UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

"The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century"

WRITTEN TESTIMONY OF STEPHEN M. KOHN[1/]
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Chairman Patrick J. Leahy, Ranking Member Arlen Specter and Honorable Members of the Senate Judiciary Committee:

On behalf of the National Whistleblower Center, thank you for the opportunity to submit this written testimony concerning the False Claims Act Correction Act (S.2041).

President Abraham Lincoln and the loyal Members of Congress who had the foresight to enact the original False Claims Act ("FCA") during the height of the Civil War are looking kindly down upon the work of the Committee. President Lincoln and his supporters in Congress knew that the key to American Democracy and the freedoms enshrined in the Declaration of Independence rested upon the active support of the People. In was in this light that they enacted the FCA – America's first whistleblower law. President Lincoln and the Civil War Congress sought to empower citizens with the ability to expose fraud in government contracting. They knew that citizens who exposed wrongdoing faced harsh retaliation, so they created a mechanism, based on longstanding legal precedent (known as "*qui tam*") to encourage and enable citizens to report contractor abuse, the sale of defective products to the government and conspiracies between unscrupulous contractors and corrupt federal employees to steal from taxpayers.

Over 120 years later, their vision of American Democracy has been vindicated. The FCA has the potential to be the most important anti-fraud law in American history. Under this law, the government has already collected tens of billions of dollars from unscrupulous contractors and the law's deterrent effect has saved taxpayers untold billions of dollars.

The FCA is based on a fundamental pillar --- encouraging and protecting whistleblowers (i.e. persons who become aware of contractual wrongdoing or other attempts to improperly bill the federal government). The FCA is not simply an anti-fraud law. It is a law premised on the recognition that employee-witnesses play a critical and irreplaceable role in uncovering fraud.

Based on this intent, the FCA has two overriding purposes: First, the protection of the public purse. Second, the protection of whistleblowers. Unfortunately, the whistleblower protection provisions of the FCA have not been properly appreciated by the Courts, and today the very effectiveness of the FCA as the premier fraud-fighting law is threatened by a deep erosion into the basic fundamental pillar of the FCA: whistleblower protection.

Bluntly stated, the overwhelming majority of employees with information about corrupt contracting practices will be left without adequate protection if the current FCA is not corrected in accordance with S.2041. This will result in a major loss to the United States – the loss of the key informants recognized by the Civil War Congress as indispensable to the ability of the United States to detect fraud and prove these cases in court.

The *Correction Act* is essential legislation for protecting the integrity of procurement and contracting process. It is narrowly designed to correct a number of judicial interpretations which undermined the original intent of the False Claims Act. For example, the *Correction Act* would Congressionally reverse the Appeals Court decision in the U.S. ex rel. Totten v. Bombardier Corp, 380 F.3d 488 (D.C. Cir. 2004). That case endorsed Enron-style "shell games" which permit government contractors to hide behind third party entities to escape liability. The result: Billions of dollars in taxpayer monies stolen or wasted, and no recourse open to protect the American taxpayers or the whistleblowers who exposed the frauds. The Correction Act also directly addresses the problem created by the Federal District Court for the Eastern District of Virginia in United States ex rel. DRC, Inc. v. Custer Battles, LLC, 2006 WL 2388790 (E.D. Va. Aug. 16, 2006), which dismissed a jury verdict finding FCA violations for funds allocated to contractors operating on Iraqi funds administered by the U.S. Government.

The *Correction Act* seeks to restore a proper balance in the jurisdictional bar which can prevent whistleblowers from obtaining protection under the FCA. This bar prohibits employees who are not "original sources" for obtaining FCA coverage, if the information on which they are blowing the whistle was "publicly disclosed." The *Correction Act* maintains this jurisdictional bar, but clarifies the definition of a "public disclosure" in a manner consistent with the original intent behind the FCA.

Attached to this testimony is a letter signed by 27 public interest organizations. As set forth in this letter, there is strong public support for the passage of the *Corrections Act* and for Congress to ensure that whistleblower protection provisions are fair, adequate and reasonable.

CONCLUSION

Today FCA whistleblower protections are stuck in the mud. Whistleblowers risk their careers, are fired from their jobs and are blacklisted. They need full protection. They need to be encouraged. Congress must pass the *Corrections Act* to ensure that America's most important anti-fraud law remains an effective instrument protecting taxpayers.

The *Corrections Act* has been endorsed by a broad array of public interest organizations, including the American Library Association, the National Security Whistleblower Coalition, The National Taxpayers Union, the Project on Government Oversight, the Government Accountability Project, and Public Citizen (see attached letter). Thank you for the opportunity to submit this written testimony. We look forward to working with you to ensure that adequate and effective legislation can be voted on during this Congressional session.

Respectfully submitted by:

____/s/ Stephen M. Kohn_____
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[1] Stephen M. Kohn is the President of the National Whistleblower Center, a partner in the Washington, D.C. law firm of Kohn, Kohn & Colapinto, LLP. For over 20 years he has represented nationally known whistleblowers in retaliation and False Claims Act cases. Mr. Kohn is the author or co-author of six books on whistleblower law: *Whistleblower Law (*Greenwood Publishing, 2004); *Concepts and Procedures in Whistleblower Law* (Quorum, 2000), *The Whistleblower Litigation Handbook, (Weily Legal Publishing*, 1990), *The Labor Lawyers Guide to the Rights and Responsibility of Employee Whistleblowers* (Quorum, 1988), *Protecting Environmental and Nuclear Whistleblowers: A Litigation Manual* (NIRS, 1985) and *Federal Whistleblower Laws and Regulations* (NWC, 2003). In 2006, he was awarded the Daynard Public Interest Visiting Fellowship by the Northeastern University School of Law.

The National Whistleblower Center is a non-profit, tax-exempt organization specializing in the support of employee whistleblowers. Created in 1988, one of the major goals of the Center is to protect the taxpayers by educating the public about the need to protect employees to disclose government abuse, misconduct and corruption. The Center publishes an educational web page, *www.whistleblowers.org*, supports precedent-setting litigation on behalf of employee whistleblowers, and provides counsel and attorney referrals to whistleblowers.