under Mr. Perez's leadership had become so politicized and so unprofessional that at times it became simply dysfunctional, it could not function properly.

This 258-page report by the Department of Justice inspector general cited ''deep ideological polarization,'' which began under his predecessors and which has continued under Mr. Perez's leadership. The inspector general said this polarization ''has at times been a significant impediment to the operation of the Section and has exacerbated the potential appearance of politicized decision-making.''

This is at the Department of Justice. So instead of upholding and enforcing all laws equally, the Department of Justice, Civil Rights Division—the Voting Section—under Mr. Perez, has launched politically motivated campaigns against commonsense constitutional laws, such as the voter ID laws adopted by the States of Texas and South Carolina.

In addition, he delivered misleading testimony to the U.S. Commission on Civil Rights back in 2010. The inspector general said Mr. Perez's testimony about a prominent voting rights case ''did not reflect the entire story regarding the involvement of political appointees.'' So when you are not telling the whole truth, you are not telling the truth.

Before joining the Department of Justice—and this is part of his unfortunate track record—he served as a local official in Montgomery County, MD. During those years, he consistently opposed the proper enforcement of our immigration laws. In fact, Mr. Perez testified against enforcement measures that were being considered by the Maryland State Legislature.

I would ask my colleagues, because we have an important function to play under our constitutional system, one of advice and consent—that is the confirmation process for Presidential nominees—is this really the type of person we want running the Department of Labor, especially at a time when Congress is contemplating passage of important immigration reform laws?

Given his record, I am concerned Mr. Perez does not have the temperament or the competence we need in our Secretary of the Department of Labor. I fear that, just like he has at the Department of Justice, he would invariably politicize the Department of Labor and impose ideological litmus tests. For all these reasons, and more, I will oppose his nomination.

Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HARKIN. I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. BROWN). Without objection, it is so ordered.

The PRESIDING OFFICER. The Senator from Iowa.

NOMINATION OF THOMAS PEREZ

Mr. HARKIN. Mr. President, I come to the floor today to express my deep disappointment that once again Republican obstructionism and procedural tricks are preventing this body from carrying out its constitutional duty and responsibility, its obligation to consider important Presidential nominations.

This time the target is Mr. Tom Perez, the President's extremely qualified nominee to be Secretary of Labor.

The HELP Committee, which I chair, was scheduled to vote on his nomination at 4 o'clock this afternoon. Obviously, we are not doing that. An anonymous Republican has invoked an obscure procedural rule to prevent our committee from meeting at that scheduled time. This pointless obstructionism is extremely disturbing.

I would like to point out that we had previously been scheduled to vote on his nomination in my committee 2 weeks ago. In an effort to bend over backwards and to be accommodating to our colleagues who requested more time to consider documents related to the nomination, I deferred it for 2 weeks as sort of senatorial courtesy.

This time there is no allegation that they have had insufficient time for consideration, just delay for delay's sake on the nomination. Tom Perez has been before our committee since March. We have had our hearing, during which Mr. Perez fully answered all questions posed to him. I cut off no one. I allowed anyone to ask whatever questions they wanted.

Mr. Perez has met with any interested Senator personally and answered over 200 written questions for the record. It is an understatement to say his nomination has been thoroughly vetted. This continuing delay is unconscionable and only hurts the American workers and businesses that rely on the Department of Labor each and every day.

As our country continues to move down the road to economic recovery, the work of the Department of Labor is becoming even more vital to the lives of our working families. Whether it is making sure workers get paid the wages they deserve, helping returning veterans reenter the workforce, protecting our seniors' retirement nest eggs, ensuring that a new mother can care for her baby without losing her job, the Department of Labor helps families build the cornerstones of a middle-class life.

Now more than ever we need strong leadership at the Department to help strengthen our fragile recovery and build a stronger and revitalized American middle class. That is why this nomination is so important.

There has been a lot of public discussion about Mr. Perez but remarkably little of it has focused on what should be the central question before our committee today: Will Tom Perez be a good Secretary of Labor. The answer is unequivocally yes. Without question, he has the knowledge and experience needed to guide this critically important agency.

Through his professional experiences, and especially his work as Secretary of the Maryland Department of Labor, Licensing and Regulation, he has developed strong policy expertise about the many important issues for American workers and businesses that come before the Department of Labor every day. He spearheaded major initiatives on potentially controversial issues, such as unemployment insurance reform and worker misclassification, while finding common ground between workers and businesses to build sensible, commonsense solutions.

He also clearly has the management skills to run a large Federal agency effectively. He was also an effective manager and a responsible steward of public resources, undertaking significant administrative and organizational reforms that made the Maryland DLLR more efficient and more effective.

His outstanding work in Maryland has won him the support of the business community and worker advocates alike. To quote from the endorsement letter of the Maryland Chamber of Commerce:

> Mr. Perez proved himself to be a pragmatic public official who was willing to bring differing voices together. The Maryland Chamber had the opportunity to work with Mr. Perez on an array of issues of importance to employers in Maryland, from unemployment and workforce development to the housing and foreclosure crisis. Despite differences of opinion, Mr. Perez was always willing to allow all parties to be heard, and we found him to be fair and collaborative. I believe that our experiences with him here in Maryland bode well for the nation. That is a pretty strong endorsement by a chamber of commerce for a nominee whom the minority leader today on the floor characterized as a ''crusading ideologue . . . willing to do or say anything to achieve his ideological ends.'' That is how he was characterized by the Republican leader today, but the Maryland Chamber of Commerce didn't seem to think so. So that grossly unfair characterization by the Republican leader is manifestly inconsistent with the experiences of the Republican leaders and businesses that have actually worked with Tom Perez.

Mr. President, I ask unanimous consent to have printed in the RECORD letters from businesses and Republican leaders demonstrating the strong bipartisan support for Mr. Perez's nomination. These people clearly disagree with the Republican leader's assessment of Mr. Perez's qualifications and character.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

MARCH 19, 2013.

JOINT STATEMENT FROM STATE ATTORNEYS GENERAL IN SUPPORT OF NOMINATION OF TOM PEREZ AS SECRETARY OF U.S. DEPARTMENT OF LABOR

''Tom Perez is a brilliant lawyer and leader, who listens thoughtfully to all sides and

works collaboratively to solve problems. He has dedicated his career to serving the public, and his experience as Secretary of the Maryland Department of Labor, Licensing and Regulation and in the U.S. Department of Justice make him ideally suited to serve as the Secretary of the U.S. Department of Labor.

''As state Attorneys General, we have found Perez to be open, responsive and fundamentally fair. He is committed to justice and the rule of law and able to work across party and philosophical lines to achieve just results.

''The U.S. Department of Labor and the country will be well served by a leader who understands the need to forge partnerships with state and local officials and who values cooperation to bring about successful results for both employers and employees.''

''The following Attorneys General issued this joint statement in support of Perez's nomination:

''California Attorney General Kamala Harris, Delaware Attorney General Beau Biden, Illinois Attorney General Lisa Madigan, Iowa Attorney General Tom Miller, Mississippi Attorney General Jim Hood, North Carolina Roy Cooper, Oregon Attorney General Ellen Rosenblum, Tennessee Attorney General Robert Cooper, Jr., Former Utah Attorney General Mark Shurtleff and Former Washington Attorney General Rob McKenna.

MARCH 15, 2013.

Hon. BARACK OBAMA,
President of the United States, The White House, Washington, DC.

DEAR PRESIDENT OBAMA: The Maryland Chamber of Commerce supports the nomination of Thomas E. Perez to serve as the United States Secretary of Labor.

During his tenure as Secretary of Maryland's Department of Labor, Licensing and Regulation, Mr. Perez oversaw a wide range of regulatory programs of critical importance to the state's business community, including unemployment insurance, the regulation of financial institutions, worker safety and professional licensing.

Mr. Perez proved himself to be a pragmatic public official who was willing to bring differing voices together. The Maryland Chamber had the opportunity to work with Mr. Perez on an array of issues of importance to employers in Maryland, from unemployment and workforce development to the housing and foreclosure crisis.

Despite differences of opinion, Mr. Perez was always willing to allow all parties to be heard and we found him to be fair and collaborative. I believe that our experiences with him here in Maryland bode well for the nation.

The Maryland Chamber of Commerce is Maryland's leading statewide business advocacy organization. Our 800 member companies employ more than 442,000 people in the state. The Chamber works to support its members and advance the State of Maryland as a national and global competitive leader in economic growth and private sector job creation through its effective advocacy, high level networking and timely communications.

Sincerely,

KATHLEEN T. SNYDER,
CCE, President/CEO,
Maryland Chamber of Commerce.

GREATER PRINCE GEORGE'S
BUSINESS ROUNDTABLE,
Bowie, MD, March 18, 2013.

TO WHOM IT MAY CONCERN: Tom Perez is one of the most honest and dedicated public officials that we in the Prince George's County business community have ever worked with. His understanding that government must work in partnership with business to find solutions that succeed in today's marketplace highlights his continual accessibility and his empathic approach to working with job creators nationwide.

We applaud the President's nomination of Tom Perez as Secretary of Labor because we have experienced, first hand, the fruits of Tom's open door policy and his steady approach to finding solutions that work for the benefit of all.

Sincerely,

M.H. JIM ESTEPP,
President/CEO.

THE MARYLAND MINORITY
CONTRACTORS ASSOCIATION, INC.,
Baltimore, MD, March 21, 2013.

President BARACK OBAMA,
The White House, Pennsylvania Avenue, Washington, DC.

DEAR PRESIDENT OBAMA, The Maryland Minority Contractors Association applauds the nomination of Tom Perez as the United States Secretary of Labor, and encourages a quick confirmation. While serving as Maryland's labor secretary, Tom proved to be fairminded, and always had an open door.

The Maryland Minority Contractors Association is composed primarily of merit shops, so our member companies have employees that are not under union collective bargaining agreements. We found ourselves at the table with Tom on a range of issues, from workplace safety to apprenticeships to the proper classification of employees. Although our perspectives often differed, we always had a seat at the table, and I can confidently say that our perspective was always taken into consideration. Tom pursues his role of protecting workers with vigor, but he always took the concerns of our members seriously, and, when presented with sound arguments, was willing to compromise.

We strongly support the nomination of Tom Perez, and we believe that he will make an excellent Secretary of Labor. He is a smart, honest person who will serve our county well.

PLESS JONES,
President, Maryland Minority Contractors.

WHITEMAN OSTERMAN
& HANNA LLP,
Albany, NY, April 15, 2013.

Re Thomas Perez, Nominee for
Secretary of Labor.

Sen. THOMAS HARKIN (D–IA),
Hart Senate Office Building,
Washington, DC.
Sen. LAMAR ALEXANDER (R–TN),
Dirksen Senate Office Building,
Washington, DC.

DEAR SENATORS HARKIN AND ALEXANDER: I write as an appointee by former President George H.W. Bush to the United States Department of Justice in support of Thomas Perez who has been nominated by President Obama to serve as Secretary of Labor and urge your favorable consideration of his candidacy.

As the Assistant Attorney General for Civil Rights (1990–1993), I worked directly with Tom (in fact, I hired him in 1990) on a variety of sensitive matters, including criminal and voting rights issues. During a number of face-to-face meetings, I had the opportunity both to review his legal-based memoranda and to engage in a number of intense debates as to what should be the Division's final course of action. As a result of those experiences, I found Tom to be an excellent lawyer, a dedicated public servant with a deep commitment to the common good, and a person of legal and moral integrity; qualities that enable him to recognize the value of contending parties' positions in order to achieve workable solutions.

I believe that he will bring those skills and strong personal qualities to the duties of the Secretary of Labor and enable him to perform in a manner worthy of your trust.

Thank you for listening to my support for this very special and patriotic man.

Respectfully yours,

JOHN R. DUNNE.

Mr. HARKIN. Indeed, I think Mr. Perez's character—his character—is exactly what qualifies him for this job—his character.

Tom Perez has dedicated his life to making sure every American has a fair opportunity to pursue the American dream. At the Maryland Department of Labor, he revamped the State's adult education system so more people could successfully train for better jobs and brighter futures. As the Assistant Attorney General for Civil Rights at the U.S. Department of Justice, where he is right now, he has been a voice for the most vulnerable, and he has reinvigorated the enforcement of some of our most critical civil rights laws. He has helped more Americans achieve the dream of home ownership through his unprecedented efforts to prevent residential lending discrimination. He has helped to ensure that people with disabilities have the choice to live in their own homes and communities rather than only in institutional settings and to make sure people with disabilities receive the support and services they need to make independent living possible. He has stepped up the Department's efforts to protect the employment rights of servicemembers so our men and women in uniform can return to their jobs and support their families after serving their country.

I can tell you that Tom Perez is passionate about these issues. He is passionate about justice and about fairness, and I believe these are qualities that Tom Perez learned at the hand of his former employer here in the Senate, our former committee chairman of the HELP Committee, Senator Ted Kennedy. But, as he explained in his confirmation hearing, he also learned from Senator Kennedy ''that idealism and pragmatism are not mutually exclusive.'' Mr. Perez knows how to bring people together to make progress on even controversial issues without burning bridges or making enemies. He knows how to hit the ground running and quickly and effectively become an agent of real change. That is exactly the kind of leadership we need at the Department of Labor. We need his vision, we need his passion, and we need, yes, his character at the helm of this important agency.

Allow me to state very clearly that while I know there has been generated controversy—not real controversy but generated controversy—surrounding Mr. Perez's nomination, there is absolutely nothing that calls into question his ability to fairly enforce the law as it is written. There is absolutely nothing that calls into question his professional integrity or his moral character or his ability to lead the Department of Labor.

As I mentioned, Mr. Perez has been as open and aboveboard as he could possibly be throughout this entire confirmation process. He has met with any Member personally who requested a meeting. As I said, he appeared before our committee in a public hearing. He has answered more than 200 written questions. He has bent over backward to respond to any and all concerns raised about his work at the Department of Justice.

This administration—President Obama—has also been extraordinarily accommodating to any Republican colleague, especially to their concerns about Mr. Perez's involvement in the global resolution of two cases involving the city of St. Paul, MN—Magner v. St. Paul and Newell v. St. Paul. The administration has produced thousands of documents concerning these two cases. They have arranged for the interview of government employees. They have facilitated almost unprecedented levels of disclosure to alleviate any concern about his involvement in these cases.

As chairman of the committee, I have also tried to be as accommodating as possible, joining in requests for documents that I, quite frankly, thought were unnecessary but willing to acquire and postponing the executive session for 2 weeks to provide Members additional time for consideration.

All this extensive process has revealed is that Mr. Perez acted at all times ethically and appropriately to advance the interests of the U.S. Government. For example, with respect to the Magner and Newell matters, Mr. Perez consulted with both outside ethics and professional responsibility experts at the Department of Justice, and Mr. Perez acted within their guidelines at all times. It is no surprise that outside ethics experts have confirmed that Mr. Perez acted appropriately in these matters.

I would like to submit again for the RECORD letters and statements from several legal ethics experts and experts in the False Claims Act confirming that Mr. Perez's handling of the Magner and Newell cases was both ethical and appropriate. And I ask unanimous consent to have printed in the RECORD these letters.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

STATEMENT OF STEPHEN GILLERS, ELIHU ROOT PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, MAY 6, 2013

The Joint Staff Report makes many assertions and contains many factual allegations, which may or may not be contested. However, only one issue is described as ethical. It is this issue that the Democratic Staff memo mainly addresses. Stated most favorably from the Joint Staff perspective, the issue is:

''Assuming that Assistant Attorney General Tomas E. Perez (Civil Rights Division) was mainly responsible for reaching the agreement with the City of St. Paul described below—even assuming that the agreement would not have happened without his intervention—but assuming, too, that Assistant Attorney General Tony West (Civil Division), who had ultimate authority to decide whether or not to intervene in Newell and Ellis, chose not to do so after considering their merits, the United States interest in preserving the disparate impact test under the Fair Housing Act, and the U.S. interest in ensuring (so far as possible) that a Supreme Court ruling on the proper test be based on favorable facts, did Perez violate any rule of professional conduct (ethics rule) governing him as a lawyer by encouraging others at DOJ or HUD (or elsewhere) to refrain from intervention in Newell and Ellis in exchange for St. Paul's agreement to withdraw the Magner appeal?''

The Joint Staff Report argues that linking the two cases—withdrawal of the Magner appeal and U.S. non-intervention in the two Qui Tam actions, Newell and Ellis (hereafter Newell)—was unethical. However, it cites no professional conduct rule, no court decision, no bar ethics opinion, and no secondary authority that supports this argument. In fact, no authority supports it.

The duty of lawyers for the United States is no different from the duty of lawyers generally, namely to pursue the goals of their client within the bounds of law and ethics. Clients generally identify those goals, but when the client is the government, its lawyers often do so, sometimes in conjunction with agencies, elected officials, or other representatives of the government who are authorized to speak for the client.

The United States had interests in Magner and also in Newell. Qui Tam actions are brought to vindicate interests of the sovereign, here the U.S. The U.S. interest was to recover money assuming, of course, that Newell had merit. The U.S. interest in Magner was to avoid Supreme Court review of a legal issue in Magner, whose facts were seen as unfavorable to a decision that would sustain a disparate impact test for violations of the Fair Housing Act. Perez believed that preserving the disparate impact test was important to his client and more important than intervention in Newell.

I assume that Perez persuaded others with decision-making authority, and in particular West, that withdrawing the Magner appeal was more important to U.S. interests than intervention in Newell. I also assume, though it is contested, that Newell was meritorious and that but for the agreement with St. Paul, the United States would have intervened in Newell and perhaps prevailed.

Of course, it is legitimate to argue that Perez, West, and others made the wrong choice and that pursuing Newell was more important to U.S. interests than how the Supreme Court would ultimately resolve the issue in Magner. I have no view on that question. It is not an ethical question. The question I can answer is whether Perez could ethically make the decision he did and which he encouraged others to accept. Could he ethically decide, when faced with a situation where only one of two possible choices could be made, and where each choice offered a benefit to his client, to choose option A over option B?

The answer is unequivocally yes. Perez was not choosing to advantage one client over another client. There was no conflict here between the interests of two clients because there was only one client. That client, we are assuming, had two interests—withdrawal of Magner or intervention in Newell—but under the circumstances, it could pursue only one. Perez made a choice between these options and encouraged others to agree. His conduct violates no ethical rule that governs lawyers. He was acting in what he believed to be the best interests of his client, which is what lawyers are required to do.

THE VERNIA LAW FIRM,
Washington DC, May 6, 2013.

Re Declination by the United States Department of Justice in *United States* ex rel. *Newell* v. *City of St. Paul*, Civil No. 09–SC–001177 (D.Minn.).

Hon. Representative JIM JORDAN,
Chairman, Subcommittee on Economic Growth, Job Creation & Regulatory Affairs Committee on Oversight and Government Reform, Rayburn House Office Building, Washington, DC.

Hon. Representative MATT CARTWRIGHT
Ranking Minority Member, Subcommittee on Economic Growth, Job Creation & Regulatory Affairs, Committee on Oversight and Government Reform, Rayburn House Office Building, Washington, DC.

Hon. Representative TRENT FRANKS
Chairman, Subcommittee on the Constitution and Civil Justice, Committee on the Judiciary, Rayburn House Office Building, Washington, DC.

Hon. Representative JERROLD NADLER
Ranking Minority Member, Subcommittee on the Constitution and Civil Justice, Committee on the Judiciary, Rayburn House Office Building, Washington, DC.

DEAR MESSRS. JORDAN, CARTWRIGHT, FRANKS, AND NADLER:

I am writing in advance of the Committee's May 7, 2013 hearing regarding the Department of Justice's declination of the False Claims Act *qui tam* cases, *United States* ex rel. *Newell* v. *City of St. Paul, Minnesota*, Civil No. 09–SC–001177 (D.Minn.), and *United States* ex rel. *Ellis* v. *City of St. Paul*, Civil No. 11CV–0416 (D.Minn.), to provide my comments on certain of the conclusions reached in the Joint Staff Report, *DOJ's Quid Pro Quo with St. Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Rule of Law* (April 15, 2013). I appreciate the opportunity to address the Committee.

For most of my twenty years practicing law, I have handled investigations and cases brought under the False Claims Act, 31 §U.S.C. §§3729, *et seq.* Early in my career, I served for eight years as a Trial Attorney in the Fraud Section of the Commercial Litigation Branch of the Department of Justice's Civil Division. In that capacity, I handled dozens of False Claims Act cases involving numerous federal agencies, including the Department of Housing and Urban Development (HUD). I left the Fraud Section to be a prosecutor in the Criminal Division where, in 2005 I received a John Marshall Award from the Department of Justice, and the National Exploited Children's Award from the National Center for Missing and Exploited Children.

That same year, I joined Covington & Burling LLP, initially focusing on the defense of False Claims Act investigations and suits. I started my own firm in 2009, in part to have the flexibility of representing whistleblower clients as well as defendants. I have filed numerous *qui tam* suits, and I am now litigating some of those, including a major case against a long-term care pharmacy for prescriptions reimbursed by Medicare Part D. In addition to my work on these cases, I have made presentations on the False Claims Act and related statutes, and I write the best-read legal blog on the topic, www.falseclaimscounsei.com.

I have had no professional involvement in the *Newell* or *Ellis* cases, and have not spoken about them with any of the persons described in the Joint Staff Report. I have, however, reviewed that Report, its attached documents, the Democratic Staff's Report on the same topic (April 14, 2013), and certain of the documents publicly available on the District Court for the District of Minnesota's PACER website.

As one of the few attorneys in private practice with significant Department of Justice experience who represents both defendants and whistleblowers, I read these documents with great interest. With all due respect to the Joint Staff, however, I feel compelled to write to take issue with certain of their factual conclusions. I will limit my comments to those that I feel are critical to assessing the conduct of Department of Justice officials involved in these cases.

MERITS OF THE NEWELL CASE

Because the documents do not treat the *Ellis* case as a significant factor in the Department's decision-making, I have not undertaken to analyze the merits of that matter. Let me also preface my remarks by stating that I do not intend this letter to disparage Mr. Newell or his counsel. The Department of Justice appears to have largely corroborated his allegations and his *qui tam* complaint is well-drafted.

I disagree, however, with the Joint Staff's conclusion that ''The Department of Justice Sacrificed a Strong Case Alleging a Particularly Egregious Example of Fraud.'' *See* Joint Staff Report at 37. Instead, I believe that the documents evidence significant bases for skepticism by Department of Justice officials.

The Joint Staff's conclusion rests in large part on its rejection of statements by Department of Justice supervisors that whether or not to intervene in *Newell* was a ''close call,'' and its reliance instead on earlier positions in support of intervention taken by the trial attorney and others assigned to the case. But the draft memorandum urging intervention acknowledges several significant potential problems with the case—problems that clearly rebut the conclusion that the case was a ''strong'' one, as the Joint Staff asserts.

Newell's most prominent weakness was the potential difficulty in proving that St. Paul's noncompliance with Section 3 was material to the decision of HUD to make grant payments. The trial attorney handling the case candidly admitted that there was litigation risk regarding materiality:

''The City will argue that even if HUD did not say it explicitly, HUD's silence over many years is tacit approval. We will have to admit that the City was failing to comply with Section 3 in ways that should have been apparent to HUD. The City did not send its HUD 60002 forms each year. HUD never objected to this failure. The City will argue that HUD was so unconcerned with Section 3 compliance that the City's failure to comply did not affect, or could not have affected HUD's decision to pay.

''The City will argue that HUD's failure to monitor its Section 3 compliance was consistent with HUD's general lack of oversight of Section 3 during the relevant period. The city has already noted that previous federal administrations were not concerned with Section 3 (a position with support in recent HUD comments), and that it is unfair to require a City to make boilerplate certification each year, ignore the City's non-compliance year-after-year, and then seek FCA relief when a new administration comes in that is more concerned with compliance with Section 3.

Draft Intervention Memo at 7. Although the trial attorney was optimistic that these arguments could be overcome, there can be no doubt that significant concerns about proving materiality of the City's noncompliance were evident long before the alleged *quid pro quo*.

RELIABILITY OF THE DRAFT INTERVENTION MEMORANDUM'S DAMAGES CALCULATION

I also respectfully disagree with the Joint Staff's assertion that the Department of Justice's decision to intervene in the case cost taxpayers a significant opportunity to recover over $200 million. *See* Joint Staff Report at 61. This, too, significantly overstates the strength of *Newell*.

The draft intervention memo very briefly describes only one damages theory, which the trial attorney characterizes as ''aggressive'': that the damages under the False Claims Act were the entire amount of the Section 3 construction project grants (which was some unknown fraction of the overall $86 million in HUD grants). That ''aggressive'' theory is an unsettled area of law, however, and the Joint Staff's reliance on it in calculating the cost to taxpayers of declining to intervene in the suit is dubious.

For much of the False Claims Act's 150–year history, computing damages was relatively straightforward: the fact-finder calculated the difference between what the Government actually paid and the value of the goods or services it received. *See United States* v. *Bornstein*, 423 U.S. 303, 316 n. 13 (1976). When a third-party, and not the Government is the intended recipient of the tangible benefit from the outlay of federal funds, this approach arguably breaks down. The traditional ''benefit-of-the-bargain'' approach is strained further when the false claim relates not to quality of the goods or services received by the third-party, but to the fund recipient's satisfaction of some other condition intended to benefit society more generally. The *Newell* case falls into this category: the city receives Section 3 funds to improve housing, and allegedly false claims relate to its compliance with a condition unrelated to the quality of that work.

The Courts have struggled with these issues, and four Courts of Appeals—for the Second, Fifth, Seventh, and Ninth Circuits—have chosen to follow the ''aggressive'' approach the trial attorney described. The District of Columbia and Third Circuits instead continue to employ the ''benefit-of-the-bargain'' approach, which might result in a very low damages calculation in a case such as *Newell*. I am not aware of any controlling precedent on this issue in the Eighth Circuit, in whose jurisdiction *Newell* was filed.

Given the unsettled nature of this area and the imprecision in the Draft Intervention Memorandum's damages figure, $86 million represented only a *theoretical* upper limit on the Government's damages for St. Paul's alleged violations. The Department of Justice trial attorney acknowledged the limitations of this approach, writing in the Draft Intervention Memorandum: ''We acknowledge this is an aggressive position, and that some less aggressive approach may be needed for trial. To date, however, we have not yet determined an alternative approach.'' *Id*. at 5.

Even if the Department of Justice had intervened and secured a judgment against the City on False Claims Act liability, moreover, there is a significant risk that the District Court or the Court of Appeals for the Eighth Circuit would, under the facts of this case (including HUD's apparent disregard of Section 3 enforcement, and the defendant's status as a taxpayer-funded entity) reject the ''aggressive'' approach of seeking to recoup all Section 3 grants. Such a decision would hinder the Government and relators in future False Claims Act cases in the Eighth Circuit's jurisdiction.

THE RISK OF NEWELL'S DISMISSAL ON PUBLIC DISCLOSURE GROUNDS

The Joint Staff Report also criticizes the Department's declination on the grounds that it exposed Mr. Newell to dismissal of his *qui tam* suit on grounds that the Court lacked jurisdiction under the False Claims Act's public disclosure bar. *See* Joint Staff Report at 58; 31 U.S.C. §3730(e)(4)(A) (2010). I respectfully disagree with the premise of this criticism, which is that the Department of Justice does, or should, evaluate the potential success of a motion to dismiss on public disclosure grounds.

In my experience, both at the Department and in private practice, the Government does not typically investigate the common grounds on which declined qui tam suits founder: public disclosure and particularity under Fed. R. Civ. P. 9(b). Although I, as a whistleblower attorney, would prefer that the Department investigate these possible grounds for dismissal prior to deciding whether to decline or intervene a case, there are sound reasons for not doing so: the Department of Justice has inadequate resources to investigate the merits of the fraud allegations; routinely investigating the public disclosures that might lead to the dismissal of a declined *qui tam* would ultimately detract from the Department's ability to carry out the False Claims Act's core mission of detecting and remedying fraud.

Certainly no one has done more than Senator Grassley to encourage whistleblowers to assist the Government in uprooting fraud. The recent amendment to the public disclosure bar demonstrates well his interest in improving enforcement of the Act. I nevertheless believe that Congress could best improve whistleblowers' involvement in fraud enforcement by addressing more significant problems besetting them (such as the application of Fed. R. Civ, P. 9(b) to False Claims Act complaints, which is by far the most common grounds for dismissal of declined *qui tam* cases).

In conclusion, after reviewing the publicly available materials on the Department of Justice's decision to decline to intervene in *United States* ex rel. *Newell* v. *City of St. Paul*, I believe that Department officials acted well within the scope of their discretion in declining to intervene in that case. I must respectfully disagree with the contrary conclusions the Joint Staff reached in its Report. I appreciate your consideration.

Truly yours,

BENJAMIN J. VERNIA.

COHEN MILSTEIN
SELLERS & TOLL PLLC,
Philadelphia, PA, May 6, 2013.

The Hon. JIM JORDAN,
Chairman, Subcommittee on Economic Growth, Job Creation & Regulatory Affairs Committee on Oversight and Government Reform, Rayburn House Office Building, Washington, DC.

The Hon. MATT CARTWRIGHT,
Ranking Minority Member, Subcommittee on Economic Growth, Job Creation & Regulatory Affairs, Committee on Oversight and Government Reform, Rayburn House Office Building, Washington, D.C.

The Hon. TRENT FRANKS,
Chairman, Subcommittee on the Constitution and Civil Justice, Committee on the Judiciary, Rayburn House Office Building, Washington, DC.

The Hon. JERROLD NADLER,
Ranking Minority Member, Subcommittee on the Constitution and Civil Justice, Committee on the Judiciary, Rayburn House Office Building, Washington, DC.

DEAR CHAIRMEN JORDAN AND FRANKS AND RANKING MEMBERS CARTWRIGHT AND NADLER: The undersigned are partners and co-chairs of the Whistleblower/False Claims Act Practice Group at Cohen Milstein Sellers & Toll, PLLC. For over ten years, we have assiduously represented whistleblowers in legal actions brought pursuant the federal False Claims Act, 31 U.S.C. §§3729, *et seq*., and its state counterparts in federal and state courts throughout the country. We regularly engage in the evaluation of the viability of

potential claims under those statutes and work with relators to combat fraud against the government. We have been asked by committee staff to offer our opinion regarding the effect of the Department of Justice's decision to decline to intervene in the *qui tam* cases of *United States* ex rel. *Newell* v. *City of St. Paul* and *United States* ex rel. *Ellis* v. *City of Minneapolis, et al.* What follows is that opinion.

On May 19, 2009, Relator Frederick Newell filed his *qui tam* action under the federal False Claims Act against the City of St. Paul in the United States District Court for the District of Minnesota. On February 9, 2012, the Department of Justice advised the court that it declined to intervene in the case. On March 12, 2012, Mr. Newell filed an amended complaint in response to which the City of St. Paul filed a motion to dismiss based, in part, on the Public Disclosure Bar.

At the time that Mr. Newell filed his initial complaint in his action, the False Claims Act provided a jurisdictional bar to a relator's *qui tam* action commonly referred to as the Public Disclosure Bar. Subsequently amended and rendered a non-jurisdictional basis for dismissal in the Patient Protection and Affordable Care Act of 2010, this section, 31 U.S.C. §3730(e)(4), provided as follows:

''(A) No court shall have jurisdiction over an action under this section based upon 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, unless the Attorney General or the person bringing the action is an original source of the information.

'''(B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.''

On July 20, 2012, the court granted St. Paul's motion to dismiss, finding that it lacked subject matter jurisdiction over Mr. Newell's action because of manifold public disclosures of his allegations predating the filing of his complaint and because he was not an original source of the information on which the allegations were based. Mr. Newell has appealed the dismissal of his case and his appeal is currently pending before the United States Court of Appeals for the 8th Circuit.

On February 18, 2011, Relators Andrew Ellis, Harriet Ellis and Michael Blodgett filed their *qui tam* action under the federal False Claims Act against, among others, the Cities of Minneapolis and St. Paul in the United States District Court for the District of Minnesota. On June 18, 2012, the Department of Justice filed a Notice of Election to Decline Intervention. The defendants in that case subsequently filed motions to dismiss the Relators' complaints, which the court denied without prejudice. That case remains pending as of the date of this letter.

The effect of the government's decision not to intervene in these two *qui tam* cases is central to the issues presently being considered by your subcommittees. Indeed, it is important to understand that, contrary to conclusory statements set forth in the Congressional Committees' Joint Staff Report of April 15, 2013, the decision by the Department of Justice not to intervene in Mr. Newell's case did not allow the City of St. Paul to move for dismissal of the case ''on grounds that would have otherwise been unavailable if the Department had intervened.'' (Joint Staff Report, p. 58). In fact, the same motion would have been available to the City whether or not the government had intervened in the case. In *Rockwell Intl. Corp.* v. *United States ex rel. Stone*, 549 U.S. 457 (2007), the United States Supreme Court rejected the argument that government intervention provides jurisdiction to a Relator who is not an original source. Even had the government intervened, Mr. Newell would have been vulnerable to the exact same public disclosure jurisdictional bar.

Likewise, in declining to intervene in Mr. Newell's *qui tam* action, the Department of Justice did not ''give up the opportunity to recover as much as $200 million.'' (Joint Staff Report, p. 4). A declination of intervention has never been recognized by any court as tantamount to the termination of the government's right to pursue the claim asserted in the action. In fact, the federal False Claims Act specifically provides that if the government initially elects not to proceed with the action, it may intervene at a later date upon a showing of good cause. 31 U.S.C. §3730(c)(3). The government can decline to intervene in one action and, after that complaint is dismissed, decide to intervene in a subsequently filed action. Or the government can institute and pursue its own action under the False Claims Act. Moreover, the dismissal of Mr. Newell's complaint does not affect the government's ability to pursue the same claims itself. Thus, in declining to intervene in the Newell and Ellis actions, the government is not foreclosed from pursuing the claims that Mr. Newell could no longer himself pursue or to intervene at a later date in the Ellis action, nor is it foreclosed from pursuing remedies that might be available under any other statutory or regulatory provisions. In fact, in declining to intervene in these actions, it ''gave up'' no rights or opportunities whatsoever.

We trust that the foregoing sheds light on the effect of the government's decision not to intervene in the Newell and Ellis *qui tam* actions and that this letter is helpful to the work of your committees.

Respectfully submitted,

GARY L. AZORSKY.
JEANNE A. MARKEY.

Mr. HARKIN. As Professor Stephen Gillers, who has taught legal ethics for more than 30 years at New York University School of Law, wrote in one of these letters, Mr. Perez's actions in these cases ''violate[d] no ethical rule that governs lawyers. He was acting in what he believed to be the best interests of his client, which is what lawyers are required to do.''

In short, Mr. Perez did his job at DOJ, and he did it well. When it comes down to it, I think the fact that he did his job well is probably the source of much of the generated controversy surrounding his nomination. Maybe some people just don't like Tom Perez precisely because he is passionate about enforcing our civil rights laws and has vigorously pursued such enforcement in his current position.

I take great issue with the minority leader's suggestion today that Mr. Perez doesn't follow the law or believe that it applies to him. I would respectfully suggest that the Republican leader needs to check his facts. To the contrary, Tom Perez has had a remarkable career as a result of a determination to make the promise of our civil rights statutes a reality for everyday Americans. Maybe these are some of the same laws that some colleagues sometimes would like to forget are on the books, but these laws matter. Voting rights matter. Fair housing rights matter. The rights of people with disabilities matter. These laws are part of what makes our country great. I am incredibly proud of the work Mr. Perez has done at the Department of Justice to make those rights a reality after years of neglect. He should be applauded, not vilified, for the service he has provided to this country.

Mr. President, it almost seems that when Mr. Perez's name came up, there was a controversy generated about these cases in St. Paul involving whistleblower types and that somehow he acted inappropriately and denied the government the ability to get back a couple hundred million dollars or so. That seemed to be a belief some of my colleagues on the other side had. So we looked into it. We went through all the documents, all the e-mails, and thousands of pages, with ethics lawyers both in the government and out. What we came up with was that Mr. Perez acted ethically and appropriately at all times. There is no ''there'' there. So the facts belie the belief, but it seems that the belief carries on and that somehow the belief trumps the facts.

Well, if some of my colleagues want to believe the worst about Tom Perez, they can believe that, but they have no facts to back it up. It is an unfounded belief. Is that what is going to guide this body in approving nominations for this President or any President—that if I believe something and I can get maybe some of my colleagues to join in and believe it, that is enough? That is sufficient to vilify a nominee, to try to tear him down?

What about the facts? Don't facts matter? Doesn't the record matter? Of course it does. And the facts, as proven time and time again, are that Mr. Perez acted ethically and appropriately at the Department of Justice at all times and especially in the two cases—Magner v. St. Paul and Newell v. St. Paul. That has been clearly brought forth, that he acted appropriately and ethically.

So I say to my colleagues on the other side, believe what you want, but that belief, mistaken as it is, should not be used to tear down a good person, to vilify a good person, to cast this person in a light which is totally false.

So, yes, Mr. President, there was an objection to our meeting today under this obscure rule of the Senate, but we have rescheduled the meeting for 1 week hence. So in 1 week we will meet again, and we will vote to report out the nomination of Tom Perez, and then we will come to the floor. Again, I hope that it won't be filibustered by my Republican colleagues but that we will be able to vote up or down on Mr. Perez based not upon what someone believes but what the facts are, what his record is, what his record has been both in local government, State government, and at the Department of Justice.

When you look at that record, it is an exemplary record of unstinting public service in the best interests of the civil rights and equal rights of our country. That is why, with his background, his experience, and his dedication to fairness and justice, the fact that he has actually worked in the Senate on the HELP Committee—the committee that has jurisdiction over the Department of Labor—gives tremendous weight to his background and insight into how to be a truly great Secretary of Labor.

So we will vote next week. I hope there are not other kinds of roadblocks—unfounded roadblocks—thrown into the path of his confirmation. We will do everything we can to make sure this good person takes his rightful place as our next Secretary of Labor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

The PRESIDING OFFICER. The Senator from Utah.

Mr. LEE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

UNANIMOUS CONSENT REQUESTS

Mr. LEE. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of S. Res. 133 submitted earlier today. I further ask unanimous consent that the resolution be agreed to, the preamble be agreed to, and the motion to reconsider be made and laid upon the table, with no intervening action or debate.

The PRESIDING OFFICER. Is there objection?

The Senator from Connecticut.

Mr. BLUMENTHAL. Reserving the right to object, I will have a request with another resolution momentarily, but I understand the resolution of my friend from Utah. I believe this problem is broader than the one cited in his resolution. In fact, looking to the conduct of the Philadelphia instance, I would prosecute that case to the fullest extent of the law. I think the conduct—or, more correctly, misconduct—in that instance was absolutely despicable and abhorrent.

I am concerned about patient safety in a variety of areas. They may be a small fraction of the total number of health care cases in this country, but anytime, anywhere patients are endangered or threatened by criminal conduct or malpractice, people should be prosecuted and disciplined to the full extent of the law. These cases shock and horrify our sense of decency and we understand the responsibility of health care practitioners anywhere, anytime.

My resolution, which I intend to offer after the Senator from Utah concludes his, will call upon our colleagues to condemn these actions in all health care settings, whether clinics, hospitals, nursing homes, or dental offices across the country.

So with that, I object.

The PRESIDING OFFICER. Objection is heard.

The Senator from Utah.

Mr. LEE. Mr. President, this week in Philadelphia, a jury is deliberating the case of Kermit Gosnell. That doctor has been charged and tried for some of the most gruesome atrocities ever encountered by the American justice system.

As the grand jury opened its harrowing report:

> This case is about a doctor who killed babies and endangered women. What we mean is that he regularly and illegally delivered live, viable babies in the third trimester of pregnancy—and then murdered these newborns by severing their spinal cords with scissors.

Yet according to defense attorneys, Dr. Gosnell is not a monster, not a serial killer, not a predator of vulnerable mothers and their helpless children. He is just an abortionist.

Mr. President, let me suspend my speech momentarily. I understand my friend, the Senator from Connecticut, wishes to make a motion.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. BLUMENTHAL. Mr. President, I wish to offer the resolution that I and Senator BOXER, who is a long-time champion of better health care for the citizens of our country, and Senator SHAHEEN, expressing the sense of the Senate that these practices will not be tolerated in any setting, regardless of personal beliefs about the type of health care being offered.

This resolution is broader than the resolution of the Senator from Utah. I understand and sympathize with the basic objectives which, as I understand it, are to improve health care generally and to make sure the kinds of abuses being prosecuted in Philadelphia will not occur anywhere in this country.

I offer my resolution calling on the Senate to condemn such practices in all health care settings, be they clinics or hospitals, dental offices, anywhere in this country. They may be a small fraction and, hopefully, are a very small fraction, of the kinds of cases we would want to condemn. But we should condemn them wherever they occur, not just in one instance, not just singling out one case, but everywhere, anytime.

I might add as a former U.S. attorney that while this case is before the jury, I think we need to be very careful about what we say in a public forum as respected as this one about the facts of that case and about potentially prejudging the result. My understanding is the jury has not yet come back. If the allegations are true—if the jury concludes they have been proved beyond a reasonable doubt—then the punishment should certainly be sufficiently severe and serious to fit those circumstances and well deserving of our condemnation. But equally deserving of our condemnation are any circumstances where health care patients are put in danger, where safety is in peril, where the consequences do damage, or threaten damage, to the recipients of health care. Whatever the kind of health care, whatever we may think of it personally in terms of the merits and the type of care provided, we ought to condemn it, and that is the purpose and sense of the resolution I am offering.

So if I may, I ask unanimous consent that the Senate proceed to the consideration of a Senate resolution expressing the sense of the Senate regarding all incidents of abusive, unsanitary, or illegal health care practices be condemned—the text is at the desk; and I ask that the resolution be agreed to, the preamble be agreed to, and the motion to reconsider be laid upon the table with no intervening action or debate.

The PRESIDING OFFICER. Is there objection?

The Senator from Utah.

Mr. LEE. Reserving the right to object, as my friend, the Senator from Connecticut, is aware, we have only just received the language of this resolution in the last few minutes. Without having to read it closely, I am reluctant to grant consent at this time. But I will say I am heartened, and I think all Americans should be heartened, and the entire pro-life movement should be heartened by the clear implication that health regulations should be equitably applied and enforced on abortion clinics as they are on other health care facilities.

Part of the reason we fear that Dr. Gosnell's clinic, if, in fact, the allegations are proven true, was not a rare outlier is that abortion clinics are generally held to the same safety standards as hospitals, ambulatory, surgical facilities, et cetera. So on that basis, I object.

The PRESIDING OFFICER. Objection is heard.

The Senator from Utah.

Mr. LEE. Mr. President, if I may continue my remarks which I started a few moments ago.

According to his defense attorneys, then, Dr. Gosnell is not a monster, not a serial killer, not a predator of helpless mothers and their children. He is just an abortionist. In this context, Dr. Gosnell's alleged crimes were just abortions, and his facility, the so-called Women's Medical Society—reportedly strewn about with animal waste, infectious instruments, and fetal remains—was not, as the grand jury alleged, ''a baby charnel house.'' No, it was just a clinic.

His staff of allegedly unqualified, untrained frauds were not coconspirators in the contract killing of newborns. No, they were just health care providers. And the failure of local health inspectors and political officials to investigate repeated claims of Dr. Gosnell's barbarism was just a bureaucratic oversight—perhaps—or perhaps, as the