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May 4, 2020

VIA ELECTRONIC TRANSMISSION

The Honorable William P. Barr
Attorney General
U.S. Department of Justice
Washington D.C., 20220

Dear Attorney General Barr:

I write in response to a recently filed brief to the Supreme Court by Solicitor General Noel J. Francisco in which the Department of Justice (DOJ) argues that their dismissal authority of a *qui tam* False Claims Act case is an unreviewable exercise of prosecutorial authority.¹ In doing so, DOJ asserts that the plain language of the law grants them unfettered discretion in the dismissal of any such claim.² As the original author of the 1986 amendments to the False Claims Act, I vehemently disagree with the Department's reading of the law.³

Originally enacted in 1863, the False Claims Act allows the government to recover triple damages and impose fines against those who knowingly defraud the government.⁴ This is the government's most powerful tool to prevent and deter fraud—it is responsible for the recovery of more than \$59 billion since 1986.⁵ The key feature of the highly successful, modern False Claims Act is the *qui tam* provision, which allows whistleblowers (referred to as relators) privy to inside information about fraudulent conduct to sue on the government's behalf.⁶ For their efforts, successful relators may receive a reward of up to 30% of funds recouped by the government.⁷ The statute requires that the relator file a claim under seal and allow DOJ 60 days to investigate the allegations raised in the complaint.⁸ DOJ may also request an extension if an investigation is likely to go past the 60-day mark. If no extension is requested, after the 60 days, DOJ may prosecute the

¹ Brief for the United States at 9, *United States ex rel. Schneider v. JPMorgan Chase, N.A.*, No. 17-7003 (D.C. Cir. 2017) (No. 19-678) [hereinafter Brief].

² *Id.* at 9 (stating that the legislative text is “best read to preserve the Executive Branch’s usual unfettered discretion to dismiss an action that is brought in the name of the United States to remedy a wrong done to the United States...”).

³ 31 U.S.C. §§ 3729–3733 (2012); See U.S. Dep’t of Justice, *The False Claims Act: A Primer* (Apr. 22, 2011), available at https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf.

⁴ *Id.*

⁵ Civil Div., U.S. Dep’t of Justice, *Fraud Statistics – Overview: October 1, 1986 – September 30, 2018* (Dec. 21, 2018), available at https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery.

⁶ 31 U.S.C. § 3730(c).

⁷ *Id.*

⁸ 31 U.S.C. § 3730(b).

case itself by “intervening” in the case.⁹ Relators who alerted the government of the fraud through their *qui tam* claim remain eligible for a reward regardless of DOJ’s involvement.¹⁰

On January 10, 2018, Michael D. Granston, Director of the Commercial Litigation Branch at DOJ, issued new guidance on when to seek dismissals of *qui tam* claims.¹¹ Prior to the memo, motions to dismiss by the government were extremely rare.¹² Since the Granston memo was issued, DOJ has moved to dismiss approximately 45 cases pursuant to authority contained in the False Claims Act under 31 U.S.C. § 3730(c)(2)(A).¹³ In seeking dismissal, DOJ argues that the plain text of the law grants DOJ unfettered discretion to dismiss a case over the objections of the relator.¹⁴ Regrettably, some courts have agreed with this erroneous interpretation.¹⁵

Debate over whether DOJ possesses unfettered discretion in the dismissal of a *qui tam* claim centers on the following provision, including the statutory meaning of the word “hearing.” The False Claims Act provides that:

*The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.*¹⁶

DOJ contends that in this context a hearing does not impose any substantive limitations on the government’s dismissal authority and simply requires that the court grant the relator an opportunity to “be heard.”¹⁷ The D.C. Circuit Court of Appeals has agreed with DOJ’s narrow reading of this section, stating that the purpose of a hearing in this context is to grant the relator an opportunity to publicly persuade DOJ to change course.¹⁸ I can confidently say this narrow reading of the False Claims Act is erroneous and contrary to congressional intent. Moreover, the statutory cannons of

⁹ *Id.*

¹⁰ 31 U.S.C. § 3730(c); see also Paden M. Hanson, *True Damages for False Claims: Why Gross Trebling Should Be Adopted*, 104 IOWA L. REV. 2093, 2099 (2019).

¹¹ Memorandum from Michael D. Granston, Dir., Commercial Litig. Branch, Fraud Section, to Atty.’s in the Commercial Litig. Branch, Fraud Section (January 10, 2018), available at <https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf>.

¹² Schooner, Steven L., *FALSE CLAIMS ACT: Greater DOJ Scrutiny of Frivolous Qui Tam Actions?* (April 2018) 32 NASH & CIBINIC REP. ¶ 20 at 60 (2018) (citing that only a single reported instance between 1986 to 1996 in which the DOJ has sought to dismiss a *qui tam* suit on the ground that the suit lacked substantive merit or otherwise contradicted the interests of the United States), available at https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2593&context=faculty_publications.

¹³ Letter from Stephen E. Boyd, Assistant Attorney General, United States Department of Justice, to Charles E. Grassley, United States Senator (Dec. 19, 2019) (on file with author). See also Joshua M. Gilbert & Jeremy R. Morris, *DOJ Moves to Dismiss 11 False Claims Act Cases*, Bricker & Eckler Attorneys at Law (Jan. 16, 2019), available at <https://www.bricker.com/insights-resources/publications/doj-moves-to-dismiss-11-false-claims-act-cases> (Eleven of the cases DOJ moved to dismiss were brought by whistleblowers backed by the National Health Care Analysis group. DOJ described this group as a “professional relator” and argued that NHCA gathered information from witnesses under false pretense. NHCA denies these allegations and argues they are safeguarding taxpayer dollars).

¹⁴ Brief at 9.

¹⁵ e.g., *Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003).

¹⁶ 31 U.S.C. § 3730(c)(2)(A).

¹⁷ Brief at 7, 12.

¹⁸ *Swift*, 318 F.3d at 253.

construction support the notion that hearing implies an adjudicative procedure where the court acts as an arbiter.¹⁹

Both the ordinary meaning and technical meaning of the word “hearing” denote a proceeding in which a judge makes a determination based on evidence and the law.

A key principle of statutory construction provides that we should understand words that are not expressly defined in a statute according to their ordinary, everyday meanings – unless the context indicates the word carries a technical meaning.²⁰ Often called the “technical meaning exception” or “term of art” exception, a word takes the meaning of the field from which it derives.²¹ As Justice Frankfurter stated: “[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”²²

Although the term “hearing” can have multiple meanings in common parlance, in the legal field it is commonly understood to mean a proceeding in which a judge makes a determination based on arguments or evidence presented by the parties. For example: *Black’s Law Dictionary* defines hearing in the first instance as a “judicial session...held for the purpose of deciding issues of fact or of law[.]”²³ Applying this legal definition is appropriate considering that the Senators who drafted this language in the Senate Judiciary Committee are primarily lawyers who also employ lawyers on their staffs—all of whom have a common understanding of the legal meaning of “hearing.”²⁴ There is also nothing in the text of the law that would suggest an alternate meaning to this commonly understood legal term.

Further, while *Black’s Law Dictionary* provides a clear definition of the legal meaning of the word “hearing,” a plain non-legal definition suggests a similar meaning. Putting the word “hearing” in the context of a court proceeding, the vast majority of Americans would presume that “hearing” implies a forum wherein a judge has decision-making authority. In statutory construction, as well as everyday life, reading words in context is critical to understanding what the author meant. For example, the word, *run*, has over 800 meanings depending on context; one can *run a company*, *run for office*, or *run late*.²⁵ In each of those examples, the same exact word evokes vastly different meanings. In the context of a court proceeding, the term “hearing” immediately brings to mind a proceeding where a judge decides issues of fact or law. For example: someone who is not legally trained would correctly presume if summoned for a hearing based on a traffic violation, that the hearing would provide more than just an opportunity to be heard, and that the Judge would have the authority to make a determination. Likewise, an administrative hearing carries a similar understanding. Finally, any movie patron can describe the scene of a criminal bail hearing in which the prosecutor and defense argue over the conditions of a suspect’s bail, only to have it ultimately decided by the presiding judge. Ironically, one of the few instances

²⁰ Antonin Scalia & Brian Garner, *Reading the Law: The Interpretation of Legal Text* at 69 -73 (1st ed. 2012).

²¹ *Id.*

²² Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947).

²³ *Hearing*, BLACK’S LAW DICTIONARY (11th ed. 2019) (emphasis added); see also *id.* (defining “Administrative law. Any setting in which an affected person presents arguments to a decision-maker”); *Hearing*, BLACK’S LAW DICTIONARY (5th ed. 1979) (defining as a “proceeding of relative formality . . . with definite issues of fact or of law to be tried . . .”).

²⁴ S. Rep 99-345, the False Claims Reform Act of 1985, to accompany S.1562 (1986).

²⁵ Scalia & Garner, *supra* note 19, at 70.

in which a hearing carries the definition promoted by DOJ is in the context of a legislative hearing. Undoubtedly, local city councils and Congressional Committees routinely hold hearings in which the only purpose is to “be heard.” Yet, few examples exist of such a notion in the context of a court of law. The very nature of a court evokes a strong connection to its adjudicatory nature.

DOJ argues that “hearing,” in its most basic definition, simply means an “opportunity to be heard.”²⁶ Yet, if Congress had intended to provide an “opportunity to be heard,”²⁷ it would have used those **exact words** as it has done in numerous other statutes.²⁸ Similarly, if Congress intended for DOJ to have unfettered discretion in dismissing a *qui tam* claim, then the word hearing would have been omitted and a period would have been added earlier to make the language read, “*The Government may dismiss the action notwithstanding the objections of the person initiating the action.*” Congress means what it says – a hearing is a hearing.²⁹

DOJ’s narrow reading of the word “hearing” is not in harmony with other elements of the law and would undermine certain provisions.

One must also read a statute in the context of the entire text of the law and not in isolation. Often referred to as the “whole text cannon,” this important tool guarantees that a specific provision is not taken out of context and read in isolation, thus ensuring the text is in harmony with other provisions in the same law.³⁰ The logic stems from the notion that Congress would not write a provision in law that directly or indirectly undermines another provision in the same law.

DOJ argues that the law grants them unfettered discretion because ultimately every *qui tam* claim is brought on behalf of the government.³¹ Therefore, since it is ultimately the government’s claim, the government has the unfettered discretion to dismiss it.³² But, Congress did not write the False Claims Act that way. In fact, in other sections, Congress wrote the law to ensure DOJ could **not** unilaterally dismiss cases. While DOJ can dismiss claims that the government brings on their own, or intervened claims, the law places various limitations on DOJ’s discretion once they allow a relator to proceed on his own.³³ For example, 31 U.S.C. § 3730(c)(3) requires that

²⁶ Brief at 7, 12 (quoting *United States ex rel. Schneider v. JPMorgan Chase Bank, N.A.*, No. CV 14-1047 (RMC), 2019 WL 1060876, at *2 (D.D.C. Mar. 6, 2019), *aff’d*, No. 19-7025, 2019 WL 4566462 (D.C. Cir. Aug. 22, 2019)).

²⁷ In any event, nothing about the term “hearing” or the phrase “opportunity to be heard” suggests that the presiding official—here, “the court”—lacks authority to decide the issue in dispute. *Cf. Harrison v. Commissioner*, 107 F.2d 341, 342 (6th Cir. 1939) (“The general rule is that a ‘hearing’ contemplates a reasonable opportunity to be heard in the presentation of evidence and argument. If petitioners had been afforded such an opportunity the Board [of Tax Appeals] might have concluded upon the record that the motion to dismiss should have been denied.”).

²⁸ *See, e.g.*, Federal Magistrates Act, Pub. L. No. 90-578, sec. 101, § 631(h), 82 Stat. 1107, 1110 (1968) (codified as amended at 28 U.S.C. § 631(i)) (giving magistrate judges facing removal “an opportunity to be heard on the charges”); Internal Revenue Code of 1954, ch. 736, subtit. F, § 7458, 68A Stat. 3, 886 (codified as amended at 26 U.S.C. § 7458) (providing for an “opportunity to be heard” in Tax Court proceedings); *cf. Miss. ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014) (reasoning that if Congress had intended references to “persons” and “plaintiffs” in the Class Action Fairness Act’s definition of “mass action” to mean “named and unnamed real parties in interest,” it “easily could have drafted language to that effect”).

²⁹ *See Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016) (“Absent persuasive indications to the contrary, we presume Congress says what it means and means what it says.”).

³⁰ *Scalia & Garner, supra* note 19, at 167.

³¹ *Brief* at 15.

³² *Id.*

³³ 31 U.S.C. § 3730(c)(3).

DOJ show “good cause” to intervene in a case after more than 60 days have passed and the relator has proceeded with the case.³⁴ Applying the whole text cannon of statutory construction, it makes little sense that Congress would require DOJ to show good cause for intervening but grant them unfettered discretion for dismissing a case they have not yet joined.³⁵

Allowing DOJ unfettered discretion to dismiss a claim would also undermine other provisions of the law which deal with dismissal by a relator. For example, 31 U.S.C. § 3730(b)(1) states:

*A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.*³⁶

In this provision, a relator may only dismiss a claim **if the court** and the Attorney General give written consent.³⁷ In that instance, DOJ would make its preference on dismissal clear, just as it would be in moving to dismiss without the relator. Yet, a court’s consent is still required. Not only does this support the notion that DOJ does not have the unfettered right to dismiss a claim, it also presents a unique instance in which DOJ’s reading of section (c)(2)(A) would effectively undermine provision (b)(1). Hypothetically, let’s assume a relator moves to dismiss a claim with DOJ’s consent. Under the (b)(1) provision, the court must also consent. Now, let’s assume the court withholds its consent and requires the suit to proceed. DOJ would only need to issue a motion to dismiss themselves, and under the standard DOJ is advocating for, they would have unfettered discretion to override the court’s previous ruling. In this hypothetical case, DOJ would clearly be undermining the judicial branch.

In closing, I have long denounced activist judges and career bureaucrats who attempt to undermine Congress’ authority by reading legislative text to achieve desired outcomes in lieu of how the text reads. During your time as Attorney General, you have expressed the same concerns, and this Administration has made it a priority to clamp down on activist bureaucrats and fill judicial vacancies with individuals who will interpret the law as Congress intended by looking at the plain meaning of the text. I urge you to reconsider the Department’s stance on dismissal authority in light of the overwhelming evidence that “hearing” indicates Congress intended a substantive process in which a judge hears arguments and decides whether a case should proceed or not. Relator’s routinely spend hundreds of thousands of dollars in legal fees to litigate cases on behalf of the government, and since 1986, they have recovered more than \$2.4 billion for the federal government via claims in which DOJ chose to not intervene.³⁸ Due to the large investment in time and money, Congress did not grant DOJ unfettered discretion to dismiss a relator’s claim, which

³⁴ *Id.*

³⁵ *Ridenour v. Kaiser-Hill Co. LLC*, 397 F.3d 925, 941 (10th Cir. 2005)(dissenting opinion, Judge Edgan, “[t]he context, design, and structure of the statute as a whole indicate that the government has unfettered discretion to dismiss if it intervenes within the sixty-day seal period, but not after.”³⁵).

³⁶ 31 U.S.C. § 3730(b)(1).

³⁷ *Id.*

³⁸ Civil Div., U.S. Dep’t of Justice, *Fraud Statistics – Overview: October 1, 1986 – September 30, 2018*, (Dec. 21, 2018), available at <https://www.justice.gov/civil/page/file/1080696/download>.

is why the law requires an adjudicative process known as a hearing to take place. The very fact that a relator can proceed on their own shows that Congress intended for whistleblowers to play a very significant role, and it is partly what encourages reports of wrongdoing.

The False Claims Act is the government's most powerful tool in deterring fraud and recovering federal funds lost to fraud. To date it has helped the federal government reclaim more than \$60 billion. What makes this law work is, and always has been, the support from whistleblowers who come forward with these claims. Having unfettered dismissal authority will create a chilling effect on future whistleblowers that will ultimately end up costing the taxpayers a lot more. Accordingly, please provide my staff with a briefing on DOJ's response to the concerns I have raised here and their plans moving forward. Should you have any questions, please contact Dario Camacho of my Committee staff at (202) 224-4515. Thank you for your attention on this important matter.

Sincerely,

Chuck

Charles E. Grassley
Chairman
Senate Finance Committee

Bill: I appreciate that you changed your mind on the constitutionality of the False Claims Act between 1992 and your confirmation to your present position.

But, there are other ways to neuter good legislation even if it's constitutional.

I don't know the number of times the courts have ruled, or DOJ did something harmful, to carrying out the spirit of the False Claims Act. And, thank God, oh, or Senator Leahy, have been successful passing legislation to correct such judicial or administrative mal-interpretation.

DOJ's action on Granston is just one more example. Don't do harmful action to a very successful piece of legislation again. Successful ?? : it returned \$63 B to the treasury. Yes, successful!!