2008

Raising the Hue and Crying: Do False Claims Act Qui Tam Relators Act Under Color of Federal Law?

Isaac B. Rosenberg

RAISING THE HUE... AND CRYING: DO FALSE CLAIMS ACT *QUI TAM* RELATORS ACT UNDER COLOR OF FEDERAL LAW?

Isaac B. Rosenberg

Isaac Rosenberg is a J.D. candidate, May 2008, William & Mary School of Law, Williamsburg, Virginia. *This note placed third in the ABA Section of Public Contract Law's 2007 Writing Competition (Division I). The author would like to thank his family and friends for their support and Professors Jayne Barnard, Kathryn Urbonya, and William Van Alstyne for their guidance and kindness.*

ABSTRACT

This note considers whether the interaction of whistleblower protections and incentives provided by the False Claims Act and the disclosure requirements of the recently enacted Deficit Reduction Act of 2005 transform *qui tam* relators' investigatory conduct into unconstitutional government searches. Applying several prevailing theories of state action, this note argues that these factors can and likely do transform relator conduct into government action with unsettling consequences: personal liability for relators and suppressibility of relator-collected evidence. Both consequences undermine the purpose of the False Claims Act by deterring those sought for help from coming to the Government's aid and by severely diminishing the value of relators' efforts.

I. INTRODUCTION

It should not surprise anyone that the Federal Government has always been ill equipped to detect fraud, waste, and abuse committed against it.[1] Through the False Claims Act (FCA or Act),[2] however, the Government has crafted a

1. *See* Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 PUB. CONT. L.J. 237, 257 (1995) (indicating that governmental complacency, corruption, and scarce resources make federal fraud prevention difficult to execute).

2. 31 U.S.C. §§ 3729–3731 (2000).

statutory scheme to help recover money taken under false pretenses. One of the most important aspects of the FCA is its *qui tam*[3] provision, which empowers private citizens, called relators, to bring suits on behalf of the Government against falsely claiming entities. In exchange for the information provided and services rendered, the Government assigns to the relator a portion of any judgment or settlement it recovers.[4]

The False Claims Act's overall scheme, including its *qui tam* provision, has proven very effective and a necessary tool in combating various types of government contract fraud, as illustrated by massive annual recoveries. In 2006 alone, a banner year according to the Department of Justice, the Government recovered over $3.1 billion, handily overshadowing the previous record of $2.2 billion recovered in 2003.[5]

Relator searches for information, however—information the Government often uses to support related criminal prosecutions and administrative proceedings[6]—could potentially infringe upon the Fourth Amendment rights of those being investigated. This note asserts that key provisions of the FCA have the potential to induce searches by relators that would be otherwise constitutionally impermissible if carried out by government agents.

Part II of this note provides a brief overview of the FCA's enactment, subsequent amendment, and current impact, and identifies five critical features of the Act and companion legislation that collectively suggest state action. Part III outlines and applies several prevailing theories of state action—public function theory, inducement/coercion theory, and symbiosis/entwinement theory—to relators' investigatory conduct. As state actors, relators could be liable in *Bivens*[7] actions for injuries resulting from Fourth Amendment violations.

3. *Id.* § 3730. *Qui tam* is short for "'qui tam pro domino rege quam pro si ipso in hac parte sequitur' meaning 'Who sues on behalf of the King as well as for himself.'" BLACK'S LAW DICTIONARY 1251 (6th ed. 1990); *see also* William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1823–24 (1996) (stating that "the *qui tam* mechanism decreases the likelihood that meritorious cases will languish because the purchasing agency or DOJ, owing to sloth, negligence, or deliberate policy choices designed to protect specific programs from needed scrutiny, declines to investigate and attack apparent episodes of fraud").

4. *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773 n.4 (2000) ("[A] *qui tam* relator 'is, in effect, suing as assignee of the United States'"); *see also infra* Part II.D.1.

5. Press Release, U.S. Dep't of Justice, Justice Department Recovers Record $3.1 Billion in Fraud and False Claims in Fiscal Year 2006: Largest Amount Ever Recovered in a Single Year (Nov. 21, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/November/06_civ_783.html.

6. *See* Jared E. Mitchem, *Parallel Proceedings: Concurrent Qui Tam and Grand Jury Litigation*, 51 ALA. L. REV. 391, 391 (1999) ("Federal '*qui tam*' lawsuits under the False Claims Act ('FCA'), for example, often lead to federal law enforcement involvement and may lead to related criminal investigations and prosecution.... Additional proceedings might include administrative proceedings...").

7. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971); *see also infra* Part V.A.

Part IV distinguishes FCA relators from other types of quasi-public actors, namely bounty hunters and IRS informants, whom courts have determined do not act under color of law. Part V then addresses the potential Fourth Amendment implications of relator searches, specifically, whether evidence obtained by relators in furtherance of FCA actions would be suppressible in parallel, noncivil proceedings.

Finally, Parts VI and VII, respectively, address potential weaknesses of this novel application of state action theory to relators' investigatory conduct and possible solutions to the imminent conflict. Minor changes to the FCA's payment structure, greater guidance for relators on properly obtaining evidence, and more stringent government auditing systems could diminish the likelihood that relators will be subjected to suit for unlawful searches and that evidence will be suppressed in noncivil enforcement cases.

II. WHAT IS THE FALSE CLAIMS ACT?

A. *A Brief History of the False Claims Act*

Congress passed the civil False Claims Act in 1863, at the height of the Civil War, to stem serious fiscal hemorrhaging exacerbated by "widely publicized abuses by unscrupulous private contractors."[8] These contractors infamously provided, among other things, diseased mules and faulty muskets to the Union army.[9] The Act was also known as the "Informer's Act" because of its *qui tam* provision,[10] a vestige of the feudal English legal system[11] that had all but vanished in U.S. federal law by the turn of the century.[12]

At the end of the Civil War, the number of false claims ebbed,[13] but the New Deal's enactment and the subsequent onset of World War II signaled a resurgence.[14] Overzealous and "parasitic" whistleblowers abounded as well. The loosely crafted *qui tam* provision allowed relators to use information found in criminal indictments to support their civil actions.[15] Such opportunistic whistleblowers, like the one in the seminal case, *United States ex rel. Marcus v. Hess*,[16] prompted the first major amendments to the original Act

8. 1 JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 1.01[A] (3d ed. 2006) (citing United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 (N.D. Cal. 1989)).

9. *See* Pamela H. Bucy, *Private Justice and the Constitution*, 69 TENN. L. REV. 939, 942 (2002).

10. *See* 1 BOESE, *supra* note 8, § 1.01[A] (citing 89 CONG. REC. S7596 (1943) (statement of Sen. Revercomb)).

11. *See infra* notes 94–98 and accompanying text.

12. 1 BOESE, *supra* note 8, § 1.01[A].

13. *Id.* § 1.01[B].

14. *Id.* § 1.02.

15. *Id.* § 1.01[B].

16. 317 U.S. 537 (1943). The Department of Justice, as it is wont to do, contested the contribution of the whistleblower, Morris Marcus, for allegedly copying a criminal indictment directly to support his civil action. *Id.* at 545. In upholding Mr. Hess's share of the judgment, the Court noted Congress could have required, but did not require that the whistleblower provide original information to partake in the bounty. *Id.* at 546.

in 1943,[17] including an absolute jurisdictional bar over *qui tam* suits if the Government had prior knowledge of the complaint's allegations.[18] The more stringent whistleblower qualifications achieved their goal: decreased use, and abuse, of the *qui tam* provision by parasitic relators.[19]

B. *The 1986 Amendments*

Dramatic escalations in spending during the Vietnam War and the later phases of the Cold War, as well as the expansion of federally funded social service programs, triggered an increase in both the number of government-initiated FCA actions and the types of persons and organizations targeted.[20] In 1986, Congress again amended several provisions of the Act, only this time to *enhance* relator protection and enticements to combat "rampant fraud and governmental acquiescence."[21] The key changes included an increase from double to treble damages;[22] an increase in penalties from $2,000 per false claim to not less than $5,000 and not more than $10,000 per false claim;[23] and expanded involvement and protection of *qui tam* relators.[24] The amendments guaranteed a relator's minimum share of the bounty, set a higher maximum share in a successful action,[25] and provided a federal cause of action for employment discrimination against employers who retaliated against relator-employees.[26]

Over time, the Government found the newly amended FCA an effective weapon to combat fraud in many industries, most notably health care.[27] Moreover, the protections granted to relators not only bolstered *qui tam* actions but fortified enforcement under the entire scheme. Data from the last twenty years illustrate the increasingly crucial role relators have played in civil fraud enforcement: they have recovered billions for the Government and the Government has in turn shared billions with them.

---

17. *See* 1 BOESE, *supra* note 8, § 1.02.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* § 1.04[A] (*citing* S. REP. No. 99-345, at 2–3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267–68); *see also* S. REP. No. 99-345, at 23–24 ("[T]o encourage more private enforcement suits."). The 1980s were rife with infamous reports of $400 hammers and $600 toilet seats. *See* Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 333 n.106 (2001).
22. 1 BOESE, *supra* note 8, § 1.04[E].
23. 1 JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 1.04[F] (3d ed. 2006 & Supp. 2007). The Department of Justice adjusted these penalties upward for inflation to $5,500 and $11,000, effective Sept. 29, 1999. *Id.*
24. *Id.* § 1.04[G].
25. *See* 31 U.S.C. § 3730(d)(1)–(2) (2000) (setting the recovery range at 15–25 percent if the Government intervenes and 25–30 percent without intervention).
26. *Id.* § 3730(h).
27. *See* Bucy, *supra* note 9, at 942 ("Today, the FCA is used to combat fraud by any and all federal government contractors, including health care providers, defense contractors, and oil and gas companies.").

Table 1: Number of New False Claims Act Matters by Year*

	New Matters		
FY	**Non *Qui Tam***	***Qui Tam***	**Total**
1987	361	66	427
1988	246	60	306
1989	236	95	331
1990	256	82	338
1991	243	90	333
1992	357	119	476
1993	329	132	461
1994	291	222	513
1995	236	277	513
1996	187	363	550
1997	185	533	718
1998	119	470	589
1999	141	481	622
2000	96	367	463
2001	88	309	397
2002	63	320	383
2003	93	334	427
2004	113	415	528
2005	100	394	494
Total	3,740	5,129	8,869

* TAXPAYERS AGAINST FRAUD EDUC. FUND, FRAUD STATISTICS–OVERVIEW 1 (2006), available at http://www.taf.org/fcastatistics2006.pdf.

C. *Five Critical Features of the False Claims Act*

This note focuses on five critical features of the current False Claims Act and companion legislation that, considered together, suggest the Government's significant involvement in relators' private searches. The first two features—a guaranteed share of the bounty and relator protection from an employer's retaliatory conduct—potentially *induce* and encourage private searches. The third and fourth features—the "original source" jurisdictional bar and Federal Rule of Civil Procedure 9(b)'s specific pleading requirement—effectively *guide* and direct relator investigatory conduct. The final feature—the Deficit Reduction Act's disclosure requirements—effectively deputizes a covered entity's employees as government investigators. This part outlines these critical features and briefly describes their impact on state action analysis.

1. Relator's Guaranteed Share of the Bounty—31 U.S.C. § 3730(d)

It is axiomatic that rewards induce action. Under 31 U.S.C. § 3730(d)(1), a relator who is not involved in the wrongdoing but who meets all other statutory

Table 2: FCA Settlements/Judgments and Relator Awards by Year*

FY	Settlements and Judgments			Total Relator Share Awards
	Non *Qui Tam*	*Qui Tam*	Total	
1987	$ 86,479,949	$ 0	$ 86,479,949	$ 0
1988	172,843,696	390,431	173,234,127	97,388
1989	197,202,180	15,111,719	212,313,899	1,446,770
1990	193,239,367	40,558,367	233,797,734	6,611,606
1991	270,945,467	69,775,271	340,720,738	10,686,287
1992	136,862,236	135,093,903	271,956,139	24,456,432
1993	187,234,076	177,416,383	364,650,459	27,393,036
1994	706,187,897	381,468,397	1,087,656,294	70,651,476
1995	279,522,866	247,276,827	526,799,693	46,992,617
1996	247,357,271	138,598,636	385,955,907	26,089,597
1997	468,549,359	629,802,525	1,098,351,884	67,920,267
1998	151,585,794	462,038,795	613,624,589	78,188,694
1999	196,613,009	516,778,031	713,391,040	67,007,516
2000	367,887,197	1,204,367,754	1,572,254,951	183,992,120
2001	494,496,974	1,300,831,678	1,795,328,652	217,770,693
2002	113,692,470	1,096,472,934	1,210,165,404	164,791,975
2003	703,003,368	1,516,226,572	2,219,229,940	327,603,286
2004	115,656,023	565,547,564	681,203,587	112,061,136
2005	276,794,983	1,141,743,736	1,418,538,719	166,375,477
Total	$ 5,366,154,182	$ 9,639,499,523	$ 15,005,653,705	$ 1,600,136,373

* TAXPAYERS AGAINST FRAUD EDUC. FUND, FRAUD STATISTICS–OVERVIEW 1 (2006), *available at* http://www.taf.org/fcastatistics2006.pdf.

requirements in a successful action in which the Government intervenes and recovers from the defendant is guaranteed to "receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim" plus reasonable attorney fees.[28] If the Government does not intervene, a relator proceeds with litigation independently and, if successful, shall recover "not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement...."[29] Where within the range the relator will recover is discretionary, "depending upon the extent to which the person substantially contributed to the prosecution of the action."[30] If the relator "planned and initiated" the wrongdoing, the court may reduce his or her share "to the extent

28. 31 U.S.C. § 3730(d)(1) (2000); *see also* 1 BOESE, *supra* note 8, § 4.08[A].

29. 31 U.S.C. § 3730(d)(2). The Government's willingness to allow relators to pursue less-promising claims further manifests more than its mere acquiescence in relator conduct. *See infra* Part IV.B.

30. 31 U.S.C. § 3730(d)(1). The legislative history outlines some consideration factors, including the significance of the information and the extent to which that information contributed to the result. *See* S. REP. No. 99-345, at 28 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5293. The Department of Justice considers a myriad of factors in favor of increasing or decreasing a relator's

the court considers appropriate";[31] relators who are criminally convicted for the conduct giving rise to the action cannot receive anything.[32]

Note that a relator is guaranteed a reward only if the action results in a payment to the Government. By inextricably tying a relator's recovery to the Government's, the FCA does more than just invite relators to provide helpful information: it incentivizes them to uncover as much fraud as possible, to dig for the most incriminating evidence they can find to ensure a positive outcome.

2. Protection from Retaliatory Termination—31 U.S.C. § 3730(h)

A relator protected is a relator emboldened. Section 3730(h), commonly known as the "whistleblower protection" provision, provides an employee-relator a federal employment discrimination cause of action for his employer's retaliatory behavior. The provision extends "all relief necessary" to

> [a]ny employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section...[33]

Courts addressing complaints filed under this section have extended protection to investigations as well as reports of fraud.[34] "An employee need not have actual knowledge of the FCA for her actions to be considered 'protected activity'...."[35]

For conduct to be protected, however, it must have a specific connection to an FCA action, be reasonably calculated to uncover fraudulent claims,[36] and be sufficient to put the defendant "on notice that [the relator] was either taking action in furtherance of a private *qui tam* action or assisting in an FCA action brought by the [G]overnment."[37] Proof of notice is critical

share. *See* 1 BOESE, *supra* note 8, § 4.08[A]. If a relator, as an original source, primarily relies on public information to support his or her action, and the Government intervenes and proceeds with the action, he or she may receive no more than 10 percent. 31 U.S.C. § 3730(d)(1).

31. 31 U.S.C. § 3730(d)(3).

32. *Id.*

33. *Id.* § 3730(h).

34. *See* United States *ex rel.* Luckey v. Baxter Healthcare Corp., 183 F.3d 730, 733 (7th Cir. 1999) ("Only investigation, testimony, and litigation are protected"); Neal v. Honeywell, Inc., 33 F.3d 860, 865 (7th Cir. 1994).

35. Fanslow v. Chicago Mfg. Ctr., 384 F.3d 469, 479 (7th Cir. 2004).

36. *See* 1 BOESE, *supra* note 23, § 4.11[B][1]; Schuhardt v. Wash. Univ., 390 F.3d 563, 567 (8th Cir. 2004). The *Schuhardt* court also focused on the "scope of the job" as relied upon in *Robertson v. Bell Helicopter Textron*, 32 F.3d 948, 952 (5th Cir. 1995). *Schuhardt*, 390 F.3d at 567.

37. United States *ex rel.* Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1522 (10th Cir. 1996) (citing *Robertson*, 32 F.3d at 950–51). The *Ramseyer* court was clear to point out that "the monitoring and reporting activities described in plaintiff's complaint were exactly those activities plaintiff was required to undertake in fulfillment of her job duties, and plaintiff took no steps to put defendants on notice that she was acting 'in furtherance of' an FCA action..." *Id.* at 1523. Senate reports suggest that a "whistleblower must show the employer had knowledge the employee engaged in 'protected activity'..." S. REP. No. 99-345, at 35 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5300.

to demonstrating retaliation.[38] Merely engaging in conduct required as part of one's job might not suffice to put an employer on notice, thereby defeating a relator's claim of retaliatory termination.[39] It is not enough that the conduct be aimed at compelling compliance with the regulatory scheme.[40] Some courts, however, have protected an employee who lodged serious allegations of his employer's fraud and whose day-to-day duties did not involve investigating fraud.[41]

Protection from employer retaliation, which only inheres to a relator when he goes beyond his job duties to investigate fraud, emboldens relators to conduct searches and to access company documents otherwise unavailable to them. As such, when an employee invokes the FCA to put his employer on notice, he effectively flashes a badge of governmental authority. An employer thereby put on notice of a relator's authority to access, and intentions in accessing, such information is effectively hamstrung and must endure the invasion or else be subject to suit in federal courts for retaliation.[42]

3. "Original Source" Requirement—31 U.S.C. § 3730(e)(4)

In response to the Supreme Court's decision in *United States ex rel. Marcus v. Hess*,[43] Congress enacted in 1943 a jurisdictional bar to *qui tam* actions to prevent relators from bringing "parasitic" *qui tam* suits.[44] Today, that bar remains codified in section 3730(e)(4)(A), which precludes a court's jurisdiction over an FCA action if a disclosure, sufficient to reveal the elements of a false or fraudulent transaction, occurs in any of three scenarios: (1) criminal, civil, or administrative hearings; (2) congressional, administrative, or Government Accountability Office reports, hearings, audits, or investigations; or (3) the news media.[45] Practically speaking, relators cannot take advantage of information when it is revealed to a "stranger to the fraud," when disclosure is sufficient to put federal authorities on notice of fraud, when allegations of fraud are injected into the "public domain," or when it is disclosed to *any* member of the public.[46]

38. *Ramseyer*, 90 F.3d at 1522. ("If defendants were not afforded such notice, then, *a fortiori*, their actions could not constitute retaliation.").

39. The court in *Robertson v. Bell Helicopter Textron* found the fact that "Robertson ha[d] identified no change in his conduct that might have objectively demonstrated his *qui tam* intentions" did not support a finding that the defendant was on notice of Robertson's *qui tam* investigation. 32 F.3d at 952.

40. *See* Luckey v. Baxter Healthcare Corp., 2 F. Supp. 2d 1034, 1052 (N.D. Ill. 1998) ("We decline to extend general investigations of regulatory non-compliance into per se employee investigations of an employer's alleged fraud upon the government.").

41. *See* 1 Boese, *supra* note 23, § 4.11[B][1].

42. Whistleblower protection also *guides* relator conduct because it only applies when a relator goes beyond his or her job duties.

43. 317 U.S. 537 (1942).

44. *See* 1 Boese, *supra* note 8, § 4.02[A].

45. 31 U.S.C. § 3730(e)(4)(A)(2000). This is the most frequently litigated issue in *qui tam* suits under the FCA. *See* 1 Boese, *supra* note 8, § 4.02[A].

46. 1 Boese, *supra* note 8, § 4.02[B].

Public disclosure will not prove fatal to a relator's case, however, if he or she is the "original source" of the information. Under § 3730(e)(4)(B), a relator is an "original source" if he or she has "direct and independent knowledge of the information" supporting the allegations *and* he or she "voluntarily provided the information to the Government before filing" the FCA action.[47] Depending on the circuit, "direct knowledge" must be either free from "intervening agency, instrumentality, or influence" or gained "firsthand, and unmediated by anything but the plaintiff's own labor."[48] This means that collateral research and investigations... [do] not establish direct and independent knowledge...."[49] Some circuits require that actions be based on entirely nonpublic knowledge, while others only require personal knowledge of "*any* essential element of the underlying fraud transaction."[50]

The Supreme Court recently tightened the scope of the original source requirement in *Rockwell International Corp. v. United States*, settling some of the uncertainty surrounding the term "allegation" as used in the original source requirement.[51] The Court decided that a relator must have direct and independent knowledge of the facts supporting allegations in *both* the original and amended complaints in order for a court to have jurisdiction over the case.[52] Government intervention cannot cure infirmities in pleading and does not provide an independent basis for jurisdiction over the relator's action.[53]

In sum, courts will only have jurisdiction over cases in which relators have come across information concerning fraud firsthand and have shared that information with the Government (and no one else) before filing the action. The original source requirement, therefore, encourages relators to investigate fraud on their own without either sharing information with others or relying too much on information provided by others.

4. Pleading with Particularity—Federal Rule of Civil Procedure 9(b)

FCA actions concern fraud. As such, complaints filed by relators are subject to Federal Rule of Civil Procedure 9(b), which requires in pertinent part that "the circumstances constituting fraud or mistake shall be stated with

47. 31 U.S.C. § 3730(e)(4)(B). This "prior notice" feature seeks to prevent additional harm and "reduces perverse incentives that otherwise exist in a bounty system" that ties a relator's share directly to the damages accrued. 1 BOESE, *supra* note 8, § 4.02[D][5].

48. 1 BOESE, *supra* note 23, § 4.02[D][2][a].

49. United States *ex rel.* Kennard v. Comstock Res., Inc., 363 F.3d 1039, 1045 (10th Cir. 2004).

50. 1 BOESE, *supra* note 23, § 4.02[D][2][c][iii] (emphasis added).

51. 127 S. Ct. 1397, 1408 (2007).

52. *Id.* ("[A] limitation of § 3730(e)(4)'s requirement to the relator's *initial* complaint... would leave the relator free to plead a trivial theory of fraud for which he had some direct and independent knowledge and later amend the complaint to include theories copied from the public domain or from materials in the Government's possession.").

53. *Id.* at 1411 ("An action brought by a private person does not become one brought by the Government just because the Government intervenes and elects to 'proceed with the action.'").

particularity."[54] Almost every court of appeals strictly applies Rule 9(b) to all of a *qui tam* relator's pleadings.[55]

Rule 9(b) requires that complaints specify the time, place, persons involved, and fraudulent nature of the alleged acts.[56] In some circuits, this means the complaint must detail the specific "who, what, when, where, and how" of fraudulent claims *actually* submitted to the Government.[57] Pleading "systematic" or "widespread" fraud will not suffice, and courts will look for a link between a fraudulent scheme and the submission of fraudulent claims.[58] Courts will also hold particularly experienced, "inside" relators to a higher standard of pleading.[59] When information is in the sole hands of the defendant, however, courts are willing to relax the rule if the complaint sets forth a factual basis for belief of fraud.[60]

In concert with the "original source" requirement, Rule 9(b)'s stringent pleading requirements effectively force relators thinking of filing actions to uncover clear evidence of specific fraudulent claims. Such clear evidence often consists of company documents discovered and seized during employee-conducted searches: it is not uncommon for relators to actually take materials from their employer to support their cause of action.[61]

5. Mandatory Disclosures—Deficit Reduction Act of 2005 (DRA)

The Federal Government has pushed in recent years to further broaden false claims litigation, most notably through the Deficit Reduction Act of 2005

54. FED. R. CIV. P. 9(b).

55. *See* 2 JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 5.04 (3d ed. 2006 & Supp. 2007-2); United States *ex rel.* Bledsoe v. Cmty. Health Sys., Inc., 342 F.3d 634, 641–42 (6th Cir. 2003) ("[W]hen pleading violations of the FCA, a fraud statute, one necessarily makes averments of fraud and necessarily must state with particularity the circumstances constituting the fraud."); United States *ex rel.* Clausen v. Lab Corp. of Am., 290 F.3d 1301, 1309–10 (11th Cir. 2002) ("[I]t was 'well settled' and 'self-evident' that the False Claims Act is 'a fraud statute' for the purposes of Rule 9(b).").

56. *See* 2 BOESE, *supra* note 55, § 5.04[B]; *see also* United States *ex rel.* Russell v. Epic Healthcare Mgmt. Group, 193 F.3d 304, 309 (5th Cir. 1999) ("A special relaxing of Rule 9(b) is a *qui tam* plaintiff's ticket to the discovery process that the statute itself does not contemplate.").

57. *See* 2 BOESE, *supra* note 55, § 5.04[B]; *Clausen*, 290 F.3d at 1306. For a list of cases applying Rule 9(b) stringently, *see* 2 BOESE, *supra* note 55, § 5.04[B][2].

58. *See* 2 BOESE, *supra* note 55, § 5.04[B][2]. However, if a relator is "privy to... the [defendant's] internal billing practices," a general allegation will have more indicia of reliability than would a general allegation made by a person who would not normally have firsthand exposure to the illicit conduct. Hill v. Morehouse Med. Assocs., No. 02-14429, 2003 WL 22019936, at *4–5 (11th Cir. Aug. 15, 2003) (per curiam); *cf.* Corsello v. Lincare, Inc., 428 F.3d 1008, 1014–15 (11th Cir. 2005) (relator, a sales employee, did not "have access to the specific billing information... submitted to the government" and therefore could not prevail on mere assertions of awareness without specifically stating the who, what, when, where, etc.).

59. *See* United States *ex rel.* Lee v. SmithKline Beecham, Inc., 245 F.3d 1048, 1052 (9th Cir. 2001).

60. *See* United States *ex rel.* Yannacopolous v. Gen. Dynamics, 315 F. Supp. 2d 939, 945 (N.D. Ill. 2004).

61. *See* X Corp. v. John Doe, 805 F. Supp. 1298, 1301 (E.D. Va. 1992), *aff'd sub nom.* Under Seal v. Under Seal, 17 F.3d 1435 (4th Cir. 1994) ("On leaving X Corp.'s employ, Doe took with him copies of certain documents and files, leaving the originals with X Corp.").

(DRA).[62] The FCA-relevant provision, added by Senator Chuck Grassley (principal author of the 1986 Amendments[63]), aims to reduce Medicaid spending in two significant ways: first, by providing strong economic incentives to states that enact their own false claims acts with *qui tam* provisions to combat Medicaid fraud;[64] second, by requiring that government contractors make disclosures to all employees regarding their rights under the FCA.[65] Specifically, the DRA requires all entities making or receiving more than $5 million in annual Medicaid payments to distribute written disclosures to "all employees of the entity (including management), and of any contractor or agent of the entity" providing detailed information about federal and state FCAs, about the entity's fraud detection and waste prevention procedures, and about the rights of employees to be protected as whistleblowers.[66] The Congressional Budget Office estimates DRA Medicaid savings will total over $1 billion through 2015.[67]

In addition to promoting state-level false claims litigation under companion state statutes, the new federally required disclosures will effectively "deputize" countless new, potential investigators. Most troublesome is how vague the DRA's disclosure requirements are: they merely mandate alerting employees of how to bring false claims actions without detailing limitations on how evidence can and should be culled. Potential relators are effectively sworn in as government investigators upon receiving these disclosures but, unlike police officers,[68] are not told how to wield their power properly.

III. STATE ACTION THEORY

A. *Introduction*

This part considers whether the five critical features of the FCA suffice to convert private relator conduct into government action. It is possible that in many cases they do.

The Fourteenth Amendment proscribes a state from "depriv[ing] any person of life, liberty, or property, without due process of law; [and from] deny[ing] to

62. *See* 42 U.S.C.S. § 1396h (LexisNexis Supp. 2007). The DRA became effective January 1, 2007. *Id.* § 1396h(c).

63. *See* Press Release, U.S. Senator Chuck Grassley of Iowa, Grassley Statement at Oversight of U.S. Justice Department Hearing (Jan. 18, 2007), *available at* http://grassley.senate.gov/public/index.cfm?FuseAction = PressReleases.Detail&PressRelease_id = 51ad100e-5068-41e9-b4fc-438cc85c94f1&Month = 1&Year = 2007.

64. States that enacted provisions that closely modeled or surpassed the federal FCA received a 10 percent reduction "in the amount owed by the state to the federal government for the federal portion of any Medicaid recovery under a qualifying state FCA." 42 U.S.C.S. § 1396h (LexisNexis Supp. 2007); 1 BOESE, *supra* note 23, § 1.04[H][3]–[4].

65. 42 U.S.C.S. § 1396a(a)(68) (LexisNexis 2001 & Supp. 2007).

66. *Id.*

67. *See* CONG. BUDGET OFFICE, COST ESTIMATE, S. 1932 DEFICIT REDUCTION ACT OF 2005 at 36, 39 (2006), *available at* http://www.cbo.gov/ftpdocs/70xx/doc7028/s1932conf.pdf.

68. *See* Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 MICH. L. REV. 1121, 1135 (2001), for a discussion of the critical role of training in officers' understanding of search and seizure law.

any person within its jurisdiction the equal protection of the laws."[69] Only when the state or its agent has infringed upon an individual's constitutionally protected rights will the Fourteenth Amendment apply.[70] Courts have refused to find constitutional violations when a private person conducted himself in a wrongful way without government involvement, albeit for the Government's benefit.[71]

Finding state action, however, has proven difficult, particularly when the Government does not act overtly through its officers but rather involves itself surreptitiously through government-sanctioned or supported private conduct. As the Court noted in *Burton v. Wilmington Parking Authority*, "[T]o fashion and apply a precise formula for recognition of state responsibility... is an 'impossible task' which 'This Court has never attempted.' Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[72] Courts continue to struggle to properly apply state action theory, often rendering decisions "clearly inconsistent" with previously decided cases.[73] Even some scholars cannot agree as to how many state action tests actually exist.[74] Nevertheless, the state action question remains a critical one, serving as a prelude to the actual constitutional claim against a private party.[75]

Today, courts ask two basic questions to find state action: (1) Did the private entity engage in a traditional and exclusive public function?[76] and (2) Is there a sufficient enough nexus between the Government and private conduct?[77] A court need only answer one of the two questions affirmatively to find state action.

69. U.S. CONST. amend. XIV, § 1.

70. *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) ("[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no such shield against *merely private conduct*, however discriminatory or wrongful.") (emphasis added).

71. Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) ("Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.").

72. 365 U.S. 715, 722 (1961) (internal citations omitted).

73. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.4.4.1 (3d ed. 2006) ("It is difficult, if not impossible, to draw a meaningful line as to the point where the involvement is great enough to require private action to comply with the Constitution"); *see also* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295–96 (2001) ("What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity... [N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.").

74. *See* Martin A. Schwartz, *New Issues Arising Under Section 1983*, 18 TOURO L. REV. 641, 645 (2002). Professor Chemerinsky argues there are two, while Professor Schwartz argues there are four, or perhaps three, or even five. *Id.*

75. *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1475 n.375 (2003).

76. *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) (asking whether a private entity exercises "powers traditionally exclusively reserved to the State").

77. That is, whether "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself." *Brentwood Acad.*, 531 U.S. at 295 (quoting *Jackson*, 419 U.S. at 351).

B. *Public Function Test*

1. "A Traditional and Exclusive Government Function"

First articulated in *Marsh v. Alabama*, the public function theory initially treated any private person or entity performing a traditional government function as the Government itself.[78] Attempts to apply this principle broadly to other types of private conduct, however, proved much less successful.[79] In nonproperty cases, for example, the Court severely limited its findings of state action to cases in which a private entity exercised "some power delegated to it by the State which is traditionally associated with sovereignty"[80] or an "exclusive public function."[81]

Notwithstanding this test's limitations, the public function theory remains viable. In 2005, the Sixth Circuit applied the public function theory to hold that casino security officers, vested under Michigan law with the plenary power to make arrests without a warrant (authority traditionally entrusted to state peace officers), were state actors performing a traditional public function.[82] In 2003, the Fifth Circuit applied the theory to hold that a private prison-management corporation performed a fundamentally governmental function, notwithstanding the fact that private entities occasionally detained prisoners.[83] The Second Circuit used the theory to find that a volunteer fire department wrongfully discharged a fireman in violation of his First

78. 326 U.S. 501, 506 (1946). In *Marsh*, a privately owned store operating in the business district of Chickasaw, Alabama—a town owned by the Gulf Shipbuilding Corporation—had a Jehovah's Witness arrested for trespass for distributing religious leaflets in front of the store. *Id.* Later cases, however, severely limited *Marsh* to circumstances where private property had taken on *all*, not merely some or even most, of the attributes of a municipality. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507, 516–17 (1976).

79. *See, e.g.*, *Jackson*, 419 U.S. at 345 (holding that a privately run public utility was not performing a traditional public function); Flagg Bros. v. Brooks, 436 U.S. 149, 165–66 (1978) (holding that private use repossession is not a traditional public function); Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (holding that running a private school for troubled children is not a traditional public function); Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 55–57 (1999) (holding that providing private workers' compensation comparable with the public structure is not a traditional public function).

80. *Jackson*, 419 U.S. at 353.

81. *Flagg Bros.*, 436 U.S. at 161–62 (refusing to find state action in a private warehouseman's sale of another's property because the sale was merely *authorized*, not required, by New York's Uniform Commercial Code); *see also* Evans v. Newton, 382 U.S. 296, 302 (1966) (holding that private operation of a recreational park was "more like a fire department or police department that traditionally serves the community" because "[m]ass recreation through the use of parks is plainly in the public domain"); West v. Adkins, 487 U.S. 42, 53–55 (1988) (holding that the medical treatment of prison inmates in a public prison, even if by a privately contracted physician, was a traditional and exclusive public function); Edmondson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991) (finding state action when a private litigant exercised a racially discriminatory peremptory challenge during civil jury empanelling because the state had delegated to the private litigant the traditional government power of choosing state officials).

82. Romanski v. Detroit Entm't, L.L.C., 428 F.3d 629, 638 (6th Cir. 2005).

83. Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003); *see also* Skelton v. Pri-Cor, Inc., 963 F.2d 100, 102 (6th Cir. 1991); Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 703 (11th Cir. 1985).

Amendment rights[84] and that a private child-caring institution wrongfully retained custody of children on behalf of the state.[85] Several district courts have applied the theory in similar cases.[86]

2. Applying the Public Function Theory to the False Claims Act

For the public function theory to apply to the *qui tam* provision of the False Claims Act, the relator must perform a function traditionally associated with sovereignty and exclusively retained and exercised by the Government. This note focuses exclusively on the relator's pre-complaint investigatory conduct aimed at the detection of false claims.[87]

Investigation of criminal and public offenses is certainly a traditional government function.[88] While investigating wrongdoing, generally, cannot be said to be the exclusive power of the Government, investigating wrongs committed against the Government itself is a traditional and exclusive government function. False Claims Act investigations concern wrongs committed against the Government and specifically against the public fisc.

Courts have repeatedly held that the protection of the public fisc is a legitimate, if not an exclusive, government interest.[89] As the legislative history and early cases make evident, Congress enacted the False Claims Act intending

84. Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17, 21–25 (2d Cir. 1979). Relying on dicta in *Flagg Bros.*, the court found that fire protection was an "exclusive municipal function" and that the fire department was the state's agent. *Id.* at 22 (quoting *Flagg Bros.*, 436 U.S. at 163–64).

85. Perez v. Sugarman, 499 F.2d 761, 764 n.3 (2d Cir. 1974). The court held that it was "the State which in effect is providing the care *through* the private institutions. This exercise of the administrative placing prerogative does not affect in any way the State's ultimate responsibility for the well-being of the children, and, consequently, the public nature of the function being performed." *Id.* at 765.

86. *See, e.g.*, Macias v. Wackenhut Corr. Corp., No. CV-F-03-5245 REC/DLB, 2005 U.S. Dist. LEXIS 29296, at *2 (E.D. Cal. Nov. 23, 2005) (citing *Rosborough*, 350 F.3d at 459; *Skelton*, 963 F.2d at 100) (private prison-management corporation); Chambers v. City of Frederick, 292 F. Supp. 2d 766, 770–72 (D. Md. 2003) (maintenance of a public park); C.K. v. Nw. Human Servs., 255 F. Supp. 2d 447, 451 (E.D. Pa. 2003) (private facility for delinquent, not dependent, youth); Riester v. Riverside Cmty. Sch., 257 F. Supp. 2d 968, 972 (S.D. Ohio 2002) (private management of community school created under state law); Eggert v. Tuckerton Volunteer Fire Co. No. 1, 938 F. Supp. 1230, 1239 (D.N.J. 1996) (volunteer fire department).

87. The case has been made that a relator's post-complaint, litigation-oriented conduct falls under the public-function analysis as well because relators serve as "deputized" private attorneys general. Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1380 n.285 (1991).

88. *See In re* Lindsey, 148 F.3d 1100, 1108 (D.C. Cir. 1998) ("[i]nvestigation and prosecution of federal crimes is one of the most important and essential functions within [Article II] responsibility").

89. *See, e.g.*, United States v. Hughes Props., Inc., 476 U.S. 593, 603 (1986) ("[T]he major responsibility of the Internal Revenue Service is to protect the public fisc."); Heckler v. Cmty. Health Servs., 467 U.S. 51, 63 n.17 (1984) ("[t]he scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power"); West v. Gibson, 527 U.S. 212, 222–23 (1999) (upholding the EEOC's "legal authority to enforce § 717 [of Title VII] through an award of compensatory damages"); Walker v. Bain, 257 F.3d 660, 678 (6th Cir. 2001) ("Without question, the desire to protect public funds is a laudable and legitimate goal of legislation.").

to vindicate the Government's interest and to protect the public fisc.[90] As the Second circuit noted, "[I]t is significant that the False Claims Act...was designed by Congress to protect against retaliation the class of whistleblowers whose activities *benefit the public fisc.*"[91] The D.C. Circuit noted that concern over "'sophisticated and widespread fraud' depleting the national fisc" spurred the 1986 Amendments to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government."[92] The Fourth Circuit noted that under the False Claims Act

> the public interest here entrusted primarily to the government's protection is a particularly substantial one. Unlike in various other contexts where governmental action on behalf of *an individual's interest* has been held not to be barred by an official's tardiness, here *the government is prosecuting directly to protect the public fisc itself against the massive drain....*[93]

As briefly mentioned above, the delegation of government power to private crime fighters also enjoys a lengthy history. Before the creation of public police, a citizen in feudal England had an affirmative duty to respond to the "hue and cry," thereby enforcing the King's law.[94] In the late seventeenth century, even after the creation of official police forces, the English Parliament enacted legislation empowering "thief-takers," private citizen-detectives, to investigate crimes in exchange for compensation "paid by the Government on results."[95] Thief-takers lacked official status, and anyone could become one, although most were criminals themselves.[96] Most importantly, thief-takers did what the official police system was unwilling or unable to do: detect and apprehend criminals.[97] By the late eighteenth century, *qui tam* actions, as natural extensions of thief-taking, were commonplace.[98]

90. Senator Howard, original sponsor of the Act, broadly asserted that its object was to provide protection against those who would "cheat the United States." CONG. GLOBE, 37th Cong., 3d Sess. 952 (1863); *see also* United States v. Griswold, 24 F. 361, 366 (D. Or. 1885) (holding that the Act was "intended to protect the treasury against the hungry and unscrupulous host that encompasse[d] it on every side."), *aff'd*, 30 F. 762 (C.C.D. Or. 1887). Subsequent Supreme Court cases make clear that the right vindicated is solely the Government's. *See, e.g.*, United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 551–52 (1943) ("[T]he device of double damages plus a specific sum was chosen to make sure that the *government* would be made completely whole." (emphasis added)).

91. Brown v. City of S. Burlington, 393 F.3d 337, 346 (2d Cir. 2004) (emphasis added).

92. United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 650 (D.C. Cir. 1994).

93. United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1346 n.6 (4th Cir. 1994) (citation omitted) (emphasis added).

94. *See* PHILIP RAWLINGS, POLICING: A SHORT HISTORY 16 (2002), which explains the process whereby citizens of one town routinely carried on the hue and cry of a neighboring town.

95. PATRICK PRINGLE, HUE AND CRY: THE STORY OF HENRY AND JOHN FIELDING AND THEIR BOW STREET RUNNERS 35 (1955).

96. *Id.* at 35–36.

97. *Id.*

98. *See* J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. REV. 539, 549–50, 550 n.35 (2000) (stating that *qui tam* actions had been in common use since the fourteenth century). *Qui tam* actions eventually waned in popularity in England with the development of capable public law enforcement and growing distrust for "overzealous" informers pursuing their bounties. *See* 1 BOESE, *supra* note 8, § 1.01[A].

If investigating federal crimes is a traditional government function,[99] investigating federal crimes committed against the treasury is implicitly the exclusive responsibility of the Government. Thus, when a relator investigates in furtherance of an FCA action, he does so to vindicate the Government's interest in protecting the public fisc; he thereby exercises a traditional and exclusive public function. Furthermore, the long history behind this type of government delegation of authority supports, rather than undermines, finding the investigative acts of *qui tam* relators quintessentially and exclusively those of the Government itself.

C. *Nexus Test*

The alternative pathway to finding state action is the nexus test. The nexus test breaks down into essentially three subtheories:[100] joint action theory,[101] coercion/inducement theory,[102] and symbiosis/entwinement theory.[103] The nexus test thus considers: whether a *state* has exercised "coercive power" over a private entity or provided "significant encouragement, either overt or covert[104]; whether a *private* entity operates as a "willful participant in joint activity with the state"[105]; or whether the private entity is entwined with governmental policies.[106] This note will examine coercion/inducement theory and symbiosis/entwinement theories seriatim.[107]

1. Coercion/Inducement Theory

The coercion/inducement theory requires that the Government have exercised coercive power over a private entity or provided significant encouragement such that "the choice must in law be deemed to be that of the State."[108] Early cases applying this test held that "a State [was] responsible for the discriminatory act of a private party when the State... ha[d] *compelled* the act,"

99. *See In re* Lindsey, 148 F.3d 1100, 1108 (D.C. Cir. 1998).

100. *See* John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 584–85 (2005).

101. *See* Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970) (whether a private party is "'a willful participant in joint activity with the State or its agents'"); Lugar v. Edmondson Oil Co., 457 U.S. 922, 931 (1982).

102. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

103. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (discussing whether "the State has so far insinuated itself into a position of interdependence" with the private party that there is a symbiotic relationship between them); Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) ("whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself").

104. *Blum*, 457 U.S. at 1004.

105. *Lugar*, 457 U.S. at 941.

106. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 302 (2001).

107. This note does not analyze relator searches under the joint action theory because the conduct considered by this note likely does not involve joint investigations by relators and government officials. *See infra* Part IV for a useful hypothetical.

108. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

whether by "statutory provision or by a custom having the force of the law."[109] Mere regulation of an incident of private activity used in a privately discriminatory manner, however, did not convert private into public action.[110] Not even state-granted private monopoly power was sufficient to attribute private conduct to the state.[111]

More recent cases recognized that private exercise of state-permitted action did not suffice to attribute that exercise to the state itself.[112] A state's "mere acquiescence in a private action," as opposed to statutory compulsion, did not "convert[] that action into that of the State."[113] Significant state encouragement, however, could convert private conduct into that of the state itself if it sufficiently influenced that private conduct.[114]

2. Applying the Coercion/Inducement Theory to Relator Conduct

Under this theory, a court must consider whether a state has exercised "coercive power" over a private entity or provided "significant encouragement, either overt or covert," to the private actor.[115] Because the FCA scheme is permissive—it neither requires a relator to blow the whistle nor compels him or her to notify the Government under threat of penalty—a coercion theory will not apply just as it did not apply in *Blum v. Yarestky*[116] or *Jackson v. Metropolitan Edison Company*.[117]

109. Adickes v. S. H. Kress & Co., 398 U.S. 144, 170–71 (1970) (emphasis added). Adickes, a white schoolteacher, was refused service at respondent-defendant Kress's restaurant when accompanied by several African American students. *Id.* at 146. Adickes sued the restaurant as a co-conspirator under 31 U.S.C. § 1983 for her subsequent pretextual arrest for vagrancy by local police. *Id.* at 146–47.

110. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 165 (1972). A private social club, whose liquor sales were regulated by the state, racially discriminated against its members' guests. *Id.* at 164–65, 176 n.3, 176–77. The state's regulation alone did not "foster or encourage racial discrimination," particularly where the state "neither approved nor endorsed" the Lodge's discriminatory policies. *Id.* at 176–77, 176 n.3.

111. A private utility company, licensed and extensively regulated by the state, terminated the respondent's power for nonpayment without notice or a hearing; the state permitted the termination procedure. Jackson v. Metro. Edison Co., 419 U.S. 345, 350–51 (1974); *see also* Pub. Util. Comm'n v. Pollak, 343 U.S. 451, 462 (1952).

112. *See* Flagg Bros. v. Brooks, 436 U.S. 149, 166 (1978); *see also Jackson*, 419 U.S. at 353.

113. *Flagg Bros.*, 436 U.S. at 164, 166 ("[T]he State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale.").

114. *See* Blum v. Yaretsky, 457 U.S. 991, 1005 (1982) (holding that a state must have "exercised coercive power or... provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State"). A private nursing home's decision to release or discharge patients without notice, resulting in adjustments to their state benefits, was made by its private staff relying exclusively on "medical judgments... made according to professional standards... not established by the State." *Id.* at 1004–08. The state's adjustment of Medicaid benefits in response to discharges and transfers did not constitute the state's approval of those private decisions, notwithstanding that it received patient care assessment forms it was federally required to review. *Id.* at 1010.

115. *Id.* at 1004.

116. *See id.*

117. 419 U.S. 345 (1974).

The five critical features of the FCA do, however, provide significant encouragement to relators to conduct searches. The bounty and whistleblower protection provide relators with powerful incentives to begin searches, beyond the mere licensure or regulation at issue in *Moose Lodge* and *Jackson*. Once begun, the heightened pleading and original source requirements encourage relators to dig deep for inculpatory evidence with the full authority of the Government behind them because more frauds uncovered mean more bounty to be collected. The high evidentiary threshold effectively guides relator conduct, as was considered by the Court in *Blum*, and manifests more than mere acquiescence, at issue in *Flagg Bros*. Expansive application of the Act, nongovernment intervention suits, and the DRA's disclosure requirements, moreover, demonstrate the Government's strong preference for private searches to uncover fraud.

3. Symbiosis/Entwinement

Symbiosis/entwinement analysis considers whether the Government has "so far insinuated itself into a position of interdependence" with the private party that there is a "symbiotic relationship" between them or whether the "nominally private character" of the relator is "overborne by the pervasive entwinement" of the Federal Government in its conduct.[118] This part asserts that the FCA's critical features create an interdependent relationship between the Government and private relators such that it often overbears the nominally private conduct of relators.

Most of the state action tests, most notably symbiosis/entwinement, trace their roots to *Burton v. Wilmington Parking Authority*.[119] Under *Burton*, symbiosis/entwinement theory initially took an ad hoc, "totality" view of the relationship between a state and private party and did not delineate a bright-line rule on state action.[120] The *Burton* court found that a private coffee shop, which leased space in a public parking building and received significant benefits from the municipal parking authority[121]—which in turn relied on increased coffee shop patronage for profits—was a state actor when it refused to serve a black patron on the basis of race.[122] *Burton*'s single "totality" view,

118. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961); Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298 (2001).

119. 365 U.S. 715 (1961); *see also* Branden J. Tedesco, National Collegiate Athletic Association v. Tarkanian: *A Death Knell for the Symbiotic Relationship Test*, 18 HASTINGS CONST. L.Q. 237, 242 (1990). The Court did previously apply a variation of the nexus test in *Public Utililty Commission v. Pollak*, 343 U.S. 451 (1952), and *Terry v. Adams*, 345 U.S. 461, 469–70 (1952), although its application was "tentative and somewhat opaque" until the "vigorous and comprehensive" analysis in the now quintessential *Burton*. G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 395 (1997).

120. The Court expressly suggested state action determinations be made on a case-by-case basis. *Burton*, 365 U.S. at 725–26.

121. The shop received state assistance constructing and decorating the space for use as a restaurant and in furnishing utilities at no charge. *Id.* at 719–20. It also enjoyed tax-exempt status on the $220,000 it spent "to make the space suitable for operation." *Id.* at 719. Building maintenance was the state's responsibility and was paid for by public funds. *Id.* at 724.

122. *Id.* at 720.

which left unanswered just how much interdependence was enough under the law,[123] subsequently yielded to several more defined nexus tests,[124] derived from three simultaneously decided cases collectively referred to as the "*Blum* Trilogy"[125] and applied seriatim for nearly two decades.[126]

Yet the Court harked back to its *Burton* roots when it decided *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n* (TSSAA).[127] There, a private interscholastic athletic association comprised almost entirely of state schools and led by several state officials was deemed a state actor when it enforced a speech-limiting recruiting rule against a member school because of the "*pervasive entwinement*" between the association and all member schools.[128] TSSAA's private motives, imposed on member schools, triggered enforcement of its rules in a way that could "fairly be attributed to the State."[129] The majority plainly reverted to pre-*Blum* Trilogy reasoning, stating that when "the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test."[130] The Court also injected a "normative judgment" element into the analysis, essentially allowing for a finding of state action when there "may be some countervailing reason" for finding it.[131]

4. Applying Symbiosis/Entwinement Theories to Relator Conduct

Applying traditional *Burton* analysis to the FCA, consider that *qui tam* suits currently contribute to at least half of the Government's annual recovery under the scheme. To increase government recoveries, Congress and the Department of Justice have consistently expanded the application of the Act and the power of relators, particularly with the recent enactment of the

123. A confounded Justice Harlan noted, "The Court's opinion, by a process of first undiscriminatingly [sic] throwing together various factual bits and pieces and then undermining the resulting structure by an equally vague disclaimer, seems to me to leave completely at sea just what it is in this record that satisfies the requirement of 'state action.'" *Id.* at 728 (Harlan, J., dissenting). The last case applying *Burton* per se, before *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001), was *Evans v. Newton*, 382 U.S. 296, 299–300 (1966).

124. *See* Buchanan, *supra* note 119, at 399–421.

125. The Burger Court trifurcated state action theory into the distinct coercion/inducement, joint action, and public function tests in *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982); and *Rendell-Baker v. Kohn*, 457 U.S. 830, 843 (1982).

126. *Blum*, 457 U.S. at 991; *Lugar*, 457 U.S. at 939; *Rendell-Baker*, 457 U.S. at 843.

127. 531 U.S. 288 (2001).

128. *Id.* at 290–92. The Tennessee State Board of Education designated TSSAA as the sole organization supervising and regulating high school sports. *Id.* at 292. The bulk of TSSAA's revenues came from gate receipts collected at football games and basketball tournaments; eligibility requirements included minimum academic standards for student athletes, state teaching licensure for coaches, and standardized financial aid. *Id.* at 291–92.

129. *Blum*, 457 U.S. at 1004.

130. *Brentwood*, 531 U.S. at 303.

131. *Id.* at 295–96 ("What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity... [N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.").

DRA evidencing the Government's not-so-tacit and significant reliance on private investigations. Relators, as assignees of the Government's interest,[132] rely on the Government for their reward, which only inheres if the Government prevails against the defendant. To better reap the fruits of the relators' efforts, Congress provides protection against, and access to federal courts for, an employer's retaliatory conduct. As in *Burton*, a relator's inability to conduct private searches would injure his ability to invoke federal protections and to uncover government fraud, which prove "indispensable... [to the] financial success" of the Government.[133] All these features, in concert, suggest a relationship of interdependence to achieve a common purpose.[134]

Brentwood's return to a totality-of-the-circumstances, normative view of state action means, perhaps, that near misses under the other discrete state action tests might not prevent a finding of state action. A court would consider whether the "nominally private character" of the relator was "overborne by the pervasive entwinement" of the Federal Government in its conduct.[135] Just as the critical features suggest state action under symbiosis theory, the five critical features of the FCA arguably demonstrate state action under *Brentwood*'s entwinement approach.

From a normative perspective, allowing the Government to assign away constitutional responsibilities for its own benefit strikes at the very heart of state action theory. Some critics, moreover, have suggested that the Act generates excessive litigation, interferes with legitimate contractor management choices, undermines internal compliance mechanisms, frustrates benign or beneficial conduct, gives rival firms tools they can strategically use to impede efficient rival behavior, and increases potential extortion,[136] notwithstanding the Act's other redeeming virtues. Consider also that many relators are not exactly patriots: they are often disgruntled employees or special-interest organizations, like Taxpayers Against Fraud (TAF), pursuing their own agendas "often not consistent with those delineated by Congress."[137]

132. The Supreme Court used a theory of "representational standing" to invalidate a challenge to a relator's Article III standing, stating that "a *qui tam* relator 'is, in effect, suing as a partial assignee of the United States.'" Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773 n.4 (2000).

133. Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961).

134. *See* Jackson v. Pantazes, 810 F.3d 426, 430 (4th Cir. 1987), which applies symbiosis theory to couch bounty hunting as state action, discussed *infra* note 145 and accompanying text.

135. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298 (2001).

136. *See* Kovacic, *supra* note 3, at 1825–40.

137. Richard Thornburgh, *Introduction* to James T. Blanch et al., Citizen Suits and Qui Tam Actions: Private Enforcement of Public Policy 3, 3–5 (Roger Clegg & James L.J. Nuzzo eds., 1996) ("[A] healthy skepticism about their motives and Congress's prolitigation regime is appropriate... [T]he assignment of the executive branch's law-enforcement responsibility to private parties—parties who are given quasi-governmental authority to pursue their own interests... at the expense of other private parties."); *see* Michael J. Davidson, *Applying the False Claims Act to Commercial IT Procurements*, 34 Pub. Cont. L.J. 25, 40 (2004) ("[Q]*ui tam* litigation will eventually partially fill [an] external oversight void as disgruntled employees... bring FCA cases alleging vendor misrepresentations to the United States."); *see generally* Taxpayers Against Fraud, http://www.taf.org (last visited July 8, 2007).

IV. COMPARING FALSE CLAIMS ACT RELATORS TO OTHER PRIVATE ACTORS

A. *Bounty Hunters*

Many commentators have likened *qui tam* relators to bounty hunters.[138] The analogy has its merits. *Qui tam* relators and bounty hunters are usually private citizens, not actual government officials. Like relators, bounty hunters fill a large gap in law enforcement and "play[] a critical role in the judicial system."[139] "Often, bounty hunters work with police departments in order to locate and to capture a fugitive,"[140] just as *qui tam* relators work with the Department of Justice and U.S Attorney's Offices to identify and punish those who defraud the Government. And much like *qui tam* suits, which have been on the rise in recent years, the bounty hunting industry in the United States has grown in line with annual rises in arrests.[141]

Yet courts, including the Supreme Court, have consistently refused to color bounty hunters state actors,[142] placing few restraints on their conduct aside from general criminal and tort law limitations.[143] In one of the only federal cases to find a bounty hunter[144] a state actor, *Jackson v. Pantazes*,[145] the Fourth Circuit held that a bail bondsman acted under color of state law because he was "'subrogated to the rights and means possessed by the State'...'to the extent necessary to [capture a fugitive]'" and "'[to] restrain him of his liberty.'"[146] The court focused generally on the symbiotic relationship between

138. *See* Frank LaSalle, *The Civil False Claims Act: The Need for a Heightened Burden of Proof for Forfeiture*, 28 AKRON L. REV. 497, 501 n.29 (1995) ("Some critics have argued that the Act simply turns disgruntled employees into bounty hunters"); William B. Rubinstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2144 (2004) ("[A relator] is a self-appointed bounty hunter, pursuing government fraud where the government has not done so.").

139. *See* Andrew D. Patrick, *Running from the Law: Should Bounty Hunters Be Considered State Actors and Thus Subject to Constitutional Restraints?* 52 VAND. L. REV. 171, 176 (1999). Studies suggest that public law enforcement is ill-equipped to wrangle in rampant bail-skipping. *See* Sasha Abramsky, *Citizen's Arrest*, NEW YORK, Jan. 5, 1998, at 37; Andrea Gerlin, *On the Loose: Criminal Defendants Released Without Bail Spark a Heated Debate*, WALL ST. J., July 9, 1996, at A1 ("[M]any locally run [bail bond] programs have outgrown their capacity to assess and monitor defendants released under their auspices.").

140. Emily M. Stout, *Bounty Hunters as Evidence Gatherers: Should They Be Considered State Actors Under the Fourth Amendment When Working with the Police?* 65 U. CIN. L. REV. 665, 670 (1997).

141. *See* Scott Winokur, *Bounty Hunters in the New West*, S.F. EXAM'R, Nov. 28, 1995, at B1; Patrick, *supra* note 139, at 176 ("Bounty hunters apprehend approximately 25,000 fugitives within the United States each year.").

142. *See, e.g.*, Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1872).

143. For example, bounty hunters may kick down doors, make warrantless entries and arrests, conduct nonconsensual searches, and pursue fugitives across state lines. *See* Patrick, *supra* note 139, at 172; Stout, *supra* note 140, at 666, 670.

144. A bondsman who chooses not to recover the bailed person himself often outsources recovery to a bounty hunter. *See* Hugh Gibbons & Nicholas Skinner, *The Biological Basis of Human Rights*, 13 B.U. PUB. INT. L.J. 51, 71 (2003) ("The bounty hunter is an agent of the bail bondsman, receiving a fee to return the bailed person, the principal, who has jumped bail to custody.").

145. 810 F.2d 426, 429 (4th Cir. 1987).

146. *Id.* at 429 (citations omitted).

bail bondsmen and the Maryland criminal court system, most notably that the state licensed bondsmen—who made their livelihood "upon the judicial use of a bail bond system"[147]—to facilitate the pretrial release of defendants, monitor their whereabouts, and ensure they appeared for trial.[148]

Other circuits have not been persuaded. The Ninth Circuit refused to hold that a bondsman was a state actor despite statutory authority to arrest, focusing instead on the bondsman's common-law right arising out of contract to apprehend his principal.[149] The court made clear that

> the bail bondsman is in the business in order to make money and is not acting out of a high-minded sense of devotion to the administration of justice.... [T]he bondsman was acting 'to protect *his own* private financial interest and *not to vindicate the interest of the state*.'[150]

The Fifth Circuit held that a bondsman's "mere possession of an arrest warrant [did] not render [him] a state actor," particularly when he "neither purport[ed] to act pursuant to the warrant, nor enlist[ed] the assistance of law enforcement officials in executing the warrant."[151] The Eighth Circuit did not consider a bounty hunter a state actor when he provided information about suspects of police interest in exchange for the whereabouts of the principals he sought.[152] Nevertheless, recent district court cases involving bounty hunters (post-*Brentwood*) have suggested a reconsideration of these issues.[153]

B. *Distinguishing Relator Searches from Bounty Hunting*

The great weight of authority against bounty hunters as state actors might suggest that *qui tam* relators would likewise fail to pass muster as state actors

147. *Id.* at 430.

148. *Id.* The court also considered that Pantazes acted jointly with police officers to apprehend the fugitive. *Id.* at 427–28.

149. Ouzts v. Md. Nat'l Ins. Co., 505 F.2d 547, 551 (9th Cir. 1974) ("[T]he common law right of the bondsman to apprehend his principal arises out of a contract between the parties and does not have its genesis in statute or legislative fiat. Because it is a contract right it is transitory and may be exercised wherever the defendant may be found.").

150. *Id.* at 555 (emphasis added).

151. Landry v. A-Able Bonding, Inc., 75 F.3d 200, 204–05 (5th Cir. 1996). The Eleventh Circuit also appears to have taken this approach. *See* Jaffe v. Smith, 825 F.2d 304, 307–08 (11th Cir. 1987).

152. *See* Dean v. Olibas, 129 F.3d 1001, 1005–06 (8th Cir. 1997), where the Court reasoned:

> Providing information about a criminal suspect to law enforcement is not a traditional governmental function; it is something that private citizens do every day. Olibas did *not rely on governmental assistance or benefits in filing the affidavit*; he filed it on his own and of his own free will, without the aid or encouragement of the state. In short, Olibas filed the affidavit as a private citizen....

Id. at 1005 (emphasis added). An Arkansas statute authorized "'any credible person' to file an affidavit requesting a fugitive's arrest." *Id.* at 1006.

153. *See, e.g.*, Tirreno v. Mott, 453 F. Supp. 2d 562, 565 (D. Conn. 2006); Brady v. Maasikas, No. 3:05-0355, 2006 U.S. Dist. LEXIS 28453, at *2 (M.D. Tenn. May 9, 2006). *But cf.* Weaver v. James Bonding Co., 442 F. Supp. 2d 1219, 1223–29 (S.D. Ala. 2006); Anderson v. Moats, No. 1:03CV152, 2004 U.S. Dist. LEXIS 29707, at *3 (N.D. W. Va. Aug. 3, 2004); Green v. Abony Bail Bond, 316 F. Supp. 2d 1254, 1260–62 (M.D. Fla. 2004).

under similar analysis. However, one should note that the FCA is an unequivocal statutory assignment of government authority to private persons rather than mere regulation of private conduct, which is the most that can be said for bounty hunting in those states that permit it.[154] The breadth of the FCA, the specificity of its requirements, protections, and benefits, and the overt government preference for the conduct it produces further distinguish private relator searches from those of the typical bounty hunter. Rather than merely permitting action, the FCA induces and directs private relator searches by promising a reward and demanding specific, original information.

The reward proves most significant of all. As most circuits have held, when a bounty hunter retrieves his principal, he vindicates his privately created pecuniary interest. A *qui tam* relator, on the other hand, vindicates a pecuniary interest that only exists because the Government *offers* it to him. Finally, one should note that most of the courts that have recently considered bounty hunting have not used *Brentwood*-like analysis, except for the Fourth Circuit when it found state action in *Pantazes*.

C. *IRS Informants*

The Internal Revenue Service, like other government agencies, cannot keep up with its workload[155] and welcomes tips from people who "suspect or know of an individual or company that is not complying with the tax laws."[156] Although not a *qui tam* provision, the IRS "rewards for information" program compensates informants for information they provide identifying tax fraud.[157] Rewards are paid according to a discretionary reward schedule based on the value of the information provided.[158] In December 2006, Congress and President Bush doubled the maximum payable rewards, which now include interest, tax, and penalties.[159]

154. *See, generally*, John A. Chamberlin, *Bounty Hunters: Can the Criminal Justice System Live Without Them?* 1998 U. ILL. L. REV. 1175, 1190–93 (1998).

155. Data from 2000 revealed that the IRS audited fewer than one-half of one percent of all returns. *See* Jeffrey Manns, *Private Monitoring of Gatekeepers: The Case of Immigration Enforcement*, 2006 U. ILL. L. REV. 887, 922 (2006). Staffing shortages "forced the IRS to write off billions in unpaid taxes." *Id.*

156. I.R.S., How Do You Report Suspected Tax Fraud, http://www.irs.gov/compliance/enforcement/article/0,,id=106778,00.html (last visited Feb. 5, 2008); *see also* I.R.S., Internal Revenue Manual, ch. 25.2.1 (2006), *available at* http://www.irs.gov/irm/part25/ch02s01.html (last visited Feb. 5, 2008).

157. *See* 26 U.S.C. § 7623 (2000) (authorizing the payment of "such sums" as the secretary of the Treasury "deems necessary" for detecting and prosecuting underpayment).

158. Rewards range from 0 to 15 percent, with a $100 minimum and $10 million maximum reward, "in proportion to the value of the information [the informant] furnished voluntarily and on [his] own initiative..." I.R.S., PUBL'N No. 733, REWARDS FOR INFORMATION PROVIDED BY INDIVIDUALS TO THE INTERNAL REVENUE SERVICE (2004), *available at* http://www.irs.gov/pub/irs-pdf/p733.pdf.

159. Kathy M. Kristof, *Tax Whistleblowers Given More Incentive*, L.A. TIMES, Feb. 25, 2007, at C3.

The IRS receives thousands of tips per year concerning billions of tax dollars,[160] aiding in the recovery of millions.[161] Informants, in return, have received millions of dollars.[162] Rewards, however, are purely within the discretion of the IRS and are not guaranteed by statute, even if the informant satisfies the statutory requirements.[163]

In one of the only cases considering whether an IRS reward for information implicated the Fourth Amendment, *United States v. Snowadzki*,[164] the Ninth Circuit held that an IRS reward for information did not sufficiently encourage a private informant's seizure of tax records to warrant their exclusion at trial. Relying on Ninth Circuit precedent, the court found insufficient evidence that "the seizure was motivated by IRS prompting or encouragement," notwithstanding the offer of a reward.[165] The court considered it critical that the informant had already collected the records before an IRS agent told him they would be "helpful" and that an award "might be available."[166]

D. *Distinguishing Relators from IRS Informants*

Although the IRS program rewards private informants for valuable tips without directly implicating state action theory, the FCA remains distinct enough to warrant further scrutiny. First, unlike the FCA's guaranteed share of the bounty, the IRS reward is wholly discretionary and speculative—if the IRS does not pay up, a scorned informant has no cause of action.[167] The Federal Circuit has held that the very broad language in 26 U.S.C. § 7623 and its accompanying regulation, promulgated and amended by the IRS, describes "an indefinite reward offer that an informant may respond to by his conduct" as opposed to an "enforceable contract [that] arises when the parties fix the reward."[168]

Second, the FCA, unlike the IRS program, *guarantees* a proportion of the Government's collected booty and puts the minimum amount paid beyond the discretion of the soliciting entity (i.e., the Department of Justice). By

160. *See* Manns, *supra* note 155, at 922.

161. The IRS collected nearly $84 million in 1998, paying nearly $7 million to informants. *See* Daniel Currell & Marsha Ferziger, *Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs*, 99 U. ILL. L. REV. 1141, 1168 (1999).

162. *Id.*

163. *Id.* at 1153.

164. 723 F.2d 1427 (9th Cir. 1984).

165. *Id.* at 1429–30 ("While Pugh may have acted in part from a desire for a reward, there is no evidence that the seizure was motivated by IRS prompting or encouragement.").

166. *Id.* at 1428–29.

167. To have a chance, a litigant would have to overcome the sovereign immunity problem. *See* Swofford v. United States, No. 99-CV-4064-JPG, 2000 U.S. Dist. LEXIS 7730, at *2 (S.D. Ill. May 17, 2000).

168. Krug v. United States, 168 F.3d 1307, 1308 (Fed. Cir. 1999) (quoting Merrick v. United States, 846 F.2d 725, 726 (Fed. Cir. 1988)); *see also* Henry v. United States, No. CIV.A. 02-968, 2002 U.S. Dist. LEXIS 17418, at *14–15 (E.D. La. Sept. 13, 2002) (relying on *Merrick* to hold that "[n]either 26 U.S.C. § 7623 nor 26 C.F.R. § 301.7623-1, standing alone, obligates the IRS to pay a reward to a tax informant"); Schein v. United States, 352 F. Supp. 182, 186 (E.D.N.Y. 1972).

inextricably tying relator recovery to the Government's, the FCA encourages private searches for the mutual, shared benefit of the Government and relators. Neither can recover without the other. Moreover, as the Federal Circuit addressed in *Krug*, the reward is sufficiently fixed (by percentage) and effectively gives rise to an enforceable right vested in the relator should the Government try *not* to pay.

V. WHAT ARE THE CONSEQUENCES IF A RELATOR IS A STATE ACTOR?

Picture this: A disgruntled new hire working for a government contractor receives information from his employer about his rights as a potential government whistleblower, including the promise of a reward, the availability of whistleblower protection, and the presence of an original source requirement. He suspects his employer might be making fraudulent claims but has nothing concrete enough to support a formal action. Enticed by the bounty and emboldened by the Government's protection, he roots through private records and scours others' offices. He makes copies of documents and stores them in a safe-deposit box in his home.[169]

After amassing enough evidence, he notifies the Government and files a civil complaint. The Government takes over the action and proceeds with criminal and administrative investigations based initially on the evidence the employee provides. Many months later, the employer settles the criminal and civil charges for a few million dollars. The employee, who has long since left the entity's employ, receives a fat government check.

Such a scenario, if it involved federal agents instead of the private employee, would likely implicate the Fourth Amendment. Presuming a relator is a government actor, as this note asserts, the search and seizure described in the hypothetical would have two serious consequences. First, the relator might be personally liable for money damages to the subject of his search; second, the evidence obtained by the relator, and all evidence gained subsequently as "fruit of the poisonous tree,"[170] would be inadmissible in parallel noncivil actions.

A. *Relator Liability for Money Damages in a* Bivens *Action*

A relator may be subject to personal liability for money damages for the injuries an aggrieved defendant suffered as a result of his unconstitutional search and seizure.[171] Under 42 U.S.C. § 1983, a defendant must prove that

169. This hypothetical closely parallels the facts of *Battle v. Board of Regents*, 468 F.3d 755, 757–58 (11th Cir. 2006).

170. The "fruit of the poisonous tree" doctrine, as applied in the Fourth Amendment context, means "evidence otherwise admissible but discovered as a result of an earlier violation is excluded as tainted." Missouri v. Seibert, 542 U.S. 600, 612 n.4 (2004).

171. *See* 42 U.S.C. § 1983 (2000).

he was deprived "of a right secured by the Constitution" and that the defendant deprived him of that right under color of state law.[172]

Although § 1983 only applies to conduct under color of *state* law, the Supreme Court recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[173] a cause of action implicit in the Fourth Amendment for unreasonable searches and seizures by federal agents acting under color of federal authority.[174] The elements of a *Bivens* action are identical to those under § 1983."[175] Unfortunately for relators subject to *Bivens* litigation, they cannot rely on qualified immunity to avoid litigation or preclude liability because they are private parties, not actual government officials, acting under color of law.[176] Possible "good faith" immunity could be raised, although the Supreme Court has not decided that issue.[177]

Ultimately, the scope of the FCA action defendant's damages might include the penalties and attorney fees it paid the Government. The relator would effectively reimburse an FCA action defendant for penalties and costs while the Government would retain all the money it collected, irrespective of the source. The specter of personal liability could no doubt deter legally unsophisticated relators from investigating at all.

B. *Suppression of Relator-Collected Evidence in Noncivil Proceedings*

Defendants also may attempt to suppress evidence obtained by private relators used in parallel criminal and administrative proceedings against them.[178] In order to qualify for exclusion or suppression, however, a defendant must prove that the Government was significantly involved in the private search by using the private citizen as its instrument who complied with its demands.[179] After all, a court must be able to distinguish between a citizen merely providing aid *sua sponte* and a citizen being used by law enforcement to avoid constitutional restraints.[180]

1. Case-by-Case "Government Instrument" Analysis

As stated above, the Government must be significantly involved in the private search and seizure for privately obtained evidence to be suppressible.

172. Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970) (internal quotations omitted).
173. 403 U.S. 388, 389 (1971).
174. *Id.* at 389.
175. *See* Van Strum v. Lawn, 940 F.2d 406, 409 (9th Cir. 1991).
176. *See* Wyatt v. Cole, 504 U.S. 158, 167 (1992) ("[T]he rationales mandating qualified immunity for public officials are not applicable to private parties.").
177. *See* Richardson v. McKnight, 521 U.S. 399, 413–14 (1997).
178. "The exclusionary rules were fashioned 'to prevent, not to repair,' and their target is official misconduct. They are 'to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).
179. *Id.* at 487.
180. *See id.* at 489–90.

Following decisions in two private search/suppression cases—the Supreme Court's *Walter v. United States*[181] and the Ninth Circuit's *United States v. Miller*[182]—a majority of the circuit courts adopted a two-prong test to determine whether a private citizen acted as an instrument or agent of the government: "(1) whether the government knew of or acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends."[183] Some circuits also consider whether "the [G]overnment...offered the private actor a reward,"[184] whether government agents "openly encouraged or cooperated in the search,"[185] "whether the citizen acted at the [G]overnment's request,"[186] or whether the "Government coerce[d], dominate[d] or direct[ed] the actions of [the] private person."[187] Courts conduct their analysis on a case-by-case basis and in light of all of the circumstances.[188]

2. Schemewide Invalidation

The Supreme Court also addressed the constitutionality of private searches generally spurred by a federal statutory scheme in *Skinner v. Railway Labor Executives Ass'n*.[189] The Federal Railroad Safety Act of 1970 gave the secretary of Transportation broad discretion to promulgate regulations to ensure safety on the railroads.[190] To address rampant and dangerous substance abuse among railroad employees, the Federal Railroad Administration (FRA) adopted regulations that authorized, but did not require, private railroads to take blood and urine samples of those "employees who violate[d] certain rules."[191] Noting that "[t]he fact that the Government ha[d] not compelled a

181. 447 U.S. 649 (1980).

182. 688 F.2d 652, 657 (9th Cir. 1982).

183. *Id.* The Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits strictly follow the *Miller* approach. *See* United States v. Alexander, 447 F.3d 1290, 1295 (10th Cir. 2006); United States v. Smith, 383 F.3d 700, 705 (8th Cir. 2004); United States v. Jarrett, 338 F.3d 339, 344 (4th Cir. 2003); United States v. Steiger, 318 F.3d 1039, 1045 (11th Cir. 2003); United States v. Crowley, 285 F.3d 553, 558 (7th Cir. 2002); United States v. Paige, 136 F.3d 1012, 1017–18 (5th Cir. 1998); United States v. Snowadzki, 723 F.2d 1427, 1429 (9th Cir. 1984). The Second Circuit has cited *Miller* without strictly applying the two-prong analysis adopted by the other circuits. *See* United States v. Bennett, 709 F.2d 803, 805 (2d Cir. 1983) (which considers the "degree of governmental knowledge and acquiescence"). The First Circuit merely identifies several relevant factors it will consider and eschews "'any specific 'standard' or 'test'" because it considers a bright-line rule as "'oversimplified or too general to be of help.'" United States v. Momoh, 427 F.3d 137, 140–41 (1st Cir. 2005) (quoting United States v. Pervaz, 118 F.3d 1, 6 (1st Cir. 1997)).

184. *Crowley*, 285 F.3d at 558 (citing United States v. Hall, 142 F.3d 988, 993 (7th Cir. 1998), and United States v. Shahid, 117 F.3d 322, 325 (7th Cir. 1997)).

185. United States v. Ford, 765 F.2d 1088, 1090 (11th Cir. 1985).

186. United States v. Huber, 404 F.3d 1047, 1053–54 (8th Cir. 2005) (quoting United States v. Smith, 383 F.3d 700, 705 (8th Cir. 2004)).

187. United States v. Alexander, 447 F.3d 1290, 1295 (10th Cir. 2006) (quoting Pleasant v. Lovell, 876 F.2d 787, 796 (10th Cir. 1989)).

188. *Id.*

189. 489 U.S. 602 (1989).

190. *Id.* at 606.

191. *Id.*

private party to perform a search [did] not, by itself, establish that the search [was] a private one,"[192] the Court said it was unwilling to conclude that private adherence to the "permissive" regulations within the scheme *per se* did not implicate the Fourth Amendment.[193] The Court considered as "clear indices of the Government's encouragement, endorsement, and participation" that a covered employee could not decline a request to submit to the private tests, that an employee who refused to be tested faced termination, that the Government had "removed all legal barriers to the testing," and that it had "made plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions."[194] Thus, private searches pursuant to the FRA regulations implicated the Fourth Amendment.[195]

3. So Does a Relator Act as a Government Instrument?

The circuits' case-by-case approach, inquiring whether a relator intends to assist law enforcement or to further his own ends, will depend on the unique facts of every case. A court will need to assess what specifically motivated the relator to conduct the search. That said, the federal courts presume that the offer of a bounty, which is inextricably tied to the Government's recovery,[196] primarily motivates a relator's conduct[197] and only exists because the Government allows it. Whistleblower protections direct a relator to go beyond his or her typical job duties to obtain evidence by offering protection in exchange. Similarly, the original source requirement and Federal Rule of Civil Procedure 9(b) direct a relator's investigatory conduct by requiring he or she be able to independently and directly show the who, what, when, where, and how of the fraud. Considering also the DRA's newly mandated disclosures, relators bringing actions against DRA-compliant entities should be presumed to know their rights and requirements under the FCA and to act accordingly.

Applying *Skinner*-like analysis to the FCA at the schemewide level, the FCA closely parallels the FRA regulations at issue in *Skinner*. First, the FCA is permissive because it does not require potential relators to become actual relators. Like the private railroads in *Skinner*, however, relators forfeit a number of benefits by not embracing the Government's goals as their own (reward, protection, etc.). Second, government contractors who refuse to subject themselves to relators' investigations, like the employees in *Skinner*,

192. *Id.* at 615.
193. *Id.* at 614.
194. *Id.* at 615–16.
195. *Id.* at 615 ("specific features of the regulations combine to convince us that the Government did more than adopt a passive position toward the underlying private conduct").
196. "Any payment to a person under the first or second sentence of this paragraph shall be made *from the proceeds*." 31 U.S.C. § 3730(d)(1) (2000) (emphasis added).
197. *See* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 949 (1997) ("As a class of plaintiffs, qui tam relators are different in kind than the Government. They are motivated *primarily by prospects of monetary reward* rather than the public good.") (emphasis added).

open themselves to loss of government privileges and potential liability for retaliation. Finally, the original source jurisdictional bar, in conjunction with Federal Rule of Civil Procedure 9(b) and FCA-provided protection against retaliation for conduct in furtherance of an action, arguably evidences the Government's strong preference for private searches because it will share and benefit greatly from the fruits of those searches. A relator must have direct and independent knowledge of the information provided, which must be very specific and must be collected by means beyond the regular scope of one's job duties to implicate the Act's protections.

The very purpose of the Act is to uncover evidence of fraud. If relator-collected evidence is deemed inadmissible, it loses significant intrinsic value to the Government because it cannot be leveraged against FCA defendants in noncivil proceedings. If relators are also potentially personally liable for money damages, the FCA gets squeezed from both ends: relators are chilled from undertaking investigations and, if they do conduct illicit searches, the Government receives the fruits of investigation that are less valuable.

VI. THE WEAKNESSES OF THIS ANALYSIS

Because state action theory has not been raised to challenge any FCA investigations of record, one must consider the potential weaknesses of this analysis and the presumptions on which it proceeds. First, state action tests depend on the peculiar facts of every case. There will be cases that will not support this theory, and in those cases where the facts suggest state action, a relator's motives must be evident—proof of which would prove time consuming and difficult. For example, if the hypothetical employee discussed in Part V, *supra*, acted solely to get back at his employer or out of some sense of patriotism, he might be able to rebut the presumption articulated in *Hughes Aircraft*[198] that he was solely motivated by the promise of a reward. Alternative motivations would frustrate findings of state action and government instrumentality.[199]

Second, state action theory has been stretched most often in race-based cases. The bulk of cases this note cites in which the Supreme Court found state action, namely, *Burton v. Wilmington Parking Authority*, *Adickes v. Kress*, *Evans v. Newton*, and *Edmondson v. Leesville Concrete*, involved racial discrimination. The Fourteenth Amendment, a post-bellum amendment, begot state action theory, and the Civil Rights Movement fomented its

198. *Id.*

199. *See* United States v. Shahid, 117 F.3d 322, 326 (7th Cir. 1997) ("A private citizen might decide to aid in the control and prevention of criminal activity out of his or her own moral conviction, concern for his or her employer's public image or profitability, or even desire to incarcerate criminals, but even if such private purpose should happen to coincide with the purposes of the government, 'this happy coincidence does not make a private actor an arm of the government' ") (quoting United States v. Koenig, 856 F.2d 843, 850–51 (7th Cir. 1988)).

development.[200] Even so, cases like *Skinner* and *Brentwood* demonstrate the Supreme Court's willingness to be creative in non-race-based cases.

Third, defendants' Fourth Amendment rights also will depend on the peculiar facts of every case. In those cases where the Fourth Amendment does apply, the various exceptions to a warrant requirement, e.g., the special needs exception, may shield the relator from liability and the evidence from suppression.[201] Finally, this approach arguably flies in the face of Congress's intent to protect whistleblowers by subjecting them to personal liability for government-sanctioned behavior. In many cases, the relator will think he is doing the "right thing," not realizing he may be doing something illicit.

VII. SOLUTIONS

In 1863, when Congress passed the original False Claims Act, state action theory did not exist. Over the course of the following 140-plus years, state action theory, and the Federal Government itself, appreciably expanded in ways the FCA's original sponsors could never have anticipated. Today, the FCA and its companion legislation are on a collision course with the body of modern state action jurisprudence, but calamity can be averted.

This note has identified five features that, in concert, potentially subject private relators to personal liability and call for the inadmissibility of relator-collected evidence. Understanding that state action and Fourth Amendment analyses are very fact specific, minor tweaks to any of the five features may suffice to dispel concern for the Government's involvement in relator conduct.

First, Congress might consider switching to a mixed compensation plan instead of a guaranteed percentage payout to successful relators. Based on the Supreme Court's holding in *United States ex rel. Stevens*,[202] the relator must be assigned some portion of the judgment to protect his standing to bring an action. But Congress could lower the significant percentages guaranteed by § 3730 to a flat, single-digit percentage (think 1 percent) plus a staggered payout schedule, similar to that used by the IRS based on the *value* of the information provided (independent of the outcome of the case). This would both preserve relator standing and reduce potential findings of overwhelming inducement by reward.

200. *See* Barbara Rook Snyder, *Private Motivation, State Action, and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1062–63 (1990); Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 U. COLO. L. REV. 1263, 1285 (2000).

201. *See* New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (recognizing exceptions to the warrant and probable cause requirements when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable").

202. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773 n.4 (2000).

Second, Congress could go beyond the DRA's mandatory disclosure requirements and provide, or require states or organizations to provide, guidelines to all potential relators on how to properly obtain information without violating the target's Fourth Amendment rights. Just as many states require businesses to provide mandatory sexual harassment and workplace safety training, so too could the states or the Federal Government require similar training to potential relators. Alternatively, the Federal Government could make training a precondition to government contracting, putting the cost and obligation of self-protection on those who contract with the Government.

Finally, federal and state governments could focus on instituting better government-side auditing systems to detect fraud rather than relying on contractor-side whistleblowers to uncover and report it. Recent efforts by the IRS to outsource private debt collection provide a salient example.[203]

VIII. CONCLUSION

The False Claims Act is an essential tool in combating government contract fraud, and its *qui tam* provision contributes greatly to its vitality. However, several features of the scheme, when acting in concert, potentially convert the private conduct of *qui tam* relators into government action. With ever-broadening application of the Act and federal promulgation of mandatory disclosure requirements and state incentives, the manifest problems of the scheme will only continue to multiply.

Although findings of state action will depend on the peculiar facts of every case, such findings could subject relators to personal liability under *Bivens*. Findings of state action also might render useful information collected by relators inadmissible in concurrent criminal and administrative proceedings. Both outcomes would undermine the policies driving the Act by deterring those sought for help from coming to the Government's aid and by frustrating non-civil enforcement.

If small changes to the Act can be made, or if the Federal Government can give more guidance to potential *qui tam* relators, many of the intrinsic problems identified by this note can be neutralized. The False Claims Act can then continue to effectively deter and punish government contract fraud without colliding head-on with state action jurisprudence.

203. For an overview of the IRS's use of private collection agencies, *see* I.R.S. Announcement 2006-63 (Aug. 23, 2006), *available at* http://www.irs.gov/pub/irs-drop/a-06-63.pdf.