West Virginia University

From the SelectedWorks of Matthew Titolo

March 2, 2010

RETROACTIVITY AND THE FRAUD ENFORCEMENT AND RECOVERY ACT OF 2009

Matthew Titolo

Available at: https://works.bepress.com/matthew_titolo/1/
I. FRAUD ENFORCEMENT AND RECOVERY ACT (FERA)................................. 3

II. FERA’S RETROACTIVITY PROVISION .................................................. 12

III. RETROACTIVITY ANALYSIS UNDER LANDGRAF V. USI FILMS .............. 18
    A. RETROACTIVITY AND NEGATIVE IMPLICATION .................................. 18
    B. LANDGRAF’S PRESUMPTION AGAINST RETROACTIVITY ....................... 22

IV. THE SUPREME COURT MODIFIES THE LANDGRAF DOCTRINE ................. 25

V. COURTS ARE SPLIT OVER FERA’S RETROACTIVITY ............................... 31
    A. RETROACTIVITY COURTS...................................................................... 31
    B. NO RETROACTIVITY COURTS.................................................................. 33

VI. LANDGRAF RETROACTIVITY ANALYSIS OF FERA................................. 35
    A. FERA INCLUDES AN EXPRESS RETROACTIVITY PROVISION ...................... 36
       1. FERA’s retroactivity language is clear on its face..... 37
       2. Claims means cases................................................................. 40
          a) Reading claims as part of a whole phrase ............ 42
          b) Reading claims as part of the whole statute ...... 43
       3. FERA’s legislative history ......................................................... 45
          a) Prior drafts of FERA ....................................................... 46
          b) The evolution of FERA’s effective date language    47
          c) The Senate Judiciary Report for FERA ................ 48
       4. FERA sponsor statements ......................................................... 49
       5. FERA’s drafting history ........................................................... 51

* Visiting Assistant Professor, West Virginia University College of Law; Ph.D., University of California, Los Angeles, J.D., University of California, Berkeley. I would like to thank my colleagues at WVU School of Law, Gregory W. Bowman, Shelley Cavalieri, Atiba R. Ellis, Anne M. Lofaso, Jena Martin Amerson and William Rhee for their insightful comments on drafts of this article. I am grateful for the feedback I received at the Fourteenth Ohio Legal Scholarship Workshop at Capital University from Regina Burch, Eric Chaffee, Joseph Grant and Michael Rich. I would also like to thank WVU law students Brandon J. Lucki and Thomas Yanni for excellent research assistance. Needless to say, any errors are mine alone.
Abstract: This paper aims to resolve an emerging circuit split over the proper interpretation of the Fraud Enforcement and Recovery Act of 2009 (FERA), a statute intended to prevent fraud against the taxpayer by government contractors. Enacted in the wake of the recent economic crisis and trillion dollar stimulus package, FERA strengthens existing anti-fraud statutes, creates a Financial Inquiry Commission and commits nearly $500 million in new funds for law enforcement. FERA also amends the False Claims Act (FCA), the government’s primary weapon to recover money lost to contractor fraud. The amendments are intended to overrule federal decisions that had rejected FCA liability for government subcontractors not in direct privity with the government.

The focus of this paper is a controversial retroactivity clause that makes FERA effective almost a year before its enactment on May 20, 2009. Courts are split on how exactly this clause operates and whether to apply FERA’s new broader FCA liability language to pending cases against subcontractors. The outcome of this issue is highly consequential—the Department of Justice is currently investigating over a thousand FCA cases, each of which carries the potential for treble damages. This paper resolves this emerging split by applying the Supreme Court’s retroactivity analysis announced in Landgraf v. USI Films. The paper examines the sometimes contradictory Landgraf line of cases and analyzes FERA’s text and legislative history under the Landgraf framework. The article concludes that Congress intended for FERA to operate retroactively and that courts should apply the statute as Congress intended.
I. FRAUD ENFORCEMENT AND RECOVERY ACT (FERA)

Private contractors perform a greater share of government functions than ever before: from military contracting and for-profit prisons to social services and education.\(^1\) Privatization remains controversial, however, and has been criticized on a number of grounds, including the dangers inherent to democracy in outsourcing core government functions,\(^2\) and continuing problems with civil and criminal accountability and oversight.\(^3\) Congressional hearings beginning in 2007 revealed widespread fraud in Iraq war contracting.\(^4\) The prominent role of private military contractors in Iraq and Afghanistan has focused continued attention on questions of criminal

---

1 See MARTHA MINOW, PARTNERS NOT Rivals: Privatization and the Public Good 4 (2002) (“Private and market-style mechanisms are increasingly employed to provide what government had taken as duties….Decision makers in education, health care, social services, and law constantly cross the boundaries between public and private, religious and secular, profit and nonprofit.”)

2 See, e.g., PAUL R. VERKUIIL, Outsourcing Sovereignty: Why the Privatization of Government Functions Threatens Democracy and What We Can Do About It 1-6 (2007).

3 See, e.g., Martha Minow, Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy, 46 B.C. L. Rev. 989, 90-5 (2005) (citing Halliburton’s no-bid contracts and overbilling for Iraq reconstruction and abuses by private contractors at Abu Ghraib as examples of accountability problems in outsourcing government functions); see also SEN. COMM. ON THE JUDICIARY, War Profiteering and Prevention Act, S. Doc. 110-66, at 2 (2007) (“Over the past four years, war profiteering has … plagued this nation during the engagement of U.S. forces in Iraq and Afghanistan. The United States has devoted hundreds of billions of dollars to military, relief, and reconstruction activities in Iraq and Afghanistan, including more than $50 billion to relief and reconstruction activities. Private contractors have been used to a greater extent during these war-time activities than at any time in our history…. Inspectors General overseeing the provision of goods and services in Iraq and Afghanistan have found that billions of dollars spent in Iraq are unaccounted for and may have been lost to fraud or other misconduct.”)

4 See, e.g., SEN. COMM. ON THE JUDICIARY, supra note 3, at 2; see also War Profiteering and Other Contractor Crimes Committed Oversees: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. 110-103, at 2 (2007) (“On the fraud side, the Department of Justice has ignored the False Claims Act cases by obtaining court orders sealing the cases. Most of the cases filed regarding the war profiteering in Iraq have remained under seal”) (statement of Hon. Robert C. “Bobby” Scott, Chairman of the Subcomm.)
and civil accountability.\textsuperscript{5} In the most recent scandal, former employees of the private security firm Blackwater (now rebranded “Xe”)\textsuperscript{6} have sued the company under the False Claims Act, alleging a pattern of fraudulent billing practices—including charging taxpayers for strippers and prostitutes.\textsuperscript{7}

But accounting for taxpayer money spent by private contractors abroad is only part of the story. The Federal government has responded to the recent financial crisis with a stimulus package estimated to be over a trillion dollars.\textsuperscript{8} The massive influx of taxpayer dollars into the economy greatly increases the potential for fraud against the government.\textsuperscript{9} To guard against potential fraud, Congress enacted the Fraud Enforcement and Recovery Act of 2009 (FERA).\textsuperscript{10} The goal of FERA is to “increase accountability for the corporate and mortgage frauds that have contributed

\textsuperscript{5} See, e.g. Privatized War, and Its Price, N.Y. TIMES, Jan 11, 2010, at A16 (noting dismissal of charges against Blackwater agents who killed 17 Iraqis and stating that “[t]here are many reasons to oppose the privatization of war. Reliance on contractors allows the government to work under the radar of public scrutiny.”)

\textsuperscript{6} Blackwater Changes Its Name to Xe, N.Y. TIMES, Feb. 13, 2009, at A10.

\textsuperscript{7} See Mark Mazzetti, 2 Ex-Workers Accuse Blackwater Company of Defrauding the U.S. for Years, N.Y. TIMES, February 11, 2010, at A22 (reporting that FCA lawsuit was filed alleging that “top Blackwater officials had engaged in a pattern of deception as they carried out government contracts in Iraq and Afghanistan, and in Louisiana in the aftermath of Hurricane Katrina. The lawsuit, filed under the False Claims Act, also asserts that Blackwater officials turned a blind eye to ‘excessive and unjustified’ force against Iraqi civilians by several Blackwater guards”); see also, Suit: Prostitute, Strippers Part of Blackwater Fraud, CNN Justice, February 12, 2010, available at http://www.cnn.com/2010/CRIME/02/12/blackwater.suit/index.html.

\textsuperscript{8} S. REP. No. 110-10, at 10 (2009), as reprinted in 2009 U.S.C.C.A.N. 430, 437-38 (“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 nongovernmental entities, going to general contractors and subcontractors working for the Government. Protecting these funds from fraud and abuse must be among our highest priorities as we move forward with these necessary actions.”)

\textsuperscript{9}See, e.g, Michael Cooper, On the Lookout for Stimulus Fraud, N.Y. TIMES, Sept. 17, 2009, at A13 (reporting on fears among government officials that stimulus money will be target for fraud); see also Grant McCool and Martha Graybrow, FBI Targets Fraud in TARP, Stimulus Fund, REUTERS, June 2, 2009 (“The FBI has been bracing for a wave of fraud and corruption cases stemming from the government’s multitrillion-dollar effort to stimulate the economy and help ailing banks.”)

to the recent economic collapse and [to] help protect Americans from future frauds that exploit the economic assistance programs intended to restore and rebuild our economy.” To achieve these goals, FERA strengthens pre-existing anti-fraud statutes, creates a Financial Crisis Inquiry Commission and authorizes nearly $500 million for law enforcement. FERA § 4 amends the False Claims Act (FCA), a statute that allows both private parties and the government to sue contractors to recover taxpayer money lost to fraud. The False Claims Act is one of the government’s primary resources to fight civil fraud against taxpayers. This paper will focus on FERA’s revisions of FCA.

FERA § 4 was intended to address Allison Engine Co., Inc. v U.S. ex rel. Sanders and U.S. ex rel. Totten v. Bombardier Corp., which held that FCA defendants must present their false claim directly to the government or intend the fraud to be paid with government funds. By imposing a “presentment” requirement, Allison Engine and Totten effectively

---

14 See infra, Part II for a more detailed discussion of FCA.
15 Michael Rich, Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-Of-Control Qui Tam Litigation under the Civil False Claims Act, 76 U. CIN. L. REV. 1233, 1235 (2008) (citing S. REP. NO. 99-345, at 3 (1986)); see also S. REP. NO. 111-10, at 10, as reprinted in 2009 U.S.C.C.A.N. 430, 438 (“One of the most successful tools for combating waste and abuse in Government spending has been the False Claims Act (FCA), which is an extraordinary civil enforcement tool used to recover funds lost to fraud and abuse.”)
17 380 F.3d 488 (D.C. Cir. 2004).
18 S. REP. NO. 111-10, at 10-12, as reprinted in 2009 U.S.C.C.A.N. 430, 438-40 (explaining that the FERA amendments were intended to overrule Totten and Allison Engine). I discuss Allison Engine and Totten in more detail in Part II, infra.
19 See Kevin M. Comeau, False Certification Claims in Light of Allison Engine and False Claims Act Amendments Introduced in the 111th Congress, 18 FED. CIRCUIT B.J. 491, 492 (2009) (“Allison Engine clarified § 3729(a)(2)’s requirement that a claim be approved ‘by the Government,’ and resolved a circuit split about the general scope of FCA liability under this theory of recovery”); see also Robert L. Vogel, Feature Comment: The 2009 Amendments to the FCA, 51 No. 37 GOV’T CONTRACTOR ¶342 (Nov. 2009) (“Totten and Allison Engine made it much more
foreclosed FCA liability for subcontractors not in direct contact with the government.\textsuperscript{20} Given that much government business is now conducted through intermediaries such as subcontractors, fraudulent conduct that would have otherwise fallen within the ambit of FCA now as a practical matter would no longer be covered.\textsuperscript{21} \textit{Totten} and \textit{Allison Engine} blunted the FCA’s edge as a weapon against civil fraud.\textsuperscript{22}

The focus of this paper is a legal issue that has divided federal courts attempting to apply FERA to pending FCA cases.\textsuperscript{23} FERA § 4 “legislatively overruled” \textit{Allison Engine} and \textit{Totten} by clarifying that there is no “presentment” requirement under FCA.\textsuperscript{24} To effectuate its intent to overrule \textit{Allison Engine}, however, Congress departed from its usual practice of

difficult for the Government to prove liability under the FCA in cases in which Government funds were passed down along a chain—e.g., first, from the Government to an entity that administered a program, or to a prime contractor, and then to a grantee or subcontractor who made claims for payment to the administrator of the program or the prime contractor, respectively.”\textsuperscript{20}

\textit{Id}.\textsuperscript{21}

\textit{SEN. REP. NO. 111-10, at 11, as reprinted in 2009 U.S.C.C.A.N. 430, 38} (“The \textit{Totten} decision, like the \textit{Allison Engine} decision, runs contrary to the clear language and congressional intent of the FCA by exempting subcontractors who knowingly submit false claims to general contractors and are paid with Government funds.”)

\textit{See Gerard E. Wimberly, et al., The Presentment Requirement under the False Claims Act, 07-12 BRIEFING PAPERS 1, 2 (November 2007) (positing that a decline in FCA recoveries is due to the judicially-imposes presentment requirement coupled with “the use of intermediaries in procurement so that perpetrators of fraud are often at the subcontract and consultant levels dealing with prime contractors or in-country entities that are not the U.S. Government.”)}

\textit{Compare} \textit{U.S. v. Aguillon, 628 F.Supp.2d 542, 550-51 (D.Del. 2009) (holding that FERA’s amendment to the FCA did not apply retroactively under the Supreme Court’s \textit{Landgraf} analysis because Congress did not explicitly provide for such retroactive effects) with U.S. ex rel. Westrick v. Second Chance Body Armor, Inc., 2010 WL 623466, at *7 (D.D.C. Feb. 23, 2010) (“FERA provided for § 3729(a)(1)(B)’s retroactive application ‘to all claims under the False Claims Act ... that are pending on or after’ June 7, 2008. Because this suit was pending on June 7, 2008, the amended provision applies here.”)}

applying new statutes only to future conduct. FERA instead includes an effective date provision, § 4(f)(1), that purports to cover “all claims under the False Claims Act…that are pending on or after June 7, 2008”— almost a year before President Obama signed FERA into law and two days before the Supreme Court’s Allison Engine decision. While the power of Congress to override court decisions in this way is well settled, statutes that implicate past conduct raise basic fairness concerns under a doctrine of legislative retroactivity. As discussed below, courts have not applied the correct

25 See Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 856 (1990) (Scalia, J., concurring) (stating that legislators typically intend statutes to govern only future conduct).

26 Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 226 (1995) (“When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly”) (citing United States v. Schooner Peggy, 1 Cranch. 103 (1801) and Landgraf v. USI Film Products, 511 U.S. 244, 273-80 (1994)); see also, Rivers v. Roadway Express, Inc., 511 U.S. 298, 304 (1994) (“Congress may also decide to announce a new rule that operates retroactively to govern the rights of parties whose rights would otherwise be subject to the rule announced in the judicial decision”); William Eskridge, Overriding Supreme Court Statutory Interpretation Decisions, 101 YALE L.J. 331, 338 (1991) (“Congress frequently overrides or modifies statutory decisions by lower federal courts as well as those by the Supreme Court.”) However, Congress cannot command an Article III court to reopen a case that has been brought to final judgment. See Plaut, 514 U.S. at 219; see also Miller v. French, 530 U.S. 327, 344 (2000) (“Congress cannot retroactively command Article III courts to reopen final judgments.”) Some have criticized the Plaut line of cases as violating separation-of-powers principles. See, e.g., Ira Bloom, Prisons, Prisoners, and Pine Forests: Congress Breaches the Wall Separating Legislative from Judicial Power, 40 ARIZ. L. REV. 389, 390-91 (1998) (arguing that legislative overruling threatens to undermine separation-of-powers and liberty principles).

27 Landgraf, 511 U.S. at 265 (“Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”) Because I aim in this paper to resolve FERA’s retroactivity problem under established legal doctrine, I do not enter the broader theoretical debate concerning retroactivity, which I address in a separate work in progress. See generally Debra Lynn Bassett, In the Wake of Schooner Peggy: Deconstructing Legislative Retroactivity, 69 U. CIN. L. REV. 453, 454 (2001) (“A careful analysis of the Court’s [retroactivity] decisions reveals a consistent approach to retroactive legislation—an approach ultimately based in fundamental principles of fairness….”); see also Michael J. Graetz, Retroactivity Revisited, 98 HARV. L. REV. 1820, 22-26 (1985)(criticizing categorical condemnations of retroactivity and
retroactivity analysis. Thus, some courts have held that FERA applies retroactively, while others have reached the opposite result. This not only fails to do justice in individual cases, it replicates the legal confusion regarding the proper scope of FCA liability that the amendments to FCA were meant to resolve. This essay aims to clarify this confusion by guiding courts through the thicket of retroactivity analysis.

Part II provides an overview of FCA and analyzes FERA’s effective date provision to explain why courts have been confused about the scope and operation of § 4(f)(1). The problem is that Congress included ambiguous language in the statute: the phrase “claims under the False Claims Act…that are pending on or after June 7, 2008” can mean “lawsuits brought under FCA” or can refer to the technical definition provided by FCA, which defines claim in relevant part as “any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that is presented to an officer, employee, or agent of the United States.” A claim, in other words, is one of the acts that trigger liability under FCA. If claims means arguing that all statutes are retroactive to some extent, and that retroactive laws are not categorically unfair or inefficient); Stephen R. Munzer, A Theory of Retroactive Legislation, 61 TEX. L. REV. 425, 444 (1982) (arguing that “retroactive laws affecting property, contracts, and taxation are more often justifiable than might be thought”); Bryant Smith, Retroactive Laws and Vested Rights, 6 TEX. L. REV. 409 (1928) (discussing historical and political factors leading to anti-retroactivity bias); Daniel E. Troy, Toward a Definition and Critique of Retroactivity, 51 ALA. L. REV. 1329 (2000) (arguing that retroactive laws are generally without justification); Ann Woolhandler, Public Rights, Private Rights, and Statutory Retroactivity, 94 GEO. L.J. 1015, 1063 (2006) (positing that “traditional categories of public and private rights might be used to [create a] coherent scheme for deciding when statutory retroactivity is constitutional.”)

28 See infra Part V.A for a discussion of the decisions that have held FERA to be retroactive.

29 See infra Part V.B for a discussion of the decisions that have found FERA not to be retroactive.

30 See S. REP. No. 110-507, at 9 (2008) (explaining that False Claims Act Corrections Act of 2008, the precursor to FERA § 4, was intended to “clarify conflicting interpretations of the FCA, to provide an affirmative answer to unresolved questions created over the years by litigation, and to bring the FCA back into line with congressional intent….These provisions will assist practitioners, judges, and businesses across the country by providing clarity and certainty to the FCA.”)

31 31 U.S.C.A § 3729(b)(2).

cases, then the new FERA language will be applied to all FCA cases pending on or after June 7, 2008. Because FCA suits may involve conduct that has occurred years before the action commences, this reading is likely to implicate conduct that took place years before FERA’s enactment date. If, on the other hand, claims refers to the false statement or request for payment, then the new FERA language will only apply to FCA cases in which the conduct at issue occurred on or after June 7, 2008. This theory would most likely implicate a far smaller subset of actions than under the “lawsuits” reading. Courts have read this technical definition into § 4(f)(1) and held that FERA’s subcontractor liability rule only applies only to cases where such a request for payment (a claim) was “pending” on or after June 7, 2008. This has led to several dismissals of FCA actions, including Allison Engine on remand to the Southern District of Ohio.

Part III discusses Landgraf v. USI Films, which created a two-step analysis to determine whether or not a new civil law may be applied to conduct that occurred prior to the statute’s effective date. The first step is

---


34 I explain in Parts VI.A.2(a)-(b), infra, that there are three problems with the technical reading. First, it does not make sense to say that a claim (i.e., a request for payment) is made “under the False Claims Act,” therefore the technical reading does not scan on the textual level. Second, even if it did make sense to say this, claims appears throughout FCA in a non-technical sense and thus provides little basis for reading the technical meaning into FERA § 4(f)(1). Third, there is scant evidence in the legislative history that Congress intended only to capture conduct on or after June 7, 2008. See infra Part VI.A, for a full analysis of the text and legislative history of FERA.

35 See infra Part V.B, for a discussion of the reasoning of the “no retroactivity” courts.

36 2009 WL 3626773, at *4 (“Neither the amendments to the FCA set forth in the FERA nor the prior FCA include a definition of ‘case.’ Thus, a plain reading of the retroactivity language reveals that the relevant change is applicable to ‘claims’ and not to ‘cases.’ The new FCA retroactivity clause is not applicable to the Defendants in this case.”)

37 Congress is, of course, categorically barred from passing ex post facto criminal laws. See discussion infra note 42.

38 See Bassett, supra note 27 at 490 (“Landgraf set out a two-part structure for initial retroactivity analysis.”)
to determine if Congress has “unambiguously restricted the statute to prospective application.”\(^{39}\) If the statute expressly intends retroactive operation, then the court should apply the statute as intended, barring a violation of the Takings\(^{40}\), Due Process\(^{41}\), Contract, Ex Post Facto\(^{42}\) or Bill of Attainder clauses of the United States Constitution.\(^{43}\) As a general rule, however, the constitutional bars to retroactive civil legislation are now quite mild.\(^{44}\) If Congress has not clearly expressed the statute’s intended temporal

\(^{39}\) *Landgraf*, 511 U.S. at 280 (“When a case implicates a federal statute enacted after the events in suit, the court’s first task is to determine whether Congress has expressly prescribed the statute’s proper reach.”)

\(^{40}\) See, e.g., *Eastern Enterprises v. Apfel*, 524 U.S. 498, 534 (1998) (holding that Coal Industry Retiree Health Benefit Act would violate Takings Clause because it would have retroactively imposed “liability on Eastern and the magnitude of that liability raise substantial questions of fairness.”)

\(^{41}\) See *id.* at 549 (Kennedy, J., concurring and dissenting) (disagreeing with plurality’s holding that the Coal Act violated the Takings Clause but that “[t]he case before us represents one of the rare instances where the Legislature has exceeded the limits imposed by due process”); see also *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18-20 (1976) (applying general due process analysis and finding that Coal Mine Health and Safety Act’s requirement that company provide benefits for former miner’s death was not arbitrary and irrational).

\(^{42}\) *Allison Engine* on remand held that applying the FCA would violate the Ex Post Facto Clause because it is essentially punitive in nature. 2009 WL 3626773, at *10 (“Retroactive application violates the Ex Post Facto Clause because Congress intended for the FCA to be punitive and because FCA sanctions are punitive in purpose and effect.”) I disagree with this holding, but address the question fully in a separate work in progress. In sum, though, the Ex Post Facto Clause applies to criminal/punitive statutes and not civil/remedial ones, such as FERA § 4. See *Calder v. Bull*, 3 Dall. 386, 394 (1798) (“The restraint against making any *ex post facto* laws was not considered, by the framers of the constitution, as extending to prohibit the depriving a citizen even of a *vested right to property*; or the provision, ‘that *private* property should not be taken for public use, without just compensation,’ was unnecessary”); see also *Oliver P. Field, Ex Post Facto in the Constitution*, 20 Mich. L. Rev. 315, 315 (1922) (“This doctrine of *Calder v. Bull* is so well settled as to have become one of the commonplaces of American constitutional law of cases…”)

\(^{43}\) *Landgraf*, 511 U.S. at 266 (noting that the Contracts, Takings, Bill of Attainer, Due Process and Ex Post Facto Clauses of the United States Constitution prohibit certain types of retroactive legislation.)

\(^{44}\) *Id.* at 267 (“The Constitution’s restrictions, of course, are of limited scope. Absent a violation of one of those specific provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope.”)
scope, the analysis moves to a second step and asks whether applying the statute to a pending case would have genuinely “retroactive effects.” There is no bright-line formulation to determine whether a statute has a “retroactive effect,” which is instead a practical inquiry, grounded in common sense notions of fairness and “familiar considerations of fair notice, reasonable reliance, and settled expectations.” The retroactive effect analysis “demands a … functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment.” In the absence of a clear statement by Congress, however, a presumption against retroactivity bars application of the new law to a pending case where such an application would have retroactive effects.

Part IV explains that the Supreme Court has modified the Landgraf analysis in *Lindh v. Murphy*, *Martin v. Hadix* and *Hughes Aircraft Co. v. U.S. ex rel. Schumer*. These cases incorporated traditional interpretive principles with the anti-retroactivity canon and reaffirm that courts will look to legislative history to guide the “clear statement” inquiry. Part V briefly discusses the district and circuit courts that have ruled on FERA’s retroactivity. Courts have split into “retroactivity” and “no retroactivity” camps. Neither group has provided a complete analysis of FERA’s retroactivity question and have either reached the wrong result (in the case of “no retroactivity” courts) or reached the right result but not provided adequate justification. Part VI supplies a complete Landgraf retroactivity analysis of FERA § 4(f)(1) and concludes that Congress intended FERA to operate retroactively. Also, FERA is intended to apply to cases that were pending on June 7, 2008. *Claims* is used as a synonym for *cases* throughout FCA, so there is no reason to import the technical definition from FCA into FERA § 4(f)(1).

45 Id. at 280.
46 Id. at 269-70.
47 See Basset, *supra* note 27, at 467.
48 *Landgraf*, 511 U.S. at 270.
52 527 U.S. 343.
54 See *infra* Part VI.A for a discussion of the reasons to reject the technical definition as controlling § 4(f)(1).
II. FERA’S RETROACTIVITY PROVISION

The False Claims Act imposes civil liability for making a false or fraudulent claim in order to receive payment from the government.55 Both the Justice Department and private parties (called “relators”) may initiate an FCA action. Where initiated by a relator (often a whistleblower) the *qui tam*56 suit functions as a “private attorney general” action.57 The statute provides civil penalties of up to eleven thousand dollars plus three times actual damages.58 The relator retains up to thirty percent of the recovery.59 Between 1986 and 2009, taxpayers recovered more than $24 billion in FCA judgments—$2.4 billion in 2009 alone.60 Two key liability provisions of FCA—§§ 3729(a)(1)-(2)—impose liability on (1) one who “knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval”61 and (2) one who “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.”62 Recent cases have alleged fraudulent requests for reimbursement from the Government under Medicare Part B63 and false


56 “*Qui tam*” is short for the Latin phrase “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*” meaning “who as well for the king as for himself sues in this matter.” BLACK’S LAW DICTIONARY (8th ed. 2004).


59 Id. at § 3730(d)(2).


62 Id. at § 3729(a)(2).

claims made directly to the Government by primary defense contractors.\textsuperscript{64} In FCA scenarios where defendant is in privity with the government, liability under (a)(1)-(2) is at least in theory straightforward. The alleged fraudster either “presented…to an officer or employee of the United States” under (a)(1) or “ma[de]…a false record…to get a false or fraudulent claim paid or approved by the Government” thus satisfying (a)(2). Current realities of government contracting, however, have presented difficulties: in an age where many functions traditionally assigned to government are now performed by private contractors\textsuperscript{65}, it is not self-evident when money is “paid by the Government.” To see why this matters, imagine that Boeing wins a large Pentagon contract for a new fighter jet. Boeing then enters into a subcontract with AirCorp for a jet engine. AirCorp in turn enters into a further subcontract with TechCo for an engine component. After completing the project, AirCorp presents a fraudulently inflated demand for payment to Boeing, conduct that would surely violate FCA if AirCorp had presented the bill to the government directly. Is AirCorp defrauding the “government” for FCA purposes if Boeing rather than the Pentagon writes the check, even if the ultimate source of the funds is the Government? To further complicate matters, what if TechCo presents a false claim to AirCorp?

Federal courts have squarely addressed the Boeing-AirCorp-TechCo subcontractor scenario. \textit{United States ex rel. Totten v. Bombardier Corp.} involved alleged false claims made to Amtrak, a government grantee.\textsuperscript{66} In

\textsuperscript{64} See, e.g., U.S. \textit{ex rel. Gale v. Raytheon Co.}, No. 05cv2264-MMA(LSP), 2009 WL 3378976, *1 (S.D.Cal. Oct. 19, 2009) (“Gale claims that by hiring an unqualified building maintenance and janitorial services company, and then charging the federal government at inflated rates for the services, Defendants are together guilty of misappropriating taxpayer funds and needlessly and recklessly endangering navy personnel.”)

\textsuperscript{65} See Lindsey Nelson, \textit{Mission Not Accomplished: Missing Billions in Iraq Enhanced Whistleblower Protections and a Large Failure in a Small Step}, 38 PUB. CONT. L.J. 277, 280 (2008) (“Contractors are now performing an increasing amount of work that, in the past, had been performed by government employees”) (citing Gov’t Accountability Office, \textit{Enhancing the Federal Government’s Ability to Address Key Fiscal and Other 21st Century Challenges} (Dec. 17, 2007)); see also discussion \textit{supra} Part I.

\textsuperscript{66} 380 F.3d at 498 (“Making false records or statements to get a false claim paid or approved by Amtrak is not making or using ‘a false record or statement to get a false or fraudulent claim paid or approved by the Government’ for purposes of 3729(a)(2) liability) (emphasis in original).
Alison Engine Co. v. United States ex rel. Sanders, defense subcontractors allegedly presented false claims to government contractors farther up the chain. Totten and Allison Engine ruled that there is no FCA liability where subcontractors do not present their claim directly to the government or intend the fraud to be “material to the Government’s decision to pay or approve the false claim.” The current financial crisis and economic downturn has given the FCA presentation/subcontractor issue new urgency. The Federal government has committed over a trillion dollars of taxpayer money to the bailout and stimulus packages. Much of this taxpayer money is likely to be channeled through subcontractors and other intermediaries. At the same time, Totten and Allison Engine made the FCA a much less potent weapon against fraud directed at government money spent by subcontractors.

Congress enacted FERA §4, titled “Clarifications to the False Claims Act to reflect the original intent of the law,” to close the subcontractor loophole opened by Totten and Allison Engine. FERA §4 “legislatively overrules” Allison Engine and Totten by amending FCA to clarify that there is no presentment requirement. FERA §4 replaces

67 128 S. Ct. at 2127.
68 Id. at 2130-31.
69 David Cho and Lori Montgomery, New Bailout May Top $1.5 Trillion, WASH. POST, Feb. 10, 2009 (Bus. Sec.).
70 S. REP. NO. 111-10, at 10 (2009), as reprinted in 2009 U.S.C.C.A.N. 430, 437 (“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. Protecting these funds from fraud and abuse must be among our highest priorities as we move forward with these necessary actions.”)
71 Id. at 10, as reprinted in 2009 U.S.C.C.A.N. 430, 438 (“The effectiveness of the FCA has recently been undermined by court decisions limiting the scope of the law and allowing subcontractors and non-governmental entities to escape responsibility for proven frauds. In order to respond to these decisions, certain provisions of the FCA must be corrected and clarified in order to protect the Federal assistance and relief funds expended in response to our current economic crisis”); see also id. at 10-12, as reprinted in 2009 U.S.C.C.A.N. 430, 437-40 (discussing the impact of Allison Engine, Totten and DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 617 (E.D. Va. 2006)) on FCA liability for subcontractors and grantees).
72 See Science Applications, 653 F.Supp.2d at 106 (“FERA ‘legislatively overrules’ the holding of Allison Engine by amending the language of § 3729(a)(2), replacing the words ‘to get’ with the word ‘material’”); see also Robert T. Rhoad and
(a)(2)’s problematic phrase “to get...paid or approved by the government” with a judicially-approved materiality standard: “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.”

FERA also removes the phrase “to an officer or employee of the Government, or to a member of the Armed Forces,” which clarifies that there is no presentment requirement in (a)(1). Drafts of similar amendments to FCA had been circulating in Congress since 2007, but the financial crisis created the necessary impetus for Congress to pass FERA’s FCA amendments.

Commentators have noted FERA’s potential for increased FCA liability in light of the Federal stimulus package. This article focuses on...
another aspect of FERA that has already divided courts and is again leading to the sort of inconsistent and unpredictable outcomes in FCA litigation that FERA was meant to correct. The controversy involves FERA’s effective date provision, which reads (emphasis added):

4(f) EFFECTIVE DATE AND APPLICATION. The amendments made by this section shall take effect on the date of enactment of this Act [May 20, 2009] and shall apply to conduct on or after the date of enactment, except that—

(1) subparagraph (B) of section 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date; and

(2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.

To understand why this section is causing problems, take each provision separately. Section 4(f) states that FERA’s amendments to FCA apply only to future conduct. There are two exceptions to § (4)(f) in Subsections (1) and (2), each covering separate statutory provisions. The Subsection that has caused controversy—4(f)(1)—carves out an exception for the amendments company to be liable under the FCA. Combining that possibility with the other FERA amendments that provide for expanded protection available to whistleblowers and qui tam relators, the potential is great for a flood of FCA litigation.

78 See Senate Report 110-507, at 9-10 (“[T]he FCA has been subjected to substantial legal challenges that have led to conflicting interpretations from courts across the country. These conflicts make the outcomes of FCA cases unclear—not based upon facts, but based upon where the case is filed—and significantly undermine the effectiveness of the FCA.”)

79 Note that that this provision applies only to the amendments to FCA (“the amendments made by this section”—the statute does not include effective date language for the remainder of FERA.

80 Subsection (f)(2) applies to several procedural and jurisdictional sections of FCA: § 3731(b) covers government intervention in a privately-filed FCA case; § 3733 modifies the procedures for the government to institute FCA actions; and §
to § 3729(a)(1)(B), the provision that “corrects” *Totten* and *Allison Engine* by clarifying that subcontractors need not present their claims directly to the government. This provision applies to “all claims under the False Claims Act…that are pending on or after June 7, 2008.” Some courts have held—correctly in my view— that “all claims under the False Claims Act” refers to all FCA cases that were pending on or after June 7, 2008.82

As noted above, the outcome of the claims/cases question is highly consequential.83 FCA actions are initially filed under seal84, so we do not know precisely how many lawsuits and litigants are implicated in this interpretive issue. We do know that according to the Department of Justice, as of September 30, 2009, there was a backlog of nearly 1,000 FCA cases that the government is presently investigating.85 Given the modern realities of privatized government, many of these cases are likely to involve claims against subcontractors, grantees or other intermediaries. Under any reading of claims, however, § 4(f)(1) reaches conduct prior to FERA’s enactment date of May 20, 2009, and thus raises the red flag of legislative retroactivity.86 Commentators have noted FERA’s retroactivity issue87, but

---

81 It is my contention that this reading of § (f)(1) is a natural fit with the text of FCA, (which uses claims generically to refer to lawsuits and causes of action), and better comports with the “restorative” purpose of FERA. Several circuit and district courts have adopted this reading of claims, although these rulings lack thorough reasoning. See *infra*, Part VI for my analysis of why we should read § 4(f)(1) as referring to cases.
82 See *infra* Parts V.A-B, for a discussion of the district and circuit courts that have reached this conclusion.
83 See *supra* Part I.
84 See Rich, *supra* note 14, at 1241-42 (noting that FCA action must remain under seal for sixty days, although government can request extensions, which are “routinely granted” and that *qui tam* actions often remain sealed for up to two years).
86 See *Landgraf*, 511 U.S. at 268 (“statutory retroactivity has long been disfavored…”)
87 See, e.g., Kashmira Makwana and Peter M. Smith, “To Be or Not To Be (Retroactive)—That Is the FERA Question, 12 NO. 1 J. HEALTH CARE COMPLIANCE 47 (Jan.-Feb. 2010) (summarizing FERA retroactivity rulings and evaluating the impact for corporate compliance officers); see also Christopher C.
no scholar has yet analyzed §4(f)(1)’s proper scope and operation. Because retroactivity analysis is grounded in the Supreme Court’s landmark retroactivity decision, Landgraf v. USI Film Products, I turn to that case in Part III.

III. RETROACTIVITY ANALYSIS UNDER LANDGRAF V. USI FILMS

Part II explained that FERA solved the subcontractor presentment issue by altering key FCA language which it then applied retroactively to “claims under the False Claims Act… pending on June 7, 2008.” This date is tied to the Supreme Court’s Allison Engine ruling and reinforces Congress’ belief that the Supreme Court’s presentment holding was wrong. Parts III and IV lay out the doctrinal roadmap for retroactivity analysis grounded in a line of cases beginning with Landgraf v. USI Films.

A. RETROACTIVITY AND NEGATIVE IMPLICATION

The starting point for modern retroactivity analysis is Landgraf v. USI Film Products.89 Barbara Landgraf worked in a Texas factory, suffered sexual harassment, and sued for constructive discharge in July of 1989 under Title VII of the Civil Rights Act of 1964.90 While her appeal was pending, President Bush signed into law the Civil Rights Act of 1991.91 Among other things, the 1991 Act provided compensatory and punitive damages, where the 1964 Act had only allowed equitable relief, such as reinstatement and back pay.92 Landgraf argued that her case should be remanded for a jury trial on damages under the 1991 Act.93 There was no clear statutory language commanding this result, so Landgraf argued that

Burris, et al., Converging Events Signal a Changing Landscape in False Claims Act and Whistle-Blower Litigation and Investigations, 56 Dec. Fed. Law 59, 61 (2009) (“The application of FERA’s revisions to the FCA’s substantive liability provisions is… complex. …Confusion already has arisen as to how courts should interpret this provision.”)
88 See Vashti D. Van Dyke, Retroactivity and Immigrant Crimes Since St. Cyr., 154 U. Pa. L. Rev. 741, 756 (2006) (“In Landgraf v. USI Film Products, the Supreme Court provided the modern framework for analysis of retroactivity questions in the civil context.”)
89 See id.
90 Landgraf, 511 U.S. at 248.
91 Id. at 249.
92 Id. at 253-54.
93 Id.
negative implication revealed retroactive intent when several provisions were read together.\textsuperscript{94} As the Supreme Court explains: “[negative implication] depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which [is] abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded.”\textsuperscript{95} Negative implication works best where an “associated group or series… justif[ies] the inference that items not mentioned were excluded by deliberate choice, not inadvertence.”\textsuperscript{96} Two or more sections covering the same subject matter and “reviewed and approved” at the same point in the legislative process may reasonably be interpreted as if they expressed a unified intent.\textsuperscript{97} The negative inference relies on the background “rule against surplusage,” which interprets statutory language so as to avoid redundancy.\textsuperscript{98} Negative implication assumes that each word in a statute has a specific, intended purpose within the whole statutory scheme.\textsuperscript{99}

\textsuperscript{94} \textit{Id.}
\textsuperscript{95} Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (quoting \textit{Chevron U.S.A. Inc. v. Echazabal}, 536 U.S. 73, 81 (2002)); see also \textit{William N. Eskridge, Jr. et al., Legislation and Statutory Interpretation} 263 (2000) (“[negative implication] is close cousin to the hoary canon “\textit{inclusio expressio unius est exclusio alterius}”…a rule of thumb that rests on the supposition that directives normally allow what they don’t prohibit.”)
\textsuperscript{96} \textit{Barnhart}, 537 U.S. at 168.
\textsuperscript{97} \textit{Hadix}, 527 U.S. at 356 (observing that the negative implication in \textit{Lindh} had special force because the relevant provisions of the AEDPA covered the same subject matter) (citing \textit{Lindh}, 521 U.S. at 329); see also Hamdan v. Rumsfeld, 548 U.S. 557, 579 (2006) (where the relevant provisions had been “considered…together at every stage” negative inference was strong); Field v. Mans, 516 U.S. 59, 75 (1995) (“The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects.”)
\textsuperscript{98} See Hibbs v. Winn, 542 U. S. 88,101 (2004) (“[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .”); see also Eskridge, \textit{supra} note 95, at 266 (“every statutory term adds something to a law’s regulatory impact.”)
\textsuperscript{99} See Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (“[W]here Congress includes particular language in one section of a statute but omits it in another…. it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion.”) The negative inference concept is not without its critics. \textit{See, e.g.,} Eskridge, \textit{supra} note 95, at 263 (“\textit{inclusio unius} is…an unreliable canon, and the reasons for its unreliability apply to other negative implication canons as well.”) It has also been rejected or criticized in specific cases
Landgraf’s core claim was that because some of the Act’s provisions contained explicit prospectivity language, the sections that did not contain such language must be read to apply retroactively.\textsuperscript{100} After all, why would Congress specify that some provisions were prospective unless some other provisions were not prospective? The first relevant provision, Section 402(a), reads: “Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.”\textsuperscript{101} Notice that this sentence has two clauses (in italics). The main clause states that “this Act…shall take effect upon enactment.” This tells us that the Act generally does what we normally expect a statute to do: become operative on the day it is enacted and regulate conduct from that day forward.\textsuperscript{102} However this default rule is preceded by a subordinate clause, “except as otherwise provided,” which modifies the main clause. Assuming, as we must, that no phrase is superfluous, “except as otherwise provided” must do some work in the statute. But what work does it do? The combined phrases tells us that there must be some provisions of the Act that do not take effect upon enactment, but take effect at some other time.

The main effective date provision creates a default prospectivity rule and says that this applies “except where otherwise specifically provided.” The question is where the statute “specifically provides” for a different rule. Landgraf nominated two sections with temporal language: §109(c) (“The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act”) and §402(b) (“Notwithstanding any other provision of this Act, nothing in this Act shall

where there are other plausible inferences from those sought by litigant. \textit{See, e.g.}, \textit{Lindh}, 521 U.S. at 337-41 (Rehnquist, J., dissenting) (listing several possible inferences, noting that “none of these competing inferences is clearly superior to the others” and arguing that under \textit{Landgraf}’s exceptions for procedural/jurisdictional statutes, it would not be “retroactive” to apply AEDPA to pending case); \textit{see also Hadix}, 527 U.S. at 356 (rejecting negative implication where relevant provisions covered different subject matter).

\textsuperscript{100} \textit{Landgraf}, 511 U.S. at 258 (“[Landgraf] contends that the introductory clause of § 402(a) would be superfluous unless it refers to §§ 402(b) and 109(c), which provide for prospective application in limited contexts.”)

\textsuperscript{101} \textit{Id.}

\textsuperscript{102} As clear as this may seem at first blush, I note a potential ambiguity even here. After all, “take effect upon enactment” might very well mean that the statute should be applied to pending cases, which simply raises the same \textit{Landgraf} question under a different guise. FERA gets around this problem by specifying that “takes effect” it means “applies to conduct on or after the effective date.” \textit{See FERA} § 4(f).
apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.”)

If Landgraf was right that these were the sections referred to by the phrase “except as otherwise provided” in Section 402(a), then the rest of the Act (including Section 102 governing Landgraf’s case) must have a different default rule—i.e., the rest of the Act’s provisions must not be prospective. In other words, why would Congress have created a default prospectivity rule to which it then said there were “exceptions” that in reality did not operate as exceptions at all because they were also governed by the same default prospectivity rule? The “effect” in “takes effect” must mean that the statute became operative immediately and applied to any pending cases. If it were otherwise, statutory language would be superfluous.

This argument did not persuade the majority. Landgraf had freighted two “minor and narrow provisions” with the burden of her entire negative implication argument. Also, statutory and legislative history contained ample evidence of other possible inferences. For example, the fact that an earlier version of the bill contained an explicit retroactivity provision that President Bush had cited as a reason for vetoing it, while the enacted version did not contain that provision, made it likely that Congress could not reach consensus on the retroactivity issue. Moreover, given the unsettled nature of retroactivity doctrine prior to Landgraf, it was “probable” that Congress had not expressed its intent one way or the other regarding retroactivity, leaving it to the courts to determine the temporal reach of the statute. Legislative history only confirmed the Court’s conclusion that no general agreement had been reached about the retroactive effect of the Act. Where there were explicit statements in the legislative

103 Landgraf, 511 U.S. at 258.
104 Id.
105 Id. at 256 (“[I]t seems likely that one of the compromises that made it possible to enact the 1991 version was an agreement not to include the kind of explicit retroactivity command found in the 1990 bill.”)
106 Id. at 261 (“Congressional doubt concerning judicial retroactivity doctrine, coupled with the likelihood that the routine ‘take effect upon enactment’ language would require courts to fall back upon that doctrine, provide a plausible explanation for both §§ 402(b) and 109(c) that makes neither provision redundant.”)
107 Id. at 262 (“The 1991 bill as originally introduced in the House contained explicit retroactivity provisions similar to those found in the 1990 bill. However, the Senate substitute that was agreed upon omitted those explicit retroactivity provisions. The legislative history discloses some frankly partisan statements
history supporting Landgraf’s retroactivity theory, they were “frankly partisan” and were thus discounted. Because the retroactivity language had been a point of contention in the earlier version of the 1991 Act, “[t]he absence of comparable language in the 1991 Act cannot realistically be attributed to oversight or to unawareness of the retroactivity issue. Rather, it seems likely that one of the compromises that made it possible to enact the 1991 version was an agreement not to include the kind of explicit retroactivity command found in the 1990 bill.” Therefore, it is entirely possible that Congress agreed to disagree about the retroactive application of the Act.

B. LANDGRAF’S PREASSUMPTION AGAINST RETROACTIVITY

The Court next turned to principles of statutory interpretation, which revealed two competing principles. On the one hand, there was a rule derived from Thorpe v. Housing Authority of Durham and Bradley v. School Bd. of City of Richmond that “a court is to apply the law in effect at the time it renders its decision.” In other words, courts apply new law to pending cases retroactively. On the other hand, a more recent line of cases beginning with Bowen v. Georgetown University Hospital and Kaiser Aluminum & Chemical Corp. v. Bonjorno invoked the contrary principle that “[r]etroactivity is not favored in the law…[and] congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.” Landgraf sided with Bowen and Bonjorno and found that the presumption against retroactivity was the rule with the hoarier pedigree. But before outlining

---

about the meaning of the final effective date language, but those statements cannot plausibly be read as reflecting any general agreement.”)

108 Id.
109 Id. at 257.
110 Id. at 264.
111 393 U.S. 268 (1969)
113 Landgraf, 511 U.S. at 264 (citing Bradley, 416 U.S. at 711)
114 488 U.S. 204 (1988)
115 494 U.S. 827 (1990)
116 Landgraf, 511 U.S. at 264 (quoting Bowen, 488 U.S. at 208) (internal punctuation omitted).
117 See Bowen, 488 U.S. at 208 (“Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result”); see also Bonjorno, 494 U.S. at 840-58 (Scalia, J., concurring) (providing a history of retroactivity
its new retroactivity framework, the Court needed to account for the contrary Bradley-Thorpe line of cases. Landgraf achieves this by identifying four exceptional situations where “application of new statutes passed after the events in suit is unquestionably proper” even in the absence of a clear statement: (1) statutes affecting only prospective relief are not “retroactive;”\textsuperscript{118} (2) courts “regularly appl[y] intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed;”\textsuperscript{119} (3) a new procedural rule may be applied in a pending case without retroactivity issues;\textsuperscript{120} (4) because attorney’s fees are “collateral to and separable from the main cause of action,” applying a new fee statute does not raise retroactivity concerns.\textsuperscript{121}

Where a statute implicates events preceding its effective date, we follow a two-step analysis.\textsuperscript{122} First, we determine if Congress has “unambiguously restricted the statute to prospective application.”\textsuperscript{123} This is referred to as a clear statement rule, one purpose of which is to ensure that Congress has considered the potential unfairness of retroactive operation.\textsuperscript{124}

\textsuperscript{118} Landgraf, 511 U.S. at 274 (citing American Steel Foundries, 257 U.S. 184 (1921)).
\textsuperscript{119} Id. (citing Bruner v. United States, 343 U.S. 112, 116-117 (1952)).
\textsuperscript{120} Id. at 275 (citing Ex parte Collett, 337 U.S. 55, 71 (1949)).
\textsuperscript{121} Id. at 276-77. The attorney’s fee exception accounted for Bradley. As for Thorpe, the Court treats it as an exceptional case involving an important constitutional right. Id. at 276. Thorpe seemed to combine aspects of “procedure” and “prospective relief” cases. Id. Thorpe also comports with the principle that the government should extend a grace period. Id. at 276 n.30.
\textsuperscript{122} Id. at 280. Courts have added an extra step when interpreting an agency rule. See, e.g., Durable Mfg. Co. v. U.S. Dept. of Labor, 578 F.3d 497, 503 (7th Cir. 2009) (“When…an administrative rule is at issue, the inquiry is two-fold: whether Congress has expressly conferred power on the agency to promulgate rules with retroactive effect and, if so, whether the agency clearly intended for the rule to have retroactive effect”) (citing Bowen, 488 U.S. at 208 and Clay v. Johnston, 264 F.3d 744, 749 (7th Cir. 2001)).
\textsuperscript{123} Landgraf, 511 U.S. at 280 (“When a case implicates a federal statute enacted after the events in suit, the court’s first task is to determine whether Congress has expressly prescribed the statute’s proper reach.”) See infra Part VI.A, for a discussion of the clear statement standard as applied to FERA’s retroactivity provision.
\textsuperscript{124} See id. at 268 (“[A] requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity
If Congress has clearly expressed temporal intent, then we apply the statute as intended, barring a violation of the United States Constitution. 125 If, on the other hand, there is no express temporal command, the analysis moves to a second step and asks whether applying the statute to a pending case would have genuinely “retroactive effects.” 126 There is no bright-line formulation to determine “retroactive effect” which is instead a practical inquiry grounded in common sense notions of equity. 127 The retroactive effect analysis “demands a … functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment.” 128 Landgraf laid out the following general principles to guide the retroactive effect inquiry: (1) we should ask whether a statute would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed 129; (2) the inquiry should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations 130; (3) the court should consider the nature and extent of the

outweigh the potential for disruption or unfairness); see also id. at 272-73 (“Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.”)

125 Id. at 266 (noting that the Contracts, Takings, Bill of Attainder, Due Process and Ex Post Facto Clauses of the United States Constitution prohibit certain types of retroactive legislation); see also id. at 267 (“The Constitution’s restrictions, of course, are of limited scope. Absent a violation of one of those specific provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope.”)

126 Id. at 280 (“retroactive effect” inquiry asks whether the statute “would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.”)

127 See Basset, supra note 26, at 506-7 (retroactive effect analysis applies “principles of fairness encompassing a wide range of considerations, including equity, justice, and reliance”); see also, Landgraf, 511 U.S. at 265 (“Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”)

128 Hadix, 527 U.S. at 357-58 (quoting Landgraf, 511 U.S. at 270).

129 Landgraf, 511 U.S. at 280.

130 Id. at 270; see also INS v. St. Cyr, 533 U.S. 289, 321 (2001) (“[T]he judgment whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations” (quoting Hadix, 527 U.S. at 358)) (internal punctuation omitted).
change in the law and the degree of connection between the operation of the new rule and a relevant past event.\textsuperscript{131} It is important to note that a statute is not “retroactive” merely because it implicates pre-enactment events.\textsuperscript{132} A statute is only “retroactive” if it implicates past events in a way that would be unfair or inequitable.\textsuperscript{133}

Here, the 1991 Act contained no clear statement of temporal reach, so the inquiry moved to the second stage to determine whether remanding the case for a new trial on the issue of newly-available punitive and compensatory damages would have a retroactive effect.\textsuperscript{134} The Court held that applying the new damages provision would be impermissibly retroactive. The punitive damages provision, § 102(b)(1), created retroactivity concerns because exemplary and punitive damages are like criminal sanctions, which raises problems under the ex post facto clause.\textsuperscript{135} But even the compensatory damages provision, § 102(a)(1), was impermissibly retroactive because it provided damages where there were none before.\textsuperscript{136} Thus, the new Civil Rights Act of 1991 would not be applied to Landgraf’s pending case.\textsuperscript{137}

IV. THE SUPREME COURT MODIFIES THE \textit{LANDGRAF} DOCTRINE

A line of Supreme Court decisions developed the \textit{Landgraf} doctrine, reinforcing the clear statement rule in theory, but modifying it in practice. As Justice Scalia feared, the clear statement rule has in practice softened into a “discernible legislative history” analysis.\textsuperscript{138} The most important \textit{Landgraf} case from the 1990s, Lindh v. Murphy, involved the retroactive application of the Antiterrorism and Effective Death Penalty Act of 1996

\textsuperscript{131} \textit{Landgraf}, 511 U.S. at 270; \textit{see also} Princess Cruises v. United States, 397 F.3d 1358 (Fed. Cir. 2005) (combining \textit{Landgraf} factors three and four into a three-part retroactivity inquiry).

\textsuperscript{132} \textit{Landgraf}, 511 U.S. at 269-70.

\textsuperscript{133} \textit{Id}.

\textsuperscript{134} \textit{Id} at 280-82.

\textsuperscript{135} \textit{Id} at 281.

\textsuperscript{136} \textit{Id} at 282-83.

\textsuperscript{137} Although agreeing with the result, Justice Scalia criticized the majority for indulging in the “soft science” of legislative history, which risked turning \textit{Landgraf}’s “clear statement” rule into “discernible legislative intent” rule. 511 U.S. at 287 (Scalia, J., concurring).

\textsuperscript{138} \textit{Id}. 
Defendant was convicted for murder and filed a losing habeas appeal with the district court. While his appeal was pending with the Seventh Circuit, Congress passed the AEDPA, which amended the statute governing petitioner’s habeas claim. The AEDPA made habeas arguments more difficult to win by requiring the “state court decision [to be] contrary to, or an unreasonable application of, clearly established federal law.” Lindh argued that the new more onerous AEDPA habeas standard should not be applied to his pending case. The Supreme Court agreed and took the opportunity to clarify that Landgraf’s presumption against retroactivity did not trump other interpretive principles.

The State argued that without an express command, the Landgraf presumption was triggered and there need not be any further inquiry. The Court rejected the argument that Landgraf had replaced all interpretive principles with the clear statement rule. Ordinary interpretive principles (such as negative implication) may actually remove the case from Landgraf’s ambit, for example “by rendering the statutory provision wholly inapplicable to a particular case.” In other words, where there is no clear statement, a court should analyze whether the statute is retroactive as applied to the litigant. If the statutory provision at issue does not govern litigant’s case, then Landgraf is unnecessary. Here, the Lindh majority found through negative inference that because AEDPA included an express effective date clause specifying that Chapter 154 applied to pending cases, this implied that the provision at issue, Chapter 153, was only meant to

---

139 521 U.S. at 329.
140 Id. at 322-23 (“The issue in this case is whether that new section of the [AEDPA] dealing with petitions for habeas corpus governs applications in noncapital cases that were already pending when the Act was passed. We hold that it does not.”)
141 See Harris v. Stovall, 212 F.3d 940, 944 (6th Cir. 2000) (“[T]he AEDPA expressly limits the source of law to cases decided by the United States Supreme Court. We have stated that this provision marks a ‘significant change’ and prevents the district court from looking to lower federal court decisions in determining whether the state court decision is contrary to, or an unreasonable application of, clearly established federal law.”)
143 521 U.S. at 324-26.
144 Id. at 325.
145 Id. at 324-26.
146 Id. at 326.
apply to future cases.\textsuperscript{147} \textit{Lindh} established the general proposition that \textit{Landgraf} did not displace ordinary interpretation principles and ratified negative implication analysis for retroactivity issues.\textsuperscript{148}

Also, several cases have called into doubt the “exceptional” nature of jurisdictional, attorney’s fees and procedural statutes. One of these, \textit{Hughes Aircraft Co. v. U.S. ex rel. Schumer},\textsuperscript{149} lies at the intersection of retroactivity and FCA jurisprudence. By the time \textit{Hughes Aircraft} was decided in 1997, the retroactivity of the 1986 FCA amendments had been litigated for ten years.\textsuperscript{150} The relevant conduct in \textit{Hughes Aircraft} had taken

\textsuperscript{147} \textit{Id.} (“We read this provision of § 107(c), expressly applying chapter 154 to all cases pending at enactment, as indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act.”) The dissent quarreled with the majority’s negative inference analysis and would have applied AEDPA to pending cases under \textit{Landgraf}’s “procedural cases,” “prospective relief” and “jurisdictional statute” exceptions. \textit{Id.} at 342-43 (Rehnquist, J., dissenting). Justice Rehnquist raises the possibility that any inferences we could draw about what Congress intended by including retroactivity language in Chapter 154 and not Chapter 153 could be countered by equally plausible inferences in the opposite direction. For example, different language in Chapters 153 and 154 might have been the result of tacit Congressional agreement to let the courts decide the question of an effective date. \textit{Id.}

\textsuperscript{148} \textit{See, e.g.} Mathews v. Kidder, Peabody & Co., Inc., 161 F.3d 156, 162 (3d Cir. 1998) (“While \textit{Landgraf} reaffirmed the traditional rule requiring retroactive application to be supported by a clear statement from Congress, \textit{Lindh} established that general rules of statutory interpretation apply to determine whether Congress has clearly spoken either way-as to prospective or retrospective application”) (internal citations omitted) (citing \textit{Lindh}, 521 U.S. at 326); \textit{see also} Killingsworth v. HSBC Bank Nevada, N.A., 507 F.3d 614, 621 (7th Cir. 2007) (“The Third Circuit has characterized \textit{Lindh} as establishing an intermediate step in the \textit{Landgraf} framework, requiring courts to examine a statute under normal rules of statutory construction for evidence of congressional intent to apply the statute prospectively only”) (internal punctuation omitted) (citing Mathews, 161 F.3d at 162); \textit{Hamdan}, 548 U.S. at 578 (“A familiar principle of statutory construction, relevant both in \textit{Lindh} and here, is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.”)

\textsuperscript{149} 520 U.S. 939.

\textsuperscript{150} \textit{See infra} Part VI for a discussion of the Justice Department’s desire to have FERA avoid the costly litigation over the effective date of the 1986 FCA amendments.
place between 1982 and 1984.\footnote{Hughes Aircraft, 520 U.S. at 945.} In 1986, the FCA was amended, in part to lift the jurisdictional bar on \textit{qui tam} lawsuits where the government already knows about the wrongdoing (the so-called government knowledge bar).\footnote{Id. at 946.} Respondent filed his FCA suit in 1989, based on conduct from the early and mid 1980s.\footnote{Id. at 943.} Defendant argued that the action was precluded under the pre-1986 FCA government knowledge bar that was in effect when the conduct occurred.\footnote{Id. at 945 (The allegedly false claims at issue in this case were submitted by Hughes between 1982 and 1984. At that time, the FCA required a district court to dismiss a \textit{qui tam} action ... based on evidence or information the Government had when the action was brought”) (quoting 31 U.S.C. § 3730(b)(4) (1982)).} There was no clear statement, so the Court conducted a retroactive effect analysis.\footnote{Id. at 946-52.} Respondent argued there was no retroactive effect because “the 1986 Amendments to the \textit{qui tam} bar do not create a new cause of action where there was none before, change the substance of the extant cause of action, or alter a defendant’s exposure for a false claim by even a single penny and thus do not increase a party’s liability for past conduct.”\footnote{Id. at 948 (quoting Brief for Respondent, at*15).} The Court rejected this position for several reasons. First, the non-availability of the government knowledge bar under the 1986 FCA was akin to the retroactive deprivation of an affirmative defense.\footnote{Id. at 946-52 (quoting Collins v. Youngblood, 497 U.S. 37, 49 (1990) (“A law that abolishes an affirmative defense” violates the Ex Post Facto Clause) and Beazell v. Ohio, 269 U.S. 167, 169-170 (1925)(“[Any] statute ... which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as \textit{ex post facto}.”) It is revealing that the Court supports this theory with a “cf.” signal to two \textit{criminal law} Ex Post Facto decisions. Since \textit{Calder v. Bull} in 1798, the \textit{Ex Post Facto} Clause has been applied exclusively to criminal and not civil statutes, such as FCA. \textit{See supra} note 38.} Second, the Court reasoned that the removal of the government bar under the amended statute empowered more \textit{qui tam} relators to sue with different (i.e., purely monetary) incentives from those of the government.\footnote{Hughes Aircraft, 520 U.S. at 949 (“The extension of an FCA cause of action to private parties in circumstances where the action was previously foreclosed is not insignificant. As a class of plaintiffs, \textit{qui tam} relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good.”)} This new incentive in effect created a new cause of action.\footnote{Id. at 945.} Third, and most puzzlingly, the
Court rejected respondent’s argument that the 1986 amendments were jurisdictional and thus did not raise retroactivity concerns under *Landgraf*.\(^\text{160}\) This is because, *Hughes Aircraft* tells us, there had never been a categorical jurisdiction exception at all, and that *Landgraf* was referring more narrowly to statutes that “simply change[] the tribunal that is to hear the case” rather than those that, as FCA arguably did here, creates jurisdiction where none existed previously.\(^\text{161}\) But this is really just a roundabout way of saying that jurisdictional statutes should be analyzed under ordinary retroactive effect principles, thus calling into doubt the vitality of the exception that had been articulated by *Landgraf*.\(^\text{162}\) Similarly, it is unclear whether attorney’s fees\(^\text{163}\) and jurisdictional or procedural statues\(^\text{164}\) operate as the exceptions to retroactivity that *Landgraf* had strongly implied.\(^\text{165}\)

---

160 *Id.* at 950-51.
161 *Id.* at 951.
162 See Bassett, *supra* note 27 at 497 (“Taken together, *Hughes* and *Lindh* served effectively to eliminate the exceptions for jurisdictional and procedural legislation that had been described in *Landgraf*. Rather than treating such provisions as exceptions to the presumption against retroactivity, the Court instead evaluated such matters in the same manner as any other legislation. These decisions undercut *Landgraf*’s claim that it provides a purported framework for retroactivity analysis—a point made even more clearly by [Martin v. Hadix.]”)
163 See, e.g., *Hadix*, 527 U.S. 343. The Prison Litigation Reform Act (PLRA) lowered the statutory fee award for prisoner civil rights litigation. *Id.* at 351-52. *Hadix* acknowledged that applying the new lower rate to past legal work would have retroactive effect, despite the fact that *Landgraf* had seemed to make an exception for attorney’s fees statutes: “When determining whether a new statute operates retroactively, it is not enough to attach a label (e.g., ‘procedural,’ ‘collateral.’)” *Id.* at 359. However, the Court held that applying the new lower award for future legal work was not “retroactive,” despite the fact that attorneys had agreed to undertake representation under the higher, pre-PLRA fee schedule. *Id.* at 360-1. The majority reasoned that attorneys were free to refuse to continue representing clients if they were not happy with the new lower PLRA fee. *Id.* at 360. Justice Ginsburg reasons convincingly that, to the contrary, altering an attorney’s fee statute may in fact be retroactive in the disfavored sense: “attorneys engaged before passage of the PLRA have little leeway to alter their conduct in response to the new legal regime; an attorney who initiated a prisoner’s rights suit before April 26, 1996, remains subject to a professional obligation to see the litigation through to final disposition.” *Id.* at 369 (Ginsburg, J., concurring and dissenting).
164 See, e.g., Republic of Austria, 541 U.S. at 693 (stating that “we sanctioned the application to *all pending and future cases* of intervening statutes that merely confer or oust jurisdiction. Such application, we stated, usually takes away no
Finally, subsequent courts have developed *Landgraf*’s “retroactive effect” jurisprudence. In *I.N.S v. St. Cyr*, for example, the Supreme Court decided the retroactivity implications of the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) and related statutes. The question in *St. Cyr* was whether the IIRIRA’s repeal of discretionary relief from deportation applied retrospectively where petitioner had pled guilty to a felony prior to the statute’s enactment. There was no clear intent, so the Court applied a retroactive effect analysis to hold that because petitioner had entered a plea agreement under an earlier regime where discretionary withholding was available, it would violate “familiar considerations of fair substantive right but simply changes the tribunal that is to hear the case. Similarly, the diminished reliance interests in matters of procedure permit courts to apply changes in procedural rules in suits arising before the rules’ enactment without raising concerns about retroactivity.” (emphasis added and internal citations and punctuation omitted) (quoting *Landgraf*, 511 U.S. at 274-75); see also *Hamdan*, 548 U.S. at 576-7 (“We have explained…that…unlike other intervening changes in the law, a jurisdiction-conferring or jurisdiction-stripping statute usually takes away no substantive right but simply changes the tribunal that is to hear the case… That does not mean, however, that all jurisdiction-stripping provisions—or even all such provisions that truly lack retroactive effect—must apply to cases pending at the time of their enactment”); see also id. at 656 (Scalia, J., dissenting) (“An ancient and unbroken line of authority attests that statutes ousting jurisdiction unambiguously apply to cases pending at their effective date.”)

*Landgraf*, 511 U.S. at 274 (“We have regularly applied intervening statutes conferring or ousting jurisdiction…”) (emphasis added); see also id. (“application of a jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case”) (emphasis added) (internal citations omitted); *id.* at 275 (“Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive”) (emphasis added) (internal citation omitted); *id.* (“Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity”) (emphasis added). The Court adds a caveat in a footnote that “[o]f course, the mere fact that a new rule is procedural does not mean that it applies to every pending case. A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial.” *Id.* at n.29.

533 U.S. 289.

*Id.* at 293.
notice, reasonable reliance, and settled expectations” to deprive petitioner of
the quid pro quo implied in a guilty plea in an immigration context.\textsuperscript{168}

V. COURTS ARE SPLIT OVER FERA’S RETROACTIVITY

Litigants have begun to test the retroactivity of FERA.\textsuperscript{169} Courts
have not shed much light on the retroactivity issue, because they have not
supplied a complete \textit{Landgraf} analysis. Parts V.A-B discuss court rulings on
the retroactivity issue, which have split into “retroactivity” and “no
retroactivity” camps. The retroactivity courts reach the right result, but do
not conduct a complete \textit{Landgraf} analysis, nor do they address the
\textit{claims/cases} question. The “no retroactivity” courts at least acknowledge
the interpretive difficulties, but they reach the wrong result because they fail
to apply a correct and complete \textit{Landgraf} analysis. I explain why
retroactivity is the right result in more detail in Part VI.

A. RETROACTIVITY COURTS

The Second\textsuperscript{170}, Fifth, Seventh and Tenth Circuits have stated or
implied that FERA is retroactive. In \textit{U.S. ex rel Longhi v. U.S.} the Fifth
Circuit faced the question of whether the narrow “outcome materiality”
standard\textsuperscript{171} or FERA’s broader materiality standard\textsuperscript{172}
controlled an FCA case filed in 2002. The \textit{Longhi} Court held that FERA’s materiality standard
governed the case, reasoning that with FERA, Congress had chosen the
broader materiality standard adopted by the Fourth, Ninth and Sixth

\textsuperscript{168} \textit{Id.} at 321-22.
\textsuperscript{169} \textit{See} Burris, et al., \textit{supra} note 86, at 61-62 (noting impact of the FERA
amendments on FCA litigation).
WL 2143829, at *3 n.2 (2d Cir. July 16, 2009) (acknowledging that some of
FERA’s provisions were retroactive, but holding this did not affect the present
case).
\textsuperscript{171} 575 F.3d 458, 468-69 (5th Cir. 2009) (defining “outcome materiality” as “a
falsehood or misrepresentations must affect the government’s ultimate decision
whether to remit funds to the claimant in order to be ‘material’”) (citing U.S. v.
Southland Management Corp., 238 F.3d 665, 676 (5th Cir. 2002)).
\textsuperscript{172} \textit{Id.} at 470 (under FERA, “‘material’ means having a natural tendency to
influence, or be capable of influencing, the payment or receipt of money or
property.” If Congress intended materiality to be defined under the more narrow
outcome materiality standard, it had ample opportunity to adopt the outcome
materiality standard in FERA. Instead, Congress embraced the test as stated by the
Supreme Court and several courts of appeals”) (quoting § 3729(b)(4)).
Circuits. The Court declined to rule on whether this was a “retroactive[] or prospective[]” application of FERA, but held that the new materiality standard was relevant to interpreting what Congress had intended in the 1986 FCA amendments.

The Seventh and Tenth Circuits acknowledged that FERA is retroactive. *U.S. ex rel. Lusby v. Rolls Royce* noted that FERA § 4(f) generally applies its amendments to § 3729(a) to post-enactment conduct. As an aside, however, the Court added that there was “an exception for the changes to § 3729(a)(1)(B), but that does not affect [relator’s § 3729(a)(7)] action.” In *U.S. ex rel. Lacy v. New Horizons, Inc.*, the Tenth Circuit stated in a footnote that “a very few of the Act’s provisions apply retroactively to [plaintiff’s] claims….Of those provisions expressly made retroactive, none establishes or changes the pleading requirements for an FCA complaint.”

The District Courts for the Eastern District of Virginia, the Northern District of Illinois, the Northern District of Georgia, and the Eastern District of Louisiana have stated—or implied—that FERA

---

173 *Id.*

174 *Id.* (citing NCNB Texas Nat’l Bank v. Cowden, 895 F.2d 1488, 1500 (5th Cir.1990) (“[A] legislative body may amend statutory language to make what was intended all along even more unmistakably clear.”) (quoting United States v. Montgomery County, Md., 761 F.2d 998, 1003 (4th Cir.1985)). The position of the Fifth Circuit on the retroactivity of FERA is not clear. In a criminal money laundering case, *U.S. v. Bueno*, 585 F.3d 847, 853 n.4 (5th Cir. 2009), Judge Demoss stated in a special concurrence that FERA “is silent on retroactivity; therefore, it only applies to conduct which occurs post-amendment” (citing *Landgraf*, 511 U.S. at 280).

175 570 F.3d 849, 855 n.1 (7th Cir. 2009).

176 *Id.* (citing *Landgraf*, 511 U.S. 244).

177 *U.S. ex rel. Carter v. Halliburton Co.*, No. 1D08-3888, 2009 WL 224033, at *5 n.3 (E.D.Va. July 23, 2009) (“Because this case was pending on June 7, 2008, the Court has applied the amendment in § 3729(a)(1)(B) (2009) to Count 4, a claim originally brought under § 3729(a)(2) (1994).”)


operates retroactively. These courts do not explicitly address the claims/cases issue. Walner v. Northshore, for example, simply applies FERA to a pending case as if the referent for claims were self evident: “Section 4(f)(1) of [FERA] states that § 3729(a)(1)(B) applies to all claims pending on and after June 7, 2008. ….Because [plaintiff’s] claim was pending on June 7, 2008, the Court will apply the new version.”

Likewise, Stephens v. Tissue Science Laboratories held that “[a]lthough most of [FERA’s] changes apply only to conduct on or after the day of enactment, changes to § 3729(a)(1)(B) are effective retroactive to June 7, 2008, and apply to all claims under the FCA pending on or after that date….Because this action was pending on June 7, 2008, the amended § 3729(a)(1)(B) applies to this action.” As I explain in Part VI, this reading has the best support in FERA’s structure, intent and overall restorative purpose to “clarify” and “correct” the holdings of Allison Engine and Totten.

B. NO RETROACTIVITY COURTS

The District Courts for the Southern District of Ohio, District of Delaware, District of Columbia, the Eastern District of Arkansas, the Middle District of Georgia and the Northern District of Illinois have

181 Walner, 2009 WL 3055357, at *2 n.3.
182 2009 WL 3363727, at *4 n.2.
183 Allison Engine, 2009 WL 3626773.
184 Aguillon, 628 F.Supp.2d 542.
held that FERA is not retroactive.\textsuperscript{189} \textit{U.S. v. Aguillon} was the first case to address the FERA retroactivity issue and concluded that FERA did not provide the requisite clear statement of retroactive intent required by \textit{Landgraf v. USI Films}: “Although the Congressional record implies retrospective application it directed against applying the amendments in a way that would cause retroactive effects. Congress has not provided the requisite instruction necessary for the amendments to be used to cause retroactive effects.”\textsuperscript{190}

\textit{U.S. v. Science Applications Intern. Corp.} proffered two rationales for finding no retroactivity. First, the court credited defendant’s argument that \textit{claims} takes a technical meaning.\textsuperscript{191} The Court, however, did not explain why the technical definition of \textit{claims} should be read into § 4(f)(1). As I explain below, the fact that a statute includes a technical definition, standing alone, does not preclude the word from being used in other senses throughout the statute.\textsuperscript{192} Second, the negative implication canon revealed that the use of \textit{claims} in § 4(f)(1) and \textit{cases} in § 4(f)(2) means that \textit{claims} in (f)(1) meant something other than \textit{cases}.\textsuperscript{193} In other words, the fact that Congress uses the word \textit{claims} in § 4(f)(1) and \textit{cases} in § 4(f)(2) implies that they must have had a different reference point in mind for each provision (or else they would have chosen the same language for both).\textsuperscript{194}

\textsuperscript{189} Another court has stated without explanation that “since the time of the government’s Complaint, the FCA has been amended. In this Opinion, all references to 31 U.S.C. § 3729 refer to the version of the FCA in force at the time of the alleged violations.” \textit{U.S. v. Edelstein}, No. 3:07-52, 2009 WL 2982884, at *1 n.1 (E.D. Ky. Sept. 16, 2009).

\textsuperscript{190} \textit{Aguillon}, 628 F.Supp.2d at 550-51. The major problem with the \textit{Aguillon} holding is that skips the first \textit{Landgraf} step and does not examine the plain language of the statute for congressional intent. Had it done so, it would have found the express retroactivity clause in FERA § 4(f)(1).

\textsuperscript{191} \textit{Science Applications}, 653 F.Supp.2d at 106-7.

\textsuperscript{192} \textit{See discussion Part VI.A.2, infra.}

\textsuperscript{193} \textit{Science Applications}, 653 F.Supp.2d at 107.

\textsuperscript{194} \textit{See infra} Part VI.A.6, for a discussion of the problems with analyzing FERA § 4(f)(1) under a negative implication rubric. \textit{See also Lindh}, 521 U.S. at 330 (“negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted.”)(quoting \textit{Field v. Mans}, 516 U.S. at 75 (“The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects ...”)) (emphasis added).
The remaining “no-retroactivity” courts follow the reasoning of *Science Applications* to hold that the new FCA language does not apply to pending cases, in part because the conduct at issue took place before June 7, 2008.\(^{195}\)

VI. **LANDGRAF RETROACTIVITY ANALYSIS OF FERA**

Based on the foregoing analysis, I propose the following. I will first determine if FERA includes a clear statement of retroactive intent. To answer this question, I ask “whether Congress has expressly prescribed the statute’s proper reach.”\(^{196}\) The clear statement rule ensures that “Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.”\(^{197}\) Because of the special concerns arising from potential retroactive operation, the statement must be so clear that it could sustain only one interpretation.\(^{198}\) *Lindh* teaches that the clear statement may be found through negative implication.\(^{199}\) If statutory text is not clear, I will look to legislative history for guidance.\(^{200}\) Next, I will apply ordinary

\(^{195}\)See *Hopper*, 588 F.3d at 1327 n.2 (“While this case was pending on and after June 7, 2008, the relators do not allege that any claims, as defined by § 3729(b)(2)(A), were pending on or after June 7, 2008. Therefore, we conclude the Fraud Enforcement and Recovery Act does not apply retroactively to this case) (citing *Science Applications*, 2009 WL 2929250, at *13-14); see also U.S. ex rel. Cullins v. Astra, Inc., No. 09-60696-CIV, 2010 WL 625279, at *2 n.2 (S.D. Fla. Feb. 17, 2010) (citing *Hopper*, 588 F.3d at 1327 n.2, to conclude that FERA does not apply retroactively); *Parato*, 2010 WL 146877, at *4 n.4 (“The revised version of section (a)(1)(B) does not apply to this case because none of Defendants’ claims at issue here…were pending on or after June 7, 2008”) (citing *Science Applications*, 653 F.Supp.2d at 106-7); *Allison Engine*, 2009 WL 3626773, at *3-4 (holding that claims takes technical meaning supported by negative implication and legislative history) (citing *Science Applications*, at 106-7); *Omega World Travel, Inc.*, 2009 WL 5174283, at *2 (“The FCA was recently amended by the Fraud Enforcement and Recovery Act of 2009…Although the sections of the FCA at issue in this case were amended, those amendments did not have retroactive application. Therefore, the FCA is interpreted herein as it existed prior to the 2009 amendments.”)

\(^{196}\) *Landgraf*, 511 U.S. at 280.


\(^{198}\) *Lindh*, 521 U.S. at 328, n. 4.

\(^{199}\) See id. at 327.

\(^{200}\) See id. at 330.
interpretive principles to determine the scope of retroactivity, which will require a resolution of the claims/cases issue.\footnote{Dewees v. National R.R. Passenger Corp., No. 09-1569, 2009 WL 4912134, at *9 (3d Cir. Dec. 22, 2009) ("deciding whether a statute has a retroactive effect, a court must determine the ‘important event’ to which the statute allegedly attaches new legal consequences.")}

I conclude that the text of FERA contains an express retroactivity clause: § 4(f)(1) names a specific pre-enactment day, June 7, 2008, as its effective date and applies to claims pending on or after that day. Whatever claims means, the statute specifically targets past behavior in a way that will increase the liability of subcontractors and others who were not liable under FCA previously, because they had benefitted from the holdings of Totten and Allison Engine. Legislative history also reveals that Congress intended the FCA amendments to operate retroactively to overrule the holding of Allison Engine.\footnote{See discussion of legislative history infra Part VI.} Standing alone, this is enough for FERA to operate retroactively. Because Congress clearly intended FERA to operate retroactively to overrule the holding of the Supreme Court in Allison Engine, it should be applied to any case pending on or after June 7, 2008.

Next, I demonstrate based on the text of FERA and FCA that Congress intended claims to be read as cases. For the sake of completeness, I also provide a retroactive effect analysis of FERA. Retroactive effect tests the fairness and equity of applying a new statute to events preceding its enactment.\footnote{See discussion supra Part V.} We apply normal statutory interpretation principles to determine retroactive operation.\footnote{See id.} These principles reveal that in the absence of a clear statement, applying FERA to past events would have an impermissibly retroactive effect.

\section*{A. FERA INCLUDES AN EXPRESS RETROACTIVITY PROVISION}

To find a clear intent for retroactive application, there must be statutory language that refers unambiguously to the temporal reach of the statute.\footnote{See id.} This language may be located in legislative history or found by implication.\footnote{See id.} The text of FERA clearly expresses intent for the statute to operate on conduct occurring before its effective date. The statute unambiguously refers to a pre-enactment day, June 7, 2008, as the effective

\begin{thebibliography}{9}
\footnotesize
\bibitem{Dewees} Dewees v. National R.R. Passenger Corp., No. 09-1569, 2009 WL 4912134, at *9 (3d Cir. Dec. 22, 2009) ("deciding whether a statute has a retroactive effect, a court must determine the ‘important event’ to which the statute allegedly attaches new legal consequences.").
\bibitem{Infradiscussion} See discussion of legislative history infra Part VI.
\bibitem{Supradiscussion} See discussion supra Part V.
\bibitem{id} See id.
\bibitem{id} See id.
\bibitem{id} See id.
\end{thebibliography}
date for the amendment to FCA § 3729(a). This reference to a pre-enactment date evinces a clear intent for the statute to apply in a way that Congress knew would impose a new legal standard to already-completed events.

1. FERA’s retroactivity language is clear on its face

The purpose of the clear statement rule is to show that Congress has considered the potential downside of retroactivity, an area that raises particular “quasi-constitutional” concerns.\(^{207}\) Retroactivity language must be “so clear that it could sustain only one interpretation.”\(^{208}\) Although judges may disagree whether particular statutory language qualifies as a clear statement, it is possible in practice to reach a workable consensus.\(^{209}\) While there are no “magic words” that signify retroactive intent, courts addressing the retroactivity issue have provided guidance. For example, *Landgraf* allowed that the following language could meet the clear statement standard: “[This Act] shall apply to all proceedings pending on or commenced after the date of enactment of this Act.”\(^{210}\) The same year as *Landgraf*, *Rivers v. Roadway Exp., Inc.* reasoned that the phrase “shall apply to all proceedings pending on or commenced after” a certain date “assuredly would have applied to pending cases.”\(^{211}\) *Lindh v. Murphy* noted a number of Supreme Court decisions that had found a clear statement for

---

\(^{207}\) See id.; see also William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 597 (1992) (arguing that “super-strong clear statement rules” are a way that courts can force legislators to focus on otherwise underenforced constitutional norms); see also, Linda D. Jellum, *Mastering Statutory Interpretation* 244 (2008) (“The requirement of a clear, or plain, statement is based on the simple assumption that a legislature would not make major changes without being absolutely clear about doing so.”)

\(^{208}\) *INS v. St. Cyr*, 533 U.S. at 317.

\(^{209}\) See John F. Manning, *Lessons from a Nondelegation Canon*, 83 Notre Dame L. Rev. 1541, 1547-48 (2008) (“It is true, of course, that judges can disagree about the question whether a statute is clear. But one can at least articulate a plausible standard against which to argue about clarity: if all or almost all of those conversant with applicable social and linguistic conventions would agree upon a statute’s meaning, the outcome can be said to be clear in context. In such a case, where almost all interpreters (sharing a common methodology) would agree that the evidence points decisively in one direction, only the most dedicated rule skeptics would hesitate to attribute the resultant interpretation to Congress.”)

\(^{210}\) 511 U.S. at 260.

retroactive intent.  

Graham v. Goodcell, for example, held that a tax “was manifestly intended to operate retroactively...[where]... it expressly applied to internal revenue taxes which had been assessed prior to June 2, 1924, and within the period of limitation applicable to the assessment.” Automobile Club of Mich. v. Commissioner, found the following to be a clear statement: “The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect.” In Hadix, the following language was an “express command:” “[This section] shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.” The Supreme Court held in Lockheed Corp. v. Spink that the following was a clear statement of prospective intent: “OBRA...expressly provides that “[t]he amendments ... shall apply only with respect to plan years beginning on or after January 1, 1988....” More recently, INS v. St. Cyr. found the following language to be a clear statement: “conviction[s] ... entered before, on, or after” the statute’s enactment date.” These cases show that the more specific and concrete the temporal language is, the more likely a court is to find that it is a clear statement of retroactivity.

212 Lindh, 521 U.S. at 328, n. 4.
213 282 U.S. 409, 418 (1931). The relevant provision reads: “If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was.....assessed prior to June 2, 1924...then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.” Id. at 414 n.1.
214 Lindh, 521 U.S. at 328, n. 4. (citing Automobile Club of Mich. v. Commissioner, 353 U.S. 180, 184 (1957)).
215 Hadix, 527 U.S. at 355.
216 517 U.S. 882, 896 (1996); see also Thorn v. BAE Systems Hawaii Shipyards, Inc., No. 08-00058 JMS/BMK, 2009 WL 274507, at *2 (D.Hawaii Feb. 2, 2009) (“[T]he ADA Amendment indicates a preference for prospective application ‘This Act and the amendments made by this Act shall become effective on January 1, 2009.’”)
218 Justice Scalia has indicated that a clear statement does not even require this much: “Even in those areas of our jurisprudence where we have adopted a ‘clear statement’ rule (notably, the sovereign immunity cases to which the Court adverts...) clear statement has never meant the kind of magic words demanded by
FERA § 4(f)(1) echoes language that has been held to be a clear statement of retroactive intent. First, the stated purpose of FERA § 4 to “clarify” Totten and Allison Engine, combined with its pre-enactment operating date, suggests a “restorative intent” that points towards retroactive operation. In Rivers v. Roadway Exp., the companion case to Landgraf, the Supreme Court faced the retroactivity of the 1991 Civil Rights Act. As is the case with FERA, one purpose of the Civil Rights Act addressed in Rivers was to legislatively overrule federal decisions construing an earlier version of the statute. The 1990 version was vetoed but included language that indicated that the new law “assuredly … applied to pending cases.” Several combined factors led to this conclusion: (1) the “Purpose” section of the 1990 version “unambiguously declared that it was intended to ‘respond to the Supreme Court’s recent decisions by restoring the civil rights protections that were dramatically limited by those decisions;’” (2) the section responding to the disapproved case was titled “Restoring Prohibition Against All Racial Discrimination in the Making and Enforcement of Contracts;” and (3) the 1990 version included the language “shall apply to all proceedings pending on or commenced after” the date of the Patterson decision. FERA shares much in common with this pattern: (1) FERA § 4 is titled “Clarifications to the False Claims Act to Reflect the Original Intent of the Law;” (2) the effective date provision states that it applies to “claims…that are pending on or after that date.”

Second, the phraseology of FERA § 4(f)(1) echoes that of other provisions held to be retroactive. For example, with its phrase “pending on or after that date,” FERA § 4(f)(1) resembles the statement “shall apply to all proceedings pending on or commenced after” approved as a clear

the Court today-explicit reference to habeas or to § 2241-rather than reference to ‘judicial review’ in a statute that explicitly calls habeas corpus a form of judicial review. In Gregory v. Ashcroft, 501 U.S. 452, 467 (1991), we said: ‘This [the Court’s clear-statement requirement] does not mean that the [Age Discrimination in Employment] Act must mention [state] judges explicitly, though it does not.’ Rather, it must be plain to anyone reading the Act that it covers judges.” Id. at 334 (Scalia, J., dissenting).

219 511 U.S. 298.
220 Id. 307-8.
221 Id. at 307.
222 Id. (emphasis in original).
223 Id.
224 Id. at 308 (emphasis in original); see also id. n.7 (stating that the “restorative purpose” standing alone was not dispositive, but when combined with the other language in the 1990 version pointed to retroactive intent).
statement in *Rivers v. Roadway*.

In *Goodcell*, the approved language mentions a specific pre-enactment date, as does FERA. *St. Cyr* identifies the phrase “before, on, or after” as a clear retroactivity statement and FERA includes the phrase “pending on or after.” FERA’s provision includes a similar combination of phrases “shall take effect…on [specific day]…and apply to all claims…pending on or after that date” as that found in other cases. The elements that are present in both FERA’s language and in judicially-approved language suggest that it qualifies as a clear statement of retroactive intent.

2. *Claims* means *cases*

Recall that under either the technical or the generic meaning of claims, FERA applies to a past event in a way that will change the legal significance of completed transactions. This is because if the statute takes the technical meaning, subcontractor defendants who violated FCA by submitting a false claim on, say, June 7, 2008 will be liable for that conduct under the new FERA amendments where they would not otherwise have been liable under *Totten* and *Allison Engine*. If *claims* means *cases*, subcontractor defendants whose cases were pending on or after June 7, 2008, but who did not present their claims directly to the government would be likewise liable for conduct that possibly occurred many years before. Although either definition of *claims* creates retroactive effect, our choice of definition will be enormously consequential. But how to choose between

---

225 511 U.S. at 307; see also Ileto v. Glock, 565 F.3d 1126, 1138 (9th Cir. 2009) (Protection of Lawful Commerce in Arms Act (PLCAA) expressed clear retroactive intent); *c.f.* 15 U.S.C.A. § 7902(b) (PLCAA) (“Dismissal of Pending Actions- A qualified civil liability action that is pending on the date of enactment of this Act shall be immediately dismissed by the court in which the action was brought or is currently pending.”)

226 282 U.S. at 418.

227 533 U.S. at 319.

228 *See generally* Martinez v. INS, 523 F.3d 365, 370 (2d Cir. 2008) (“[n]otwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996”); see also Sandhvani v. Chertoff, 460 F.Supp. 2d 114, 121 (D.D.C. 2006) (the phrase “effective immediately and applicable to cases in which the final administrative order of removal ... was issued before, on, or after” indicated retroactive intent).

229 *See supra* Part I.

230 *See id.*
them? The answer lies in contextual analysis. A word will take its ordinary meaning unless it is a term of art defined in the statute. But a technical term will only control interpretation where the term is being used in the same technical way in the provision we are interpreting as it is where it is defined by the statute. The mere fact that a statute defines a term does not mean that the term takes the technical meaning every time it appears in the statute. To assume otherwise is to make the mistake identified by the Supreme Court in General Dynamics Land Systems, Inc. v. Cline. Petitioner invoked the “presumption that identical words used in different parts of the same act are intended to have the same meaning” to argue that the word “age” meant the same thing every time it was used in the ADEA. General Dynamics clarified that this presumption does not arise where we can draw a reasonable conclusion that the word is used in different senses throughout the statute. “The presumption of uniform usage...relents when a word used has several commonly understood meanings among which a speaker can alternate in the course of an ordinary conversation, without being confused or getting confusing.”

Several FERA courts have assumed that the mere existence of a technical definition of claims signifies that the technical meaning controls. In place of this blanket assumption, we instead must ask whether claims has “several commonly understood meanings among which a speaker can alternate.” The fact that § 4(f)(1) embeds claims in the phrase “claims….under the

---

231 See Graham County Soil & Water Conservation District v. United States, 545 U.S. 409, 415 (2005) (“Statutory language has meaning only in context”) (citing Leocal v. Ashcroft, 543 U.S. 1, 9 (2004)).

232 Schneider v. Chertoff, 450 F.3d 944, 953 (9th Cir. 2006) (“unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”)


234 540 U.S. 581.

235 Id. at 595 (quoting Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932) (“the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent”) and citing United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 213 (2001) (“‘wages paid’ has different meanings in different parts of Title 26 U.S.C.”) and Robinson v. Shell Oil Co., the 519 U.S. 337, 343-44 (1997) (“term ‘employee’ has different meanings in different parts of Title VII.”))

236 Id. at 595.

237 Id. at 595-6.

238 See e.g., Science Applications, 653 F.Supp.2d at 106-7.

239 Dynamics, 540 U.S. at 595.
False Claims Act,” coupled with the frequent use of claims as a synonym for cases leads to the conclusion that Congress did not intend claims in § 4(f)(1) to take a special technical meaning.

a) Reading claims as part of a whole phrase

We do not read statutory terms in isolation, but in context.\textsuperscript{240} Thus, we cannot simply attempt to define claims in isolation. To begin with, claims in § 4(f)(1) is embedded in a phrase: “all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date.” When we plug our definitions of claims into the whole phrase, it quickly becomes apparent that the technical definition would not be a natural fit. First, it does not make sense to say that a claim submitted for payment to the government or another contractor is a claim “under the False Claims Act.” While it is true that such conduct would be “under the jurisdiction” of FCA, we would not normally say that a request for payment is submitted “under” a statute that might be violated by its submission. It is true that FCA defines claim as “any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property.”\textsuperscript{241} But the use of “under” in the definition of claim counts against the technical reading, because its inclusion in FERA § 4(f)(1) would be redundant (i.e., “a claim under a contract under the False Claims Act.”) This awkward phrase would be a rather roundabout way for Congress to express prospective intent. If Congress had intended to have the new rule apply exclusively to conduct that took place on or after June 7, 2008, it could simply have said so, as it did with earlier versions of the statute.\textsuperscript{242} Second, Courts routinely use the phrase “claim under the False Claims Act” and cognate phrases in the generic sense to mean “lawsuits brought under the False Claims Act.”\textsuperscript{243}

\textsuperscript{240} See Graham County Soil, 545 U.S. at 415.
\textsuperscript{241} 31 U.S.C.A. § 3729 (b)(2)(A) (emphasis added); see also U.S. ex rel. Hendow v. University of Phoenix, 461 F.3d 1166, 1171 (9th Cir. 2006) (“[E]ach and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim”) (quoting S.Rep. No. 99-345, at 9 (1986)) (emphasis added).
\textsuperscript{242} See, e.g., S. 2041, 110th Cong. § 9 (“The amendments made by section 2 shall take effect on the date of enactment of this Act and shall apply to conduct occurring after the date of enactment.”)
\textsuperscript{243} See, e.g., U.S. ex rel. Pogue v. American Healthcorp., Inc., 914 F.Supp. 1507, 1512 (M.D.Tenn. 1996) (“the court dismissed the plaintiff’s claim under the False Claims Act”) (emphasis added); see also Tissue Science Laboratories, 2009 WL
The FCA itself uses the prepositional “under” construction in this same way.\textsuperscript{244} If §4(f)(1) did not include the prepositional phrase beginning “under,” the technical reading might be rescued (although it would still be a stretch). As it stands, however, to make sense at all, we would need to exclude the “under the False Claims Act” phrase, which the rule against surplusage will not permit us to do.

The generic meaning does not cause this problem. Lawyers and judges often use the word “claims” interchangeably with “case,” “legal theory,” “lawsuit,” etc., as does FCA itself.\textsuperscript{245} Thus, the generic reading comports with our general understanding of how claims is used by legislators and courts.\textsuperscript{246} As well as being more in line with its common usage, the generic meaning avoids rendering the phrase “under the False Claims Act” redundant. This is because it is not redundant to specify that the amendment applies to cases brought “under the False Claims Act” since there are cases pending in federal courts under myriad legal theories. “Cases pending under the false claims act” accounts for each word in the phrase in a way that the technical meaning does not. It thus avoids the rule against surplusage.

\textit{b) Reading claims as part of the whole statute}

\footnotesize{
3363727, at *5 (“\textit{Claims brought pursuant to the FCA must also meet the particularity requirement}”) (emphasis added); U.S. \textit{ex rel.} Gay v. Lincoln Technical Institute, Inc., No. Civ.A. 301CV505K, 2003 WL 22474586, at *2 (N.D.Tex. Sept. 3, 2003) (“Even if Relators had alleged sufficient facts, they would have still failed to state a cognizable \textit{claim under the False Claims Act}”) (emphasis added); U.S. \textit{ex rel.} Hendow v. University of Phoenix, 461 F.3d 1166, 1169 (9th Cir.2006) (“This case involves allegations \textit{under the False Claims Act}”) (emphasis added).\textsuperscript{244} \textit{See}, \textit{e.g.}, 31 U.S.C.A. § 3730(a) (“the Attorney General may bring a civil action \textit{under} this section…”) (emphasis added); \textit{see also} § 3730(b)(3) (“The defendant shall not be required to respond to any complaint filed \textit{under} this section…”)\textsuperscript{245} \textit{See infra} Part VI.A.2(b).

\textit{246 See} BLACK’S LAW DICTIONARY (8th ed. 2004) (“\textit{claim, n. 1. The aggregate of operative facts giving rise to a right enforceable by a court. 2. The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional. 3. A demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for}”; \textit{see also}, Republic of Austria, 541 U.S. at 698 (“…with respect to \textit{claims} to immunity thereafter asserted. Notably, any such \textit{claim} asserted immediately after the statute became effective would necessarily have related to conduct that took place at an earlier date”) (emphasis added).}
To be sure, FCA sometimes uses the word *claims* in its technical sense, but where it is used this way, it is clear from context that it is being used as such and is often embedded in a phrase such as “false or fraudulent claim.” For example, the key liability provisions §§ 3729(a)(1)(A)-(B) uses the phrase “fraudulent claim” and “false or fraudulent claim” when specifying the proscribed behavior. Similarly, § 3729(a)(2)(A) uses the phrase “false claims violations.” Claims appears throughout § 3733 embedded in the phrases “false claims investigation,” “false claims law” or “false claims act.” Of course, the phrase also appears in the Definitions section, § 3729(b)(2).

*Claims* is frequently used throughout FCA interchangeably with case or civil action. Section 3730 explains the scope of government and private power to bring civil actions under FCA. Several provisions in the same section use the word claims interchangeably with case or cause of action (emphases added):

§ 3730(c)(5) “the Government may elect to pursue its claim through any alternate remedy available to the Government.”

§ 3730(d)(1) “[i]f the Government proceeds with an action brought by a person…such person shall…receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim.”

§ 3730(d)(2) “the person bringing the action or settling the claim.”

§ 3730(d)(4) “if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous.”

Section 3731(c) finds Congress again using *claims* interchangeably with civil action and causes of action: “the Government may …clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief…to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences…” Section 3732 delimits the jurisdiction in which an FCA action may be brought. The heading of

---

247 See, e.g., 31 U.S.C. § 3733(a)(1) (“a false claims law investigation”); see also § 3733(a)(2) (“alleged violation of a false claims law.”)
§3732(b) is “Claims under state law.” Section (b) then goes on to talk about jurisdiction over “actions.” In short, Congress commonly uses claims as a synonym for cases in the FCA. Where a technical meaning is intended in the statute, it is part of the Definitions section, or it appears in § 3733 as part of the phrase “false claims law investigator” or a variant. Because the term claims is used in this generic sense throughout the statute, it is not a strong candidate for the presumption in favor of a technical meaning.

3. FERA’s legislative history

I argue above that the retroactivity issue is resolved at the textual level because “claims under the False Claims Act” means “lawsuits under the False Claims Act.” Where textual language is clear, there is no need to resort to legislative history. However, it is sometimes instructive to examine legislative history for congressional intent in retroactivity cases. Not every piece of legislative history, however, is equally authoritative. Professors William Eskridge, Jr., Philip P. Frickey and Elizabeth Garrett provide a “Hierarchy of Legislative History Sources” that, while not setting forth an exclusive list of the types of materials courts may examine, will guide my inquiry. In descending order of importance, these sources are: (1) committee reports; (2) explanatory statements by the legislation’s

---

248 See also § 3729(d): “This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.”
249 General Dynamic, 540 U.S. at 594-595.
250 See United States v. Gonzales, 520 U.S. 1, 6 (1997) (“Given the straightforward statutory command, there is no reason to resort to legislative history”) (citing Connecticut Nat. Bank v. Germain, 503 U.S. 249, 254 (1992)).
251 See, e.g., Landgraf, 511 U.S. at 262-63; see also Hamdan, 548 U.S. at 579-80.
252 FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 64 (2009) (“Given the presence of contradictory materials in [legislative history] courts have developed guidance to determine the most reliable sources of intent.”)
253 ESKRIDGE, supra note 95, at 310-17.
254 Id. at 310 (committee reports are a useful source to glean general and specific intent); see also 2A SUTHERLAND STATUTORY CONSTRUCTION § 48A:11 (6th ed.) (“A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation….Committee reports are often the best evidence of bicameral agreement, either because the House and Senate reports are identical, or because a conference report explicates the chambers’ resolution of differences”); Garcia v. United States, 469 U.S. 70, 76 (1984) (“In surveying legislative history we have
sponsors; and (3) drafting and deliberation history. Each of these sources for FERA is discussed below. In sum, FERA’s legislative history shows that Congress intended to overrule Allison Engine and Totten but does not definitively resolve the claims/cases question.

a) Prior drafts of FERA

The Committee Report refers us to precursor legislation for FERA § 4—the False Claims Act Corrections Act of 2008. The Corrections Act was introduced on September 12, 2007 by Senator Charles Grassley who was joined by original co-sponsors Senators Durbin, Leahy, Specter and Whitehouse. It was then referred to the Judiciary Committee, chaired by Senator Leahy. The Judiciary Report begins with a history of the FCA, leading up to the 1986 FCA amendments. A section titled “The Importance of the False Claims Act,” begins by stating that “[t]he need for a robust FCA cannot be understated” and emphasizes the taxpayer dollars that have been recovered since the 1986 amendments. The Report cites new areas of fraud, such as Medicare and Medicaid, with estimates of possible losses as high as $16.25 billion. The “purpose” section describes the FCA’s “noble goals” of rooting out fraud and notes that the courts had created “conflicting interpretations” of FCA that led to inconsistent

repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill.”

255 ESKRIDGE, supra note 95, at 312 (citing North Haven Board of Education v. Bell, 456 U.S. 512 (1982)).
256 Id., at 313-14.
257 Senate Report 111-10, at 10, as reprinted in 2009 U.S.C.C.A.N. 430, 438 (“The provisions in Section 4 were drawn, in significant part, from the Committee’s previous work on S. 2041, the False Claims Act Corrections Act of 2008, in the 110th Congress. The Committee feels that the report to S. 2041, S. Rpt. 110-507, should be read as a complement to this report due to a number of similar changes contained in S. 386”) (emphasis added).
258 Senate Report 110-507, at 9. Senator Grassley was a key player in the genesis of FERA’s amendments to FCA. This is unsurprising, as he was also the sponsor of the major 1986 amendments to FCA.
259 Id.
260 Id.
261 Id. at 1-5.
262 Id. at 6.
263 Id.
264 Id.
outcomes that varied from “court to court.” By clarifying the original intent of the law, the Senate hoped to “assist practitioners, judges, and businesses across the country by providing clarity and certainty to the FCA.”

b) The evolution of FERA’s effective date language

The Judiciary Committee held a hearing on February 27, 2008 titled: “The False Claims Act Correction Act: Strengthening the Government’s Most Effective Tool Against Fraud for the 21st Century.” The Department of Justice expressed concerns that there would be extensive litigation regarding FERA’s effective date as there had been following the 1986 FCA amendments. In response to these concerns, the Committee added an effective date provision that would apply the Corrections Act to “all cases pending on the date of enactment, and to all cases filed thereafter.” This is a simple, express retroactivity provision. The Justice Department filed a second letter in April 2008 expressing concern that it “was not clear whether the effective date should apply to all parts of the bill or only to its procedural provisions.” In response, the Committee changed the language again, this time creating a two-tiered provision with a default retroactivity rule plus exceptions for the amendments to the substantive liability provisions of FCA (emphases added):

(a) IN GENERAL.—Except as provided under sub sections (b) and (c), the amendments made by this Act shall take effect on the date of enactment of this Act and shall apply to all civil actions filed before, on, or after that date.

(b) FALSE CLAIMS.—The amendments made by section 2 shall take effect on the date of enactment of this Act and shall apply to conduct occurring after that date of enactment.

(c) STATUTE OF LIMITATION.—The amendment made

---

265 Id. at 9.
266 Id.
267 Id.
268 Id. at 12.
269 Id. at 30.
270 Id.
As the Committee Report explains, this change was meant to clarify that "the substantive liability provisions amended in Section 3729 take effect upon the date of enactment" and apply to conduct on or after that date.\textsuperscript{271} This effective date provision is almost a mirror image of FERA’s. It begins with default retroactivity ("all civil actions filed before, on, or after that date") and then carves out prospectivity for the amendments to FCA’s substantive liability sections. If this language had remained in FERA § 4(f), there would be no question that it did not apply retroactively. This language, however, was not included in FERA, which instead makes the substantive revisions retroactive. The Corrections Act was reported out of the Judiciary Committee on September 25, 2008, but no action was taken on it.

c) The Senate Judiciary Report for FERA

Several months after the onset of the financial crisis, Senators Leahy, Grassley and Kaufman introduced the Fraud Enforcement and Recovery Act of 2009.\textsuperscript{272} On February 11, 2009, the Senate Judiciary Committee held a hearing titled The Need for Increased Fraud Enforcement in the Wake of the Economic Downturn.\textsuperscript{273} At the hearing, the Committee heard testimony from the FBI Director, Special Inspector General for the Troubled Asset Relief Program and Acting Assistant Attorney General for the Criminal Division of the Department of Justice.\textsuperscript{274} The FBI Director spoke about an increase in mortgage fraud, the Inspector General spoke about the need for increased funding to fight securities and financial fraud, especially in light of the massive influx of taxpayer funds via TARP, and

\begin{flushleft}
\textsuperscript{271} \textit{Id.}
\end{flushleft}

\begin{flushleft}
\textsuperscript{272} S. REP. NO. 111-10, at 2, \textit{as reprinted in} 2009 U.S.C.C.A.N. 430, 430. The following senators joined later as co-sponsors: Bayh (D-IA), Specter (D-PA), Snowe (R-Maine), Harkin (D-Iowa), Klobachur (D-Minn.), Levin (D-Mich.), Dorgan (D-ND), Whitehouse (D-RI), Rockefeller (D-WV), Shaheen (D-NH), Stabenow (D-MI), Sanders (I-VT), Bennet (D-CO), Durbin (D-IL), Mikulski (D-MD), Gillibrand (D-NY), Begich (D-Alaska), Burris (D-IL), Dodd (D-Conn.), Menendez (D-NJ), Murray (D-WA), Cardin (D-MD), Reid (D-NV), Schumer (D-NY) and Pryor (D-AK). \textit{See} 155 CONG. REC. S4735-02, S4736 (2009).
\end{flushleft}

\begin{flushleft}
\end{flushleft}

\begin{flushleft}
\textsuperscript{274} \textit{Id.} at 4-5.
\end{flushleft}
the Acting Assistant General discussed the need for FERA to “provide key statutory enhancements that will assist in ensuring that those who have committed fraud are held accountable.” The Committee Report does not comment on the effective date provision. The “Purpose” section frames FERA generally as a law enforcement response to the financial crisis but reiterates the FCA amendments’ restorative purpose to overrule Allison Engine and Totten. Despite the large-bore overhaul of the anti-fraud regime throughout the rest of FERA, the amending language in FERA § 4 (including subcontractor liability and a clarified definition of claims) is very close to that contemplated by the Corrections Act, discussed above.

4. FERA sponsor statements

Unsurprisingly, individual senators emphasized different aspects of FERA at different points in the legislative process. There are no smoking guns in the sponsor statements. Nevertheless, several themes emerge. The first is the need for accountability for the economic crisis. Senator Leahy, for example, emphasized the criminal sanctions for mortgage fraud included in FERA. Senator Kaufman focused on the need to restore confidence in the financial markets. The second theme is the restorative purpose of

---

275 Id. at 5.
276 Id. at 3 (“This bipartisan legislation will reinvigorate our Nation’s capacity to investigate and prosecute the kinds of financial frauds that have so severely undermined our financial markets and hurt so many hard working people in these difficult economic times. This legislation provides the resources and new tools needed for law enforcement to uncover and prosecute these frauds and to aggressively work to detect and prevent fraud related to the Government’s ongoing efforts to bail out banks and stimulate the economy.”)
277 Id. at 10 (“[Section 4] amends the FCA to clarify and correct erroneous interpretations of the law that were decided in Allison Engine… and Totten…”)
278 See supra Part VI.A.
279 155 CONG. REC. S4408-02, S4408-10 (daily ed. April 20, 2009) (statement of Sen. Leahy) (emphasizing law enforcement response to the fraud causing massive financial loss); see also id. at S4414-15 (statement of Sen. Klobuchar) (emphasizing need for law enforcement response to financial fraud); id. at S4420 (“There is a lot of work to do in investigating and cracking down on financial fraud, including mortgage fraud. The bill we are considering this week is going to go a long way toward that effort”) (statement of Sen. Dorgan).
280 155 CONG. REC. S3115-01, S3210 (daily ed. Mar. 16, 2009) (statement of Sen. Kaufman) (“Foremost, we must rescue, reform, and recapitalize our banking system. and I pressed this legislation forward because we needed to ensure that the Justice Department, the FBI, and other law enforcement agencies have the
FERA’s FCA amendments, which respond to “recent court decisions and changes in government-contracting practices [which] have limited the effectiveness of the False Claims Act.”

Statements by co-sponsors affirm that the FERA § 4 was meant to reverse the presentment decisions. They also show that the sponsors considered the FCA amendments integral to a broad anti-fraud program necessitated by the present financial crisis. At the same time, the statements show that Congress considered the amendments to be narrowly targeted and not creating any new penalties.

Finally, Representative Berman, a key sponsor of the House version of FERA, made a statement that supports retroactive application. Representative Berman directly addresses the retroactivity of Section 4(f) and then stated: “We intend for the definition of claim also to apply to all False Claims Act claims pending on or after June 7, 2008, as that definition is an intrinsic part of amended Section 3729(a)(1)(B). The purpose of this amendment is to avoid the extensive litigation over whether the amendments apply retroactively, as occurred following the 1986 False Claims Act amendments.”

Representative Berman adds that:

resources they need to find, prosecute, and jail those who have committed financial fraud.”

---

281 155 CONG. REC. S4408-02, S4410 (daily ed. April 20, 2009).
282 See, e.g., 155 CONG. REC. S1679-01, S1682 (daily ed. Feb. 5, 2009) (statement of Sen. Leahy) (“The effectiveness of the False Claims Act has recently been undermined by court decisions which limit the scope of the law and allow subcontractors paid with government money to escape responsibility for proven frauds. The False Claims Act must quickly be corrected and clarified in order to protect from fraud the Federal assistance and relief funds expended in response to our current economic crisis.”)
283 See id. at 1681-82 (statement of Sen. Leahy).
284 155 Cong. Rec. S4408-02, S4410 (daily ed. April 20, 2009) (“The bill creates no new statutes and no new sentences. Instead, it focuses on modernizing existing statutes to reach unregulated conduct and on addressing flawed court decisions interpreting those laws”); see also id. at S4413 (stating that the changes to FCA did not create “new paths to recover[] illgotten gains,” but instead were “carefully considered” and “precisely targeted” to correct “ill-considered” court decisions) (statement of Sen. Kaufman).
286 Id.
287 Id.
With the exception of conspiracy liability, the courts should rely on these amendments to clarify the existing scope of False Claims Act liability, even if the alleged violations occurred before the enactment of these amendments. In other words, the clarifying amendments in Section 4(a) do not create a new cause of action where there was none before. Moreover, these clarifications do not remove a potential defense or alter a defendant’s potential exposure under the Act. In turn, courts should consider and honor these clarifying amendments, for they correctly describe the existing scope of False Claims Act liability under the current and amended False Claims Act. The amended conspiracy provision, on the other hand, is limited to those violations that occur after the enactment of these amendments.288

These remarks are intended to close a potential loophole caused by the fact that § 4(f) does not explicitly incorporate the newly revised definition of claims, which resides in a different section.289 The context for this statement is Totten, where plaintiff attempted to escape the presentment requirement by pointing to FCA’s definition of claims, which even prior to FERA included requests “made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money”— a move the court rejected.290 Representative Berman is saying that both the newly “clarified” liability provisions and the new definitions of claims apply retroactively. The reference to “removing a potential defense” and “increasing liability” addresses the holding of Hughes Aircraft by making explicit that the “clarifications” to FCA do not create new liability and thus do not have “retroactive effect.”291

5. FERA’s drafting history

There were several draft versions of FERA. The first was introduced

288 Id.
290 Totten, 380 F.3d at 498-99 (“the dissent points to Section 3729(c), which, as we have seen, provides that the term ‘claim’ includes requests made to grantees and other recipients ‘if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse [the recipient] for any portion of the money or property.’ This reading has a fatal flaw: it yields exactly the same meaning that would result if Section 3729(a)(2) did not contain the words ‘by the Government’ at all.”)
291 See discussion supra Part IV.
into the Senate on February 5, 2009. The original version of FERA did not include an effective date provision. On March 5, a marked-up version was introduced containing retroactivity language that is the same language that appears in FERA § 4(f)(1), but without the companion subsection (f)(2). On May 6, 2009, the House amended FERA by adding § 4(f)(2), which applies certain procedural amendments “to cases pending on the date of enactment.” This multi-tiered provision remained in the final version signed by President Obama on May 20, 2009.

6. Conclusion: legislative history

We can draw several conclusions from legislative and drafting history. First, legislative history confirms FERA § 4’s restorative intent to overrule Totten and Allison Engine. This restorative goal was also

---

293 Id. at 6, as reprinted in 2009 U.S.C.C.A.N. 430, 434; see also S. 386, 111th Cong. § 4(b) (reported in Senate March 5, 2009).
294 The earliest House version of the FCA Corrections Act was introduced by Representative Berman (joined by Representative James Sensenbrenner) to the House on December 19, 2007. H.R. 4854, 110th Cong. (2007). The original bill includes an express retroactivity provision that reads “The amendments made by this Act shall take effect on the date of the enactment of this Act and shall apply to any case pending on, or filed on or after, that date.” Id. at § 8. Rep. Berman explained that the law’s intent was to correct judicial rulings where “courts have thrown out cases in which the Government has administered Government programs, and expended its funds through contractors and other agents, as opposed to direct expenditure.” 153 CONG. REC. E2658-02, E2658 (extension of remarks, Dec. 19, 2007) (statement of Rep. Berman). To further that end, “[w]e intend for these amendments to apply to all future cases as well as all cases that are pending in the courts on the date the amendments become law.” Id. The 2009 version of the House Corrections Act is far more detailed and has a multi-tiered effective date provision with default retroactivity (“shall apply to any case pending on, or filed on or after, that date”), but now with exceptions for several procedural provisions that would operate prospectively. See H.R. 1788, 111th Cong. § 7 (2009).
296 See
297 See, e.g., Senate Report 111-10, at 11, as reprinted in 2009 U.S.C.C.A.N. 430, 438 (“The Totten decision, like the Allison Engine decision, runs contrary to the clear language and congressional intent of the FCA by exempting subcontractors who knowingly submit false claims to general contractors and are paid with Government funds”); see also id. (“Following the decision in Totten a number of courts have held that the FCA does not reach false claims that are (1) presented to
achieved by revising the technical definition of claims to clarify that it was the original intent of FCA to capture fraud against government funds administered by third parties, even where the government no longer has title to the money.\textsuperscript{298} The “original intent” argument has additional force because Senator Grassley was the both the original sponsor of the 1986 FCA amendments and an original co-sponsor of FERA.\textsuperscript{299} While a stated intent to restore the original understanding of a statute does not dispose of the retroactivity question, it nevertheless points towards applying the FCA amendments to pending cases. This is because where Congress has expressed its intent to overrule a federal court’s erroneous interpretation of a statute, the correct reading should be applied to pending cases under the reasoning of \textit{Plaut v. Spendthrift Farm} “[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.”\textsuperscript{300} Moreover, “[i]t is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress’s latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must ‘decide according to existing laws.’”\textsuperscript{301} \textit{Plaut} was clear that Congress could

Government grantees and contractors, and (2) paid with Government grant or contract funds. These cases are representative of the types of frauds the FCA was intended to reach when it was amended in 1986.”\textsuperscript{298} S. REP. NO. 111-10, at 13 (“[T]his bill includes a clarification to the definition of the term “claim” in new Section 3729(b)(2)(A) and attaches FCA liability to knowingly false requests or demands for money and property from the U.S. Government, without regard to whether the United States holds title to the funds under its administration”) (citing \textit{Custer Battles}, 376 F.Supp. 2d. 617).

\textsuperscript{299} 155 CONG. REC. S4408-02, S4412 (“I think I have some expertise in that area, being the author of this legislation and finding the Supreme Court’s ruling contrary to congressional intent, albeit their motivation may be to interpret the law and that is the way they interpret it, but it does not keep us from going back to what we think is the original intent and saying to the courts: You got it wrong”) (statement of Sen. Grassley).

\textsuperscript{300} 514 U.S. at 226; \textit{see also} discussion \textit{supra} note 26; \textit{Landgraf}, 511 U.S. at 273-280; Lundeen v. Canadian Pacific R. Co., 532 F.3d 682, 689 (8th Cir. 2008) (applying new corrective amendment to conduct preceding enactment where the statute applies “to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.”)

\textsuperscript{301} \textit{Plaut}, 514 at 227 (quoting \textit{Schooner Peggy}, 1 Cranch at 109); \textit{see also Lundeen}, 532 F.3d at 689 (“[T]he Supreme Court reiterated Congress possesses the power to amend existing law even if the amendment affects the outcome of pending cases.”) (citing \textit{Plaut}, 514 U.S. at 218).
not reopen a final judgment lest it trigger a separation-of-powers violation of the Court’s Article III powers.\textsuperscript{302} A final judgment is one rendered by the United States Supreme Court (or one in which the time for appeal has expired).\textsuperscript{303} Therefore, FERA cannot reopen cases brought to final adjudication.

Second, legislative history reveals that Congress considered the possible effects of retroactivity. Early versions of FERA § 4 include retroactivity language.\textsuperscript{304} The Clarifications Act twice amended the effective date language to assuage the concerns of the Department of Justice that unclear retroactivity language could lead to a replay of the post-1986 FCA litigation.\textsuperscript{305} In the next version, FERA § 4(f), Congress tied the substantive amendments to the date of Allison Engine, making these amendments retroactive. The floor statement made by Representative Berman only confirms that Congress considered the retroactivity issue.\textsuperscript{306}

Third, drafting history undermines the negative implication theory that several courts have relied on to conclude that claims and cases must mean different things.\textsuperscript{307} It is well established that negative implication works best where the provisions at issue were drafted at the same time and cover the same subject matter.\textsuperscript{308} As demonstrated above, §§ 4(f)(1)-(2)

\begin{itemize}
\item \textsuperscript{302} Plaut, 514 U.S. at 227 (“Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was”); see also Ileto v. Glock, Inc., 565 F.3d at 1139 (there is no separation of power challenge to an amendment to applicable law, which applies in pending and future cases).
\item \textsuperscript{303} Plaut, 514 U.S. at 227 (“Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole.”)
\item \textsuperscript{304} See discussion supra note 294.
\item \textsuperscript{305} See discussion supra Part VI.A.3(b).
\item \textsuperscript{306} See discussion supra Part VI.A.4.
\item \textsuperscript{307} See, e.g., Science Applications, 653 F.Supp.2d at 107; see also discussion supra Part VI.A.5.
\item \textsuperscript{308} Lindh, 521 U.S. at 330 (“ negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted”) (citing Field v. Mans, 516 U.S. at 75) (“The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects ...”)
\end{itemize}
were drafted in different chambers of Congress at different times.\textsuperscript{309} FERA § 4(f)(1) began its life in the March 5, 2009 Senate version of FERA.\textsuperscript{310} Section 4(f)(2) entered the mix through an amendment made by the House and accepted by the Senate on May 5, 2009.\textsuperscript{311} If the provisions had been drafted together, it might have been possible to draw the inference that they include different language because § 4(f)(1) implicates substantive liability while § 4(f)(2) refers only to procedural provisions. As it stands, however, because they were drafted at different times in different chambers of Congress, the case for a negative inference regarding §§ (f)(1) and (f)(2) is weak.

\textbf{B. RETROACTIVE EFFECT ANALYSIS}

The imposition of FCA liability on subcontractors without a clear statement of retroactive intent would have retroactive effect because it would impose increased liability for past conduct. Under either definition of \textit{claims}, subcontractors who would not have been liable under the pre-FERA presentment rulings would now be liable for treble damages under FCA. Prior to FERA, under the technical reading, subcontractors who had claims pending between June 7, 2008 and May 20, 2009 would not have been subject to treble-damages FCA liability. They now would be subject to such liability. Even ordinary compensatory damages would affect the liability of FCA subcontractor defendants in the same fashion as triggered retroactivity concerns in \textit{Landgraf}.\textsuperscript{312} As the Supreme Court stated in \textit{Landgraf}, “[t]he extent of a party’s liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored.”\textsuperscript{313}

Moreover, under the \textit{cases} theory, potential liability reaches back many years, as the conduct underlying pending FCA cases may have occurred long ago.\textsuperscript{314} The \textit{Aguillon} court’s analysis was therefore correct in at least one respect: “If, in fact, plaintiff were not required to prove actual payment or approval under the 2009 amendments to the FCA, application of the FCA amendments would cause retroactive effects because it would

\begin{itemize}
\item \textsuperscript{309} See discussion \textit{supra} Part VI.A.5.
\item \textsuperscript{310} \textit{Id.}
\item \textsuperscript{311} \textit{Id.}
\item \textsuperscript{312} \textit{Landgraf}, 511 U.S. at 282 (“Compensatory damages may be \textit{intended} less to sanction wrongdoers than to make victims whole, but they do so by a mechanism that affects the liabilities of defendants.”) (emphasis in original).
\item \textsuperscript{313} \textit{Id.} at 283-4.
\item \textsuperscript{314} See \textit{supra} Part I.
\end{itemize}
increase defendant’s liability for past conduct.” This is in line with the Supreme Court’s ruling in Hughes Aircraft that FCA amendments retroactively subjected parties to qui tam litigation that was foreclosed under prior law. A new statute that without expressly intending to nevertheless imposes retroactive liability where there was no liability before can fairly be said to operate in a fundamentally unfair way.

VII. CONCLUSION

It is an unfortunate irony that Congress chose the word \textit{claims} to describe the cases to which § 4(f)(1) applies. Using \textit{claims} in a generic sense where the statute also provides a narrower technical definition of that very term is at best sloppy draftsmanship. This is doubly so because FERA is meant to provide clarity and consistency in an unclear area of the law. The present confusion could have been avoided had Congress written a phrase such as “cases pending on June 7, 2008” or “conduct occurring prior to June 7, 2008.” Nevertheless, as I have demonstrated above, all available evidence points towards retroactivity, so courts should apply the new FCA subcontractor liability language in cases that were pending on or after June 7, 2008. This is the result Congress intended.

One final point. The financial crisis has starkly revealed structural cracks in our public policy consensus that privatized government and deregulation typically lead to better outcomes. Longtime proponents of a

\begin{itemize}
\item \textsuperscript{315} Aguillon, 628 F.Supp.2d at 550.
\item \textsuperscript{316} Hughes Aircraft, 520 U.S. at 950.
\item \textsuperscript{317} See id.; see also Landgraf, 511 U.S. at 265; see also Basset, supra note 27 at 530 (“the Supreme Court’s decisions have … traditionally considered notions of fairness in reviewing legislative retroactivity. These notions of fairness have included equity, justice, and reliance.”)
\item \textsuperscript{318} This point was suggested to me by Professor Michael Rich. See E-mail from Professor Michael Rich, Assistant Professor of Law, Capital University to Matthew Titolo, Visiting Assistant Professor of Law, West Virginia University School of Law (Feb. 17 2010, 16:21 EST) (on file with author).
\item \textsuperscript{319} See discussion supra Part VI.A.3(a).
\item \textsuperscript{320} See, e.g., supra notes 2-3; see also Victoria Nourse and Gregory Shaffer, Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?, 95 CORNELL L. REV. 61, 63 (2009) (“In the past year, the world has shown us the folly of some of legal scholarship’s most powerful intellectual assumptions. The sudden collapse of our world economy has led to economists’ open confessions that markets are not self-regulating and that they can be skewed
law and economics approach, such as Judge Richard Posner, have initiated a dialogue on the conceptual shortcomings of *laissez faire* economics that have contributed to our current economic malaise.\(^{321}\) Similarly, legal scholars will continue to debate the merits of our nation’s heavy reliance on private contractors to perform many functions traditionally performed by government.\(^{322}\) Space does not permit me to address these larger issues here. In future essays, however, I will join this debate by addressing the theoretical underpinnings that have informed both the law and economics movement and the dominant policy preference for privatized government.

---

by systematic irrational behavior, [undermining] frequent assumptions of neoclassical law and economics.”)

\(^{321}\) *See, e.g.,* Richard A. Posner, *A Failure of Capitalism: The Crisis of ’08 and the Descent into Depression* 235 (2009) (“As far as one can judge on the basis of what is known today…, the depression is the result of normal business activity in a laissez-faire economic regime—more precisely, it is an event consistent with the normal operation of economic markets.”)