A Look at the Constitutional Implications of Retrospective Laws: The Case of the False Claims Act

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Fraud and abuse costs government programs and the taxpayers tens of billions of dollars per year. In search for better ways to recover public monies lost to fraud, the federal government set out in 1986 to revive and improve an anti-fraud statute from the Civil War era, which enlisted private citizens in the government’s fight against fraud. In just twenty-four years since its revival, said anti-fraud statute, known today as the False Claims Act, became the single most powerful anti-fraud enforcement tool in the history of the United States. However, as is usually the case with powerful legislation, the False Claims Act has faced significant legal challenges over the

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3 Since 1986, recoveries under the False Claims Act totaled over $24 billion. In 2009 alone, False Claim Act recoveries topped $5.6 billion. Statistics can found at www.taf.org/statistics.htm


years since its Civil War inception and, thereafter, since its 1986 re-birth.\textsuperscript{6} The purpose of this Article is to explore the latest of such challenges arising out of the last round of amendments of the False Claims Act in 2009.

In a nutshell, critics of the False Claims Act claim that the 2009 amendments constitute an ex-post facto law which violates the United States Constitution. Courts are beginning to split on the matter. To facilitate discussion of the pertinent issues, Part I of this Article provides a basic overview of the False Claims Act; Part II provides a brief history of the False Claims Act and its amendments; Part III discusses in detail the 2009 amendments which are the focus of the ex-post facto challenge; Part IV discusses the judicial split triggered by the 2009 amendments; Part V discusses the Constitutional prohibition against ex-post facto laws, as well the existing jurisprudence for resolving ex-post facto challenges; and Part VI concludes that the 2009 amendments do not constitute an ex-post facto law.

Part I: A Basic Overview of the FCA

The False Claims Act makes it unlawful for individuals to knowingly use false information in order to obtain, retain, or cause the government to spend government funds. Most commonly, the False Claims Act is used to recover charges to the government by private persons for goods or services which are not reimbursable at the level billed (or at all), as well as to recover payments for goods or services which are defective or do not comply with government specifications.\textsuperscript{7} The Act specifically prohibits (1) knowingly presenting or causing to be presented a false claim for payment;\textsuperscript{8} (2) knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim;\textsuperscript{9} (3) conspiring to commit any violation of the False Claims Act;\textsuperscript{10} (4) having possession or control of property or money used or to


\textsuperscript{7} The False Claims Act excludes certain government officials from liability under the Act, as well as false records, claims or statements made under the Internal Revenue Code of 1986. 31 U.S.C. §§ 3729, 3730(e)(1)-(2).

\textsuperscript{8} § 3729(a)(1)(A).

\textsuperscript{9} § 3729(a)(1)(B).

\textsuperscript{10} § 3729(a)(1)(C).
be used by the government and knowingly delivering or causing to be delivered less than all of that money or property;\(^\text{11}\) (5) certifying receipt of property on behalf of the government without knowledge of the accuracy of the certification;\(^\text{12}\) (6) knowingly buying government property from an unauthorized officer of the government;\(^\text{13}\) and (7) knowingly making, or causing to be made or used, a false record to avoid or decrease an obligation to pay or transmit property to the government.\(^\text{14}\) Persons who violate the False Claims Act are subject to civil penalties of no less than $5,000 and no more than $10,000, plus three times the amount of damages sustained by the government because of the violations.\(^\text{15}\) \(^\text{16}\)

Apart from its significant penalty and treble damage provisions, the most notable feature of the False Claims Act, and the one to which most of the Act’s success is attributed, is that any private person with knowledge of government fraud may bring a civil action for a violation of the Act on behalf of the government.\(^\text{17}\) The genesis and importance of this private enforcement mechanism in American jurisprudence dates back to the Civil War.

**Part II: A Brief History of the False Claims Act**

Unscrupulous civil war defense contractors draining the U.S. Treasury with fraudulent claims for goods that were either substandard or not provided were the genesis of the False Claims Act in the United States.\(^\text{18}\) Amid rampant and covert fraudulent conduct, government officials could not police or enforce the laws themselves, so President Lincoln urged Congress in 1863

\(^\text{11}\) § 3729(a)(1)(D).

\(^\text{12}\) § 3729(a)(1)(E).

\(^\text{13}\) § 3729(a)(1)(F).

\(^\text{14}\) § 3729(a)(1)(G).

\(^\text{15}\) § 3729(a)(1).


\(^\text{17}\) § 3729(a)-(b). The Act also imposes special procedures for the filing of such actions by private persons, including filing the case under seal. See generally § 3729(b)-(c).

to pass the original False Claims Act, then commonly known as “Lincoln’s Law” or “Informers Law.”

Lincoln’s Law re-affirmed that it was illegal for a person to present fraudulent claims for payment to the federal government. More importantly, Lincoln’s Law enlisted the private sector in the government’s anti-fraud efforts by giving private citizens standing to file lawsuits to recover the stolen monies on behalf of the federal government and to receive a reward of up to fifty-percent of the recovery. The mechanism for allowing private citizens, known modernly as “relators,” to blow the whistle on fraudsters by suing them on behalf of the government is known as qui tam.

Lincoln’s Law was widely instrumental in curbing defense fraud until 1943, when it came under attack as a result of widespread concerns that allegedly parasitic lawsuits which rested on information already known to the government were yielding generous rewards for “undeserving” relators. In response to such concerns, Congress rolled back the qui tam provisions of the original False Claims Act by imposing additional requirements on relators’ right to sue and recover a reward.

Among other requirements, the 1943 law required relators to provide the government with the evidence on which their lawsuits were based; gave the government up to 60 days to intervene and thus assume primary prosecution of qui tam cases under the False Claims Act, and precluded relators from filing cases on the basis of information that was already in the government’s possession. The latter provision, which later became known as

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20 *Id.*
21 Though most agree that qui tam has been the key to the success of the False Claims Act, many do not know that qui tam was not the creation of the 1863 law. Rather, qui tam litigation has a long lineage dating back to the early English common law. See Charles Doyle, *Qui Tam: The False Claims Act and Related Federal Statutes*, CONG. RES. SERV., 1 (Aug. 6, 2009) http://www.fas.org/sgp/crs/misc/R40785.pdf (describing the history of qui tam). Further, the False Claims Act is not the only contemporary American statute containing a qui tam provision; a qui tam provision is also found in the Patent Act and in an Indian Protection Law. See Doyle, *supra* note 21, at 4; Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 768-69 n.1 (2000).
22 Doyle at 7.
23 *Id.*
the “public disclosure bar,” proved over time to be highly problematic for the potency of the Act because it removed a court’s jurisdiction to hear a suit involving information that was “public” regardless of whether the government actually knew the information or had pursued the defendants. Finally, the 1943 amendments reduced the relator’s reward from 50% of the government’s recovery to no more than 25%.

The 1943 weakening of the qui tam provisions caused Lincoln’s Law to fall into disuse for the better part of half a century. It was not until 1986, when significant concerns about extensive defense fraud once again troubled Congress, that the old anti-fraud statute became a renewed tool of interest and the subject of new amendments. It is the 1986 amendments to Lincoln’s Law that rendered the old statute into the modern qui tam statute of today.

The 1986 amendments sought to reinvigorate the False Claims Act by expanding the scope of liability and rewards under the Act. For starters, the amendments increased the penalties on the defendants from $2,000 and double damages to no less than $5,000 and no more than $10,000 in penalties and treble damages. In addition to increasing the penalties for violating the Act, the amendments increased the maximum award available to relators from not more than 25% to up to 30% of the government’s recovery. Additionally, the 1986 amendments created a new cause of action to protect relators from employment retaliation and also created an explicit

24 Lawsuits that were based on the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media were jurisdictionally barred. 31 U.S.C. § 3730(e)(4)(A).
25 See infra notes 53-54 and related text.
26 Id.
27 S. REP. NO. 99-345 (1986):
In 1985 . . . 45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses. Additionally, the Justice Department has reported that in the last year, four of the largest defense contractors . . . have been convicted of criminal offenses while another . . . has been indicted and awaits trial . . . . The Department of Justice has estimated fraud as draining 1 to 10 percent of the entire Federal budget. Taking into account the spending level in 1985 of nearly $1 trillion, fraud against the Government could be costing taxpayers anywhere from $10 to $100 billion annually.
Id. at 2-3.
28 Although the statute has been amended and/or corrected two additional times, the 1986 amendments are credited for the basic modern framework of the statute and its unprecedented success to date.
29 False Claims Act, ch. 67, § 3729, 12 Stat. 698 (1863) (current version at 31 U.S.C. § 3729(a)(1)(G)) (provided for only a $2,000 penalty since 1863).
cause of action for reverse false claims (false statements calculated to reduce an obligation to pay the United States).\textsuperscript{32} Importantly, in addition to broadening the penalties and the potential relator rewards, the 1986 amendments also provided an express and broad definition of the knowledge required for a violation of the False Claims Act, making it clear that specific intent on the part of defendants was unnecessary.\textsuperscript{33} The 1986 amendments also revised the public disclosure bar created by the 1943 amendments by exempting from it frauds as to which the relator was an original source (i.e., had knowledge of the fraud at issue in the lawsuit independent from any public disclosure).\textsuperscript{34} Finally, the 1986 amendments expanded the statute of limitations under the Act;\textsuperscript{35} established firmly that the Act was a civil statute with a preponderance-of-the-evidence burden of proof standard;\textsuperscript{36} and authorized the government to use civil investigative demands to investigate defendants.\textsuperscript{37}

Part III: Recent Developments and Current State of the Act

The 1986 amendments successfully reinvigorated qui tam litigation in the United States. Indeed, between 1986 and the end of the fiscal year ending in September 30, 2009, the FCA returned $24 billion to the United States Treasury.\textsuperscript{38} However, notwithstanding the Act’s significant successes, two decades of qui tam litigation produced judicial interpretations which diluted the Act’s potency.\textsuperscript{39}

\begin{itemize}
  \item \textsuperscript{32} 31 U.S.C. 3730 (h) (1986); 31 U.S.C. § 3729 (a)(7) (1986).
  \item \textsuperscript{33} 31 U.S.C. § 3729(b) (1986).
  \item \textsuperscript{34} 31 U.S.C. § 3730(e) (1986).
  \item \textsuperscript{35} 31 U.S.C. § 3731(b) (1986).
  \item \textsuperscript{36} Prior to the 1986 amendment, some courts had imposed more demanding standards. S. REP. NO. 99-345, at 31 (1986) (“Some courts have required that the United States prove its case by clear and convincing, or even by clear, unequivocal, and convincing evidence.”) (citing United States v. Ueber, 299 F.2d 310 (6th Cir. 1962)); H.R. REP. NO. 99-660 at 25-6 (1986).
  \item \textsuperscript{38} Statistics can found at www.taf.org/statistics.htm. The success of the False Claims Act is widely credited for the wave of state false claims statutes and enforcement actions modeled after the federal statute. The scope of the state false claim statutes varies, but they generally make persons who use false statements to obtain State funds liable to the State in the same fashion as the federal False Claims Act. See generally James F. Barger Jr., Pamela H. Bucy, Melinda M. Eubanks & Marc A. Raspanti, States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts, 80 Tul. L. Rev. 465 (2005).
  \item \textsuperscript{39} For example, the United States Supreme Court held that, in order for a claim to be false within the meaning of the Act, such claim had to be “presented” directly to the federal government, something which became known as the “presentment” requirement. See Allison Engine Co. v. United States ex rel. Sanders, 128 S. Ct. 2123 (2008).
\end{itemize}
The numerous misinterpretations of the Act’s provisions became particularly problematic for Congress in 2009 in light of the projected $1 trillion government expenditures under the Troubled Asset Relief Program (TARP) and Stimulus Bill.\(^\text{40}\) As a pre-emptive response to the expected renewed wave of fraud, Congress signed into law the Fraud Enforcement and Recovery Act of 2009 (FERA) for the express purpose of reinforcing the 1986 amendments, correcting provisions of the Act in need of clarification,\(^\text{41}\) and increasing the tools available to the government to fight fraud.\(^\text{42}\)

Among the corrections to the False Claims Act, FERA eliminated language in the earlier iteration of the False Claims Act which suggested that a false claim had to be submitted \textit{directly to} a federal officer or employee in order to meet what courts called the “presentation” requirement for liability under the earlier version of the Act.\(^\text{43}\) It did so by redefining “claim” under the False Claims Act to mean “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 directly to the United States \textit{or to a contractor or other recipient of federal monies} if the government provides or reimburses any portion of the requested funds.\(^\text{44}\)

In addition, FERA also secured the government’s claw-back ability to recover fraudulently obtained funds by providing that the government’s complaint-in-intervention in a False Claims Act case related back to the date of the relator’s filing (which often pre-dates the government’s intervention by

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\(^\text{42}\) In an April 27, 2009 press release Senator Patrick Leahy (D), who along with Senator Chuck Grassley (R) sponsored FERA, explained that the amendments would provide new resources and legal tools needed by law enforcement agencies to combat fraud effectively by authorizing the hiring of more agents, prosecutors, forensic analysts and support staff. Patrick Leahy, \textit{Senate Crosses Procedural Hurdle, Set To Vote on Leahy-Authored Anti-Fraud Bill Tuesday} (April 27, 2009), available at http://leahy.senate.gov/press/press_releases/release/?id=ada1da8d-088d-4c2b-9978-3ba59b9033e2.

\(^\text{43}\) 31 U.S.C. § 3729(a)(1)(A). Thus, the Fraud Enforcement and Recovery Act overruled the presentment requirement that the Supreme Court found in the original Act in \textit{Allison Engine Co. v. United States ex rel. Sander}, 128 S. Ct. 2123 (2008).

\(^\text{44}\) § 3729(b)(2)(A).
FERA also added specific “materiality” language for liability under the Act, providing that any false statement having a natural tendency to influence payments was material to payment and, thus, a basis for liability under the Act. FERA further expanded the conspiracy provisions of the Act, clarifying that they applied to all violations of the Act and further enlarged the reverse false claims provision of the Act by making it clear that it covered not only false statements to the government, but also any improper avoidance of returning improperly obtained monies back to the government. Additionally, FERA expanded the anti-retaliation provisions of the Act by including contractors and agents of the defendants in the class of persons who are entitled to protection under the Act.

Then, in March of 2010, just a few months after FERA’s enactment, Congress made additional corrections to the False Claims Act, seemingly missed by the FERA amendments, through the passage of the Patient Protection and Affordable Care Act (PPACA). The most important of these corrections involved the issue of public disclosure. Because the 1943 amendments to the False Claims Act had elevated to jurisdictional bar status any public disclosure of information leading to the fraud charges, arguments about the “public disclosure bar,” rather than the wrongful conduct of the defendants, took center stage in most qui tam litigation. Congress modified the jurisdictional bar in an attempt to correct the foregoing problem through the 1986 amendments by providing that a relator could maintain a qui tam suit notwithstanding a public disclosure if the relator was an original source.

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46 § 3729(a)(1)(B), (G), (b)(4). Prior to the FERA amendments, the False Claims Act provided that any person 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” was liable under 31 U.S.C. § 3729(a)(2). This subsection of the False Claims Act was amended by FERA to provide that any person who “knowingly makes, uses or causes to be made or used, a false record or statement material to a false or fraudulent claim” is liable. § 3729(a)(1)(B). Thus, FERA eliminated as requirements for liability the terms “to get paid” and “paid or approved by the Government,” which served as the basis for the Supreme Court’s finding of a “presentment” requirement in Allison Engine Co. v. United States ex rel. Sander, 128 S. Ct. 2123 (2008).
47 § 3729(a)(1)(A).
48 § 3729(a)(1)(G).
51 See supra note 14 and infra 53-54. It should be recalled that the public disclosure bar stripped a court’s jurisdiction to hear a False Claims Act suit involving information that was “public” regardless of whether the government actually knew the information or had failed to pursue the defendants.
of the information and, thus, not a parasitic relator. However, a number of judicial decisions interpreting the amended law weakened the “original source” exemption to the public disclosure bar by reading additional requirements into the statute, including the requirement that the relator be a source of the public disclosure in order to qualify as an original source under the False Claims Act. PPACA corrected these misguided judicial pronouncements by narrowing what constitutes a public disclosure; by expanding what constitutes an original source; and by giving the government the ability to veto the dismissal of an otherwise appropriate case from being automatically dismissed on the basis of public disclosure.

In general, the foregoing False Claims Act amendments were given prospective effect, with one exception: Congress provided that section 3729(a)(1) of FERA was to take effect “as if enacted on June 7, 2008, and apply to all claims under the False Claims Act...that are pending on or after that date.” It is the retrospective effect of this provision that has triggered the ex-post facto challenges which are beginning to split the courts.

Part IV: The Judicial Split

Since the FERA amendments, many courts have had the opportunity to take up the retrospective effect of FERA in the context of determining whether the defendant had a “claim” that was “pending” as of June 7, 2008, so as to bring the pending case within the retrospective purview of FERA. Naturally, 

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52 § 3730(e)(4)(A).
54 Patient Protection and Affordable Care Act § 10104(j)(2)(4)(A).
55 Congress included the following language in section 4(f) of the bill: “The amendments made by this section shall take effect on the date of enactment and shall apply to conduct on or after the date of enactment . . . .” Fraud Enforcement and Recovery Act of 2009 Pub. L. No. 111-21, § 4(f), 123 Stat. 1617, 1625.
56 In general, laws are not applied retroactively absent a clear indication from Congress that it intended such result. I.N.S. v. St. Cyr., 533 U.S. 289, 315-16 (2001) (citing Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208 (1988)).
57 Naturally, since the impetus of FERA is to broaden the scope of FCA liability, defendants always argue for the narrowest possible definition of “claim” in an effort to escape from the purview of FERA. The converse is the case as well; the government and relators argue for the broadest possible definition of “claim” in an effort to bring all cases pending on June 7, 2008 within the purview of FERA. Thus far, the judicial interpretations of “claims pending” ranges from a very narrow reading of “claims pending” (suggesting that it is a request for federal funds that is still “open” or “unpaid”) to a broader reading of “claims pending” (which includes both open or closed requests for payments that were or could have been the subject of an enforcement action under the FCA on the effective date of the amendment). Indeed, there is already a circuit split on the meaning of “claims pending” under FERA.
the constitutionality of FERA has been an issue when a court has answered that question in the affirmative; that is, when a court concludes that a defendant had a “claim pending” as of June 7, 2008 (thus falling within the retrospective purview of FERA), then the court would be expected to determine whether the retrospective effect of the statute poses a constitutional problem.\(^\text{58}\) Thus far, two courts have taken on the constitutionality of FERA in light of its retrospective effect, while many more

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The Eight Circuit and Eleventh Circuit have endorsed the narrow view that a claim is pending within the meaning of FERA if it had not been resolved (i.e., it has not been paid or denied) by the effective date of June 7, 2008. See United States ex rel. Hawley, 619 F.3d 886, 894 (8th Cir. Aug. 23, 2010) (no pending claims in that case because they had been paid prior to June 7, 2008); United States ex rel. Hopper v. Solvay Pharmaceuticals, Inc., 588 F.3d 1318, 1327 n.3 (11th Cir. 2009) (“claim” means any request or demand for money, so no “pending claims” on a case that was already pending on June 7, 2008). The majority of the district courts have followed the Eighth Circuit’s view. See, e.g., United States ex rel. Baker, 709 F. Supp.2d 1084, 1107 (D. N.M. March 19, 2010) (FERA applies to claims pending on June 7, 2008, not to cases); United States ex rel. Burroughs v. Central Arkansas Dev. Council, No. 4:08-CV-2257-JMM, 2010 WL 1875580, at *2 (E.D. Ark. May 10, 2010) (“claim” refers to defendant’s request for payment and not to pending cases); United States ex rel. Parato v. Unadilla Health Care Center, Inc., No. 5:07-CV-76(HL), 2010 WL 146877, at *4 n.4 (M.D. Ga. Jan. 11, 2010) (“claim” is a request or demand for money of property,” rather than a case); United States ex rel. Boone v. Mountainmade Foundation, 684 F. Supp.2d 1, 7 n.7 (D. Col. 2010) (FERA did not apply because the false claims for payment made in 2006 and were not pending on June 7, 2008, even though FCA case was); United States ex rel. Bender, 686 F. Supp.2d 46, 49 n.4 (D.Col. 2010) (“Claims” were not “pending” given that they had been paid prior to the case being filed in August of 2006).

In contrast, the Second Circuit has held that a “pending claim” under section 4(f) refers not just to a defendant’s pending demand for payment to the government, but rather any legal claims (i.e., cases) that were pending as of June 7, 2008. United States ex rel. Kirk v. Schindler Elevator Corp., 601 F.3d 94, 113 (2d Cir. 2010) (vacating a pre-FERA dismissal of a case on the basis of section 4(f) because the case was still in the litigative pipeline on June 7, 2008). A number of District Courts in and outside of the Second Circuit adhere to the broader view of “pending claims.” See, e.g., United States ex rel. Pervz v. Beth Israel Med. Ctr., No. 01 Civ. 2745(LAK), 2010 WL 3543457, *4 n.38 (S.D.N.Y. Sept. 13, 2010) (the amendment applies to all “legal claims” pending before a court on or after June 7, 2008); United States ex. rel. Carter v. Halliburton Co., No. 1:08CV1162(ICC), 2009 WL 2240331, *5 n.3 (E.D. Va. Jul 23, 2009) (amendment applied because case was “pending” on June 7, 2008); United States ex. rel. Drake v. NSI, Inc., No. 3:94-CV-963(WWE), 2010 WL 3417854, *5 (D. Conn., Aug. 26, 2010) (section 4(f)(1) applies to “claims” in the sense of cases before a court); United States ex. rel. Westrick v. Second Chance Body Armor, Inc., 685 F. Supp.2d 129, 140 (D. Col. 2010) (because suit was “pending” on June 7, 2008, the FERA amendments apply); United States ex. rel. Walner v. Northshore Univ. Healthsystem, 660 F. Supp.2d 891, 895 n.3 (N.D. Ill. 2009) (FERA applies to legal claims pending as of June 7, 2008). Though the definition of “claims pending” is an important one, this author believes that the constitutionality of the 2009 amendments does not hinge on it. \(^\text{58}\) That said, at least one court has taken up the constitutionality of section 4(f)(1), even after concluding that it did not apply in that case because the “claims” were not pending as of FERA’s effective date. See Allison Engine Co. v. United States ex rel Sanders, 667 F. Supp.2d 747 (S.D. Ohio 2009) (“Even if the retroactivity clause enacted as part [sic] FERA was to be found by a reading of its plain language to apply to the ‘claims’ pending in this case, application of this retroactivity language to these Defendants would violate the Ex Post Facto Clause of the U.S. Constitution.”). Curiously, it is the Supreme Court’s opinion in this very case that Congress set out to overturn through the passage of FERA. See discussion supra.
have avoided the issue altogether. Of the courts taking up the matter, one concluded that FERA violates the Ex Post Facto Clause of the Constitution. The other court concluded that it does not.

Part V: The Constitutional Landscape

The Ex-Post Facto Clause of the Constitution prohibits the passage of “retroactive” laws. Significant confusion exists between the terms “retroactive” and “retrospective” in the judicial opinions addressing the subject and in the literature applying the Ex-Post Facto Clause to FERA. Clarification of the terminology, therefore, is necessary before the issue of FERA’s constitutionally can be undertaken.

FERA became law on May 20, 2009. However, Congress made section 4(f) of FERA (codified at subparagraph (B) of section 3729(a)(1) of the False Claims Act) effective on June 7, 2008, a date which pre-dated FERA’s enactment. In street parlance, the retrospective effect of the law is sometimes referred to as “retroactivity.” However, retrospectivity and retroactivity are not interchangeable terms in constitutional parlance. All that being said, the misnomer has invaded the legal commentary and has obscured the legal analysis of whether FERA is a “retroactive” law.

A. FERA is not constitutionally retroactive because it does not impair rights

A law is not constitutionally retroactive merely because it has an effective date which pre-dates the signing of the law. A statute which has an effective date earlier than its creation is only “retroactive” in the

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62 Using the Ex Post Facto Clause, “the framers [of the U.S. Constitution] sought to assure that legislative acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.” Weaver v. Graham, 450 U.S. 24, 28-9 (1981).
constitutional sense of the term if the new provision “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.” 63 Furthermore, a law is not “retroactive” in the constitutional sense if it does not interfere with settled expectations or reasonable reliance interests. 64 65 Put in even simpler terms, the government may not “enact a law that punishes an act that was innocent prior to the enactment....” 66 The inquiry into the “retroactivity” of a law is not a “mechanical task,” but a “functional” one. To begin such a functional task, one must look to what exactly FERA changed in order to determine if that change impaired a person’s “right” or imposed “new duties.”

Prior to FERA, the FCA imposed civil liability on any person 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.” 67 However un-artful this language may have been, it is amply clear that Congress intended through the foregoing language to protect federal funds from fraud, whatever the modality for perpetrating such fraud. Indeed, it goes without saying that, even before the FCA was ever enacted, defendants never had a right to obtain federal funds through fraud.

Though Congress intended for the FCA to function as a general anti-fraud statute, a United States Supreme Court case changed that. In Allison Engine, the high Court interpreted the “to get ... paid or approved ...by the Government” language of the False Claims Act to create a “presentation” requirement of the false claim directly to the federal government (as opposed to someone else in possession of or managing federal money) before liability could attach. 68 In other words, Allison Engine created a judicial safe-harbor which allowed persons to knowingly commit fraud on the federal government with impunity as long as the fraud was committed indirectly by simply

63 Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994).
64 Id. at 277-8; Bradley v. School Bd. of Richmond, 416 U.S. 696, 721 (1974).
65 See Landgraf, 511 U.S. at 269 (“functional conceptions of legislative ‘retroactivity’ have found voice in this Court’s decisions and elsewhere”).
66 Hobbs v. County of Westchester, 397 F.3d 133, 157 (2d Cir. 2005).
submitting the false claims to third parties managing or charged with spending federal funds.\textsuperscript{69}

FERA set out to change that. The legislative history of FERA makes it clear that a significant impetus of the amendments was Congress’s desire to correct the \textit{Allison Engine} error. For example, Senator Charles Grassley (R. Iowa) stated that the amendments would “address a loophole that was created in the False Claims Act by the Supreme Court decision in the \textit{Allison Engine case}...”\textsuperscript{70} Likewise, Senator Patrick Leahy (D. Vermont), an author of the 1986 Amendments, confirmed that to be the case: “[I]n recent years, litigation fueled by powerful Government defense and health care contractors has created legal loopholes that threaten the application of this powerful tool...This legislation fixes this, thus ensuring that no fraud can go unpunished by simply navigating through the legal loopholes. \textsuperscript{71} Joining in the sentiment, Representative Howard Berman (D. California) explained that the \textit{Allison Engine} ruling “severely limits the reach of the law” and that “[t]he primary impetus for [FERA] is to reverse these unacceptable limitations and restore the False Claims Act to its original status as the protector of all Government funds or property.”\textsuperscript{72}

Thus, for the explicit purpose of over-ruling \textit{Allison Engine} and restoring the original scope of the False Claims Act as a general anti-fraud statute, FERA changed Section 3729(a)(1)(B) of the Act to impose liability on any person “who knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim...”. In so doing, Congress removed the “to get” and “paid or approved by the Government” language.

\textsuperscript{69}The \textit{Allison Engine} case involved contracts between the U.S. Navy and two shipyards for the production of a new fleet of destroyers. Each destroyer required an electrical generator set to provide electricity. Several companies (the “Subcontractors”) became involved in the project to build the generator sets. None of these Subcontractors billed the federal government, but rather billed the company directly above them in the chain of production. The company directly above them did not include these bills when submitting for payment from the government, but nonetheless, obtained payment from the government that was based, in part, on the Subcontractors bills, which turned out to be fraudulent. The Supreme Court concluded that the subcontractors had no liability under the False Claims Act because the fraudulent claims had not been presented to the United States Government. \textit{Allison Engine}, 128 S.Ct. 2123, 2131 (2008).


from the 1986 iteration of the statute from which the Supreme Court read a “presentation” requirement into the FCA. Further, Congress made the amendment effective on June 7, 2008, a date which pre-dated the *Allison Engine* decision by two days, for the clear purpose of essentially over-ruling *Allison Engine*.

In sum, Congress intended the foregoing amendment to be treated as a correction, but one that was to be given the broadest of scopes given the original intent and remedial nature of the statute. In fact, Representative Berman confirmed that the amendment was for the purpose of correcting the Supreme Court’s misreading of the original scope of the Act when he explained that the only substantive changes of the FCA under FERA was the expansion of conspiracy liability, but that the other amendments “merely clarify the law as it currently exists under the False Claims.” Representative Berman further advised the courts to “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” and to “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.” Agreeing with him, Senator Ted Kaufman (D. Delaware), a co-sponsor of FERA, stated that Congress was “not creating new crimes, or establishing an entirely new path to recovering ill-gotten gains;” rather, Congress had made “narrow changes” to ensure that “lawbreakers don’t slip through the gaps in existing law.”

Given the foregoing - as well as the fact that defendants never had a right to and could not reasonably have relied on the existence of a right to obtain federal funds from *any parties* through fraud - it is difficult to find merit in the argument that FERA’s correction of the judicially-created presentment requirement somehow “impaired” the rights of defendants or imposed new liabilities or duties on them.

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74 *Id.*
76 *Id.*
B. **FERA is not constitutionally retroactive because it is not a criminal statute**

Even if it could be argued that the amendments in question somehow impair a right or impose new duties on defendants, the amendments still do not violate the Constitutions’s Ex Post Facto Clause.\(^77\)

It is well established in American jurisprudence that the Ex Post Facto Clause applies only to criminal or penal provisions.\(^78\) Thus, in considering an Ex Post Facto challenge to any statute, courts must consider whether “the legislature intended the statute to establish civil proceedings.”\(^79\) The foregoing consideration must start with the statute’s text.\(^80\) “[O]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty”\(^81\) so as to fall within the ambit of the Ex Post Facto Clause.\(^82\)

That the text of the statute treats the False Claims Act as a civil one is unassailable. For example, the statute is codified in title 31 of the United States Code as a civil statute, rather than as a criminal statute codified in title 18.\(^83\) Moreover, section 3730 of the False Claims Act, which governs the procedures by which the Attorney General and private individuals can bring causes of action under section 3729 is entitled “Civil actions for false claims,” which again underscores the civil nature of the Act.\(^84\) Further, the legislative history of the 1986 and 2009 amendments to the False Claims Act underscore

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\(^77\) U.S. CONST. art. I, § 9.

\(^78\) Seling v. Young, 531 U.S. 250, 261-2 (2001); Eastern Enters. v. Apfel, 524 U.S. 498, 533 (1988) (“the Ex Post Facto Clause is directed at the retroactivity of penal legislation”); Burr v. Snider, 234 F.3d 1062, 1054 (8th Cir. 2000) (“it is well established that this provision applies only to criminal punishments”).

\(^79\) Seling, 531 U.S. at 261.

\(^80\) Id. at 261 (“the civil or punitive nature of an Act must begin with reference to its text.”).


\(^84\) This is the very textual analysis the Supreme Court conducted in *Hudson v. United States* 522 U.S. 93 (1997). Noting that the statute “expressly provide[s] that such penalties are civil,” the Court concluded that the monetary penalty scheme in that case, which was akin to the False Claims Act’s, was civil and not punitive in nature. Id. at 103. As in *Hudson*, the False Claims Act, by its terms, is a civil statute, not a criminal statute. Just as in *Hudson*, the False Claims Act provides for “civil” penalties.
Congress’s intention to enact a civil statute.\textsuperscript{85} Thus, by its terms and legislative intent, the False Claims Act is a civil statute, not a criminal statute.\textsuperscript{86} Accordingly, under well-established Supreme Court precedent, such a civil designation is entitled to significant deference.

That said, the Ex Post Facto Clause \textit{could} apply, even if Congress’s intention was to enact a regulatory scheme that is civil, but \textit{only} if the statutory scheme is \textit{so} punitive either in purpose or effect as to negate the Legislature’s intention to deem it civil.\textsuperscript{87} Again, however, “only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.”\textsuperscript{88}

In this regard, commentators have pointed to the treble damages and penalty provisions of the Act as evidence that the Act is so punitive as to amount to penal statute. These arguments are for naught in light of clear Supreme Court precedent to the contrary. Less than a decade ago, the Supreme Court took up the treble damages and penalty provisions of the statute and recognized that there was a punitive aspect to them.\textsuperscript{89} However, the Court also made it clear, as did decades of judicial precedent prior to the Court’s decision, that a statute’s punitive aspect also is \textit{not enough} to render the civil scheme in which the statute operates “so punitive” as to negate the text and Congress’s intention to deem it civil.”\textsuperscript{90} \textsuperscript{91}

\textsuperscript{85} Congress referred to FERA as “one of the most potent civil tools” to stop fraud. S. Rep. No. 110-10, at 4 (2009); \textit{see also} S. Rep. No. 99-345, 11, reprinted in 1986 U.S.C.C.A.N. 5266, 5276 (“The statute is a remedial one. It is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side…”).
\textsuperscript{86} It is now well-settled that the treble damages of the False Claims Act serve deterrence and compensatory functions which do not convert the False Claims Act into a criminal statute. \textit{See} Cook County, Illinois v. United States \textit{ex rel.} Chandler, 538 U.S. 119, 130 (2003) (the False Claims Act’s “treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives”); \textit{Hudson}, 522 U.S. at 102 (“[A]ll civil penalties have some deterrent effect.”); \textit{id}. at 105 (“[D]eterrence may serve civil as well as criminal goals.”).
\textsuperscript{87} \textit{Smith}, 538 U.S. at 92.
\textsuperscript{88} \textit{id}.
\textsuperscript{89} \textit{See} Vermont Agency of Natural Res. v. United States \textit{ex rel.} Stevens, 529 U.S. 765, 784-6 (2000).
\textsuperscript{90} \textit{See} Cook County v. United States \textit{ex rel.} Chandler, 538 U.S. 119, (2003):

To begin with it is important to realize that treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives. While the tipping point between payback and punishment defies general formulation, being dependent on the workings of a particular statute and the course of particular litigation, the facts about the False Claims Act show that the damages multiplier has compensatory traits along with the punitive.

\textit{id}. at 130.
Act in particular, the Supreme Court recognized that the treble damages of the False Claims Act serve appropriate compensatory and deterrence functions which predominate and imprint the statute as civil.\(^{92}\) Likewise, the Court has taken up the issue of deterrence as a purpose of the False Claims Act. In this regard, the Court specifically held that the deterrence functions of the Act did not render the Act’s sanctions “punitive” within the meaning of the Ex-Post Facto clause.\(^{93}\) In light of the foregoing pronouncements, the Supreme Court has consistently held that “proceedings and penalties under the civil False Claims Act are indeed civil in nature, and that a civil remedy does not rise to the level of ‘punishment’ merely because Congress provided for civil recovery in excess of the Government’s actual damages.”\(^{94}\) For purposes of analysis, therefore, the Supreme Court’s pronouncements of the civil nature of the False Claims Act should suffice to end the Ex-Post Facto inquiry.

In the interests of thoroughness in the analysis, however, one can take the analysis one step further, as there does exist a legal framework *which is applicable in the absence of Supreme Court precedent* regarding the civil nature of a statute. Assuming, *arguendo*, a lack of Supreme Court precedent on the subject, that legal framework requires courts to apply seven factors when determining whether a civil scheme is *so punitive* that it should be treated as criminal for purposes of the Ex Post Facto Clause (or other criminal protection). The seven-factors laid out by the Supreme Court\(^{95}\) require courts to consider (1) whether the sanction in question involves an affirmative disability or restraint; (2) whether the sanction has been historically regarded as a punishment; (3) whether the sanction only comes into play upon a finding of scienter; (4) whether the sanction promotes the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which the sanction applies is already a crime; (6) whether there is an alternative non-penal purpose to which the sanction may rationally be connected; and (7) whether the sanction appears excessive in relation to the alternative purpose.

\(^{92}\) *Cook County*, 538 U.S. at 130.


\(^{94}\) *Halper*, 490 U.S. at 442.

assigned. Again, “these factors must be considered in relation to the statute on its face” and “only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.”

An analysis of all factors but one, which will be addressed last, handsomely support treatment of the False Claims Act as a civil statute.

Factor one involves the consideration of whether the sanction imposes an “affirmative disability or restraint.” A sanction imposes an “affirmative disability or restraint” when it approaches imprisonment. However, the penalties in the False Claims Act neither impose nor approach imprisonment. Thus, factor one does not militate toward finding that the False Claims Act is penal in nature.

Factor two requires the courts to look to the historical treatment of the statute in question. The False Claims Act is a statute which has been regarded historically as remedial and compensatory in nature. Therefore, factor two does not bode in favor of finding the statute to be penal.

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96 Id. at 168.
99 Ignoring the existence of Supreme Court precedent to the contrary, one court applied the seven-factor test to conclude that the False Claims Act was “so punitive” that the Ex Post Facto Clause applied to it and rendered unconstitutional section 4(f) of FERA. See United States ex rel. Sanders v. Allison Engine, 667 F. Supp.2d 747 (S.D. Ohio 2009). In this author’s view, the court’s analysis is critically flawed. The court not only ignored Supreme Court precedent regarding the remedial and deterrent nature of the False Claims Act, but also all applicable presumptions in favor of the text of the False Claims Act. Worse, in a seeming effort to justify tipping the scale in favor of labeling the False Claims Act punitive (the court found that 4 to 3 factors weighed toward that result), the court quoted selective statements of law-makers regarding the need to punish fraudsters while ignoring the plain legislative history of the False Claims Act to the contrary. Most remarkably, the court, seeming hell-bent on reaching and rejecting the constitutionality of the statute, took up a constitutional analysis that was uncalled for in the case which, by the court’s own conclusion, did not fall within the purview of FERA (rendering the court’s constitutional analysis at best dicta). This author is not alone in her assessment of the Allison Engine opinion. See Drake, 2010 WL 3417854, at *7 (“Defendants point to the decision in … Allison Engine, in which the district court found that the False Claims Act was so punitive as to raise ex post facto concerns. The Court does not find these opinions persuasive on this point in light of the historical view of the False Claims Act and the relevant legislative history.”) (citations omitted).
101 See, e.g., United States v. Vill. of Island Park, No. 90-CV-992(ILG), 2008 WL 4790724, at *6 (E.D.N.Y. 2008) (excessive fines clause did not apply because False Claims Act is remedial); United States ex rel. Colucci v. Beth...
Factor four evaluates whether the scheme promotes retribution and deterrence, attributes which are shared by criminal schemes. In this regard, it must be kept in mind that, historically, disgorgement and money penalties are not, in and of themselves, punishment. Indeed, many civil schemes recognize and operate on the assumption that penalties and treble damages are often necessary to provide full restitution to the victim of wrongful conduct. With respect to the False Claims Act, it is fair to say that courts have recognized that the treble and penalty damages of the False Claims Act have a punitive aspect to them. However, the courts have also historically recognized that these penalty and treble damage provisions are not in the nature of retribution. To the contrary, courts have historically concluded that treble damages and penalties under the False Claims Act are calculated to provide the government with “complete indemnity for the injuries done it.” In light of the foregoing, neither the treble damages nor the penalties of the False Claim Act support turning the Act into a criminal statute.

Factor five considers whether the behavior proscribed by the False Claims is already the subject of a criminal statute, such that treating the civil scheme as a criminal one would be superfluous or redundant. Here, the conduct proscribed by the Act is, indeed, proscribed by a criminal statute; to wit, criminal health care fraud is prohibited by Title 18 of the United States code. Factor five, therefore, does not support transforming the False Claims Act into a penal scheme.

Israel Med. Ctr, 603 F. Supp.2d 677 (S.D.N.Y. 2009) (False Claims Act actions survive death of relator because they are primarily remedial).


103 United States v. Lamanna, 114 F. Supp.2d 193, 198 (2000) ("[N]either disgorgement nor money penalties have historically been viewed as punishment. Rather the payment of fixed or variable sums of money is a sanction that has long been recognized as civil." (quoting Palmisiano, 135 F.3d at 866)).

104 United States v. Halper, 490 U.S. 435, 442 (1989) ("[P]roceedings and penalties under the civil False Claims Act are indeed civil in nature, and . . . a civil remedy does not rise to the level of ‘punishment’ merely because Congress provided for civil recovery in excess of the Government’s actual damages[,]"), abrogated by Hudson v. United States, 118 S. Ct. 488 (1997).


106 Cook County v. United States ex rel. Chandler, 538 U.S. 119 (2003) ("treble damages have a compensatory side, serving remedial purposes in additional to punitive objectives").
Factor six evaluates whether the statute has an alternative purpose assigned to it other than to punish. The legal precedent on the False Claims Act overwhelmingly supports that the statute has a compensatory purpose because it seeks to make the government whole.\textsuperscript{107} Factor six, therefore, also fails to color the FCA as a criminal scheme.

Factor seven evaluates whether the damages that are recoverable under the False Claims Act exceed the compensatory function they serve. In this regard, some courts have advanced as a truism the conclusion that treble damages and penalties in general, and with respect to the False Claims Act in particular, always do more than merely compensate the government for its losses and are, thus, punitive.\textsuperscript{108} However, there is no basis in reality for such a broad generalization. With respect to the False Claims Act, the economic injury that fraud imposes on federal programs and the government far exceeds on a pro rata basis the single measure of damages suffered by the government in any given case.\textsuperscript{109} Thus, if violators of the False Claims Act were merely required to disgorge their improper gains,\textsuperscript{110} as would be the case with a non-treble damages statute, significant costs of the violators’ wrongful actions would have to be absorbed by the government and, ultimately, the innocent taxpayer. In this instance, therefore, the penalties and treble damage provisions of the False Claims Act serve as an equitable and well-established way to ensure full indemnity for the government for the

\textsuperscript{107} Upon passage of the 1986 amendments of the False Claims Act, the Senate Committee on the Judiciary said “[t]he purpose of . . . the False Claims Reforms Act[] is to enhance the Government’s ability to recover losses sustained as a result of fraud against the Government.” S. REP. NO. Congress Number-345 (DATE), \textit{reprinted in} 1986 U.S.C.C.A.N. 6266. \textit{See also} United States \textit{ex rel.} Marcus v. Hess, 317 U.S. 537, 549 (1943) (holding that the False Claims Act is remedial in purpose and effect), \textit{superseded by} Graham Cnty. Soil & Water Conservation Dist. \textit{v. United States ex rel.} Wilson, 130 S. Ct. 1396 (2010).


\textsuperscript{109} Indeed, in 2011 alone, the Office of the Inspector General (OIG) will spend over $324 million to protect the programs and operations of the U.S. Department of Health and Human Services alone from waste, fraud and abuse. \textit{See} DEP’T OF HEALTH & HUMAN SERV., OFFICE OF INSPECTOR GENERAL, JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES (2011). This sum does not reflect the government’s costs in detecting and pursuing fraud through other agencies and in dozens of other government programs outside of healthcare.

\textsuperscript{110} Though there are no published statistics to this effect, it is common knowledge among qui tam practitioners that a great number of False Claims Act cases settle for double the amount of the fraud, rather than for the statutory penalties and/or treble damages. Thus, False Claims Act violators already receive significant discounts for their misconduct.
injuries caused by the proscribed conduct.\textsuperscript{111} Factor seven, therefore, does not color the False Claims Act as a criminal scheme.

In contrast to factors one, two, four, five, six and seven, factor three looks to whether the statute contains a scienter requirement, which is more characteristic of a criminal law than a civil law. The False Claims does arguably contain a scienter requirement, prohibiting only \textit{knowing} violations of the statute.\textsuperscript{112} However, the False Claims Act does not require \textit{criminal intent} or specific intent to defraud. Rather, liability under the False Claims Act attaches for false claims for government funds made in deliberate ignorance and/or reckless disregard of their falsity.\textsuperscript{113} Thus, the scienter requirement of the Act barely weighs on the penal side of the framework.\textsuperscript{114}

In balance, the mandatory factors pertinent to the inquiry overwhelmingly support the conclusion that the False Claims Act is not “so punitive” so as to warrant being treated as a criminal statute subject to the Ex Post Facto Clause. Certainly, the factors in question, individually and collectively, do not come anywhere close to the level of “clearest proof” that is required under the law to defeat the plain text of the statute and intention of Congress to create a civil framework to prevent fraud.

C. FERA’s retrospective effect is otherwise constitutionally permissible

Opponents of the FERA amendments have sought to fit FERA within the realm of the constitutional prohibition against ex post facto laws. For the reasons set forth above, those efforts are misplaced because the False Claims Act is a civil statute. This is not to say that the retrospective effect of FERA does not warrant constitutional evaluation. Rather, it is to say that the ex-post facto framework is inapplicable.

\textsuperscript{111} See Marcus, 317 U.S. at 549 (damages under the False Claims Act are calculated to provide the government with “complete indemnity for the injuries done it.”).
\textsuperscript{112} 31 U.S.C. § 3729 (a)(1)(B).
\textsuperscript{113} § 3729 (b)(1).
\textsuperscript{114} See, \textit{e.g.}, Hagood v. Sonoma Cnty. Water Agency, 81 F.3d 1465, 1477 (9th Cir. 1996) (“Thus, a violation of the False Claims Act requires scienter”) (quoting United States \textit{ex rel. Anderson v. Northern Telecom, Inc.}, 52 F.3d 810, 815 (9th Cir. 1995), \textit{cert. denied}, 116 S. Ct. 700 (1996)).
The False Claims Act regulates fraud in the conduct of business with the government and, thus, falls within the realm of legislation that regulates economic and business affairs subject to the Due Process Clause of the Constitution.\textsuperscript{115} Civil legislation which regulates economic and business affairs is subject to a “highly deferential rational basis” standard of review.\textsuperscript{116} Further, “[L]egislative Acts adjusting the burdens and benefits of economic life come to the [c]ourt[s] with a presumption of constitutionality, and that the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way”.\textsuperscript{117}

Even retrospective legislation is subject to a rational basis standard of review, even though it can present problems of unfairness to the extent it unsettles legitimate expectations.\textsuperscript{118} Retrospective legislation meets the test of due process under the rational basis standard of review if the legislation is a rational means for the accomplishment of a legitimate legislative purpose.\textsuperscript{120}

The FERA amendments in question meet the foregoing standard. It has long been recognized that the enactment of a retrospective statute “to correct the unexpected results of a [j]udicial opinion’ qualifies as a legitimate

\textsuperscript{115}U.S.\ CONST. amend. V. \textit{See also} Lundeen v. Canadian Pacific Railway Co., 532 F.3d 682 (8\textsuperscript{th} Cir. 2008) (Highly deferential standard of review applies to whether legislation regulating economic and business affairs violates due process).

\textsuperscript{116} \textit{See, e.g.}, General Motors Corporation v. Romein, 503 U.S. 181, 191 (1992); Lundeen v. Canadian Pacific Railway Co., 532 F.3d 682, 689-90 (8\textsuperscript{th} Cir. 2008) (”[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way”) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)).

\textsuperscript{117} \textit{Usery}, 428 U.S. at 15.

\textsuperscript{118} \textit{Romein}, 503 U.S. at 191 (recognizing that while “retroactive (sic) legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions . . . [t]he retroactive (sic) aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process” [when] they are the rational means by which a legitimate legislative purpose is advanced.)

\textsuperscript{119} However, as previously explained, False Claims Act defendants cannot claim a legitimate expectation in their ability to obtain federal funds from third parties through fraud.

\textsuperscript{120} \textit{Romein}, 503 U.S. at 191 (\textit{quoting} Pension Benefit Guaranty Corporation v. R.A. Gray & Co., 467 U.S. 717, 730 (1984)).
The text and legislative history of FERA make it clear that Congress enacted the amendments to reiterate the original intent of the False Claims Act and to correct an unexpected and erroneous judicial interpretation of the scope of the Act.\textsuperscript{123} As previously discussed, Congress was concerned that frauds committed against the United States through third parties should not be insulated from False Claims Act liability as a result of the unexpected “presentment” requirement judicially created by the United States Supreme Court in \textit{Allison Engine}. To resolve such concerns, Congress reaffirmed through the amended text of the statute that False Claims Act liability may be imposed upon persons who cheat the United States “without regard to whether the wrongdoer deals directly with the Federal Government”\textsuperscript{124} and further gave special treatment to said provision by pegging its new section 3729(a)(1) language to pre-date by two days the \textit{Allison Engine} decision, effectively overturning it.\textsuperscript{125} Given Congress’s concern and purpose, it was

\begin{itemize}
  \item \textsuperscript{121} See, e.g., Id. ("The purpose of the 1987 statute was to correct the unexpected results of the Michigan Supreme Court’s \textit{Chambers} opinion. The retroactive (sic) repayment provision of the 1987 statute was a rational means of meeting this legitimate objective . . . ."). \textit{See also Lundeen}, 532 F.3d at 690 ("[T]he very act of enacting a retroactive statute ‘to correct the unexpected results of a [judicial ] opinion’ qualifies as a legitimate legislative purpose which survives scrutiny under the deferential rational basis standard.”) (quoting \textit{Romein}, 503 U.S. at 191.).
  \item \textsuperscript{122} Further, a legislature may pass retrospective legislation in civil matters so long as the intention for retrospective application is clearly expressed. \textit{Landgraf v.USI Film Products}, 511 U.S. 244, 266-8 (1994) (providing “that Congress has ample power to provide for retroactive (sic) application of §102 [of the Civil Rights Act of 1991]”).
  \item \textsuperscript{123} Unquestionably, FERA is the most significant overhaul of the False Claims Act in a quarter of a century, which is potentially the reason why the amendments have been perceived as substantive changes, rather than mere clarifications of what was always the law up until the \textit{Allison Engine} decision. The reality is that the legislative history of FERA makes it clear that its proponents did not believe that FERA constituted a departure from the original law. Instead, proponents of the 2009 amendments declared that FERA was intended to “reflect the original intent” of the False Claims Act, override certain court decisions limiting the scope of the law, and improve one of the most potent civil tools for rooting out waste and fraud in Government. \textit{SEN. REP. NO.} 111-10 at 4 (2009). At the end of the day, whether Congress characterizes the amendment as a “clarification” of existing law or a “substantive change” to existing law is completely without consequence from a constitutional perspective. See \textit{Lundeen}, 532 F.3d at 289 ("[W]e reject [petitioner’s] argument about Congress’s reference to the amendment as a ‘[c]larification’ of existing law rather than a substantive change to existing law somehow alters our analysis. We are obliged to apply the amendment to pending cases regardless of the label Congress attached to it"). \textit{See also Porter v. Comm’r of Internal Revenue}, 856 F.2d 1205, 1209 (8th Cir. 1988) ("Our objective in interpreting a federal statute is to achieve the intent of Congress.").
  \item \textsuperscript{124} \textit{S. REP. NO.} 111-10, at 11 (2009).
  \item \textsuperscript{125} Note that “Congress can rationally decide to pick an effective date for legislation which will address the particular event which attracted its attention.” \textit{Lundeen}, 532 F.3d at 691. Indeed, “the enactment of retroactive statutes ‘confined to short and limited periods required by the practicalities of producing national legislation . . . is
appropriate for Congress to take steps to realign the statute’s terms more explicitly with its underlying intent and legislative purpose of combating persistent fraud against the federal fisc and to do so retrospectively in order to undo the incorrect interpretation of the Act’s scope under Allison Engine. This ameliorative legislation to protect the Treasury consistent with the False Claims Act’s long standing purposes is fully consistent with the requirements of Due Process that retrospective legislation rationally serve a legitimate legislative purpose.

VI. Conclusion

As discussed in this article, the False Claims Act serves a vital function in the country’s arsenal against fraud on government programs. The statute has been amended numerous times and has been the subject of numerous constitutional challenges, including the latest challenge based on the prohibition against ex-post-facto laws. Thus far, the False Claims Act has escaped unscathed and that should be its fate once again.

For the reasons set forth in this article, the False Claims Act, as amended by FERA in 2009, does not constitute an ex-post facto law and does not otherwise violate Due Process. Accordingly, retrospective application of the statute should be given full effect by the courts.

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126 It is further appropriate for the amendments to affect the outcome of pending cases. See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (making it clear that Congress possesses the power to amend existing law even if affects the outcome of pending cases). It should be noted, however, that the separation of powers doctrine could be violated when Congress tries to apply a new law to a case that has already reached a final judgment. Id. at 225-6. Even then, however, “Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive (sic), 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.” Id. at 226.