

# Preserving The FCA Is Crucial In Trump's 2nd Term

By **Adam Pollock** (November 7, 2024)

Since the Civil War, the False Claims Act has been one of the most important legislative tools the government has for combating fraud on the U.S.

The FCA allows private citizens to file lawsuits, known as qui tam suits, on behalf of the government if they uncover fraudulent activities by entities receiving federal funds.[1] These individuals, known as whistleblowers or relators, can receive a portion of the recovered funds as a reward.

Over the years, the FCA has evolved to cover a broad spectrum of industries, with whistleblowers playing a critical role in exposing fraud in healthcare, defense and beyond.

While the FCA has traditionally enjoyed bipartisan support, there is concern over the FCA's future with the return of Donald Trump to the presidency.

The new Trump administration's pro-business orientation could lead to a weakening of FCA enforcement, changing the landscape of fraud prevention. But upheaval of FCA enforcement and jurisprudence would have real consequences for both taxpayers and government integrity.

## Threats to the FCA Under the New Administration

During his previous term, the Trump administration demonstrated a strong pro-business bias, rolling back numerous regulatory measures and reducing enforcement in various federal agencies. A similar approach to the FCA could limit its efficacy.

If the administration chooses to minimize oversight of corporations doing business with the government, companies may face less scrutiny, increasing the likelihood of fraud. Furthermore, a Trump administration could influence the U.S. Department of Justice, and other agencies, to deprioritize FCA cases, particularly those that originate solely from whistleblower complaints, making it harder for to expose fraud.

Another potential threat is the possibility that the Trump administration will encourage the U.S. Supreme Court to hold the FCA unconstitutional.

In the Supreme Court's 2023 decision in *U.S. ex rel. Polansky v. Executive Health Resources Inc.*, Justice Clarence Thomas wrote a dissent arguing that the qui tam structure is unconstitutional.[2] Two justices — Brett Kavanaugh and Amy Coney Barrett — while agreeing with the outcome of that case, wrote separately to urge that the Supreme Court take up the constitutionality arguments "in an appropriate case." [3]

Taking up that invitation, a U.S. District Court for the Middle District of Florida recently held in *U.S. ex rel. Zafirov v. Florida Medical Associates LLC* that a qui tam relator's exercise of authority to litigate the case on behalf of the U.S. was unconstitutional.[4]

This case will almost certainly generate a circuit split as it heads to the Supreme Court.



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Although there did not previously appear to be a majority inclined to kill off the FCA, with only three supportive votes in *Polansky*, there is a real risk that an aggressive push from the Trump administration could lead to the Supreme Court reevaluating the FCA's constitutionality.

Another approach would be for the new Congress to amend the law. Such changes might aim to limit the scope of qui tam actions or reduce the financial incentives for whistleblowers, making it less attractive for insiders to report fraud. Limiting the incentives would likely reduce the number of cases brought forward, effectively allowing more fraud to go unreported and unchecked.

Alternatively, a Trump-era DOJ could simply decide to dismiss relator-led cases. Ordinarily in FCA cases, the government has the option to intervene and take over the lawsuit or to decline intervention, allowing the whistleblower to proceed independently. The DOJ can also dismiss a qui tam suit it has declined.

If the new Trump administration DOJ chooses to dismiss declined or relator-led cases as a matter of policy, it would significantly reduce the law's impact. If relators cannot pursue cases without government backing, it will likely discourage other whistleblowers from coming forward.

By sidelining independent whistleblower actions, the new administration could effectively curtail the FCA's reach and shield companies from accountability.

The new administration could also cut budgets and constrain resources. Effective enforcement of the FCA relies on U.S. attorney's offices, Main Justice, and other federal agencies having resources to investigate and prosecute cases.

The previous Trump administration's fiscal priorities indicated a preference for cutting regulatory and enforcement budgets. If the new administration similarly reduces funding, there may be fewer resources available to pursue FCA cases, leaving many instances of fraud to go unchallenged. This would weaken the FCA's deterrent effect and allow more abuse of government funds.

### **How The FCA Safeguards Taxpayer Dollars**

The FCA plays a vital role in protecting taxpayer dollars. Each year, the federal government spends billions on programs and contracts in sectors such as healthcare, defense and infrastructure. Not surprisingly, even a handful of fraudsters can scam the American people out of tens of millions of dollars.

The FCA helps to ensure that these funds are used as intended by deterring fraud and holding entities accountable for the misuse of public funds. In 2023 alone, the DOJ recovered over \$2.6 billion in settlements and judgments in FCA cases, including over \$2.3 billion from whistleblower-led cases.<sup>[5]</sup> Without the FCA, billions of taxpayer dollars would be at greater risk each year.

The FCA also incentivizes ethical behavior and corporate accountability by providing a legal framework that discourages fraud. Knowing that employees have legal recourse via the FCA to report misconduct keeps companies vigilant in their dealings with the government.

This self-regulating effect is crucial in a market economy where businesses may otherwise

prioritize profit over legal or ethical considerations. Without the watchful oversight provided by insiders who could become whistleblowers — and strong enforcement by the government that encourages whistleblowing — companies might view fraud as a manageable risk rather than as an unacceptable behavior. Any weakening of the FCA could erode public trust and governmental efficacy.

Further, the FCA's qui tam provisions empower whistleblowers by giving them legal protections and financial incentives to report fraud. Despite the risk to their careers and reputations, whistleblowers have exposed large-scale frauds that may have never come to light without their courage.

The FCA's reward mechanism — which pays whistleblowers typically between 15% and 30% of the monies recovered by the government — has proven effective in prompting individuals with insider knowledge to come forward, strengthening government oversight.[6] This not only helps prevent fraud but also fosters a culture where unethical practices can be challenged.

### **Consequences of a Weakened FCA**

A weakened FCA could have significant consequences for the government, taxpayers and whistleblowers.

First, an emboldened corporate sector might engage in more fraud, knowing that the risks of getting caught and penalized have been reduced. Key sectors like healthcare and defense — the largest areas of federal expenditure — would be at increased risk for fraud, potentially undermining public health and national security.

The healthcare and defense industries are highly susceptible to fraud. FCA actions in healthcare, for example, have exposed widespread overbilling and fraudulent billing practices under Medicare and Medicaid. In a typical year, some 70% of the money recovered by the government in FCA cases stems from healthcare fraud.

And in the defense industry, the FCA has prevented the misuse of funds in military contracting — ensuring that funds are dedicated to maintaining national security. Weakening the FCA could compromise the integrity of these programs, putting American lives and resources at risk.

Furthermore, if whistleblowers lose the ability or the incentive to report fraud, a crucial check on unethical behavior will be lost. Whistleblower-led cases have historically led to billions in recoveries for the government, exposing misconduct that would have otherwise remained hidden. Not only would discouraging whistleblowers result in more undetected fraud, but it would also foster a corporate culture of impunity.

### **Conclusion**

The False Claims Act remains an essential tool in safeguarding public funds and maintaining corporate accountability. Now is not the time to undermine ethical behavior, or reduce protections and incentives for whistleblowers. Preserving the FCA is crucial to maintaining a transparent, accountable government and protecting the integrity of federal spending in healthcare, defense and beyond.

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[1] 31 U.S.C. § 3730(b).

[2] U.S., ex rel. Polansky v. Exec. Health Res., Inc., 599 U.S. 419, 442 (2023) (Thomas, J., dissenting).

[3] Id.

[4] U.S. ex rel. Zafirov v. Fla. Med. Assocs., LLC, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024).

[5] <https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-268-billion-fiscal-year-2023>.

[6] 31 U.S.C. § 3730(d).