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Saying What They Mean: The False Claims Act Amendments in the Wake of Allison Engine

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I. INTRODUCTION

THE POWER OF THE FALSE CLAIMS ACT ("FCA") HAS EBBED and flowed throughout the Act's history.[1] What initially began as a robust law against fraud found itself weakened during World War II due to concerns about redundant litigation,[2] resulting in the law being all but forgotten.[3] Concerned with the loss of this anti-fraud tool, Congress amended the Act in 1986 with much success.[4] However, the courts began to chip away at the Act's foundation as they interpreted the Act's language, culminating with the Supreme Court's decision in *Allison Engine Co. v. United States ex rel. Sanders*.[5] In response to the Court's attacks on the FCA, Congress again amended the Act in the Fraud Enforcement and Recovery Act of 2009 ("FERA").[6] Through FERA, the tide has again turned the FCA into a powerful weapon against those who wish to defraud the federal government ("Government").[7]

This comment first discusses the history and language of the FCA through its various incarnations.[8] Next, the comment traces the court's statutory interpretation of the FCA,[9] focusing on the Supreme Court's decision in *Allison Engine*.[10] Then, the comment examines Congress's response to *Allison Engine* through the FERA amendments.[11] Finally, the comment compares the new statutory language to the

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1. *See, e.g.*, 155 CONG. REC. E1295–96 (daily ed. Jun. 3, 2009) (statement of Rep. Berman) (describing the history of the FCA from its enactment through the 1986 amendments).
2. *See, e.g.*, *id.* (detailing the 1943 amendments).
3. *See id.* ("From 1943 to 1986, fewer than ten [FCA] cases were brought each year.").
4. *See, e.g.*, Anthony L. DeWitt, *Badges? We Don't Need No Stinking Badges! Citizen Attorney Generals and the False Claims Act*, 65 UMKC L. REV. 30, 31 & n.12 (1996).
5. 128 S. Ct. 2123 (2008); *see also infra* Part II.C.
6. Pub. L. No. 111-21, sec. 4, 123 Stat. 1617 (to be codified at 31 U.S.C.).
7. *See infra* Part III.C.
8. *See infra* Part II.A.
9. *See infra* Part II.B.
10. *See infra* Part II.C.
11. *See infra* Part II.D.

Court's decision in *Allison Engine* to show how the new statute changes the law and reflects what Congress really meant to say.[12]

II. LEGAL BACKGROUND

A. *The False Claims Act*

Procurement by the United States government has a long and infamous history of fraud and abuse.[13] Congress enacted the FCA to prevent fraud, waste, and abuse in federal contracting.[14] The FCA creates civil liability against persons who make certain false statements or claims to the Government.[15] Congress enacted the FCA, originally known as the "Informer's Act" and the "Lincoln Law," in 1863, during the Civil War in response to alleged fraud, defective weapons, and price-gouging of the Union Army.[16]

The FCA received a major revision in 1986 due to congressional concerns about significant fraud in government procurement.[17] The 1986 Act required the false claim to be paid "by the Government" for the first time,[18] and removed the requirement for specific intent.[19] The Act established the burden of proof required in FCA cases, requiring the plaintiff to prove all elements by a preponderance of the evidence.[20] Congress also revised the statute of limitations to the longer of six years

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12. *See infra* Part III.

13. *See, e.g.*, S. Rep. No. 99-345, at 1–8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266–73 (describing the extent of fraud in Government procurement).

14. *See* 155 Cong. Rec. E1295 (daily ed. Jun. 3, 2009) (statement of Rep. Berman) (stating Congress enacted FCA due to fraud and corruption during the Civil War).

15. *See, e.g.*, S. Rep. No. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273 ("Originally the act provided for both civil and criminal penalties assessed against one who was found to knowingly have submitted a false claim to the Government.").

16. 1 John T. Boese, Civil False Claims and *Qui Tam* Actions 1-3 (3d ed. & Supp. 2009). The 1863 Act prohibited frauds against the United States in the form of fictitious claims, false vouchers or papers, or delivery of false receipts, with a possible punishment of fines and imprisonment. Law of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696–97 (current version at 31 U.S.C. §§ 3729–3733 (2006)).

17. *See* S. Rep. No. 99-345, at 2–3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267–68.

18. *See* False Claims Amendment Act of 1986, Pub. L. No. 99-562, sec. 2, § 3729, 100 Stat. 3153, 3153 (1986) (codified as amended in 31 U.S.C. § 3729(a)(1)) (inserting "by the Government" after "approved'" in subsection (a)(2)). However, Congress was clear that the FCA was not limited only to claims directly presented to the Government. *See* S. Rep. No. 99-345, at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5275 (stating that claims are actionable when made to parties other than the Government if payment would result in Government loss or the funds were financed by the Government).

19. United States v. Entin, 750 F. Supp. 512, 518 (S.D. Fla. 1990). The pre-1986 version of the Act "imposed civil liability for 'knowingly' submitting a false claim." *Id.* The pre-1986 Act contained numerous references to "knowingly." *Compare* Pub. L. No. 97-259, sec. 1, § 3729, 96 Stat. 877, 978 (1982), *amended by* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, § 3729, 123 Stat. 1617, 1621–25 (to be codified at 31 U.S.C. § 3729(b)) (not having a separate section defining "knowingly" to include acts without specific intent), *with* Pub. L. No. 99-562, sec. 2, § 3729, 100 Stat. 3152, 3154 (1986), *amended by* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, § 3729, 123 Stat. 1617, 1622–23 (to be codified at 31 U.S.C. § 3729(b)) (expanding definition of "knowingly" to include "acts in deliberate ignorance" or "reckless disregard" of the truth).

20. 31 U.S.C. § 3731(c) (2006), *amended by* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, § 3729, 123 Stat. 1617, 1623 (to be codified at 31 U.S.C. § 3731(d)).

from the initial violation, or three years from the date the violation was known or should have been reasonably known to the Government, but in no event to exceed ten years.[21] The 1986 Act increased penalties to "not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the [false claims]."[22] Finally, in an effort to encourage more private suits on the Government's behalf,[23] Congress expanded the rights of private *qui tam* relators, allowing private parties to continue participating in the action,[24] increasing relator's percentage of recovery,[25] and creating a federal cause of action for employees discriminated against due to his or her participation in an FCA suit.[26]

The right of private *qui tam*[27] actions to enforce the FCA started in the original 1863 Act.[28] First receiving popular use in thirteenth-century England,[29] *qui tam* actions allowed private parties to initiate actions to redress public wrongs.[30] To ensure that *qui tam* actions do not conflict with the Government's investigation of FCA violations, the Act requires *qui tam* relators to file FCA suits under seal and serve the Government for a determination of whether the Government will join the suit.[31] Even if the Government initially decides not to join the suit, it may intervene at a later time with "good cause."[32] The *qui tam* relator may continue to participate in a case where the Government intervenes, subject to certain limitations.[33] The

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21. *Id.* § 3731(b).

22. *Id.* § 3729(a), *amended by* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, 123 Stat. 1617, 1622–23.

23. S. Rep. No. 99-345, at 23–24 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288–89.

24. 31 U.S.C. § 3730(c)(1). When the Government intervenes, relator may recover "at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim." *Id.* § 3720(d)(1). When there is no Government intervention, relator may recover "not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement." *Id.* § 3730(d)(2).

25. *See* S. Rep. No. 99-345, at 27 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5292 (explaining the increase in *qui tam* relator recovery percentages).

26. 31 U.S.C. § 3730(h), *amended by* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, 123 Stat. 1617, 1624–25 (to be codified at 31 U.S.C. § 3729(h)).

27. "*Qui tam* is the abbreviation for the phrase '*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,' which translates as 'he who pursues this action on our Lord the King's behalf as well as his own.'" Boese, *supra* note 16, at 1-7 (citing Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 769 n.1 (2000)).

28. Law of Mar. 2, 1863, ch. 67, 12 Stat. 696, 698 (current version at 31 U.S.C. §§ 3729–3733 (2006)) (stating the FCA suits "may be brought and carried on by any person, as well for himself as for the United States").

29. *See* Boese, *supra* note 16, at 1-7.

30. *Id.* at 1-7 to 1-8. *Qui tam* actions moved to America with the early colonists, and "10 of the first 14 statutes enacted by the first United States Congress relied on some form of *qui tam* action." *Id.* (citing United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 (N.D. Cal. 1989)). The Supreme Court upheld the use of *qui tam* actions in United States *ex rel.* Marcus v. Hess. 317 U.S. 537, 545 (1943) (finding that *qui tam* relators "contribute[ ] much to accomplishing one of the purposes for which the [False Claims] Act was passed").

31. 31 U.S.C. § 3730(b)(2).

32. *Id.* § 3730(c)(3).

33. *Id.* § 3730(c)(1). The Government may dismiss or settle the action, both notwithstanding the objections of the *qui tam* relator if there has been notice provided and a hearing. *Id.* § 3730(c)(2)(A)–(B). The court may also limit the number, length of testimony, and cross-examination of witnesses by the *qui tam* relator if it

revisions to the *qui tam* provisions have "let loose a posse of *ad hoc* deputies to uncover and prosecute frauds against the government."[34]

B. Pre-Allison Engine *Case Law*

Prior to the Sixth Circuit's decision in *Allison Engine*, the circuit courts of appeals were relatively consistent in their treatment of the FCA, by requiring presentment of a false or fraudulent claim to the Government.[35] One court stated that "[a]lthough § 3729(a)(2) prohibits the submission of a false record or statement, it does so only when the submission of the record or statement was done in an attempt to get a false claim paid,"[36] and that false statements on their own, when not accompanying an attempt to get paid, do not constitute violations of the FCA.[37] Another court emphasized that "[t]he submission of a claim is . . . the *sine qua non* of a False Claims Act violation."[38] By requiring presentment, the courts focused not on the underlying fraudulent claims, but rather on the actual "claim for payment."[39]

While following the same general presentment requirements of the other circuits, the Third Circuit established a more comprehensive test for presentment.[40] To establish a claim under 31 U.S.C. § 3729(a)(1), the Third Circuit required the plaintiff to show that: "(1) the defendant presented or caused to be presented to an agent of the United States a claim for payment; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent."[41] Finding that

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would interfere with or unduly delay the Government, as well as "otherwise limit[ ] the participation by the [*qui tam* relator] in the litigation." *Id.* § 3730(c)(2)(C).

34. United States *ex rel.* Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr., 961 F.2d 46, 49 (4th Cir. 1992).

35. *See* United States *ex rel.* Sanders v. Allison Engine Co., No. 1-:95-CV-970, 2005 WL 713569, at *2 (S.D. Ohio Mar. 11, 2005) ("At least nine Federal Circuit Courts have determined that a defendant must, in claims based upon [31 U.S.C. §§ 3729(a)(1) and (a)(2)], show that a false or fraudulent claim was submitted to the Government."), *rev'd*, 471 F.3d 610 (6th Cir. 2006), *vacated*, 128 S. Ct. 2123 (2008).

36. United States v. Southland Management Corp., 326 F.3d 669, 675 (5th Cir. 2003).

37. *See id.* ("There is no liability under [the FCA] for a false statement unless it is used to get [sic] false claim paid.").

38. United States *ex rel.* Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1311 (11th Cir. 2002) ("The False Claims Act does not create liability merely for . . . disregard of Government regulations or improper internal policies unless, as a result of such acts, the provider knowingly asks the Government to pay amounts it does not owe.").

39. United States v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995); *see also* United States v. Kitsap Physicians Serv., 314 F.3d 995, 997 (9th Cir. 2002) ("It seems to be a fairly obvious notion that a False Claims Act suit ought to require a false claim."); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 794 (4th Cir. 1999) (finding a cause of action under the FCA where defendant "submitted a certification known to be false"); Costner v. URS Consultants, Inc., 153 F.3d 667, 677 (8th Cir. 1998) ("To prove allegations brought under the FCA, then, relators must show that a claim for payment from the government was made and that the claim was false or fraudulent." (internal quotations omitted)).

40. United States *ex rel.* Schmidt v. Zimmer, Inc., 386 F.3d 235, 242 (3d Cir. 2004); *see also* United States *ex rel.* Quinn v. Omnicare, Inc., 382 F.3d 432, 438 (3d Cir. 2004).

41. *Zimmer*, 386 F.3d at 242 (quoting Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 182 (3d Cir. 2001)).

"mere awareness that another may . . . make such a [false] claim does not alone constitute 'causing a false claim to be presented,'"[42] the court stated that "[i]n order to prove a claim under § 3729(a)(2), a plaintiff must also show that the defendant made or used (or caused someone else to make or use) a false record in order to cause the false claim to be actually paid or approved."[43]

The principal FCA case prior to *Allison Engine* is *United States ex rel. Totten v. Bombardier Corp*.[44] In *Totten*, the Circuit Court of Appeals for the District of Columbia found that the plain language of the FCA required presentment to the Government.[45] Tying together the language of the statute, the court found that "False Claims Act liability will attach if the Government *provides* the funds to the grantee *upon presentment of a claim* to the Government."[46] Further, liability attached "if the Government—again, upon presentment of the claim—reimburses the grantee for funds that the grantee has already disbursed to the claimant."[47] In short, the *Totten* court was clear that presentment to the Government was a necessary requirement for liability under the FCA, and since there was no presentment to the Government in that case,[48] the plaintiffs did not satisfy the presentment requirement.[49]

The court went further and looked to the legislative history of the FCA to determine whether presentment to a grantee would satisfy the statute.[50] Under the FCA, the court found there was no way the language could be satisfied by claims presented to a grantee of Government funds such as Amtrak.[51] Although the plaintiffs argued that Congress intended to allow presentment to a grantee in the statute,

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42. *Id.* at 245 (quoting United States *ex rel.* Shaver v. Lucas Western Corp., 237 F.3d 932 (8th Cir. 2001)).

43. *Id.* at 242.

44. 380 F.3d 488 (D.C. Cir. 2004). In *Totten*, the relator "brought a *qui tam* action against Bombardier Corporation and Envirovac, Inc., alleging that those companies violated the [FCA] by delivering allegedly defective rail cars to the National Railroad Passenger Corporation (Amtrak) and submitting invoices to Amtrak for payment from an account that included federal funds." *Id.* at 490.

45. *See id.* at 493.

46. *Id.*

47. *Id.*

48. *See id.* at 491 ("Amtrak's organic statute has flatly stated that the company 'is not a department, agency, or instrumentality of the United States Government.'" (citing 49 U.S.C. § 24301(a)(3) (2000))). Additionally, "the Government candidly concedes that 'Congress has specified that Amtrak is not itself an agency of the Government.'" *Id.* at 491–92 (citation omitted).

49. *See id.* at 493.

50. *See id.* at 493–97. "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id.* at 494 (citation and internal quotation marks omitted).

51. The court found three reasons why the statute should not be read to allow presentment to grantees. First, "extending False Claims Act liability here seems to result in quadruple liability for false claimants: a grantee could presumably bring suit and obtain a recovery for itself, in addition to the treble damages the Government and the relator divvy up under the Act." *Id.* at 496. Second, the court was concerned that "authorizing suit on behalf of an entity to which a claim was not presented raises complicated questions in applying the statute's scienter requirement." *Id.* The court was unsure how the "knowingly presents" element of the FCA applies when there is "no . . . requirement of presentment to the Government." *Id.* Finally, the court expressed concern that "an 'effective' presentment approach would make the potential reach of the Act almost boundless." *Id.*

the court noted that "Congress could readily have done just that—amend[ed] subsection (a)(1) to provide that claims be presented to the Government *or a grantee or recipient of Government funds*."[52] Prior to *Allison Engine*, the case law established that presentment to the Government is a necessary element of the FCA.[53]

C. Allison Engine Co. v. United States ex. rel Sanders

In *Allison Engine Co. v. United States ex rel. Sanders*,[54] the Supreme Court of the United States vacated and remanded the judgment of the Court of Appeals for the Sixth Circuit[55] and held that for liability to occur under the FCA, "a plaintiff asserting a § 3729(a)(2) claim must prove that the defendant intended that the false record or statement be material to the Government's decision to pay or approve the false claim."[56]

1. *Facts and Case History*

The underlying claims in *Allison Engine* arose from a contract between the United States Navy and Bath Iron Works and Ingalls Shipbuilding ("the shipyards") in 1985, for the production of a new fleet of guided missile destroyers.[57] The shipyards contracted with Allison Engine Company, Inc. ("Allison Engine") to build generator sets for the destroyers.[58] Allison Engine contracted with General Tool Company ("GTC") to assemble the generator sets, who in turn contracted with Southern Ohio Fabricators, Inc. ("SOFCO"), for manufacture of the bases and enclosures of the generator sets.[59] The total cost for each destroyer was $1 billion, of which Allison Engine was paid $3 million, GTC was paid $800,000, and SOFCO was paid $100,000.[60] Ultimately, all funds came from the United States Treasury.[61] The prime contract between the Navy and the shipyards contained specifications for every part of the destroyer, and the contract required that the generator sets be delivered with a certificate of conformance, which certifies the unit was manufactured in accordance with the contract specifications.[62] Each subcontract incorporated these requirements.[63]

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52. *Id.* Rather, the language of § 3729(a)(1) did not include any mention of grantees or recipients. 31 U.S.C. § 3729(a)(1) (2006), *amended by* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, 123 Stat. 1617, 1622–23. This part of *Totten* was a contributing factor to the 2009 changes to the FCA. *See infra* Part II.D.
53. *See supra* notes 35–52 and accompanying text.
54. 128 S. Ct. 2123 (2008).
55. *Id.* at 2131.
56. *Id.* at 2126.
57. *Id.*
58. *Id.*
59. *Id.* at 2126–27.
60. *Id.* at 2127.
61. *Id.*
62. *Id.*
63. *Id.*

In 1995, Roger L. Sanders and Roger L. Thacker (collectively, "the relators"), both former employees of GTC, filed suit in the District Court for the Southern District of Ohio, bringing claims under the FCA[64] as *qui tam* relators, claiming that the invoices submitted by Allison Engine, GTC, and SOFCO sought payment for work that was not performed in accordance with contract requirements.[65] After the close of the relators' case in the jury trial, Allison Engine filed a motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a),[66] asserting no reasonable jury could find for the relators because there was no evidence that Allison Engine presented a false or fraudulent claim to the Navy.[67] The District Court found that the FCA required the presentment of a false or fraudulent claim to the Government to establish a violation of the FCA[68] and granted Allison Engine's motion.[69]

The United States Court of Appeals for the Sixth Circuit reversed in a divided opinion.[70] Finding that the "Supreme Court has consistently reaffirmed that the FCA is a remedial statute and should be construed broadly,"[71] the majority found no presentment requirement under the FCA.[72] Instead of merely requiring a showing that false claims were presented to the Government, in addition "a relator . . . must show that government money was used to pay the false or fraudulent claim."[73] The Sixth Circuit recognized its ruling conflicted with the District of Columbia Circuit's ruling in *United States ex rel. Totten v. Bombardier Corp*.[74] The Supreme Court of the United States granted certiorari to resolve the conflict over the proper interpretation of subsection (a)(2) and (a)(3) of the FCA.[75]

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64. 31 U.S.C. § 3729(a)(1)–(3) (2006), *amended by* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, § 3729(a), 123 Stat. 1617, 1622–23.

65. *Allison Engine*, 128 S. Ct. at 2127. The relators specifically claimed that "the gearboxes installed by Allison Engine in the first 52 [generator sets] were defective and leaked oil; that GTC never conducted a required final quality inspection for approximately half of the first 67 [generator sets]; and that the SOFCO welders who worked on the first 67 [generator sets] did not meet military standards." *Id.* Further, the relators alleged that Allison Engine "issued [certificates of conformance] claiming falsely that the [generator sets] had been built to the contractually required specifications even though [Allison Engine] knew that those specifications had not been met." *Id.*

66. The court may grant judgment as a matter of law under Rule 50(a) when "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1).

67. United States *ex rel.* Sanders v. Allison Engine Co., No. 1-:95-CV-970, 2005 WL 713569, at *11 (S.D. Ohio Mar. 11, 2005), *rev'd*, 471 F.3d 610 (6th Cir. 2006), *vacated*, 128 S. Ct. 2123 (2008).

68. *See id.* at *10 ("[A] violation of subsection (a)(2) of the FCA requires a showing that a false or fraudulent claim has been submitted to an officer or employee of the United States Government.").

69. *Id.* at *11.

70. United States *ex rel.* Sanders v. Allison Engine Co., 471 F.3d 610, 627 (6th Cir. 2006).

71. *Id.* at 618.

72. *See id.* at 616 ("[T]he plain language of subsections (a)(2) and (a)(3) simply does not require that a claim must be presented to the government to be actionable.").

73. *Id.* at 622.

74. 380 F.3d 488 (D.C. Cir. 2004); *see supra* Part II.B.

75. Allison Engine Co. v. United States *ex rel.* Sanders, 552 U.S. 989 (2007).

2. The Court's Decision

In *Allison Engine Co. v. United States ex rel. Sanders*,[76] the Supreme Court of the United States vacated and remanded the judgment of the Court of Appeals for the Sixth Circuit[77] and held that for liability to occur under the FCA, "a plaintiff asserting a § 3729(a)(2) claim must prove that the defendant intended that the false record or statement be material to the Government's decision to pay or approve the false claim."[78] Writing for a unanimous court, Justice Samuel Alito began the opinion by looking at the language of the statute.[79] First looking to the § 3729(a)(2) claim, the Court found the language of the statute required that "the defendant must make the false record or statement 'to get' a false or fraudulent claim 'paid or approved by the Government.'"[80] The Court found that "'[t]o get' denotes purpose," and the defendant must "have the purpose of getting a false or fraudulent claim 'paid or approved by the Government' in order to be liable under § 3729(a)(2)."[81] The Court went further in finding that getting a claim "'paid . . . by the Government'" is not the same as Government funds paying the claim,[82] rather requiring the defendant intend for the Government itself to pay the claim.[83] Citing both *Rainwater v. United States*[84] and *United States ex rel. Totten v. Bombardier Corp.*,[85] the Court emphasized the need to limit the FCA to "its intended role of combating 'fraud against the *Government*.'"[86]

The Court next addressed the Government's contention "that the phrase 'paid . . . by the Government' does not mean that the Government must literally pay the bill."[87] Rather, "[t]he Government maintain[ed] that it is customary to say that the Government pays a bill when a person who has received Government funds uses those funds to pay a bill."[88] The Court rejected this argument "because it involves a colloquial usage of the phrase 'paid by.'"[89] The Court also rejected the Government's argument "that the definition of the term 'claim' in § 3729(c) means that

76. 128 S. Ct. 2123 (2008).
77. *Id.* at 2131.
78. *Id.* at 2126.
79. *Id.* at 2128 (citing Williams v. Taylor, 529 U.S. 420, 431 (2000)).
80. *Id.*
81. *Id.*
82. *Id.*
83. *See id.*
84. 356 U.S. 590 (1958).
85. 380 F.3d 488 (D.C. Cir. 2004).
86. *Allison Engine*, 128 S. Ct. at 2128.
87. *Id.* at 2128–29.
88. *Id.* at 2129. The Government illustrated this idea with an example: "[W]hen a student says that his college living expenses are 'paid by' his parents, he typically does not mean that his parents send checks directly to his creditors. Rather, he means that his parents are the ultimate source of the funds he uses to pay those expenses." *Id.* (quoting *Totten*, 380 F.3d at 506 (Garland, J., dissenting)) (internal quotation marks omitted).
89. *Id.* The Court used the example that an employee of the Government would not say that a new car or vacation was paid by the Government, even though the employee's ultimate income was from the Government. *Id.*

§ 3729(a)(2)'s use of the phrase 'paid by the government' should not be read literally."[90] The Court's interpretation of "claim" did not require a request for money or property to be made directly to the Government.[91] A "claim" could be a request made to "a contractor, grantee, or other recipient" if the Government provides the funds or reimburses the party to which the claim was presented.[92]

Additionally, the Court found that because presentment is included in § 3729(a)(1) and not mentioned in (a)(2), this "suggests that Congress did not intend to include a presentment requirement in subsection (a)(2)."[93] The Court set the requirement of § 3729(a)(2) as "not proof that the defendant caused a false record or statement to be presented or submitted to the Government but that the defendant made a false record or statement for the purpose of getting 'a false or fraudulent claim paid or approved by the Government.'"[94] A subcontractor, such as Allison Engine, would "violate[ ] § 3729(a)(2) if [it] submit[ted] a false statement to the prime contractor intending for the statement to be used by the prime contractor to get the Government to pay its claim," but would not violate § 3729(a)(2) if the subcontractor "[did] not intend the Government to rely on that false statement as a condition of payment."[95] The Court focused on fraud directed toward the Government, not wanting to "transform the FCA into an all-purpose anti-fraud statute."[96]

Finally, the Court addressed the plaintiff's complaint under § 3729(a)(3), which is the conspiracy provision of the FCA.[97] Finding the interpretation of this section similar to § 3729(a)(2), the Court stated "it is not enough for a plaintiff to show that the alleged conspirators agreed upon a fraud scheme that had the effect of causing a private entity to make payments using money obtained from the Government."[98] To be liable under this subsection, the defendants must have "had the purpose of 'getting' the false record or statement to bring about the Government's payment of a false or fraudulent claim."[99] Plaintiffs did not need to show any intent to present the false record or statement to the Government, but had to show that

90. *Id.*

91. *Id.*

92. *Id.* (internal quotation marks omitted).

93. *Id.* at 2129–30 ("'[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452 (2002))).

94. *Id.* at 2130.

95. *Id.*

96. *Id.*

97. *Id.* Section 3729(a)(3) makes liable any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(3) (2006), *amended by* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, 123 Stat. 1617, 1622–23.

98. *Allison Engine*, 128 S. Ct. at 2130.

99. *Id.*

the defendants "agreed that the false record or statement would have a material effect on the Government's decision to pay the false or fraudulent claim."[100]

D. Congressional Response to Allison Engine

In the wake of the Court's decision in *Allison Engine*, Congress reacted by proposing, although not enacting, amendments to overturn *Allison Engine* and remove any presentment requirement from the statute.[101] In late 2008 and early 2009, as the global economy fell into recession,[102] the federal government attempted to stimulate the economy through a number of measures.[103] Many of these measures involved the Government directly giving private entities money.[104] Out of a desire to protect the Government from being defrauded out of this stimulus money,[105] the Fraud Enforcement and Recovery Act of 2009 ("FERA") was born.[106]

On May 20, 2009, President Barack Obama signed FERA into law.[107] While the general purpose of this bill was to "reinvigorate our Nation's capacity to investigate and prosecute" financial fraud,[108] FERA also included a section to "amend[ ] the FCA to clarify and correct erroneous interpretations of the law that were decided in *Allison Engine* . . . and . . . *Totten* . . . ."[109] Congress was clear that it did not agree with the Court in *Allison Engine*.[110]

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100. *Id.* at 2130–31. The Court cited *Tanner v. United States*, 483 U.S. 107 (1987), as in accord with this decision. *Id.* at 2131. The *Allison Engine* Court interpreted *Tanner's* holding to mean that "a conspiracy to defraud a federally funded private entity does not constitute a 'conspiracy to defraud the United States.'" *Id.* (quoting *Tanner*, 483 U.S. at 129). Here, as in *Tanner*, the Court refused to extend a law designed to protect the Government to protect private entities against fraud. *Id.*

101. *See* False Claims Act Clarification Act of 2009, S. 458, 111th Cong. (2009); False Claims Act Correction Act of 2009, H.R. 1788, 111th Cong. (2009); False Claims Act Correction Act of 2007, S. 2041, 110th Cong. (2008); False Claims Act Correction Act of 2007, H.R. 4854, 110th Cong. (2007); *see also* Kevin M. Comeau, *False Certification Claims in Light of* Allison Engine *and False Claims Act Amendments Introduced in the 111th Congress*, 18 Fed. Cir. B.J. 491, 492–93 (2009).

102. *See* Nat'l. Bureau of Econ. Research, Determination of the December 2007 Peak in Economic Activity (2008), http://www.nber.org/dec2008.html (stating the United States had been in a recession starting December 2007).

103. *See, e.g.*, American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 ("An Act [m]aking supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization . . . .").

104. *See* S. Rep. No. 111-10, at 10 (2009) ("In response to the economic crisis, the Federal Government has obligated and expended more than $1 trillion in an effort to stabilize our banking system and rebuild our economy. These funds are often dispensed through contracts with non-governmental entities, going to general contractors and subcontractors working for the Government.").

105. *See id.* ("Protecting these funds from fraud and abuse must be among our highest priorities as we move forward with these necessary actions.").

106. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (to be codified at 31 U.S.C.).

107. President's Statement on Signing the Fraud Enforcement and Recovery Act of 2009, Daily Comp. Pres. Doc. 00387, (May 20, 2009).

108. S. Rep. No. 111-10, at 3 (2009).

109. *Id.* at 10 (citations omitted).

110. *See id.*; *see also* 155 Cong. Rec. S4612 (daily ed. Apr. 23, 2009) (statement of Sen. Grassley) ("We are trying to just, in this bill, in a very rifle shot way, correct some court opinions that have been detrimental and

FERA completely rewrote § 3729 to return the statute to Congress's original intent.[111] First, Congress rewrote § 3729(a)(2) by removing the phrase "paid or approved by the Government,"[112] and focused on "a false or fraudulent claim."[113] Further, Congress added a materiality requirement to the FCA, defining materiality as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[114] Now, a false statement only needs to be "material to a false or fraudulent claim,"[115] and there is no element of intent.[116] FERA further redefines a claim as "any request or demand . . . for money" made to either a Government officer or official or any "contractor, grantee, or other recipient" when the Government either provided or would reimburse the funds paid.[117] These changes now allow a cause of action under the FCA for claims made by subcontractors to prime contractors under a federal government contract, such as in *Allison Engine*,[118] or by prime or subcontractors to non-Governmental entities receiving Government money, such as in *Totten*.[119] The effective date of FERA's amendments to § 3729(a)(1) is retroactive to June 7, 2008, two days before the Supreme Court announced its decision in *Allison Engine*,[120] ensuring no subcontractor or grantee claims would be decided by the FCA as interpreted in *Allison Engine* and *Totten*.[121] FERA restores the FCA to "[o]ne of the most successful tools for combating waste and abuse in Government spending."[122]

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weaken the False Claims Act."); 155 Cong. Rec. S4536 (daily ed. Apr. 22, 2009) (statement of Sen. Specter) ("[T]here were also judicial interpretations of the False Claims Act which this legislation will correct."); 155 Cong. Rec. S4540 (daily ed. Apr. 22, 2009) (statement of Sen. Kyl) ("[T]he purpose of the new definition of 'claim' is to overrule the Totten and Allison Engine cases.").

111. *See* S. Rep. No. 111-10, at 10 (2009) (describing the original intent of the FCA as a "civil enforcement tool" against any entity that attempted to defraud the Government).

112. *Compare* 31 U.S.C. § 3729(a)(2) (2006) (amended 2009), *with* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, 123 Stat. 1617, 1621–22.

113. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, § 3729, 123 Stat. 1617, 1621 (to be codified at 31 U.S.C. § 3729(a)(1)(B)).

114. *Id.* sec. 4, § 3729, 123 Stat. 1617, 1622–23 (to be codified at 31 U.S.C. § 3729(b)(4)).

115. *Id.* sec. 4, § 3729, 123 Stat. 1617, 1621 (to be codified at 31 U.S.C. § 3729(a)(1)(B)).

116. *See supra* note 19 and accompanying text.

117. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, § 3729, 123 Stat. 1617, 1622–23 (to be codified at 31 U.S.C. § 3729(d)(2)).

118. Defendants in *Allison Engine* were subcontractors. Allison Engine Co. v. United States *ex rel.* Sanders, 128 S. Ct. 2123, 2126–27 (2008). Therefore, they would fall under § 3729(b)(2)'s definition of a contractor being reimbursed with funding provided by the Government. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, § 3729, 123 Stat. 1617, 1622–23 (to be codified at 31 U.S.C. § 3729(b)(2)).

119. The false claim in *Totten* was presented to Amtrak, which, although not a Governmental entity, received Government funds. United States *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 491–92 (D.C. Cir. 2004).

120. *Allison Engine*, 128 S. Ct. at 2123 (decided June 9, 2008).

121. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4(f), 123 Stat. 1617, 1625 (applying the revisions to § 3729(a)(1) to all claims applying on or after June 7, 2008).

122. S. Rep. No. 111-10, at 10 (2009).

III. ANALYSIS

In *Allison Engine*, the Court properly limited the scope of FCA claims to prevent the Act from becoming an all-purpose anti-fraud statute.[123] However, the *Allison Engine* Court went too far in limiting the scope of the Act when it required subcontractors to have intent to defraud the Government to violate the FCA, which Congress corrected in FERA.[124] Instead, the Supreme Court should have adopted a standard that recognized the role of subcontractors in Government contracting, and Congress ultimately incorporated this standard in the revised statute.[125]

A. Both the Allison Engine *Court and FERA Properly Limited the Scope of the False Claims Act to Prevent It from Becoming an All-Purpose Anti-Fraud Statute*

The Supreme Court was correct in *Allison Engine* when it refused to "transform the [False Claims Act] into an all-purpose anti-fraud statute."[126] The purpose of the FCA "is to enhance the Government's ability to recover losses sustained as a result of fraud against the Government."[127] When Congress amended the FCA in 1986, the primary purpose for the amendment was Congress's desire to change the "sad truth . . . that crime against the Government often *does* pay."[128] Of the federal government's fiscal year 1985 budget, approaching nearly $1 trillion, the Department of Justice estimated between $10 and $100 billion was lost to fraud.[129] The evidence contained in the legislative history of the 1986 amendments focused on high-profile reports and testimony about the state of Government procurement in the mid-1980s.[130]

What was not contained in the legislative history was any indication that Congress intended the FCA to combat fraud against entities other than the Government.[131] For example, one court refused to extend the FCA to claims against non-Government entities in *United States ex rel. Totten v Bombardier Corp.*[132] In *Totten*, the relator alleged that the defendant submitted a false claim to Amtrak,[133] which the court noted was not a Governmental entity.[134] The *Totten* court then focused on the requirements in the FCA for presentment to an officer or employee of the

123. *See infra* Part III.A.
124. *See infra* Part III.B.
125. *See infra* Part III.C.
126. Allison Engine Co. v. United States *ex rel.* Sanders, 128 S. Ct. 2123, 2130 (2008).
127. S. Rep. No. 99-345, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266.
128. *Id.* at 3, *reprinted in* 1986 U.S.C.C.A.N. at 5268.
129. *Id.*
130. *See id.*
131. *See, e.g.*, *id.* at 1, *reprinted in* 1986 U.S.C.C.A.N. at 5266 (stating that the purpose of the False Claims Act is to reduce "fraud against the *Government*") (emphasis added).
132. 380 F.3d 488 (D.C. Cir. 2004) (refusing to extend the FCA to non-governmental entities).
133. *Id.* at 490.
134. *See id.* at 491–92 ("Amtrak's organic statute has flatly stated that the company 'is not a department, agency, or instrumentality of the United States Government.'" (quoting 49 U.S.C. § 24301(a)(3) (2000))).

Government[135] and held that because the defendants presented claims to Amtrak, a non-Government entity, the FCA did not apply, even though money provided by the Government ultimately paid the false claims.[136] This did not mean that Amtrak was without remedy for the false claims submitted by the defendants, as they still had all available remedies at law and equity for those actions.[137] The court simply limited the scope of the FCA to false claims against the Government, which was the original intent of Congress when amending the statute.[138]

In *Allison Engine*, the Court had similar concerns, focusing on claims paid "by the government."[139] The Court did not want to extend the scope of the FCA to false claims presented to any entity that receives funding from the Government.[140] Rather, the Court showed a desire to limit FCA claims to those with intent to defraud the Government.[141] The Court's limitation of the FCA to the Government was in-line with both congressional intent and prior court decisions.[142]

Although the FCA amendments removed the "by the Government" language,[143] Congress still intended to limit the FCA to actions related to the Government.[144] FERA's preamble states the purpose of the act is "[t]o improve enforcement of . . . frauds related to Federal assistance and relief programs."[145] Congressional testimony also indicates that the reach of the FCA amendments targets those who attempt or succeed in obtaining tax dollars without the right to do so.[146] However, there is some concern that the new definition of "claim" in FERA could extend the FCA beyond what the courts previously allowed.[147] This concern is somewhat exag-

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135. *Id.* at 492.

136. *Id.* at 502.

137. A private entity may use any common law or statutory remedies, such as tort claims, contract claims, and general anti-fraud statutes, to recover money that it fraudulently pays out.

138. *See Totten*, 380 F.3d at 495–96 (stating that Congress had the opportunity to expand the FCA beyond claims presented to the Government, but chose not to).

139. Allison Engine Co. v. United States *ex rel.* Sanders, 128 S. Ct. 2123, 2128 (2008).

140. *See id.* at 2128–29 (using the example that a government employee would not say the government paid for a new car or vacation, even though the government was the ultimate source of funds for those purchases).

141. *Id.* at 2130.

142. *See, e.g.*, *supra* note 138.

143. *See supra* note 112.

144. *See, e.g.*, *Feature Comment: The Impact of the Fraud Enforcement and Recovery Act of 2009 on the Civil False Claims Act*, 51 Gov't Contractor (West) ¶ 224, at 1 (July 8, 2009) [hereinafter *Impact of FERA*] ("Congress wanted to ensure that, as the Government was spending unprecedented amounts of taxpayer funds, it could limit and recover for fraudulent uses of those funds.").

145. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617, 1617.

146. *See* 155 Cong. Rec. E1297 (daily ed. Jun. 3, 2009) (statement of Rep. Berman) ("[FERA] clarifies a number of key provisions and reaffirms that the False Claims Act is intended to protect all Government funds, without qualification or limitation, from the predation of those who would avail themselves of taxpayer money without the right to do so.").

147. *See Impact of FERA*, *supra* note 144, at 4 (describing how the new statute could allow "tracing" of funds through Government agencies and how it could place liability on second-, third-, and lower-tier subcontractors). While the old FCA had an express "by the Government" requirement, see 31 U.S.C. § 3729(a)(1) (2006), *amended by* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, 123 Stat. 1617, 1622–23, FERA still requires some nexus to the Government. *See id.* sec. 4, § 3729, 123 Stat. 1617, 1622–23 (to be

gerated, as the areas of concern still involve defrauded Government funds.[148] While FERA does expand the scope of the FCA, it does not create an all-purpose anti-fraud statute.[149]

B. FERA Corrected the Allison Engine *Court When It Went Too Far in Limiting the Scope of the False Claims Act by Requiring Subcontractor Intent to Defraud the Government*

The *Allison Engine* Court narrowed the scope of the FCA considerably when it required "that the defendant ma[ke] a false record or statement for the purpose of getting 'a false or fraudulent claim paid or approved by the Government.'"[150] In reaching this holding, the Court focused on the "infinitive phrase 'to get'" in § 3729(a)(2) and the "defendant's purpose in making or using a false record or statement."[151] The Court erred by severely narrowing the scope of the FCA because the intent requirement could have caused formerly possible FCA violations by subcontractors to fall outside the scope of the statute.[152]

Allison Engine specifically addressed a situation where a subcontractor made the alleged false claim.[153] It is very common for federal contracts to have multiple layers of subcontracting with numerous subcontractors.[154] To find a subcontractor violation of the FCA, the Court created a standard under § 3729(a)(2) that required the relator to prove that the subcontractor intended for their false record or statement "to be used by the prime contractor to get the Government to pay its claim."[155] Proving intent can be a difficult hurdle to overcome,[156] and this could have had the

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codified at 31 U.S.C. §3729(b)(2)) (definition of claim requiring nexus to Government). However, the Act does address a hypothetical proposed by Justice Alito in *Allison Engine*, where he noted a car or vacation purchased by a federal employee should not fall under the FCA, even though the funds ultimately came from the Government. Allison Engine Co. v. United States *ex rel.* Sanders, 128 S. Ct. 2123, 2129 (2009). FERA clearly states that compensation for Federal employment is not covered under the act. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, § 3729, 123 Stat. 1617, 1623 (to be codified at 31 U.S.C. §3729(b)(2)(B)).

148. *See, e.g.*, *False Claims Act Liability: Contracts with the Coalition Provisional Authority*, 23 Nash & Cibinic Rep. (West) ¶ 35, at 103 (July 2009) (discussing impact of FERA on funds from non-governmental organizations such as the Iraqi Provisional Authority that received Government funds to operate).

149. *See, e.g.*, Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1622–23 (to be codified at 31 U.S.C. §3729(b)(2)) (definition of claim requires the Government to provide or reimburse the money used to pay the false claim).

150. *Allison Engine*, 128 S. Ct. at 2130.

151. *Id.* at 2130 n.2.

152. *See infra* notes 153–61 and accompanying text.

153. *See supra* Part II.C.1.

154. Lockheed Martin Aeronautics Company is the prime contractor for the Air Force's F-22 Raptor program; however, there are "thousands" of suppliers working on the program. Lockheed Martin Corp., F-22 Raptor 5, *available at* http://www.lockheedmartin.com/data/assets/corporate/press-kit/F-22-Brochure.pdf.

155. *See Allison Engine*, 128 S. Ct. at 2130.

156. Although evidence of mental state to prove intent is admissible as an exclusion to the hearsay rule, *see* Fed. R. Evid. 803(3), "intent is often difficult to prove." Gen. Analytics Corp. v. CNA Ins. Co., 86 F.3d 51, 54 (4th Cir. 1995).

effect of discouraging potential *qui tam* relators from pursuing claims against subcontractors that are potentially defrauding the Government.[157]

The Court's decision also unnecessarily imposed an evidentiary hurdle.[158] It is difficult to fathom a reason why a subcontractor would knowingly submit a false record or statement without the intent of receiving payment for work that the subcontractor did not perform.[159] Although it could be difficult to uncover evidence proving the subcontractor intended for the Government to rely on the subcontractor's false record or statement to induce payment of the false claim, there could easily be a situation where a subcontractor submits a false inspection record to the prime contractor with the hope of receiving payment, while never caring if the prime contractor passed the falsified inspection record to the Government for payment to the prime contractor.[160] Under *Allison Engine*, this situation would fall outside of the FCA, although it is the type of activity that the FCA was designed to combat.[161] The Court created a gaping hole in the FCA that limited the Government's and relator's ability to prosecute FCA violations against subcontractors.[162]

Congress quickly filled this hole with FERA.[163] By deleting the presentment requirement, Congress removed any notion that a false claim must be presented directly to the Government.[164] Rather, FERA creates a two-part test to determine whether the FCA applies to a claim that is not presented directly to the Government.[165] First, the court must determine if the false claim was made to a contractor, grantee, or other recipient for the Government's interest or to advance a Government program.[166] Second, the court must determine if the Government provided or planned in the future to reimburse the funds to pay the false claim.[167] A typical

157. *See, e.g.*, Stephan J. Choi, *Do the Merits Matter* Less *After the Private Securities Litigation Reform Act?*, 23 J. L. Econ. & Org. 598, 599–602 (2007) (discussing how large hurdles such as expense and difficulty in obtaining evidence can reduce meritorious litigation).

158. *See Allison Engine*, 128 S. Ct. at 2130 (requiring the subcontractor or defendant to intend for the Government to rely on the false claim to be a cause of action under the FCA).

159. Many FCA cases involve contractors allegedly submitting false invoices with the hopes of receiving payment for them. *See, e.g.*, Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 943 (1997) (relator alleged defendant improperly invoiced the government for costs that were associated with another, less-profitable, contract); United States *ex rel.* DRC Inc. v. Custer Battles LLC, 562 F.3d 295, 299–300 (4th Cir. 2009) (relator alleged defendant improperly invoiced the government for more than the contract allowed).

160. This situation occurred in *Allison Engine*, where the defendants submitted falsified certificates of conformance in lieu of actually performing the required testing. *Allison Engine*, 128 S. Ct. at 2127.

161. *See supra* Part II.B (explaining that the purpose of the FCA was to prevent fraud against the Government).

162. *See supra* notes 150–61 and accompanying text.

163. *See supra* Part II.D.

164. *See supra* notes 117–19 and accompanying text. Of course, the FCA applies if the claim is presented to the Government. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, 123 Stat. 1617, 1622–23 (to be codified at 31 U.S.C. § 3729(b)(2)(A)(i)).

165. *See infra* notes 166–67 and accompanying text.

166. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, § 3729, 123 Stat. 1617, 1623 (to be codified at 31 U.S.C. § 3729(b)(2)(A)(ii)).

167. *See id.*

subcontractor false claim would fall under the FCA through this test, as the subcontractor would submit a false claim to the prime contractor, and the prime contractor would submit a claim to the Government, seeking reimbursement for expenses incurred in paying the subcontractor's false claim.[168] The FERA amendment makes it clear that subcontractors are subject to the FCA.[169] Although *Allison Engine* severely limited subcontractor FCA suits, FERA restored their viability as a cause of action.[170]

C. The Supreme Court Should Have Adopted a Middle-Ground Approach to Reflect the Significant Involvement of Subcontractors in Government Procurement, Which Congress Accomplished Through FERA

Rather than requiring a plaintiff to show that a subcontractor intended for the Government to rely on its false record or statement to induce payment, the Court should have adopted an approach that looks to the practical effect of the subcontractor's actions.[171] When subcontractors are involved in a Government program, they do not individually submit invoices to the Government; rather, the subcontractors submit invoices to the prime contractor, who in turn invoices the Government for all work done by the prime and subcontractors on the program.[172] The element of intent and presentment under the FCA should be determined at the point where the subcontractor submits the false record or statement, which in the typical subcontractor situation would be when the subcontractor submits its invoice to the prime contractor.[173] If the subcontractor intended for the prime contractor to rely on that false record or statement when generating the invoice to the Government, who ultimately generates the funds to pay the subcontractor, then that action should be a violation of the FCA, which Congress acknowledged in its new definition of "claim."[174]

The new congressional approach side-stepped the *Allison Engine* Court's intent requirement and adopted a middle-ground approach by implicitly acknowledging the presence of subcontractors and their ability to make false claims through prime

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168. *See, e.g.*, 48 C.F.R. § 31.201 (2008) (the Government will pay contractor costs that are allowable, reasonable, and allocable).

169. *See infra* Part III.C. In addition, FERA overturned *Totten* by expressly allowing false claims to grantees, such as Amtrak, to fall under the FCA. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, §3729, 123 Stat. 1617, 1622–23 (to be codified at 31 U.S.C. § 3729(b)(2)(A)(ii)).

170. *See supra* notes 150–69.

171. *See infra* notes 172–90.

172. *See, e.g.*, 48 C.F.R. § 32.112-1 (2008) (providing subcontractor remedies if prime contractor fails to make payments).

173. *See, e.g.*, Cornell Univ., Office of Sponsored Programs, Subcontracting Procedures, http://www.osp.cornell.edu/Policies/sub-proc.html (last visited Sep. 16, 2009) (procedures for subcontract administration requires invoices be submitted to the university, who is the prime contractor).

174. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, § 3729, 123 Stat. 1617, 1622–23 (to be codified at 31 U.S.C. § 3729(b)(2)(A)(ii)).

contractors.[175] In *Allison Engine*, the Court required that "a defendant must intend that the Government itself pay the claim."[176] The subcontractor knows the work they are doing is for the government; in *Allison Engine*, it would be hard to believe that the defendants thought they were building components of a guided missile destroyer for a private party.[177] Rather, subcontractors who make false records or statements want the prime contractor to take its invoice, include it with the invoices of the other subcontractors and the prime contractor's work, and submit it to the Government for payment.[178] The intent to have the invoice ultimately submitted to and paid by the Government as required in *Allison Engine* is not required in the new two-part test in FERA's definition of a claim.[179]

The statutory revision acknowledged the concept of privity of contract.[180] In a typical contract, there is only privity between the Government and the prime contractor.[181] While there is no contractual relationship between the Government and subcontractors, clauses contained in the prime contract often flow down to the subcontracts.[182] This concept reverses the "flow-down" approach such that any false records or statements made by a subcontractor "flows up" through the prime contractor to the Government.[183] This also addresses a fairness issue raised in *Allison Engine*: the Court was seemingly permitting subcontractors to hide behind the prime contractor and avoid any FCA liability.[184] If the intent of the 1986 Congress was to restrict the reach of the FCA to prime contractors, that intent was hard to decipher.[185] Congress clarified in 2009 that the FCA intended to address all false

175. *See id.* (recognizing claims made to Government contractors that are ultimately paid with Government funds—the situation seen in a subcontractor false claim).

176. Allison Engine Co. v. United States *ex rel.* Sanders, 128 S. Ct. 2123, 2128 (2008).

177. *See id.* at 2126. Even in situations where the program is not as obviously governmental as a guided missile destroyer, the presence of federal acquisition clauses in the subcontract should provide adequate notice that the program is funded by the Government. *See, e.g.*, 48 C.F.R. § 52.245-1 (2008) (clause requiring "appropriate flow down of contract terms and conditions" for government-furnished property).

178. It is unlikely that after producing fraudulent certificates of conformance, see *Allison Engine*, 128 S. Ct. at 2127, the subcontractors wanted the prime contractor to investigate or otherwise check to ensure the subcontractors actually performed the work.

179. *See supra* notes 154–57, 165–67 and accompanying text.

180. *See infra notes* 181–86 and accompanying text.

181. *See* Globex Corp. v. United States, 54 Fed. Cl. 343, 347 (2002) ("[S]ubcontractors typically are not in privity of contract with the Government . . . .").

182. *See, e.g.*, 48 C.F.R. § 52.245-1 (2008) (containing clause that requires "appropriate flow down of contract terms and conditions" for government furnished property).

183. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, § 3729, 123 Stat. 1617, 1622–23 (to be codified at 31 U.S.C. § 3729(b)(2)(A)) (definition of claim allows false claims by subcontractors when the subcontractor is paid with Government funds in support of a Government program regardless of the involvement of the prime contractor).

184. *See* Allison Engine Co. v. United States *ex rel.* Sanders, 128 S. Ct. 2123, 2128 (2008) (requiring that "a defendant must intend that the Government itself pay the claim"). This is impossible in the typical subcontractor situation, as there is no privity with the Government. *See supra* note 181.

185. *See* S. Rep. No. 99-345, at 1, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266 (False Claims Reform Act addressed "fraud against the Government," but did not limit that fraud to prime contractors).

records or statements made to the Government, and that subcontractors should be equally susceptible to suit under the FCA.[186]

Through FERA, Congress restored the FCA to its original intent: a powerful weapon to combat fraud against the Government.[187] FERA legislatively overturns the prior stalwarts of FCA jurisprudence, *Totten* and *Allison Engine*, and paves the way for a flood of lawsuits attacking false claims by not only prime contractors, as previously allowed, but their subcontractors as well.[188] Subcontractors should be on notice that their actions will be scrutinized by potential *qui tam* relators.[189] Though there may be a potential backlash, Government money is ultimately taxpayer money, and it should be spent in a prudent manner free of fraud and waste.[190]

IV. CONCLUSION

Throughout the history of the FCA, the statute's power has risen and fallen.[191] In recent legislation, Congress agreed with the *Allison Engine* Court that the FCA should only target fraud against the Government,[192] but differed with the Court in its approach to subcontractor fraud, opting for the FCA to include all fraud that is perpetrated against Government funds.[193] While there is concern that FERA may extend the scope of the FCA beyond Governmental fraud,[194] the amendments put all federal contractors on notice that they could be liable for any false claims made under Government contracts.[195] The FERA amendments restore the FCA to its place as a powerful tool to fight fraud against the Government.[196]

186. *See supra* Part II.D.
187. *See supra* Part II.D.
188. *See supra* Part III.C.
189. *See supra* Part III.C.
190. *See supra* Part II.D.
191. *See supra* notes 1–6 and accompanying text.
192. *See supra* Part III.A.
193. *See supra* Part III.B.
194. *See supra* Part III.B.
195. *See supra* Part III.B.
196. *See supra* Part III.C.