

NOTE†

THE KEY PROBLEMS WITH QUI TAM DISMISSALS UNDER *SWIFT*

HOLLY GWYDIR*

I

INTRODUCTION

In 2018, the federal government spent \$1.59 trillion on the military and health industries alone, with \$623 billion allocated for military expenditures, \$582 billion for Medicare costs, and \$389 billion for Medicaid costs.¹ In the same year, the rate of improper payment for Medicare and Medicaid was 8 percent and 9.79 percent, respectively, resulting in more than \$80 billion in losses of taxpayer money to fraudulent or improper healthcare claims.² While the rate of fraud in the defense industry is more difficult to establish, over 1,000 cases of defense contracting fraud were filed from 2013 to 2017, resulting in the recovery of over \$800 million.³ This is likely a fraction of the amount lost due to defense contracting fraud. Between the two industries, the American taxpayers are likely losing close to \$100 billion dollars *per year* due to fraudulent payments and improper claims. These staggering statistics leave taxpayers wondering, *how do we get it back?*

One method of recourse for taxpayers lies in the False Claims Act (FCA). Congress passed the FCA to encourage citizens through economic incentives to report fraud committed against the government.⁴ The FCA authorizes qui tam

Copyright ©2022 by Holly Gwydir.

This Article is also available online at <http://lcp.law.duke.edu>.

†Addendum to *Two Decades of Corporate Criminal Enforcement*, 83 LAW & CONTEMP. PROBS., No. 4, 2020.

* Duke University School of Law, J.D. 2022. Thank you to Professor Jeremy Mullem for his guidance and feedback. Thanks also to the editors of *Law and Contemporary Problems* for their help and insight throughout the process, especially to Mary Chandler Beam, Anna Dezenzo, Peter Berquist, and Meredith Criner.

1. CONGRESSIONAL BUDGET OFFICE, THE FEDERAL BUDGET IN 2018 (2019), <https://www.cbo.gov/publication/55342> [<https://perma.cc/FW38-J7V4>].

2. CENTERS FOR MEDICARE & MEDICAID SERVICES, 2019 ESTIMATED IMPROPER PAYMENT RATES FOR CENTERS FOR MEDICARE & MEDICAID SERVICES PROGRAMS (2019), <https://www.cms.gov/newsroom/fact-sheets/2019-estimated-improper-payment-rates-centers-medicare-medicaid-services-cms-programs> [<https://perma.cc/PW8L-K2U4>].

3. Peter Suciu, *Defense Contracting Fraud Remains an Ongoing Issue*, CLEARANCE JOBS (May 14, 2019), <https://news.clearancejobs.com/2019/05/14/defense-contracting-fraud-remains-an-ongoing-issue/> [<https://perma.cc/MH4K-48SY>].

4. JOEL M. ANDROPHY & NORMAN W. BLACK, FEDERAL FALSE CLAIMS ACT AND QUI TAM

actions, which allow private individuals called “relators” to bring suit against federal contractors on behalf of the government. In 2017, qui tam suits resulted in the recovery of over \$3.7 billion in taxpayer money, \$2.48 billion of which was related to fraudulent charges for health care and \$220 million of which was from the defense industry.⁵ In exchange for their efforts to administer justice to perpetrators of fraud, relators are entitled to a portion of the recovery; today, this is between fifteen and thirty percent of the damages awarded.⁶ In 2017, relators received over \$478 million in awards in total.⁷

Because relators in qui tam actions pursue a suit on behalf of the government, the Department of Justice (DOJ) is given significant control over the litigation. Individual filers must first refer the case to the DOJ, which may choose to intervene and take over litigation of the suit.⁸ If the DOJ decides not to intervene, the individual can pursue the lawsuit independently. Generally, intervention strengthens a case considerably and increases the likelihood of a favorable settlement for the relator.⁹ However, relators sometimes find involvement by the DOJ to be unwelcome.

In addition to the intervention right, the DOJ retains the power to settle and dismiss qui tam suits over the objections of relators.¹⁰ The dismissal right is a controversial power for the DOJ to exercise, partially because pursuing recourse for fraudulent conduct through a qui tam suit is not an easy task. Relators are often subjected to retaliation at the hands of their former employers, which may take the form of termination, harassment, or debarment, and even criminal activity such as break-ins to the relator’s home.¹¹ Where a suit is dismissed over relator objections, relators take all the risk with none of the reward. In some jurisdictions, regardless of whether a complaint is meritorious, the DOJ has the right to dismiss actions without showing a rational purpose for the dismissal, leaving open the possibility for improper incentives to underlie dismissal motions.¹² Thus, a meritorious suit with the potential to recover taxpayer money

LITIGATION § 2.04 (2020).

5. *Analysis of DOJ’s \$3.7 Billion in False Claims Act Recoveries in FY 2017 Suggests Interesting Trends*, WINSTON & STRAWN LLP (Jan. 5, 2018), <https://www.winston.com/en/thought-leadership/analysis-of-DOJ-s-3-7-billion-in-false-claims-act-recoveries-in.html> [<https://perma.cc/3KJU-2FBM>].

6. ANDROPHY & BLACK, *supra* note 4.

7. U.S. DEPARTMENT OF JUSTICE, FRAUD STATISTICS- OVERVIEW (2019), https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdeliver [<https://perma.cc/F22V-HP9Y>].

8. ANDROPHY & BLACK, *supra* note 4.

9. David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 657, 661 (2013).

10. False Claims Act, 31 U.S.C. § 3730(c)(2) (2018).

11. *See Whistleblower: The Case Against Northrop* (CBS television broadcast July 27, 2018) (narrating the case of qui tam relator James Holzrichter, who experienced break-ins and tampering with his car and was banned from the defense industry after bringing suit against Northrup Grumman, eventually ending up homeless with his family before settling the lawsuit).

12. *See Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003) (holding that the DOJ has unfettered discretion to dismiss qui tam suits).

may be dismissed for reasons that are not in the public interest.

Federal circuit courts are divided on the standard by which the DOJ may dismiss qui tam suits.¹³ In 1998, the Ninth Circuit held in *United States ex rel. Sequoia Orange, Co. v. Baird-Neece Packing Corp.* that the DOJ must identify a valid governmental purpose and show a rational relation between dismissal and accomplishment of that purpose before a dismissal motion may be granted.¹⁴ In reaching this conclusion, the court focused on language in the FCA that requires court approval for a dismissal and provides relators with a right to a court hearing on the dismissal action.¹⁵ The court also analyzed the legislative history of the FCA and determined that Congress intended for qui tam suits to provide a limited check on prosecutorial discretion.¹⁶ Thus, the Ninth Circuit held that prosecutors should not retain the unlimited right to dismiss suits.

In 2003, the D.C. Circuit disagreed in *Swift v. United States*, holding instead that the DOJ has “unfettered discretion” to dismiss qui tam suits.¹⁷ The court reasoned that because these lawsuits are an extension of the executive branch’s arm of enforcement, the DOJ has exclusive discretion to settle or dismiss the lawsuits under the Take Care Clause of the Constitution.¹⁸

In August 2020, the Seventh Circuit complicated the matter. In *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, the court straddled the holdings of the Ninth and the D.C. Circuit courts, and ultimately found that the standard was “much nearer to *Swift* than *Sequoia Orange*.”¹⁹ However, the court acknowledged the existence of background constraints on executive action and potential due process concerns posed by an unfettered right to dismiss.²⁰ This approach was followed most recently by the Third Circuit in *Polansky v. Executive Health Resources, Inc.* in October 2021.²¹

At the center of much of the disagreement is the question of whether the language of the FCA provides judicial review of a motion to dismiss a qui tam suit filed by the government. The FCA requires the court to provide the relator with an opportunity for a hearing on the dismissal motion, as well as “written consent to the dismissal and their reasons for consenting.”²² The courts in both *Sequoia Orange* and *CIMZNHCA* interpreted this language to require substantive judicial review of motions to dismiss, but disagreed on when this must

13. *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835 (7th Cir. 2020); *Swift*, 318 F.3d at 252; *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998).

14. *Sequoia Orange Co.*, 151 F.3d at 1145.

15. *Id.*; 31 U.S.C. § 3730(b)(1), 3730(c)(2)(A).

16. *Sequoia Orange Co.*, 151 F.3d at 1146.

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

18. *Id.* at 253.

19. *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 840 (7th Cir. 2020).

20. *Id.* at 849.

21. *Polansky v. Exec. Health Res.*, 17 F.4th 376, 385 (3d Cir. 2021).

22. 31 U.S.C. § 3730(b)(1).

apply.²³ Alternatively, *Swift* found that the language provided only a formalistic role for courts, rather than a substantive or discretionary power.²⁴

The DOJ's power to dismiss a qui tam suit without judicial review presents problems for relators' rights and taxpayer interests. To begin with, the power to dismiss qui tam suits with unfettered discretion provides a greater opportunity for corrupt or improper incentives to influence DOJ officials. For example, through situations such as the investigation into Russian interference with the 2016 election and the granting of Presidential pardons, the Trump administration made it abundantly clear that the White House has the power to exert undue influence over the DOJ.²⁵ Throughout history, numerous presidential administrations have demonstrated the pitfalls of this political influence over the DOJ.²⁶

Further, the DOJ may be susceptible to regulatory capture. Departments and administrative agencies like the DOJ may be "captured" when some special interest "persuades government actors to exercise the coercive power of the state in ways that are not in the 'public interest.'"²⁷ Studies show that the DOJ may not be the most impartial agency, and may in fact be vulnerable to capture by interests that overcome those of taxpayers.²⁸ Susceptibility to capture makes the power to dismiss suits without judicial oversight exceedingly problematic. This is especially true given that many qui tam suits are filed against top government contractors.²⁹ There is a documented "revolving door" between the Department of Defense (DOD) and federal contractors, which presents a risk of bias on the part of the government in handling allegations of fraud.³⁰ The potential for unfair dismissal of meritorious claims over the objections of relators is especially alarming in consideration of the hardship that relators may endure while pursuing punishment of fraudulent and unlawful behavior.³¹

This Note argues that the correct standard for qui tam dismissals is that of the Ninth Circuit, which calls on the DOJ to present a valid governmental purpose for the dismissal of qui tam lawsuits. As support for this conclusion, this Note

23. *CIMZNHCA, LLC*, 970 F.3d at 853; *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1145 (9th Cir. 1998).

24. *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003).

25. Andrew McCause Wright, *The Take Clare Clause, Justice Department Independence, and White House Control*, 121 W. Va. L. Rev. 353, 359–60 (2013).

26. Todd David Peterson, *Federal Prosecutorial Independence*, 15 DUKE J. CONST. L. & PUB. POL'Y 217, 264 (2020).

27. M. Elizabeth Magill, *Courts and Regulatory Capture*, in PREVENTING REGULATORY CAPTURE 397, 401 (Daniel Carpenter & David Moss eds., 2014).

28. David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1256 (2012).

29. WINSTON & STRAWN LLP, *supra* note 5.

30. MARSHALL B. CLINARD, CORPORATE CORRUPTION: THE ABUSE OF POWER 88 (1990).

31. See *Whistleblower: The Case Against Northrop*, *supra* note 11 (narrating the case of qui tam relator James Holzrichter, who experienced break-ins and tampering with his car and was banned from the defense industry after bringing suit against Northrup Grumman, eventually ending up homeless with his family before settling the lawsuit).

argues that the DOJ, as an administrative agency, is not always likely to be impartial and is in fact vulnerable to political influence and regulatory capture. This justifies the application of the stricter, yet still permissive, Ninth Circuit standard. Part II examines the history of the FCA and qui tam lawsuits, explaining and analyzing the holdings of each circuit regarding the DOJ's right to dismiss qui tam suits. Part III conducts a statutory analysis of the FCA, with specific attention to the legislative history of the Act and its 1986 Amendments. It concludes that the statutory language of the FCA, which requires judicial consent to dismissal and establishes the right to a hearing for relators, provides discretionary power to the judiciary in reviewing dismissal actions. Part IV addresses the vulnerability of the DOJ to influence by political actors and to regulatory capture, concluding that the agency is not sufficiently impartial and independent to justify unfettered discretion to dismiss qui tam lawsuits. Instead, Part V argues that this role is better filled by the judiciary. Part V also addresses the due process concerns created by the *Swift* standard and concludes that this issue is substantial. While this conclusion supports the need for judicial review, deeper analysis is required.

II

BACKGROUND

A. History of the FCA

Congress enacted the FCA in 1863, known at the time as Lincoln's Law, to combat rampant fraud committed against the United States government during the Civil War.³² Civilian contractors and even members of the military exploited the war by procuring payment from the government for fraudulent expenses, resulting in \$17 million in government losses for false payment.³³ Conduct such as supplying the Army with ammunition shells filled with sawdust, and selling rifles valued at \$17,500 to the government for over \$100,000, was commonplace. In one instance, the federal government paid Brooks Brothers to provide uniforms to Union soldiers.³⁴ The uniforms the company delivered were useless, as they were made of deficient material and lacked necessary components such as pockets. A prominent politician tasked with inspecting the uniforms was blamed for the loss, and allegations were made that the politician had profited off of the debacle. Following this incident, Congress created a committee to investigate the complicity of public officials in the rampant fraud. The committee discovered that many government officials had turned a blind eye to the fraudulent behavior during the war, and even received kickbacks from contractors for doing so.³⁵ These actions called "into question the honor or good

32. ANDROPHY & BLACK, *supra* note 4.

33. *Id.* This would be over \$350 million today.

34. FRED SHANNON, *THE ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY 1861-1865* 57-8 (1965).

35. *Id.*; ANDROPHY & BLACK, *supra* note 4 ("This extraordinary number of fraudulent schemes

judgment of men high in political and military councils of the country.”³⁶

To combat this fraud, the FCA permitted private individuals known as “relators” to pursue damages on behalf of the United States against contractors who committed fraud against the government.³⁷ The FCA applied to fraud committed by all government contractors, with a specific focus on military contractors. Defendants convicted under the FCA were subjected to significant fines and imprisonment for up to five years, and fines increased for military personnel. Relators were originally entitled to half of the total financial recovery of these suits.

Relators serve several purposes. First, they serve as informants who notify federal officials of fraudulent conduct that may be discoverable only by those within the corporation.³⁸ Without whistleblowers, the federal government would be crippled in its pursuit of discovering, punishing, and deterring such unlawful behavior. Second, relators fill a gaping hole in enforcement that is caused by a severe lack of resources of government agencies. In 2018, qui tam suits resulted in the recovery of over \$2.1 billion in taxpayer money.³⁹ In contrast, non-qui tam suits filed under the FCA recovered only \$767 million.⁴⁰ Finally, relators also assist in alerting the public and other federal agencies to the unlawful behavior of public officials who turn a blind eye to corrupt government contractors, which may include the DOJ.⁴¹

Since the FCA’s inception, critics have regarded qui tam suits with widespread disfavor.⁴² Critics most often object to the relators’ alleged manipulation of the suits to secure individual advantages and payouts. In 1942, *United States ex rel. Marcus v. Hess* held that relators could bring qui tam suits based solely on information contained in a criminal indictment, about which the relator had no first-hand knowledge.⁴³ This decision was heavily criticized.⁴⁴ In response to the disapproval, the FCA was amended in 1943.⁴⁵ The amendment

resulted from the collusion of contractors and corrupt Government officials who received kickbacks in exchange for their willful blindness.”).

36. SHANNON, *supra* note 34, at 58.

37. ANDROPHY & BLACK, *supra* note 4.

38. *Id.* at § 2.02.

39. Press Release, Department of Justice Office of Public Affairs, Justice Department Recovers Over \$2.8 Billion from False Claims Act Cases in Fiscal Year 2018 (Dec. 21, 2018), <https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018> [<https://perma.cc/52F9-TSME>]. Of this, independent qui tam relators produced \$118 million in actions where the DOJ declined to intervene, due in part to scarcity of resources. *Id.*

40. *Id.*

41. ANDROPHY & BLACK, *supra* note 4, at § 2.02; H.R. REP. NO. 99-3753, at 354 (1985) (statement of Mr. Helmer arguing that the problem with permitting the Justice Department to settle cases without court supervision “is that it allows a sweetheart deal to be worked out between the Government and the contractor.”).

42. *United States ex rel. Marcus v. Hess*, 127 F.2d 233, 235 (3d Cir. 1942).

43. *Id.* at 238.

44. ANDROPHY & BLACK, *supra* note 4, at § 2.05.

45. Pub. L. No. 78-213, ch. 377, 57 Stat. 608 (1943) (amended 1986); ANDROPHY & BLACK, *supra* note 4, at § 2.05.

eliminated qui tam suits that were brought based on information that was already known to the government. Further, the amendment gave the Attorney General the power to intervene in any qui tam suit, and the relator's recovery was reduced to twenty-five percent if there was no intervention and ten percent if the Attorney General intervened.

The 1943 amendments reduced the incentives for relators to bring suit to such an extent that witnesses to wrongdoing no longer could justify reporting the unlawful activity.⁴⁶ During congressional hearings on the issue in 1986, witnesses to fraud testified that they feared being fired, experiencing retaliatory action, and becoming targets of harassment.⁴⁷ One witness concluded that employees of government contractors felt there was "no incentive to report fraud in the defense industry and that the fear of employer retaliation instead created a great disincentive."⁴⁸ Following the 1943 amendments, the FCA was no longer an effective tool for addressing fraud, and the prevalence of qui tam suits rapidly decreased.⁴⁹

B. The FCA Today

The FCA as we know it today developed from further amendments passed in 1986. The 1986 amendments sought to reinvigorate the FCA in response to reports of increased fraud by government contractors during the Cold War.⁵⁰ Another factor was an increasing prevalence of "sweetheart deals" between government officials and defense contractors at this time.⁵¹ These changes sought to address this influx of fraud by enhancing incentives for relators to file qui tam actions.⁵² Most importantly, the 1986 amendments allows relators to continue on as a party in the suit even where the government intervenes and provides a cause of action for any relator who was terminated, suspended, harassed, or otherwise discriminated against as a result of involvement in a qui tam suit.⁵³ In relevant part, the statute provides that:

(b)(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting . . .

(c)(1) If the Government proceeds with the action, it shall have the primary

46. CLINARD, *supra* note 30, at 88–89.

47. S. REP. NO. 99-345, 85 (1986).

48. *Id.*

49. ANDROPHY & BLACK, *supra* note 4, at § 2.06.

50. *Id.* at § 2.06 (explaining that in 1986, "of the top 100 defense contractors, 45% were currently under investigation" and "[i]n one year alone (1986) the five largest defense contractors had all either been indicted or convicted of criminal violations.").

51. CLINARD, *supra* note 30, at 88–89.

52. ANDROPHY & BLACK, *supra* note 4, at § 2.06. The General Accounting Office reported that a vast majority of fraud goes undetected, and thus few contractors were ever punished. *Id.* As acknowledged by Congress in passing the original FCA, an effective method of increasing detection of fraud is incentivizing witnesses to fraud to report the behavior. *Id.*

53. 31 U.S.C. § 3730(c)(1), (h)(1).

responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).⁵⁴

Lastly, the amendments clarified relator recovery, and provided that without government intervention, relators are entitled to twenty five to thirty percent of the recovery.⁵⁵ If the government does intervene, relators are entitled to fifteen to twenty percent of the recovery.⁵⁶ These amendments were primarily intended to increase protections for relators and create greater incentives for individuals to report fraudulent conduct.⁵⁷ “Congress wanted to reward private individuals who take significant personal risks to bring wrongdoing to light, to break conspiracies of silence among employees of malfeasors, and to encourage whistleblowing and disclosure of fraud.”⁵⁸

As *qui tam* suits are technically an arm of executive enforcement, the government wields significant control over the suits. Relators must first provide the government with the complaint and any material evidence before filing suit.⁵⁹ The DOJ has the right to intervene in any *qui tam* suit within sixty days of receiving the complaint. After sixty days, the relator may proceed independently.⁶⁰ Importantly, however, the government retains the right to intervene at any point during the course of the proceedings. If the government intervenes, “it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the relator.”⁶¹ The DOJ also has significant control over the settlement or dismissal of cases. Section (c)(2) provides:

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

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held *in camera*.⁶²

Where the standard for approving settlements in (c)(2)(B) appears clear, the same cannot be said for the standard for granting dismissal motions. The ambiguity has sparked disagreement amongst courts.

C. The Circuit Split Regarding Dismissal

Congress has not affirmatively proscribed the standard by which the government may dismiss *qui tam* suits over the objections of relators. Courts are

54. § 3730(b)(1), (c)(1).

55. § 3730(d)(2).

56. § 3730(d)(1).

57. ANDROPHY & BLACK, *supra* note 4, at § 2.06.

58. *United States v. Bank of Farmington*, 166 F.3d 853, 858 (7th Cir. 1999).

59. § 3730(b)(2).

60. § 3730(b)(4).

61. § 3730(c)(1).

62. § 3730(c)(2).

divided on how much discretion the government should be given on this issue. The Ninth Circuit addressed the subject first in 1998 in *Sequoia Orange*.⁶³ Sequoia Orange, a company that grows and packs citrus and fruits, filed numerous qui tam actions against other growers and packinghouses in the citrus industry.⁶⁴ The company alleged that the defendants committed fraud by shipping goods in excess of the federal allotment under marketing orders set in 1984. The Government decided to dismiss the suits upon the suspension of the marketing orders after officials changed course on the policy. Sequoia Orange argued that the suits could not be dismissed unless they lacked merit. Prior case precedent described the government's right to dismiss qui tam actions as "a matter within the government's prosecutorial discretion in enforcing federal laws," but it remained unclear whether this gave the Government an unlimited and unreviewable right of dismissal.⁶⁵

The court in *Sequoia Orange* acknowledged that the statute does not set a standard for dismissal. Instead, the court relied primarily upon the legislative history of the FCA. While the 1986 amendments to the FCA expanded the role of relators in qui tam suits, the court reasoned that the government still retains primary control and responsibility over the suit after intervention.⁶⁶ However, the court held that this does not give the government absolute, unchecked discretion in dismissal. Instead, a meritorious suit may be dismissed only upon a proper showing.

The court adopted a two-step analysis to test the government's justifications for dismissal, which requires the identification of a valid governmental purpose and a rational relation between dismissal and accomplishment of that purpose. Upon satisfaction of this test, the burden then switches to the relator "to demonstrate that dismissal is fraudulent, arbitrary, capricious, or illegal."⁶⁷ The court determined that this test does not create a separation of powers issue, as it requires "no greater justification of the dismissal motion than is mandated by the Constitution itself."⁶⁸ In *Sequoia Orange*, the court held that the Government, in dismissing the suit, had a valid purpose that was rationally related to the dismissal: for example, aligning with policy changes and ending divisiveness in the citrus industry.⁶⁹ Since this decision in 1998, the Tenth Circuit and several district courts have fallen in line with the Ninth Circuit's decision in *Sequoia Orange*.⁷⁰

63. 151 F.3d 1139 (9th Cir. 1998).

64. *Id.* at 1141–42.

65. *Id.* at 1143.

66. *Id.* at 1144–45.

67. *Id.*

68. *Id.* at 1146.

69. *Id.* at 1147.

70. *See Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 936 (10th Cir. 2005) (finding that the government met its burden to establish a rational basis to dismiss the suit to further a legitimate government purpose of preventing the disclosure of classified information); *United States ex rel. Campie v. Gilead Scis., Inc.*, No. C-11-0941 EMC, 2015 WL 3659765, at *8–9 (N.D. Cal. June 12, 2015) (dismissing the suit because

The D.C. Circuit disagreed with *Sequoia Orange's* holding in 2003 in *Swift v. United States*.⁷¹ In that case, the relator brought a qui tam suit alleging that the defendant had committed fraud related to time sheets and leave slips, resulting in \$6,100 in damages. The Government argued that the low recoverable damages did not justify the expense of litigation and moved to dismiss. The court declined to adopt the *Sequoia Orange* test, reasoning that nothing in the FCA provided for judicial oversight of the Executive's judgment in dismissing suits. The court based this decision on § 3730(c)(2)(A), which states that the *government* may dismiss an action. The court reasoned that this language suggests the absence of judicial review because it places the power to dismiss in the hands of the government alone. Further, the court reasoned that the relator's right to a hearing, as proscribed in § 3730(c)(2)(A), functions only to give the relator a formal opportunity to convince the government not to end the case.⁷²

The court ultimately held that the Government has an unfettered right to dismiss a qui tam action. As support for this determination, the court explained that under the Constitution, the executive has the duty to "take Care that the Laws be faithfully executed," and thus the executive has absolute discretion on whether to dismiss an action on behalf of the United States.⁷³ Several other district courts, but no circuit courts, have agreed with *Swift*.⁷⁴

The Seventh Circuit contributed the most recent addition to the controversy in August of 2020. In *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, the relators alleged that defendants gave unlawful kickbacks to physicians for prescribing or recommending a drug the defendants manufactured.⁷⁵ The Government argued that the relators' claims lacked merit sufficient to justify the cost of investigation and a suit would be contrary to the public interest. The DOJ filed a motion to dismiss. At the trial level, the Government urged the court to adopt the *Swift* standard, while the relators argued for the more stringent *Sequoia Orange* standard. The trial court sided with the relators and found the Government's evaluation of the defendants' actions to be insufficient. Holding that the Government's decision to dismiss was arbitrary and capricious, and not rationally related to a valid governmental purpose, the trial court denied the

relators failed to allege sufficient facts to state a claim under the worthless services theory); *United States ex rel. Toomer v. TerraPower, LLC*, No. 4:16-cv-00226-DCN, 2018 WL 4934070, at *10 (D. Idaho Oct. 10, 2018) ("To obtain a dismissal of a qui tam action, the Government must (1) identify a valid governmental purpose for the dismissal; and (2) demonstrate a rational relation between dismissal and accomplishment of the purpose.").

71. 318 F.3d 250 (D.C. Cir. 2003).

72. *Id.* at 252–53.

73. *Id.* at 253.

74. See *Health Choice All., LLC ex rel. United States v. Eli Lilly & Co.*, No. 5:17-CV-123-RWS-CMC, 2019 WL 2520165 (E.D. Tex. May 16, 2019) (granting Government's motion to dismiss without applying the rational relation test); *United States ex rel. Sibley v. Delta Reg'l Med. Ctr.*, No. 4:17-cv-000053-GHD-RP, 2019 WL 1305069 (N.D. Miss. Mar. 21, 2019) (same); *United States ex rel. Maldonado v. Ball Homes, LLC*, No. 5: 17-379-DCR, 2018 WL 3213614, at *3 (E.D. Ky. June 29, 2018) (agreeing with the D.C. Circuit that the government has unfettered discretion to dismiss a qui tam suit).

75. *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 839–40 (7th Cir. 2020).

motion to dismiss.

On appeal, the Seventh Circuit straddled the holdings of *Sequoia Orange* and *Swift*. The court stated that the competing standards are based on a “misunderstanding of the government’s rights and obligations under the [FCA].”⁷⁶ The court stated that Federal Rule of Civil Procedure 41 would apply where the government had intervened and the defendants had not yet filed an answer to the complaint, “as limited by any more specific provision of the [FCA] and any applicable background constraints on executive conduct in general.”⁷⁷ Under these circumstances, the government is not required to show any rational purpose for dismissal.

However, the court acknowledged that where the government’s opportunity to serve a notice of dismissal has passed under Federal Rules of Civil Procedure 41, then a hearing under the FCA “could serve to air what terms of dismissal are proper.”⁷⁸ The court reasoned that the right to a hearing is not a meaningless administrative procedure, as the court in *Swift* had found. Further, the executive branch could not be exempt from review because the FCA gives the relator an interest in the lawsuit as well as a portion of the damages. Thus, a dismissal must not exercise coercive power over an individual’s liberty or property rights, and a standard that protects an individual’s basic due process rights was required. Thus, the court held that in this narrow circumstance, the *Sequoia Orange* test would apply.⁷⁹

III

STATUTORY ANALYSIS

A. The Statute Provides Discretionary Power to the Judiciary in Reviewing Motions to Dismiss Qui Tam Suits

As demonstrated by the circuit dispute, the FCA does not explicitly enumerate a standard of dismissal for qui tam suits. However, the statutory language does indicate that the court retains the power to exercise discretion in reviewing dismissal actions. The statute proscribes two functions for the court regarding dismissal of qui tam suits. Section 3730(b)(1) dictates that “[t]he action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.”⁸⁰ Additionally, § 3730(c)(2)(A) states:

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

76. *Id.* at 839.

77. *Id.* at 849.

78. *Id.* at 850–51.

79. *Id.*

80. 31 U.S.C. § 3730(b)(1).

the motion and the court has provided the person with an opportunity for a hearing on the motion.⁸¹

Thus, in addition to providing written consent, the court must also provide the relator with an opportunity for a hearing on the motion.

Where *Swift* found these two roles to be formalistic in nature and did not provide the court with discretionary power, *Sequoia Orange* and *CIMZNHCA* found this argument to be unconvincing, and this Note agrees.⁸² To begin with, the FCA states in § 3730(b)(1) that a qui tam suit “*may* be dismissed” with written consent from the court and the Attorney General.⁸³ Where ‘shall’ is generally mandatory, ‘may’ implies discretion.⁸⁴ The use of ‘may’ suggests that the court and Attorney General could, but are not required, to consent to dismissal motions. This confers discretionary power on the part of both the court and the Attorney General. If the statute provided unfettered discretion to the government in dismissal motions, as *Swift* held, the court would be required to grant consent for the dismissal, thus necessitating the use of the term ‘shall’ or ‘must.’⁸⁵ The alternative use of ‘may’ suggests that the court instead has discretion in granting the motion, thus presenting a judicial check on prosecutorial power.

Further, the statute *requires* the court’s approval to grant the motion.⁸⁶ Under the surplusage canon of construction, every word of a statute is to be given effect, and “none should needlessly be given an interpretation that causes it to . . . have no consequence.”⁸⁷ Application of *Swift*’s “unfettered discretion” standard would render the statutory language here meaningless. Under this standard, the government need not provide any rationale for dismissal, and a motion to dismiss would be granted in any and all circumstances.⁸⁸ Thus, consent from the court, as required under the statute, would be empty and meaningless.

A similar argument can be made with regards to a relator’s right to a hearing under § 3730(c)(2)(A). The court in *Swift* reasoned that the court’s role under § 3730(c)(2)(A) was merely to provide a venue for a relator to “convince the government not to end the case.”⁸⁹ But, the law does not require the doing of a useless thing.⁹⁰ As stated by the court in *CIMZNHCA*, “the court is not called upon to serve as a mere convening authority – ‘and perhaps,’ as the district judge

81. § 3730(c)(2)(A).

82. *CIMZNHCA, LLC*, 970 F.3d at 850–51; *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003); *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145–46 (9th Cir. 1998).

83. § 3730(b)(1).

84. *Kingdomware Technologies, Inc., v. United States*, 136 S. Ct. 1969, 1977 (2016).

85. *See id.* (“Unlike the word ‘may’ which implies discretion, the word ‘shall’ usually connotes a requirement.”).

86. § 3730(b)(1).

87. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS, SURPLUSAGE CANNON* (West 2012); *United States v. Butler*, 297 U.S. 1, 65 (1936) (“These words cannot be meaningless, else they would not have been used.”).

88. *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003).

89. *Id.*

90. *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 850 (7th Cir. 2020).

put it here, ‘serve you some donuts and coffee’ – while the parties carry on an essentially private conversation in its presence.”⁹¹ The court’s role must be more substantive than that. By providing relators with a hearing, the statute serves as a check on absolute discretion by the prosecutor. An unfettered right to dismiss is incompatible with this goal. Thus, contrary to *Swift*’s suggestion that absolute deference must be given to government dismissals, there must be a standard by which courts assess dismissal motions.

B. An Unfettered Right to Dismiss is Incompatible with Congressional Intent

The legislative history of the FCA informs and supports the conclusion that the court has discretionary power to review motions to dismiss.⁹² At the crux of the circuit dispute is whether the court may apply *any* standard in evaluating a motion to dismiss a qui tam suit, or if the DOJ has unlimited discretion to dismiss an action. Where the question is whether a statute precludes judicial review, as here, the answer is determined “not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.”⁹³ Thus, the legislative history is important in evaluating this issue.

The 1986 amendments are particularly informative. Congress altered the FCA in 1986 to provide relators with more power in qui tam actions; specifically, following the amendments, a relator could maintain his involvement in the suit even if the government enters the case.⁹⁴ The House Report makes clear that the purpose behind this expansion of relators’ rights was to “ensure that the case is effectively prosecuted on its merits.”⁹⁵ The Senate Report states,

Subsection (c)(1) provides qui tam plaintiffs with a more direct role not only in keeping abreast of the Government’s efforts and protecting his financial stake, but also in acting as a check that the Government does not neglect evidence, cause unduly delay, or drop the false claims case without legitimate reason.⁹⁶

This language from the legislative history illustrates a Congressional effort to ensure that relators have the ability to check prosecutorial discretion in leading and ultimately settling or dismissing qui tam actions.

With regards to the relator’s right to a hearing under § 3730(c)(2)(A), the Senate Report explains that a hearing is appropriate “if the relator presents a colorable claim that the settlement or dismissal is unreasonable in light of the existing evidence, that the government has not fully investigated the allegations, or that the government’s decision was based on arbitrary or improper considerations.”⁹⁷ This language indicates that Congress’s purpose in drafting this clause was to ensure that if there was evidence that the DOJ acted unreasonably

91. *Id.* at 850.

92. H.R. REP. NO. 99-3753 (1985); S. REP. NO. 99-345 (1986).

93. *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 779 (1985).

94. 31 U.S.C. § 3730(c)(1).

95. H.R. REP. NO. 99-3753, at 95 (1985).

96. S. REP. NO. 99-345, at 25–26 (1986).

97. *Id.*

or dismissed an action based on improper considerations, a relator would have recourse through judicial review during their statutorily required hearing.

Further, the Report refers to these hearings as “evidentiary hearings.”⁹⁸ The Environmental Protection Agency (EPA), an agency with similar power to evaluate private lawsuits on a case-by-case basis, maintains a similar procedure for requesting evidentiary hearings with the presiding court.⁹⁹ In this circumstance under the EPA, the “Presiding Officer will conduct a fair and impartial hearing on the record, take action to avoid unnecessary delay in the disposition of the proceedings, and maintain order.”¹⁰⁰ Additionally, the Officer will “[r]ule on motions and other pending procedural matters, including but not limited to motions for summary disposition.”¹⁰¹ Given the similarities between the two agencies and their evidentiary hearing procedures, courts should treat evidentiary hearings under the FCA in the same manner. Thus, during such hearings, the court must review evidence and apply its discretion in determining whether the DOJ acted unreasonably or arbitrarily.

This analysis also aligns with the intent of the FCA at its inception. “Lincoln’s Law”, as the FCA was initially called, sought not only to ferret out fraud committed by government contractors in the Civil War, but also to address the widespread corruption of government officials that enabled the fraud to occur at such high levels.¹⁰² The FCA acknowledged the import of relators serving as a check on government officials who would otherwise overlook the fraud in exchange for kickbacks and favors from government contractors. An unlimited governmental right of dismissal would negate any efforts to address this corruption and is counterintuitive to Congressional purposes in enacting the FCA.

IV

THE DOJ IS SUSCEPTIBLE TO POLITICAL INFLUENCE AND REGULATORY CAPTURE

This Note argues that the DOJ is not always an impartial, independent institution, and its decisions may be influenced by corrupt in-government actors, or by regulated parties through regulatory capture. Additionally, DOJ decisions are not always in the public interest, as they may correspond more closely with other priorities. At times these priorities may be reasonable, as is the case with inadequate litigation resources in the face of those maintained by defense giants. However, the reasonableness of these priorities does not justify unfettered discretion to make consequential decisions without judicial review. The public should at the very least have notice where decisions are being made by public

98. *Id.*

99. 40 C.F.R. § 78.14; Engstrom, *supra* note 9, at 647–48.

100. *Id.*

101. § 78.14(a)(7).

102. ANDROPHY & BLACK, *supra* note 4, at § 2.04.

servants that are biased, corrupt, or demonstrably not in the public interest, especially those that result in the loss of taxpayer dollars and the dismissal of meritorious cases that adversely affect the relators involved. This transparency can be achieved through the application of the *Sequoia Orange* standard of review.

A. The DOJ is Susceptible to Influence by Biased Political Actors and Political Incentives

The DOJ is vulnerable to undue influence exerted by political actors, especially the President. White House administrations are frequently accused of inappropriate political influence on DOJ affairs, including investigative matters.¹⁰³ The President's office may exert pressure on DOJ officials through the use of threats, incentives, or demands for information, which may implicate reports by confidential informants, undercover operations, or grand jury materials. Additionally, the President appoints hundreds of DOJ officials, and though this power is well-established, it may be used to improperly influence investigative functions. Such opportunities for manipulation have resulted in numerous attempts by presidential administrations to use federal prosecutorial power to serve political goals. For example, President Lyndon Johnson ordered the FBI to investigate and report on civil rights groups and anti-Vietnam war groups, and President Nixon used the DOJ to investigate political opponents.¹⁰⁴

The potential for the DOJ to be unduly influenced by the priorities and motives of political actors has been particularly clear under the Trump Administration.¹⁰⁵ President Trump's attempts to intervene in the Russia investigation and his pardon of former Arizona Sheriff Joe Arpaio caused a hailstorm of criticism launched against him for inappropriately seeking to influence the DOJ's activities. In response, Trump stated "I have the absolute right to do what I want with the Justice Department."¹⁰⁶ This statement is at the crux of the argument in this section. If the White House has the absolute right to control DOJ decisions without judicial review, as with *qui tam* dismissals under *Swift*, the DOJ can hardly be expected to serve as a beacon of impartiality that exclusively serves the public interest.

During his administration, "President Trump has made unorthodox private contacts with DOJ officials with responsibility for criminal investigations touching on his interests; publicly criticized senior DOJ officials for prosecutorial and investigative judgments; and accused former officials, including his predecessor, of politically motivated surveillance and criminal conduct."¹⁰⁷ His

103. Wright, *supra* note 25, at 356–57.

104. Todd David Peterson, *Federal Prosecutorial Independence*, 15 Duke J. Const. L. & Pub. Pol'y 217, 264 (2020).

105. Wright, *supra* note 25, at 359–60.

106. *Id.*; *Excerpts From Trump's Interview With The Times*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/us/politics/trump-interview-excerpts.html> [<https://perma.cc/8C7W-GVRC>].

107. Wright, *supra* note 25, at 360.

attempts to influence the DOJ can be seen most clearly in the case of Michael Flynn. Trump pressured former FBI Director James Comey to drop the investigation into Flynn's involvement with Trump's contacts with Russia prior to the election.¹⁰⁸ Trump and his Congressional supporters also pressured DOJ officials to share sensitive materials from the investigation with Congress.¹⁰⁹ This disclosure hindered the DOJ's efforts to pursue the ongoing investigation, and "[m]embers of Congress unabashedly acknowledged that their investigative efforts had helped the President's defense."¹¹⁰ Finally, Trump seemingly fired Comey with the purpose of hindering the FBI's investigation into Trump's affairs with Russia.¹¹¹ This type of behavior "exacerbates an already charged political climate that presents challenges to the exercise of independent professional judgment on the part of law enforcement and prosecutors."¹¹² Trump's actions present a powerful demonstration of the injustice that can occur when political actors exert undue influence over the DOJ.

Like other areas of prosecution under the DOJ, the treatment of *qui tam* suits is susceptible to undue influence by political priorities and shifts significantly based on the administration in power. The reality of this phenomenon was demonstrated most recently by the Granston Memo. Issued under the Trump Administration, the Memo instructed U.S. Attorneys to seek broad dismissal of *qui tam* suits.¹¹³ As a result, motions to dismiss *qui tam* suits over the objections of relators increased significantly.¹¹⁴ From 2018 to 2020, the DOJ sought dismissal of almost fifty *qui tam* suits, the same number it moved to dismiss over the past *thirty years* combined.¹¹⁵ The procedural effect of politicization of *qui tam* suits may also be seen in the timeliness of intervention and ultimate settlement of *qui tam* suits by the DOJ. For example, "[q]ui tam cases relating to controversial war efforts in Iraq and Afghanistan remained under DOJ investigation longer than other defense-related cases during the George W. Bush Administration and then were quickly acted upon during the Obama Administration, suggesting a partisan

108. *Id.* at 368–69.

109. Peterson, *supra* note 104, at 258.

110. *Id.*

111. Wright, *supra* note 25, at 368–69 ("President Trump reportedly told Russian officials visiting the Oval Office that firing Comey relieved 'great pressure' from the Russia investigation.").

112. *Id.* at 361.

113. Memorandum from Michael D. Granston, Director, Commercial Litigation Branch, Fraud Section, to Attorneys, Commercial Litigation Branch, Fraud Section and Assistant U.S. Attorneys on Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3720(c)(2)(A) (Jan. 10, 2018), <https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf> [<https://perma.cc/2R8F-N98P>].

114. Lydia Wheeler, *Government Tosses out More Whistleblower Cases After 2018 Memo*, BLOOMBERG L. (June 24, 2019), <https://news.bloomberglaw.com/health-law-and-business/government-tosses-out-more-whistleblower-cases-after-2018-memo> [<https://perma.cc/7NMG-G4J6>].

115. James L. Zelenay, Jr. & Sean Twomey, *False Claims Act Enforcement Under the Trump Administration*, GIBSON, DUNN & CRUTCHER (March 3, 2020), <https://www.mondaq.com/unitedstates/constitutional-administrative-law/899884/false-claims-act-enforcement-under-the-trump-administration> [<https://perma.cc/2PG3-9UEY>].

pattern of delay.”¹¹⁶

Political interference in prosecutorial functions is exceedingly problematic. While the President does retain some authority in resolving prosecutorial questions, it is in this function that “the crassest forms of politics (involving, at the extreme, personal favors and vendettas) pose the greatest danger of displacing professionalism and thereby undermining confidence in legal decision-making.”¹¹⁷ An unfettered right to dismiss lawsuits exacerbates this danger. Given this reality, the judiciary should have the power to review DOJ decisions to ensure that they are motivated by a rational governmental purpose.

B. The DOJ As an Administrative Agency is Susceptible to Capture by Regulated Parties

The FCA designates the DOJ as an administrative agency tasked with the power to evaluate private lawsuits on a case-by-case basis. It is one of numerous administrative agencies with this power, operating in a similar manner to the EPA’s oversight of individual lawsuits filed under the citizen suit provisions in federal environmental statutes and medical malpractice review boards that screen individual medical malpractice tort cases.¹¹⁸ Administrative agencies serve important functions in the investigation of claims and ultimate enforcement of the rule of law. Ideally, these agencies use their expertise and perspective to weigh aggregate costs and benefits, and determine whether private enforcement efforts are in the public interest.¹¹⁹ Additionally, agencies may help bolster a private litigant’s legal resources, which may be vastly deficient in comparison to those of defendants such as Northrop Grumman and Lockheed Martin in qui tam suits. This is part of the reason why relators seek and benefit from intervention by the DOJ.

While administrative agencies can provide gatekeeping functions that are important to the public interest, agencies are often flawed. One of the most problematic features of administrative agencies is vulnerability to regulatory capture.¹²⁰ “Capture occurs when some special interest, typically an industry group, persuades government actors to exercise the coercive power of the state in ways that are not in the ‘public interest.’”¹²¹ In the context of gatekeeping agencies, the concern is that “regulated parties will exert disproportionate influence over agency gatekeepers, systematically bending gatekeeping decisions in their favor and thus compromising the agency’s stewardship of zealotry, coordination, and legislative fidelity within the regime.”¹²² Susceptibility to

116. Engstrom, *supra* note 9, at 677.

117. Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2357–58 (2001); Wright, *supra* note 25, at 389.

118. Engstrom, *supra* note 9, at 647–48.

119. *Id.* at 657, 661.

120. *Id.* at 674.

121. Magill, *supra* note 27, at 401.

122. Engstrom, *supra* note 9, at 674.

regulatory capture is a significant threat to the efficacy and impartiality of administrative agencies, especially when so much is on the line for private litigants.

Other issues counsel against reliance upon administrative agencies in gatekeeping capacities. An often-cited strength of administrative agencies is their superior capacity to cull meritless cases. However, research suggests that “case termination is the gatekeeper task where the competence and capacity gap between agencies and courts is likely to be narrowest.”¹²³ In other words, courts are likely equally as capable of rooting out frivolous and meritless cases, and agencies provide little expertise in this area. Further, agencies rarely use their termination authority to dismiss cases. This suggests that “while case termination is the most commonly articulated justification for vesting agencies with gatekeeper authority, it is also where agencies may be least reliable.”¹²⁴

The DOJ is not exempt from these risks. In fact, research suggests that the DOJ is susceptible to regulatory capture. As stated, relators desire DOJ intervention in qui tam suits because of the significant resources that the agency brings to a relator’s case. Qui tam suits in which the government has intervened are more likely to result in a higher settlement for relators.¹²⁵ The cases in which the DOJ chooses to intervene tend to reveal the agency’s priorities and incentives. Recent studies have found that the DOJ is more likely to intervene in suits brought by former DOJ attorneys that now serve as relator’s counsel.¹²⁶ Additionally, the agency is less likely to intervene in cases brought against Fortune 100 companies or top defense contractors. At the bare minimum, these correlations raise yellow flags.

The intervention rates may have a variety of explanations, the most concerning of which is corruption. Corrupt relationships between DOJ decisionmakers and former government officials now working as defense contractors were certainly a concern of Congressional leaders when enacting the 1986 Amendments.¹²⁷ Several Congressmen articulated a concern that permitting the DOJ to independently resolve or dismiss suits opens the door to allowing a “sweetheart deal” to be worked out between the government and the contractor.¹²⁸

A common practice that leads to this concern regarding the DOJ’s impartiality is the “revolving door” between government work and private defense contractor work.¹²⁹ Defense contractors frequently hire former civilian or military officials of the DOD. It is conceivable that DOJ officials are more likely to give deference to former government officials now on the side of the

123. *Id.* at 673.

124. *Id.* at 684.

125. See Press Release, Department of Justice Office of Public Affairs, *supra* note 39.

126. Engstrom, *supra* note 9, at 677.

127. H.R. REP. NO. 99-3753, at 355 (1985) (statement of Rep. Helmer).

128. *Id.*

129. Engstrom, *supra* note 9, at 677.

contractor. “This ‘revolving door’ helps to explain, in part, the limited government response to defense contractors’ excessive abuses, particularly in cost overruns and fraud.”¹³⁰ The implication of this deference is that meritorious suits brought by relators who make great personal sacrifices to do so may be dismissed as a result of an unsavory relationship between current and former government employees.

C. What We Don’t Know Will Hurt Us

Admittedly, the explanation behind the intervention rates is far from certain. As David Freeman Engstrom, a leading scholar on qui tam litigation, states,

It’s hard to know whether the DOJ’s seeming soft-pedaling of defense cases results from overly cozy relationships between the Department of defense and the “old generals” network within the defense contractor establishment, simple overhead political control (e.g. the Administration’s desire to deflect attention from unpopular war efforts) or a combination of both.¹³¹

The rates could also have more innocuous explanations. For example, the DOJ may be more apprehensive in the face of the greater litigation resources that defendants such as top defense contractors and Fortune 100 companies can deploy.¹³² Additionally, the DOJ generally has less litigation leverage in these circumstances because of the unavailability of debarment from government business as a remedial option for critically important defense contractors.¹³³

These alternative explanations do not help the case for DOJ efficacy and impartiality. The purpose of qui tam suits is to root out and address fraud committed against the federal government, with an understanding that such fraud harms American taxpayers. If the agency is so easily intimidated or dissuaded by these defendants, this leads to concerns about the reliability of and motivations behind DOJ decisions not to intervene. From here, the inference is easily made that because reliability and impartiality of intervention decisions is questionable, the reliability and impartiality behind decisions to dismiss qui tam suits are also questionable. There is enough uncertainty here to warrant judicial review of DOJ dismissal decisions.

This issue is further complicated by the fact that DOJ capture is extremely difficult to identify in qui tam suits. To know if capture has occurred in any particular case, critics must know what the public interest outcome would have been and compare that with the outcome adopted.¹³⁴ In circumstances where captured parties dismiss a suit without any scrutiny or oversight, it would be difficult to evaluate exactly what the public interest outcome would have been had the court assessed the rational for dismissal against the relators’ interest in the suit.

130. CLINARD, *supra* note 30, at 88.

131. Engstrom, *supra* note 9, at 677.

132. David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam litigation under the False Claims Act*, 107 Nw. U.L. Rev. 1689, 1735 (2013).

133. *Id.*

134. Magill, *supra* note 27, at 401.

Additionally, it is difficult for legislative oversight committees to detect capture-related distortions across a large body of individual agency decisions.¹³⁵ “This is particularly true of qui tam lawsuits, some of which remain under seal even after the DOJ renders a gatekeeper decision.”¹³⁶ This prohibits legislative bodies from identifying and addressing vulnerabilities to capture. In other words, because legislative oversight committees cannot detect distortions in qui tam cases across the board that result from capture, they are crippled in their ability to pass corrective legislation: for example, by providing courts with greater oversight capabilities.

Lastly, even if legislative oversight committees did notice that capture plagued qui tam suits, it is difficult or nearly impossible to distinguish among capture dynamics.¹³⁷ Congress and other oversight bodies cannot easily identify which influences have caused an agency like the DOJ to act in a biased way. A failure to identify the corrupting influences leads to an inability to insulate such agencies from external pressures. As Engstrom states,

In the FCA context, . . . one could insulate DOJ gatekeeper decisions from legislative pressures that may be skewing them in favor of Fortune 100 companies or defense contractors by rendering DOJ enforcement efforts self-funding, or by granting agency officials with gatekeeper duties greater protection from removal. But shielding the DOJ from political oversight in this way will also grant the agency freer rein to dispense regulatory favors to former DOJ insiders. In other words, one cannot mitigate one type of capture without facilitating another.¹³⁸

This casts doubt on the potential for Congress to solve the agency’s susceptibility to capture with amendments to legislation. Instead, judicial review is necessary to address this issue.

V

JUDICIAL OVERSIGHT AS A SOLUTION

A. The Judiciary is Better Suited to Dismiss Qui Tam Suits

Dismissal of lawsuits has historically been a responsibility reserved almost exclusively for the judiciary. Courts are uniquely situated to assess the merits of a case through application of governing standards. The key elevating characteristic of courts is, of course, their impartiality, which results from the independence of the judiciary from the legislative and executive branches and the life tenure of federal judges, amongst other contributing factors.¹³⁹ Where DOJ officials may be influenced by a number of sources, federal judges are

135. Engstrom, *supra* note 9, at 678.

136. *Id.*

137. *Id.* at 679.

138. *Id.*

139. U.S. CONST. art. III; *see also* Paul L. Friedman, *Threats to Judicial Independence and the Rule of Law*, AM. BAR ASS’N (Nov. 18, 2019), <https://www.americanbar.org/groups/litigation/initiatives/committee-on-american-judicial-system/in-the-news/threats-to-judicial-independence-and-rule-of-law/> [<https://perma.cc/2MVS-KPYL>].

significantly less susceptible to capture.¹⁴⁰ With regard to agency decisions, judicial review is an effective step in ensuring that the decisions of administrative agencies are sound, reliable, and based on the merits of the suit rather than on corrupting influences. Requiring judicial review makes it more difficult for agencies to adopt policies that favor the private over the public interest. This is because when reviewing agency decisions, courts apply a merits-based test. “Under this form of review, a reason that sounds in capture will be quickly rejected by the court. An agency, that is, could not defend its decision by explaining that a ‘powerfully connected interest group sought this result.’”¹⁴¹

Subjecting DOJ decisions to judicial review effectively addresses the consequences of regulatory capture in qui tam dismissals. Courts are better equipped to assess whether the actions taken were illegal or improper, as the DOJ may have a conflict of interest. For example, in *Sequoia Orange*, relators argued that the DOJ officials were influenced by political lobbyists and campaign contributions, that pressured officials into dismissing the qui tam suits.¹⁴² Courts, not DOJ officials, are best situated to determine whether officials were in fact so influenced, and if this influence was unbiased. Under *Swift*’s unfettered discretion standard, such an allegation would not even warrant judicial review. The dismissal would stand, regardless of whether the allegations had merit.

In *Swift*, the court claimed that because qui tam actions are brought on behalf of the federal government against defendants that violate federal law by committing fraud, limiting the DOJ’s right to dismiss qui tam suits would infringe on the executive’s right under the Constitution to “take Care that the Laws be faithfully executed.”¹⁴³ However, this right is not absolute. Courts may still strike down executive action or unlawful enforcement mechanisms if they violate the Constitution. As held in *Sequoia Orange*, judicial oversight under the Ninth Circuit’s standard does not create a separation of powers issue, as it requires “no greater justification of the dismissal motion than is mandated by the Constitution itself.”¹⁴⁴ By this, the court was referring to the Due Process Clause’s prohibition on arbitrary or irrational prosecutorial decisions.¹⁴⁵

The Ninth Circuit’s rational-relation test applies in other areas of law that

140. Magill, *supra* note 27, at 409. See also Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 398 (“The rule of law presumed that Congress and the President could not impartially determine whether they had complied with constitutional provisions that limited their own powers.”).

141. Magill, *supra* note 27, at 409.

142. *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1146 (9th Cir. 1998).

143. U.S. CONST. art. II, § 3; *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003). See also *Heckler v. Chaney*, 470 U.S. 821 (1985) (stating that the executive branch is “far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.”).

144. *Sequoia Orange Co.*, 151 F.3d at 1146.

145. *Id.*; see also *United States v. Redondo-Lemos*, 955 F.2d 1296, 1298–99 (9th Cir. 1992) (“Given the significance of the prosecutor’s charging and plea bargaining decisions, it would offend common notions of justice to have them made on the basis of a dart throw, a coin toss or some other arbitrary or capricious process.”).

may be considered under the umbrella, and control, of the executive branch. For example, the Administrative Procedure Act instructs courts to invalidate agency decisions that the court finds to be arbitrary and capricious.¹⁴⁶ This test was recently applied by a federal judge to an action by the Department of Health and Human Services under the Trump administration, which attempted to keep Title X funding from abortion related activities.¹⁴⁷ The federal judge issued a preliminary injunction, arguing in part that the rule was arbitrary and capricious because it reversed long standing positions of the Department without a valid reason for doing so. The application of this test through judicial review is upheld and employed elsewhere today.¹⁴⁸

Proponents of the *Swift* standard may argue that Congress would not approve of allegedly frivolous or self-serving qui tam suits, and thus the government should have unlimited power to dismiss these suits.¹⁴⁹ This argument assumes that courts will be unable to police suits that deviate from Congressional intent. This assumption is baseless here. Courts are more than capable of addressing and dismissing frivolous or meritless suits, and this does not change in the case of qui tam actions.¹⁵⁰ Further, Congress gave power to private litigants to pursue qui tam claims. Therefore, parties must defer to Congress and trust that it has already factored regulatory drift into the decision to delegate enforcement authority to litigants.¹⁵¹ Because Congress has provided such rights with the purpose of allowing relators to serve as a check on prosecutorial discretion, Congressional action has conferred “democratic legitimacy on any and all deviations that result.”¹⁵² In other words, Congress has considered the possibility of an influx of frivolous suits and determined that the legislation was still important and effective, regardless of this risk.

Additionally, the claim that qui tam relators are primarily motivated by self-interest and personal gain at the expense of the public interest is likely

146. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2018).

147. Fred Barbash, *Trump Abortion ‘Gag’ Rule Blocked by Federal Judge*, WASH. POST (Apr. 25, 2019), https://www.washingtonpost.com/national/health-science/trump-abortion-gag-rule-blocked-by-federal-judge/2019/04/25/c147359a-67ac-11e9-a1b6-b29b90efa879_story.html [https://perma.cc/33VW-FXKL].

148. *See id.* (reporting that a federal judge scolded the Department of Health and Human Services “for offering ‘no reasoned analysis’ for changing the long-standing rule.”).

149. *See Engstrom, supra* note 9, at 637–39 (explaining that a common critique of private enforcement is that private enforcers are not politically accountable actors).

150. *See United States ex rel. Wickliffe v. EMC Corp.*, 473 Fed. Appx. 849 (10th Cir. 2012) (holding that the merit of the suit was insufficient to overcome the government’s rational purposes for motioning to dismiss); *Enter. Recovery Sys. V. Salmeron*, 401 Ill. App. 3d 65 (Ill. App. 2010) (finding that relator’s claims were properly dismissed due to procedural issues); *United States ex rel. Sampson v. Crescent City E.M.S., Inc.*, 1997 U.S. Dist. LEXIS 14147 (E.D. LA 1997) (dismissing a qui tam suit alleging the same facts and arguments as two prior suits that had both been dismissed as frivolous and non-meritorious, and assigning Rule 11 sanctions); *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 936 (10th Cir. 2005) (finding that the government met its burden to establish a rational basis to dismiss the suit to further a legitimate government purpose of preventing the disclosure of classified information).

151. Engstrom, *supra* note 9, at 638–39.

152. *Id.*

exaggerated. Studies have shown that money is not the primary motivating factor for the majority of relators.¹⁵³ Many relators only become involved in qui tam suits after engaging with reporting procedures within their company, or consulting an attorney for other employment related issues that resulted from their employer's misconduct.¹⁵⁴ Instead of monetary motivations, "[r]eported motivations coalesced around four non-mutually exclusive themes: integrity, altruism or public safety, justice, and self-preservation."¹⁵⁵ Thus, the concern that relators will use qui tam suits as a method of pursuing improper, undesirable claims is likely not strong enough to justify *Swift's* standard.

Lastly, judicial oversight will not force the DOJ to expend resources that it does not have. The Ninth Circuit standard does not consider minimizing administrative costs to be an invalid purpose of dismissal.¹⁵⁶ Thus, it will still allow the DOJ to dismiss suits that would unduly burden government resources, so long as this is a rational conclusion under the circumstances, and the government's motion is not motivated by another improper influence.

B. *Swift's* Unfettered Discretion Standard Creates Due Process Concerns

Permitting the DOJ to dismiss qui tam suits with unfettered discretion, bypassing judicial review, presents due process concerns. The Due Process Clause states that no one shall be "deprived of life, liberty or property without due process of law."¹⁵⁷ As acknowledged by the Seventh Circuit, dismissal under the FCA impacts an individual relator's liberty and property rights because of the interest a relator has in the lawsuit, legitimized by the FCA.¹⁵⁸ Relators are entitled to part of the recovery of qui tam suits.¹⁵⁹ Beyond that, relators make great personal sacrifices in order to bring justice to fraud committed against the federal government, and by default, American taxpayers.¹⁶⁰ Therefore, DOJ actions must not violate the due process rights of relators.

First, due process requires that an agency action have a reasonable foundation, that is. "if it rationally pursues a purpose that is lawful for the (agency) to seek."¹⁶¹ The *Swift* standard fails to fulfill this test, as it does not require any showing of a reasonable foundation for a dismissal.¹⁶² The Ninth

153. Aaron S. Kesselheim, David M. Studdert & Michelle M. Mello, *Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies*, 362 New Eng. J. Med. 1832, 1834 (2010).

154. ANDROPHY & BLACK, *supra* note 4, at § 2.10.

155. Kesselheim et al., *supra* note 153, at 1834.

156. United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1146 (9th Cir. 1998).

157. U.S. CONST. amend. V.

158. United States ex rel. CIMZNHCA, LLC v. UCB, Inc., 970 F.3d 835, 848 (7th Cir. 2020).

159. 31 U.S.C. § 3730(d)(1), (d)(2).

160. See *Whistleblower: The Case Against Northrop*, *supra* note 11 (narrating the case of qui tam relator James Holzrichter, who experienced break-ins and tampering with his car and was banned from the defense industry after bringing suit against Northrup Grumman, eventually ending up homeless with his family before settling the lawsuit).

161. *Reno v. Flores*, 507 U.S. 292, 309 (1993).

162. *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003).

Circuit's rational-relation test, however, reflects and respects the due process rights of relators by demanding identification of a valid governmental purpose and a rational relation between dismissal and accomplishment of that purpose.¹⁶³

Additionally, due process generally requires a hearing in front of an impartial tribunal.¹⁶⁴ In the dismissal of *qui tam* suits, the "tribunal" right is fulfilled by the requirement for a hearing where the relator may contest the dismissal. Under the *Swift* standard, the result of any deliberation before the tribunal is controlled solely by DOJ officials.¹⁶⁵ As discussed above, the impartiality of these officials is questionable at best. The danger of undue influence by political actors, corrupt officials turning a blind eye to fraud, or "overly cozy" relationships with officials of top government contractors eviscerates the relators' right to a hearing in front of an impartial tribunal if DOJ officials control the outcome. Alternatively, under the *Sequoia Orange* standard, judicial review mitigates these risks by requiring an impartial assessment of the rationale for dismissal motions by the court.¹⁶⁶

Finally, as discussed, the treatment of *qui tam* suits by the DOJ is susceptible to undue influence by political priorities and shifts significantly based on the administration in power. Again, this is clearly demonstrated by the Granston Memo and Trump's interference in DOJ activities throughout his presidency. This politicization has consequences for the due process rights of relators. Treatment of *qui tam* suits under the FCA should be uniform across administrations to avoid violating a relator's rights.

Along these same lines, the obligations owed to relators by the DOJ should likewise be uniform across *jurisdictions*. As it stands now, DOJ officials must show a rational purpose for dismissal in all cases within jurisdictions that follow the *Sequoia Orange* standard, and in some cases that adhere to the *CIMZNHCA* standard; however, the DOJ has unlimited power to dismiss cases without showing any rational purpose in the D.C. Circuit and others that may choose to apply the *Swift* standard.¹⁶⁷ The variation in standards presents an opportunity for the rights of relators to differ under the same federal statute, depending on the jurisdiction in which they bring suit. This varying treatment is concerning because of the established interest a relator has in his *qui tam* suit. A deeper analysis into the implications of this due process issue is necessary.

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

164. *Peters v. Kiff*, 407 U.S. 493, 501 (1972) ("Due process requires a competent and impartial tribunal in administrative hearings.").

165. *Swift*, 151 F.3d at 253.

166. *Sequoia Orange*, 151 F.3d at 1145.

167. United States ex rel. *CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 851 (7th Cir. 2020); *Swift*, 151 F.3d at 253; *Sequoia Orange*, 151 F.3d at 1145.

VI

CONCLUSION

The FCA requires substantive judicial review of the DOJ's motions to dismiss qui tam suits. This statutory interpretation is further justified by the public interest concerns arising from potential bias on the part of the DOJ, as well as the threat to due process rights of relators. Threshold judicial review would, at the very least, address some of the issues created by the susceptibility of the DOJ to undue political influence and to regulatory capture. The Ninth Circuit's test forces the DOJ to justify its decisions, leading to greater transparency with regards to agency decisions that may result in a failure to recover taxpayer money or in negative consequences for individual relators. Application of this test will hopefully lead to a reduction in the number of qui tam suits dismissed by the DOJ as well.

Given the constitutional issues at play and the sharp divide between circuit courts, it is likely that the Supreme Court will soon grant certiorari to determine the standard by which the government may dismiss qui tam suits. The Supreme Court should adopt the Ninth Circuit's rational-relation test. This standard best fits with the statutory language and Congressional intentions. Moreover, the rational-relation test best serves the public interest by recovering the maximum amount of fraudulently expended taxpayer money and protecting the rights of relators to pursue relief.