Government Control over Qui Tam Suits and Separation of Powers

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The False Claims Act's qui tam provisions, authorizing private parties or relators to sue on behalf of the U.S. government, have faced renewed constitutional challenges despite record recoveries. Within the past two years, three Supreme Court Justices suggested qui tam may violate Article II of the Constitution, and a district court dismissed a qui tam lawsuit as unconstitutional. The Department of Justice has broad statutory authority to dismiss a qui tam case and veto any settlement or voluntary dismissal by a relator, allowing the Executive to maintain control over qui tam suits. But DOJ rarely exercises these rights, as empirical studies reveal. This Note highlights the disconnect between the importance of executive control over qui tam cases for the FCA's constitutionality and DOJ's infrequent oversight in practice. It proposes (1) amending the FCA to further DOJ incentives to dismiss by requiring non-intervened cases proceeding to have merits similar to government-initiated FCA cases and (2) resolving the circuit split in favor of broad government authority to object to a settlement between relator and defendant, weakening separation-of-powers challenges.

† Yale Law School, J.D. 2024. Thanks to Professor Nicholas Parrillo for his guidance throughout all stages of this Note and the editors of the *Yale Journal on Regulation* for their insightful feedback and edits.

Introduction

In February 2024, the Department of Justice (DOJ) announced that it recovered over $2.68 billion in False Claims Act (FCA) settlements and judgments in fiscal year 2023.[1] That year's 1,212 new cases also marked a record number of lawsuits filed, while DOJ's statistics on annual FCA matters revealed over 20,000 cases and $75 billion in total recoveries since 1986.[2] First enacted during the Civil War, the FCA is a federal statute that imposes civil liability on individuals and corporations for defrauding the federal government. Today, the statute primarily serves as a cause of action to recover for healthcare and procurement fraud, given the high frequency of federal programs and contracts in those sectors.[3]

The FCA also contains a unique qui tam provision, which allows private individuals called relators to file civil actions on behalf of the government and pursue them separately from DOJ. These individuals are often whistleblowers with inside information about fraudulent conduct, and the Act incentivizes private actions by permitting relators to recover fifteen to thirty percent of damages if successful.[4] Given these incentives, qui tam actions outnumber DOJ-initiated suits today. Of the over a thousand new cases in 2023, 712 were filed under the qui tam provisions of the Act, making an average of thirteen new cases every week.[5] Qui tam actions also led to $2.3 billion in recoveries, or over eighty percent of total 2023 FCA revenue.[6]

At the same time as these historic recoveries, qui tam has faced constitutional challenges, primarily around whether allowing private parties to sue on behalf of the government violates the separation of powers. The Supreme Court has yet to rule on this issue,[7] although several circuit courts have upheld the statute's constitutionality under Article II because the statute's provisions ensure the U.S.'s control of qui tam actions.[8] For example, qui tam actions begin with relators filing a complaint in camera with the U.S. government, and the complaint must remain under seal for at least

1. *False Claims Act Settlements and Judgments Exceed $2.68 Billion in Fiscal Year 2023*, DEP'T OF JUST. (Feb. 22, 2024), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-268-billion-fiscal-year-2023 [https://perma.cc/DGD4-YUTP] [hereinafter *2023 FCA Summary*]. Fiscal year 2023 is October 1, 2022, to September 30, 2023.

2. *Fraud Statistics — Overview,* DEP'T. OF JUST. (Sept. 30, 2023), https://www.justice.gov/opa/media/1339306/dl [https://perma.cc/6UHP-JHEQ]; *see False Claims Act 2023 Year-End Update*, GIBSON DUNN (Mar. 4, 2024), https://www.gibsondunn.com/false-claims-act-2023-year-end-update [https://perma.cc/ALB4-NZU9] (summarizing the press release on 2023 FCA recoveries).

3. *2023 FCA Summary, supra* note 1.

4. 31 U.S.C. § 3730(d)(1)-(2).

5. *Fraud Statistics — Overview, supra* note 2.

6. *Id.*

7. By contrast, the Supreme Court upheld qui tam's validity under Article III in 2000. Vt. Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 771-78 (2000).

8. *See infra* Section I.B.

sixty days.[9] During this time, the government has the right to intervene and take over the investigation, ensuring the U.S. government has the first say in pursuing an FCA action, or decline to intervene and permit the relator to proceed. The statute also authorizes the government to dismiss the action despite objections from relators, preventing them from proceeding with meritless cases, although the precise timing and standard for dismissal are not stated.[10]

DOJ's right to dismiss a qui tam suit made its way to the Supreme Court when it granted certiorari on the issue in June 2022, as circuits differed on the precise standard for dismissal.[11] In July 2023, the majority in *United States* ex rel. *Polansky v. Executive Health Resources* held on textual and statutory interpretation grounds that DOJ can dismiss an FCA suit as long as it intervened sometime in the litigation, not only within the first sixty days.[12] Justice Thomas dissented, finding that the text and structure of the FCA do not give the government unilateral dismissal authority. He also asked the Third Circuit on remand to "consider the serious constitutional questions" raised by the defendants.[13] Justices Kavanaugh and Barrett concurred with the majority but noted their agreement with Thomas that "[t]here are substantial arguments that the *qui tam* device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation."[14]

As if on cue, defendants in FCA cases, encouraged by many organizations, began to argue that the statute is unconstitutional.[15] One district court in the Middle District of Florida has already accepted the defendants' challenges, finding that qui tam violates the Appointments Clause and dismissing the suit as unconstitutional.[16] The relator and the U.S. government appealed to the Eleventh Circuit, paving the way for a circuit split if the appellate court affirms.[17] Four justices must agree to grant certiorari on an FCA case, or only one justice beyond the three that cast doubt on qui tam in *Polansky*, as Justices Kavanaugh and Barrett also expressed the view

9. 31 U.S.C. § 3730(b)(2).

10. 31 U.S.C. § 3730(b)(1), (c)(2)(A).

11. Petition for Writ of Certiorari, U.S. *ex rel.* Polansky v. Exec. Health Res., Inc., 599 U.S. 419 (2023) (No. 21-1052); 142 S. Ct. 2834 (2022) (granting certiorari).

12. U.S. *ex rel.* Polansky v. Exec. Health Res., Inc., 599 U.S. 419, 423 (2023). The Court also found that district courts should apply the rule generally governing voluntary dismissal of suits.

13. *Id.* at 442-52 (Thomas, J., dissenting). The defendants and many amicus briefs argued against the FCA's constitutionality. *See infra* Section I.C.

14. 599 U.S. at 442 (Kavanaugh, J., concurring).

15. *See infra* Section I.C.

16. U.S. *ex rel.* Zafirov v. Fla. Med. Assoc., 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024).

17. United States' Notice of Appeal, U.S. *ex rel.* Zafirov v. Fla. Med. Assoc., No. 8:19-cv-01236-KKM-SPF (M.D. Tenn. Sept. 30, 2024), ECF No. 349; Relator's Notice of Appeal, *id.*, ECF No. 350; *see* Clarissa Zafirov v. Fla. Med. Assoc., LLC, No. 24-13581 (11th Cir. Oct. 30, 2024) (appeal docket).

that "the Court should consider the competing arguments on the Article II issue in an appropriate case."[18] As a result, odds are high that an FCA case will end up at the Court again, maybe involving a constitutional challenge to qui tam. In recent years, the Supreme Court has also often ruled in favor of broad executive power, increasing the likelihood of a successful renewed challenge to the FCA.[19]

At the same time, there remains a disconnect between DOJ's broad authority to exercise control over qui tam suits and its approach in practice. *Polansky* gave the U.S. the power to dismiss a case throughout the life of a qui tam action, so qui tam supporters could point to the case as supporting qui tam's consistency with Article II. In reality, though, DOJ rarely exercises its control over qui tam: several studies suggest a dismissal rate of less than five percent, even though most FCA cases do not result in recovery.[20] Some may believe that as long as DOJ *can* dismiss cases, there is no unconstitutional delegation of executive authority, even if DOJ fails to exercise this authority. Infrequent dismissal, however, leads to hundreds of cases with limited merit proceeding each year on behalf of the United States, taking up taxpayer resources to monitor, attaching the name of the United States to frivolous claims, and violating core values such as effective government that are at the heart of separation of powers.[21] Similarly, the FCA gives DOJ the power to object to relators who settle or dismiss a case with the defendant, but it rarely exercises this right. The Ninth Circuit limits this right by requiring that the United States show good cause before objecting, raising significant executive power concerns.[22] DOJ's limited use of its right to dismissal and objection also contrasts with many courts' findings that the government's ability to control FCA litigation is critical to the statute's constitutionality.[23]

Given limited government oversight of qui tam actions, perhaps qui tam and its constitutionally shaky diffusion of executive power should be eliminated so that only the U.S. can enforce the FCA. There are several reasons, however, for maintaining the FCA's qui tam provision. First, qui tam is not an anomaly but an example of the increasingly blurred line between the public and private sectors, demonstrating the benefits of utilizing both sectors' strengths. Many areas of law today, from securities to antitrust law, feature both public and private enforcement.[24] The FCA has

18. 599 U.S. at 442 (Kavanaugh, J., concurring).

19. *See infra* Section I.C.

20. *See infra* Section II.C.

21. *See infra* Section V.A for more on separation of powers. Cases with limited merit proceeding also impose burdens on defendants and on the judicial system.

22. *See infra* Part III.

23. *See infra* Section I.B.

24. For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 contains provisions to protect and incentivize whistleblowers of securities and commodities fraud. David Kwok, *Evidence from the False Claims Act: Does Private Enforcement Attract*

served as a case study for giving agencies the power to oversee private litigation and reflects a growing trend across the administrative state, so eliminating qui tam would be a step backward.[25]

Second, qui tam remains a major source of revenue for the United States, so eliminating it may reduce annual FCA recoveries by over a billion. For instance, 2023 qui tam actions led to $2.3 billion in recovery versus less than $400 million for non-qui tam actions.[26] While the government would presumably take on many of those qui tam actions, it would lack the resources provided by relator counsel and lose access to inside information without the incentives of qui tam.

Last, as this paper will argue, a few minor tweaks can ensure that DOJ retains control of qui tam actions and relators, ensuring it complies with Article II. Qui tam's origins in fourteenth-century England and the more than 150-year history of the FCA also suggest the long tradition and high value of qui tam and reinforce the idea that checks on relators were built into the text of the statute to produce a well-functioning qui tam system. Therefore, eliminating qui tam would be far more disruptive and inconsistent with the goals of the FCA.

Given extensive discussions about the constitutionality of the FCA,[27] this Note's goal is not to rehash those arguments. This Note is also not the first to perform an empirical study of qui tam, as several authors have already published detailed reports.[28] These two topics, however, occupy

Excessive Litigation, 42 PUB. CONT. L.J. 225, 228-29 (Winter 2013) (citing the Dodd-Frank Wall Street Reform and Consumer Protect Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code)).

25. *See, e.g.*, Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 127-29 (2005); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 630-43 (2013); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1153-60 (2012) (arguing that private enforcement is necessary to leverage private information and resources and prevent capture by regulated parties). *But see* John C. Coffee Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 220 (1983) (criticizing the private Attorney General as inefficient, uncoordinated, and unaccountable).

26. *See Fraud Statistics — Overview, supra* note 2; text accompanying *supra* note 6.

27. Academics have argued for and against aspects of the statute's constitutionality over the decades since the 1986 amendments strengthened its power. *See infra* Section I.B.

28. Christina Broderick studied qui tam actions between 1987 and 2004, observing that many FCA suits are frivolous and proposing greater Attorney General control over qui tam suits. Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 997-1001 (2007). David Kwok conducted an empirical study of FCA actions from 1986-2009 to observe the effectiveness of private enforcement, concluding that repeat-player firms have good track records for intervention. Kwok, *supra* note 24, at 235-40. David Freeman Engstrom published several papers on empirical studies of qui tam suits between 1986 and 2011, finding that relator-side firms play a positive role with higher success rates, DOJ makes intervention decisions strategically, and rejecting the claim that qui tam's recent growth constitutes an inefficient "gold rush" of private enforcement. David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1322 (2012); David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis*

distinct spaces within the literature and have not been connected.[29] This paper takes the novel step of combining an empirical study of the FCA in practice with an analysis of separation-of-powers principles to observe whether the FCA as used today satisfies constitutional values—at a time when the FCA faces renewed separation-of-powers challenges and a skeptical Supreme Court. Specifically, this paper will incorporate existing and novel empirical data on DOJ's exercise of its rights under the FCA to (1) dismiss a case and (2) object to relator settlement and dismissal, together with the scope of the government's power to exercise these rights in theory. The scope of these rights can be resolved from a textual and legislative-history perspective, as many courts have done, but at their core also reflect essential issues on the allocation of power between the United States and the private relator.

This Note proceeds in five parts. Part I will provide an overview of the Act's history, constitutional debates, and recent challenges. Parts II and III will discuss the government's right to dismissal and to object to settlement or dismissal, respectively, by providing an overview of the current standard and existing discussion, both empirical and theoretical. Part IV will present novel data on the frequency and causes of government exercise of these two rights through analysis of over four hundred FCA qui tam cases in 2018 and a sample of government motions. Part V will lay out the implications of this disconnect between rights in theory and practice. This Note ends by arguing that broad executive power is critical to the constitutionality of the FCA and proposes (1) amending the FCA to expand DOJ dismissal in practice by requiring DOJ to deem non-intervened cases on par with a case it would have brought itself and (2) resolving the circuit split in favor of broad government authority to object to dismissal and settlement, changes that would eliminate many of the separation of powers challenges that the statute faces today.

I. Overview of the False Claims Act and Constitutional Challenges

A. A Brief History and Overview of Qui Tam

Qui tam is an abbreviation of the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur,* which means '[he] who pursues

of DOJ Oversight of Qui Tam Litigation Under the False Claims Act, 107 NW. U. L. REV. 1689, 1728-37 (2013); David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation,* 114 COLUM. L. REV. 1913, 1959-63 (2014). None of these authors, however, has discussed how the status quo may reflect constitutional issues with the statute.

29. Note that the FCA has generated extensive scholarship for decades on many topics ranging from policy and statutory interpretation; to specific applications like environmental and health fraud; to comparing qui tam to other whistleblower laws. J. Randy Beck provides an excellent survey of the literature in his article, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 544 n.19 (2000), where he cites over thirty articles discussing the False Claims Act.

this action on our Lord the King's behalf as well as his own.'"[30] Qui tam actions date back to fourteenth-century England; most early qui tam statutes allowed persons with no standing-type interest, or "common informers," to initiate a suit and share the penalty for conviction with the King.[31] Starting in 1318 and over the next few centuries, partly due to the decline of communal law enforcement and limited public resources after the Black Death, Parliament enacted dozens of these statutes, primarily dealing with economic regulation or misbehavior on the part of officeholders.[32] By the sixteenth century, a group of "quasi-professional informers" developed, many of whom "found a variety of ways to abuse the *qui tam* process."[33] Methods of abuse included the collusive lawsuit (when the offender paid the informer to "botch the prosecution" or "undervalue the amount in issue"), compounding (when the offender paid the informer not to bring an action altogether), prosecuting wrongfully (to provoke settlement), or filing in a remote venue to force settlement due to high litigation costs.[34] As a result, and with the rise of professional policing, qui tam statutes were gradually repealed and eliminated in 1951.[35]

Qui tam actions in the United States date back to colonial legislatures, mirroring England, and many state laws were similarly repealed with the growth of professional policing.[36] By contrast, the federal FCA still exists today, amended several times throughout the past eighty years to incentivize qui tam actions.[37] The FCA was first enacted during the Civil War in 1863 in response to military procurement fraud.[38] The statute permitted any person to bring suit in the name of the United States to recover civil penalties from military personnel and civilian offenders, compensating the relator with half of the recovery if successful.[39] While this system worked

30. Vt. Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000) (citing 3 W. BLACKSTONE, COMMENTARIES *160).

31. JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 222 (2d ed. 2009).

32. *Id.*; *see also* Beck, *supra* note 29, at 567-73 (describing several qui tam statutes in the fourteenth and fifteenth centuries).

33. LANGBEIN ET AL., *supra* note 3131, at 222-23.

34. *Id.* at 223-24.

35. *Id.* at 224*; see also* Beck, *supra* note 29, at 579-85 (describing problems from qui tam enforcement, such as unlicensed settlements, fraudulent accusations, and selection of inconvenient venues).

36. LANGBEIN ET AL.*, supra* note 31, at 223.

37. *Id.*

38. Congress received many reports of misappropriation of money that was supposed to aid the Union, such as "[t]he same mules being sold over and over again," "[r]otted ship hulls freshly painted to appear new then sold as new vessels," "[i]nfantry boots made of cardboard," and "[g]unpowder barrels that when opened contained sawdust." James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1264-65 (2013).

39. CHARLES DOYLE, CONG. RSCH. SERV., R40786, QUI TAM: AN ABRIDGED LOOK AT THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 2, 5-6 (2021).

during the Civil War, the federal government post-war rarely used the FCA, preferring to pursue criminal prosecutions against government contractors.[40] By the early twentieth century, the FCA became primarily a tool for individuals "lurk[ing] in federal courthouses," who would file a qui tam action right after a criminal indictment, making most FCA cases "parasitic lawsuits."[41] Frustrated, the Attorney General proposed abolishing the FCA in 1943, but the Supreme Court shut down these efforts and directed the Attorney General to seek a legislative solution.[42] Congress amended the statute instead; notable changes included giving the United States sixty days to decide whether to prosecute the case, reducing relator bounties (up to ten percent if DOJ intervenes, up to twenty-five percent if not), and requiring dismissal if the government possessed knowledge of the fraud at the time the action was filed.[43] This last provision responded to the parasitic-lawsuit issue but effectively barred any qui tam suits, as almost every fraud was partly known by the government, until Congress amended the FCA again forty years later.[44]

With the onset of the Cold War and criminal fraud convictions for four of the largest defense contractors, Congress amended the Act again in 1986 to incentivize cases.[45] These amendments included setting the relator's recovery to fifteen to twenty-five percent if the United States prosecutes the case and twenty-five to thirty percent if only the relator does, allowing recovery for treble damages, and increasing the penalties for each false claim.[46] Further, the Act eliminated the "any prior government knowledge" defense and added a public-disclosure exception to prevent parasitic lawsuits.[47] As a result, qui tam filings surged, first focused on military fraud but expanding to healthcare fraud by the 1990s.[48] Congress most recently amended the FCA in 2009 and 2010, mostly clarifying questions that arose with the previous version of the statute. For example, the 2009 amendments overruled the "presentment" requirement set out by the Supreme Court and increased anti-retaliation protections for relators, while

40. Helmer, Jr., *supra* note 38, at 1267.
41. *Id.* at 1267-71.
42. *Id* at 1268.
43. *Id* at 1270-71.
44. *Id*.
45. *Id.* at 1271-73.
46. *Id.* at 1271-74.
47. *Id.* at 1274.
48. *See* Carolyn J. Paschke, Note, *The Qui Tam Provision of the Federal False Claims Act: The Statute in Current Form, Its History and Its Unique Position to Influence the Health Care Industry*, 9 J.L. & HEALTH 163, 164-65, 173-74 (1994-95); Aaron S. Kesselheim & David M. Studdert, *Whistleblower-Initiated Enforcement Actions Against Health Care Fraud and Abuse in the United States, 1996 to 2005*, 149 ANNALS INT. MED. 342, 343, 346 (2008) (describing the scope and characteristics of qui tam health-fraud litigation).

the 2010 amendments responded to disagreement about the public disclosure provisions.[49]

Today, the federal FCA (31 U.S.C. §§ 3729-3733) is a powerful tool for the United States to recover money from parties filing fraudulent claims for payment by the federal government. DOJ recovered over twenty billion dollars between 1986 and the last amendments in 2009 and over two billion dollars annually for the past fourteen years, or seventy-five billion dollars under the FCA since 1986.[50] The bulk of this recovery is now due to healthcare fraud, followed by procurement or defense fraud.[51]

FCA violations apply to any person who "knowingly presents . . . a false or fraudulent claim for payment or approval" or "knowingly makes . . . a false record or statement material to a false or fraudulent claim."[52] A case usually begins when the U.S. government or a private whistleblower or relator files a complaint in federal court claiming that a defendant has made a false claim, such as a healthcare insurance company submitting unsupported diagnosis codes to Medicare or a defense contractor inducing the U.S. Army to enter into a contract at inflated prices. Private relators must follow specific procedures in § 3730 of the Act. When a relator discovers potential fraud against the United States, they must serve on the government a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses."[53] Relators must also hire legal representation, as all the circuits to address this issue have held that only attorneys can represent the interests of the United States, so no *pro se* relators are allowed.[54] The complaint must be filed "in camera," "remain under seal for at least 60 days," and not "be served on the defendant until the court so orders."[55] During these sixty days, the government may choose to "intervene and proceed with the action," move for "extensions of . . . time" to investigate further while the complaint remains under seal, or "notify the court that it declines to take over the action," giving the relator the right to continue with the suit.[56] The

49. Helmer, Jr., *supra* note 38, at 1278-80; *see 2009 Amendments to False Claims Act Pose New Challenges for Health Care Industry*, AKIN GUMP (June 2, 2009), https://www.akingump.com/en/insights/alerts/2009-amendments-to-false-claims-act-pose-new-challenges-for-health-care-industry [https://perma.cc/R45T-JFZ2].

50. DOYLE, *supra* note 39, at 1; *Fraud Statistics — Overview, supra* note 2.

51. *Fraud Statistics — Overview, supra* note 2.

52. 31 U.S.C. § 3729(a)(1)(A).

53. 31 U.S.C. § 3730(b)(2).

54. United States v. Flaherty, 540 F.3d 89, 93-94 (2d Cir. 2008) ("Because relators lack a personal interest in False Claims Act *qui tam* actions, we conclude that they are not entitled to proceed pro se. . . . Our holding is in accord with all of the circuits that have considered the issue." (citations omitted)); *e.g.*, Timson v. Sampson, 518 F.3d 870, 873 (11th Cir. 2008) (explaining that while the FCA is silent on whether a "private individual can bring a *qui tam* suit *pro se* . . . the general provision permitting parties to proceed *pro se* . . . . appears to provide a personal right that does not extend to the representation of the interests of others" (citing 28 U.S.C. § 1654)).

55. 31 U.S.C. § 3730(b)(2).

56. 31 U.S.C. § 3730(b)(2)-(4).

text also indicates that the government may dismiss the case, though it is not fully clear when it can do so, making the exact scope of this dismissal power subject to debate for many years and only recently resolved by the Supreme Court in *Polansky*.

The FCA's history and the divergence between the use of qui tam in the United Kingdom and the United States also remains a topic of discussion. Some scholars like Paul Carrington, who supports expanding qui tam, have viewed this difference as reflecting the countries' differing uses of public versus private enforcement, with more private enforcement in the U.S. relative to the UK due to greater U.S. mistrust of government officials.[57] By contrast, other authors like Randy Beck argue that the English experience illustrates qui tam's inherent conflict of interest by giving relators a financial interest that often conflicts with the public interest at stake in the litigation.[58] Beck proposes that Congress eliminate the FCA's qui tam provisions, in line with English practice, or alternately amend the FCA to mandate the dismissal of declined cases, ensuring litigation only by government lawyers who lack financial interests in the outcome.[59]

B. Debates on the FCA's Constitutionality

The FCA's abolition in England has also contributed to discussions about the constitutionality of qui tam litigation, going back for decades. In 1989, after a surge in qui tam actions due to the 1986 amendments, then-Assistant Attorney General William P. Barr argued in a memorandum to the Attorney General on behalf of the Office of Legal Counsel that the FCA's qui tam provisions are unconstitutional—on three grounds.[60] First, the Appointments Clause of Article II requires that litigation to enforce the rights of the United States be carried out by an executive-branch official or a properly appointed governmental officer, not private parties who act from "mercenary motives."[61] Second, Article III standing doctrine or the "case-or-controversy" requirement precludes plaintiffs from bringing suit in federal court unless they suffer an "injury in fact" due to the defendant's conduct, so the FCA's universal standing for relators without any injury violates Article III.[62] Last, allowing private relators to enforce the law takes enforcement power away from the Executive and infringes on the

57. LANGBEIN ET AL., *supra* note 30, at 223; Paul D. Carrington, *Law and Transnational Corruption: The Need for Lincoln's Law Abroad*, 70 L. & CONTEMP. PROBS. 109, 111 (2007).

58. Beck, *supra* note 29, at 637-41.

59. *Id.* at 638-40.

60. Office of Legal Counsel, Memorandum Opinion for the Attorney General, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, U.S. DEP'T OF JUST. (July 18, 1989), https://www.justice.gov/file/24271/download [https://perma.cc/24NJ-BQ43] [hereinafter *Barr Memo*].

61. *Id.* at 209-10, 221-24; U.S. CONST. art. II, § 2, cl. 2; *see* Morrison v. Olson, 487 U.S. 654, 670-77 (1988).

62. *Barr Memo, supra* note 60, at 210, 224-28.

President's authority to ensure "faithful execution of the law" under the Take Care Clause.[63]

For the Take Care clause, Barr identified "the discretion to decide whether to prosecute a claim, and the control of litigation brought to enforce the government's interests" as critical to executive power and infringed by qui tam.[64] He also distinguished *Morrison v. Olson*, where the Supreme Court considered the constitutionality of the Ethics in Government Act's restrictions on the president's power to supervise and remove an independent counsel. The majority in *Morrison* upheld the provisions because the Attorney General retained "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties," such as the "unreviewable discretion" not to request the appointment of independent counsel and control over the breadth of the investigation.[65] By contrast, Barr explained, qui tam means DOJ "loses all control over the decision whether to initiate a suit" and has limited ability to assert the government's interests if it does not intervene initially, far less executive control than under the Ethics in Government Act.[66]

At the same time, legal academics also commented on the FCA's constitutionality, some agreeing with Barr while others came out the other way in defense of the FCA.[67] For example, Evan Caminker concluded that the "constitutional values underlying Articles II and III are no more threatened by 'public' *qui tam* actions than by conventional 'private' citizens' suits."[68] Thomas Lee, defending the FCA's constitutionality, argued for the assignment theory of standing, where the government's harm is assigned to the relator,[69] a position that the Supreme Court later adopted.[70] Cass Sunstein cited qui tam as a reason *Lujan v. Defenders of Wildlife* was

63. *Id.* at 210, 228-32.

64. *Id.* at 229.

65. *Id.* at 229 (quoting *Morrison*, 487 U.S. at 696).

66. *Id.* at 229-30.

67. Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381, 382 n.3 (providing examples of scholarly discussion of FCA constitutional issues); Beck, *supra* note 29, at 543-44 nn.13 & 18 (same); *see, e.g.*, Sean Hamer, *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act,* 6 KAN. J.L. & PUB. POL'Y 89,98 (1997) (arguing qui tam is constitutional); Peter M. Shane, *Returning Separation-of-Powers Analysis to Its Normative Roots: The Constitutionality of Qui Tam Actions and Other Private Suits to Enforce Civil Fines,* 30 ENV'T L. REP. 11081, 11082 (2000) (same); James T. Blanch, Note, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 HARV. J.L. & PUB. POL'Y 701, 703 (1993) (arguing qui tam is unconstitutional); Frank A. Edgar, Jr., Comment, *"Missing the Analytical Boat": The Unconstitutionality of the Qui Tam Provisions of the False Claims Act*, 27 IDAHO L. REV. 319, 319-20 (1990) (same).

68. Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 348 (1989).

69. Thomas R. Lee, Comment, *Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543, 545 (1990).

70. Vt. Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 768-69 & n.1 (2000).

wrongfully decided in 1992 and why the Supreme Court's approach to standing, still good law today, is inconsistent with our country's history.[71]

In a 1996 memo, Walter Dellinger, on behalf of the Office of Legal Counsel, set out an overview of the constitutional issues between the executive and legislative branches, including separation-of-powers issues core to the challenges to the FCA that superseded many of the 1989 memo's conclusions.[72] The memo clarified that giving *non-federal* actors significant authority does not violate the Appointments Clause, affirming lower-court decisions rejecting Appointments Clause challenges to qui tam.[73] The Supreme Court in 2000 then rejected an Article III standing challenge to the FCA, finding that relators meet the requirements for standing because the government's injury is assigned to the relator, leading to the partial assignment of the government's damages claim.[74]

No Supreme Court case has yet addressed the Article II challenges to the FCA constitutionality, and the Court in *Vermont Agency of Natural Resources v. United States* ex rel. *Stevens* clarified that it was not commenting apart from Article III.[75] Every circuit to consider the issue, however, has concluded that the FCA does not violate Article II, in part due to the government's substantial control of qui tam actions even if it declines to intervene.[76] For instance, the Fifth Circuit found that the government exercises constitutionally sufficient control over qui tam litigation because it can veto settlements without intervening and retains "unilateral power to

71. Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 175-76 (1992) (suggesting that qui tam indicates Congress can authorize citizens to sue to enforce federal laws even if they have not suffered individualized injuries).

72. Office of Legal Counsel, Memorandum Opinion for the General Counsels of the Federal Government, *The Constitutional Separation of Powers Between the President and Congress*, U.S. DEP'T OF JUST. (1996), https://www.justice.gov/file/20061/download [https://perma.cc/9275-RQH8].

73. *Id.* at 145-46; *see, e.g.*, Burch v. Piqua Eng'g, Inc., 803 F. Supp. 115, 120 (S.D. Ohio 1992) (holding that "because qui tam plaintiffs are not officers of the United States, the FCA does not violate the Appointments Clause"). The U.S. government made similar arguments, and others, in its recent brief in *Zafirov*, asking the Eleventh Circuit to overturn the District Court's holding that qui tam violates the Appointments Clause. Brief for Appellant United States of America at 8-11, Zafirov v. Fla. Med. Assocs., LLC, No. 24-13581 (11th Cir. Jan. 6, 2025), ECF No. 39 (explaining that the Appointments Clause does not apply to private citizens; the FCA ensures that qui tam actions are consistent with the DOJ's priorities for enforcing federal law; and that relators' roles are limited in time and scope).

74. *Stevens*, 529 U.S. at 773-74.

75. "In so concluding, we express no view on the question whether qui tam suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3." *Id.* at 778.

76. Many circuit courts ruled on Article II challenges to the FCA between 1993 to 2004, largely upholding qui tam provisions "[p]recisely because of the United States' significant control over FCA qui tam actions." Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1312 (11th Cir. 2021); *see* U.S. *ex rel.* Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032, 1040-42 (6th Cir. 1994); U.S. *ex rel.* Stone v. Rockwell Int'l Corp., 282 F.3d 787, 804-07 (10th Cir. 2002).

dismiss an action" despite the relator's objection.[77] The circuits split, however, on the precise standard for dismissal and objection to settlement.[78]

Amidst these court decisions, academic writing on the FCA surged again. Some applied the lens of qui tam to argue that citizen suits resemble private actions and should survive Article II scrutiny.[79] Others like Richard Bales defended the constitutionality of qui tam along Article II grounds.[80] Pamela Bucy also noted that DOJ's authority to dismiss or settle a case over the relator's objections is an example of "significant control," meaning the FCA does not interfere with the Take Care Clause.[81] The discussion has also continued over the past twenty years, with some academics using the history of qui tam statutes to refute arguments that Congress cannot delegate to private individuals the right to litigate on behalf of the public.[82] For example, in refuting critiques about the executive as chief prosecutor, Saikrishna Prakash wrote that the executive historically retained control over qui tam actions in England and the United States.[83] For the most part, writings on qui tam focused upon other aspects of the statute, such as public versus private enforcement, and constitutionality took a back seat as mostly settled law after the early 2000s.

C. Recent Challenges to the FCA

In the past few years, with another surge in qui tam litigation and growing disagreement about the standard for government control over FCA cases, conversations about the statute's constitutionality have

77. Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 753-58 (5th Cir. 2001) (en banc). But two judges dissented, arguing that qui tam violates the Take Care Clause, the Appointments Clause, and separation-of-powers principles. *Id.* at 758-75 (Smith, J., dissenting). The Ninth Circuit also found that the FCA does not violate separation of powers because of the government's power, "albeit somewhat qualified, to end qui tam litigation." U.S. *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 751-58, 754 n.11 (9th Cir. 1993).

78. *See infra* Parts II and III.

79. *See, e.g.*, Robin Kundis Craig, *Will Separation of Powers Challenges 'Take Care' of Environmental Citizen Suits? Article II, Injury-in-Fact, Private 'Enforcers,' and Lessons from Qui Tam Litigation*, 72 U. COLO. L. REV. 94, 169-70 (2001); Stephen M. Johnson, *Private Plaintiffs, Public Rights: Article II and Environmental Citizen Suits*, 49 KAN. L. REV. 383, 408-09 (2001); Shane, *supra* note 67, at 11082.

80. Bales, *supra* note 67, at 404, 435.

81. Pamela H. Bucy, *Private Justice and the Constitution*, 69 TENN. L. REV. 939, 954-56 (2002).

82. *See, e.g.*, F. Andrew Hessick, *Standing, Injury in Facts, and Private Rights*, 93 CORNELL L. REV. 275, 278, 320 (2008) (arguing that requiring "injury in fact" in private-rights cases is ahistorical and undermines separation of powers); Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. 1235, 1239 (2018) (finding that qui tam historically authorized private litigation against executive officials for "generalized grievances").

83. Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 537, 590-94 (2005).

resurfaced outside the academic setting and in the courtroom.[84] When the Supreme Court granted certiorari on the standard for dismissal in 2023, respondent Executive Health Resources argued in its brief that the petitioner's interpretation of limited government authority to dismiss would be unconstitutional, along with textual and structural arguments about the FCA. First, the "President must supervise and control qui tam suits to take care that the laws are faithfully executed," as delegations of executive authority are permissible only if the Executive can supervise or control the non-executive party, as in *Morrison*.[85] Second, the validity of the FCA under the Appointments Clause requires the government's control over qui tam actions.[86] Other amicus briefs for the respondent also discussed the importance of dismissal for respecting separation of powers. The Washington Legal Foundation, for example, argued that the petitioner's interpretation would violate the Constitution's vesting of the right to control litigation in the Executive.[87]

Rather than respond to these constitutional arguments, the majority decided the case entirely on the text and structure of the statute, without mentioning Article II at all.[88] Only the three justices filing separate opinions alluded to other concerns in light of the arguments raised by the parties below. Justice Thomas described qui tam as long inhabiting "something of a constitutional twilight zone" and identified "substantial arguments that the qui tam device is inconsistent" with Article II's Appointments and Take Care Clauses.[89]

In light of *Polansky*, many defendants in FCA suits have argued that the FCA is unconstitutional, and organizations have encouraged re-litigating qui tam's constitutionality.[90] A few months after the Court's decision

84. *See* Kevin M. McGinty & Keshav Ahuja, *Blowing the Whistle on the False Claims Act Qui Tam Provisions: Dissent and Concurrence in* Polansky *Invite Constitutional Challenge to the Predominant Source of FCA Litigation*, MINTZ (July 17, 2023), https://www.mintz.com/insights-center/viewpoints/2146/2023-07-17-blowing-whistle-false-claims-act-qui-tam-provisions [https://perma.cc/YFR2-8CNA].

85. Brief for Respondent Executive Health Resources, Inc. at 25, U.S. *ex rel.*Polansky v. Exec. Health Res., Inc., 599 U.S. 419 (2023) (No. 21-1052).

86. *Id.* at 35-37. The brief argues that the Appointments Clause is applied based on whether the individual wields significant authority pursuant to the laws of the United States, meaning relators must be "removed" by being "dismissed" at any time to respect this clause.

87. Brief for Washington Legal Foundation as Amicus Curiae Supporting Respondents at 5-6, *Polansky*, 599 U.S. 419 (2023) (No. 21-1052).

88. *Polansky*, 599 U.S. at 429-38. "Paragraph 2 refutes the idea that it applies regardless of intervention." *Id.* at 430. "[A] straightforward reading of the FCA refutes Polansky's (and the dissent's) position—that Paragraph 2 (and also Paragraph 1) applies only when the Government's intervention occurs during the seal period." *Id.* at 432.

89. *Id.* at 449 (Thomas, J., dissenting).

90. *See, e.g.*, Kristin Graham Koehler & Joshua Fougere, *An Open Invitation to Challenge the Constitutionality of the Qui Tam False Claims Act Cases*, WASH. LEGAL FOUND. (Sept. 23, 2023), https://www.wlf.org/2023/09/29/publishing/an-open-invitation-to-challenge-the-constitutionality-of-qui-tam-false-claims-act-cases [https://perma.cc/XF3D-DAWB] ("FCA defendants can—and should—be raising arguments about the *qui tam* provision's constitutionality."); Robert

in *Polansky*, Exactech, a medical device manufacturer sued for submitting false claims to Medicare and Medicaid, moved to dismiss on Article II grounds.[91] The Northern District of Alabama denied the motion, reasoning that qui tam relators are not officers acting in violation of the Appointments Clause because their authority to litigate is temporary, and the government's rights to intervene, monitor, and settle without relator consent limit relators' power in accord with the Take Care Clause.[92] The court also distinguished the Supreme Court's holding in *Morrison* by noting that relators are civil litigants without the criminal authority of the independent counsel.[93] In September 2024, the Southern District of Florida rejected similar motions to dismiss, noting the history of qui tam and that "[e]very circuit court that has considered the issue outside of the Eleventh Circuit has considered the provision constitutional." [94] The court also cited *Polansky* as supporting qui tam's consistency with the Take Care Clause, for "the United States always has the opportunity to later intervene in the action, even if it chooses not to intervene initially, and it can always seek dismissal of the claims."[95]

While these challenges failed, other defendants and amicus parties have continued to make similar arguments. For instance, the U.S. Chamber of Commerce filed amicus briefs in two FCA suits, supporting the defendants' arguments that qui tam is unconstitutional.[96] In one case, the

Salcido & Emily I. Gerry, *Courts Should Rule That the False Claims Act Qui Tam Provisions Are Unconstitutional*, NAT'L L.J. (Mar. 7, 2024), https://www.law.com/nationallawjournal/2024/03/07/courts-should-rule-that-the-false-claims-act-qui-tam-provisions-are-unconstitutional; Daniel Seiden, *Big 2025 FCA Cases Ponder Constitution, Causation, Cybersecurity*, BLOOMBERG L. (Dec. 31, 2024), https://news.bloomberglaw.com/business-and-practice/big-2025-fca-cases-ponder-constitution-causation-cybersecurity [https://perma.cc/K78X-MYUQ] (mentioning two constitutional challenges by defendants Fluor Corp. and Planned Parenthood Federation of America).

91. *See* Kevin M. McGinty & Keshav Ahuja, *Challenge to False Claims Act Qui Tam Provisions Fails in an Initial Attempt to Revive Long-Dormant Arguments as to Constitutionality Under Article II*, MINTZ (Dec. 7, 2023), https://www.mintz.com/insights-center/viewpoints/2146/2023-12-07-challenge-false-claims-act-qui-tam-provisions-fails [https://perma.cc/GG83-WAF8] (describing Exactech's arguments and the court's response).

92. U.S. *ex rel.* Wallace v. Exactech, Inc., 703 F. Supp. 3d 1356, 1364-65 (N.D. Ala. 2023).

93. *Id.* at 1364-65. The court also rejected an argument by the defendant that the "Government's power to maintain control is relevant only if it exercises that power." Indeed, "retaining" the power "to remove the independent counsel for good cause" gives the Executive "substantial ability to ensure that the laws [are] 'faithfully executed,' even if this power remains unexercised." *Id.* at 1365. This Note, by contrast, will argue why exercising this power in practice is important.

94. U.S. *ex rel.* Butler v. Shikara, No. 20-80483-CV, 2024 WL 4354807, at *11-13 (S.D. Fla. Sept. 6, 2024).

95. *Id.* at *12 (emphasis omitted) (citing U.S. *ex rel.* Polansky v. Exec. Health Res., Inc., 599 U.S. 419, 434 (2023)). "The United States also has the authority to settle the case, and it can veto any voluntary dismissal/settlement by the relators." *Id.* (citations omitted).

96. *Amicus Curiae* Brief of the Chamber of Commerce of the United States of America in Support of Defendants' Motion for Judgment on the Pleadings, U.S. *ex rel.* Shepherd v. Fluor Corp., No. 6:13-cv-02428-JD (D.S.C. Sept. 13, 2024), ECF No. 398-1; *Amicus Curiae* Brief of the

District of South Carolina denied the defendants' motion for procedural reasons (i.e., failure to raise the affirmative defense in a timely manner).[97] In the other case, the court agreed with the defendants and the Chamber of Commerce. In September 2024, the Middle District of Florida in *United States* ex rel. *Zafirov v. Florida Medical Associates, LLC* dismissed a qui tam action for violating the Appointments Clause.[98] In a 53-page-long order, the court explained that FCA relators yield "significant authority" and maintain a "continuing position" akin to a constitutional office, satisfying the test for officers under Supreme Court precedent.[99] The court also noted that a robust history of qui tam actions cannot "save [the relator] from qualifying as an officer."[100] While the case is not binding outside of the district, the plaintiff and the government appealed to the Eleventh Circuit, setting the way for a potential circuit split, and other defendants may cite the ruling as persuasive—making it more likely that the issue comes before the Supreme Court.[101]

While U.S. control over qui tam cases is a crucial reason why executive power under Article II is satisfied, this power is rarely exercised. For example, Cristina Broderick found that DOJ intervened in only twenty-two percent of FCA cases from 1987 to 2004, while seventy-three percent were ultimately dismissed, suggesting infrequent involvement in FCA litigation despite many frivolous suits.[102] Even more striking is the government's limited use of its dismissal power despite its importance in *Polansky*. David Freeman Engstrom found that DOJ dismissed only thirty cases

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Chamber of Commerce of the United States of America in Support of Defendants' Joint Motion for Judgment on the Pleadings or to Dismiss for Lack of Subject-Matter Jurisdiction at 4, United States *ex rel.* Zafirov v. Fla. Med. Assoc., No. 8:19-cv-01236-KKM-SPF, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024); *see* Institute for Legal Reform, *The Constitutionality Issues of the FCA's Qui Tam Provisions*, U.S. CHAMBER COM. (Mar. 21, 2024), https://instituteforlegalreform.com/blog/the-constitutionality-issues-of-the-fcas-qui-tam-provisions [https://perma.cc/KUV2-P94R].

97. Order on Motion for Judgment on the Pleadings and on Motion to Expedite Consideration of Motion for Judgment on the Pleadings at 4-7, *Shepherd*, No. 6:13-cv-02428-JD, ECF No. 461.

98. *Zafirov*, 2024 WL 4349242, at *18.

99. *Id.* at *7-15 (citing Buckley v. Valeo, 424 U.S. 1, 126 (1976); Lucia v. SEC, 585 U.S. 237, 245 (2018)).

100. *Id.* at *15-18. The court also noted that "[t]he unclear role of litigation funding heightens the tension between qui tam actions and ordinary Executive Branch practice," as relators "may sell portions of [their] interest in an FCA action to third parties," so "the government might not know who is involved in FCA enforcement." *Id.* at *3.

101. United States' Notice of Appeal, *Zafirov*, No. 8:19-cv-01236-KKM-SPF, ECF No. 349; Relator's Notice of Appeal, *id*., ECF No. 350; *see* Seiden, *supra* note 90; Courtney Saleski, Eric Christofferson, John Hillebrecht, Christopher Oprison & Michael Keramidas, *Federal Judge Rules Whistleblower Provision of the False Claims Act IsUnconstitutional*, DLA PIPER (Oct. 8, 2024), https://www.dlapiper.com/en/insights/publications/2024/10/zafirov-v-florida-medical-associates-llc [https://perma.cc/8JY4-R6RE]. This Note focuses on challenges under the Take Care Clause, while *Zafirov* struck down qui tam under the Appointments Clause, but both challenges relate to Article II and executive power. *Zafirov* suggests that Article II challenges generally may come up to the Supreme Court.

102. Broderick, *supra* note 28, at 971-75.

from 1986 to 2013,[103] and other reports found that only a tiny fraction of the six-hundred to seven-hundred annual cases are dismissed by the United States.[104] No authors have studied the frequency of U.S. objection to settlement and dismissal, though the Ninth Circuit's good-cause requirement also calls into question whether the United States exercises control over qui tam in that circuit.[105]

The importance of the Executive maintaining control over dismissal and objection to settlement, contrasted with the infrequent use of these powers, suggests changes must be made to align the exercise of these rights with separation-of-power considerations. This discrepancy is particularly important as the Supreme Court in the past twenty years has moved away from its holding in *Morrison* to embrace Scalia's dissent, which requires the Executive to have "complete control over investigation and prosecution of violations of the law."[106] In 2010, the Supreme Court held that a dual layer of for-cause restrictions for the Public Company Accounting Oversight Board, an independent agency, violated Article II because the President must have "power to oversee executive officials through removal."[107] Similarly, in two cases in 2020 and 2021, the Court invalidated for-cause restrictions on removing agency directors because these restrictions violate the separation-of-powers doctrine.[108] Thus, for the FCA to survive potential separation-of-powers challenges at the current Supreme Court, DOJ must be able to point to its control over all elements of a qui tam action.

One other aspect of the FCA's constitutionality that is worth briefly mentioning is related to due process, excessive fines, double jeopardy, and defendants' rights in criminal cases. Some academics have noted that the FCA may violate due process by allowing a private person to serve as a "prosecutor" without procedural safeguards, and the penalties under the

103. Engstrom, *Public Regulation of Private Enforcement*, *supra* note 28, at 1717 n.89.

104. Douglas W. Baruch, Jennifer M. Wollenberg, Rebecca A. Hillyer, Harold Malkin, Scott Memmott, & Paul Meyer, *US Supreme Court Affirms Easy Government Dismissal Standard in Declined Qui Tam Cases, But Renews Constitutionality Debate*, MORGAN LEWIS (June 16, 2023), https://www.morganlewis.com/pubs/2023/06/us-supreme-court-affirms-easy-government-dismissal-standard-in-declined-qui-tam-cases-but-renews-constitutionality-debate [https://perma.cc/NF39-K326].

105. *See infra* Part III.

106. Salcido & Gerry, *supra* note 90 (citing Morrison v. Olson, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting)); *see* Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 102-12.

107. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484, 492, 514 (2010) ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them.").

108. Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 213, 219 (2020); Collins v. Yellen, 594 U.S. 220, 257 (2021). Most recently, the Supreme Court expanded executive power even more in *Trump v. United States* by finding presumptive immunity for the president's official acts.144 S. Ct. 2312, 2331 (2024).

FCA may violate the Eighth Amendment prohibition on excessive fines.[109] However, most of these arguments have been rejected by courts because qui tam is civil.[110]

II. The Government's Right to Dismissal

A. The Circuit Split Pre-2023 and the Supreme Court's Decision in Polansky

Section 3730(c)(2)(A) of Title 31 of the U.S. Code lays out the government's right to dismiss an FCA case, reading: "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 . . . ."[111] Until last year, there were two circuit splits related to dismissal: (1) can the government dismiss an FCA suit without intervening and (2) what is the standard for government dismissal.[112] On the first, the D.C.,[113] Ninth,[114] and Tenth Circuits[115] read the statute as empowering the government to move for dismissal at any point in the litigation, regardless of whether it intervened. Notably, the Tenth Circuit in *Ridenour* based its decision in part on the constitutional-doubt canon of statutory interpretation, finding that conditioning the Government's right to dismiss an action tied to a showing of good cause under § 3730(c)(3) would place the FCA on "constitutionally unsteady ground."[116] By contrast, the Third,[117] Sixth,[118] and Seventh Circuits[119] read the statute as authorizing government dismissal only when it "proceeds with the action"[120] or intervenes. The Third and the Seventh Circuits cast doubt upon the Tenth Circuit's concerns about

109. Bucy, *supra* note 81, at 963-73; *see* Laura Hough, *Finding Equilibrium: Exploring Due Process Violations in the Whistleblower Provisions of the Fraud Enforcement and Recovery Act of 2009*, 19 WM. & MARY BILL RTS. J. 1061, 1074 (2011); Frank LaSalle, *The Civil False Claims Act: The Need for a Heightened Burden of Proof as a Prerequisite for Forfeiture*, 28 AKRON L. REV. 497, 529, 533 (1995); Sharon G. Finegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 PENN ST. L. REV. 625, 678 (2007).

110. DOYLE, *supra* note 39, at 13-16.

111. 31 U.S.C. § 3730(c)(2)(A).

112. *See* Polansky v. Exec. Health Res. Inc., 17 F.4th 376, 382, 384 n.8, 388 (3d Cir. 2021) (outlining the splits).

113. Swift v. United States, 318 F.3d 250, 251 (D.C. Cir. 2003).

114. U.S. *ex rel.* Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1145 (9th Cir. 1998).

115. Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 934-35 (10th Cir. 2005).

116. *Ridenour*, 397 F.3d at 934 (quoting Zadvydas v. Davis, 533 U.S. 678, 689 (2001)).

117. *Polansky*, 17 F.4th at 388.

118. U.S. *ex rel.* Poteet v. Medtronic, Inc., 552 F.3d 503, 519 (6th Cir. 2009).

119. U.S. *ex rel.* CIMZNHCA, LLC v. UCB, Inc., 970 F.3d 835, 844 (7th Cir. 2020).

120. 31 U.S.C. § 3730(c)(1).

unconstitutionality.[121] The Seventh Circuit noted that the power to terminate an action is "simply part of the power 'to conduct the action'"[122] and the government must have "'leave of court' to dismiss the prosecution," even in criminal cases.[123] The petitioner in *Polansky* went even further, asking the court to hold that the government can dismiss the suit only if it intervenes at the outset.[124]

The second was a three-way split on the standard for the government to dismiss a qui tam action over a relator's objection.[125] In 1998, the Ninth Circuit in *Sequoia* held that the government must identify a "valid government purpose" and a "rational relation between dismissal and accomplishment of the purpose"[126] before dismissal, an approach the Tenth Circuit also followed.[127] The Ninth Circuit noted the statute itself does not create a standard for dismissal but found the district court's two-part standard was reasonable based on substantive-due-process jurisprudence, legislative history, and avoidance of separation-of-powers concerns.[128] By contrast, the D.C. Circuit in *Swift* in 2003 found the government has broad, "unfettered" authority to dismiss qui tam cases,[129] which the First Circuit largely followed.[130] Relying primarily upon the text of the statute, the D.C. Circuit concluded that the statute's right to a hearing is "simply to give the relator a formal opportunity to convince the government not to end the case" rather than judicial review, as the Executive Branch has the prerogative to decide which cases should go forward.[131] The Third and Seventh Circuits applied the Federal Rules of Civil Procedure as it would for any party, requiring the government to satisfy the Rule 41(a) standard for voluntary dismissals. The Seventh Circuit noted, "If Congress wishes to require some

121. *CIMZNHCA*, 970 F.3d at 848; *Polansky*, 17 F.4th at 387 (reiterating the Seventh Circuit's arguments that good cause is neither "burdensome nor unfamiliar," and routinely satisfied when the government extends its time to investigate and decide whether to intervene).

122. *CIMZNHCA*, 970 F.3d at 848 (citing 31 U.S.C. § 3730(c)(3)).

123. *Id.* (citing FED. R. CRIM. P. 48(a)).

124. *Polansky*, 17 F.4th at 384-85.

125. *Id.* at 388.

126. U.S. *ex rel.* Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1145-46 (9th Cir. 1998) (quoting U.S. *ex rel.* Sequoia Orange Co. v. Sunland Packing House Co., 912 F. Supp. 1325, 1341 (E.D. Cal. 1995)).

127. Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 936 (10th Cir. 2005).

128. *Sequoia*, 151 F.3d at 1145-46. The court found support from the Senate Report to the False Claims Amendments Act of 1986. S. REP. NO. 99-345, at 26 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.

129. *Swift*, 318 F.3d at 252.

130. Borzilleri v. Bayer Healthcare Pharms., Inc., 24 F.4th 32, 42-45 (1st Cir. 2022) (finding the government can dismiss "unless the relator . . . can show that the government's decision . . . transgresses constitutional limitations or . . . is perpetrating a fraud on the court").

131. *Swift*, 318 F.3d at 252-53 (finding that § 3730(c)(2)(A) "states that 'The Government'—meaning the Executive Branch, not the Judicial—'may dismiss the action,' which . . . suggests the absence of judicial constraint," and there is a "presumption that decisions not to prosecute . . . are unreviewable") (citing Heckler v. Chaney, 470 U.S. 821, 831-33 (1985)).

extra-constitutional minimum of fairness, reasonableness, or adequacy of the government's decision under § 3730(c)(2)(A), it will need to say so."[132]

The Supreme Court resolved this dispute in 2023 by affirming the Third Circuit's approach to both questions. Relying on the text and structure of the statute and the canons of statutory interpretation, the Court held "the Government may seek dismissal of an FCA action over a relator's objection so long as it intervened sometime in the litigation, whether at the outset or afterward."[133] The Court also agreed with the Rule 41(a) standard for voluntary dismissals, declining to accept the broad *Swift* standard or the more demanding *Sequoia* standard because "[t]he Federal Rules are the default rules in civil litigation, and nothing warrants a departure from them here."[134] The Court, however, clarified that government motions to dismiss are likely to "satisfy Rule 41 in all but the most exceptional cases" and that the government's views are "entitled to substantial deference."[135] A district court should "think several times over before denying a motion to dismiss" and grant the motion as long as the government offers a "reasonable argument for why the burdens of continued litigation outweigh its benefits," even if the relator "presents a credible assessment to the contrary."[136] As a result, while *Polansky* "places some limits" on dismissing FCA qui tam actions, it will be "difficult for relators to overcome a government motion to dismiss" going forward.[137]

Notably, while many amicus briefs for *Polansky* stressed the importance of government control of dismissal for the FCA to be constitutional,[138] as did many circuits when deciding the level of government control over dismissal,[139] the majority opinion in *Polansky* does not mention constitutionality at all.[140] Some could still read the opinion as implying that the FCA is constitutional because the U.S. government has the broad authority to dismiss whenever it wants, responding to separation-of-powers concerns. However, as this Note discusses, empirical evidence shows that DOJ rarely dismisses cases, meaning that the United States has its name

132. U.S. *ex rel.* CIMZNHCA, LLC v. UCB, Inc., 970 F.3d 835, 853 (7th Cir. 2020); *see* Polansky v. Exec. Health Res. Inc., 17 F.4th 376, 388 (3d Cir. 2021).

133. *Polansky*, 599 U.S. at 424 (2023). Specifically, the Court looked at the statute as a whole, grouping the text of the statute into four key paragraphs. It then found that "Paragraph 2" (containing the key provision at issue) "applies only if the Government has intervened, but the timing of the intervention makes no difference." *Id.* at 430.

134. *Id.* at 436.

135. *Id.* at 437.

136. *Id.* at 438.

137. VICTORIA L. KILLION, CONG. RSCH. SERV., LSB11047, LEGAL STANDARDS FOR GOVERNMENT DISMISSAL OF QUI TAM CASES UNDER THE FALSE CLAIMS ACT 1 (2021).

138. *See, e.g.*, Brief for Washington Legal Foundation, *supra* note 87.

139. *See, e.g.*, U.S. *ex rel.* Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1146 (9th Cir. 1998) (finding the two-step standard respects the "Executive Branch's prosecutorial authority by requiring no greater justification of the dismissal motion than is mandated by the Constitution itself").

140. *See generally Polansky*, 599 U.S. 419 (neglecting to consider the constitutionality of qui tam in the majority opinion).

attached to frivolous claims and must spend taxpayer resources to monitor those cases. There are also strong arguments for a more functionalist approach, including the importance of effective government for separation of powers. This disconnect between theory and practice and the Supreme Court's lack of a clear position on the FCA's validity under Article II means that the statute's constitutionality remains an important question.[141]

On the law-review side, only a few articles have discussed DOJ control of dismissal, most of which focus on the inherent contradictions in the FCA that discourage dismissal while spending limited time on constitutionality.[142] One exception is a 2020 comment arguing that existing standards for dismissal (pre-*Polansky*) are unconstitutional and finding support from text, legislative history, and the Constitution for a new standard inspired by the business-judgment rule.[143] Other articles that focus on the FCA's constitutionality have mentioned dismissal authority mostly in brief as one of many aspects of qui tam implicating constitutionality issues.[144]

B. DOJ's Internal Policies on Oversight in FCA Cases

As discussed, the text of the FCA requires that the U.S. government review and take action on the qui tam suit before the defendant is served within 60 days or longer if it moves for an extension.[145] The result is one of three actions: 1) intervene and take over the case,[146] 2) dismiss and end the case altogether,[147] and 3) decline to intervene without dismissal, allowing the relator to proceed and lead the case.[148] As DOJ has stated in a memorandum, there are also two other options in practice: 4) "settle the pending qui tam action with the defendant," which usually leads to a "simultaneous intervention and settlement," or 5) "advise the relator that the [DOJ] intends to decline intervention," which "usually . . . results in dismissal" by

141. *See* Part V.

142. *See, e.g.*, Wallace Stage, *Should the Government Have the Unrestricted Power to Dismiss Meritorious Qui Tam Actions Brought Under the False Claims Act?: A Closer Look at Why the Government Should Not be Held to a Judicially Imposed Standard*, 16 FIU L. REV. 857, 876-78 (2022) (arguing for broad government control over dismissal mostly due to statutory interpretation and prudential concerns, briefly noting separation-of-powers concerns).

143. Nathan T. Tschepik, Comment, *The Executive Judgment Rule: A New Standard of Dismissal for Qui Tam Suits Under the False Claims Act*, 87 U. CHI. L. REV. 1051 (2020).

144. *See, e.g.*, Bales, *supra* note 67; Prakash, *supra* note 83; Bucy, *supra* note 81.

145. 31 U.S.C. § 3730(b)(2). The government will often move for multiple extensions to investigate whether the case has merit and is worth intervening in, sometimes taking multiple years to make the initial decision. *See, e.g.*, U.S. *ex rel.* Aldridge v. Corp. Mgmt., 78 F.4th 727, 732 (5th Cir. 2023) ("The Government sought to extend the seal entered by the district court pursuant to 31 U.S.C. § 3730(b)(3) *eighteen* times and delayed its intervention in the relator's action for eight years.").

146. 31 U.S.C. § 3730(b)(2), (4)(A).

147. 31 U.S.C. § 3730(c)(2)(A).

148. 31 U.S.C. § 3730(4)(B).

the relator.[149] To understand what impacts the route DOJ takes for a given qui tam action, it is helpful to know the structure of U.S. government teams working on FCA cases and the internal regulations and policies governing review.

As with many areas of litigation against the government, civil-fraud litigation involves the D.C.-based DOJ and local U.S. Attorney's Offices (USAOs) around the country. The Fraud Section of the Commercial Litigation Branch, within DOJ's Civil Section, focuses on civil-fraud litigation, while the USAOs have authority to issue civil investigative demands and close qui tam cases.[150] Service of a qui tam action must be done per Rule 4(i)(1) of the Federal Rules of Civil Procedure, which requires the summons and complaint to be delivered to the Attorney General and the U.S. Attorney for the district where the action is brought.[151] DOJ's Justice Manual indicates that soon after the qui tam complaint is filed, attorneys from the USAO and the Fraud Section will confer to decide how to handle the case. These attorneys should also confer with the relevant agency throughout the process to gain insights on whether the elements of the FCA can be established (e.g., the Department of Housing and Urban Development for a housing-fraud case). While DOJ has exclusive authority to decide whether to seek dismissal, the agency may provide expertise and "may recommend that the Department seek dismissal of the case."[152] The Manual also recommends "expeditious enforcement" of civil remedies to provide a "strong deterrent" to fraudulent conduct and to make the government whole.[153]

A 2018 memo from Michael Granston, the Director of the Civil Fraud Section, provides further insight into DOJ's approach to seeking dismissal (referred to as the Granston memo).[154] Granston notes the importance of being judicious in using § 3730(c)(2)(A) to "avoid precluding relators from pursuing potentially worthwhile matters" while also emphasizing that it is a key tool to "advance the government's interests, preserve limited resources, and avoid adverse precedent."[155] To guide attorney decision-making, Granston set out seven non-exhaustive factors that can serve as grounds for seeking dismissal, along with examples of cases where the

149. *False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits*, U.S. ATT'Y'S OFF. FOR THE E. DIST. OF PA. 2 (Apr. 18, 2004), http://www.justice.gov/sites/default/files/usao-edpa/legacy/2011/04/18/fcaprocess2_0.pdf[https://perma.cc/7MQZ-3E5G].

150. U.S. Dep't of Just., Just. Manual § 4-4.110 (2019).

151. FED. R. CIV. P. 4(i)(1).

152. U.S. Dep't of Just., Just. Manual § 4-4.111 (2019).

153. U.S. Dep't of Just., Just. Manual § 4-4.110 (2019).

154. Memorandum from Michael D. Granston, Dir., Com. Litig. Branch, Fraud Section, Dep't of Just., to Att'ys, Com. Litig. Branch,Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(2)(A), at 3-7 (Jan. 10, 2018), https://www.insidethefalseclaimsact.com/wp-content/uploads/sites/860/2018/12/Granston-Memo.pdf [https://perma.cc/4STD-HBY5].

155. *Id.* at 2.

government previously sought dismissal.[156] DOJ adopted these factors as its formal policy in a manual, highlighting the importance of dismissal.[157] These potential reasons for dismissal include:

1. Curbing meritless qui tams that facially lack merit (either because the relator's legal theory is inherently defective, or the relator's factual allegations are frivolous)
2. Preventing parasitic or opportunistic qui tam actions that duplicate a pre-existing government investigation and add no useful information to the investigation
3. Preventing interference with an agency's policies or the administration of its programs
4. Controlling litigation brought on behalf of the United States, in order to protect the Department's litigation prerogatives
5. Safeguarding classified information and national security interests
6. Preserving government resources, particularly where the government's costs (including the opportunity costs of expending resources on other matters) are likely to exceed any expected gain
7. Addressing egregious procedural errors that could frustrate the government's efforts to conduct a proper investigation[158]

The Manual also notes that sometimes partial dismissal of defendants or claims may be appropriate, and attorneys may cite alternative grounds for dismissal other than § 3730(c)(2)(A), such as the public disclosure or first-to-file bar.[159] Additionally, if DOJ attorneys believe dismissal may be warranted, they should consult with the affected agency and obtain the agency's recommendation first, as there may be some instances where an agency opposes dismissal (e.g., if the government must disclose sensitive information or if other collateral consequences may result).[160] Finally, the memo and Manual recommend advising relators of perceived deficiencies so they may make an informed decision about proceeding and choose to voluntarily dismiss their actions.[161] Granston also notes in a footnote that since 2012, more than 700 qui tam actions have been dismissed by relators after the government declined to intervene, and the "frequency with which relators voluntarily dismiss declined *qui tam* actions has significantly reduced the number of cases where the government might otherwise have

156. *Id.* at 3-7.
157. U.S. Dep't of Just., Just. Manual § 4-4.111 (2021).
158. *Id.*
159. *Id.*
160. Memorandum from Michael D. Granston, *supra* note 154, at 8.
161. *Id.*

considered seeking dismissal."[162] Plainly, DOJ favors dismissal but also recognizes the high frequency of voluntary dismissal and has used that as a reason to decline to dismiss many cases.

C. Existing Studies on DOJ's Use of its Dismissal Power

The Granston memo cites dozens of examples where the government sought dismissal based upon the seven factors, which may give the impression that DOJ frequently dismisses cases. In reality, the government dismisses less than 5% of qui tam cases, as reported across multiple sources. At a conference in 2023, Granston provided statistics on qui tam dismissals, reporting that from 2018 through 2023, relators dismissed only fifty-eight FCA cases out of over 3,000 total—a less than 2% rate.[163] This rate is unlikely to change, even after *Polansky*, according to Granston at a separate conference.[164]

Several academics have also done empirical research on qui tam and provided more details about the frequency of and reasons for government dismissal. Kwok accessed 3,515 FCA cases from 1986 to 2009 through a FOIA data request, dividing them into 953 intervened cases and 2,314 declined intervention cases.[165] DOJ only dismissed nine of the intervened cases and eighty-two of the declined intervention cases, marking a dismissal rate of less than 1% for the former and less than 4% for the latter, in line with Granston's statistics.[166] Kwok noted that despite this low dismissal rate, the "mere threat of dismissal by the government" may be enough to deter relator's law firms from pursuing a filing mill strategy.[167]

Similarly, Engstrom analyzed a subsample of 460 qui tam cases and found zero where DOJ exercised its termination authority, leading him to conclude (based on standard principles of sampling error) that DOJ invokes its termination authority in less than 4% of cases.[168] Engstrom also looked into the full 4,000-plus case dataset of 31 U.S.C. § 3730(c)(2)(A) from 1986 through 2011 and found only thirty cases where "DOJ exercised its authority to dismiss cases out from under private relators." He also

162. *Id.* at 8 n.5.

163. Karen S. Lovitch, Brian P. Dunphy, Grady R. Campion, Kathryn F. Edgerton, Cory S. Flashner, Samantha P. Kingsbury & Kevin M. McGinty, *Analyzing Health Care False Claims Act Cases*, MINTZ (Feb. 9, 2023), https://www.mintz.com/insights-center/viewpoints/2406/2023-02-09-enforcemintz-newsletter-health-care-enforcement-year [https://perma.cc/R7Q9-LNX9].

164. Kerry K. Walsh & Giselle J. Joffre, *ABA Panelists Talk FCA Developments and Predictions*, ARNOLD & PORTER (Mar. 7, 2024), https://www.arnoldporter.com/en/perspectives/blogs/enforcement-edge/2024/03/aba-panelists-talk-fca-developments-and-predictions [https://perma.cc/X9VG-XP94].

165. Kwok, *supra* note 24, at 241.

166. *Id.* at 245. Kwok noted that there are some dismissed cases that do not identify the dismissed party, leading to some uncertainty about the total number of dismissed cases, but even including them all results in a low rate of dismissal.

167. *Id.* at 246.

168. Engstrom, *Public Regulation of Private Enforcement*, *supra* note 28, at 1717.

noted that most cases were dismissed because the claim was jurisdictionally barred or because of national security concerns, not because of underlying case merits.[169] Engstrom considered that this may be because DOJ is unconcerned with screening meritless cases or can achieve the same ends via informal ways, like privately conveying its disinterest in a case to relators and inducing them to dismiss before DOJ does so.[170]

Other authors have also written more broadly about the inherent problems with the incentive system of qui tam under the FCA, which can lead to inefficient use of public resources. Randy Beck described a conflict of interest between private financial and public interests when writing about lessons from England abolishing qui tam, from relators being incentivized to reduce the government's recovery to relators bringing many meritless cases in the hopes of a "lottery ticket" action.[171] Ben Depoorter and Jef De Mot conducted an economic analysis of the government's incentives to intervene, finding that sometimes the government will "decline to intervene, since it can free ride and avoid litigation expenses by leaving litigation to the relator."[172] Yet free riding also leads to "opportunity costs," such as a lower award and a smaller government share of the award.[173]

Dayna Bowen Matthew also took a law-and-economics approach by applying the concept of moral hazard to understanding qui tam suits in the pharmaceutical industry.[174] If the FCA only permitted public enforcement, DOJ would pursue only the strongest cases given limited resources.[175] But because qui tam relators bear all the costs of failed cases, DOJ allows "excessive numbers of FCA cases" to proceed, including cases based on weak facts or unfounded theories of recovery.[176] Michael Rich makes a similar point: even if most non-intervened suits are unlikely to result in recovery, they have, in total, led to $300 million in recoveries, or an average government recovery of $57,000 each.[177] As a result, DOJ is incentivized to allow even weak cases to go forward rather than dismiss—a "systemic bias against dismissal" even though the public and defendants must absorb the

169. *Id.* at 1717 n.89.

170. *Id.* at 1717.

171. Beck, *supra* note 29, at 608-37.

172. Ben Depoorter & Jef De Mot, *Whistle Blowing: An Economic Analysis of the False Claims Act*, 14 SUP. CT. ECON. REV. 135, 150 (2006).

173. *Id.*

174. Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281 (2007). Moral hazard is the "opportunistic behavior on the part of an insured party," resulting when an insured party is "less averse to risk" because the insurer will bear any "losses from risky behavior." *Id.* at 298-99.

175. *Id.* at 301.

176. *Id.* at 300-01.

177. Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. CIN. L. REV. 1233, 1263-64 (2008) (as of the writing of the article in 2008).

costs of litigating.[178] Rich notes the United States is unlikely to intervene when the "potential recovery is high and the likelihood of a favorable outcome is low," even though these cases, often based on novel legal theories, would benefit from government intervention the most, in terms of litigation costs and strategy.[179] The practical effect, Matthew goes on to explain by discussing several qui tam pharmaceutical cases, is harm to the public—allowing inexperienced relators to take the lead on cases, advancing weak claims, preventing the development of good law, and wasting resources.[180]

Beck, Matthew, and Rich all also propose solutions to the FCA's inherent conflict of interest. Beck proposed modifying the FCA to mandate dismissal without prejudice over cases where DOJ chooses not to intervene.[181] Such an amendment would eliminate meritless cases while maintaining a financial incentive for relators to bring cases, and private resources could still be tapped into even if DOJ intervenes by allowing relator counsel to be involved in less strategic, more routine tasks like depositions.[182] Matthew proposes an amendment requiring the government, if declining to intervene or dismiss, to "certify that it has evaluated the [relator's] claim" and "deems the case worthy to continue," ensuring DOJ would evaluate the underlying merits of all cases.[183] Rich proposes two options: (1) making the government "jointly and severally liable with the relator for the defendants' reasonable attorneys' fees and expenses" (2) authorizing courts to require the government to certify if novel theories of liability have merit, both of which would encourage DOJ to assess the viability of new qui tam allegations more thoroughly.[184]

While Rich, Matthew, and other authors have noted the skewed incentives of qui tam, their arguments are limited to considering the practical consequences of infrequent government dismissal—none mention implications for constitutionality or separation-of-powers principles. The empirical studies have also primarily looked at government dismissal in the context of agency decision-making and only in passing; no studies have done a deep dive into the patterns and reasons behind DOJ dismissal and its importance to executive authority and constitutionality. The few constitutional articles have focused on dismissal authority in theory rather than

178. *Id.* at 1264. DOJ declines to intervene in 78% of cases and rarely dismisses. *Id.* at 1263. One study found that only 6% of non-intervened cases result in recovery, in contrast with 94% of intervened or government-led cases resulting in settlement or judgment. Broderick, *supra* note 28, at 975 tbl.2.

179. *Id.* at 1266-68.

180. Matthew, *supra* note 174, at 309-32.

181. Beck, *supra* note 29, at 639-40.

182. *Id.* at 639-41. Beck notes that this requirement could be coupled with greater congressional oversight to increase transparency and reduce the likelihood of DOJ dismissing cases with merit, such as "periodic oversight hearings" and a "documentary record" of the informer's allegations each time DOJ declines to prosecute. *Id.* at 641.

183. Matthew, *supra* note 174, at 334-37.

184. Rich, *supra* note 177, at 1275-77.

practice. There remains a gap in bridging these two spaces, as the government's use of its power in practice is essential to fully understanding the nature of the FCA and its conformity with separation-of-powers principles, particularly as many parties have come to critique the Act. As such, this Note reveals how the government's use of its dismissal power raises concerns for the constitutionality of the FCA and recommends changes, contributing to the debate about the statute's constitutionality in theory and practice.

III. The Government's Right to Object to Settlement and Dismissal

A. The Existing Circuit Split

In contrast to *Polansky* resolving the circuit split on government dismissals, the Supreme Court has not commented on the standard for government control over settlements between the relator and the defendants, leaving a circuit split on absolute versus limited control.[185] Section 3730(b)(1) of the FCA states that a qui tam action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."[186] Of the four circuits that have interpreted the text, only one has concluded that the government's ability to object to settlement is limited, while the other three circuits have found that the United States can always veto a settlement.[187]

In 1994, in *United States* ex rel. *Killingsworth v. Northrop Corp*, the Ninth Circuit considered whether the United States could object to a settlement between the plaintiff relator and defendant corporation without intervening.[188] The government believed the proposed settlement was a "deliberate attempt by [the defendant] and [the relator] to divert money from the False Claims Act claim to [the relator's] personal claim," but the district court found the parties could dismiss the case despite the government's objection.[189] The circuit court began its analysis by examining the Act's legislative history, finding that the 1986 amendments were intended

185. *See* Robert Salcido, *False Claims Act Circuit Splits—FCA Issues That May Soon Reach the Supreme Court or Lead to Congressional Amendment*, AKIN GUMP (Feb. 12, 2018), https://www.akingump.com/en/insights/alerts/false-claims-act-circuit-splits-fca-issues-that-may-soon-reach [https://perma.cc/PV5Q-6Q4W].

186. 31 U.S.C. § 3730(b)(1).

187. Salcido, *supra* note 185 (explaining that the Fourth, Fifth, and Sixth Circuits held that the United States has an unlimited settlement veto power, while the Ninth Circuit found that the United States must have intervened in the action in order to exercise its settlement veto power); *see* Matthew H. Solomson & Sarah M. Brackney, *What Would Scalia Do? A Textualist Approach to the "Qui Tam" Settlement Provision of the False Claims Act*, 36 PUB. CONT. L.J. 39, 43-55 (2006) (describing several circuit decisions on when the government can object to settlement).

188. 25 F.3d 715, 717 (9th Cir. 1994).

189. *Id.* at 720.

to increase private enforcement with limited opportunities for U.S. government involvement.[190] The Court also noted that § 3730(b)(1) "must be read in conjunction with" subsections (b)(2) and (c)(3), which allow the government to intervene, respectively, within the first sixty days[191] or "at a later date upon a showing of good cause."[192] Further, § 3730(b)(4)(B) gives the relator the "right to conduct the action"[193] if the government declines to intervene, which the court finds "includes the right to negotiate a settlement."[194] As a result, the court found that while the government "may question the settlement for good cause," courts ultimately decide via hearing whether the settlement is fair and reasonable; if so, it can go forward despite the government's objection.[195]

By contrast, the Fourth, Fifth, and Sixth Circuits have found that the U.S. government can object to a settlement or dismissal between relators and defendants for any reason without intervention or court review.[196] First, three years after *Killingsworth*, the Fifth Circuit in *Searcy v. Philips Electronics North America Corp.* labelled the Ninth Circuit's ruling as "unpersuasive."[197] The court disagreed with the Ninth Circuit's view of legislative history, finding that both the 1943 and 1986 amendments "expanded the government's power to assume control of the litigation," and "[i]f Congress meant to repeal the government's power to consent to voluntary settlements, it needed to say so explicitly."[198] The court also considered

190. *Id.* at 721-22.

191. *Id.* at 722 (quoting 31 U.S.C. § 3730(b)(2)).

192. *Id.* at 722 (quoting 31 U.S.C. § 3730(c)(3)).

193. *Id.* at 722 (quoting 31 U.S.C. § 3730(b)(4)(B)); *see* 31 U.S.C. § 3730(b)(4) ("Before the expiration of the 60-day period or any extensions . . . the Government shall—(A) proceed with the action . . . or (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.").

194. *Killingsworth*, 25 F.3d 715, 722-23 (9th Cir. 1994).

195. *Id.* at 724-25. The court also explains that § 3730(d)(3) gives the district court "an important role in allocating the proceeds of a settlement." *Id.* at 724. The Second Circuit also ruled in *Minotti v. Lensink* in 1990 that a *court* can dismiss a case without the U.S. government's consent. 895 F.2d 100, 104 (2d Cir. 1990) ("Once the United States formally has declined to intervene in an action . . . little rationale remains for requiring consent of the Attorney General before an action may be dismissed."). But as one law review article noted, the court's reasoning was "terse" and "properly should be read as limited to its facts" on involuntary dismissals. Solomson & Brackney, *supra* note 187, at 44, 46. This case and some others are generally not included when assessing circuit rulings on objections to settlement. *See, e.g.*, Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 158 (5th Cir. 1997) (finding that *Minotti* and its kin "did not confront the situation presented today and do not bind us"); *Fourth Circuit Decides Closely Watched False Claims Act Case,* Michaels v. Agape Senior Community*, But Declines to Rule on Validity of Statistical Sampling*, HANSON BRIDGETT (Mar. 3, 2017), https://www.hansonbridgett.com/Publications/articles/2017-03-fourth-circuit-decides [https://perma.cc/2YBP-C4QT] (describing the Ninth Circuit as "the only circuit court to rule" that the United States does not have "unreviewable veto" authority over settlements).

196. Salcido, *supra* note 185 (listing the circuits—Fourth, Fifth, and Sixth—that have ruled in favor of absolute veto authority); *see Searcy*, 117 F.3d at 160; United States *ex rel.* Doyle v. Health Possibilities, P.S.C., 207 F.3d 335, 344 (6th Cir. 2000); United States *ex rel.* Michaels v. Agape Senior Cmty., Inc., 848 F.3d 330, 339 (4th Cir. 2017).

197. 117 F.3d at 159.

198. *Id.*

§ 3730(b)(1) to be as "unambiguous as one can expect" in permitting dismissal only if the Attorney General consents.[199] A relator can conduct an action under § 3730(b)(4)(B) even if the government "retains the power to take the more radical step of unilaterally dismissing the defendant."[200]

The Sixth Circuit agreed in 2000, drawing on the FCA's plain text and "purpose, structure and legislative history."[201] Both courts pointed to policy arguments, with the Sixth Circuit noting that "the power to veto a privately negotiated settlement of public claims is a critical aspect of the government's ability to protect the public interest," given that "private opportunism and public good do not always overlap."[202] Otherwise, relators could "manipulate settlements in ways that unfairly enrich them[selves] and reduce benefits to the government."[203] The Fifth and Sixth Circuits also responded to Article III concerns by noting that the consent requirement applies only to voluntary dismissal, so extending the Executive's consent for dismissal beyond sixty days would not violate the judiciary's independence.[204] Most recently, in 2017, the Fourth Circuit reached the same conclusion based on plain language and policy reasoning.[205] A few district courts in other circuits have also ruled on this matter, mostly agreeing with the majority view of absolute government authority to object to settlement.[206]

Like law-review articles on the government's control over dismissal, many law-review articles mention the government's control over settlements as one of many factors to consider for qui tam's constitutionality, but few focus primarily on settlement. The few articles that *do* look at settlement from a statutory-interpretation perspective, similar to the courts'

199. *Id.*

200. *Id.* at 160; 31 U.S.C. § 3730(b)(1) ("The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.").

201. *Health Possibilities*, 207 F.3d at 340. "If Congress wanted to limit the consent requirement to the period before the United States makes its initial intervention decision, we presume that it knew the words to do so." *Id.* at 399.

202. *Id.* at 340; *Searcy*, 117 F.3d at 160.

203. *Searcy*, 117 F.3d at 160.

204. *Health Possibilities*, 207 F.3d at 343-44; *Searcy*, 117 F.3d at 158 ("Before us, the government forthrightly acknowledges that requiring the government's consent to an *involuntary* dismissal would raise separation-of-powers concerns." (emphasis added)). The Sixth Circuit also responded to mootness arguments by noting that the government is the real party in interest, so a live controversy exists if the government's interests are adverse to those reflected in a putative settlement agreement. *Health Possibilities*, 207 F.3d at 344.

205. *Michaels*,848 F.3d at 339("[T]he Attorney General possesses an absolute veto power over voluntary settlements in FCA qui tam actions.").

206. *See, e.g.*, United States *ex rel.* Landis v. Tailwind Sports Corp., 98 F. Supp. 3d 8, 9 (D.D.C. 2015) (declining to enforce private settlement with defendant over government's objection). The Supreme Court has also noted that if the U.S. declines to intervene, it retains specific rights such as "vetoing a relator's decision to voluntarily dismiss the action." *Id.* (citing U.S. *ex rel.* Eisenstein v. City of New York, New York, 556 U.S. 928, 932); *see also* Appendix Table 2 (listing district courts in the First, Seventh, Eleventh, and D.C. Circuits that have ruled for absolute authority to object).

approach. For example, one 1998 article looked at the text of the FCA to argue that *Killingsworth* was inappropriately decided,[207] while another that year argued for a middle ground that respects qui tam's language and purpose.[208] A 2006 article took a textualist approach and argued that the Ninth Circuit is more consistent, also raising the mootness and separation of powers concerns that the Sixth Circuit responded to.[209] Neither these articles nor the courts, however, have discussed whether DOJ's inability to object to a private settlement violates separation of powers under Article III—even though the government's control over other aspects of qui tam litigation, as with dismissal, has come up extensively.[210] As a result, even more novel questions arise about this right in theory and practice.[211]

B. Existing Studies on DOJ Use of Its Objection Power

There is limited data on the frequency of government objection to private settlement or dismissal and what influences government decisions to object, as this topic has been far less discussed than dismissal power. One notable finding comes from Engstrom's empirical analysis of FCA cases. Engstrom speculated that DOJ would choose to intervene more frequently in the Ninth Circuit to preserve its ability to veto private settlements because of the good-cause requirement under *Killingsworth* for non-intervened cases.[212] This hypothesis was confirmed, as he found that all else

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207. Christopher C. Frieden, *Protecting the Government's Interests: Qui Tam Actions Under the False Claims Act and the Government's Right to Veto Settlements of Those Actions*, 47 EMORY L.J. 1041, 1078 (1998) ("The *Killingsworth* court should not have resorted to the legislative history, as the language of the FCA, and § 3730(b)(1) in particular, is clear and unambiguous.").

208. Gretchen L. Forney, *Qui Tam Suits: Defining the Rights and Roles of the Government and the Relator under the False Claims Act*, 82 MINN. L. REV. 1400 (1998).

209. Matthew H. Solomson & Sarah M. Brackney, *What Would Scalia Do? A Textualist Approach to the "Qui Tam" Settlement Provision of the False Claims Act*, 36 PUB. CONT. L.J. 39 (2006).

210. In *Polansky*, the Supreme Court held that the government must intervene to dismiss and noted that "post-seal intervention requires a showing of good cause." *Polansky*, 599 U.S. at 429 n.2. However, the Court cited the Third Circuit's explanation that the good-cause requirement is not "burdensome" and is instead "a uniquely flexible and capacious concept, meaning simply a legally sufficient reason." *Id.* (citing *Polansky*, 17 F.4th at 387). But showing good cause to intervene after initially declining to intervene involves different considerations from showing good cause to object to private parties' settlement of a case, as the government's financial stakes are directly on the line in the latter situation, so the Supreme Court's endorsement of a "good cause" requirement for government intervention—and the constitutionality of such a requirement—does not necessarily apply to government objections to private settlement. *Killingsworth* also goes farther than *Polansky* in allowing a court to decide if a settlement is fair and reasonable, taking away the final say from the government. This stands instark contrast to dismissal, where the government can easily show good cause and satisfy Rule 41(a) for voluntary dismissals. The relevant sections of the FCA are also different, as Section 3730(b)(1) is explicit in allowing relator dismissal only if DOJ consents. As a result,the majority of circuits have held that DOJ can object without intervening. *See Killingsworth*, 25 F.3d at 725.

211. Other law-review articles also acknowledge other constitutional issues with settlements, though these are less persuasive since qui tam is not criminal. *See supra* note 109.

212. Engstrom, *Public Regulation of Private Enforcement*, *supra* note 28, at 1732, 1734, 1735-36.

equal, post-*Killingsworth* cases initiated in district courts under the Ninth Circuit were fourteen percent more likely to win DOJ intervention.[213] He also found "the difference in recovery between intervened and declined cases within the Ninth Circuit before versus after *Killingsworth* is roughly $29 M smaller than the difference before versus after *Killingsworth* in district courts outside the Ninth Circuit."[214]

While Engstrom caveats the results, he concludes that they show that the inability to veto settlements has "a substantial impact" on DOJ's intervention calculus and that DOJ possesses merits-screening capacity because more arbitrary intervention would not increase average recovery amounts.[215] As a result, it is also possible to reason that overruling *Killingsworth* would lead to less intervention—a contradiction because advocates of broad executive authority would want both broad government control over settlement *and* broad government intervention in FCA cases.

There has also been some discussion on settlements in FCA litigation, as settlements are now more frequent than cases proceeding to trial. Jacob Elberg studied FCA civil settlements between healthcare business organizations and DOJ between early 2018 and May 31, 2019. He found that ninety-two percent of nearly two hundred FCA resolutions did not include defendants accepting responsibility and thirty-seven percent involved defendants actively denying responsibility.[216] He also argues that DOJ's lack of policy favoring the admission of responsibility conflicts with its policy goals of deterrence, legitimacy, and incentivizing cooperation and compliance.[217] "[B]oth Congress and DOJ have recognized the harm which results" when companies view settlements as the cost of doing business and doubt that they would ever go to trial for violating the FCA.[218] Elberg also found high variability, with DOJ's Civil Division treating cases more leniently than USAOs.[219]

Isaac Buck similarly argues that DOJ is too willing to settle and criticizes the reliance on settlement as precluding "clear precedent or strong condemnation of what the law prevents," decreasing "community involvement and judicial input," relying "too heavily on federal prosecutorial discretion," and exacting "reputational costs on investigated providers even absent settlement."[220] These recent conversations about DOJ being too

213. *Id.* at 1735-36.

214. *Id.* at 1743.

215. *Id.* at 1735-36, 1743.

216. Jacob T. Elberg, *Health Care Health Care Fraud Means Never Having to Say You're Sorry*, 96 WASH. L. REV. 371, 371-72, 383 (2021).

217. *Id.* at 372, 399-409.

218. Jacob T. Elberg, *A Path to Data-Driven Health Care Enforcement*, 2021 UTAH L. REV. 1170, 1212.

219. *Id.* at 1170.

220. Isaac D. Buck, *Enforcement Overdose: Health Care Fraud Regulation in an Era of Overcriminalization and Overtreatment*, 74 MD. L. REV. 258, 294 (2015).

willing to settle, however, do not touch upon the U.S. government's power to *object* to relator settlement. They may support the idea that the United States is inclined to intervene in private-relator settlements to advance its interests. Conversely, this data may imply that the United States does *not* want to intervene in relator settlements because it has low expectations for settlement terms.

The current literature on the government's power to object is sparse. No articles—as far as I can tell—have looked at the frequency of the government's use of this power, and few articles have addressed the implications of *Killingsworth* for the Act's conformity to the separation-of-powers doctrine. This oversight is particularly significant because it is easy to conclude that the Ninth Circuit decision prevents the Executive from exercising its Take Care power, either meaning that the decision is wrong or that the FCA fails to respect executive authority. As a result, this section will also fill a gap within the literature and perhaps bring attention to the courts to overturn *Killingsworth* and ensure a reasonable constitutional interpretation of the government's power to object to settlements.

IV. Primary Research

A. Methods and Overview

To characterize the frequency of and reasons for U.S. dismissals and objections to dismissals or settlements, I used Bloomberg Law's dockets database, which has complete federal coverage of dockets dating back to 1989.[221] I ran an advanced search without specifying any keywords,[222] restricting the search to dockets starting between January 1, 2018 through December 31, 2018, U.S. district courts, and dockets with the nature of suit (NOS) code assigned as False Claims Act [375] or qui tam [376],[223] yielding

221. Bloomberg Law's dockets are pulled directly from the Public Access to Court Electronic Records (PACER) system, in addition to other federal websites. *See Dockets Coverage & Outages,* BLOOMBERG LAW, https://www.bloomberglaw.com/dockets/coverage [https://perma.cc/6GUY-PZEM]; *Litigation, Overview – Using Bloomberg Law Dockets*, BLOOMBERG LAW, https://www.bloomberglaw.com/document/X9HLF760000000 [https://perma.cc/BSW7-7HYU].

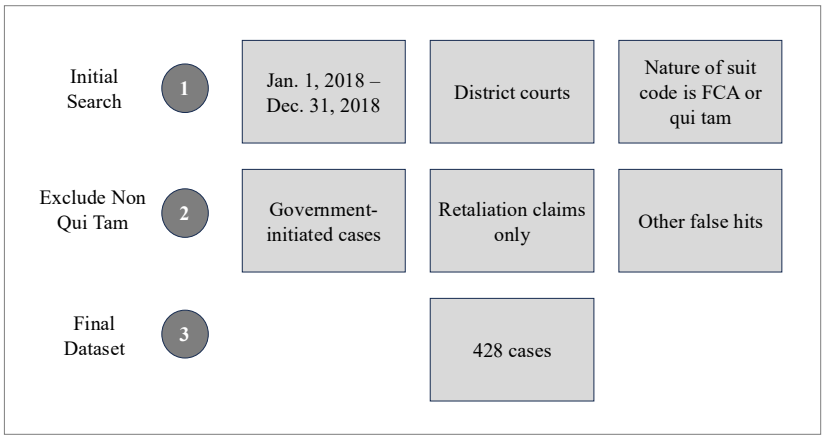
222. Before finalizing on this methodology, I also searched for "31 U.S.C. § 3729 OR 31 U.S.C. § 3730" with the same filters. This yielded 501 cases, 91 fewer than searching without any keywords. (Note that editing the search to include § 3731 (False claims procedure), § 3732 (False claims jurisdiction), and § 3733 (Civil investigative demands) did not add any additional cases beyond the 501 cases already captured in § 3729 or § 3730.) This is likely because, while the search goes to Dockets and Documents, it only searches the full text of court filings that have already been loaded onto Bloomberg Law from a court's electronic document service. If the filings are not yet viewable or handwritten, any citations to the statute will not be captured. As a result, searching without any keywords is likely to be more comprehensive. *Litigation, Overview – Using Bloomberg Law Dockets*, BLOOMBERG LAW, *supra* note 221.

223. When filing a civil case in federal district court, attorneys must select one of 90 "nature of suit" (NOS) codes that best describes their case, which is used as the basis of federal caseload statistics produced by the federal judiciary. NOS Code 375 refers to "Action filed by private

592 cases (Figure 1, step 1).[224] As FCA cases can take several years to resolve and be unsealed, I chose 2018 to allow enough time for the cases to progress to an outcome and to avoid any abnormal results due to the COVID-19 pandemic in 2020.

After downloading the 592 cases, I manually reviewed each docket to make three additional cuts (Figure 1, step 2). First, I excluded 38 government-initiated FCA suits (i.e., non-qui tam). Second, I excluded 46 cases that were brought under the retaliation provisions of the FCA, not to recover money through the qui tam provisions. Last, I excluded an additional 80 false positives, including duplicates, financial disputes erroneously classified as FCA suits, and pro se cases filed by plaintiffs who attempted to use the FCA as a cause of action for their perceived fraud.[225]

Figure 1: Data Cleaning Methodology



After excluding non-qui tam cases, retaliation claims, and other false positives, I was left with 428 qui tam FCA cases from 2018. DOJ reports that there were 649 qui tam cases in 2018, so the results represent about

individuals alleging fraud against the U.S. government under 31 U.S.C. § 3279," and NOS Code 376 refers to "Action brought under the False Claims Act by private persons . . . to recover damages against another person or entity that acted fraudulently . . . 31 U.S.C. § 3730." *Civil Nature of Suit Code Descriptions*, U.S. COURTS (Apr. 2021), https://www.uscourts.gov/sites/default/files/js_044_code_descriptions.pdf [https://perma.cc/MT5C-9SPN].

224. Bloomberg Law also automatically collects complaints in civil cases for "Other Statues – False Claims Act [375]" and "Other Statues – Qui Tam (31 USC 3729(a)) [376]." *See Product Help & Walkthrough,* BLOOMBERG LAW, https://www.bloomberglaw.com/help/dockets [https://perma.cc/PE76-GZQT].

225. The search results returned many cases filed by pro se plaintiffs who believed that their complaint was a fraud under the FCA, but only qualified as a fraud in colloquial terms (e.g., defendants making misleading advertisements on TV, disputes with neighbors, or financial disagreements).

two-thirds of 2018 qui tam cases.[226] This undercount is expected and likely due to two main factors. First, a large percentage of FCA cases remain under seal even over five years after filing.[227] Sealed cases are unavailable to the public and cannot be found on PACER or other databases.[228] As a result, part of this undercount likely reflects the qui tam cases from 2018 that remain under seal, although they would be included in DOJ's statistics.[229] Sealed cases may be more likely to result in government intervention or dismissal, as the government likely required more time to decide whether to intervene for cases that remain sealed 5+ years later.[230] However, according to Engstrom's report of interviews with DOJ attorneys, most cases that are still sealed after a few years are likely closed cases that remain sealed for reasons such as neglect by the judge to unseal, failure by DOJ to request unsealing, or relator effort to persuade the judge to keep the case sealed if they continue to be employed by the defendant company.[231]

Second, while scholars and courts widely use NOS codes to analyze areas of law, they are imperfect representations of the subject matter of a case.[232] The NOS code is determined by the box an attorney checks when filing a complaint in federal court, and attorneys have little incentive to ensure the code matches the subject matter.[233] Further, complaints with more than one cause of action can only be categorized based on one NOS

226. *Fraud Statistics – Overview, supra* note 2.

227. A Federal Judicial Center report from 2009 found that "nearly half of qui tam cases filed in 2008 are sealed as of October 2009" and "approximately 15% of cases filed early in the decade are still sealed late in 2009." *Sealed Cases in Federal Courts,* FEDERAL JUDICIAL CENTER 5-6 (Oct. 23, 2009), https://www.uscourts.gov/sites/default/files/sealed-cases.pdf [https://perma.cc/9DXH-RKJ5].

228. A small number of districts make available on PACER highly redacted docket sheets for sealed cases. These may be pulled into Bloomberg Law, for instance, as "ABC v. DEF," with most documents unavailable to access. For most districts though, if a user searches for a sealed case's docket number, the user will get a message that the case is sealed and no additional information. As such, these would not be incorporated into Bloomberg Law. *Id.* at 1-2, 2 n.1.

229. These cases would also be impossible to access through a FOIA request. Kwok and Engstrom submitted FOIA requests but reported that results provided by DOJ were limited to unsealed cases. Kwok, *supra* note 24, at 238; Engstrom, *Public Regulation of Private Enforcement*, *supra* note 28, at 1716.

230. For instance, the Federal Judicial Center indicates that out of the 182 sealed qui tam actions filed in 2006, 48 were dismissed, a higher rate than recent studies have found. FEDERAL JUDICAL CENTER, *supra* note 227, at 6-7. However, DOJ itself reported that DOJ rarely exercised its dismissal authority from 2018-2023, dismissing only 58 cases out of 3,000 FCA cases, meaning that the 2006 numbers may be an anomaly. Lovitch, *supra* note 163.

231. Engstrom*, Harnessing the Private Attorney General*, *supra* note 28, at 1287 n.158. A small number likely remain sealed due to the state secrets privilege and national security concerns. *Id.*

232. Christina L. Boyd & David A. Hoffman, *The Use and Reliability of Federal Nature of Suit Codes*, 2017 MICH. ST. L. REV. 997, 1001-03 (2017).

233. *Id.* at 1006 ("There is no punishment for improperly classifying a lawsuit's content or reward for selecting the 'true' summary category. Lawyers may strategically pick codes to signal to a busy judge that a case is ripe for an aggressive (or passive) management approach. Even more cynically, in a profession where time is money, perhaps the only real NOS selection-related incentive is to select something quickly.")

code.[234] While manually filtering the 2018 data, I found over 70 non-FCA cases assigned an FCA NOS code, so the converse may also be true—many FCA cases have other NOS codes. A 2017 study examined 2,500 federal civil complaints and their causes of action to find that certain NOS categories are "problematic" and can indicate many different causes of action.[235] While the study did not look at the FCA NOS code, its findings suggest that while the NOS code is likely to capture many FCA cases, it will not perfectly capture all of them. Regardless, these dockets likely capture a representative sample of FCA cases in 2018, as any correlation between an FCA NOS code and a specific outcome is unlikely, and the resulting data is consistent with previous studies based on FOIA data.[236]

From these 428 qui tam FCA cases, I manually reviewed the dockets on Bloomberg Law to characterize three elements of the sample: (1) whether the government intervened, (2) the outcome of the case, and (3) whether the government objected to dismissal or settlement, if applicable. The results indicated that the United States intervened (whether at the onset or later, including to intervene to dismiss or settle) in 16.8% of total cases (Table 1). For cases that the United States directly initiated, as opposed to qui tam cases, the United States successfully recovered damages from the defendant in the vast majority of cases (89.5%) (Table 1), as opposed to only 25% of qui tam suits (Table 2). Cases where the government intervened also resulted in a significantly higher percentage of successful cases recovering money (84.7%), as opposed to cases where the government declined to intervene (12.9%) (Table 1). These results are comparable to existing studies in the literature on intervention and recovery rates.[237]

234. The guidance on the civil cover sheet for attorneys filing a complaint tells attorneys to "pick the nature of suit code that is most applicable" if there are multiple codes associated with the case. Civil Cover Sheet, U.S. COURTS, https://www.uscourts.gov/sites/default/files/js044.pdf [https://perma.cc/PC32-2AMR].

235. Boyd & Hoffman, *supra* note 232, at 1009-1023. For fraud causes, 5% have a "other statutory NOS code" while 19% are assigned to tort. *Id.* at 1020-21.

236. To see if there was any way to identify qui tam FCA cases without using the nature of suit code, I searched for "31 U.S.C. § 3729 OR 31 U.S.C. § 3730" (the False Claims Act) without any nature of suit filter. This yielded over 9,000 results, which would be unwieldy to filter through for ~600 qui tam cases. It is possible that the missing miscategorized FCA cases would be more likely to be dismissed as they may be filed by attorneys with less FCA experience, but the low rates of dismissal reported by Kwok and Engstrom with FOIA data confirm that these findings are not missing a lot of dismissals. Kwok, *supra* note 24, at 241, 245 (finding a less than 5% government dismissal rate); Engstrom, *Public Regulation of Private Enforcement*, *supra* note 28, at 1717 (same).

237. *See, e.g.,* Broderick, *supra* note 28, 971, 974-75 (finding U.S. intervention in 22% of cases and 94% recovery for cases with government intervention, as opposed to 6% for cases without); Engstrom, *Public Regulation of Private Enforcement*, *supra* note 28, at 1719-20 (finding DOJ intervention in approximately 25% of cases and recoveries in 90% of intervened cases).

Table 1: Overview of Cases

Total Bloomberg Results		**592 (100.0%)**
False Hits		**164 (27.7%)**
Government sues directly		38 (23.2%)
Plaintiff "wins"	*34 (89.5%)*	
Defendant "wins"	*4 (10.5%)*	
Retaliation provisions		46 (28.0%)
Other false hits		80 (48.8%)
Qui Tam Cases		**428 (72.3%)**
Government intervention		72 (16.8%)
Plaintiff "wins"	*61 (84.7%)*	
Defendant "wins"	*5 (6.9%)*	
Unclear or Ongoing	*6 (8.3%)*	
No intervention[238]		356 (83.2%)
Plaintiff "wins"	*46 (12.9%)*	
Defendant "wins"	*272 (76.4%)*	
Unclear or Ongoing	*38 (10.7%)*	

Table 2: Qui Tam Cases by Outcome

Total FCA Qui Tam Cases		**428 (100.0%)**
Dismissed, Defendant "Wins"		**277 (64.7%)**
Dismissal by U.S.	11 (2.6%)	
Voluntary Dismissal	203 (47.4%)	
Court Dismissal	63 (14.7%)	
Plaintiff "Wins"		**107 (25%)**
Settlement	103 (24.1%)	
Judgment for Plaintiff	4 (0.9%)	
Case Ongoing or Unclear		**44 (10.3%)**
Ongoing	40 (9.3%)	
Unclear	4 (0.9%)	

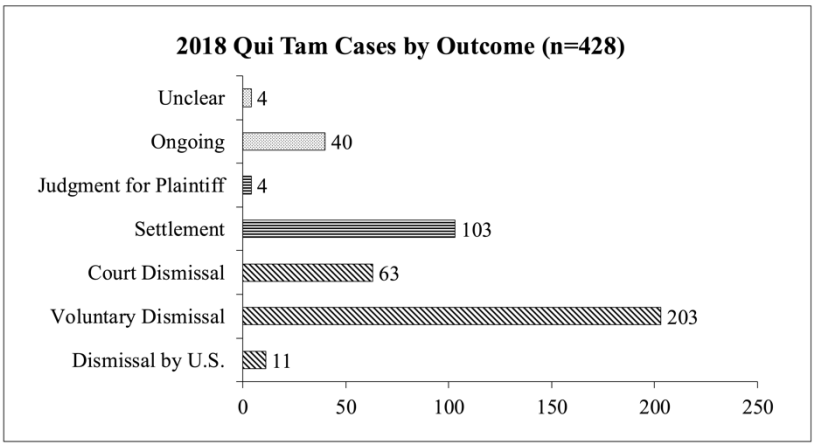
238. In the majority of these cases, the government actively declined to intervene; in a minority, the case was resolved (through voluntary or court dismissal) before the government decided whether to intervene. Out of the latter group, a small number involved the relator voluntarily dismissing the case soon after filing the complaint (i.e., within a few months); most involved the government extending the deadline to decide whether to intervene, suggesting the government had the chance to intervene but put off the decision.

Unfortunately, Bloomberg results yielded no examples of government objection to the dismissal or settlement of 2018 qui tam cases, which limited its use in understanding reasons for objecting. As a result, I used legal research platforms Westlaw and Lexis to find examples of court opinions or orders ruling on a government objection to dismissal or settlement despite not intervening, as objections would result in a court ruling on whether to grant the objection. I identified 14 cases across eight circuits to characterize common reasons for objection (Appendix Table 2).

B. Dismissal

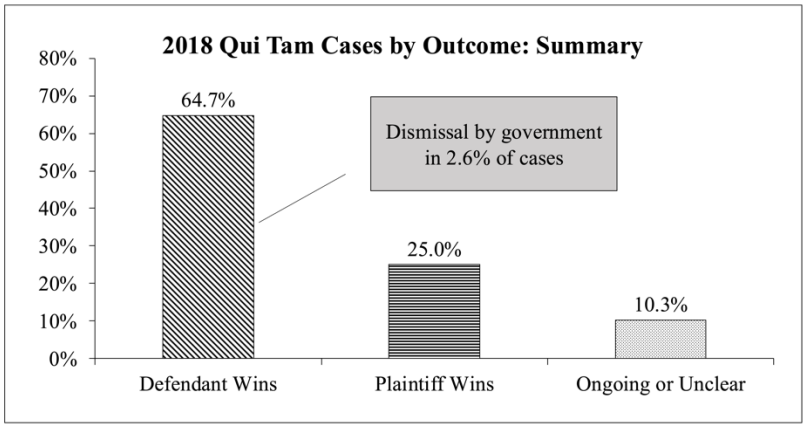
Out of the 428 FCA qui tam cases, there were only eleven examples of U.S. intervention to dismiss an FCA case (2.6%). This 2.6% is low compared to the 65% of cases where the defendant wins, whether by voluntary or court dismissal (Figure 2b). Over 20% of cases involved the United States declining to intervene and the plaintiff agreeing to voluntary dismissal within 3 months. About 10% of cases were still ongoing or unclear, while the plaintiff received a judgment or settlement in 25% of cases. Of these, a majority were via a settlement, with the court ruling for the plaintiff in a judgment in only four cases total. Dismissals likely indicate a lack of merit in the suit, while a settlement indicates the suit likely had some merit.[239]

Figure 2(A): 2018 Qui Tam Cases by Outcome, Detailed



239. Broderick, *supra* note 28, at 972-74.

Figure 2(B): 2018 Qui Tam Cases by Outcome, Summary



In seven of the eleven dismissed cases, the government argued for dismissal due to 31 U.S.C. § 3730(c)(2)(A) (Appendix Table 1).[240] Since these motions to dismiss were filed before *Polansky*, the government in all these cases argued for dismissal based upon unfettered discretion in *Swift* and the rational relation test in *Sequoia.* The government also often took the opportunity in its motions to dismiss to argue for *Swift* as the correct standard. For example, in *CenseoHealth*, DOJ noted the *Swift* court's conclusion that "full deference to the Executive Branch is particularly appropriate" given the principle of separation of powers and that Executive decisions not to prosecute a case brought in its name are unreviewable per *Heckler v. Chaney*, including decisions to dismiss under Section 3730(c)(2)(A).[241] The government's rationale in these cases for satisfying the *Sequoia* two-part test spanned a variety of interests, with conserving government resources and time as an interest in every case. In *SavaSeniorCare*, DOJ found an interest in ending "duplicative, parasitic, and opportunistic *qui tam* actions," as the relator did not provide new information, and in "preserving government resources" because the United States would have to assist in discovery, "monitor pleadings," and "participate in any mediation and settlement negotiations" if the case continued.[242]

240. Three of these motions to dismiss argued for dismissal *only* under § 3730(c)(2)(A), while four also argued based on other reasons.

241. Memorandum of Law in Support of the United States' Motion to Dismiss Relators' Complaint at 5-6, United States v. CenseoHealth, LLC, No. 4:18-cv-00347 (E.D. Tex. May 11, 2018), ECF No. 8-1; *see Heckler,* 470 U.S. at 831-32 (recognizing an agency's choice not to bring civil action as within the agency's "absolute discretion").

242. Memorandum in Support of the United States' Motion to Dismiss at 22-25, United States *ex rel.* Laurie Hinds v. SavaSeniorCare, LLC, No. 3:18-cv-01202 (M.D. Tenn. Oct. 25, 2018), ECF No. 80.

Four of the eleven cases were dismissed due to Section 3730(c)(2) and other substantive reasons. These non-3730(c)(2) reasons included the FCA's prohibition on pro se plaintiffs, the public disclosure bar (i.e., information already disclosed before the plaintiff brought it), and superior alternate legal theories. In *Crandell*, the government argued for dismissal based on Section 3730(c)(2)(A) and public disclosure because the relator's allegations were substantially the same as allegations in a previous qui tam case.[243] The memo also explained the well-settled precedent that "individuals appearing pro se cannot represent the U.S. in FCA actions," another reason to dismiss.[244] Two cases pointed to the importance of dismissal because the claims touched upon foreign affairs: *Brutus Trading* involved transactions with Iran,[245] and *Oxfam* involved support to Hamas. DOJ in *Oxfam* noted that continuing with litigation would require the Court to adjudicate whether the "alleged actions . . . constitute material support of terrorism" and if the Palestinian Authority is a "terrorist" entity, a departure from the principle that foreign relations are entrusted to Congress or the President, not the judiciary.[246]

Four cases were dismissed based only on factors other than Section 3730(c)(2)(A). In *Kelly*, the United States declined to intervene and moved to dismiss the complaint because of res judicata and collateral estoppel, as well as seven other reasons such as conclusory allegations, failure to plead fraud with particularity, and failure to meet procedural requirements.[247] The United States requested the dismissal of three other cases because the plaintiff brought the case pro se, which the court quickly granted in all three cases.[248]

243. Memorandum in Support of the United States' Motion to Dismiss at 11-14, Crandell v. United States, No. 2:18-cv-00124 (N.D. W. Va. Nov. 29, 2018), ECF No. 11-1 (citing 31 U.S.C § 3730(e)(4)).

244. *Id.* at 14-16.

245. Memorandum of Law in Support of the Government's Motion to Dismiss Relators' Second Amended Complaint at 20-30, United States *ex rel.* Brutus Trading, LLC v. Standard Chartered Bank, Docket No. 1:18-cv-11117 (S.D.N.Y. Nov. 29, 2018), ECF No. 31.

246. Memorandum of Law in Support of the United States' Motion to Dismiss at 11-12, United States *ex rel.* TZAC, Inc. v. Oxfam, Docket No. 1:18-cv-01500 (S.D.N.Y. Feb 20, 2018), ECF No. 20.

247. United States' Brief in Support of Motion to Dismiss, Kelly v. Carson at 1, Docket No. 8:18-cv-00532 (D. Neb. Nov. 09, 2018), ECF No. 16.

248. United States' Motion to Dismiss Pro Se Relator's Amended Complaint, McCane v. Sch. Dist. Psco Cnty., Docket No. 8:18-cv-01559 (M.D. Fla. June 28, 2018), ECF No. 20; Memorandum in Support of the United States' Motion to Dismiss, Wilson v. United States, Docket No. 3:18-cv-00017 (N.D. W. Va. Jan. 31, 2018), ECF No. 64-2; United States' Notice of Election to Decline Intervention; [Proposed] Order to Unseal, United States *ex rel.* Rune Kraft v. CalPortland Constr., Docket No. 4:18-cv-01705 (N.D. Cal. Mar. 19, 2018), ECF No. 5. Note that for the last case, the U.S. declined to intervene and "respectfully suggest[ed] that the Court dismiss the complaint" because pro se relators cannot prosecute qui tam actions on behalf, instead of intervening and moving to dismiss. *Id.* at 2-3.

The rationale for dismissal in these eleven cases matches DOJ's list of factors suggesting dismissal is warranted.[249] The two cases with claims touching upon foreign policy reflect the factor of "safeguarding classified information and national security interests," and the rationales for the other cases reflect the factors around "curbing meritless qui tams," "preventing parasitic or opportunistic qui tam actions," and "preserving government resources."[250] The above data also confirms existing studies on the low percentage of FCA cases dismissed by the government.[251]

However, if most FCA cases are dismissed voluntarily or by the court, most would benefit from government intervention and dismissal to avoid wasting resources, yet the government does not intervene. In fact, the government's notices of consent to voluntary dismissal, the result for almost half of the total cases, often state this precise rationale: that dismissal is "commensurate with the public interest" and that the matter does not warrant "continued expenditure of government resources to pursue or monitor further litigation."[252] The United States has even stated explicitly in its statements of interest for cases where it has declined to intervene that the plaintiff's position is wrong, despite not dismissing the case. For instance, in *Kinder Morgan*, the United States filed a statement of interest correcting Relator's incorrect assertions about federal requirements governing helium.[253] The defendant used this to support its motion to dismiss, noting "the Government—the real party in interest—has stated affirmatively that Kinder Morgan has committed no violation under the statutes and regulations at issue."[254] The court agreed, noting the government's statement of interest in its opinion granting the defendant's motion to dismiss.[255] This case is an excellent example of the discrepancy around the United States infrequently dismissing cases, even when it explicitly finds that a case lacks merit.

Why, then, does the government dismiss only sporadically, and why did it dismiss these eleven cases first filed in 2018? One reason may be

249. *See supra* Section II.B.

250. U.S. Dep't of Just., Just. Manual § 4-4.111, *supra* note 157.

251. *See supra* Section II.B. Note that 11 dismissed cases in 2018 is high compared to Engstrom's finding of only 30 dismissals over 25 years (though he looked at 1986-2011, as opposed to 2018 here), but a 2.5% dismissal rate matches that found in existing literature. Engstrom, *Public Regulation of Private Enforcement*, *supra* note 28, at 1717 n.89; Kwok, *supra* note 24, at 241, 245.

252. *See, e.g.,* The United States' Notice of Consent to Dismissal at 1, Strauser et al v. Stephen L LaFrance Holdings Inc., Docket No. 4:18-cv-00673 (N.D. Okla. Dec. 28, 2018), ECF No. 484.

253. United States' Statement of Interest at 3-5, United States v. Kinder Morgan CO2 Company LP, Docket No. 3:18-cv-01775 (N.D. Tex. Jul 10, 2018), ECF No. 45 (for example, the law does not require a party to compensate the U.S. for comingled helium that is never extracted from a gas stream from federal lands).

254. Defendant Kinder Morgan CO2 Company, LP's Response to the United States' Statement of Interest at 1, United States v. Kinder Morgan CO2 Company LP, Docket No. 3:18-cv-01775 (N.D. Tex. Jul 10, 2018), ECF No. 51.

255. Memorandum Opinion and Order at 1, United States v. Kinder Morgan CO2 Co. LP, Docket No. 3:18-cv-01775 (N.D. Tex. July 10, 2018), ECF No. 59.

related to the over 10% of non-intervened cases that still resulted in a settlement or judgment for the plaintiff, illustrating the dilemma that Rich and Matthew discussed—the government is incentivized not to dismiss if the plaintiff can recover some money for the government, even if the chance is low.[256] As the eleven government-dismissed cases revealed, the government often chooses to dismiss based on reasons other than Section 3730(c)(2)(A), which may indicate limited reliance upon its statutory power to take control of a case. The trends in these cases also suggest that the government only dismisses if there are major substantive issues (e.g., pro se plaintiffs, multiple previous cases without merit) or unique political considerations (e.g., interference with foreign affairs).

As noted in the Granston memo and the high percentages of voluntary dismissals following DOJ declining to intervene, DOJ may also communicate with relators to confirm that they will dismiss weak cases after DOJ declines to intervene—avoiding the need to draft a memorandum arguing for dismissal.[257] DOJ thus may only dismiss if the relator refuses to end the case or continuing the case would pose serious issues for the United States. An analysis of the 142 cases where the government declined to intervene and the relator subsequently voluntarily dismissed the case indicated that almost 40% of those cases were dismissed by the relator within *one month* of the government's notice that it declined to intervene—with many dismissals filed within one week (Appendix Figure 1). Another 25% of cases were dismissed within the next two months, and 20% within 4-6 months. But almost 20% of cases were not dismissed until after six months, with a few going on for several years—showing that DOJ does not rely upon promises to voluntarily dismiss *all* cases that it declines to intervene.

C. Objections to Dismissal and Settlement

Analysis of the 428 qui tam cases filed in 2018 yielded no examples of the United States objecting to settlement or voluntary dismissal without settlement. Settlements are relatively frequent (24.1%), with the United States often intervening directly to settle (Figure 2). In fact, out of the 103 cases that resulted in settlement, the United States directly participated in over 50 of those cases, meaning that the number of cases requiring the United States to consent to settlement is itself low. However, 203 voluntary dismissals required the United States to consent,[258] yet none of these dockets contained an objection. It is possible that these dockets do not capture objections to settlement or dismissal, as government motions may remain

256. Matthew, *supra* note 174, at 297-303; Rich, *supra* note 177, at 1259-74.

257. *See supra* note 162.

258. 31 U.S.C. § 3730(b)(1).

under seal. These low rates of objection to settlement and dismissal are unsurprising, though: first, few cases settle without direct participation from the United States, and second, most of the cases that are voluntarily dismissed without settlement likely lack merit, giving the United States no incentive to object to dismissal.

While the dockets revealed little on objections to dismissal, they showed that the United States *does* continues to monitor qui tam litigation by filing statements of interest, even if it does not intervene. One common statement of interest asserts that voluntary dismissal must be done without prejudice to the government.[259] The United States also occasionally objects to a defendant's motion by submitting a statement of interest. For example, the United States in *Marcus* argues against the defendant's attempt to dismiss based upon public disclosure grounds and clarifies that claims premised on Anti-Kickback Statute (AKS) violations do not require the plaintiff to show that remuneration exceeds fair market value or is commercially unreasonable, in contrast to the defendant's construction of the standard.[260] Other statements of interest can be less substantive, such as a motion to transfer venue in *Humana*. Here, DOJ notes the USAO in the Central District of California has dedicated "significant investigative resources," so it is an appropriate judicial district, while transferring the suit to the Western District of Kentucky, a district with no existing involvement, would require it to expend "significant time and resources" to acquire the Central District of California's level of knowledge.[261] The United States also submitted a statement arguing against the defendant's motion for summary judgment in the same case, explaining the FCA's requirements for materiality and scienter and why the relator has satisfied both to defeat summary judgment.[262]

While the government's statements of interest have not been discussed much in academic literature, practitioners have monitored these statements, given their tendency to clarify DOJ's stance on legal standards or areas of dispute. For instance, practitioners have reported that statements of interest have revealed DOJ's position on the "proper causation standard in [FCA] cases predicated on violations of the anti-kickback

259. United States' Statement of Interest Regarding an Issue Raised in Defendants' Motion to Dismiss at 2-3, United States v. Cherry Creek Mortgage Co., Docket No. 2:18-cv-03298 (C.D. Cal. Apr. 19, 2018), ECF No. 52 ("dismissing any part of relator's complaint with prejudice to the United States would harm the United States, as it would provide grounds for a defendant to argue, albeit incorrectly, that such a dismissal precludes future actions . . . .").

260. United States' Opposition to Public Disclosure Dismissal and Statement of Interest Re Motion to Dismiss at 3-11, Marcus v. Biotek Labs, LLC, No. 8:18-cv-02915 (M.D. Fla. Nov. 30, 2018), ECF No. 94.

261. Statement of Interest by the United States at 2-3, United States v Humana Inc., No. 3:18-cv-00061 (W.D. Ky. Jan. 30, 2018), ECF No. 42.

262. Statement of Interest Regarding Humana's Motion for Summary Judgment by United States at 2-5, United States v Humana Inc., No. 3:18-cv-00061 (W.D. Ky. Jan. 30, 2018), ECF No. 403.

statute"[263] and its support of the novel "fraud-on-the-FDA" theory, which finds that "fraudulent conduct directed at FDA" can make claims submitted to a different agency like CMS qualify as "false" under the FCA.[264] All these statements demonstrate that the U.S. government spends a considerable amount of time and resources on monitoring non-intervened cases, even using them to express its opinion on novel legal theories, lending further support to the importance of dismissal for a case without merit to conserve government resources. At the same time, the statements also show the value of qui tam by allowing private relators to spend non-government resources to recover money in declined cases with merit—as if the non-intervened cases completely lacked merit, the DOJ would not submit statements of interest supporting the relators.

Because Bloomberg Law dockets in 2018 did not contain any objections to dismissal or settlement, I utilized legal research platforms to identify reasons for objections to settlement or dismissal, yielding 14 examples across circuits over the past 30 years (Appendix Table 2). This averages to about one objection every two years, suggesting that quantifying the number of objections over a smaller timeframe via Bloomberg dockets will yield few results, so qualitatively researching it through legal research platforms provides a practical solution.

Out of 14 illustrative cases, objections are primarily due to (1) low monetary recovery and/or (2) settlement's release of claims provisions or dismissal with prejudice if voluntary dismissal without settlement. For example, the United States successfully objected to a settlement in *Michaels* because potential damages at trial would be approximately 25 million dollars, while the proposed settlement was only for 2.5 million dollars.[265] Similarly, the court granted a U.S. objection to a settlement in *Health Possibilities,* with the government arguing that the settlement's compliance program "was insufficient consideration for an all-encompassing release," exacerbated by a "lack of oversight mechanisms."[266] The government also noted that the relators "essentially channeled damages payments to the defamation action . . ." to divert money to the relators and their counsel

263. *DOJ Files Statement of Interest Rebutting Application of a "But-For" Causation Standard in False Claims Act Cases Predicated on Violations of the Anti-Kickback Statute*, GREGG SHAPIRO LAW (Oct. 27, 2023), https://greggshapirolaw.com/doj-files-statement-of-interest-rebutting-application-of-a-but-for-causation-standard-in-false-claims-act-cases-predicated-on-violations-of-the-anti-kickback-statute [https://perma.cc/VA2G-CDXW].

264. Jaime L.M. Jones, Brenna E. Jenny & Krystalyn K. Weaver, *DOJ Defends Viability of Fraud-on-the-FDA Theory in Statement of Interest*, SIDLEY (June 9, 2022), https://fcablog.sidley.com/2022/06/09/doj-defends-viability-of-fraud-on-the-fda-theory-in-statement-of-interest [https://perma.cc/ZCC8-RRRN].

265. United States *ex rel.* Michaels v. Agape Senior Cmty., Inc., 2015 WL 3903675, at *2, (D.S.C. June 25, 2015).

266. United States *ex rel.* Doyle v. Health Possibilities, P.S.C., 207 F.3d 335, 338 (6th Cir. 2000).

rather than the government.[267] In both these cases, the United States also argued that the text of Section 3730(b)(1) gave the Attorney General an absolute veto of any qui tam settlement, which the court agreed with as an independent reason for stopping the settlement. These examples indicate that the U.S. rationale for objection is primarily self-interested, often to obtain a more significant recovery or prevent preclusion in future cases rather than to help the defendant over the relator.

The six cases in the Ninth Circuit illustrate that the stricter *Killingsworth* standard does make it harder for the government to object in practice. For half of those cases, the court approved settlements between the relator and the defendants over the government's objection, such as in *Pratt* and *Hullinger,* because the settlements were "fair and reasonable" even if the government received a relatively low amount of money and the settlement contained release language.[268] The same reasons were enough to veto settlements outside the Ninth Circuit. In two cases, the district courts modified the settlements to ensure the government's share of the recovery, with the decisions upheld on appeal.[269] But the fact remains that three qui tam cases were settled even though the U.S. believed the relators prioritized their private recovery. Thus, *Killingsworth* poses a fundamental limitation upon executive power by preventing the United States from vetoing a settlement by private relators even though the United States is the real party in interest and would benefit from continuing the litigation or negotiating a separate settlement.

Of course, the judiciary retains the power to dismiss cases sua sponte for failure to comply with the rules of civil procedure and can generally decline to approve certain settlements.[270] But it does not have the *opposite* power to force parties to settle, a decision left up to the litigants. Under *Killingsworth*, the United States cannot stop a settlement affecting its *own* financial recovery and release of claims that it disagrees with. In effect, the judiciary, rather than the executive, enforces the False Claims Act, in direct violation of separation of powers.

None of the eight courts outside the Ninth Circuit that approved settlements based on absolute government veto authority directly mentioned executive power as a reason for greater control over objections. But increased U.S. intervention in the Ninth Circuit and the fact that all cases in the circuit on government objections to settlement—that I have found—are from over twenty years ago suggest that the United States has found

267. *Id.*

268. United States *ex rel.* Pratt v. Alliant Techsystems, Inc., 50 F. Supp. 2d 942, 947-51(C.D. Cal. 1999); United States *ex rel.* Hullinger v. Hercules, Inc., 80 F. Supp. 2d 1234, 1242-44 (D. Utah 1999).

269. United States v. Texas Instruments Corp., 104 F.3d 276, 277 (9th Cir. 1997); United States *ex rel.* Sharma v. Univ. S. Cal., 217 F.3d 1141, 1144-45 (9th Cir. 2000).

270. *See* FED. R. CIV. P. 41(b) (involuntary dismissal); FED. R. CIV. P. 23(e) (class action settlements require court approval). Many states also require the court's consent for settlements involving persons with a disability. *E.g.,* Va. Code Ann. § 8.01-424 (2024).

ways to maintain control over FCA litigation even if the judiciary has limited its power to object to settlement.

V. Implications and Recommendations

Today, the FCA may be constitutional and pass separation-of-powers scrutiny, but statistics on DOJ's involvement in FCA cases reveal some uncertainty. For one, DOJ's infrequent intervention and/or dismissal casts doubt on whether it controls qui tam relators, who continue pursuing frivolous cases and wasting government resources. For another, DOJ lacks broad authority to object to private settlements in the Ninth Circuit, meaning that courts can ignore the government's objection and approve a settlement that favors private over public interests—a violation of executive power. As a result, changes must be made for the FCA to withstand constitutional challenges.

A. The Importance of Greater Dismissal Power in Theory and Practice

Before we get into recommendations for ensuring greater DOJ control of relators, readers may suspect that the Supreme Court's broad reading of government dismissal authority in *Polansky* will lead to DOJ dismissing cases more frequently, making the existing data on dismissal outdated.[271] While this is possible, we have not seen high dismissal rates in any of the circuits with historically deferential standards to dismiss, so a dramatic increase in the frequency of DOJ dismissal seems unlikely. Michael Granston, Deputy Assistant Attorney General of the Civil Division, has also stated that DOJ is unlikely to change its approach to qui tam cases post-Polansky significantly and will likely apply the same standards to its decision-making on intervention and dismissal.[272] As these patterns of low dismissal date back over thirty years[273], when many courts already operated upon the principle that they could dismiss at all times, and the FCA inherently incentivizes DOJ to dismiss infrequently, the chance of a rapid increase in DOJ qui tam dismissals is unlikely to happen.

Readers may also conclude that even if DOJ dismisses infrequently in practice, its *ability* to dismiss whenever it wants is enough to maintain executive control and respect separation of powers. After all, with the Supreme Court's decision in *Polansky* last year, broad dismissal power *is* the status quo. The U.S. government, in theory, can dismiss whenever it wants,

271. *See* U.S. *ex rel.* Polansky v. Exec. Health Res., Inc., 599 U.S. 419, 430-38 (2023).

272. Lovitch, *supra* note 163; Kerry K. Walsh & Giselle J. Joffre, *ABA Panelists Talk FCA Developments and Predictions*, ARNOLD & PORTER (Mar. 7, 2024), https://www.arnoldporter.com/en/perspectives/blogs/enforcement-edge/2024/03/aba-panelists-talk-fca-developments-and-predictions [https://perma.cc/E437-QACJ].

273. *See* Kwok, *supra* note 24, at 238 (studying dismissal rates starting in 1986); Engstrom, *Public Regulation of Private Enforcement*, *supra* note 28, at 1716 (same).

given the broad 41(a) standard and expected high degree of deference to dismissals.[274] Perhaps the small chance of a settlement leading to millions of dollars justifies the government permitting most cases to continue.

There are strong arguments for a more functionalist approach, however, rooted in both practical factors and constitutional principles. Many academics have written extensively about practical reasons for increasing dismissal, such as conserving government resources and time.[275] The many U.S. statements of interest found in this study and the FCA's requirement that the government consent to voluntary dismissal also show the taxpayer resources spent monitoring ongoing qui tam cases.[276] Even if a case is voluntarily dismissed, at least several attorneys[277] are still required to look into the case and ensure that dismissal is in the public interest, something that could be avoided if the government dismissed at the onset. FCA defendants and the courts are also burdened by spending time writing motions and court orders on cases unlikely to win. These practical reasons alone, together with the distorted incentive structure of the FCA, are enough to consider changes to the statute.

On the constitutional side, the Supreme Court could, in the future, uphold qui tam's constitutionality under Article II because of *Polansky*'s holding, which gives a broad right to dismiss a qui tam case. [278] However, because the Supreme Court and other academics have been advancing a more expansive view of executive power,[279] coupled with the status quo of hundreds of low-merit relator-led qui tam cases every year, this outcome is far from certain. Greater exercise of dismissal power may be key to respecting Article II's Take Care Clause and the values underlying separation of powers more generally.

Scalia's dissent in *Morrison,* which is often now seen as good law,[280] provides a great place to start. The Supreme Court in *Morrison* considered the constitutionality of the independent-counsel provisions of the Ethics in Government Act. Enacted in response to the Watergate crisis, the Act required the Attorney General to appoint an independent counsel whenever he received information suggesting a high-ranking government official

274. *See Polansky*, 599 U.S. at 437-38; FED. R. CIV. P. 41(a).

275. *See supra* Section II.C (discussing work by Michael Rich, Randy Beck, and Dayna Bowen Matthew).

276. *See also* Matthew, *supra* note 174, at 293 ("Recent reports of several high profile FCA cases, each of which cost taxpayers hundreds of millions of dollars to prosecute but which ultimately had questionable basis in fact, belie the seductive influence of the large financial incentives imbedded in the FCA statutory structure."); Rich, *supra* note 177, at 1247 ("The FCA requires the Attorney General to investigate diligently any FCA violations alleged by relators, and the DOJ expends 'significant resources' on these investigations.")

277. DOJ Civil Fraud, the local USAO, and the relevant agency are all likely to be involved.

278. *Polansky*, 599 U.S. at 438.

279. *See supra* Section I.C (especially the last two paragraphs).

280. *See, e.g.*, Nick Bravin, *Is* Morrison v. Olson *Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1119 (1998).

violated federal criminal laws unless he found "no reasonable grounds" to warrant further investigation.[281] The Act also provided that an independent counsel may be removed "only by the personal action of the Attorney General and only for good cause."[282] The majority upheld the provisions because the Executive exercises "sufficient control over the independent counsel."[283] Scalia dissented, finding any delegation of executive authority unconstitutional: "[i]t is not for us to determine . . . how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are."[284] Article II, § 1, clause 1 states that "[t]he executive power shall be vested in a President of the United States," which does not mean "*some of* the executive power, but *all of* the executive power."[285] As a result, vesting purely executive power in a person who is not the President—the independent counsel, in this case—makes a statute void. Scalia also goes into some of the values underlying the separation of powers, stating, "The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom."[286]

Under our present status quo, the high number of meritless cases proceeding in the name of the United States matches up with what Scalia cautions against—a President lacking exclusive control of the executive power. Because the Constitution forbids "'impermissibly undermin[ing]' the powers of the Executive Branch," vesting the "executive power in a self-appointed agent" who can pursue meritless claims contrary to the government's interest violates separation of powers.[287] Further, having the ability to dismiss but not exercising that right in practice still means that defendants are brought into frivolous litigation by relators suing on behalf of the government. More frequent dismissals—an execution of executive power—would strengthen the FCA's constitutionality by eliminating the possibility of private actors acting in their private interests and pursuing a case that the government would not bring on its own. A current Supreme Court could point to the hundreds of relator cases continuing each year without government involvement as violating the Constitution's requirement that the executive power be fully vested in the President.[288]

281. Morrison v. Olson, 487 U.S. 654, 685-96 (1988).
282. *Id.* at 663.
283. *Id.* at 696.
284. *Id.* at 709 (Scalia, J., dissenting).
285. *Id.* at 705 (Scalia, J., dissenting) (quoting U.S. CONST. art. II, § 1, cl. 1).
286. *Id.* at 727 (Scalia, J., dissenting).
287. *See Riley*, 252 F.3d at 760 (Smith, J., dissenting).
288. Judge Smith's dissent in *Riley* raises many of these concerns to argue that qui tam actions where the government has declined to intervene violate the Take Care Clause altogether. Specifically, he argues qui tam 1) removes the Executive's discretion not to pursue a claim 2)

Additionally, as alluded to by Scalia's mention of effective government, the many meritless cases proceeding also go against the values that separation of powers aims to advance. Separation of powers is a critical feature of American democracy, dating back to James Madison, who believed in "the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct."[289] Intellectual history indicates that no one theory led to its inclusion in the Constitution, as many thinkers, including Blackstone, Locke, and Montesquieu, influenced the Framers.[290] Many historians consider Montesquieu the most influential, particularly his view that checks and balances were needed to avoid tyranny and preserve liberty.[291] But even Montesquieu's views and influence on the founders are unclear.[292]

Of course, as the Supreme Court and many scholars have acknowledged, separating tasks into three branches can reduce cooperation and yield inefficiencies.[293] Other scholars have found that government efficiency remained at the core of the original Constitution, or at least was one of the factors at play.[294] For example, Louis Fisher looked into writings by six founding fathers to argue that they envisioned a separate Executive would *increase* governmental efficiency—from Washington believing executive orders would improve order and discipline for the military,[295] to John Jay recommending single cabinet heads to enhance responsiveness to

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aggrandizes the legislative and judicial branches 3) does not allow for enough Executive control over the lawsuit (e.g., no free dismissal, settlement, or objection to settlement). *Riley*, 252 F.3d at 761-63 (Smith, J., dissenting). Many of these arguments fail if the DOJ were to dismiss most qui tam cases and only allow cases that it deems has merit to proceed.

289. Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 437 (2013) (quoting THE FEDERALIST NO. 47, at 239 (James Madison) (Lawrence Goldman ed., 2008)).

290. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1993-95 (2011). Other scholars see separation of powers as going back to Ancient Greece and feudal England, societies that had both a small, centralized executive and a democratic legislative, leading to checks and balances. Steven G. Calabresi, Mark E. Berghausen & Skylar Albertson, *The Rise and Fall of the Separation of Powers*, 106 NW. L. REV. 527, 533, 534 n.39 (2012).

291. Manning, *supra* note 290, at 1962, 1994-96; Waldron, *supra* note 289, at 450-56; *see also* Buckley v. Valeo, 424 U.S. 1, 122 (1976) (noting the Framers established checks and balances in the Constitution as a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other").

292. Waldron, *supra* note 289, at 450-56; Louis Fisher, *The Efficiency Side of Separated Powers*, 5 J. AM. STUD. 113, 113 (1971).

293. *See* Myers v. United States, 272 U.S. 52, 293 (1926) ("The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.")

294. Fisher, *supra* note 292, at 115; Manning, *supra* note 290, at 1994 (noting that separation of powers could have been included for many purposes, including to "create greater governmental efficiency" (quoting W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 127-28 (1965))). Jeremy Waldron focuses this principle on the rule of law and integrity of separate institutions and as articulated governance—allowing each branch to focus upon what they are good at. Waldron, *supra* note 289, at 456, 460, 466.

295. Fisher, *supra* note 292, at 116.

foreign policy requests,[296] and Thomas Jefferson and James Madison preferring an independent executive to Congress and its slowness.[297] While interpretations of the founding of the Constitution differ, at least one scholar has found historical evidence that the Framers wanted to craft a strong Executive by giving the President broad authority to administer federal law and independence akin to a monarch.[298]

Throughout the years, the courts have issued rulings based upon violations of these principles, finding that executive duties cannot be imposed on Article III judges[299] and forbidding the President from executing legislative authority limited to Congress.[300] Ultimately, separation of powers keeps each branch focused on its expertise. For the executive branch, that means executing the laws of the United States, which includes overseeing recoveries of government funds under the FCA. Thus, because effective government is one of the core reasons for this principle, the government's ability to dismiss meritless relator claims is constitutionally meaningless if DOJ does not use this right in practice but wastes government resources on monitoring those cases. This is also true under Chief Justice Rehnquist's majority opinion in *Morrison*, which affirms the requirement that the Executive's powers are not "impermissibly undermine[d]" so that the branch can fulfill its "constitutionally assigned functions"[301]—something that is contradicted by relators who are advancing their private interests.

Heckler v. Chaney and the principle of deference to agency inaction is also key. As DOJ has alluded to in many of its motions to dismiss, courts have recognized that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[302] As a result, when DOJ dismisses a qui tam, it is executing "[o]ne of the greatest *unilateral* powers a President possesses under the Constitution . . . [:] the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior."[303] To protect individual liberty—specifically the liberty of defendants accused of violating the FCA despite insufficient evidence of any

296. *Id.* at 119-122.

297. *Id.* at 122-24, 127-29.

298. Saikrishna Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 1012-15 (1992); SAIKRISHNA PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE (2015) 3-4, 12-27.

299. Hayburn's Case, 2 U.S. 408, 410 (1792).

300. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952).

301. Morrison v. Olson, 487 U.S. 654, 695 (1988) (quoting Nixon v. Admin. of Gen. Servs., 433 U.S. 425, 443 (1977)).

302. 470 U.S 821, 831 (1985).

303. *In re* Aiken Cnty., 725 F.3d 255, 264 (D.C. Cir. 2013) ("The Framers saw the separation of the power to prosecute from the power to legislate as essential to preserving individual liberty.").

violations—and executive power, as well as to increase consistency and preserve government resources, DOJ must exercise its dismissal power over meritless cases and ensure relators that proceed are advancing the government's interests.

There is a separate discussion about whether Congress can violate Article II by giving the Executive complete control in theory but with skewed incentives that discourage taking ownership. The structure of the FCA incentivizes DOJ to be idle because it shifts economic benefits and burdens, even though DOJ has broad capacity to take over qui tam suits at most points (except to object to settlement in the Ninth Circuit). Aaron Nielson and Christopher Walker have addressed this in the context of the presidential removal of agency officials, given recent Supreme Court cases that have prevented statutory restrictions on presidential removal power. They argue that the Constitution provides Congress with the "anti-removal power" or "the ability to discourage the White House from using its removal power."[304] They also looked into the founding and early years of Congress to argue that these functional restrictions are constitutional and have long been used to deter the exercise of removal power.[305] Perhaps a statute that skews incentives to exercise executive control is not in itself unconstitutional. However, other reasons suggest amending the statute to align incentives better.

In sum, empirical evidence in this study revealed that DOJ rarely dismisses cases, and the FCA inherently disincentives dismissal of frivolous cases. Data also shows that when the government chooses to intervene is arbitrary—out of more than four hundred cases in 2018, the government dismissed only eleven cases for reasons that overlap with many other cases that were not dismissed. Most cases proceeding under the FCA are qui tam, often based on claims that are unlikely to succeed, even though these cases are in the name of the United States. Many qui tam cases also proceed for over 6 months after DOJ declines to intervene, despite eventually leading to voluntary dismissal. As a result, the United States has its name attached to frivolous claims and must spend taxpayer resources to monitor those cases. This finding is all the more striking because DOJ internal policy requires that DOJ, the USAO, and the relevant agency investigate and confer together on whether to dismiss, meaning that at least three parties made an explicit decision to choose to allow the case to continue.

Consequently, I propose amending the statute to incentivize dismissal and ensure any remaining cases have merit, ensuring that qui tam "does not impermissibly undermine the powers of the Executive Branch, or disrupt the proper balance between the coordinate branches by preventing

304. Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1, 2 (2023).

305. Aaron L. Nielson & Christopher J. Walker, *The Early Years of Congress's Anti-Removal Power*, 63 AM. J. LEGAL HIST. 219, 221-22, 223 (2023).

the Executive Branch from accomplishing its constitutionally assigned functions."[306]

B. Amend the FCA to Incentivize Dismissal and Ensure Remaining Cases Have Merit

There are a few ways to ensure fewer meritless qui tam cases proceed in the name of the government and take up taxpayer resources. One option is for DOJ to adopt more prescriptive guidelines for when to dismiss qui tam cases, which would vastly decrease the number of frivolous cases continuing. For example, DOJ could update its policies to mandate dismissal if a case is *pro se*, touches upon foreign affairs, and involves claims brought multiple times before. The current guidelines list non-exhaustive and recommended factors but do not mandate dismissal under any specific situations, leading to the status quo of few dismissals. A lack of official guidelines may also mean that lower-level DOJ attorneys are uncertain today whether they can dismiss a case, and suggestions to dismiss likely take time to go through the necessary reviewers. New formal guidelines that require dismissal would avoid delegation concerns because these broad standards would become rules established by senior officials. Courts are also likely to grant dismissals broadly— the Rule 41(a) standard is broad,[307] and "the Government's views are entitled to substantial deference."[308] More prescriptive, mandatory rules would be a practical solution that DOJ can easily implement in this post-*Polansky* world.

Other options require amending the FCA, which would be more difficult in practice but not unrealistic given the many times the FCA has been amended, including as recently as 2010.[309] One approach is amending the FCA to require communication between DOJ and private relators before the government decides whether to intervene—to ensure that relators truly represent the executive's interests. Twenty percent of the 2018 qui tam cases analyzed in this Note involved the government declining to intervene and the relator submitting a motion for voluntary dismissal within three months; but many other cases do not resolve for over six months or even years.[310] DOJ internal guidelines currently encourage government lawyers to communicate with relators, but they also recommend declining to intervene and allowing the relator to proceed and dismiss voluntarily. An amended FCA could (1) mandate DOJ to ask relators if they will proceed with the case if DOJ declines to intervene and (2) require DOJ to dismiss

306. *Morrison*, 487 U.S. at 695 (internal quotation marks and citations omitted).

307. *See* FED. R. CIV. P. 41(a).

308. *Polansky*,599 U.S. at 437.

309. Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, amended 31 U.S.C. § 3730.

310. Appendix Figure 1.

the case if they respond "no." Dismissing initially is perhaps functionally the same outcome as DOJ not intervening and the private relator immediately filing for voluntary dismissal, but this practice shows greater formal executive control, especially because the relator may delay the case further, as seen in this study. Many different parties are also involved in qui tam suits, including the USAO, DOJ Civil Fraud, the relevant government agency, the relator, and relator counsel, so avoiding the need for further coordination would reduce time and resources.

Beyond ensuring meritless cases are dismissed, an amendment requiring more communication could also lead to DOJ intervening in *more* cases with a strong potential for recovery. When DOJ declines to intervene, relators must decide if they want to take on the financial cost and emotional strain of continuing to litigate; many qui tam cases are complex and could likely lead to recovery by government attorneys, though relators may voluntarily dismiss those cases because of competing factors like lack of resources.[311] Mandating communication between the relator and DOJ would make clear to the government that, if the case does have merit, intervention is better than the relator dismissing the case altogether or allowing the case to go forward as a qui tam where the relator may have less money and expertise.

Several academics have also proposed amendments to further incentivize DOJ dismissal. The most straightforward outcome, which Randy Beck describes, is to modify the FCA to mandate dismissal without prejudice over cases where DOJ chooses not to intervene.[312] This change would eliminate meritless cases while maintaining a financial incentive for relators to bring cases because they would share in the proceeds if the government intervenes.[313] Dayna Bowen Matthew proposes amending the FCA to require the government to certify in all non-intervened cases that it has evaluated the relator's claims and deems the case worthy of continuing.[314] Michael Rich advances a similar proposal that would allow a court to set a certification requirement specifically when the relator's claim pertains to novel theories of liability.[315]

Any of these proposals would establish greater DOJ control over qui tam suits by leading to more frequent dismissal and fewer meritless cases proceeding. Rich and Matthew's proposals for certification are the most promising because they maintain the possibility of non-intervened qui tam suits leading to recovery—more than ten percent of non-intervened cases

311. *See* Rich, *supra* note 177, at 1262 ("[T]he relator will proceed with her suit only if the potential recovery, discounted by the chance of losing, outweighs the perceived costs," with costs including attorney's fees, "time, the emotional strain of litigation, and the potential for retaliation once her suit becomes public.").

312. Beck, *supra* note 29, at 639.

313. *Id.* at 640.

314. Matthew, *supra* note 174, at 334-36; *see supra* Section II.B.

315. Rich, *supra* note 177, at 1276-78.

result in recovery (Table 1). However, any certification requirement must be precise, ensuring that DOJ both believes in the potential merit of a qui tam case and retains the ability to intervene if needed. Rich's proposal to limit certification to novel, relator-created legal theories is logical but does not avoid the possibility of relators proceeding on unfounded facts. Rather, any amendment must clarify that the law *and* the facts have merit and serve the public interest.

Matthew's proposal, which she excellently sets out,[316] would be more effective in ensuring that the government takes care in evaluating all cases and that it believes that all qui tam cases it declines to dismiss have merit. Currently, Rule 11 of the Federal Rules of Civil Procedure acts as a safeguard to avoid frivolous claims and meritless lawsuits by requiring that attorneys certify that in any pleading or motion, (1) the claims are warranted by existing law or by a nonfrivolous argument for modifying existing law and (2) the factual contentions have evidentiary support or will likely have evidentiary support after discovery.[317] Relators' attorneys must comply with Rule 11 when filing qui tam suits or face sanctions, but the government can decline to intervene without facing any consequences if the qui tam suit turns out to be frivolous or lacking evidentiary support. As a result, Matthew suggests amending Section 3730(b)(2) of the FCA, which details qui tam procedure, to require the government's adherence to Rule 11.[318] Specifically, she proposes adding two sentences after the sentence explaining that the government may elect to intervene and proceed within 60 days: if the government declines to intervene, it "must certify that it has evaluated the claim" and "deems the case worthy to continue," per Rule 11.[319]

I propose an amendment substantially similar to Matthew's suggestion but would recommend one additional change: ensuring the case is on par with a case the government would have brought itself.[320] After all, even if a case has a small basis for merit and would satisfy Rule 11, the case would not necessarily satisfy the high standards that a DOJ-initiated FCA case would be held to—meaning that litigation is not truly in the name of the Executive, even if not wholly frivolous. The statute could add at the end of § 3730(b)(2), "[i]If the Government elects not to intervene or dismiss the case, the Government must certify that it has evaluated the claims and

316. Matthew, *supra* note 174, at 335.

317. FED. R. CIV. P. 11(b)(2)-(3).

318. Matthew, *supra* note 174, at 335.

319. 31 U.S.C. § 3730(b)(2); *see* Matthew, *supra* note 176, at 335.

320. Matthew's proposed amendment, serving as the inspiration for my proposal, states in full: "The Government may elect not to intervene but to allow the action to proceed. In this case, the Government must certify that it has evaluated the claim and, in accordance with Rule 11 of the Federal Rules of Civil Procedure, deems the case worthy to continue. The Government may elect to intervene and proceed with a certified action at any time." Matthew, *supra* note 176, at 335.

believes both the legal theories and the factual contentions are warranted, as established in Rule 11 of the Federal Rules of Civil Procedure, and consistent with a case that the Government would itself have initiated." Adding this last requirement would ensure that any continuing qui tam cases have legal theories and factual contentions similar in merit to those the government would have brought itself if it had unlimited resources and sources of information to pursue all FCA cases on its own. The government already spends time and resources investigating whether to intervene, often extending the deadline to decide to intervene, so this requirement would not unreasonably burden DOJ. Instead, it would strengthen executive control over all FCA cases, in line with the Executive's duty to ensure faithful execution of the laws and separation of powers.

C. Resolve the Circuit Split in Favor of Broad Authority to Object

While the FCA distorts incentives for dismissal, the statute incentivizes DOJ to object to unfavorable settlements and dismissal: DOJ has an interest in preventing any settlement that underrepresents the amount of money it could recover or places limitations on its ability to sue in the future. As a result, the text of the FCA does not need amending to further use of DOJ's objection power because it will act in its self-interest and object when appropriate. The ongoing circuit split on the standard for objection to settlement and dismissal, however, requires resolution.

Courts and academics have primarily commented on the standard for government control over settlement from a textualist and legislative-history perspective, with three circuits finding absolute government veto authority based on similar reasons.[321] The main separation-of-powers concern they have discussed in this context is allowing the executive to usurp the judiciary's power to dismiss a case, though this concern is easily avoided by limiting government objections to voluntary dismissals.[322] By contrast, the separation-of-powers concerns around DOJ's inability to exercise its executive power to object to a private relator's unreasonable settlement are more challenging to ignore.

The Ninth Circuit's good-cause and court-approval requirements for objection today cannot be reconciled with Article II's Take Care clause.[323] For qui tam suits to be constitutional, the government must be able to control a case at all stages, including at the point of settlement or voluntary dismissal. Similar to the government's right to dismiss, the government's right to object to settlement and dismissal is critical to maintaining executive control over qui tam and avoiding relators taking on executive power

321. *See supra* notes 196, 207-209.

322. *See, e.g., Health Possibilities*, 207 F.3d at 343-44; *Searcy*, 117 F.3d at 158 ("requiring the government's consent to an involuntary dismissal would raise separation-of-powers concerns.").

323. *Killingsworth,* 25 F.3d at 722-25.

alone. The Ninth Circuit's current approach renders the FCA unconstitutional by allowing private parties to exercise unreviewable executive authority, as DOJ cannot object to a settlement if it lacks good cause, or shifting the executive's ability to follow the FCA to the judiciary, as the court can veto an unreasonable settlement. As a result, the Supreme Court must resolve this circuit split in favor of the Constitution's broad allocation of executive control to align with separation of powers and Article II.

A survey of common reasons for objecting to dismissal or settlement also supports this conclusion, as they reveal that (1) the government's reasons to object are generally valid and advance its interests in recovering more money, and (2) a good-cause requirement can disrupt the government's ability to advance its interests, as the courts sometimes overrule the government. The second result shows the Ninth Circuit's violation of separation of powers—DOJ, not the court, has been spending significant time and money on investigating the claims and deciding whether to intervene or whether the settlement is worthwhile, and the Executive, not the court, enforces laws including the FCA.

This second takeaway also implicates a separate question about optimizing the recovery of public funds, as most DOJ objections center around collecting money from the defendant for the United States. Courts are often required to approve settlements,[324] so the question becomes: should the judiciary or the executive control whether to stop a settlement? There is only one correct answer when we view this question in the broader context of agency discretion and precedent. The executive branch has broad discretion not to prosecute or enforce, meaning that DOJ's decision to decline to allow a settlement that effectively enforces the civil process is also committed to agency discretion.[325] Allowing a court to decide the quality of a settlement or if DOJ's rationale satisfies good cause not only takes over the role of the Executive and violates the Take Care clause but also contradicts the principle of deference to agency decision-making in *Chaney*.

Of course, the text of the FCA is also important in deciding the standard for objection. The textual analyses of the Fourth, Fifth, and Sixth Circuits are convincing, and another circuit that has not yet examined this issue, the Ninth Circuit in a new case, or the Supreme Court should begin its discussion with a similar analysis. If we also consider principles of statutory interpretation, including the constitutional-doubt canon, it becomes even

324. *See supra* note 270.

325. *See Chaney*, 470 U.S at 831("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.").

more clear that the Ninth Circuit's decision in *Killingsworth* is an aberration that must be overruled.[326]

Conclusion

The Supreme Court has not ruled on the constitutionality of qui tam since 2000, when it upheld the FCA under Article III.[327] The Court has never commented on the Article II challenges, and the circuit-court cases upholding the FCA under Article II date back to the 1990s or early 2000s.[328] Within the past twenty years, the Supreme Court has trended toward a broad view of executive power, finding slight limitations unconstitutional. After the dissent in *Polansky*, the FCA has faced renewed scrutiny and a high likelihood of its constitutionality under Article II making its way to the Supreme Court despite qui tam generating over two billion dollars in annual recoveries.[329]

What is likely to happen in the next few years? A circuit court may rule that the FCA violates separation of powers, and the Supreme Court grants certiorari.[330] The Court may consider the Take Care Clause and point to existing examples of limited executive oversight: the United States intervening in less than a quarter of cases, qui tam relators using government resources to proceed in hundreds of unsuccessful cases every year, and DOJ unable in many districts to object to settlements by private relators that disfavor the government. The Court may find the False Claims Act unconstitutional, based on broad readings of executive power and no diffusion of authority permitted.

As a result, for the FCA to stand scrutiny at the high court, the statute must be amended to increase DOJ's incentives to dismiss cases and ensure that declined-intervention cases have merit in the government's eyes, reducing frivolous cases in the name of the government. The Ninth Circuit's holding in *Killingsworth* must also be overturned, as the United States must be able to object to any private settlement without reason because the settlement is on behalf of the United States itself. Even if DOJ must spend more money evaluating cases to dismiss, and relators may lose some incentive to bring cases because their settlements may be vetoed, these

326. *Killingsworth,* 25 F.3d at 722-25; *see Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 354-56 (explaining the "long established presumption in favor of the constitutionality of a statute").

327. *Stevens*, 529 U.S. at 773.

328. *See supra* note 79.

329. *Fraud Statistics – Overview, supra* note 2.

330. A district court has already ruled that the FCA violates the Appointments Clause of Article II, and the government and the relator have appealed to the Eleventh Circuit. U.S. *ex rel.* Zafirov v. Fla. Med. Assoc., LLC, No. 8:19-cv-01236-KKM-SPF, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024). With the change in presidential administration, it is also possible that DOJ will change its stance on the constitutionality of the FCA and perhaps endorse *Zafirov*. *See* Seiden, *supra* note 90.

outcomes are still more favorable to recovery than abolishing qui tam altogether.

One way for these complex questions to be resolved is for a case to come up to a circuit on the standard for objection, so the Supreme Court can grant certiorari given the split and find that *Killingsworth* is wrong. This reasoning, however, must be different from that in *Polansky* by discussing *both* the text and the separation-of-powers arguments[331]: the Court can take this opportunity to clarify that strong DOJ oversight of qui tam litigation indicates that the FCA withstands Article II challenges. Or, if the Eleventh Circuit affirms *Zafirov's* holding that qui tam violates the Appointments Clause, the Supreme Court could grant certiorari to confront the statute's constitutionality directly. Otherwise, FCA defendants will continue to spend time and money arguing the same old Appointments and Take Care Clause arguments, as the Supreme Court's stance on the FCA's constitutionality under Article II remains unclear.

331. *See generally Polansky*, 599 U.S. at 429-38 (analyzing the text of the FCA and declining to discuss constitutionality).

Appendix

Table 1: Summary of 2018 FCA Cases Dismissed by the U.S. Government

Case Name	Statutory Basis?	Brief Summary	Reasons for Dismissal
Crandell v. United States, No. 2:18-cv-00124 (N.D. W. Va. Nov. 29, 2018)	3730(c)(2)(A) and non-3730(c)(2)(A)	Relator alleges defendant, county rural development authority, submitted false claims under an industrial land development grant program.	• Waste of gov't resources • No pro se • Failure to state a claim • Public disclosure
Davis v. Hennepin County, No. 0:18-cv-01551 (D. Minn. June 4, 2018)	3730(c)(2)(A)	Relators allege defendants covered up the true cause of bridge collapse to persuade federal gov't to appropriate funds to rebuild the bridge. Gov't assessed claims in two previous cases; new complaint unlikely to lead to different conclusion.	• Previous case(s) • Waste of gov't resources
Kelly v. Carson, No. 8:18-cv-00532 (D. Neb. Nov. 9, 2018)	Non-3730(c)(2)(A) only	Relator previously filed employment discrimination cases against Omaha Housing Authority and 3 previous qui tam cases arguing OHA submitted false claims to HUD, which the court all dismissed.	• Previous case(s) • Waste of gov't resources • Not justiciable • Failure to state a claim • Procedural barriers

McCane v. Sch. Dist. Pasco Cnty., No. 8:18-cv-01559 (M.D. Fla. June 28, 2018)	Non-3730(c)(2)(A) only	Relator, appearing pro se, argues that defendant School District submitted false claims in reporting the correct amount of funds for the free and reduced lunch program, using excess funds to pay off employee mortgages and state officials.	• No pro se
Melhorn v. Hogan, No. 3:18-cv-00236 (E.D. Tenn. June 15, 2018)	3730(c)(2)(A) and non-3730(c)(2)(A)	Relators, appearing pro se, argue home was improperly foreclosed on in violation of FCA. They allege14 defendants (including judges) acted via sham courts and used false statements to execute foreclosure.	• Waste of gov't resources • No pro se
United States ex rel. Rune Kraft v. CalPortland Constr., No. 4:18-cv-01705 (N.D. Cal. Mar. 19, 2018)	Non-3730(c)(2)(A) only	Relator alleges defendants construction companies submitted false claims in relation to federal construction and contracts.	• No pro se
United States v. CenseoHealth, LLC, No. 4:18-cv-00347 (E.D. Tex. May 11, 2018)	3730(c)(2)(A) and non-3730(c)(2)(A)	Relators, employees of defendant corporation that provides risk assessment services to healthcare organizations,	• Waste of gov't resources • Alternate legal theory

		allege defendant violated HIPAA and other patient privacy laws.	
United States ex rel. TZAC, Inc. v. Oxfam, No. 1:18-cv-01500 (S.D.N.Y. Feb. 20, 2018)	3730(c)(2)(A)	Relator alleges defendant Oxfam provided support to Hamas / Palestinian Authority in Gaza, so its certifications to USAID in connection with grant applications were false in stating that it did not support terrorist acts.	• Foreign affairs • Waste of gov't resources
United States ex rel. Laurie Hinds v. SavaSeniorCare, LLC, No. 3:18-cv-01202 (M.D. Tenn. Oct. 25, 2018)	3730(c)(2)(A) and non-3730(c)(2)(A)	Relator alleges defendant nursing facilities systemically overbilled Medicare for rehab therapy services. US filed complaint in intervention 3 years ago and requested a stay of litigation given possible settlement.	• Waste of gov't resources • Previous case(s) • Public disclosure
United States ex rel. Brutus Trading, LLC v. Standard Chartered Bank, No. 1:18-cv-11117 (S.D.N.Y. Nov. 29, 2018)	3730(c)(2)(A)	Defendant bank failed to disclose transactions with Iran, in violation of sanctions, leading to underpaying of former settlement agreement. Former FCA case resolved	• Foreign affairs • Previous case(s) • Waste of gov't resources

		this. Now relator brings a new complaint based on new info and a different legal theory.	
Wilson v. United States, No. 3:18-cv-00017 (N.D. W. Va. Jan. 31, 2018)	Non-3730(c)(2)(A) only	Relator alleges defendant physician submitted false claims for Medicare & Medicaid reimbursement (e.g., billing for ultrasound studies never performed, improperly entering measurements).	• No pro se

Table 2: Summary of Cases with Government Objection to Settlement or Dismissal

Circuit	Case	Why did the gov't object to settlement or dismissal?	Absolute gov't veto power?	Summary
First	United States ex rel. Globe Composite Sols., Ltd. v. Solar Const., Inc., 528 F. Supp. 2d 1 (D. Mass. 2007)	[Object to voluntary dismissal] Relator and defendants seek dismissal of US claims with prejudice	Yes	• Dismissal with prejudice
Fourth	United States ex rel. Michaels v. Agape Senior Cmty., Inc., 848 F.3d 330 (4th Cir. 2017)	Proposed settlement represents only 10% of potential recovery ($25 M) at trial	Yes	• Low monetary recovery

Fifth	Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154 (5th Cir. 1997)	Settlement includes a release from all claims and counterclaims in any pleading or filing	Yes	• Release of claims
Sixth	United States v. Health Possibilities, P.S.C., 207 F.3d 335 (6th Cir. 2000)	Compliance program was inadequate, all money went either to relators or counsel, not complying with settlement division requirements	Yes	• Low monetary recovery • Inadequate compliance program
Sixth	United States ex rel. Smith v. Lampers, 69 F. App'x 719 (6th Cir. 2003)	[Object to voluntary dismissal] No monetary settlement of claims against defendant, and dismissal with prejudice could harm gov't for claim-preclusion purposes	Yes	• Low monetary recovery • Dismissal with prejudice
Seventh	United States v. Sleep Centers Fort Wayne, LLC, 2016 WL 1358457 (N.D. Ind. Apr. 6, 2016)	Settlement dismisses FCA claims belonging to the government	Yes	• Release of claims
Ninth	United States ex rel. Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994).	Settlement is deliberate attempt to divert money ($2.7 M) to plaintiff via personal claim and attorney's	No; district court found settlement reasonable and fair and dismissed	• Low monetary recovery

		fees	the case[332]	
Ninth	United States v. Texas Instruments Corp., 25 F.3d 725 (9th Cir. 1994)	Settlement consists of attorney's fees instead of FCA claims that require allocation to gov't and lacks prohibitions on future defendant conduct	No; district court restructured settlement to secure government's share[333]	• Low monetary recovery • Release of claims
Ninth	United States ex rel Sharma v. Univ. S. California, 217 F.3d 1141 (9th Cir. 2000)	Settlement would give relator 30% of recovery *and* attorneys' fees from FCA proceeds, denying the US of its statutorily mandated share	No; district court modified settlement to comply with FCA	• Low monetary recovery
Ninth	United States ex rel. Pratt v. Alliant Techsystems, Inc., 50 F. Supp. 2d 942 (C.D. Cal. 1999)	Settlement releases defendants from potential FCA liability, minimal recovery of $360 K (vs. hundreds of millions at stake), omission of restriction on defendant conduct	No; district court found settlement reasonable and fair and dismissed the case	• Low monetary recovery • Release of claims

332. U.S. ex rel. Killingsworth v. Northrop Corp., 69 F.3d 545 (9th Cir. 1995).
333. United States v. Texas Instruments Corp., 104 F.3d 276 (9th Cir. 1997).

Ninth	United States ex rel. Ericson v. City Coll. San Francisco, 1999 WL 221057 (N.D. Cal. Jan. 22, 1999)	Disproportionate amount of settlement allocated as attorney fees, depriving gov't of recovery (125 K vs. 3.5 K); gov't not given complete copy of settlement	No; district court found settlement not fair and reasonable and disapproved it	• Low monetary recovery
Ninth	United States ex rel. Hullinger v. Hercules, Inc., 80 F. Supp. 2d 1234 (D. Utah 1999)	Disproportionate amount of settlement allocated to relator's retaliatory discharge claims ($3.7 M), limiting U.S. recovery (only $600 K); release language in settlement	No; district court found settlement reasonable and fair and dismissed the case	• Low monetary recovery • Release of claims
Eleventh	United States ex rel. Dimartino v. Intelligent Decisions, Inc., 308 F. Supp. 2d 1318 (M.D. Fla. 2004)	Settlement does not give government any money ($500 K only goes to the relator)	Yes	• Low monetary recovery
D.C.	United States ex rel. Landis v. Tailwind Sports Corp., 98 F. Supp. 3d 8 (D.D.C. 2015)	Not specified ("withholding of consent [to settlement] requires no explanation")	Yes	Unknown

Figure 1: Time Between Gov't Declining to Intervene and Voluntary Dismissal