections by public employees to press its agents to reveal their true costs and to meet quality requirements.

Audits and inspections can be costly, however, and even arduous examination schemes may fail to equip external government observers with the same knowledge possessed by internal contractor employees. Due to greater familiarity with, and understanding of, the contractor's activities, contractor employees ordinarily can identify and assess relevant information at a lower cost than external government observers. Compared to a government auditor, assembly line workers will be first to know that supervisors have instructed employees to take labor hours properly attributable to a fixed-price government contract and charge them to a cost-plus project. Compared to a government inspector, quality control engineers can more readily detect the deliberate omission of mandatory product tests or tampering with test results. Compared to a government purchasing official, a supplier's cost analyst can more easily detect that the firm's sealed bid was part of a covertly-orchestrated bid rotation scheme.

2. Antidote to deficient public agency incentives

Adopting decentralized enforcement mechanisms also flows from

112. The Senate report on the 1986 qui tam reforms said enhanced qui tam monitoring was “necessary to halt the so-called 'conspiracy of silence' that has allowed fraud against the Government to flourish.” S. REP. NO. 345, supra note 11, at 6, reprinted in 1986 U.S.C.C.A.N. at 5271.
doubts about how closely the incentives of public purchasing authorities and enforcement agencies are aligned with taxpayer interests. The 1986 *qui tam* reforms consciously tried to reduce reliance on public authorities that, for various institutional reasons, might not attack contractor misconduct aggressively. When it detects supplier fraud, a government purchasing body might forego prosecution for fear that any scandal will endanger funding for favored programs, or because the firm has captured its regulator. These tendencies are partly offset by placing the decision to prosecute fraud in the hands of the Justice Department, which presumably is less concerned about the fate of individual purchasing agency projects or suppliers. Yet without decentralized monitoring that brings fraud allegations directly to its attention, the DOJ might depend excessively upon purchasing agencies whose interests could dictate suppression of information needed to begin and develop investigations. Moreover, the DOJ also might withhold aggressive inquiry if members of Congress or the President apply pressure to protect specific acquisition programs.

The decentralization approach of the 1986 *qui tam* reforms counteracts the possibility of inadequate public enforcement in three ways. First, it gives the DOJ greater access to fraud-related information that government purchasing agencies might pursue halfheartedly, and never discover, or suppress. By compelling relators to serve the DOJ with their complaints and supporting data, the *qui tam* process provides a tripwire for alerting the DOJ to misconduct that purchasing agencies might not bring to its attention.

Second, by deputizing contractor employees and government employees to sue on the government’s behalf, the *qui tam* mechanism decreases the likelihood that meritorious cases will languish because the purchasing agency or DOJ, owing to sloth, negligence, or

117. See Marshall et al., supra note 9, at 3.
118. During hearings on the 1986 *qui tam* reforms, one of the chief sponsors of the False Claims Act amendments stated that “[w]hether as a result of lack of resources, or worse, the Department of Justice has not done an acceptable job of prosecuting defense contractor fraud.” *False Claims Act Amendments: Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary, 99th Cong., 2d Sess.* 95 (1986) (statement of Rep. Howard Berman).
deliberate policy choices designed to protect specific programs from needed scrutiny, declines to investigate and attack apparent episodes of fraud. Perhaps most important, the *qui tam* reforms permit government employees—including employees of prosecutorial bureaus such as the DOJ—to second-guess internal government decisions not to prosecute where such decisions may be the result of capture or corruption.

Third, scholars have suggested that one way to reduce corruption and discourage shirking by public inspectors is to increase their stake in amounts the government recovers by identifying and challenging violations of legal requirements.120 Allowing *qui tam* suits by government employees such as auditors and inspectors may reduce the likelihood that individual employees will be captured or corrupted by firms they oversee. Compared to the incentive schemes—promotions and relatively modest bonuses and salary increases—that government agencies now use to motivate inspectors and auditors to find and report contractor misconduct, *qui tam* bounties may provide more potent inducements to hunt for and challenge procurement law violations.

3. Augment limited public enforcement resources

Sponsors of the *qui tam* reforms expected decentralized monitoring to improve procurement efficiency by increasing total resources devoted to detecting and attacking contractor corruption.121 To some extent, this justification is consistent with the efficiency rationale presented above: Given the choice between spending a fixed amount of resources on monitoring by contractor employees or monitoring by public employees, one should prefer employee monitoring because such individuals can identify fraud at a lower cost than public employees. For similar reasons, Gary Becker and George Stigler have found that private enforcement of public law would be more efficient than public monitoring.122

120. See MOOKHERJEE & PNG, *supra* note 6, at 1-3.


In addition to detection, investigative and litigative problems which permit fraud to go unaddressed, perhaps the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies. . . . The Committee believes that the [1986 False Claims Act] amendments . . . which allow and encourage assistance from the private citizenry can make a significant impact on bolstering the Government’s fraud enforcement effort.

Support for *qui tam* decentralization also rested upon the desire to obtain more monitoring without having to appropriate federal funds to pay additional government auditors, inspectors, and prosecutors.\(^{123}\) Operation of the private monitoring mechanism consumes real resources, but it was believed that such resources would not be drawn from appropriated public funds. The notion that augmenting decentralized monitoring would provide additional enforcement at little or no cost to the government is misguided. *Qui tam* monitoring entails the consumption of substantial private resources, and, as discussed below, such transaction costs ultimately are paid in significant part with public funds.

**B. Disadvantages of Qui Tam Actions**

Scholars have observed that, notwithstanding positive attributes, decentralized law enforcement schemes can have perverse efficiency consequences of their own. Decentralized enforcement systems can generate excessive litigation,\(^{124}\) elicit substantial numbers of nuisance suits,\(^{125}\) and provide tools by which firms strategically use the courts to impede efficient behavior by rivals.\(^{126}\) While the interests of public enforcement officials may not be perfectly congruent with taxpayer interests, it is likely that the aims of *qui tam* relators and taxpayers also are not invariably coincident.\(^{127}\)

The formative treatments of decentralized monitoring have recognized that private enforcement could entail significant agency costs of its own.\(^{128}\) The 1986 *qui tam* reforms create species of agency costs that have largely escaped treatment in scholarly debate over public and private enforcement. These distinctive costs arise


\(^{127}\) This observation provides the implicit policy basis for a series of contractor efforts to persuade courts to invalidate the 1986 *qui tam* reforms as, in effect, a constitutionally defective delegation by Congress of Executive Branch enforcement functions to private individuals. These arguments have been rejected in each instance. See supra note 43 and accompanying text.

because the 1986 reforms permit whistleblowing employees of
government contractors to attack the conduct of their own employers
and allow government employees to bring suits in their own right to
challenge behavior that their agencies also have authority to prose-
cute. Thus, the private enforcer is not, as Becker and Stigler seem to
assume, external to the entity whose behavior is being regulated, but is an employee of that organization. Making the private enforcer
both an agent of the public and an agent of the party to be monitored
creates distinctive problems. The policymaking process that led to
enactment of the 1986 procurement reforms took scant account of
potential qui tam costs, but their evaluation is essential to any sensible
decision about the future application of qui tam monitoring and
enforcement tools.

1. Interference with legitimate contractor management choices

Business managers routinely make decisions that displease
individual employees. On countless occasions every day, managers in
contractor organizations decline to provide desired salary increases,
withhold promotions, punish misbehavior (for example, tardiness,
unexcused absences, substance abuse), order firings, and make
product design, development, and marketing choices that contradict
the preferences of some subordinates. Each event is a potential
source of employer-employee friction. If the organization in question
receives federal funds—for example, a weapons manufacturer, a
university research institute, a telephone company, or a hospital that
receives Medicaid reimbursements—it is likely that the organization
on some occasion has wavered in adhering to a procurement
regulation with which the organization nonetheless has certified its
compliance.

These conditions generate a constant pool of aggrieved employ-
ees and provide the basis for individuals with some imagination and
familiarity with the organization’s operations to conceive a facially
plausible story about organizational departures from statutory or
regulatory commands. Dissatisfied contractor employees may
threaten to file—or file—qui tam actions to deflect legitimate
discipline, extract unwarranted termination arrangements, or second-
guess valid management decisions concerning matters such as the
design and manufacture of the company’s products. Efficiency-

129. See Becker & Stigler, supra note 1, at 13-14.
enhancing employment and product development decisions may be avoided or weakened.

Firms may adopt costly safeguards to reduce the likelihood of a *qui tam* suit. For example, the contractor may invest more resources in employment screening techniques which identify employees with personality and character traits suggesting strong tendencies toward conformity and loyalty. Not only does this increase the cost of screening employees, but it also may reshape the contractor's workforce in undesirable ways. It is not unusual for highly creative, inventive individuals to be assertive and headstrong. The wide availability of *qui tam* suits may dictate screening methodologies that emphasize passivity at the expense of inventiveness and creativity.

A second safeguard may take the form of changes in internal decision-making processes. *Qui tam* monitoring may increase the importance of consensus as a decision-making objective because achieving consensus reduces the possibility that individual employees will believe that favored approaches were improperly rejected. In effect, the availability of a *qui tam* suit gives the employee a means of vetoing disfavored policy choices. Achieving consensus can be time-consuming and yield decisions that are suboptimal in their tendency to incorporate compromise positions which satisfy potential holdouts but fail to make needed choices or respond adequately to specific problems. The firm may become more concerned about soothing the feelings of each participant in the decision-making process and less attentive to solving difficult problems.

2. Strategic threats by rivals and vertically related firms

Performing public contracts often involves extensive collaboration between two or more firms. Prime contractors for sophisticated systems such as air traffic control computers and combat aircraft usually rely on massive networks of subcontractors to provide inputs for the end product. In many instances the design and development of a major system is shared equally through joint ventures or teaming arrangements involving two or more contractors. Thus, prime

130. Cf. United States *ex rel.* Butler v. Hughes Helicopters, Inc., 71 F.3d 321, 324 (9th Cir. 1995) (discussing relator's *qui tam* complaint based in part on employer's rejection of the relator's draft plan for testing a weapon system). The author is Of Counsel to the law firm that represented the defendant in *Butler*.

contractors obtain numerous inputs from vertically-related suppliers and sometimes share design and production responsibility with direct rivals. Prime contractors often provide extensive information about their operations in soliciting bids from competing input suppliers, overseeing performance by its subcontractors, screening potential coventurers, and coordinating design and production activities with a chosen teammate.

The *qui tam* mechanism can affect relationships among input suppliers, prime contractors, and coventurers in two ways. First, input suppliers may use the *qui tam* mechanism opportunistically to extract subcontracts from prime contractors. Firms that had bid unsuccessfully on input contracts might allege that the winning subcontractor bribed the prime contractor. Because the prime contractor must certify that it has not paid kickbacks to its suppliers, the subcontractor could file a *qui tam* suit alleging that the certificate was false and that any payments made under the contract were tainted.

Second, firms may attempt to use information collected during the course of performance to extract contractual concessions from input suppliers, prime contractors, or coventurers. For example, information sharing could reveal to a prime contractor that one of its subcontractors violated a procurement regulation. The prime contractor then could threaten a *qui tam* suit to induce its supplier to renegotiate the subcontract on terms more favorable to the prime contractor. The awareness that subcontractors, prime contractors, and coventurers might use information gathered in the course of collaboration to threaten *qui tam* suits could impede efficient information sharing that is important to the success of many contractual relationships.

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132. The background of United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339 (4th Cir.), *cert. denied,* 115 S. Ct. 316 (1994) illustrates how input suppliers or customers of a contractor can use allegations of fraud to extract concessions from the contractor. In *Siller* the *qui tam* relator was the brother and employee of a former distributor of Becton Dickinson health care products. *Id.* at 1341. After Becton Dickinson terminated its relationship with the distributor, the distributor filed a wrongful termination suit in Texas state court, alleging that Becton Dickinson terminated the distributorship because the distributor was aware that the defendant was overcharging the government in sales that it made directly to federal purchasers. *Id.* at 1340-41. After the state court action was settled, the distributor's brother filed a *qui tam* action against Becton Dickinson and alleged misconduct similar to that pleaded in the state lawsuit. *Id.*
3. Delayed identification and correction of problems

Taxpayers prefer early correction of certain types of contractor conduct. The value of a swift cure is perhaps most evident in the area of quality control, where failure to abide by specified testing regimes and materials standards could cause the catastrophic destruction of a critical component, such as an aircraft engine. Potential *qui tam* relators may not share this concern. Rather than promptly bringing problems to management’s attention, employees may allow them to persist—thus increasing the size of the injury and the relator’s potential recovery—and to gather evidence for pursuing a *qui tam* suit. The incentive to delay will be greatest where few people know of the misconduct, and thus the number of potential competing relators is small.

For example, an employee not directly involved in a project may notice irregularities in billing, fulfillment of product testing requirements, or other potential misconduct connected with that project. Unless firm management has authorized the illicit scheme, the company probably would prefer that the employee immediately bring such improprieties to management’s attention because early internal detection and correction can significantly reduce the firm’s exposure to legal sanctions. The availability of the *qui tam* mechanism may induce the employee to disregard the company’s internal anti-fraud hotlines or similar safeguards.

One of the most interesting episodes of *qui tam* enforcement involved a suit filed by a former General Electric employee against General Electric for paying bribes to an Israeli general in connection with the sale of jet engines to the Israeli government.\(^{133}\) The *qui tam* relator, Chester Walsh, may have learned of the bribes as early as 1984, consulted an attorney in 1987, and filed a *qui tam* suit against General Electric in November 1990.\(^{134}\) From 1987 until Walsh filed suit, the alleged injury to the United States grew by roughly $28.5 million, substantially increasing the base upon which Walsh’s bounty might be calculated.\(^{135}\) Walsh argued that the delay in filing his suit resulted from his fear that the recipient of the bribe was prepared to

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134. *Id.* at 1037.
135. *Id.* at 1038-39.
have Walsh killed.\textsuperscript{136} Walsh has stated that he waited until the
general was imprisoned before beginning the action.\textsuperscript{137} Walsh
conceivably had a genuine concern for his safety, but his behavior also
is consistent with the hypothesis that the damage meter would run
substantially higher if he delayed filing suit.\textsuperscript{138}

Comparable incentive problems exist for potential relators who
are government employees. Government auditors, inspectors, and
investigators also may fail to exert timely effort to correct problems
identified during the course of their official duties. In auditing a
contractor's accounts, a government investigator might notice a
questionable cost-allocation practice. The best outcome for society is
that improper practices be corrected promptly. If the government
employee anticipates filing a \emph{qui tam} suit, the employee might decline
to impede the questionable conduct in the expectation that continua-
tion of the behavior will increase the size of the potential \emph{qui tam}
recovery. Thus, tying the private enforcer's bounty to the size of the
total injury can induce monitoring behavior, such as delayed reporting
of apparent violations, that increases rather than mitigates the injury.

4. Erosion of internal compliance mechanisms

Government contractors routinely create internal mechanisms for
detecting and correcting possible instances of misconduct. For
example, many firms use corporate counsel or internal audit depart-
ments to examine operating units periodically to determine compli-
ance with government regulatory controls. Establishing an internal
compliance apparatus can facilitate early detection and correction of
misconduct. It also can reduce the punishment a contractor would
receive under the Federal Sentencing Guidelines\textsuperscript{139} and can assist
the firm in making voluntary disclosures to the government which
minimize the firm's exposure for fraud.\textsuperscript{140}

\textsuperscript{136} \emph{Id.} at 1037.
\textsuperscript{137} \emph{Id.}
\textsuperscript{138} The district court eventually awarded Walsh a bounty of approximately $11.3
million. \emph{Id.} at 1036.
\textsuperscript{139} U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL
\S\S 8A1.2, 8C2.5(f) (1995).
\textsuperscript{140} In 1986 the Department of Defense created a Voluntary Disclosure Program to
encourage suppliers to identify contracting improprieties of which the government was not
aware. \textit{See} June Gibbs Brown, \textit{THE DEPARTMENT OF DEFENSE VOLUNTARY DISCLOS-
URE PROGRAM: A DESCRIPTION OF THE PROCESS}, 1988 A.B.A. SEC. PUB. CONT. LAW,
Tab A (compiling letters from the Deputy Secretary of Defense establishing the Voluntary
Disclosure Program).
**Qui tam** enforcement can undermine internal compliance mechanisms in two ways. The first of these, suggested above, is that employees may choose to file *qui tam* suits instead of resorting to internal anti-fraud mechanisms such as hotlines. The second is that the firm's internal compliance officials may fail to correct instances of misconduct in a timely manner. Suppose that an internal auditor observes that one of the contractor's operating divisions appears to be misallocating labor costs. It is in the interest of taxpayers and—usually—the firm, for the auditor to move promptly to investigate and stop the cost mischarging. The *qui tam* incentive structure may induce the auditor to ignore the suspect behavior in order to lay the foundation for a larger *qui tam* recovery. Unless the firm can write enforceable contracts with its internal compliance officials compelling such officials to correct fraud promptly, the *qui tam* mechanism may severely reduce the effectiveness of internal compliance systems.

5. Challenges to beneficial or benign conduct

The efficiency effects of the *qui tam* mechanism depend greatly upon how often relators challenge conduct that is genuinely harmful. The net benefits of *qui tam* monitoring shrink as the number of “false positives”—challenges to benign or beneficial conduct—increase. There are at least two basic reasons to think that relators in a significant number of instances will attack conduct that is benign. The first is the possibility that relators will mistakenly conclude that a contractor's acts are fraudulent when such acts in fact conform to legal requirements or are undertaken without the state of mind needed to establish fraud. Faulty diagnoses of observed behavior are inescapable given the complexity and murkiness of the regulatory commands controlling government contractors. James Nagle accurately observes that the federal procurement regulations are “a mine-studded labyrinth bewildering and dangerous to Government and contractors alike.”141 Relators may be particularly prone to misapprehend the legal significance of contractor efforts to comply

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141. JAMES F. NAGLE, FEDERAL PROCUREMENT REGULATIONS: POLICY, PRACTICE AND PROCEDURES 532 (1987); see also 1 COMMISSION ON GOV'T PROCUREMENT, REPORT OF THE COMM’N ON GOV’T PROCUREMENT 31 (1972) (noting the existence of “a burdensome mass and maze of procurement and procurement-related regulations”); PRESIDENT'S BLUE RIBBON COMM’N ON DEF. MGMT., A FORMULA FOR ACTION: A REPORT TO THE PRESIDENT ON DEFENSE ACQUISITION 18 (1986) (observing that “the legal regime for defense acquisition is today impossibly cumbersome”).
with the government’s complex cost allocation and accounting conventions. Secondly, relators may incorrectly characterize as fraudulent deviations from regulatory requirements that result from innocent error or from other impulses that lack the degree of deliberateness or recklessness needed to establish fraud.

A third source of challenges to benign conduct consists of deliberate, strategic efforts to extract settlement offers from defendants. The defense of *qui tam* actions is costly in terms of expenditures for outside counsel and diversion of the contractor’s internal resources to investigate and respond to the *qui tam* allegations. *Qui tam* suits also attract adverse publicity. While such matters remain on the court’s active docket, the defendant is likely to confront a series of news reports that give full play to the relator’s allegations, regardless of the underlying merits of the claims. Relators may file *qui tam* actions to extract settlements which exploit the defendant’s desire to avoid the costs of legal defense and adverse publicity.

142. Paul Biddle’s attack upon Stanford University’s practice of charging certain indirect costs on federal research contracts appears to constitute an important example of a relator false positive—characterizing as fraudulent conduct which satisfies regulatory requirements. In 1990, Biddle, an auditor who was the representative of the Office of Naval Research at Stanford, alleged that the university had engaged in fraud by using incorrect rates for billing indirect costs to the government and by charging various species of unallowable costs to its federal contracts. *See* Kenneth J. Cooper, *Navy to Honor Biddle’s Campus Crusade*, WASH. POST, Sept. 30, 1991, at A9. Stanford responded that the disputed accounting practices conformed to the terms of numerous memoranda of understanding executed by Stanford and the Navy extending back to the early 1980s. Biddle’s allegations inspired the Navy to commence an administrative proceeding to recover millions of dollars in disputed costs. Biddle also filed a *qui tam* suit alleging injury to the government of over $300 million. *Id.* In October 1994, the Navy settled its suit against Stanford on terms that largely exonerated the university and cast doubt on the legal soundness of Biddle’s allegations. Stanford agreed to pay the government $1.2 million as an adjustment for costs charged in fiscal years 1981-92, but the Navy concluded that it did “not have a claim that Stanford engaged in fraud, misrepresentation, or other wrongdoing with respect to the Memoranda of Understanding.” *Navy, Stanford Settle Indirect Cost Dispute*, Daily Rep. for Executives (BNA), at 201 (Oct. 20, 1994). Biddle’s *qui tam* suit, which did not elicit Justice Department participation, is still pending.

143. *See* Perzan, *supra* note 20, at 642-47 (analyzing application of the False Claims Act to allegations of fraud in scientific research, and discussing the importance of distinguishing between an outright fabrication or manipulation of data and alterations which result from mere sloppiness or “self-deception” by the researcher).

144. A number of reported settlements in *qui tam* suits since 1986 seem consistent with this explanation. For example, in *United States ex rel. Stillwell v. Hughes Helicopter, Inc.*, 714 F. Supp. 1084 (C.D. Cal. 1989), the relator alleged that the defendants filed false claims totalling $214 million. *See* Thompson, *supra* note 26, at 35. Because the government declined to intervene, the relator would have recovered up to 30% of this amount, $64.2 million, if he had sustained his claims. The case was settled for $500,000,
Settlements of *qui tam* suits can be structured to exclude payment to the government. Even when it declines to prosecute a case, the government is entitled to at least seventy percent of the ultimate recovery, including sums obtained by settlement. However, relators can exclude the government from the recovery either by denominating the settlement amount as attorneys’ fees and related legal costs or by making the *qui tam* allegations one part of a larger complaint that includes state law claims of wrongful termination or breach of contract. The settlement can then be cast in terms of payment for abandoning the state law based claims—causes of action in which the government has no basis to assert an interest in the outcome.145

6. Distortions in intrafirm cooperation and information flows

One way for contractors to reduce the likelihood of *qui tam* suits by their employees is to restrict access to information that might be construed as supporting an allegation of fraud. Suppose a concern arises about whether a component has passed contractually mandated quality tests. Several hypotheses (for example, improper application of the test, misreading of the test results, a design flaw, or a production defect) could explain the apparent inability of the product to meet the test’s requirements. The most effective approach to solving the problem may be to enlist the help of a broad spectrum of company employees—design engineers, quality control officials, and production workers. Among other steps, one would alert these employees to all possible explanations for the test failure and enlist their assistance in identifying causes of, and cures for, the problem.

The prospect of *qui tam* monitoring may caution against embracing this approach. Encouraging employees to speculate freely about and discuss explanatory hypotheses may be seen as disseminating information that could provide the basis for a *qui tam* claim. A firm might decide instead to restrict the range of subjects that are analyzed openly within the company and to reduce the number and type of individuals who are engaged to address specific matters. *Qui*

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most of which was earmarked as reimbursement for the relator’s attorneys fees and costs. See Richard A. Sauber, *Relators vs. The Department of Justice: Intramural Conflict in the Qui Tam Case, in* GRAPES OF WRATH: A GOOD OR BAD YEAR FOR EMPLOYEE RIGHTS?, 1990 A.B.A. SEC. PUB. CONT. LAW, Tab F, at 1, 27-28. The defendant paid the government $28,000 in costs for investigating the relator’s claims, but the government received nothing else from the settlement. *Id.* at 28 & n.18. The author is Of Counsel to the law firm that represented one of the Stillwell defendants.

145. See *supra* note 84 and accompanying text.
"qui tam" monitoring by employees may discourage desirable cooperation and may lead to inefficient compartmentalization of information within the contractor's organization. This relates to a larger concern that historically has accompanied consideration of decentralized whistleblower monitoring schemes: namely, that deputizing each employee to attack misconduct by colleagues can inhibit the cooperation needed to make the organization function effectively.

Expansive application of "qui tam" monitoring also may damage firm efficiency in another important respect. The legislative record leading to adoption of the 1986 False Claims Act amendments expresses the desire of Congress to unravel "the conspiracy of silence" sustained by participants in fraudulent schemes within contractor organizations. The benefits of using an informing mechanism to break a conspiracy of silence within an organization must be weighed against potentially harmful effects upon desirable features of organizational conduct. Cooperation, teamwork, and close collaboration among individual workers often are characteristics of successful organizations. An inherent cost of any informing mechanism is to reduce the willingness of potential team members to share ideas and confidences and engage in uninhibited discussion about how the organization is performing and how it might improve. The awareness that one's speculation about the existence or causes of a potential problem might be construed as an admission of misconduct inexorably will tend to impede the exchange of ideas and reduce the extent and effectiveness of employee cooperation within the organization. Expansive reliance on informing and bounty hunting as monitoring tools necessarily must come at some cost in team effectiveness.

7. Distortions in contractor-purchasing agency relations

As indicated above, several courts have ruled that the 1986 "qui tam" reforms give government employees liberal standing to bring "qui tam" actions, even when the "qui tam" suit is based upon information accumulated in the course of the employee's official duties. Particularly striking is the decision in United States ex rel. Williams v. NEC Corp., in which the U.S. Court of Appeals for the Eleventh Circuit stated that government employees need not wait until the government concludes its own nonpublic investigation before filing a

147. See supra notes 53-77 and accompanying text.
148. 931 F.2d 1493 (11th Cir. 1991).
The logic of Williams suggests that, in the absence of a pending public inquiry, any government employee can maintain a *qui tam* suit so long as the employee beats the Justice Department to the courthouse.

Expansive interpretations of government employee standing have powerful implications for the relationship between federal agencies and their suppliers. Any government employee who routinely transacts business with the contractor—program managers, auditors, inspectors, investigators, contract administration personnel, attorneys—is a potential *qui tam* relator. Not only can these officials sue individually, but it is possible to imagine collaboration between a contractor employee and a government official, such as an auditor, to develop a *qui tam* complaint that both might file against the contractor. Researchers have found that success in public contracting often depends upon unwritten, relational features of the transaction between the government and its suppliers. Placing the decision to prosecute in the hands of individual government employees may endanger valuable relational features of federal procurement transactions.

Consider two ways in which *qui tam* monitoring can undermine desirable relational aspects of transactions between the government and its suppliers. One result may be a greater incidence of what amounts to extortion by public officials. Giving each government official a large bounty for detecting fraud may increase the number of instances in which such officials challenge conduct that is largely or entirely benign. Dilip Mookherjee and I.P.L. Png suggest that generous bounties might stiffen the resistance of public inspectors to bribery by regulated firms. It is conceivable, however, that the bounty mechanism also might provide a greater incentive for public

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149. *Id.* at 1503 & n.16.


151. See *Mookherjee & Png, supra* note 6, at 2-3.
inspectors to threaten attacks upon relatively minor violations or benign conduct as a way to extract side payments from the contractor.

A significant number of government agencies are responsible for overseeing contractor performance and investigating apparent departures from regulatory requirements. A second consequence of liberal standing for government employees is likely to be a reduction in the contractor's willingness to cooperate with government agencies in executing routine contract administration, oversight, and auditing activities. Contractors will regard each government request or demand for information as a potential conduit for data that government employees might use to develop qui tam claims. Contractors may think twice before engaging government officials in candid, uninhibited discussions of problems that the contractor has encountered during performance. Participation in programs designed to encourage voluntary disclosure to government agencies of misconduct identified through internal contractor auditing becomes problematic if individual government employees can incorporate damaging information directly into their own qui tam complaints.

One justification for decentralized qui tam monitoring is that it curbs the tendency of purchasing agencies and contractors to collaborate in evading procurement regulatory commands. Purchasing agencies are seen as victims of supplier capture, so that purchasing officials voluntarily bend the rules for suppliers and refrain from attacking misconduct. Law enforcement agencies that are cautious or hesitate to investigate or prosecute apparent contractor departures from regulatory norms are taken as proof of the government's general unwillingness to disturb cozy relationships with entrenched suppliers. Thus, permissive qui tam standing is said to serve a valuable purpose by encouraging individual employees of contractors and government agencies to defect from the corrupt, unwritten agreements to which their employers adhere.

152. By minor violations I have in mind comparatively trivial departures from stated regulatory requirements. Because the False Claims Act assesses fixed penalties for each false claim, mere technical violations can generate substantial penalties where the contractor routinely submits vouchers for payment under a contract that is "tainted" by a technical impropriety.


154. See Qui Tam Litigation, supra note 22, at 129.

155. See Bullock, supra note 72, at 386; DeSouza, supra note 119, at 399-401.
This perspective ignores the possibility that purchasing agencies and contractors sometimes collectively ignore or bend procurement rules because full compliance with such commands would significantly inhibit the efficient production of needed goods and services. Many procurement rules substantially raise the cost of executing public contracts while offering few, if any, offsetting benefits. To get things done, purchasing agencies and contractors sometimes operate by understandings which, in effect, contract around efficiency-reducing procurement rules. The hesitation of government purchasing agencies and the Justice Department to challenge departures from nominal procurement standards may not invariably reflect unseemly capture by or capitulation to private suppliers. Rather, such hesitation may flow from awareness that government officials endorsed departures from existing rules because doing so would reduce prices, improve quality, or speed delivery.

Granting government employees liberal standing ignores the possibility that purchasing agencies and the DOJ sometimes do not prosecute to avoid forcing compliance with welfare-reducing requirements. By increasing the likelihood that departures from all procurement rules—wise or foolish—will be challenged, qui tam monitoring may increase enforcement of standards whose application reduces the efficiency of purchasing agencies and suppliers alike. Not only will some efficient practices be curtailed, but contractors will expend additional sums to ensure that all features of their dealings with government buyers are conducted strictly by the book.

156. William Landes and Richard Posner point out that many statutes and regulations prohibit some conduct that is socially desirable. Public law enforcement officials sometimes reduce the costs of such overinclusiveness in prohibitory statutes by declining to attack beneficial conduct that nominally violates the law. Landes & Posner, supra note 1, at 38-41; cf. Greenstein, supra note 3, at 36-37 (suggesting the importance of permitting exceptions to rigid procedural procurement rules).


158. See William E. Kovacic, The Role of Relational Agreements in Reducing the Adverse Effects of Inefficient Procurement Regulations 9 (Nov. 18, 1995) (manuscript prepared for the 65th Annual Conference of the Southern Economic Association, on file with the Loyola of Los Angeles Law Review).
Qui tam enforcement can undermine one other potentially valuable relational feature of agreements between the government and its suppliers. In the course of performance, a government agency and its suppliers develop understandings about the interpretation of contract specifications. The purchasing agency and the contractor might agree that a given level of performance satisfies the seller's contractual obligations, even though the contract specification might be read to require attainment of a higher level of performance. Through a series of relational understandings, the government and the contractor may agree to relax certain specifications whose attainment may no longer be essential to satisfying the government's needs, or which can be achieved only through an expenditure of effort whose returns do not, in the government's view, justify such additional effort. Qui tam enforcement might prevent useful relational adjustments in contract terms if a relator subsequently could persuade a court that an apparent deviation from a strict reading of the contract's requirements constituted fraud.

8. Distortions in public enforcement activities

Giving government employees liberal standing to pursue qui tam actions introduces several potential distortions into the manner in which federal agencies monitor and enforce compliance with procurement regulations. One consequence, mentioned above, may be more instances in which public officials threaten to attack fundamentally benign conduct—or violations of technical requirements carrying substantial monetary penalties—to extort bribes from the contractor. Such threats are more credible if the government employee can sue unilaterally rather than be forced to gain the approval of superiors to whom the contractor can appeal to discourage the prosecution of legitimate conduct or behavior that amounts to an insignificant violation.

A second distortion stems from the possible tendency of bounties to induce public employees to devote disproportionate effort to

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159. Several False Claims Act cases have involved challenges to contractor behavior that appeared to have gained the approval of the government body to which the contractor was supplying goods or services. See, e.g., United States ex rel. Butler v. Hughes Helicopters, Inc., 71 F.3d 321, 326-27 (9th Cir. 1995) (rejecting relator challenge to adjustments in weapon system testing regime where government officials knew of adjustments and cooperated in making them); Wang v. FMC Corp., 975 F.2d 1412, 1421 (9th Cir. 1992) (rejecting relator challenge to weapon system producer, which communicated alleged design deficiencies to the government purchaser).
monitoring firms with comparatively large assets and major contracts. To the potential government *qui tam* relator, deep pockets ensure that the firm can pay a substantial judgment or settlement, and contracts with large dollar values provide a more fertile ground for large recoveries if colorable allegations of fraud can be made. This may yield an underinvestment in effort devoted to monitoring smaller firms with weak balance sheets and contracts with lesser dollar values. Marginally solvent subcontractors that make simple, low-value components such as aircraft fasteners may receive too little attention, even though the result of their misconduct—for example, the disintegration of a fuselage due to defective fasteners—can be at least as serious as fraud by a large prime contractor.

A third difficulty is that permissive government employee standing potentially engages law enforcement agencies in a race with their employees to file suit. This may cause government agencies to bring lawsuits prematurely to avoid the need to share possible recoveries with an employee/relator. Accelerating the decision to prosecute may result in the filing of cases against conduct that, evaluated in more detail and with greater deliberation, would be found to be innocuous.

9. Impact on exit and entry

Operating under the public procurement system's *qui tam* monitoring regime, firms confront distinctive costs that they do not

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160. In testimony before a House Judiciary Subcommittee in 1992, Stuart M. Gerson, Assistant Attorney General for the DOJ Civil Division, recited the following roster of problems posed by giving *qui tam* standing to government employees:

[I]nherent conflicts of interest among federal employees that the potential of large *qui tam* awards would create; the incentive for government employees assigned to investigations to understate the significance of the cases ... in the hope that the government will not follow up, leaving the way open for a *qui tam* case; morale problems in government service among employees assigned to non-fraud investigations or smaller dollar value investigations; and the misallocation of government resources through individual decisions by government employees to spend official time on cases they hope could lead to potential personal recoveries rather than on other assigned duties.

incur in commercial markets.\textsuperscript{161} These costs include greater exposure to \textit{qui tam} suits by the firm's employees and additional precautions taken to minimize the likelihood of \textit{qui tam} suits. For firms that previously have not done business with federal agencies, the existence of such costs can discourage entry into government procurement markets. For firms that serve both commercial and government customers, the costs associated with \textit{qui tam} monitoring may dictate a gradual de-emphasis on federal procurement in the firm's business mix or exit from federal contracting altogether. By inhibiting new entry and encouraging the exit of existing suppliers, \textit{qui tam} monitoring may reduce the pool of contractors and the degree of rivalry and competition among such firms, creating the potential for a costlier, lower-quality product.

10. Impact on public expenditures

Experience with the augmented \textit{qui tam} mechanism contradicts the view of some legislators who believed that administration of the 1986 reforms would produce greater enforcement without an additional commitment of federal resources. \textit{Qui tam} suits impose three types of costs upon the U.S. Treasury. The first is a substantial increase in DOJ resources devoted to exercising the government's evaluation function under the 1986 reforms. In the six months preceding enactment of the 1986 amendments, Justice Department Civil Division attorneys spent approximately 1100 hours on \textit{qui tam} matters. In the first six months of 1990, Civil Division attorneys devoted roughly 11,000 hours to \textit{qui tam} matters.\textsuperscript{162}

The second charge to public funds results from the ability of government contractors to bill all or part of defense-related legal fees to the government when the contractor defeats the allegations of the \textit{qui tam} suit.\textsuperscript{163} The provisions of the Federal Acquisition Regula-


\textsuperscript{162} See Cavanagh, supra note 52, at 18-19; see also Budget Expands, Anticipating Immigration Cases, DOJ ALERT, Apr. 3, 1995, at 11, 11 (reporting that \textit{qui tam} litigation accounted for 22% of the caseload of the Civil Division's Commercial Litigation branch in 1994, compared to 4% in 1989).

tions (FAR) governing reimbursement for professional fees in effect permit the contractor to charge the government for costs of defending procurement fraud suits that ultimately prove to be baseless.\footnote{164} In addition, the contractor often can pass along all or part of the costs associated with adopting certain administrative techniques—such as more exacting methods of screening potential employees—whose aim is to reduce the likelihood of a qui tam challenge.

A third cost would arise if government employees file qui tam suits to attack conduct that the DOJ would have challenged even in the absence of a qui tam mechanism. The clearest illustration would occur if a government employee initiates a qui tam suit during the pendency of a nonpublic DOJ fraud investigation. By filing a qui tam suit, the government employee qualifies for at least part of a recovery that otherwise would go entirely to the federal treasury. In such instances, the qui tam mechanism merely facilitates transfers between the government and its employees.

V. FRAMEWORK FOR EVALUATION AND POSSIBLE REFINEMENTS

Publicly available data about the effects of the 1986 qui tam reforms provide only a limited basis for determining whether the anticipated efficiency benefits of qui tam monitoring (inducing greater revelation of contractor-private information concerning fraud and ensuring that enforcement defaults by federal agencies do not permit harmful conduct to go unchallenged) or the possible efficiency costs (resources consumed in responding to relator opportunism or mistake) predominate. Although one can obtain aggregate data on total

\footnote{164} FAR 31.205-47 disallows the recovery of legal and administrative costs associated with defending against fraud allegations in a criminal, civil, or administrative proceeding where the outcome is a conviction in a criminal proceeding, a finding of fraud in a civil or administrative proceeding, or the disposition of the matter by consent or compromise if the proceeding could have led to any of the outcomes described above. 48 C.F.R. § 31.205-47 (1996). At a minimum, this FAR provision permits a contractor who gains dismissal of qui tam fraud claims to treat its defense costs as allowable costs. \textit{Id.} However, the contractor's ability to recover these costs may depend on whether the contract that is the subject of the fraud claims has been finally priced or closed out. \textit{See In re General Dynamics Corp., ASBCA Nos. 39500, 40995, 92-1 B.C.A. (CCH) ¶ 24,657, at 123,005-06 (Dec. 16, 1991) (refusing to retroactively adjust firm-fixed price contracts to permit the contractor to claim as allowable costs $29 million in legal fees that the contractor had incurred to defend civil and criminal fraud charges which the government dismissed voluntarily). In General Dynamics the Armed Services Board of Contract Appeals observed that contractors could protect themselves against this contingency by negotiating advanced agreements that would allow for a price adjustment should fraud proceedings be dismissed after a contract is finally priced or closed out. \textit{Id.} at 123,006.}
numbers of suits and dispositions, detailed accounts of complaints and settlements are relatively rare. Thus, it is difficult to develop even a rough sense of how many *qui tam* actions are based on meritorious claims. Empirical data about the effects of the 1986 reforms upon internal contractor organization and behavior come almost entirely in the form of random, idiosyncratic anecdotes.

Despite the lack of rich empirical data concerning *qui tam* effects, one can construct a framework to analyze the operation of the *qui tam* mechanism as more data become available. Indeed, even a purely abstract assessment of the 1986 reforms suggests areas for change. In general, the net value to society of *qui tam* monitoring—and the desirability of modifications to the 1986 reforms—essentially depend upon four considerations. First, are there adequate controls to deal with plausible scenarios of relator error and opportunism? Second, are there less costly alternative methods for monitoring contractor behavior and for discouraging shirking by public enforcement agencies? Third, are the underlying substantive conduct standards that *qui tam* monitoring seeks to enforce appropriate? Fourth, are penalties for violations calibrated to correspond to the seriousness of the underlying offense as measured by its economic harm?

**A. Adequacy of Constraints upon Relator Error and Opportunism**

The discussion of *qui tam* disadvantages above has identified a number of ways in which *qui tam* relators—contractor employees, government employees, or private firms—can use the 1986 reforms strategically or opportunistically, or can misidentify benign behavior as being corrupt. In the legislative debates leading to the adoption of the original False Claims Act in 1863, Michigan senator Jacob Howard acknowledged the possibility that relators might behave opportunistically but observed that *qui tam* enforcement contemplated enlisting a “rogue to catch a rogue.” Advocates of expansive *qui tam* enforcement invoke Howard’s statement as a basis for rejecting any measures, other than those already contained in the False Claims Act, for deterring destructive behavior by the “rogue.”

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165. A significant number of pending *qui tam* matters remain under seal.
166. Ch. 67, 12 Stat. 696 (1863).
168. See supra notes 94-100 and accompanying text (discussing False Claims Act restrictions on bounties for relators who orchestrate fraud).
the net effect of enhanced decentralized monitoring depends upon the availability of controls to discourage the filing of erroneous, frivolous, abusive, or rent-seeking actions. It is doubtful that Senator Howard would endorse a mechanism that ultimately forced the government to bear costs which would exceed the benefits of enhanced monitoring. It also is questionable that Congress intended to foreclose exploration of any adjustments in the existing *qui tam* mechanism that served to curb harmful relator behavior while preserving the core advantages of decentralized monitoring. The discussion below proposes approaches for providing the needed constraints upon *qui tam* suits that contradict taxpayer interests.

1. Allowing counterclaims to discourage relator opportunism

In a number of instances, defendants have pursued counterclaims against *qui tam* plaintiffs for alleged participation in fraudulent conduct or for breaches of contractual or other duties in order to avail themselves of internal corporate mechanisms to correct fraud. For the most part, courts have taken a hostile view toward such counterclaims.170 Opinions rejecting counterclaims reflect the view that allowing counterclaims would contradict the False Claims Act’s objective of giving potential relators the greatest possible incentive to challenge contractor misconduct.171 Such decisions also emphasize the apparent willingness of the statute’s sponsors to tolerate corrupt behavior by relators if their prosecution of a *qui tam* suit serves to

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169. See HELMER ET AL., supra note 22, at 251-52.  
171. See, e.g., Mortgages, Inc., 934 F.2d at 213 (“The FCA is in no way intended to ameliorate the liability of wrongdoers by providing defendants with a remedy against a *qui tam* plaintiff with ‘unclean hands.’ “); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 779 F. Supp. 1252, 1254 (N.D. Cal. 1991) (rejecting *qui tam* defendant’s counterclaims on ground that “to permit defendant to pursue a counterclaim for breach of contract and breach of loyalty for the failure to first raise its concerns with the alleged wrongdoer, would allow wrongdoers to retaliate against whistleblowers, and is contrary to legislative intent”).
expose fraud. Although most reported opinions have rejected the filing of counterclaims against *qui tam* relators, one court has allowed a defendant to pursue a counterclaim for "independent damages."

Judicial opposition to counterclaims is misplaced, for it ignores how the existing scheme of *qui tam* monitoring creates strong incentives for perverse behavior on the part of the contractor's employees. Because the amount of the relator's bounty is a function of the total damage to the government, contractor employees may passively observe or encourage questionable conduct rather than seeking to correct such behavior, either by using the contractor's internal anti-fraud controls or, where such controls fail, by promptly filing a *qui tam* suit. Second, the *qui tam* mechanism may induce employees—such as internal auditors—whose duties involve the detection and correction of misconduct to shirk in fulfilling their responsibilities to their employers.

Firms should be allowed to use counterclaims to enforce internal ethics codes that compel employees to perform a gatekeeping function by refusing to participate in misconduct and to report all apparent deviations from procurement standards to a company ombudsman. If employees violate these requirements and later file *qui tam* suits based upon conduct that should have been resisted and reported, the employer should be permitted to pursue counterclaims for the breach of a duty to forego wrongful behavior and to alert management to such conduct. Perhaps most important, it is difficult to imagine how contractors can operate internal compliance systems if they cannot bind internal compliance officials, such as auditors and corporate counsel, to act in a way that ends misconduct promptly. There may be little point in operating an internal hotline if the person on the receiving end is allowed to use special access to information within the firm to prepare *qui tam* complaints rather than use internal procedures to correct fraud swiftly.

Contractors also should be permitted to seek contribution or indemnification from employees who have fostered or acquiesced in questionable conduct. Contribution or indemnification suits also

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173. See United States *ex rel.* Madden v. General Dynamics, 4 F.3d 827, 831 (9th Cir. 1993).
should be available against the firm’s external advisors, such as outside counsel, who use confidential relationships with the firm to develop and prosecute a *qui tam* claim. Suppose, for example, that a contractor’s outside counsel detects a pattern of fraud within a client’s organization. The fraud involves a possible total civil penalty of $100 million under the False Claims Act and has neither been revealed to the government nor publicly disclosed. One can ask what would deter the attorney from filing a *qui tam* suit against the client. One possibility is the certainty of a proceeding before the state bar’s disciplinary board for, among other grounds, violations of ethical canons requiring the lawyer to preserve client confidences and secrets and to represent a client zealously within the bounds of the law. But the lawyer might deem a *qui tam* bounty of as much as $30 million to be an acceptable price to pay for the loss of a license to practice law. Unless the client can pursue a counterclaim or independent action against the lawyer, there may be no way to deter the attorney—or other external advisors such as accountants—from abusing a confidential relationship for personal gain.

2. Adjusting damage awards to encourage timely suits

The False Claims Act’s formula for calculating the relator’s bounty requires adjustment to encourage relators to challenge corrupt behavior in a timely manner. Taxpayers have an interest in the prompt correction of fraud, and a bounty system that rewards the relator according to the total size of the fraud may encourage delay by inspiring relators to wait until the damage to the government has increased. It is unwise to tie the firefighter’s reward to the total size of the blaze extinguished. The perverse incentive associated with allowing a problem to grow larger can be corrected by calculating the relator’s bounty as a percentage of damages suffered by the govern-

175. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1981) ("A Lawyer Should Preserve the Confidences and Secrets of a Client."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."). In United States ex rel. John Doe v. X Corp., 862 F. Supp. 1502, 1503 (E.D. Va. 1994), the court confronted the issue of whether an attorney who had served as in-house counsel for a corporation could properly act as a False Claims Act relator against the same corporation. The court held that the False Claims Act did not preclude standing by attorneys, including in-house counsel, to serve as relators. *Id.* at 1508. The court reasoned that state law protections governing the professional responsibility of attorneys provided adequate assurances that lawyers would not abuse confidential relationships with their clients. *Id.* at 1507-08.
ment up to the time that the relator knew or should have known of the misconduct at issue. Damages arising after this point would be excluded from the base on which the bounty is computed.

3. Discouraging government employee opportunism

There are at least three approaches for discouraging government employees from opportunistically filing *qui tam* suits before the government decides to prosecute apparent instances of fraud. The first, and most appropriate, path is to establish a complete bar on *qui tam* suits by government employees who (a) work in bureaus with responsibility for investigating or prosecuting procurement fraud—such as the DOJ or an inspector general’s office, (b) work in an agency that is the target of the fraudulent scheme in question, or (c) obtain information relevant to procurement fraud in the course of discharging their official duties. There are several grounds for a total ban on government employee suits in these circumstances. As described above, granting standing to government employees can undermine the successful performance and oversight of individual contracts by eroding healthy relational features of purchaser-supplier agreements, distorting incentives for proper monitoring of contractor activities, and depriving the government of payments that ordinarily would have been paid entirely to the U.S. Treasury.

Giving standing to individual government employees threatens other, more fundamental harm to the formation and execution of public procurement policy. In effect, government employee standing serves to eliminate an agency’s prosecutorial discretion. *Qui tam* monitoring generally squeezes prosecutorial discretion out of a system of law, but it does so with greater force where the potential relator is a government employee. Compared to a private relator, the government employee has access to information which the government is uniquely able to collect and maintain. Access to this information permits the government employee to override the agency’s decision not to prosecute, or to prosecute in ways that the individual employee believes to be insufficiently robust. Prosecutorial discretion can be abused, but it is hardly evident that it always or routinely is misused.

The loss of prosecutorial discretion is one element of a larger loss of institutional power to set policy and be held accountable for its

176. *See supra* notes 151-55 and accompanying text.
results. *Qui tam* monitoring by government employees severely weakens the agency's ability to credibly commit itself to a specific course of action, because each government employee ultimately retains the power to prosecute by filing a *qui tam* action. The loss of policymaking flexibility would be most evident where the government has decided to change its approach to enforcing a comparatively open-ended law or regulation that lends itself to alternative interpretations. The government might choose to narrow the focus of its enforcement efforts, but the government *qui tam* relator can override this choice by bringing a suit premised on a broader, preexisting interpretation of the same legal command. So long as the relator's interpretation strikes a court as plausible, the government loses its ability to adjust the enforcement of the law.

In effect, a legal system that grants *qui tam* standing to government employees regards all exercises of discretion by government procurement officials as inherently suspect. Because one cannot trust the judgments of government purchasing agencies or the DOJ, the argument goes, it is necessary to allow individual employees of these institutions to proceed unilaterally. Yet there is no particular reason to think that officials engaged in making and executing public procurement policy are inherently more prone to make corrupt or flawed decisions than government officials in other agencies. If *qui tam* monitoring is necessary to correct corruption or sloth by government institutions responsible for public procurement, then one would think it would be suitable in a much broader range of contexts. Embracing *qui tam* monitoring for procurement leads one to ask why an individual government employee should not be allowed to second-guess the prosecutorial decisions of government agencies in other contexts. Why do we not allow government employees to override a decision not to prosecute, or prosecute lightly, in other areas? If we are concerned with the possibility of disjointed, inconsistent, or mischievous suits by individual employees in other areas, there is little reason to ignore such hazards for procurement policy.

Short of a complete ban on suits, a second-best strategy for dealing with government employee standing is to severely limit the circumstances in which a government employee could proceed unilaterally. At a minimum, employees who rely on information developed during the term of their public employment should be required to demonstrate that (a) such information was disclosed to government officials responsible for investigating and prosecuting fraud, and (b) that enforcement officials either declined to investigate
or conducted an inquiry and determined it to be fruitless. Under these restrictions, current or former government employees could proceed only after full disclosure and after government law enforcement agencies have decided whether to prosecute. In these limited circumstances, such employees might be permitted to demonstrate that law enforcement groups deliberately allowed pending investigations to languish in order to delay or avoid prosecution.

A further limiting strategy involves sanctioning employees who arguably have breached special duties owed to the government. For example, government attorneys constitute an important subset of potential *qui tam* relators. In dealing with its own attorneys, the government might argue that the relator violated the duty of loyalty that attorneys owe to their clients—that is, the government agency. The disloyal conduct consists of failing to alert the government of apparent misconduct and by appropriating to oneself part of the client’s property rights. This occurs because the attorney, by filing a *qui tam* suit before the government can complete its own investigation and file a suit in its own right, is entitled to part of a recovery that otherwise would go entirely to the U.S. Treasury.

In dealing with nonattorneys, government agencies might use similar arguments based upon the view that public employees essentially have contracted to give the government a right of first refusal to attack contractor misconduct. The government might assert that employees who fail to report apparent episodes of fraud to their superiors, or refuse to allow the government adequate time to investigate and prosecute in its own right, violate statutory ethical requirements that bar employees from converting to their own use confidential information obtained during their public employment. As with contractor claims for breach of contract and for contribution or indemnification, the effectiveness of such counterstrategies is important to the long term equilibrium of *qui tam* practice.

4. Enhanced DOJ screening to eliminate erroneous or frivolous suits

The 1986 *qui tam* reforms gave the DOJ an important quality control function in reviewing relator allegations. Most importantly, the reforms permit the DOJ to move to dismiss lawsuits that lack substantive merit. In 688 cases through March 15, 1996, the DOJ has
declined to prosecute a *qui tam* suit. In only a single instance has the DOJ moved to dismiss a *qui tam* suit for lack of substantive merit or because the maintenance of the *qui tam* suit contradicted the government's interests. It is improbable that, even though these cases were deemed insufficiently attractive to warrant DOJ prosecution, all but one of these cases deserved to go forward. One can only conclude that the screening function in practice is virtually nonexistent.

The most likely explanation for this default is the DOJ's assessment that its political capital is ill-spent irritating a Congress that believes the DOJ has been lax in prosecuting procurement fraud and likely would object to DOJ efforts to gain dismissal of *qui tam* suits on nonjurisdictional grounds. In declining to challenge substantively failed *qui tam* complainants, the DOJ has been a faithful agent to legislators who desire expansive recourse to *qui tam* actions and who are biased towards overenforcement rather than underenforcement. Given the potential for welfare-reducing use of *qui tam* monitoring, taxpayers would be better off if the DOJ exercised its screening function more vigorously. For example, the DOJ's skepticism would be appropriate when the Civil Division has concluded that the underlying claim is baseless. Standing aside in such cases is not costless for the government, as a defendant who prevails can recover its legal fees as allowable costs under its government contracts. A willingness to intervene to dismiss

178. See *supra* note 90 and accompanying text.
179. The chief Congressional proponents of *qui tam* enforcement have expressed doubts about the DOJ's willingness to prosecute procurement fraud vigorously under the 1986 False Claims Act amendments. See, e.g., Sen. Charles E. Grassley, *Abe Lincoln vs. The Justice Department*, N.Y. TIMES, Jan. 16, 1993, at 21 (op ed article by chief Senate sponsor of 1986 False Claims Act amendments stating that "the Justice Department has been consistently hostile to whistleblowers," and observing that "perhaps the executive branch dislikes citizens interfering in the cozy relationships it has with defense companies and other public contractors."); Moore, *supra* note 21, at 2010 (quoting Sen. Grassley as saying, "'Just as somebody said war is too important to leave to the generals, so, too, with the antifraud efforts, . . . [they are too important to leave to the Justice Department.' ]").
180. Where the government declines to intervene in a *qui tam* suit, the government has taken the position that the allowability principles of FAR 31.205-47 apply to all defense costs that the contractor continues to incur in responding to the relator's pursuit of his or her claim. See DCAA Issues Guidance on *Qui Tam* Costs, CONT. MGMT., Nov. 1995, at 38 (reporting that the Defense Contract Audit Agency has issued a guidance document that treats the costs of defending any *qui tam* suit, whether or not the government joins the suit, as covered by FAR 31.205-47). The contractor cannot recover its defense costs under FAR 31.205-47 unless it prevails against the relator's fraud claims. See *supra* note
'foolish lawsuits would demonstrate the genuineness of the government's desire to establish stronger "partnerships" between public purchasing agencies and their suppliers.\textsuperscript{181}

5. Fee and cost shifting

The 1986 qui tam reforms allow the defendant to shift the legal fees and defense costs to the relator when the defendant proves that the relator's suit was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."\textsuperscript{182} In practice this promises to be a feeble constraint. Courts are likely to have a difficult time determining whether a plaintiff's claims are "clearly frivolous," especially when the plaintiff makes the almost unverifiable assertion that the lawsuit was filed on the basis of a good faith belief in the defendant's culpability.\textsuperscript{183} To date, few qui tam defendants have successfully invoked this provision.\textsuperscript{184}

To discourage relator opportunism, the fee-shifting provisions of the False Claims Act might be modified and made more symmetrical.\textsuperscript{185} Specifically, when the DOJ concludes that the claims are insufficiently robust to warrant the government's participation and the relator decides to proceed independently, a successful defendant should be permitted to charge the relator for all legal fees and expenses incurred in responding to the relator's claims, without regard

\textsuperscript{160} and accompanying text. In United States \textit{ex rel.} Butler v. Hughes Helicopters, Inc., 71 F.3d 321 (9th Cir. 1995), the DOJ declined to intervene in the relator's suit, and the case proceeded to trial. \textit{Id.} at 325. After a 10-day trial, the district court granted the defendant's motion for summary judgment as a matter of law. \textit{Id.} The Ninth Circuit subsequently affirmed. \textit{Id.} at 329. The defendant's legal fees in preparing for and conducting the trial and appeal could not have been trivial. If the DOJ's original decision not to intervene reflected its assessment of the merits of the relator's claims, most of these fees could have been avoided if the DOJ had moved to dismiss the case.

\textsuperscript{181} See supra notes 29-33 and accompanying text.


\textsuperscript{184} See supra notes 104-05 and accompanying text.

\textsuperscript{185} There is considerable debate among scholars over the effects of fee-shifting upon the inclination of private plaintiffs to file and pursue suits and upon the parties' willingness to settle cases. Avery Katz doubts that adopting the English fee-shifting rule—the loser pays the winner's legal costs—discourages the pursuit of frivolous suits. See Katz, supra note 183, at 17. Edward Snyder and James Hughes find that the English rule of fee-shifting tends to discourage settlement once cases are initiated, but such a standard may reduce the inclination of plaintiffs to initiate suits. See Edward A. Snyder & James W. Hughes, The English Rule for Allocating Legal Costs: Evidence Confronts Theory, 6 J.L. ECON. & ORG. 345, 377-78 (1990).
to whether the suit is "clearly frivolous." the DOJ's decision not to prosecute should create a presumption that the suit has limited value to the government.\textsuperscript{186} If the DOJ declines to intervene on the relator's behalf, the cost to the relator of proceeding with a suit that ultimately fails should be increased.

\textbf{B. Attractiveness of Alternative Regulatory Strategies}

Whistleblower bounties constitute one of several oversight strategies for solving pricing and quality monitoring problems that arise in the government's principal-agent relationships with its suppliers. Scholars have pointed out that a useful device for evaluating public regulatory structures is to explore how private firms attempt to solve problems that have close counterparts in public regulation.\textsuperscript{187} In evaluating the \textit{qui tam} mechanism, one can consider how private firms deal with monitoring problems that arise in their relationships with their suppliers. Private manufacturers presumably would be pleased if employees of their input suppliers informed them about quality deficiencies or intersupplier pricing conspiracies that defy ready detection.

It does not appear that private manufacturers routinely alert the employees of their input suppliers to the availability of bounties if

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  \item This suggestion makes the seemingly reasonable assumption that the government's decision not to join a case generally is a reliable indication that the federal fraud claims lack substantial merit. An examination of \textit{qui tam} experience to date suggests that the Justice Department's decision to participate or not participate is a sound proxy for the quality of the relator's claims. The Justice Department has participated in 198 of the 1229 \textit{qui tam} cases filed from 1986 through March 15, 1996. Telephone Interview with Joseph Krovisky, \textit{supra} note 14. Of the 198 cases in which the DOJ participated, 151 have been completed by judgment or settlement and 47 remain in litigation. In 149 of the 151 completed matters, the DOJ succeeded in obtaining a False Claims Act recovery. \textit{Id. In} 688 cases the DOJ declined to participate. Of the 688 matters, 463 cases were later dismissed with no recovery for the relator, 31 cases yielded relator recoveries by judgment or settlement, and 117 cases remain in litigation. The DOJ has achieved recoveries in nearly 100\% (149 out of 151) of the completed cases in which it participated, whereas relators realized recoveries in only 6.3\% (31 out of 494) of the completed cases in which the DOJ declined to participate. The DOJ's recoveries in its 149 successful matters have totaled nearly $1.06 billion, compared to total recoveries of roughly $16 million by relators in the 31 cases in which they have succeeded where the DOJ declined to participate. This assumption could undergo further empirical testing by studying cases that the Civil Division declined to join to determine the reason for the government's refusal to participate in and to independently assess the quality of the claims that proceeded without the government's participation.
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such employees alert the manufacturer to instances of quality shirking, price fixing, or other misconduct by their employer. However, even without recourse to *qui tam*-like monitoring, private manufacturers almost certainly attempt to obtain such information by other means. One strategy is to hire employees of the manufacturer's suppliers. Former employees can describe how faithfully an input supplier-fulfilled contractual quality specifications and can identify rumored or actual instances of apparent collusion among input suppliers. Such information can be used to directly attack questionable conduct and to improve the manufacturer's other monitoring devices.

As an alternative to *qui tam* monitoring, public officials might reassess the desirability of draconian limitations upon movements by contractor employees into the public sector. As popularly conceived, the "revolving door" has a dangerous tendency to damage public procurement by corrupting the judgment of government officials who aspire to positions with the firms they regulate, and by inhabiting government agencies with private sector émigrés who consciously or unconsciously make policy decisions that unduly favor industry interests. Recent scholarship has suggested that loosening restrictions upon the revolving door can facilitate the formation and execution of welfare-increasing, long-term regulatory contracts between private firms and public agencies. Increasing the government's ability to recruit contractor employees would provide an alternative source of access to private information that is the target of *qui tam* monitoring.

188. Some owners of intellectual property rights offer bounties to individuals who report misappropriations of the owner's rights. Publishers of newsletters sometimes pay rewards for proof of illegal photocopying. See *Satellite News*, Mar. 21, 1994, at 7 (offering reward of up to $1000 to those who provide "conclusive evidence of illegal faxing or photocopying"). Trade associations of software producers in recent years have offered bounties to persons who identify illegal use of software. See Richard L. Hudson, *Bounties Offered For Reporting Of Software Piracy*, WALL ST. J., Oct. 11, 1994, at B7 (reporting that industry association of software manufacturers is offering a bounty of up to $3900 to anyone in Britain who informs on companies that use unlicensed software).

189. See ADAMS & BROCK, supra note 119, at 338-40.

C. Choosing the Correct Liability Standard

Embracing decentralized enforcement demands careful consideration of the underlying substantive standards that private monitoring parties are allowed to police. A probing assessment of the structure of commands to be enforced is essential because qui tam enforcement eliminates prosecutorial discretion as an equilibrating device by which public enforcement institutions mitigate the effects of overly broad laws and regulations. One cannot decide whether decentralization is wise or foolish without reference to the conduct that is to be condemned. For example, scholarly criticism of private antitrust enforcement would subside considerably if the private cause of action applied only to horizontal price fixing, a form of conduct that most antitrust scholars regard as posing severe competitive hazards. Concern about strategic misuse of private enforcement in antitrust is greatest where plaintiffs can attack conduct—for example, mergers, distribution practices, and single-firm pricing decisions—that frequently increases consumer welfare.

In a number of instances, federal procurement regulations proscribe conduct whose efficiency effects may be positive or, at worst, neutral. Given the existing scheme of substantive conduct requirements, qui tam monitoring sometimes elicits greater resources to vindicate prohibitions of questionable wisdom. This suggests the appropriateness of two modifications to the 1986 qui tam reforms. The first and most ambitious approach is to examine the underlying statutes and regulations and ruthlessly limit their scope to behavior that unquestionably harms taxpayer interests. A second, more modest undertaking is to carefully denominate categories of conduct that qui

191. See Landes & Posner, supra note 1, at 10-16.

192. See ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 262-63 (1978) (discussing antitrust's per se ban against horizontal price fixing and market division agreements and concluding that the rule's "contributions to consumer welfare over the decades have been enormous").


relators can attack. The *qui tam* cause of action might be restricted, for example, to episodes of conduct such as double billing, bid-rigging and product substitution. Policy makers should directly reconsider whether so powerful a monitoring tool should be focused upon all apparent departures from existing procurement controls.

**D. Choosing the Correct Penalty**

The remedial scheme of the False Claims Act derives much of its power from the interaction of the statute's minimum penalties—$5000 to $10,000 per offense—and the nature of contractor conduct that can create liability under the statute. Firms that engage in frequently repeated activities that are covered by a certification can commit hundreds of individual offenses if the behavior in question does not strictly conform with the representations of the certification. Deviation from the certified level of performance may impose trivial economic harm on the government, but each event in which the contractor fails to achieve complete compliance is a separately punishable offense under the False Claims Act. The existing False Claims Act minimum penalties promise to elicit costly efforts to achieve strict compliance with these regulations. The possibility of incurring massive liability provides a powerful incentive for contractors to ensure compliance with all regulatory requirements covered by a certificate, no matter how poorly conceived such requirements might be. Reducing excessive expenditures on compliance would entail either eliminating regulatory controls that provide negligible economic benefits to the government, or recalibrating the False Claims Act penalties to track more closely the actual economic harm to the government of violations.

**VI. CONCLUSION**

The 1986 *qui tam* reforms sought to improve detection of contractor misconduct and decrease reliance upon government agencies to attack fraud. Enhanced bounty hunting incentives in public procurement raise questions common to consideration of all decentralized schemes for enforcing public laws: Compared to public enforcement agencies, are the incentives of the deputized private party better aligned with the interests of taxpayers? Does the decentralized mechanism account for and control opportunism or strategic misuse of litigation by the private plaintiff? Is the decentralized mechanism superior to other regulatory strategies that might
attain the same goals? Are the underlying substantive standards that the private monitors will enforce well-conceived?

In principle, *qui tam* monitoring offers potential benefits, chiefly in the form of encouraging detection of welfare-reducing behavior—such as bid-rigging and product substitution—that might escape detection by other means or would be discovered only through comparatively more expensive devices such as audits and inspections. In practice, *qui tam* monitoring appears to suffer from five basic flaws.

First, the 1986 reforms reveal little recognition of the full range of ways in which the availability of *qui tam* suits could harmfully distort the behavior of potential relators. For this and other reasons, the *qui tam* mechanism provides inadequate disincentives for relators to file meritless suits. Contractors and government agencies may be able to compensate for this defect by using internal controls to discourage some forms of employee opportunism. However, such controls respond to only some of the scenarios for rent-seeking and strategic behavior.

Second, the weakness of *qui tam* constraints upon relator conduct is compounded by the Justice Department’s refusal to perform screening functions that the statute nominally contemplates. The Department’s unwillingness to seek dismissal of substantively weak *qui tam* complaints removes a potentially important constraint upon relator opportunism and a check against relator error in interpreting events within the contractor’s organization.

The third deficiency is deputization of private individuals and companies to enforce substantive conduct requirements that vary considerably in their efficiency consequences. The 1986 reforms do not limit the *qui tam* cause of action to conduct with unambiguously harmful efficiency effects. Among other remedies, the False Claims Act imposes substantial minimum penalties on deviations from statutory and regulatory requirements, regardless of their economic impact on the government. Focusing *qui tam* monitoring upon decidedly egregious conduct would curtail opportunism and direct private enforcement efforts toward the most serious behavior.

The fourth flaw is the tendency to frustrate the attainment of important contemporary procurement reform goals. Congress and the Clinton Administration have committed themselves to making government agencies emulate more closely the purchasing techniques of private commercial actors and to nurturing the development of “partnerships” between public buyers and private suppliers. There is a fundamental contradiction between the existing False Claims Act
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*qui tam* mechanism and the transformation of public procurement agencies into commercially-oriented buyers who operate through collaborative relationships with suppliers. The fundamental contradiction can be resolved only by abandoning the professed aim of having the government function like a commercial purchaser or by making major adjustments to the *qui tam* system. Such adjustments should include retrenching the substantive legal commands that *qui tam* monitoring is designed to enforce, excluding government employees as relators, and establishing stronger disincentives for relators to behave strategically in ways that injure taxpayer interests.

Finally, implementation of the 1986 reforms has proceeded without consideration of whether other regulatory strategies may achieve the *qui tam* mechanism's efficiency aims, but at lower cost and without the distortions in relator behavior that accompany the *qui tam* incentive structure. Such strategies might usefully be derived from examining how large commercial firms detect and punish misconduct by their customers and input suppliers.

Major additions to public procurement regulation often occur without systematic assessment of costs and benefits of existing or contemplated regulatory controls. Assessing the seriousness of concerns about *qui tam* monitoring requires further study of individual *qui tam* complaints and litigation episodes, as well as efforts to measure the internal institutional effects of decentralized enforcement upon the operation of government contractors and government agencies. Such analysis poses formidable data collection and assessment problems, but it is precisely the type of ex-post empirical evaluation that is necessary for policy makers to appraise the wisdom of the 1986 *qui tam* reforms.

A careful empirical assessment of the effects of the False Claims Act *qui tam* mechanism could have implications that extend well beyond the field of public procurement. If empirical analysis showed that the existing equilibrium of *qui tam* doctrine and enforcement yielded substantial net benefits to society, it could spur a far-reaching reassessment of the approach used to enforce numerous other legal commands. If expansive *qui tam* enforcement is sensible for government procurement, one might ask why it should not be adopted broadly for any number of other statutory schemes. Why, for

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example, should persons who detect violations of environmental statutes not be allowed to share in penalties that the government recovers? Why should standing to prosecute violations for employment discrimination statutes not be extended to individuals other than the victim? Should we give individual government officials the ability to bring suits on behalf of the public when the agencies that employ them decline to prosecute apparent violations of the law? If we distrust the government's exercise of prosecutorial discretion in the enforcement of public procurement laws, why should we tolerate it in other fields? In short, if robust decentralized bountyhunting makes sense for government contracting because it facilitates superior detection, punishment, and deterrence of illegal conduct, there seems little reason not to adopt such a mechanism for enforcing virtually all other legal commands.