

## Qui Tam: An Ingenious Bulwark Against Fraud

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*In 1863, the “Qui Tam” provision was introduced to the United States (U.S.) in the False Claims Act (FCA) and has since served as the foundational law of U.S. government fraud prevention. The FCA set up the consequences for individuals found to have defrauded the U.S. government. It also introduced provisions which allowed private citizens to sue a person or company for defrauding the government.<sup>187</sup> In essence, the FCA allowed private citizens to initiate lawsuits against other private citizens on the government’s behalf, as if the government were suing them itself.*

### Introduction

As one of the most significant nations on the world stage, the United States has a seemingly endless list of fiscal obligations. From funding defense, to subsidizing businesses, to paying the salaries of elected officials and civil servants, there is an immense variety of government programs into which the U.S. pours its money. With such extensive fiscal responsibilities, it is imperative that the U.S. safeguards its money from misappropriation. After all, it would not be fitting for a government ‘of, by, and for’ the people to be neglecting the tax revenue it acquires from the people. To protect government spending from misappropriation and misuse, the U.S. has safeguards designed to regulate, protect, and ensure the proper use of government funding. Of the many safeguards that exist to regulate government money, perhaps one of the

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<sup>186</sup> Brandeis University Undergraduate, Class of 2025.

<sup>187</sup> Howard, “False Claims Act,” 1863.



most useful of these defense systems, is the Qui Tam doctrine. By providing both ‘a will and a way’ to whistleblowers, qui tam makes for a very effective tool for recovering stolen government money, and is thus a powerful defense against fraud.

### **The Pandemic & Fraud**

The Qui Tam doctrine is a legal protocol that allows citizens to act as whistleblowers against individuals or entities who have defrauded the U.S. government. It has garnered increased publicity in recent years due to the COVID-19 pandemic, particularly in relation to loan programs operated by the U.S. Small Business Administration (SBA). Designed to help bail out small businesses that struggled financially during the pandemic, the SBA created the Paycheck Protection Program (PPP) and the Economic Injury Disaster Loan Program (EIDL).<sup>188</sup> The PPP was hastily administered in March 2020 by the CARES Act, and operated until May 2021. During that time, it is estimated that the PPP and EIDL distributed over 800 billion dollars to various businesses across the country.<sup>189</sup> Part of the programs’ main mission was to quickly distribute enough money to small businesses to prevent them from failing during the difficult first year of the COVID-19 pandemic, and to allow them to keep workers employed. Because of the time pressure, the PPP and EIDL sacrificed security for speed, and disbursed 800 billion dollars over the course of one year, with minimal security or surveillance. So serious was the lack of security that almost immediately upon the program’s initiation in 2020, “the SBA’s

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<sup>188</sup> “Paycheck Protection Program.”

<sup>189</sup> O’Brien, “Bloomberg - Where, Exactly, Did \$800 Billion in PPP Money Go?,” 2021.



inspector general had detected the possibility of ‘widespread potential fraud’ in the EIDL program.”<sup>190</sup>

To lose even a small portion of 800 billion dollars to fraud would be counter to all the ideals of responsible governance; as the SBA’s loan programs continued, it became clear that the level of fraudulent acquisition of loan money was quite large. According to Bloomberg, “the University of Texas at Austin noted that \$76 billion of a \$780 billion pool of PPP loans it examined involved ‘questionable’ lending.”<sup>191</sup> The scope of fraudulent lending was indicative of a major problem. However, disbursing loan money to businesses who legitimately needed it was too important, and implementing the kinds of security measures necessary to eliminate fraud would slow the loan process down. As a consequence of these considerations, the SBA elected to do nothing and leave the program as it was. Being unable to stop misappropriation of emergency program funding, the government elected to turn its attention towards restitution after the fact.

Tracking down \$76 billion or more missing loans would be a daunting task, but U.S. prosecutors and investigators began immediately at the first sign of widespread fraud. In May 2020, two individuals from Rhode Island became the first to be charged with defrauding the Paycheck Protection Program.<sup>192</sup> Over the following months, dozens of others were charged with defrauding the program. According to Arnold & Porter, a major multinational law firm, by August 2022, 708 individual cases had been opened investigating pandemic fraud. These cases concern alleged fraud anywhere

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<sup>190</sup> O’Brien, “Bloomberg - Where, Exactly, Did \$800 Billion in PPP Money Go?,” 2021.

<sup>191</sup> O’Brien, “Bloomberg - Where, Exactly, Did \$800 Billion in PPP Money Go?,” 2021.

<sup>192</sup> Martin, “Guilty Plea in First-In-The-Nation Cares Act Fraud Case,” 2021.



from a \$10,000 EIDL grant to millions of dollars of PPP loans.<sup>193</sup>

### **How Does Qui Tam Recover on Fraud?**

The 708 cases tracked by Arnold & Porter represent only a fraction of the total money defrauded in the past year from the EIDL, PPP, and other pandemic-related loan programs. Even with U.S. investigators operating at their maximum efficiency, recovering all estimated 76 billion dollars lost to fraud is a titanic task. Depending on how well fraudsters hide their illegal actions, the U.S. government, on its own, may never recover all of the money lost to fraud. It is here that the qui tam doctrine is especially important. The qui tam provision was introduced in the False Claims Act (FCA) of 1863 and gave U.S. citizens the ability to sue somebody, on the government's behalf, if they suspected that that individual had defrauded the government. If proven correct in court, these whistleblowers would be entitled to a portion of the settlement. Citizens' ability to sue on the government's behalf, in exchange for a portion of restitution, gave citizens a means and incentive to act as whistleblowers.

However, the effectiveness of the Qui Tam provision is predicated on the assumption that private citizens will actually use it. In a situation where an individual suspects somebody of stealing from the U.S. government, there may be little incentive to file suit against them on the government's behalf. After all, the government is perfectly capable of filing its own lawsuits, so why would anybody want to waste time and money on a lawsuit where the government, and not them, is eligible for restitution? Filing a lawsuit can be a very time consuming procedure, even in the case of qui tam, where in some cases the original relator/plaintiff does not need to be deeply involved.

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<sup>193</sup> Green, et al., "CARES Act Fraud Tracker."



So, even if, as stated earlier, a financial incentive existed (a portion of the settlement), how much was that incentive, and would it be enough to get citizens to sue under qui tam? While the specific amount of money that a person filing a qui tam suit can be entitled varies depending on the circumstances, it can be quite significant.

Once a qui tam suit is filed, there are divergent paths for the suit before reaching trial. The first step in a qui tam case is submitting the case and notifying the government. Once a qui tam suit is filed, the relator must submit a copy of the complaint and any evidence they have collected against the accused. The government then has 60 days to respond to the complaint, during which time the complaint is not yet served and remains sealed (secret).<sup>194</sup> The government may extend the time during which the complaint is under seal, which it can use to investigate the complaint and process the evidence submitted by the relator. Only once this period has elapsed can the case actually be served upon the respondent. The next step is a government decision. After it reviews the complaint, the government has two choices: it can either assume responsibility for the case, and prosecute it (sidelining the relator), or it can elect not to pursue the case, in which case the original relator can choose to either pursue the case alone or drop it. After the government has responded, the case proceeds as any other civil action.

Government intervention (or lack thereof) in qui tam cases is the main factor that determines what percentage of restitution/settlement the original relator may be entitled to. If the government chooses to intervene in a qui tam suit and take over its prosecution, the original relator is entitled to anywhere from 15-25 percent of the settlement, depending on the significance of their contribution to the case. For example, if a relator files a claim that is taken over by the government, but

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<sup>194</sup> Green, et al., “CARES Act Fraud Tracker.”



then chooses not to continue as a party to the case, they may be entitled to a lower reward. However, if a relator continues as a party, and provides more meaningful evidence, they may receive up to 25 percent of the settlement.<sup>195</sup> However, if the government chooses not to intervene in a qui tam suit, a relator who chooses to prosecute the case alone may be entitled to 25-30 percent of the settlement. The justification for this has to do with personal effort and cost. If an individual prosecutes a qui tam case alone, without government help, they are solely responsible for hiring legal counsel, paying the costs of the suit, and possibly appearing in court. If the government intervenes, however, a relator may not have to do any of these things, and so is entitled to a lower reward. Remember, a qui tam action is, by definition, an action taken on the government's behalf in response to fraudulent acquisition of government money, so regardless of whether or not the government intervenes in a case, it always is entitled to the restitution from the action.

The FCA allows the government to intervene in any qui tam suit that it originally chose not to if it is able to show the relevant court compelling evidence of "good cause."<sup>196</sup> The "good cause" definition is relatively vague, but is generally recognized as giving the government the ability to return to a case it previously passed over, if during the course of that case information was uncovered relevant to the government's prosecutorial priorities.<sup>197</sup> If the government intervenes later in a suit, the relator remains entitled to the 25-30 percent range of the settlement that they would have been entitled to if they continued to prosecute the case alone. Despite these general guidelines, the FCA also lays out certain circumstantial restrictions on the percentage of a settlement that the relator can claim. For example, under certain conditions, a court may

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<sup>195</sup> Green, et al., "CARES Act Fraud Tracker."

<sup>196</sup> Green, et al., "CARES Act Fraud Tracker."

<sup>197</sup> LII / Legal Information Institute (Cornell), "Good Cause."



be able to reduce the claim of a relator down to less than 10 percent - namely in cases where the relator's evidence against the respondent came from mainly public sources.<sup>198</sup> Finally, to close a loophole, a relator who planned or participated in the fraud that the respondent is being accused of may not benefit from any percentage of the settlement from a qui tam case.<sup>199</sup>

Ultimately, the goal of the qui tam doctrine is to allow private citizens to act on cases in which they suspect another fellow citizen is defrauding the government. If they are correct, they are entitled to a certain percentage of the overall settlement. This allows the government to remove pressure from its investigators, and enables individuals far removed from the government to assist in addressing fraudulent actions. This strategy makes it easier to prosecute individuals defrauding the U.S. government, because it means that it is easier for evidence not directly available to investigators to more easily be brought to their attention by private citizens and whistleblowers.

### **Does Qui Tam Work?**

The idea that a monetary reward will motivate people to invoke qui tam more frequently is good in theory, but it begs the question: is there any data proving whether or not it actually works? After all, bringing a lawsuit is a time consuming task for anybody, even if— in the case of many qui tam suits— the relator does not need to actually prosecute the case. Is the offer of a percentage of a settlement enough incentive for individuals to actually bring forward qui tam cases against others? Does qui tam actually work to recover on fraud, and if so, how effective is it?

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<sup>198</sup> Howard, "False Claims Act," 1863.

<sup>199</sup> "The False Claims Act," 2010.



Qui tam suits have been remarkably effective at catching fraud and getting settlements. According to the Government Accountability Office (GAO), “The False Claims Act is one of the government's primary weapons to fight fraud against the government. . . . From fiscal years 1987 through 2005, settlements and judgments for the federal government in FCA cases have exceeded \$15 billion, of which \$9.6 billion, or 64 percent, was for cases filed by whistleblowers under FCA's qui tam provisions.”<sup>200</sup> The sheer value of the amount of money recovered by the government— \$9.6 billion, over the course of only 18 years— shows just how effective the qui tam provisions are. This money represents nearly  $\frac{2}{3}$  of all money returned to the government that was previously misappropriated- money that otherwise might not have been found. The data from the GAO demonstrates that a massive majority of money handed to the federal government in fraud settlements comes from qui tam suits. Only 36 percent of fraud settlements given to the government come from cases initiated by the government itself. The amount of money ‘loses’ in awarding relators, which according to the GAO is approximately \$1.6 billion, is far less than the amounts recovered by qui tam actions. The prevalence of qui tam as a share of both volume of FCA suits, and value of FCA suits, as well as the minimal worth of money lost to relator payouts, conveys just how effective qui tam suits are in returning money defrauded from the government.

Although the information provided by the GAO only covers cases between 1987 and 2005, it provides an important insight into the more recent past of qui tam cases, as well as its future. According to the GAO’s report, “[the] DOJ’s Civil Division received 8,869 FCA cases from fiscal years 1987 through 2005. During this period, the number of qui tam FCA cases generally increased as a proportion of total FCA

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<sup>200</sup> U. S. Government Accountability Office, “Information on False Claims Act Litigation,” 2006.



cases.”<sup>201</sup> Further, the report indicates that the number of qui tam suits related to health care fraud and procurement fraud greatly increased over the observed time period. Other conclusions about data collected from the GAO shows that the government chose to pursue these cases more frequently, and also received greater settlements in cases related to health care and procurement fraud.

Part of the reason health care and procurement fraud became more common over the period of time observed by the GAO is because the U.S. government became increasingly involved in these industries. According to the GAO’s report, the Department of Health and Human Services and the Department of Defense were most frequently named in qui tam suits as having been defrauded.<sup>202</sup> Over the same time period, the U.S. greatly increased funding towards both departments. In 1987, the U.S. spent a nominal \$115.1 billion\* on healthcare outlays, which had increased to \$549.2 billion by 2005.\*<sup>203</sup> On defense, the U.S. spent \$221.6 billion\* in 1987, increasing to \$600 billion\* in 2005.<sup>204,205</sup> More money being spent means more money possibly exposed to fraud. The presence of whistleblowers is particularly important in the defense and healthcare industries due to the understandably private nature of both industries. This helps explain why qui tam suits have become a greater share of FCA suits during the monitored period. Because the U.S. has begun spending more money in industries that are secretive or private, the qui tam doctrine is

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<sup>201</sup> U. S. Government Accountability Office, “Information on False Claims Act Litigation,” 2006.

<sup>202</sup> U. S. Government Accountability Office, “Information on False Claims Act Litigation,” 2006.

<sup>203</sup> Chantrill, “US Federal Budget Actual Spending Breakdown 1982-1987.”; Chantrill, “US Federal Budget Actual Spending Breakdown 2000-2005.”; Note: All values for money spent noted with an asterisk (\*) are in nominal USD and represent spending outlays.

<sup>204</sup> Chantrill, “US Federal Budget Actual Spending Breakdown 1982-1987.”

<sup>205</sup> Chantrill, “US Federal Budget Actual Spending Breakdown 2000-2005.”



becoming more important than ever in protecting against fraud. By encouraging whistleblowers to bring suit against those who defraud the government, the government ensures a greater recovery of money defrauded from it.

### **The Future of Qui Tam**

The story of qui tam did not end in 2005. Based on the trends from the GAO's observed period of 1987-2005, the volume of money the government loses to fraud has likely also increased in line with the U.S. budget. Thus, the number and proportion of FCA suits which are qui tam have most likely also increased over the last 18 years, and will continue to increase as the government spends more money. This prediction is predicated on current trends, including increasing government budgets, and previous trends from the original 1987-2005 GAO report. However, besides predicting future qui tam trends, important current events such as the COVID-19 pandemic also highlight the relevance of qui tam today. During the pandemic, the U.S. distributed vast sums of money to small businesses with little oversight. Only a small percentage of the estimated amount of money that was defrauded from these emergency loans has been located by U.S. investigators. In the immediate future, qui tam is likely to emerge as more significant than ever; as investigators struggle to locate large amounts of money defrauded by the government, the task of locating these funds is likely to fall on qui tam whistleblowers.

Much of predicting the future of qui tam is just speculation and extrapolation based on previously recorded trends for cases. This is because, besides the GAO's report, it is difficult to find compiled data regarding qui tam cases. As such, further research of qui tam cases and the statistics behind them may be necessary. This fact is not lost on the U.S. Congress and also has historical precedents. In 1943 and 1986, Congress commissioned various budget analyses which made it



clear to U.S. investigators that the government was losing significant amounts of money to fraud. In response, Congress amended the False Claims Act to improve qui tam and ease the burden on investigators.<sup>206</sup> In 2021, Congress began the process to once again amend the FCA.<sup>207</sup> Although the amendments were not as significant as the 1943 and 1986 amendments, the 2021 Year-End FCA Amendment, if passed, could serve to also ease the burden on investigators by redefining what kinds of fraud were eligible to be sued for under qui tam suits. This would have the effect of making it easier for potential relators to bring suits. The 2021 FCA Amendment would order the GAO to compile another report on the effectiveness of the FCA. Similar to the report on FCA actions between 1987-2005, this report would examine more recent uses and developments of the FCA.<sup>208</sup> The data from this new GAO report, if commissioned, could be extremely useful in shedding light on current qui tam trends and would be helpful in predicting the future volume of qui tam use. Unfortunately, this will only occur if the U.S. Congress passes the FCA amendment, which is currently stuck in committee. Although the FCA Amendment has not yet passed, the U.S. Congress did pass a law to extend the statute of limitations for defrauding the PPP and EIDL program to 10 years.<sup>209</sup>

All of these Congressional actions show that the U.S. Congress expects the FCA to be invoked at a greater frequency in the near future, as the scale of COVID-19 relief fraud becomes evident over the coming months. The government's actions serve to make it easier for potential relators to bring forth qui tam suits and appear to be encouraging them

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<sup>206</sup> Whistleblower Law Firm, "False Claims Act History[redacted]."

<sup>207</sup> "False Claims Amendments Act of 2021," S.2428, 117th Congress (2021-2022), 2021.

<sup>208</sup> "False Claims Amendments Act of 2021" (2021).

<sup>209</sup> Brewer, "Bills Extend Statute of Limitation for Prosecuting PPP, EIDL Fraud," 2022.



considerably as the government attempts to recover large amounts of money defrauded during the COVID-19 pandemic. So, what can be concluded from this? For one, there is not enough information on the current trends of qui tam suits. The last GAO report on FCA and qui tam cases recorded cases only between 1987 and 2005 and is now outdated. The last 18 years have yet to be compiled. If the GAO were to examine the last 18 years (and especially the time since the COVID-19 pandemic), it would likely find that the usage and settlement values of qui tam have increased and will continue to increase. This is not an unreasonable extrapolation of the trends found in the 1987-2005 report, but to draw any solid conclusions, a new GAO report (or something similar) examining the total volume of all qui tam suits is needed. At the very least, we can say with confidence that a rising importance of qui tam suits is currently expected by Congress, as evidenced by its moves to enable qui tam further, and potentially investigate the last two decades of qui tam cases. Finally, even if all of this turns out to be true, and the last 18 years do not follow the previous decades' trends with qui tam, the fallout from the COVID-19 pandemic is certain to increase the usage of qui tam- even if just in the short term.

### **Conclusion**

Qui tam is a very effective protection against fraud. It gives whistleblowers a way and a will when it comes to supporting fraud recovery. During extraordinary times, such as the last three years (2019-2022), even the colossal bureaucracy of the United States needs a helping hand tracking down money unlawfully stolen from it. Qui tam grants exactly the type of help needed. By allowing regular citizens to become whistleblowers and help return stolen money to its rightful place, qui tam helps U.S. investigators find the money that slips between the cracks of the justice system.



By incentivizing people to act, qui tam ensures that the U.S government has an effective defense against fraud. The potential power of millions of citizens willing to become whistleblowers far outweighs any surveillance or accountability apparatus the government could devise. It is for this reason that qui tam is an effective defense against fraud. Because of its effectiveness, the U.S. Congress has taken action to revitalize the doctrine as the country faces a great wave of fraudulent activity, and may soon commission a new GAO report on qui tam. When tax revenue that people expect to be invested in their collective prosperity is stolen, justice demands that such money be returned. Qui tam enables that, in a very literal sense. As the Latin phrase goes, from which the name of the doctrine originates, “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,”- who sues on behalf of the King, sues on behalf of himself. Though the King is now a Congress, the concept has stood the test of time. Qui tam today remains a powerful bulwark against fraud.



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