

U.S. Senator Chuck Grassley • Iowa

Ranking Member • Senate Judiciary Committee

<http://grassley.senate.gov>



Prepared Statement of Senator Chuck Grassley
Ranking Member, United States Senate Committee on the Judiciary
Hearing Before the House Committee on Oversight and Government Reform
Subcommittee on Economic Growth, Job Creation & Regulatory Affairs and the Committee on
the Judiciary Subcommittee on the Constitution and Civil Justice
“Doj’s Quid Pro Quo with St. Paul: A Whistleblower’s Perspective”
Tuesday, May 7, 2013

Thank you for inviting me here today to testify. It’s important to examine the impact the deal between the Justice Department and City of St. Paul, Minnesota has had on the whistleblower in that case, Fredrick Newell.

One of the most important lessons I have learned is that an individual member of Congress can make a huge difference through oversight.

I realized early on that uncovering and eliminating fraud in government programs could save the federal government billions of dollars. One of my early investigations revealed how the Department of Defense was spending \$700 on toilet seats.

Of course, while individual members can make a difference, the federal government is simply too big to oversee without help.

In order to find reinforcements, I turned to a simple and well-tested law: the False Claims Act. Also known as “Lincoln’s Law,” the False Claims Act was adopted during the Civil War as a way to leverage private citizens in the fight against fraud.

Unfortunately, the False Claims Act was weakened by Congress following World War II. In an effort to give the law real teeth again, I joined Congressman Howard Berman and introduced the False Claims Amendments Act of 1986.

One of the key provisions included allowing “qui tam” lawsuits. Qui tam actions allow individual whistleblowers to represent the federal government in certain cases and recover a share of the proceeds.

These changes were adopted by Congress and quickly signed into law by President Reagan.

Since my amendments were signed into law, the federal government has recovered more than \$40 billion.

Taxpayers owe whistleblowers a debt of gratitude for sticking their necks out. They stand up and speak out when things are wrong.

When courts across the country narrowed the False Claims Act I worked with Senator Leahy, to author legislation that overturned years of court decisions that watered down the False Claims Act.

I also worked with Chairman Leahy to craft a provision that fixed a problem with a part of the False Claims Act known as the “public disclosure bar.”

Under the public disclosure bar, private citizens can’t file a qui tam action if it is based only on facts that the federal government has publicly disclosed, such as in an official government report.

However, if the qui tam suit is based at least in part on the private citizen’s independent information, then he can proceed as an “original source.”

Before 2010, the Supreme Court said that private citizens do not get rewarded unless the original source information is the basis of the settlement or court verdict. But oftentimes the Justice Department begins a case using original source information and in the end uses only publicly available information to settle or try the case. Thus, the Court created a disincentive for whistleblowers to come forward with new information. They would get none of the reward, but still face the probability of retaliation.

My provision made it clear that Congress disapproved of this broad interpretation. Instead of allowing organizations and individuals to string along whistleblowers only to kick them off the case at the very end, the provision required that the Justice Department file a timely motion to dismiss claims that violate the public disclosure bar.

This amendment was designed to have the Justice Department help whistleblowers in their suits, not hurt them. In fact, I included input from the Department when we drafted it.

That’s what the FCA is truly about: protecting the whistleblower. It’s not about protecting certain defendants. Nowhere does the False Claims Act distinguish between public defendants, such as city governments, and private defendants, such as companies.

It cannot be correct that cities get a pass on ripping off federal taxpayers simply because they are funded by municipal taxpayers.

Yet, our investigation into the quid pro quo found that Department officials apparently set a different standard for the City than for a private company. If this new standard becomes precedent, it seems likely that more and more cities will find it easier to defraud the federal government.

And that is not the only reason this quid pro quo is harmful to the goals of the False Claims Act. Tom Perez committed the Justice Department to assist the City in getting Fredrick Newell’s qui tam action dismissed on public disclosure bar grounds—in exchange for dismissing an unrelated Supreme Court case to further his own favored legal theory.

In doing so, Mr. Perez circumvented Congress's legislative intent in reforming the law to help whistleblowers like Mr. Newell. In the process, Mr. Perez made it nearly impossible that Mr. Newell would succeed in his suit to recover money for the United States. The result is that the Department has demonstrated to future qui tam whistleblowers that they might be helped, but only if a defendant doesn't have something else the Department wants in exchange.

The actions of the Justice Department in throwing Mr. Newell aside are particularly upsetting in light of questions I asked high level Department employees at their confirmation.

Senate-confirmed appointments testified before the Judiciary Committee that they supported the False Claims Act and that they would work with whistleblowers to make sure their cases received consideration and assistance from the Justice Department. It seems clear that the Department did the exact opposite in Mr. Newell's case, and the False Claims Act and whistleblowers everywhere will suffer.

In this case, the Department took the authority granted to them under the law, and rather than using it to secure millions of dollars for the taxpayer, they used it as leverage.

They took that leverage and struck a deal to throw out a case that the career lawyers in the Department considered very strong. And along with it, they threw out the ability to recover potentially hundreds of millions of taxpayer dollars.

And in the process, they left Mr. Newell, the whistleblower, twisting in the wind.

There are a couple of points about this deal to emphasize.

First, even though the Department traded away Mr. Newell's case, Mr. Perez has defended his actions, in part, by claiming that Mr. Newell still had his "day in court."

What Mr. Perez omits from his story is that Mr. Newell's case was dismissed **precisely because** the United States was not a party.

After the U.S. declined to join the case, the judge dismissed Mr. Newell's case based on the "public disclosure bar," finding he was not the "original source" of information to the government.

I'll remind you, preventing an outcome like this is exactly why we amended the law. Specifically, those amendments made clear that the Justice Department can contest the "original source" dismissal, even if it fails to intervene. So, the Department **chose** to leave Mr. Newell all alone in his case.

That was the whole point.

That is why it was so important for the City of St. Paul to make sure that the United States did not join the case.

That is why the City was willing to trade away a strong case before the Supreme Court.

The City knew that if the United States joined the action, the case would almost certainly go forward. Conversely, the City knew if the United States **did not** join the case, and chose not to contest the original source, it would likely get dismissed.

Now think about that.

The Department trades away a case worth millions of taxpayer dollars. They did it **precisely because** of the impact the decision would have on the litigation.

They knew that as a result of their decision, the whistleblower would get dismissed based on “original source” grounds, since they didn’t contest it.

And yet, when Congress starts asking questions, they have the guts to say: ‘we didn’t do anything improper because Mr. Newell still had his day in court.’

The second point has to do with the strength of the case. Throughout our investigation, the Department has tried to defend Mr. Perez’s actions by claiming the case was “marginal” or “weak.”

The documents, however, tell a far different story.

Before Mr. Perez got involved, the career lawyers at the Department wrote a Memo recommending intervention in the case. In that memo, they described St. Paul’s actions as, “a **particularly egregious** example of false certifications.”

In fact, the career lawyers in Minnesota felt so strongly about the case that they took the unusual step of flying to Washington, D.C. to meet with HUD officials.

And HUD, of course, agreed that the United States should intervene.

That was before Mr. Perez got involved.

The documents make clear that career lawyers considered it a strong case. But, the Department has claimed that Mike Hertz – the Department’s expert on the False Claims Act – considered it a weak case.

In fact, two weeks ago Mr. Perez testified before my colleagues on the Senate HELP Committee that Mr. Hertz “had a very immediate and visceral reaction that it was a weak case.”

The documents tell a far different story. Mr. Hertz knew about the case in November of 2011. Two months later, a Department official took notes of a meeting where the quid pro quo was discussed. That official wrote down Mr. Hertz’s reaction: She wrote:

“Mike – Odd – Looks like buying off St. Paul. Should be whether there are legit reasons to decline as to past practice.”

The next day, that same official emailed the Associate Attorney General, and said:

“Mike Hertz brought up the St. Paul “disparate impact” case in which the SG just filed an amicus brief in the Supreme Court. He’s concerned about the recommendation that we decline to intervene in two qui tam cases against St. Paul.”

These documents appear to show that Mr. Hertz’s primary concern was **NOT** the strength of the case, as Mr. Perez led my Senate colleagues to believe. Mr. Hertz was concerned that the quid pro quo Mr. Perez ultimately arranged was improper. Again, in his words, it “looks like buying off St. Paul.”

And, just last night the Justice Department sent my staff a critical 33 page slide show about the Department’s case against St. Paul. In this document, the career lawyers make their case for intervention. The Department failed to provide this document to the committees, and we only learned about it in a recent interview with a HUD employee. Getting such a critical document so late in this investigation could be construed as a cover up. I expect any remaining documents will be immediately forthcoming.

The Department’s actions—and specifically those of Mr. Perez in orchestrating this deal—are to the detriment of the American taxpayers, whistleblowers, and the Department.

Ironically, the Justice Department and the Obama administration are currently engaged in waging the war on whistleblowers in federal courts across the country—most notably in a case pending before the Federal Circuit titled *Berry v. Conyers*.

While unrelated to this matter, we all need to keep an eye on that case as it could effectively end protected whistleblowing in the federal government.

I thank Mr. Newell for having the fortitude to come forward as a whistleblower, and to keep fighting after the Justice Department hung him out to dry.

He should be praised for being here today.

Thank you.