COMMENTS

The Executive Judgment Rule: A New Standard of Dismissal for Qui Tam Suits Under the False Claims Act

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Under the 1986 amendments to the False Claims Act, whistleblowing has become big business. The Act's qui tam provision empowers private parties, called relators, to bring suit on behalf of the government for frauds committed against it—and to receive substantial portions of that recovery. Relying on the award-sharing provision to draw out relators with inside knowledge of complex and well-hidden frauds, the government uses these qui tam suits as a critical part of its regulatory policy. The recent history of the Act shows that it has done this to great effect: the government recovers billions of dollars annually from fraudulent contractors through relators' suits.

However, the Act has become something of a victim of its own success. The promise of big rewards for relators has led to a dramatic increase in the number of suits overall and, especially, in the number of dubious claims costing valuable prosecutorial resources. In response to the increase in meritless suits, the government has resolved to more aggressively seek dismissal to sort the wheat from the chaff.

The circuit courts of appeals have split over the proper dismissal standard. The first approach, created in United States ex rel Sequoia Orange Co v Baird-Neece Packing Corp*, requires the executive branch to explain why dismissal is justified by cost-benefit analysis. The second approach, created in* Swift v United States*, offers near plenary dismissal power to the government.* Sequoia*, in permitting relators to probe the government's reasoning, encourages meritless and strategic suits, while stunting the government's ability to respond to this increase.* Swift*, in denying relators a meaningful opportunity to object, discourages meritorious relators from bringing suit. Beyond their suboptimal incentive structures, neither approach fully comports with the text and legislative history of the 1986 amendments, and both raise serious constitutional concerns. As such, this Comment offers a new standard of dismissal that resolves the incentive, interpretive, and constitutional issues.*

To address these issues, this Comment turns to an area in which courts and legislatures have long worked to create a standard that draws out only the meritorious claims: shareholder derivative lawsuits. Analogizing the executive to a Special

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Litigation Committee, this Comment adapts the business judgment rule to the qui tam context. Because government attorneys lack the independence and bias concerns traditionally associated with actual board members, this Comment argues that New York's deferential application of the business judgment rule to SLC decisions can be transposed with great success to the qui tam context. Such an "Executive Judgment Rule" would guarantee that the government's review of the relator's claim meets its statutory duty of "diligent investigation," but would deny more probing judicial review without good cause. This approach not only remedies the interpretive and constitutional shortcomings of both current approaches, but also strikes the optimal incentives balance by assuring serious relators that their claims will be fully investigated without encouraging frivolous suits.

INTRODUCTION

Under the False Claims Act[1] (FCA), blowing the whistle can pay—and it can sometimes pay a lot. A successful whistleblower, even one who helped submit false claims to the government, can earn millions for turning their coconspirators in. "[S]etting a rogue to catch a rogue,"[2] the FCA has recovered over $62 billion since 1986 with 7.3 billion of those dollars flowing to whistleblowers.[3]

Designed to rein in inflated and false claims submitted by government contractors and suppliers, the FCA imposes liability on persons and companies who defraud the government. As part of a recognition that detecting such fraud "is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity,"[4] the FCA includes a powerful whistleblower section referred to as the "qui tam" provision.[5] Under this provision, private individuals, termed "relators" for the purposes of qui tam litigation, may bring

1 31 USC §§ 3729–33.

2 33 Cong Globe, 37th Cong, 3d Sess 956 (1863) (statement of Sen Howard).

3 US Department of Justice, Civil Division, *Fraud Statistics—Overview* *3 (2019), archived at https://perma.cc/227C-FGJ2.

4 *The False Claims Reform Act of 1985*, S Rep No 99-345, 99th Cong, 2d Sess 4 (1986).

5 31 USC § 3730.

suit on behalf of the United States. These relators tend to be employee whistleblowers and are often previous participants in the fraudulent activities themselves. As the Act intended, these relators use their specialized knowledge to uncover fraud in government contracts, procurements, and reimbursements—most often in health care and defense contracts.

To begin a qui tam action, relators first file their complaints under seal.[6] A government attorney, most often from the Department of Justice (DOJ), then evaluates the allegations and decides whether to intervene and assume "primary responsibility,"[7] allow the relator to continue on in the government's name,[8] settle,[9] or seek dismissal.[10]

Originally passed during the Civil War to combat defense contractor fraud, the qui tam provision was revived in the 1986 amendments to the FCA (the "1986 Amendment"). To incentivize whistleblowers to report fraud, the qui tam provision provides relators with between 15 and 30 percent of the total recovery as well as attorneys' fees and costs.[11]

The 1986 Amendment has been stunningly successful with a staggering $62,102,439,394 in total recoveries since its passage.[12] What began as a few dozen qui tam suits and relatively minor recoveries has swelled into "the fastest-growing area of federal litigation."[13] In 2019 alone, relators initiated 636 new qui tam suits under the FCA and generated $2,210,401,366 in recoveries, of which relators received over $270,000,000.[14] By contrast, in 2019, the DOJ brought 146 non–qui tam suits under the FCA and recovered $844,023,684.[15]

These substantial recoveries disguise the high costs that the increasing number of qui tam actions impose on the executive branch. Within a few years of the 1986 Amendment's passage, the

6 31 USC § 3730(b)(2).

7 31 USC § 3730(b)(4)(A), (c)(1).

8 31 USC § 3730(b)(4)(B).

9 31 USC § 3730(c)(2)(B).

10 31 USC § 3730(c)(2)(A).

11 31 USC § 3730(d)(1)–(2).

12 US Department of Justice, Civil Division, *Fraud Statistics* at *3 (cited in note 3).

13 Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 Pub Contract L J 813, 844 (2012).

14 US Department of Justice, Civil Division, *Fraud Statistics* at *2 (cited in note 3).

15 Id.

significant burden on government resources that qui tam litigation posed became clear.[16] In a personal letter, the Director of the Civil Division, Frank Hunger, remarked that FCA work already consumed 40 percent of line attorneys' days but represented only 28 percent of their recovery.[17] The highly complex and fact-intensive nature of fraud suits compounds the difficulty of having to accommodate and work with relators as coparties in the suit. Not even counting the work of United States Attorneys' Offices and other agencies involved in reviewing qui tam suits, in 1992, the DOJ reported spending over 20,000 hours to obtain dismissal of 150 meritless suits.[18] This was at a time when the Civil Division fielded barely three cases each week; in 2019, the Division received more than twelve cases each week.[19] This number is likely to continue to grow rapidly.[20]

In response to this growth of time-consuming, frivolous litigation, the Director of the Civil Division's Fraud Section, Michael Granston, encouraged line attorneys to seek dismissal in a 2018 leaked memo (the "Granston Memo").[21] Later that year, the DOJ adopted the Granston Memo as its formal policy in revisions to the Justice Manual, which highlighted dismissal as "an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent."[22]

The DOJ has already begun to make good on its commitment to aggressively seek dismissal in meritless cases. For example, on one day alone in December 2018, only months after the revisions

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16 See Michael Lawrence Kolis, Comment, *Settling for Less: The Department of Justice's Command Performance Under the 1986 False Claims Amendments Act*, 7 Admin L J 409, 444 (1993).

17 Id at 444 n 162.

18 *False Claims Act Technical Amendments of 1992, Hearing on HR 4563 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 102d Cong, 2d Sess 25–26 (1992) (statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, US Department of Justice).

19 See US Department of Justice, Civil Division, *Fraud Statistics* at *2 (cited in note 3).

20 See David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 Colum L Rev 1244, 1318 (2012) (describing the growth of the qui tam bar and relator professionalization). See also Mathew Andrews, Note, *The Growth of Litigation Finance in DOJ Whistleblower Suits: Implications and Recommendations*, 123 Yale L J 2422, 2440–47 (2014) (extolling alternative litigation financing groups seeking and funding technical and complex, but extremely lucrative, qui tam suits).

21 Michael D. Granston, *Memorandum: Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)* *3–7 (DOJ, Jan 10, 2018), archived at https://perma.cc/4STD-HBY5.

22 US Department of Justice, *Justice Manual 4-4.111* (Sept 2018), archived at https://perma.cc/NLK7-3DNM.

to the Justice Manual, the DOJ filed motions to dismiss in eleven qui tam suits.[23] However, filing for dismissal is much easier than attaining it, especially as the circuits are split over the proper standard for dismissal.

The circuits to have considered the issue of dismissal have adopted one of two approaches. The first is *United States ex rel Sequoia Orange Co v Baird-Neece Packing Corp*[24] (*Sequoia*). Handling the first dismissal action under the 1986 Amendment, the Ninth Circuit adopted the district court's "rational relation" test.[25] Though the qui tam provision is essentially silent as to dismissal, the district court fashioned a test requiring the government to show that dismissal is justified by legitimate government interests. In contrast, in *Swift v United States*,[26] the DC Circuit held that the government's dismissal power was "unfettered," meaning that relators have essentially no recourse where the government seeks dismissal.[27] These two cases provide the dueling dismissal standards currently employed by courts.

This Comment argues that both standards fail to accurately reflect the 1986 Amendment's text and legislative history, raise serious constitutional questions, and create undesirable incentive structures. As to the statutory language and history, *Sequoia* creates serious burdens for the executive branch in seeking dismissal, while *Swift* ignores the text in giving relators essentially meaningless hearings. As to the constitutional analysis, *Sequoia* arguably infringes on the executive branch's prosecutorial discretion by forcing the government to explain its nonenforcement decisions, while *Swift* arguably denies due process of law in violation of the Fifth Amendment. And, most significantly, neither standard adequately resolves the influx of meritless qui tam cases at the heart of the DOJ's more aggressive dismissal policy. *Sequoia* indiscriminately encourages suits by guaranteeing every relator the right to demand the government's reasoning, while *Swift*'s plenary dismissal standard discourages all relators from taking the risk of bringing their cases.

This Comment proposes a new rule for adjudicating government dismissal of qui tam suits that comports with the text of the

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23 *DOJ Moves to Dismiss 11 Patient Assistance Services FCA Cases* (Bass, Berry & Sims, Dec 21, 2018), archived at https://perma.cc/G95Y-BDHX.

24 151 F3d 1139 (9th Cir 1998).

25 Id at 1145.

26 318 F3d 250 (DC Cir 2003).

27 Id at 252.

FCA, respects relators' due process rights and the separation of powers, and correctly calibrates the incentive structure. In fashioning the rule, this Comment draws on another area of law in which courts attempt to protect meritorious cases while allowing swift dismissal of meritless claims: corporate law. In both contexts, legislatures and courts struggle to strike the right balance in allowing meritorious suits to move forward without overloading corporations and the government. Additionally, both the shareholder and relator have partial, but real, interests in the suit, and are putatively bringing it for the benefit of the larger body. And, just as the DOJ reviews the relator's complaint, Special Litigation Committees (SLCs) review the shareholder's suit. Both are charged with taking a broader view of the situation in determining whether litigation is justified.

Though it deals with shareholders rather than relators, corporate law has grappled extensively with the question of how to strike the optimal incentive balance. This Comment advocates importing New York's approach to shareholder derivative suits found in *Auerbach v Bennett*[28] as a model for crafting a powerful incentive regime. In doing so, a court would apply the business judgment rule from corporate law to DOJ decisions to dismiss as a sort of Executive Judgment Rule. This rule would allow relators to challenge government dismissal only if they first prove that the government's investigation suffered from procedural defects—such as a failure to review the relator's complaint or interview relevant witnesses—under the Act's requirement that the government "diligently [ ] investigate."[29] Only after the relator showed that the government failed to meet its statutory duty could the court then more closely scrutinize the government's substantive reasoning for seeking dismissal. In doing so, the court ensures that relators receive the minimum requirements of due process while respecting the executive branch's judgment and separation of powers.

This Comment proceeds in four parts. Part I summarizes the history and origin of the False Claims Act before examining the

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[28] 393 NE2d 994 (NY 1979). As discussed at length in Part IV.A, this Comment takes the minority *Auerbach* approach because it best applies to the DOJ. Whereas the majority approach in *Zapata Corp v Maldonado*, 430 A2d 779 (Del 1981), was created to deal with concerns of SLC partiality and impropriety, *Auerbach* assumes disinterest and good faith. This better comports with the qui tam context, where the DOJ is akin to the model SLC, with unimpeachable credentials and impartiality.

[29] 31 USC § 3730(a).

outcomes and criticisms of the 1986 Amendment's qui tam provision. Part II dives into the text and legislative history of the 1986 qui tam provision. Part III describes the *Sequoia-Swift* split, the effects of those two approaches, and their interpretive and constitutional shortcomings. Part IV begins with a primer on special litigation committees and the *Auerbach* standard before arguing that their application in the FCA context would both remedy *Swift* and *Sequoia*'s deficiencies and, crucially, best serve the public and relators by encouraging and protecting high-quality suits. The proposed solution offers not simply a more accurate interpretation of the FCA's text and history, but one that addresses the constitutional concerns raised by the current approaches and creates the optimal incentive structure for qui tam suits.

I. The Qui Tam Provision of the False Claims Act: History and Current Practice

This Part first provides a brief history of the False Claims Act. Following that, this Part examines the specific history of the 1986 Amendment before surveying its outcomes and criticisms. By looking at the response, in practice and in academia, to the revived qui tam provision—especially the calls for greater government control over relators—the significance of which standard of dismissal courts apply becomes clear.

A. Brief History of the False Claims Act

Congress passed the first False Claims Act[30] (FCA) in response to rampant defense contractor fraud in the Civil War.[31] The FCA's drafters included the qui tam provision as a means of effectively uncovering and rooting out fraud the government would otherwise be unable to discover.[32] To encourage relators to come forward, the Act offered generous rewards. Most notably, it

30 An Act to Prevent and Punish Frauds upon the Government of the United States, 12 Stat 696 (1863), codified as amended at 31 USC §§ 3729–33.

31 US 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), archived at https://perma.cc/96T6-63J3. Enraged by vivid stories of charlatans selling "sick mules, lame horses, [and] sawdust instead of gunpowder" to unsuspecting Union quartermasters, the public demanded congressional action. Id.

32 33 Cong Globe at 955–56 (cited in note 2) ("The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator . . . 'setting a rogue to catch a rogue.'").

guaranteed the relator 50 percent of the recovery as well as attorneys' fees.[33] While the statute required the consent of the court and federal prosecutors for any settlements,[34] it provided no provision for government intervention, including dismissal, once the relator commenced the action. What little caselaw exists supports the proposition that this omission prevented the government from dismissing suits.[35]

The Act remained relatively unchanged until 1943, after Attorney General Francis Biddle moved to repeal the False Claims Act in response to growing instances of "parasitical" suits.[36] Specifically, he alleged that relators increasingly would read the criminal charges of an individual or corporation and immediately sue in civil court on those same charges of fraud for a cut of the recovery.[37]

In response, Congress considerably reduced the relator's role and incentives. Among other restrictions, the 1943 Amendment[38] removed the fixed reward for successful relators.[39] This meant that relators no longer were guaranteed 50 percent of every successful prosecution; rather, their payout, if any, was left to the discretion of the government and court. In gutting the central incentive for qui tam suits—the guarantee of compensation—this provision was tantamount to repealing the relator provision.[40]

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33 An Act to Prevent and Punish Frauds § 6, 12 Stat at 698.

34 An Act to Prevent and Punish Frauds § 4, 12 Stat at 698.

35 See *United States v Griswold*, 26 F Cases 42, 44 (D Or 1877) ("But the rule of law is, and the practice always has been, that a qui tam action is the action of the party who brings it, and the sovereign, however much concerned in the result of it, has no right to interfere, . . . *except as specially provided by statute*.") (emphasis added).

36 *Eliminating Private Suits for Penalties and Damages Arising out of Frauds Against the United States*, S Rep No 77-1708, 77th Cong, 2d Sess 2 (1942); *Eliminating Private Suits for Penalties and Damages Arising out of Frauds Against the United States*, H Rep No 78-263, 78th Cong, 1st Sess 2 (1943). See also Charles Doyle, *Qui Tam: The False Claims Act and Related Federal Statutes* *6 (Congressional Research Service, 2009), archived at https://perma.cc/B74H-2A28.

37 See Gary W. Thompson, *A Critical Analysis of Restrictive Interpretations Under the False Claims Act's Public Disclosure Bar: Reopening the* Qui Tam *Door*, 27 Pub Contract L J 669, 674 (1998).

38 An Act to Limit Private Suits for Penalties and Damages Arising out of Frauds Against the United States, 57 Stat 608 (1943).

39 An Act to Limit Private Suits for Penalties and Damages § 1, 57 Stat at 609.

40 Following this amendment, qui tam suits dropped to an average of six cases annually until the provision's revival in 1986. Elameto, 41 Pub Contract L J at 818 (cited in note 13).

B. The 1986 Amendment to the False Claims Act

The qui tam provision therefore largely remained a dead letter for the next forty years. However, the tide turned in qui tam's favor following a series of high-profile and embarrassing scandals in the 1970s and 1980s involving defense contractor fraud.[41] In the "era of the $435 hammer, the $640 toilet seat cover, and the $7622 coffee maker," public outrage mounted over the perceived ubiquity of defense contractor fraud.[42] In response, Congress began to explore reviving the False Claims Act's central tool: the qui tam provision.

The Senate Report to the 1986 Amendment clearly states the dual impetus for reenlisting the qui tam relator. First, there was simply a staggering amount of fraud—the DOJ estimated that at least $1 billion was lost each year in defense contractor fraud alone.[43] Second, Congress and government prosecutors recognized that it was nearly impossible to uncover these frauds without whistleblowers' inside knowledge.[44] On that point, the Senate Report squarely addresses the need for relators: "Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity. Yet in the area of Government fraud, there appears to be a great unwillingness to expose illegalities."[45] The Report explains that "S. 1562 increases incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government."[46]

Recognizing that this new, more complex, and highly technical fraud required an insider's knowledge to uncover, Congress passed the 1986 Amendment. To give the statute teeth, Congress imposed treble damages and huge minimum fines for violations of the Act.[47] To incentivize relators, Congress guaranteed successful relators' costs and attorneys' fees, and, crucially, reinstated the mandatory bounty provision—every successful relator would

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[41] J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 NC L Rev 539, 561 (2000).

[42] Id. The Senate Report highlights the fact that nine of the ten biggest defense contractors "were under investigation for multiple fraud offenses" at the time of the amendments' drafting. S Rep 99-345 at 2 (cited in note 4).

[43] S Rep 99-345 at 2 (cited in note 4).

[44] Id at 4.

[45] Id.

[46] Id at 2.

[47] 31 USC § 3729(a)(1).

now receive 15 to 30 percent of the massive damages the Act imposed.[48] The 1986 Amendment's supporters celebrated the reinvigorated Act as "an opportunity without adding one more person to the Federal payroll of enlisting support of thousands of people in ferreting out fraud against the Government."[49]

C. Outcomes and Criticisms of the 1986 Amendment

In order to begin explaining the centrality of the dismissal standard, this Section will note some of the developments in qui tam litigation since the 1986 Amendment, as well as survey the major criticisms leveled against it. In surveying the data and responses of academics, this Section reinforces the Comment's argument that the standard of dismissal is fundamental in both enabling the executive branch to successfully manage its cases and enforcement as well as ensuring only meritorious suits are brought.

1. The increase in qui tam suits after the 1986 Amendment and limited government intervention.

Since the 1986 Amendment's enactment there has been a steady uptick in the number and value of qui tam suits. In 1988, forty-three relators brought suits, and the DOJ grossed slightly more than $2.3 million in qui tam recoveries.[50] By 2019, 636 relators brought suit, and the DOJ grossed over $2 billion in qui tam recoveries.[51] However, just looking at the successful suits in aggregate fails to tell the full story. These massive recoveries disguise the significant number of dismissed and meritless suits brought by relators.

While the government is extremely successful in winning and extracting large recoveries in those cases in which it intervenes, it only does so in less than a quarter of qui tam suits.[52] About 95 percent of the cases in which the government intervenes result

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48 31 USC § 3730(d)(1)–(2).

49 *False Claims Act Amendments: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 99th Cong, 2d Sess 417 (1986) (statement of John Phillips, Center for Law in the Public Interest).

50 US Department of Justice, Civil Division, *Fraud Statistics* at *2 (cited in note 3).

51 Id.

52 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 (2008).

in settlement or judgment in favor of the United States[53] with an average total recovery well into the millions of dollars.[54] When the government does not intervene—some 78 percent of total cases—only about 6 percent of those cases are successful, with an average total recovery of $75,000.[55] As discussed below,[56] resource constraints and a mismatch of incentives mean that outside of the 22 percent of cases that the executive branch prosecutes, there is little reason to expect that the DOJ is closely monitoring the private parties litigating in the government's name.

As the Granston Memo suggests, the DOJ is highly concerned with these unmanaged cases—and it is those cases that animate this Comment. Even assuming half of the relators drop their cases following the government's decision not to intervene, that still leaves private citizens litigating almost twice as many cases as the government. Furthermore, before the Granston Memo, the DOJ sought dismissal for less than 1 percent of qui tam actions filed.[57] The consequences of these hundreds of uncontrolled suits each year are critical for the government, contractors, and society more generally. First, these numbers show that relators are bringing too many meritless suits—suits that impose significant costs on the government to monitor and, especially, on contractors to defend against. Second, and relatedly, the high number of suits proceeding without government intervention means that relators exert substantial influence over the direction and expansion of FCA liability. Both of these concerns are addressed in the following Section.

2. Criticisms of the qui tam provision in academic literature.

Given the growing number of suits exclusively managed by relators since 1986, the academic literature has coalesced around a nested criticism of the qui tam mechanism. The first part of the argument is that the perverse incentives of the qui tam provision encourage cunning relators to file strategic, and often meritless,

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[53] David Kwok, *Evidence from the False Claims Act: Does Private Enforcement Attract Excessive Litigation?*, 42 Pub Contract L J 225, 240 (2013).

[54] See US Department of Justice, Civil Division, *Fraud Statistics* at *2 (cited in note 3). For a slightly dated but in-depth examination of comparative payoffs between 1986 and 1992, see Kolis, Comment, 7 Admin L J at 439–45 (cited in note 16).

[55] Rich, 76 U Cin L Rev at 1263–64 (cited in note 52).

[56] See Part I.C.2.

[57] Steven L. Schooner, *False Claims Act: Greater DOJ Scrutiny of Frivolous Qui Tam Actions?*, 32 Nash & Cibinic Report 59, 60 (2018).

suits and discourage the DOJ from seeking dismissal because defendant corporations, not the DOJ, bear the cost of meritless suits. The second part of the argument states that this abdication of responsibility by the government leads to unnecessary, expensive litigation and uncontrolled FCA development. Given the growth of suits, disincentives for government oversight and dismissal, and the serious effects of unconstrained relators, this Section helps explain the importance of a properly calibrated dismissal standard.

The first part of this critique is that the incentive structure of qui tam, in conjunction with the lack of a meaningful threat of dismissal or sanctions, encourages relators to bring dubious or meritless suits, often in the hopes of quick settlements or as a tool of corporate competition. Relators have strong incentives to bring an action because their only real disincentive is the cost of filing the suit itself. If the government intervenes, the relator is almost assured of a payout.[58] But even if the government does not intervene, the relator has three often cheap litigation options. First, they can drop the suit. Second, they can seek settlement with companies, who rightfully fear the Act's massive treble damages and per claim fines. Third, if they believe their case has merit, they can pursue the suit and, in the event of a victory, receive costs, attorneys' fees, and an average $18,000 payout.[59]

One might believe that sanctions under Rule 11 would deter relators, but Rule 11 may actually increase the number of frivolous suits due to its safe harbor provision and filing requirements.[60] As relators have the ability to avoid sanctions by withdrawing their complaint at any time within twenty-one days of the defendant's service of the motion for sanctions,[61] relators can effectively immunize themselves from punishment. Furthermore,

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58 Kwok, 42 Pub Contract L J at 240 (cited in note 53).

59 Rich, 76 U Cin L Rev at 1264 (cited in note 52).

60 Todd B. Castleton, Comment, *Compounding Fraud: The Costs of Acquiring Relator Information Under the False Claims Act and the 1993 Amendments to Federal Rules of Civil Procedure*, 4 Geo Mason L Rev 327, 351 (1996) ("Under the new Rule 11, a potential *qui tam* plaintiff suffers no penalty for filing a marginal or even frivolous claim. . . . As a result, a potential *qui tam* plaintiff has nothing to lose and everything to gain by initiating a suit, regardless of its merit."). See also Charles Yablon, *Hindsight, Regret, and Safe Harbors in Rule 11 Litigation*, 37 Loyola LA L Rev 599, 621 (2004) ("[T]he 1993 amendments had precisely the effect of making it significantly more difficult to win a Rule 11 motion" because it required defendants to file the Rule 11 motion before the court adjudicated the plaintiff's claim—thus depriving the court and defendant of the "hindsight perspective" that encouraged sanctions.).

61 FRCP 11(c)(2).

the safe harbor provision forces parties to bring Rule 11 motions before the underlying merits of the claim are resolved.[62] This eliminates the "hindsight perspective," or bias, that encouraged courts to bring down heavy sanctions on the losing party as the judge and winning party presumed the other party's loss meant their complaint was likely frivolous.[63] By providing protection from sanctions and discouraging parties from seeking sanctions in the first place, Rule 11 provides little deterrence to relators filing meritless suits in the hopes of a quick payout. Compounding the issue is that courts are seemingly wary of imposing sanctions; for example, in 2015, only two FCA relators received sanctions,[64] and even then, in one case the court only applied sanctions after it gave the relators three separate warnings.[65] With an almost nonexistent government dismissal rate and impotent sanctions, relators currently have little to fear and much to gain in filing strategic and meritless suits.

Potential relators know the government is unlikely to find and litigate these often complex and hypertechnical frauds on its own.[66] Given that the relator does not have to worry about the government discovering the fraud first and reaping the entire recovery, the relator is incentivized to wait as long as possible before filing in order to obtain a greater payout.[67] In *United States v General Electric Co*,[68] for example, the FCA relator first contacted his attorney in 1987, when GE's fraudulent receipt of government payments totaled $13.1 million, but delayed filing suit for three

62 Yablon, 37 Loyola LA L Rev at 604 (cited in note 60).

63 Id at 621–22.

64 Richard Arnholt, *Relators Beware—Sanctions Upheld for "Vexatious" False Claims Act Suit* (Bass, Berry & Sims, June 17, 2015), archived at https://perma.cc/83J6-X3W4.

65 *United States ex rel Jacobs v Lambda Research, Inc*, 622 F Appx 477, 479 (6th Cir 2015).

66 US Department of Justice Office of Public Affairs, *Justice Department Recovers over $4.7 Billion from False Claims Act Cases in Fiscal Year 2016* (Dec 14, 2016), archived at https://perma.cc/D5JN-XVAA. The DOJ has repeatedly admitted that many complex and health care crimes are undiscoverable without industry insiders. For an example of such a fraud, see *United States v Academy Mortgage Corp*, 2018 WL 3208157, *1–2 (ND Cal), where the relator revealed a false loan certification scheme which traded on the intricacies of Federal Housing Administration regulations. Without the relator, there is little reason to suspect the fraud would otherwise have been revealed given its complex nature.

67 See Ben Depoorter and Jef De Mot, *Whistle Blowing: An Economic Analysis of the False Claims Act*, 14 S Ct Econ Rev 135, 156–57 (2006); Beck, 78 NC L Rev at 635 (cited in note 41).

68 41 F3d 1032 (6th Cir 1994).

years, at which point the total fraud, and thus the relator's reward, had more than tripled.[69]

The DOJ is not incentivized to control relators' suits. Dismissal requires valuable line-attorney time and resources, while the benefits are diffuse and flow almost entirely to a defendant often unaware that a case against them was even being considered. Furthermore, when a relator does win, the DOJ can expect an average recovery of $57,000.[70] And, especially in *Sequoia* jurisdictions where the bar for dismissal is higher, the cost of dismissal often exceeds the resources saved by an early termination of the case.[71]

Given the failure of the current incentive structure, relators essentially control the majority of qui tam litigation. As such, the second part of the critique argues that this relator control leads to ever-increasing FCA liability for contractors, as relators seek the highest payout rather than stable and effective regulation.

The DOJ and relators' lack of proper incentives in managing and bringing these actions, respectively, has serious negative consequences on the development of FCA liability law. As Professor Michael Rich explores at length, the category of qui tam action most likely to proceed without government intervention is also the most in need of government oversight: qui tam actions based on establishing a novel theory of FCA liability.[72] He lays out four categories of suits defined by low and high payout on one axis, and low and high likelihood of success on the other. When the potential payout is low and the likelihood of success is low, relators and the government are unlikely to intervene,[73] and this comports with the Act's purpose of drawing out *useful* information.[74] In contrast, when the potential payout is low but the likelihood of success is high, relators are likely to pursue the case and the government is unlikely to intervene to conserve resources,[75] and this

69 Id at 1037–39.

70 Rich, 76 U Cin L Rev at 1264 (cited in note 52).

71 See Patrick A. Barthle II, *Whistling Rogues: A Comparative Analysis of the Dodd-Frank Whistleblower Bounty Program*, 69 Wash & Lee L Rev 1201, 1233–35 (2012).

72 Rich, 76 U Cin L Rev at 1268 (cited in note 52).

73 Id at 1266.

74 Id ("The relator recovery structure of the FCA is intended to encourage whistleblowers to come forward with helpful information.").

75 Id at 1266–67.

comports with the Act's purpose of having "10,000 lawyers . . . assisting the Attorney General."[76] Finally, when the potential payout is high and the likelihood of success is high, it is reasonable to assume that the government will intervene.

The problem occurs when the potential payout is high, but the likelihood of success is low. These cases tend to require either extensive discovery chasing a smoking gun or a novel legal theory of liability.[77] Relators are not incentivized to pursue smoking gun claims because, considering the low likelihood of success and the exorbitant cost of discovery, the expected payout is likely to be low. However, relators are incentivized to pursue novel theories of liability because, compared to resource-intensive discovery, the cost of producing a brief advancing a new legal theory of FCA liability is relatively low given the potential for a substantial payout.[78] In both cases, the government is not incentivized to bring suit as the likelihood of success is low and the cost of DOJ investigation and litigation is high.[79] Professor Rich concludes that "[a]s a result, relators exercise nearly unfettered prosecutorial discretion in precisely those cases in which government oversight is most essential."[80]

Unconstrained relators seeking to open new areas of liability have created significant uncertainty for government contractors and even subjected them to billion-dollar suits for conduct that was previously unobjectionable under the FCA. A successful case based on a novel theory of liability substantially raises the incentives for other relators to rush in and sue contractors. For example, in 2003, a lone relator's novel theory of "off-label" marketing liability succeeded in a single district court case.[81] That single case led to a new theory of liability exponentially increasing health care defendants' exposure under the FCA. For example, in

[76] 89 Cong Rec 7606 (1943) (statement of Sen Langer). See also Rich, 76 U Cin L Rev at 1267 (cited in note 55).

[77] Rich, 76 U Cin L Rev at 1268 (cited in note 52).

[78] Id at 1267–68.

[79] Id.

[80] Id.

[81] *United States v Parke-Davis*, 2003 WL 22048255, *7 (D Mass). For a richer discussion of relator-generated liability in the health care field, see generally Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U Mich J L Ref 281 (2007).

2013, Johnson & Johnson paid more than $2.2 billion for a single off-label marketing suit.[82]

While ever-greater liability is a resounding benefit for the plaintiffs' bar, dramatic increases in liability raise the costs of goods and services for the government and public.[83] When confronted with an ever-harsher regulatory landscape, government suppliers, especially health care providers and defense contractors, grow "cynical and alienated."[84] Contractors increasingly see the government's litigation strategy, or lack thereof, as based on the pursuit of maximum recoveries rather than any principled approach to which activities create liability.[85] As this distrust grows, cooperation between the government and regulated industries deteriorates, which forces the government to rely on increasingly coercive means of obtaining compliance.[86] This more aggressive posture starkly contrasts with the DOJ's explicit preference for cooperation and belief that it is far more effective in preventing fraud.[87] And, more broadly, in abdicating its gatekeeping responsibility, the DOJ fails its own articulated duty of "provid[ing] federal leadership" in "enforc[ing] the law" and "defend[ing] the interests of the United States."[88]

Furthermore, when novel-theory claims are brought by unskilled or inexperienced relators, their failures can lead to mounting adverse precedent. Even if the DOJ seeks to pursue a new theory of liability under the FCA, relators may have already created substantial adverse precedent, making it difficult for the government to shape the future of FCA liability. This also has serious negative consequences for effective corporate regulation.

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82 US Department of Justice Office of Public Affairs, *Johnson & Johnson to Pay More than $2.2 Billion to Resolve Criminal and Civil Investigations* (Nov 4, 2013), archived at https://perma.cc/DN8L-P3BV.

83 Matthew, 40 U Mich J L Ref at 293–95 (cited in note 81).

84 Rich, 76 U Cin L Rev at 1274 (cited in note 52).

85 Id. For an account of this effect in the health care sector, see Joan H. Krause, *"Promises to Keep": Health Care Providers and the Civil False Claims Act*, 23 Cardozo L Rev 1363, 1414 (2002).

86 Rich, 76 U Cin L Rev at 1274 (cited in note 52). See also Depoorter and De Mot, 14 S Ct Econ Rev at 154 (cited in note 67) ("The DOJ has an interest not simply in prosecution and punishment but also in generating goodwill to persuade companies to improve monitoring procedures.").

87 US Department of Justice, *Acting Assistant Attorney General Stuart F. Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement* (June 7, 2012), archived at https://perma.cc/HVH2-VX9R. See also Depoorter and De Mot, 14 S Ct Econ Rev at 152–56 (cited in note 67).

88 US Department of Justice, *Mission Statement*, archived at https://perma.cc/FV2L-T58G.

If the government cannot effectively threaten to regulate certain conduct because of numerous failed relators' attempts to do so, this seriously weakens the government's hand in demanding contractor cooperation.

To preserve its power to effectively regulate, stop wasteful and meritless suits, encourage meritorious suits, and reclaim control over litigation brought in the nation's name, the DOJ must more aggressively seek dismissal. Unfortunately, the current standards for dismissal either make dismissal too costly and encourage meritless suits, or make dismissal too cheap and discourage serious relators from bringing their suits.

However, the text and legislative history of the 1986 Amendment clearly point to a middle ground where serious relators are guaranteed process and meritless suits are denied their strategic benefit. The next Part will examine the text and history of the 1986 Amendment's qui tam provision to lay the foundation on which this Comment builds its argument for the Executive Judgment Rule.

II. THE TEXT AND LEGISLATIVE HISTORY OF THE 1986 AMENDMENT'S QUI TAM PROVISION

This Part dives into the text and legislative history of the 1986 Amendment. Part II.A explains that the text of the qui tam dismissal provision is brief and, compared with the other provisions governing government action, requires little from the government in dismissing a relator's suit. Part II.B then examines what little legislative history exists regarding dismissal. These two sections reflect the relatively blank slate there is on which to build a better dismissal standard that optimizes incentives and avoids the issues posed by the current two approaches.

A. The Text of the 1986 Amendment's Qui Tam Provision Provides No Clear Dismissal Standard

The 1986 Amendment provides clear standards for most of the points in a qui tam case in which the relator and government interact. However, the Amendment is largely silent as to the standard for government dismissal of a qui tam suit. By examining the varying language of the provisions governing these moments of interaction, this Section lays the foundation for the later discussion of the proper dismissal standard. In particular, the differing language used in the provisions governing settlement, intervention, and dismissal is crucial to understanding the workings of the Act and for the later identification of the dismissal standard Congress intended.

Every qui tam suit begins with the relator filing a complaint under seal.[89] The complaint then remains under seal for sixty days to allow the DOJ to review evidence and decide its course of action.[90] For every suit, the Act requires that "[t]he Attorney General diligently shall investigate [the alleged] violation."[91] Following its investigation, the government may choose to intervene[92] with the relator as coparty;[93] decline to intervene and leave the relator to conduct the suit;[94] or seek settlement[95] or dismissal.[96]

At almost every point during the course of the investigation and suit, the Act provides the government with discretion to pause or alter the suit. The government may intervene any time before the complaint is unsealed and may, "for good cause shown," move for additional time to consider the complaint.[97] The court may stay discovery, whether or not the government intervened, for periods of sixty days with successive showings by the government that discovery in the relator's case would interfere with its own ongoing enforcement actions.[98] "[U]pon a showing of good cause," the court may allow the government to intervene after the complaint is unsealed.[99] The court may also limit a relator's participation in the suit on a variety of grounds, including if unlimited participation threatens to interfere with or delay the government's prosecution of the case.[100]

When the relator seeks dismissal of the suit or the government seeks settlement, the Act provides stronger guidelines. The relator may dismiss the matter only with the written consent of

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89 31 USC § 3730(b)(2). As a procedural matter, the complaint is brought "in the name of the Government" the moment it is submitted. 31 USC § 3730(b)(1). Even if the government declines to intervene, the relator continues in the government's name. 31 USC § 3730(b)(1).

90 31 USC § 3730(b)(2).

91 31 USC § 3730(a).

92 31 USC § 3730(b)(4)(A).

93 31 USC § 3730(c)(1). This is in contrast to the 1943 Amendment, which removed the relator as a party once the government intervened and left awards at the court's discretion. An Act to Limit Private Suits for Penalties and Damages § 1, 57 Stat at 609.

94 31 USC § 3730(b)(4)(B).

95 31 USC § 3730(c)(2)(B).

96 31 USC § 3730(c)(2)(A).

97 31 USC § 3730(b)(3).

98 31 USC § 3730(c)(4).

99 31 USC § 3730(c)(3).

100 31 USC § 3730(c)(2)(C).

the court and Attorney General.[101] 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."[102]

However, when the government seeks dismissal, the Act's text is much more ambiguous and seemingly deferential: "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 the opportunity for a hearing on the motion."[103] This provision is at the heart of this Comment. Parsing the standard for government dismissal of a qui tam suit from this relatively sparse text involves the interpretive, constitutional, and incentives analysis performed in the following Parts.

B. The Legislative History Clarifies That Objecting Relators Are Not Guaranteed a Hearing but Provides No Clear Dismissal Standard

The legislative history on the topic of dismissal is sparse. This Section argues that Congress clearly contemplated that relators could challenge the government's dismissal, but hearings would only be provided for substantiated objections. Despite fleshing out some of the hearing provision, the legislative history suggests no clear standard of review for dismissal petitions.

The Senate Committee Report is the only source of legislative history on the question of dismissal, and all courts that have considered the question refer to it. In its brief discussion of the dismissal provision, the Report reads:

> Any objections filed by the *qui tam* plaintiff may be accompanied by a petition for an evidentiary hearing on those objections. The Committee does not intend, however, that evidentiary hearings be granted as a matter of right. We recognize that an automatic right could provoke unnecessary litigation delays. Rather, evidentiary hearings should be granted when the *qui tam* relator shows a "substantial and particularized need" for a hearing.[104]

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[101] 31 USC § 3730(b)(1).
[102] 31 USC § 3730(c)(2)(B).
[103] 31 USC § 3730(c)(2)(A).
[104] S Rep 99-345 at 26 (cited in note 4).

This Senate Committee Report reflects Congress's unwillingness to give objecting relators even a hearing on the government's motion to dismiss without good reason. In contrast to the settlement provision's requirement that the court must determine that the agreement is "fair, adequate, and reasonable under all the circumstances,"[105] the Report explains that only persuasive objections warrant a hearing.

Only when a relator shows a "substantial and particularized need"[106] should the court grant a hearing on the motion to dismiss. Noticeably absent is what exactly a "substantial and particularized need" entails. Even more noticeable—in both the statute and legislative history—is the total lack of a discussion of the standard of review. Unlike the other sections noted above, the dismissal provision offers no suggestion for how a court should go about determining whether dismissal is unwarranted.

From the legislative history, it is at least clear that the relator is not guaranteed protection from—let alone a hearing on—dismissal, but also that Congress did conceive of situations in which a court could deny the government's dismissal motion. Given this ambiguity—that meaningful hearings are contemplated but only for serious objections—the current dismissal standards of the Ninth and DC Circuits are on questionable footing. Without strong textual or historical support, these current approaches lack a compelling justification. The following Part will present and critique these two dominant standards before turning to the final Part in presenting the Executive Judgment Rule as the superior approach.

III. *SEQUOIA* AND *SWIFT*: WHAT THEY ARE, WHY THEY MATTER, AND HOW THEY FALL SHORT

Given the few relator suits initially brought following the 1986 Amendment, courts were not confronted with the question of dismissal standards until some eleven years after the Amendment's passage. In the late 1980s the number of qui tam suits was

105 31 USC § 3730(c)(2)(B).
106 S Rep 99-345 at 42 (cited in note 4).

low, but it began to grow rapidly in the mid-1990s.[107] Not coincidentally, the DOJ moved for dismissal of a relator's claim for the first time under the 1986 Amendment in *Sequoia*.[108]

The Ninth Circuit required the government to prove a "rational relation" between its interests and the dismissal it sought.[109] In practice, the *Sequoia* standard requires that the government justify dismissal by showing that valid government interests outweigh the potential benefits of pursuing the case.

Rejecting *Sequoia*, the DC Circuit in *Swift v United States* interpreted the 1986 Amendment to grant the government an "unfettered right" to dismiss.[110] In practice, the *Swift* standard's burden of dismissal is simply that of filing a motion to dismiss. Where *Sequoia* creates a presumption that the suit is valid and requires the government to explain why it should be dismissed, *Swift* creates an almost irrebuttable presumption that the government's decision to dismiss is valid.

This Part will examine the reasoning behind each approach before arguing that both fail to either fully embrace the text of the Act or avoid constitutional concerns. Furthermore, as this Comment argues in Part IV.D, even if these judicially crafted standards perfectly interpreted the Act's text, they still would fail to address the central issue animating the DOJ and this Comment: too many meritless suits are being brought. Demonstrating these deficiencies lays the groundwork for the proposed solution—one that best achieves the goals of the qui tam provision, avoids the constitutional issues of both current approaches, and gives courts a manageable approach to evaluating dismissals, while simultaneously creating an optimal incentive structure.

A. *Sequoia*

In 1988, the Sequoia Orange Company filed thirty-four qui tam actions against a number of competing citrus growers for alleged violations of orange and lemon marketing orders set by the Department of Agriculture.[111] After intervening in ten of the

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107 US Department of Justice, Civil Division, *Fraud Statistics* at *1 (cited in note 3).

108 Interestingly, in the immediate aftermath of *Sequoia*, the number of relator suits fell and did not exceed the 1995 high until 2010. Id at *1–2. Since 2011, the number of new qui tam suits has often exceeded seven hundred. Id at *2.

109 *Sequoia*, 151 F3d at 1145.

110 *Swift*, 318 F3d at 252.

111 *Sequoia*, 151 F3d at 1141. In 1984, the Secretary of Agriculture had imposed restrictions on citrus shipments into California in order to stabilize prices and production. Id at 1142.

cases, the government discovered "evidence of widespread [ ] violations" of the marketing orders and concluded "that the [regulations] had become divisive."[112] As a result, the government proposed a complete settlement of FCA claims "in order to end industry turmoil."[113] After securing consent to the settlement from the defendants, the government intervened in the remaining twenty-four suits to dismiss them.[114]

With no precedent for government dismissal under the 1986 Amendment, the District Court for the Eastern District of California created a "rational relation" test to flesh out the FCA's ambiguous dismissal standard.[115] Having decided that the government may dismiss if it can demonstrate a rational relationship between dismissal and legitimate government interests, the court held a four-day evidentiary hearing. The court ordered dismissal of all of Sequoia's suits after finding the government's interest in settling the disruptions to the citrus market was legitimate and rationally related to dismissal.[116] Sequoia appealed, contending that dismissal is improper "unless the court found the cases lacked merit."[117]

The Ninth Circuit affirmed the district court and rejected Sequoia's proposed rule, concluding that "[t]he district court acted reasonably in adopting [the rational relation test]."[118] Because the government carried its burden of meeting the test, the burden then switched to Sequoia "to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal."[119]

The Ninth Circuit's justification is brief—just two paragraphs and a block quote defend its adoption of the lower court's creation.[120] The Ninth Circuit first notes that the 1986 Amendment's text "does not create a particular standard for dismissal."[121] Given that the text was ambiguous, the court found the district court's approach to be a reasonable interpretation. The rest of the opinion notes and quickly rejects the constitutional

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112 Id.

113 Id.

114 Id.

115 *Sequoia*, 151 F3d at 1145.

116 *United States ex rel Sequoia Orange Co v Sunland Packing House Co*, 912 F Supp 1325, 1341, 1354 (ED Cal 1995).

117 *Sequoia*, 151 F3d at 1143.

118 Id at 1145.

119 *Sunland Packing*, 912 F Supp at 1347.

120 *Sequoia*, 151 F3d at 1145–46.

121 Id at 1145.

concerns raised by this rational relation test. The court emphasized that "the district court has respected the Executive Branch's prosecutorial authority by requiring no greater justification of the dismissal motion than is mandated by the Constitution itself," because "due process prohibits arbitrary or irrational prosecutorial decisions."[122] No further explanation is provided.

In the years following *Sequoia*, the Second[123] and Tenth[124] Circuits adopted the rational relation standard for dismissal, but neither expanded significantly upon the Ninth Circuit's reasoning. Though the Seventh Circuit has not taken a position, its district courts appear to favor *Sequoia* review.[125]

In addition to the *Sequoia* court's explanation that due process prevents "arbitrary or irrational prosecutorial decisions,"[126] there is a powerful argument that due process also requires at least some level of judicial review before dismissal. This argument combines the Supreme Court's due process jurisprudence and its recent decision on the nature of the relator's share.

As an initial matter, the Fifth Amendment protects individuals from being "deprived of life, liberty, or property, without due process of law."[127] In the landmark case *Goldberg v Kelly*,[128] the Court recognized that nondiscretionary interests, entitlements, and benefits guaranteed by statute fall under the definition of property for the purposes of due process analysis.[129] However, the fact that the relator has a property interest does not end the inquiry. As held in *Mathews v Eldridge*[130], the level of process—that is, the level of procedural protections one receives—is tied to the extent and importance of the interest.[131] Under this test, the court

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122 Id at 1146.

123 See *United States ex rel Stevens v Vermont Agency of Natural Resources*, 162 F3d 195, 201 (2d Cir 1998), revd on other grounds, 529 US 765 (2000).

124 See *Ridenour v Kaiser-Hill Co, LLC*, 397 F3d 925, 936 (10th Cir 2005). Similar to *Stevens*, *Ridenour* only required that the government's reason be "plausible, or arguable" for it to pass muster. Id at 937, quoting *Sunland Packing*, 912 F Supp at 1341.

125 See, for example, *United States ex rel CIMZNHCA, LLC v UCB, Inc*, 2019 WL 2409576, *1 (SD Ill); *United States ex rel Nicholson v Spigelman*, 2011 WL 2683161, *3 (ND Ill).

126 *Sequoia*, 151 F3d at 1146.

127 US Const Amend V.

128 397 US 254 (1970).

129 See id at 262 n 8. For the seminal proposal of this new conception of property under the Fifth Amendment, see generally Charles A. Reich, *The New Property*, 73 Yale L J 733 (1964).

130 424 US 319 (1976).

131 In *Eldridge*, the Court held that statutorily created property rights—Social Security benefits in that case—implicated Fifth Amendment protections but did not warrant

balances three considerations in determining the amount of due process required for the government to deprive someone of a property interest. These considerations are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[132]

This balancing determines the extent of procedural protections required to lawfully deprive an individual of a property right.

Applying this caselaw and approach to qui tam relators entails two steps: first, showing that relators have a property interest; and second, considering the level of due process required to protect this right. The text of the statute and a recent Supreme Court decision make clear that relators have a property interest in the suit.

Looking first at the text, the Act uses the mandatory "shall" in its provision for relator awards.[133] Unlike the 1943 version of the FCA, relators are conceived of as equal coparties and guaranteed a percentage of the recovery. The Supreme Court's decision in *Vermont Agency of Natural Resources v United States ex rel Stevens*[134] ratified this understanding of the text in holding that relators are "*partial* assignee[s]" of the government's claims under the FCA.[135] Noting that though the relator cannot meet Article III standing alone, the Court concluded:

> We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered

the full extent of due process protections. The Court held that posttermination appeal options sufficiently protected the plaintiff's interests, and that the interest was not substantial enough to justify the burden pretermination hearings would place on the government. Id at 334–35.

132 Id at 336.

133 31 USC § 3730(d)(1).

134 529 US 765 (2000).

135 Id at 773 n 4.

by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim.[136]

As a partial assignee, the relator can claim protection of the Fifth Amendment's due process guarantee on the grounds that dismissal is a deprivation of a property interest and, as such, requires a level of due process protection. The text of the amendment explicitly allows for unrestricted dismissal only where the "the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729."[137] Even where the relator is the "person who planned and initiated the violation," the deprivation is at the discretion of the court.[138] The Supreme Court's due process caselaw, its conception of the relator as partial assignee, and the Act's own hesitation to deprive a relator of their share clearly reject a standard that provides absolutely no protection. The actual extent of the due process protection will be explored at length in the following sections, but it is enough to note now that some level of process is required.

B. *Swift*

In 1999, DOJ employee Susan Swift brought a qui tam action against one current and two former coworkers at the Department's Office of Legal Counsel.[139] Swift alleged that the defendants violated the FCA by submitting fraudulent time sheets and leave slips.[140] The government sought dismissal, arguing (1) that it had the right to dismiss any claim brought in its name, and (2) that the costs of litigation well outweighed any recovery from the suit. The District Court for the District of Columbia granted the government's motion to dismiss.[141]

In *Swift v United States*, the DC Circuit upheld the district court, giving several related reasons why the government's right to dismiss is "unfettered."[142] First, the court examined the question through a separation of powers lens. It stated that as a constitutional baseline, the executive branch has the sole power to

136 Id at 773.
137 31 USC § 3730(d)(3).
138 31 USC § 3730(d)(3).
139 *Swift*, 318 F3d at 250.
140 Id.
141 Id at 251.
142 Id at 252.

execute and enforce the laws.[143] Inherent in this power is the right to bring and dismiss prosecutions without judicial oversight, except where the statute provides for judicial review.[144] Looking to the text for a clear statement of intent to override the separation of powers baseline, the court argued that the words "[t]he *government* may dismiss"[145] in the 1986 Amendment clearly refer to the executive's, and not the judiciary's, right to dismiss, "which at least suggests the absence of judicial constraint."[146] Looking to precedent, the court cited *Heckler v Chaney*[147] for the "presumption that decisions not to prosecute, which is what the government's judgment in this case amounts to, are unreviewable."[148]

This prosecutorial discretion argument is powerful, as the Supreme Court has repeatedly recognized the near plenary power of the executive branch to bring and withhold suit in both the civil and criminal contexts.[149] Judicial review of a prosecutor's decision to bring or dismiss the government's own case is only available where the defendant can meet the high bar of showing selective prosecution[150] or exercise of prosecutorial discretion for "impermissible reasons."[151]

Along these same lines, *Swift* rejects both the due process argument advanced in *Sequoia* (that the Fifth Amendment prevents "arbitrary or irrational prosecutorial decisions"[152]) as well as the argument advanced above (that relators have a protected property interest in their suits).[153]

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[143] *Swift*, 318 F3d at 252.

[144] Id at 252–53.

[145] Id at 251, quoting 31 USC § 3730(c)(2)(A) (emphasis added).

[146] *Swift*, 318 F3d at 252.

[147] 470 US 821 (1985). See also *United States v Armstrong*, 517 US 456, 465 (1996), citing *Wayte v United States*, 470 US 598, 607 (1985) ("Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.").

[148] *Swift*, 318 F3d at 252.

[149] See, for example, *Massachusetts v Environmental Protection Agency*, 549 US 497, 527 (2007); *Armstrong*, 517 US at 465; *Wade v United States*, 504 US 181, 186–87 (1992); *Wayte*, 470 US at 612–14; *Chaney*, 470 US at 834–35, 838; *Bordenkircher v Hayes*, 434 US 357, 364 (1978); *United States v Nixon*, 418 US 683, 693 (1974); *Vaca v Sipes*, 386 US 171, 182 (1967); *Confiscation Cases*, 74 US 454, 457 (1868).

[150] *Armstrong*, 517 US at 465 ("In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'").

[151] *Chaney*, 470 US at 847.

[152] *Sequoia*, 151 F3d at 1146.

[153] *Swift*, 318 F3d at 253.

The *Sequoia* court held that the Constitution prohibited arbitrary or irrational prosecutorial decisions, and, as such, the government must justify its decision to dismiss a relator's suit. The *Swift* court flatly rejected this claim, reiterating that the justifications for bringing or withholding prosecution are committed to the government's "absolute discretion."[154] This argument is much the same as the separation of powers argument, but instead of turning on whether the statute provided for judicial review, this argument focuses on whether the basic constitutional guarantees of due process provide for judicial review. The court conceded that even if the discretion is not absolute, at the very least the government is entitled to a presumption of rationality and good faith in its prosecutorial decisions.[155] *Sequoia* thus goes too far in flipping this presumption by impermissibly requiring the government to justify its decisions to seek dismissal.[156]

As for the other due process argument, the *Swift* court did not meaningfully engage with the argument this Comment advances in favor of some level of judicial review based on the "partial assignee" relationship. The court said simply that although the Supreme Court recognized relators as partial assignees of the government's claim, "[d]ismissal ends the assignment."[157] No further explanation was given. Thus, lacking any interpretive reason to justify judicial review, highlighting the constitutional presumption of deference to prosecutorial discretion, and rejecting the property interest–based due process argument, the court upheld the dismissal and adopted the "unfettered right" approach to government dismissal of relators' suits.[158]

The Fifth Circuit[159] and the Eastern District of Kentucky[160], in cases considering the constitutionality of the qui tam provision,

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154 Id.

155 Id.

156 Id.

157 *Swift*, 318 F3d at 254 n *.

158 Id.

159 See *Riley v St. Luke's Episcopal Hospital*, 252 F3d 749, 758 (5th Cir 2001) (en banc) (addressing the constitutionality of the FCA's qui tam provision, and noting that the government has the "unilateral power to dismiss an action notwithstanding the objections of the person") (quotation marks omitted). See also *United States v Delta Regional Medical Center*, 2019 WL 1305069, *5 (ND Miss) ("[T]he Fifth Circuit has all but explicitly stated that the government's decision to dismiss a qui tam false claim case is its choice alone.").

160 See *United States v Ball Homes, LLC*, 2018 WL 3213614, *4 (ED Ky), citing *United States ex rel Levine v Avnet, Inc*, 2015 WL 1499519 (ED Ky):

> Although § 3730(c)(2)(A) entitles him to 'a hearing' on the government's motion to dismiss, if he requests one, there is no requirement that he be permitted to

offer an additional argument in favor of *Swift*. They argue that the dismissal stage is the first real opportunity for the government to decide if it wants to bring the case, as the relator brings the suit in the government's name without having to obtain its consent first. Therefore, because the decision to dismiss is tantamount to the executive branch's decision not to prosecute, "the Court should give it the same deference."[161] Not permitting the government to dismiss here "usurps" the executive branch's prosecutorial discretion in the same way as if a court forced the executive to bring charges.[162]

C. The Choice of Dismissal Standard Is Outcome Determinative

Deciding which dismissal standard to apply is not simply a matter of interpretive and constitutional hairsplitting. Rather, this decision has real stakes for both relators and the executive branch. When a court applies *Sequoia*, the government must justify its decision and give both the court and the relator its policy goals and interests. When a court applies *Swift*, the relator is provided no protection from dismissal except in cases of outright fraud on the court. The solution to these approaches' shortcomings is not to simply employ both, as such an approach does not in any way address the root problems. Applying both would still mean either having the decision turn on the heightened *Sequoia* or the plenary *Swift* dismissal standard.

The choice of dismissal standard is crucial, as this decision is often outcome determinative.[163] Though there are currently no systematic studies of how often dismissal is denied, one of the few studies analyzing available data suggests a nonnegligible number of dismissal motions is rejected each year.[164] Additionally, the fact that the Granston Memo instructs attorneys to invoke the *Swift* standard in seeking dismissal suggests that the DOJ sees a meaningful difference in outcomes between the standards and, thus,

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introduce evidence. This Court has concluded that the government has virtually unfettered discretion to dismiss a False Claims Act case, save exceptional circumstances, such as a showing of fraud on the Court.

161 *Delta Regional Medical Center*, 2019 WL 1305069 at *6.

162 Id.

163 See, for example, *United States v Academy Mortgage Corp*, 2018 WL 3208157, *3 (ND Cal) (applying *Sequoia* and denying dismissal); *CIMZNHCA*, 2019 WL 2409576 at *2 (same).

164 Engstrom, 107 Nw U L Rev at 1715–18 (cited in note 20).

that dismissal is presumably less likely in *Sequoia* jurisdictions. This difference in outcomes is significant for both parties. When *Swift* is applied instead of *Sequoia* and the government's motion is granted, a possibly meritorious relator is left with almost no recourse. When *Sequoia* is applied instead of *Swift* and the government's motion to dismiss is not granted, the government is forced to permit an unwanted suit to continue in its name.

The cost to the government of a higher bar to dismissal is not insignificant. On the front end, such a standard requires greater investigation and work to dismiss meritless cases. This difference means millions of dollars and thousands of DOJ man-hours. For example, in a single health care qui tam case, the government recounted: "To date, the United States has had to devote considerable resources to this declined case. HHS-OGC has dedicated at least two attorneys, one almost full-time, and the Department of Justice has dedicated up to four attorneys to this case."[165]

On the back end, after their motion to dismiss is denied, the government will at least closely monitor the case developments, if not seek dismissal again, intervene to control the course of the suit, or seek settlement with the defendant.[166] One of the most notable expenses in dismissal-denied cases is the advancement to discovery and trial where government agents may be subjected to deposition and testimony for a case the government has already disclaimed interest in.[167] One dismissal motion states:

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165 Memorandum of Law in Support of the United States' Motion to Dismiss Relator's Third Amended Complaint, *United States ex rel Polansky v Executive Health Resources, Inc*, No 12-cv-04239-MMB, *10 (ED Pa filed Aug 20, 2019) (Polansky Motion to Dismiss).

166 Though exact statistics of resources and hours spent monitoring such cases is unavailable, the government's motion to dismiss in a 2019 case is representative. The government argued that

> [r]elators' continued pursuit of the matter will necessarily entail the further expenditure of the government's resources. As is evident from the government's participation to date, the United States has actively monitored Relators' litigation. In particular, the government has found it necessary on multiple occasions to file briefs to set forth the United States' views on the interpretation and application of the FCA to the legal theories alleged by Relators and the challenges to it presented by defendants.

United States' Motion to Dismiss Relators' Second Amended Complaint; [Proposed] Order, *United States ex rel Campie v Gilead Sciences, Inc*, No 11-cv-00941-EMC, *9 (ND Cal filed Mar 28, 2019) (available on Westlaw at 2019 WL 1583123).

167 Id ("Absent dismissal, the litigation will likely proceed to discovery, requiring the United States to commit even more significant resources. . . . [T]he same FDA and CMS employees relevant to discovery would be potential witnesses at any trial. This would divert those employees from their other duties and agency priorities.").

> If this litigation were to go forward, the United States would also need to continue devoting considerable resources to monitoring the case to ensure that the United States' interests are protected and not harmed by the ongoing litigation. Two Civil Division attorneys and two Assistant U.S. Attorneys have been assigned to this matter, and all four have devoted a considerable amount of time to this case at the expense of other important matters.[168]

The costs of just monitoring are significant, let alone the costs of being forced to participate in the suit. Whether it is DOJ lawyers or agency personnel, the impositions of a declined dismissal make the differences in outcome of more than just academic interest.

Additionally, a heightened dismissal standard results in fewer dismissals, which leads to more complaints and a greater number of those complaints being unsealed. Each unsealed complaint results in huge defense costs for regulated entities—even where the case is ultimately dismissed.[169] For one defendant, successfully rejecting the relator's claims required "eighteen years of litigation before three district judges and two magistrate judges, including massive discovery."[170] Lastly, in placing the burden to show rational relation on the government, even when the case is successfully dismissed, *Sequoia* ignores the legislative history's rejection of an "automatic right" to a hearing.[171]

On the other hand, when *Swift* is selected over *Sequoia*, relators are stripped of a property interest recognized by the Supreme Court without much of a meaningful opportunity to object. Furthermore, serious relators are discouraged from bringing suit as

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168 Polansky Motion to Dismiss at *20 (cited in note 165).

169 William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 S Ct Econ Rev 201, 225 (1998) ("[C]ontractors incur out-of-pocket legal costs of at least $250,000 to $500,000 whenever . . . a qui tam relator has filed a suit."); Pamela Bucy, et al, *States, Statutes, and Fraud: A Study of Emerging State Efforts to Combat White Collar Crime*, 31 Cardozo L Rev 1523, 1533 (2010) ("When a fraud investigation becomes public, business expansions, corporate borrowing, and mergers and acquisitions may be put on hold or lost as opportunities."); Todd J. Canni, *Who's Making False Claims, The* Qui Tam *Plaintiff or the Government Contractor? A Proposal to Amend the FCA to Require That All* Qui Tam *Plaintiffs Possess Direct Knowledge*, 37 Pub Contract L J 1, 12 (2007) ("These huge costs may ultimately put the contractor out of business.").

170 Brief of the American Hospital Association and Federation of American Hospitals as *Amici Curiae* in Support of Petitioners, *Intermountain Health Care, Inc v United States ex rel Polukoff*, No 18-911, *21 (US filed Feb 13, 2019).

171 S Rep 99-345 at 26 (cited in note 4).

they know they have no protections from summary dismissal or the possible employment consequences of failed whistleblowing. In denying relators any meaningful right to object to the proceedings, *Swift* ignores the legislative history's provision for evidentiary hearings when "substantial and particularized need" is shown.[172] In either direction, the difference in decisional rules matters for the government and relators as parties and for the incentive structure of the qui tam provision.

D. The Current Approaches' Interpretive and Constitutional Shortcomings

To lay the grounds for the proposed solution, this Comment will examine the failures of both current approaches to fully embrace the text and articulated purpose of the statute as well as the significant constitutional concerns they raise.

1. Both approaches fail to reflect the 1986 Amendment's text.

Both *Swift* and *Sequoia* fail to fully comport with the FCA's text. The plain text of the 1986 Amendment requires that the "Attorney General diligently shall investigate a violation under section 3729"[173] and that the court provide a relator "with an opportunity for a hearing on the motion" to dismiss.[174] *Swift* leaves both textual requirements unfulfilled.

First, the "unfettered right" approach of *Swift* jurisdictions directly conflicts with the Attorney General's duty to "diligently [ ] investigate."[175] Under *Swift*, the government only needs to receive the complaint before dismissing it, even when the relator can show the existence of a "manifest public interest" in investigating the case.[176] Such discretion renders the "hearing" requirement a nullity. The superfluidity canon counsels against such interpretations that ignore the duly passed and enacted words of Congress.[177]

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[172] Id at 42.

[173] 31 USC § 3730(a).

[174] 31 USC § 3730(c)(2)(A).

[175] 31 USC § 3730(a).

[176] *Hoyte v American National Red Cross*, 518 F3d 61, 65 (DC Cir 2008).

[177] See *Hibbs v Winn*, 542 US 88, 101 (2004), quoting Norman Singer, 2A *Sutherland, Statutes and Statutory Construction* § 46.06 at 181–86 (West rev 6th ed 2000) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."); *Bailey v United States*, 516 US 137, 146

Second, the statute repeatedly confirms that relators are coparties, not simply tipsters. Entitled "Rights of the parties to qui tam actions," § 3730(c) covers both the government's dismissal and settlement powers as well as the right of relators "to continue as a party to the action" after government intervention. Section 3730(c)(2)(C) further indicates that the relators are full-fledged parties in the suit. The section allows the government to reduce, at the court's discretion, the participation of a relator in a suit only when it shows a clear need on the government's or defendant's part. Just as the court recognized relators as partial assignees, the text of the statute empowers courts to protect that partial interest of relators. The total abdication of this role by courts adopting *Swift* conflicts with the text.

Lastly, § 3730(b)(1) requires written consent "and their reasons for consenting" from both the Attorney General *and* the court in order for a relator to dismiss their suit. If the Attorney General had plenary power to dismiss the suit, it is unclear why Congress would insert a written consent requirement. This provision clearly recognizes a role for courts in the proceedings—one *Swift* ignores.

On the other hand, *Sequoia* goes too far in the other direction by reading in a stricter standard of review than the text can support. All other provisions permitting government action or petition in the 1986 Amendment provide standards such as "good cause,"[178] "fair, adequate, and reasonable,"[179] or "[u]pon a showing."[180] Only the government's request to be served with copies of pleadings[181] and the dismissal provision[182] furnish no clear standard of judicial review. The canon of *expressio unius*[183] provides a robust presumption that Congress meant something when it did not include such standards in the dismissal provision. The only textual guide in the FCA is "diligently [ ] investigate."[184] There is no reason to interpret those two words to permit the probing, substantive review that *Sequoia* courts perform as a first resort in dismissal hearings. Furthermore, given the negative inferences

(1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.").

178 31 USC § 3730(b)(3).

179 31 USC § 3730(c)(2)(B).

180 31 USC § 3730(c)(2)(D).

181 31 USC § 3730(c)(3).

182 31 USC § 3730(c)(2)(A).

183 See, for example, *Tate v Ogg*, 195 SE 496, 499–500 (Va 1938).

184 31 USC § 3730(a).

drawn from the fact that only the dismissal provision lacks a standard for review, such an interpretation would be contrary to the plain meaning of the statute. As argued below, the minimum requirements of due process do not rescue *Sequoia*'s overreach either.

2. The 1986 Amendment's legislative history supports neither approach.

The 1986 Amendment's legislative history[185] further highlights *Sequoia's* and *Swift*'s interpretive deficiencies. The legislative history cuts against both current standards.

Beginning with *Swift*, the court's "unfettered right" approach ignores one of Congress's central reasons for passing the amendment: to make combatting fraud "a coordinated effort of *both* the Government *and the citizenry*."[186] The 1986 Amendment's drafters recognized the need for increased incentives and protections for relators to encourage potential relators to bring and pursue their suits vigorously.[187] Specifically, the legislative history reflects the 1986 Amendment's drafters' belief that its provisions would enable relators to "act[ ] as a check" against the government "neglect[ing] evidence" or otherwise mishandling the case.[188]

The *Swift* standard undermines the tool of qui tam suits—a tool Congress intentionally resuscitated in 1986—by reading out relator protections. *Swift* jurisdictions seemingly provide no recourse for dismissed relators.[189] Importantly, a dismissed suit carries none of the Act's protections from employer retaliation or termination that a successful relator is entitled to. The majority of relators are one-off plaintiffs[190] who "come forward despite the risk to their careers"—an act that "takes courage," as DOJ press releases frequently emphasize.[191] *Swift* disincentivizes relators from bringing suit by creating a cloud of doubt that the government will summarily dismiss, ignoring the Senate Report's

[185] See Part II.B. The only legislative history dealing with the dismissal standard, and the one used by every court to consider the issue, is the Senate Committee Report.

[186] S Rep 99-345 at 2 (emphasis added) (cited in note 4).

[187] Id at 4.

[188] Id at 26.

[189] *Swift*, 318 F3d at 253. See also *Ball Homes*, 2018 WL 3213614 at *4.

[190] Engstrom, 112 Colum L Rev at 1289 (cited in note 20).

[191] US Department of Justice Office of Public Affairs, *Justice Department Recovers Over $4.7 Billion* (cited in note 66).

specific declaration that the purpose of the qui tam revisions is to remedy this "great unwillingness to expose illegalities."[192]

Just as *Swift* ignores the text of the Act and the protections it provides relators, *Sequoia* overreads the Act's procedural protections. As discussed above, a main purpose of the Act was to incentivize relators in a number of ways—one of those being enhanced procedural protections. However, the legislative history was not silent about the nature of those protections from dismissal. The Senate Report states that "[t]he Committee does not intend, however, that evidentiary hearings be granted as a matter of right."[193] Rather, a hearing is only "granted when the qui tam relator shows a 'substantial and particularized need' for a hearing."[194] The legislative history is clear that there is no intent for an objection to result in the government *automatically* being forced to prove anything, let alone being forced in every dismissal motion to meet a judicially created rational relation test based neither in the history nor text of the 1986 Amendment. While *Sequoia* puts the burden of defending its substantive decision on the government in every dismissal, the legislative history imagines such investigations will occur only *after* the relator shows a "substantial and particularized need" for a hearing. There is no evidence in either the text or legislative history that supports such a constant and probing role for courts to review motions to dismiss. Furthermore, neither approach is saved from their interpretive problems, let alone even supported, by constitutional analysis.

3. The canon of constitutional avoidance counsels adopting an alternative interpretation.

Even if the standards fully embraced the text and history of the 1986 Amendment, they would still have to comport with the Constitution. In examining their constitutionality, the canon of constitutional avoidance[195] is instructive as both *Swift* and *Sequoia* raise serious constitutional concerns. As such, a court

192 S Rep 99-345 at 4 (cited in note 4).

193 Id at 26.

194 Id (emphasis omitted).

195 See, for example, *United States v Delaware and Hudson Co*, 213 US 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.").

should choose an interpretation of the FCA not raising such concerns so long as the statute is "reasonably susceptible" to such interpretation.[196]

Swift jurisdictions have yet to satisfactorily explain why "unfettered" dismissal of a relator's partial interest without a meaningful opportunity to object does not violate the minimum requirements of due process. While *Swift* is correct to note that the presumption is that "the Executive is acting rationally and in good faith,"[197] this does not, even in the context of prosecutorial discretion, totally insulate government dismissal from judicial review.[198] Even under the limiting principles of *Eldridge*, statutory entitlements require *some* amount of due process protection. In determining the "specific dictates" of the due process required, courts balance the individual's interest being deprived, the risk of erroneous deprivation under the current procedures as well as the efficacy of possible additional safeguards, and the costs and burdens additional procedural safeguards would place on the government.[199] Here, much like in *Eldridge*, relators have a statutorily created interest in a portion of the total recovery. However, unlike *Eldridge*'s posttermination hearing guarantee, *Swift* forces a relator to seek costly appellate review that is unlikely to safeguard the interest. Furthermore, the cost and burden to the government of instituting additional procedures is not clearly high enough to justify the current balance struck by *Swift* courts. Crafted to accommodate the age of statutory rights and entitlements, *Eldridge* does not stand for the proposition that any burden on the government justifies a total lack of process for interest holders. An opportunity to simply object without any requirement that the government respond is not likely the remedy this canon of construction calls for.

While *Swift* arguably denies relators their right to due process, *Sequoia* arguably unconstitutionally burdens the government's execution of the laws and prosecutorial discretion by permitting probing review under the guise of the constitutional minimum of due process. Prosecutorial discretion is incompatible with an approach requiring the government to satisfactorily justify dismissal every time a relator would prefer to proceed.[200]

196 Id at 407.

197 *Swift*, 318 F3d at 253.

198 See *United States v Batchelder*, 442 US 114, 124–25 (1979).

199 *Eldridge*, 424 US at 335.

200 See *Chaney,* 470 US at 821.

When the "statute has provided guidelines for the agency to follow in exercising its enforcement powers," the presumption of unreviewability may be rebutted, but only insofar as the court is evaluating the executive exercise of the statutory authority against the guidelines in that statute.[201]

Though "diligently [ ] investigate"[202] offers *some* standard against which to review the government's investigation, there is no compelling reason to read it as offering anything more. Under the Supreme Court's prosecutorial discretion caselaw, a court is empowered to review agency action against the text of the statute conferring the power to act.[203] Thus, a court is arguably on solid ground, under the holding of *Chaney*, to use the statutory guideline of diligent investigation as the standard against which to judge the DOJ's investigation of the complaint. However, this phrase furnishes no clear basis for *Sequoia* jurisdictions' requirement that the government provide and justify its cost-benefit analysis every time the relator objects to dismissal. Diligent investigation, the only relevant statutory guideline, concerns the process of the investigation, not the agency's balancing of enforcement priorities, resource constraints, regulatory strategy, and other complex factors.

Both approaches fail to embrace the text or history of the 1986 Amendment while raising significant constitutional concerns. Furthermore, neither successfully balances the incentives of the qui tam provision in both encouraging meritorious suits and discouraging meritless ones. Addressed fully in Part IV.D, *Swift* underprotects relators and thereby discourages those with knowledge of fraud from bringing suit, while *Sequoia* overprotects and thereby encourages meritless suits. As such, even if either approach better reflected the text of the Act and avoided constitutional problems, they would still fall short. The proposed solution not only lacks the interpretive and constitutional defects of *Sequoia* and *Swift*, but also incentivizes serious relators to bring suit while disincentivizing frivolous suits.

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[201] Id at 833.
[202] 31 USC § 3730(a).
[203] *Chaney*, 470 US at 833.

IV. The Executive Judgment Rule: How Corporate Law Balances the Textual, Constitutional, and Incentive Considerations

This Part argues that by adapting the business judgment rule to the FCA context, courts can embrace the text of the 1986 Amendment and remedy the proliferation of meritless qui tam suits. Given the similarities between the qui tam and shareholder derivative suit contexts, corporate law provides a satisfying solution because it strikes the optimal balance of incentives and protections. Much like the DOJ, a Special Litigation Committee is presented with a filed complaint and tasked with acting in the corporation's best interest. While the shareholder/relator is putatively suing on behalf of the corporation/government, their real interest is naturally self-interest. Thus, the question is the same in both contexts: How do we harness this self-interest for the corporation's/United States' benefit without also encouraging frivolous, costly suits? To do so, corporate law employs the business judgment rule. While the analogy is not perfect, the mismatches between the shareholder and relator contexts actually support importing this solution. Chiefly, unlike SLCs, we can justifiably assume the DOJ works in the public interest and without self-serving concerns. Secondly, unlike shareholders, relators receive sizeable rewards and have easier filing requirements. Thus, with the DOJ as the perfect SLC and relators as the most litigious shareholders, the business judgment rule's presumption of informed decision-making and focus on procedural concerns perfectly suits the qui tam context. While *Swift* discourages meritorious suits and *Sequoia* encourages meritless suits, this Comment's proposed Executive Judgment Rule strikes the optimal balance of protecting only those relators with viable claims.

This Part proceeds in five sections. To lay the foundation for the Executive Judgment Rule, Part IV.A provides necessary background on shareholder derivative suits, SLCs, and the *Auerbach* standard. Part IV.B describes the Executive Judgment Rule and analogizes the circumstances and procedural aspects of shareholder derivative suits and qui tam actions. Part IV.C argues that the proposed solution best embraces the text and history of the 1986 Amendment while avoiding the constitutional issues of the current approaches. Part IV.D examines literature on the incentive structures of whistleblower statutes to argue that not only would the proposed solution better serve the government and public by filtering out lower-quality tips but would also serve serious relators by guaranteeing a basic level of government review. Lastly, Part IV.E examines the solution in practice.

A. Shareholder Derivative Suits, Special Litigation Committees, and the *Auerbach* Standard

Though dealing with shareholders rather than relators, corporate law has grappled extensively with how to strike the optimal incentive balance between drawing out strong claims and minimizing the number of costly, frivolous suits. In doing so, a number of states have taken different approaches. This Comment does not seek to present them all in full detail. Rather, this Section will lay out the basic contours of shareholder derivative suits to explain where the business judgment rule came from and how it has been applied. Specifically, for reasons discussed later in this Section, the Executive Judgment Rule adopts the more deferential approach of New York State and the dozen or so other jurisdictions following *Auerbach*. Before examining the specifics of *Auerbach*, a brief primer on shareholder derivative suits and SLCs is necessary.

A shareholder derivative suit is an action taken by a shareholder seeking to "enforce a corporation's rights where its directors refuse to seek a remedy for an alleged harm to the corporation."[204] A shareholder alleging such a refusal has two options. First, the shareholder can serve a demand letter on the corporation's board. By doing so, the shareholder is implicitly conceding that the majority of the board is independent and able to fairly review the complaint.[205] In this first situation, all courts apply the business judgment rule and, with the exception of "extraordinary cases,"[206] the board's decision regarding the letter is affirmed.[207] As such, the majority of shareholders take the second option: purporting to bring the litigation on behalf of the corporation and alleging that the demand requirement is excused as futile.[208] To

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[204] Judson R. Scaggs Jr and Angela C. Whitesell, *Derivative Lawsuits*, Part II.A (Bloomberg BNA, 2014), online at https://www.bloomberglaw.com/document/4305287208 (visited Apr 21, 2020) (Perma archive unavailable).

[205] Scott Hirst, *Special Litigation Committees in Shareholder Derivative Litigation* (Harvard Law School Forum on Corporate Governance, Apr 25, 2010), archived at https://perma.cc/G596-GX2S.

[206] Id, citing *Kamen v Kemper Financial Services, Inc*, 908 F2d 1338, 1343 (7th Cir 1990), revd on other grounds, 500 US 90 (1991).

[207] Hirst, *Special Litigation Committees* (cited in note 205).

[208] Id.

excuse the demand requirement, the shareholder must show particularized facts that create a reasonable doubt that a majority of the board could impartially consider the complaint.[209] If the shareholder successfully alleges board partiality, the shareholder brings the suit on behalf of the corporation,[210] but the board has another avenue for reasserting the corporation's control over the suit: the SLC.[211]

Once suit is filed, the corporation may elect to form an SLC, which is comprised of those members of the board or other appointees not involved in the alleged mismanagement, violation, or action at issue.[212] SLCs enable a board to reassert control over the suit in cases in which the shareholder has successfully alleged demand futility.[213] These SLCs are independent from the board and retain final decisional authority over the shareholder's suit.[214] Assuming the SLC's decision passes judicial review, this tool enables a corporation to dismiss the shareholder's suit.[215]

State courts afford varying levels of deference to the SLCs' decisions to dismiss derivative suits. The deference accorded to SLCs turns on whether the court applies the business judgment rule—essentially the presumption that the board or SLC members are disinterested, informed, and acting in good faith, and, thus, that the court will not second-guess the board's or SLC's motion.[216] The majority, and least deferential, approach is that of Delaware, as set out in *Zapata Corp v Maldonado*.[217] Under *Zapata*, the corporation must prove that the formation, composition, and work of the SLC were at all times independent, undertaken in good faith, and reasonable.[218] If the corporation cannot show that the SLC was independent, then the court "appl[ies] its own independent business judgment, whether [dismissal] should be

[209] Id. This is the approach in Delaware and New York. See Del Chanc Court R 23.1 and NY Bus Corp L § 626.

[210] Hirst, *Special Litigation Committees* (cited in note 205).

[211] Id.

[212] Id.

[213] Scaggs and Whitesell, *Derivative Lawsuits*, Part VII.A (cited in note 204).

[214] Id.

[215] Hirst, *Special Litigation Committees* (cited in note 205).

[216] The business judgment rule recognizes that courts struggle to make substantive determinations about the propriety of business decisions and therefore gives deference to a board's unconflicted business judgments.

[217] 430 A2d 779 (Del 1981).

[218] Id at 787. See also Hirst, *Special Litigation Committees* (cited in note 205).

granted."[219] Even if the corporation does establish the SLC's independence, dismissal is not guaranteed as the court still "may proceed, in its discretion" to its own independent review of whether dismissal is in the corporation's best interest.[220] Under *Zapata*, the business judgment rule's protection is not guaranteed. Rather, courts are empowered, even where the SLC passes procedural muster, to wade into the fact-intensive, values-balancing quagmire of deciding whether the suit best serves the corporation's interests.

This lack of deference comes out of Delaware's anxiety over whether SLCs actually resolve the alleged partiality of the board.[221] This is not without basis as many academics share the concern over SLCs.[222] Delaware's suspicion of SLCs leads its courts to decide whether the facts justify dismissal and, in doing so, to make their own judgments as to the best interest of the corporation[223]—a substantive call that courts are poorly positioned to make.[224] The varying strength of this anxiety over the good faith and independence of SLCs helps fuel the difference in standards across jurisdictions.

Unlike Delaware, New York and the jurisdictions following its lead accord SLCs greater deference. Rejecting *Zapata*, New York held in *Auerbach v Bennett*, that courts cannot attempt to apply their own business judgment; rather, they may only review

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219 *Zapata*, 430 A2d at 789.

220 Id.

221 Id at 787:

> [W]e must be mindful that directors are passing judgment on fellow directors in the same corporation and fellow directors, in this instance, who designated them to serve both as directors and committee members. The question naturally arises whether a 'there but for the grace of God go I' empathy might not play a role.

Such concerns of director fraternity assumedly do not exist when the DOJ determines whether to sue a fraudulent contractor.

222 See, for example, C.N.V. Krishnan, Steven Davidoff Solomon, and Randall S. Thomas, *How Do Legal Standards Matter? An Empirical Study of Special Litigation Committees* (Vanderbilt Law Research Paper No 17-56, Nov 29, 2019), archived at https://perma.cc/84UF-MQ2M (finding that the greater deference to the SLC, the more likely the SLC is to seek dismissal); Kenneth B. Davis Jr, *Structural Bias, Special Litigation Committees, and the Vagaries of Director Independence*, 90 Iowa L Rev 1305, 1306–09 (2005). Not all jurisdictions outside of *Auerbach* consider the SLC as suspect. Rejecting Delaware's scrutiny of SLCs, the ABA's Model Business Corporation Act (MBCA) favors *Auerbach*, prompting commentators to note that the MBCA "entrusts courts with the least latitude possible" in questioning the SLC's decision. Meg Shevach, Comment, *Deciding Who Should Decide to Dismiss Derivative Suits*, 39 Emory L J 937, 956 (1990).

223 *Zapata*, 430 A2d at 788.

224 *Auerbach*, 393 NE2d at 999–1000.

SLCs for independence and for the "sufficiency of the investigative procedures chosen and pursued."[225] So long as the procedure by which the SLC was formed and operated is untainted, New York courts will grant the SLC's motion to dismiss.[226]

The *Auerbach* approach, which continues to gain converts even after four decades,[227] limits judicial scrutiny to the procedure of the SLC.[228] So long as the SLC's procedure is not grossly negligent, its decision is accorded business judgment rule deference. Only where the shareholder provides a substantiated basis to question the "disinterested independence of the members of that committee" or "appropriateness and sufficiency of the investigative procedures chosen and pursued," is the business judgment rule presumption rebutted and may the court then review the "substantive aspects" of the SLC's decision to terminate the suit.[229] In examining the SLC's investigation, the court relies on its expertise as an investigative body itself. The court looks to the "adequacy and appropriateness of the committee's investigative procedures and methodologies."[230] If the court finds the methods flawed such that the SLC did not properly inform itself, or if the SLC's investigation was restricted in scope or execution or performed so halfheartedly as to "constitute a pretext or sham," then the business judgment rule is peeled back.[231]

The New York Court of Appeals created this approach because it recognized how difficult and imprecise it is to review corporate decisions. In applying its own "oxymoronic judicial 'business judgment,'"[232] in the words of then–Vice Chancellor Leo Strine, a court following *Zapata* is forced to evaluate a litany of fact-intensive considerations in determining whether the decision

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[225] Id at 996.

[226] See id:

> [T]he substantive aspects of a decision to terminate a shareholders' derivative action against defendant corporate directors made by a committee of disinterested directors appointed by the corporation's board of directors are beyond judicial inquiry under the business judgment doctrine, the court may inquire as to the disinterested independence of the members of that committee and as to the appropriateness and sufficiency of the investigative procedures chosen and pursued by the committee.

[227] See, for example, *In re Dish Network Derivative Litigation*, 401 P3d 1081, 1085 (Nev 2017).

[228] See *Auerbach*, 393 NE2d at 996.

[229] Id.

[230] Id at 1002.

[231] Id at 1003.

[232] *In re Oracle Corp Derivative Litigation*, 824 A2d 917, 928 (Del Chanc 2003).

was reasonable at the time. The general unsuitability of business decisions for judicial review explains the business judgment rule's existence and, more specifically, New York's preference for evaluating process rather than substance in reviewing SLC decisions. As described in *Auerbach*:

> [T]he business judgment doctrine, at least in part, is grounded in the prudent recognition that courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments. The authority and responsibilities vested in corporate directors both by statute and decisional law proceed on the assumption that inescapably there can be no available objective standard by which the correctness of every corporate decision may be measured, by the courts or otherwise.[233]

The especially fraught circumstances of shareholder derivative litigation—in which the SLC must decide, for example, whether to hold a director or officer liable for conduct—compounds this difficulty. As such, *Auerbach* turns to ensuring the process and independence of the SLC and leaves the difficult weighing of factors and priorities to those most knowledgeable: the SLC members.[234] This is not to say the Supreme Court of Delaware's anxiety over SLCs is unfounded, but for the purposes of this analogy to executive investigation and dismissal of qui tam relator suits, *Auerbach* offers the more sensible standard.

The DOJ and executive assumedly do not raise the worries of self-dealing and self-serving behavior that critics allege of SLCs—because derivative suits are brought against their fellow board members and the corporation. Government attorneys are not being asked to determine whether one of their coworkers should be subjected to liability, as directors on SLCs are; rather, they are determining whether to seek recovery for fraud committed by a contractor. There is no compelling reason to apply Delaware's nondeferential approach to SLC decisions to the qui tam context.

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[233] *Auerbach*, 393 NE2d at 1000. See also Bernard S. Sharfman, *The Importance of the Business Judgment Rule*, 14 NYU J L & Bus 27, 30 (2017) ("[W]ithout the Rule, the raw power of equity . . . could conceivably require all challenged Board decisions to undergo an entire fairness review.").

[234] For an example of this analysis, *Auerbach* held that the SLC's process was sufficient because, among other actions, the SLC "promptly engaged eminent special counsel," reviewed all work of the audit committee and tested their reports for "completeness, accuracy and thoroughness," and interviewed all those who were "in any way" related to the alleged issue. *Auerbach*, 393 NE2d at 1003.

Rather, *Auerbach*'s approach of providing full deference so long as the SLC follows reasonable investigative procedures is much more appropriate to the situation of the DOJ. Because courts can presume that the DOJ is independent and impartial, *Zapata* does not offer a useful guide for evaluating dismissal decisions. Just as corporate governance decisions are difficult balancing questions, decisions to dismiss qui tam suits involve difficult cost-benefit analyses and regulatory priority decisions. As such, where sufficient procedure merits the business judgment rule in *Auerbach* jurisdictions, sufficient procedure should merit the Executive Judgment Rule in DOJ decisions to dismiss relators' claims.

B. Applying the Wisdom of Corporate Law: The Executive Judgment Rule

This Section proceeds in two parts. First, it explains how the Executive Judgment Rule would model the *Auerbach* approach and utilize the language of the 1986 Amendment as a guide for judicial review. Second, having set out the Rule, this Section argues that the similarities in goals and context between shareholder and relator suits offer strong support for adapting the successes of corporate law to FCA suits. This Section will argue that beyond the clear analogy between the two fields, interpretive, constitutional, and incentive analysis all counsel in favor of the Executive Judgment Rule.

1. How the Executive Judgment Rule would work.

Applying the *Auerbach* approach to the qui tam context would be relatively simple. First, courts should treat the relator as a shareholder. Second, courts should treat the government as an SLC. Third, if the relator challenges the government's dismissal (by seeking a hearing), courts should only allow the relator to substantively challenge alleged procedural defects in the DOJ's investigative process.[235] Relators may only attack the process by which this decision was made (for example, insufficient scope, duration, and effort of the investigation) and not the substantive, policy-based determinations of the government (for example,

[235] An investigation restricted in scope or execution or performed so halfheartedly as to "constitute a pretext or sham . . . would raise questions of good faith or conceivably fraud which would never be shielded by that doctrine." Id. But, "[w]hile the court may properly inquire as to the adequacy and appropriateness of the committee's investigative procedures and methodologies, it may not under the guise of consideration of such factors trespass in the domain of business judgment." Id at 1002.

cost-benefit analysis, need for gatekeeping, and merit determinations).

Under the Executive Judgment Rule, courts would give meaning to the 1986 Amendment's requirement that the "Attorney General diligently shall investigate."[236] This statutory language would be the touchstone for all review of the procedure by which the government investigated the case. Only when a relator shows procedural defects should a court require the government to explain its decision to dismiss on substantive grounds. Using the statutory lodestar of "diligently [ ] investigate," courts would scrutinize any procedural defects in the government's investigation.

For example, the relator could rebut the presumption favoring deference to the government by evidencing the failure of the government to review documents submitted by the relator, interview witnesses named in the complaint, or otherwise not diligently investigate the matter. Although relators do not have access to the government's substantive reasoning, they are well positioned to know whether the information, witnesses, and directions for investigation they provided are being reviewed and pursued. As the majority of qui tam suits are whistleblower suits, the relator is often the sole possessor of the relevant knowledge and means of divulging the fraud. For instance, in *United States v Academy Mortgage Corp*,[237] the relator brought a claim over fraudulent mortgage certifications.[238] The relator knew which witnesses to question and whether they had been questioned, and repeatedly tried to provide the government with evidence about the fraudulent certifications.[239] Given the highly technical and complex nature of many FCA violations, the government relies on the relator,[240] and this reliance allows relators to see if the government has actually examined the material, witness, and relator information.

2. The shareholder derivative suit context analogizes well to the qui tam relator context.

Before examining the interpretive, constitutional, and incentive rationales for the Executive Judgment Rule, it is useful to

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236 31 USC § 3730(a).
237 2018 WL 3208157 (ND Cal).
238 Id at *1.
239 Id at *2.
240 S Rep 99-345 at 4 (cited in note 4). See also Part I.B.

further discuss why analogizing to this corporate approach makes sense. First, shareholders and relators are both, in theory, suing to promote good (corporate) governance. While the qui tam relator is more directly incentivized by the promise of a reward, in general the positions are quite analogous as both have a limited, but actual, interest in the suit. Just like qui tam relators, shareholders in derivative suits seek redress on behalf of the corporation for an injury felt primarily by the corporation and only incidentally by the shareholder. Both are afforded rights by their part ownership/membership in the constituent body. And, crucially for this analogy, both also require careful incentive-regime building.

SLCs and the DOJ are also similarly situated. Both are charged with investigating claims impartially and "diligently"[241] and rendering a decision on the best path forward in the corporation's/government's interest, and not just the shareholder's/relator's interest. Further, the main anxiety surrounding SLCs, as the Delaware Supreme Court has expressed, is that they are acting in their own and fellow board members' interests rather than the interest of the corporation.[242] This is not a concern with government attorneys. In contrast to the systemic corruption and "structural bias" that plague SLCs,[243] DOJ attorneys are unlikely to be biased by a desire to shield the government from its misdeeds[244] as targets of qui tams are contractors, not the government itself.[245] Thus, there is little compelling reason to provide more robust procedural protections for relators and less deference to the DOJ. This key distinction speaks strongly against bias concerns that might make courts hesitant to adopt the *Auerbach* standard in the corporate context.

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[241] 31 USC § 3730(a).

[242] See Part IV.A.

[243] Davis, 90 Iowa L Rev at 1306–09 (2005) (cited in note 222). See also generally Krishnan, Solomon, and Thomas, *How Do Legal Standards Matter?* (cited in note 222) (finding that the greater deference to the SLC, the more likely the SLC is to seek dismissal).

[244] Comparing data in prosecutions and dismissals between administrations and subject areas demonstrates that there is negligible partisan coloring of DOJ dismissal decisions. Engstrom, 107 Nw U L Rev at 1720–27 (cited in note 20).

[245] This is not to say that the DOJ seeking dismissal to protect the government from its own misdeeds is an unheard-of argument. *Ridenour*, 397 F3d at 937–38 (explaining the relators' accusation that the government sought dismissal to avoid the suit revealing mismanagement of a nuclear facility). However, on balance, the concern of an SLC member protecting "one of its own" is much more intuitive than the government allowing continued fraud out of embarrassment for having been defrauded.

Lastly, the business judgment rule and prosecutorial discretion have strikingly similar foundations: both seek to prevent courts from getting weighed down in fact-intensive, imprecise, and substantive analysis. The business judgment rule seeks to keep courts from examining the substance of decisions because "[q]uestions of policy of management, expediency of contracts or action, adequacy of consideration, [and] lawful appropriation of corporate funds to advance corporate interests" are not strong suits of courts and should be left to the corporation's directors even when "the results show that what they did was unwise or inexpedient."[246] Analogous to a business's decision not to pursue a derivative lawsuit is the government's decision not to prosecute because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise."[247] Further supporting the Executive Judgment Rule are the concerns raised by *Swift* about the constitutionality of such probing court review. While *Zapata* jurisdictions deploy searching review of SLCs' independence, courts have no similar reason to expect the DOJ to behave partially. The arguments undergirding *Auerbach* thus ring even truer in the FCA context.

C. Textual and Constitutional Support for the Executive Judgment Rule

As an initial matter, it is useful to remember that neither the *Sequoia* approach nor the *Swift* approach is mandated by the text of the Act itself. Both are judicially created gap-fillers. Outside of one approach's ability to effectuate the purpose of the FCA, there is no reason to privilege one over the other. This Section argues that the Executive Judgment Rule not only best maps onto the text and legislative history of the 1986 Amendment, but also best resolves the constitutional concerns raised by both current approaches.

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[246] *Auerbach*, 393 NE2d at 1000, quoting *Pollitz v Wabash Railroad Company*, 100 NE 721, 724 (NY 1912).

[247] *Chaney*, 470 US at 831.

1. The proposed solution fully embraces the 1986 Amendment's text.

The Executive Judgment Rule overcomes the superfluidity shortcomings of *Swift* by making the provided hearing a meaningful opportunity to object.[248] Under the proposed solution, the hearing would allow the relator to challenge the government's procedural conduct of the investigation against the statutory touchstone of "diligently shall investigate." Such an approach reflects the Act's clear instruction that the relator is a coparty, not simply a tipster, and better comports with the statute's provision of a role for the court.

This solution also avoids the shortcomings of *Sequoia*, which goes well beyond the statutory language to make inquiry into the government's decisional calculus and substantive priorities the first stop after any relator objection to dismissal. All other provisions but the dismissal portion of the Act provide a standard for review, strongly implying that the elaborate superstructure *Sequoia* built on top of the two words "diligently [ ] investigate" cannot withstand the canons of *expressio unius* and meaningful variation.

2. The proposed solution avoids the constitutional defects of both current approaches.

While *Swift* frees the government to deprive relators of their recognized partial interest in the suit, the proposed solution offers a minimum level of due process. In fashioning the procedural safeguards, the Executive Judgment Rule takes its cue from cases like *Eldridge*, which state that "due process is flexible and calls for such procedural protections as the particular situation demands."[249] In attempting to balance the relator's interest, risk of erroneous deprivation, and the government's interest under the *Eldridge* test,[250] *Swift* ignores the first two factors. *Swift* denies relators any interest, despite that interest being statutorily provided and recognized by the Supreme Court, while also ignoring

[248] See Part III.D.1.

[249] *Morrissey v Brewer*, 408 US 471, 481 (1972). As the Court explained in *Morrissey*, the flexibility of due process "has been said so often by this Court and others as not to require citation of authority." Id. See also *Connecticut v Doehr*, 501 US 1, 10 (1991), quoting *Eldridge*, 424 US at 334 ("[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."); Jason Parkin, *Adaptable Due Process*, 160 U Pa L Rev 1309, 1319–34 (2012).

[250] *Eldridge*, 424 US at 334–35.

the lack of meaningful review for dismissal and low burden a procedural review of government investigation would impose.

Sequoia, on the other hand, ignores the strong government interest in control over its laws and prosecutions and, importantly, goes beyond "additional or substitute procedural safeguards"[251] in permitting every objecting relator the right to searching review of the government's substantive and policy grounds for seeking dismissal. *Sequoia* goes past the realm of limited due process that *Eldridge* contemplates for partial and statutorily provided property interests. And, in doing so, it infringes on the government's prosecutorial discretion without clear justification. It is important to remember that the difference between *Swift* and *Sequoia* is not simply that *Sequoia* offers a hearing. Where *Swift* gives essentially no meaningful opportunity to object, *Sequoia* requires the government, in *each* case of relator objection, to explain why dismissal is justified by legitimate state interests. This is not simply another layer of procedural review. *Sequoia* forces the government to divulge its cost-benefit analysis, its regulatory priorities, and its prosecutorial interests in order to achieve dismissal. This goes beyond what is required in criminal and agency decisions not to prosecute. *Eldridge*'s factors should not be read to impose a duty to divulge in the context of a partial right under the FCA, especially when such a duty is not demanded even under full due process protections in criminal prosecutions. While judicial review of executive branch action taken pursuant to the relevant statute is permissible, *Chaney* makes clear it is limited to those "guidelines [provided by the statute] for the agency to follow in exercising its enforcement powers."[252] "[D]iligently [ ] investigate," however, furnishes no basis for *Sequoia*'s requirement that the government explain its substantive reasons for seeking dismissal to the court's satisfaction.

By contrast, the Executive Judgment Rule guarantees relators a minimum of due process by ensuring the procedure by which this partial, speculative interest is deprived includes adequate review of the evidence and facts before the government. This is in line with *Chaney,* as judicial review is tied directly to the statutory guideline of diligent investigation imposed by Congress. Procedural review, not searching substantive probing, best ensures that the DOJ diligently investigated. No statutory

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[251] Id at 335.

[252] *Chaney*, 470 US at 833.

guidelines suggest any further basis for review of the government's decision to dismiss.

Under the canon of constitutional avoidance, the proposed solution is the clear winner. As this Comment argues, not only does the solution best map onto the text of the Act, but it also eschews the constitutional concerns plaguing both current approaches. Additionally, the Executive Judgment Rule goes beyond simply addressing the interpretive and constitutional failings of *Swift* and *Sequoia*; it best achieves the entire purpose of the qui tam provision—a claim neither current approach can accurately make.

D. The Executive Judgment Rule Creates the Optimal Incentives Structure

This Section examines recent literature on the role of pleading standards in the FCA's incentive structure to argue that the proposed dismissal standard will lead to higher quality tips for the government, fewer meritless suits, and greater protection for meritorious relators.

Although Congress took pains to explain that the incentive structure is the whole ballgame when it comes to the qui tam provision, neither *Swift* nor *Sequoia* courts have grappled with the poor incentive structures that their rules create. According to the Senate Report, the entire point of the qui tam provision is to bring about a "coordinated effort of both the Government and the citizenry" to combat fraud.[253] Neither rule strikes the balance of encouraging meritorious suits while discouraging the proliferation of meritless and wasteful strategic suits. As argued below, the Executive Judgment Rule achieves this balance by guaranteeing serious relators the ability to ensure their complaints are fully investigated without giving strategic or meritless relators a basis for misusing the qui tam provision by placing the burden of justification on the government.

1. Altering the dismissal standard affects relators' incentives.

Recent research on the role of heightened pleading standards offers a useful basis for understanding the similar role dismissal standards play.[254] Because dismissal standards are just as much

253 S Rep 99-345 at 2 (cited in note 4).

254 Anthony J. Casey and Anthony Niblett, *Noise Reduction: The Screening Value of* Qui Tam, 91 Wash U L Rev 1169, 1203 (2014); Michael Lockman, Comment, *In Defense of*

a part of "the private cost of blowing the whistle"[255] as scienter requirements and retaliation protections, raising the pleading standard is likely to have similar results to lowering the dismissal standard. This similarity allows us to apply much of the extant pleading standards research to the dismissal standards context. For instance, recent works on the FCA note that a stricter pleading bar "does not diminish relators' incentives to file high-quality qui tam suits, but rather serves as a much-needed screening mechanism to ensure that the DOJ is not flooded with low-quality tips."[256] That is, even when the system makes it more difficult to establish their complaint, relators with meritorious cases are not discouraged from coming forward. This is easily transferable to the dismissal context. The Executive Judgment Rule guarantees only that the procedure of the investigation will meet the statutory requirement. Knowing that their case will be fully investigated before a decision is reached, relators with strong claims can be confident that the value of their claim is seen. By contrast, those with weak or meritless claims will be discouraged as the procedural guarantee offers no benefit to them.

The choice of dismissal standard affects the number of suits brought. This is so because we can expect awareness of dismissal standards to play a role similar to any other factor attorneys and relators weigh before bringing suit, especially as the professionalization of the qui tam bar increases.[257] When relators know that they have essentially no ability to meaningfully object to dismissal, as in *Swift* jurisdictions, they will likely be less willing to risk time, money, and their livelihoods to bring an uncertain case. However, where they are certain that not only can they object but that the government must explain its decisions to the satisfaction of a court, as in *Sequoia* jurisdictions, they will be more likely to bring suit. Though decreasing the relator's cost of blowing the whistle may encourage more meritorious whistleblowers to come forward, it also encourages more relators in general to come forward.[258]

Beyond just over- or underencouraging relator suits, a suboptimal dismissal standard also risks incentivizing self-dealing and

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a Strict Pleading Standard for False Claims Act Whistleblowers, 82 U Chi L Rev 1559, 1568–69 (2015).

[255] Casey and Niblett, 91 Wash U L Rev at 1201 (cited in note 254).

[256] Lockman, Comment, 82 U Chi L Rev at 1560 (cited in note 254).

[257] See Engstrom, 112 Colum L Rev at 1318 (cited in note 20).

[258] Casey and Niblett, 91 Wash U L Rev at 1201 (cited in note 254).

strategic suits among relators. When relators are increasingly free to pursue claims that the government would otherwise dismiss, they become "monopolists in the production"[259] of the settlement or trial, which encourages relators to bring suits solely for strategic reasons.[260] An ulterior motive may not be problematic when the underlying fraud claim is meritorious. But when the ulterior motive is the only motive, *Sequoia* risks allowing businesses to sue competitors to force *in terrorem* settlements, competitors to turn over sensitive information in discovery, and the government to divulge its regulatory and enforcement priorities. As qui tam suits are already incredibly expensive—with the average defense cost starting at $250,000[261]—permitting, and even encouraging, wasteful and counterproductive suits only further cuts against *Sequoia*.

2. The Executive Judgment Rule strikes the optimal balance of encouraging meritorious suits while discouraging frivolous suits.

For *Swift* jurisdictions, this change will encourage relators to file suit as they can ensure that the government actually engages with their complaint. As stated above, this assurance of investigation is only appealing to those relators with a complaint that can stand on its merits.[262] Implementing the Executive Judgment Rule here reassures those who fear summary government dismissal in the wake of the Granston Memo. And, importantly, the Executive Judgment Rule continues to discourage those without meritorious claims from bringing costly and unnecessary litigation for strategic purposes—as *Sequoia* does.

For *Sequoia* jurisdictions, the Executive Judgment Rule will better protect serious relators. The rational relation test focuses solely on the government's substantive reasoning for dismissal and does little for a relator concerned that their high-quality tip will not be fully investigated. Such a relator is better served by

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[259] Depoorter and De Mot, 14 S Ct Econ Rev at 156 (cited in note 67).

[260] Like in *Sequoia*, qui tam actions are often brought by competitors or those who lost out on government bids. Forcing the government to explain its substantive reasoning may offer a useful avenue for competitors to engage in fishing expeditions regarding the government's regulatory, enforcement, or prosecutorial priorities. For a positive spin on this strategic competition aspect of FCA litigation, see J. Stephen Simms, Robin Page West, and Vincent J. Columbia Jr, *Using the False Claims Act for Competitive Advantage*, 30 Md Bar J 29, 31 (1997).

[261] Kovacic, 6 S Ct Econ Rev at 225 (cited in note 169).

[262] See Part IV.D.1.

the Executive Judgment Rule as it would always allow them to challenge the government's fulfillment of the statutorily mandated diligent investigation, regardless of the persuasiveness of the government's cost-benefit analysis.[263] Furthermore, relators writ large are likely better served by such a standard. When a relator asks the court to examine whether a government interest is rationally related to dismissal, both the relator and the court are the least informed and skilled parties to the analysis. When a relator asks the court to evaluate the thoroughness of the government's investigation, both relator and judge are well informed and skilled to do so. The relator, as the holder of the complaint and information, is well suited to know the extent of the government's investigation into the relator's allegations. And the court is well suited to accurately and consistently judge the government's investigation, as well as any constitutional claims the relator may allege.

The analysis of the current dismissal standards is important as it undermines the conventional assumption that *Sequoia* is in the relator's best interest and *Swift* is in the government's best interest. Neither of those approaches strikes the proper balance. Only the Executive Judgment Rule screens low-quality tips by raising the private cost of litigation while simultaneously incentivizing high-quality tips by guaranteeing a diligent investigation of those claims. As such, not only is the proposed solution the most compatible with the text, history, and constitutionality of the Act, but it best serves the purposes enshrined in the 1986 Amendment.

E. The Rule in Practice: Applying the Executive Judgment Rule

This Section will examine two recent qui tam dismissal cases that demonstrate a court's capacity for implementing the Executive Judgment Rule. The first case shows how a court would actually go about this analysis. The second shows how *Sequoia* jurisdictions, even where they review the investigation, go too far beyond the textual and constitutional bounds in burdening the government with additional hoops to jump through to attain dismissal. Both selected cases are from *Sequoia* jurisdictions for two reasons. First, given the extreme deference of *Swift* jurisdictions, only egregious deficiencies that amount to "fraud on the court"

[263] 31 USC § 3730(a).

are bases for meaningful judicial review. The type of review contemplated by the Executive Judgment Rule sees courts stepping in well before outright fraud by the government. Second, the *Sequoia* court cases here are unique for focusing almost exclusively on procedural review and, in doing so, evidence the ability of courts to do just that under the Executive Judgment Rule. However, unlike in *Sequoia* courts, the proposed solution would place the burden of alleging investigative inadequacy on the relator, not the government. In doing so, the Executive Judgment Rule addresses the competing textual and constitutional concerns while still allowing for meaningful judicial review where warranted.

In *United States v Academy Mortgage Corp*, the relator alleged that Academy Mortgage defrauded the government by falsely certifying loans.[264] The government sought dismissal.[265] The court ordered an evidentiary hearing after the relator provided evidence that the government failed its investigatory duty by, among other things, refusing to even read her new complaint.[266]

The court held that the government failed to meet its burden to show a rational relation between dismissal and its interests because its investigation was procedurally defective. The court found that the government conducted no investigation outside of interviewing the relator and receiving her documents, "even turning down the Relator's counsel when he offered to provide additional information."[267] The court specifically noted two investigative failings. First, the government failed to interview key witnesses. And, second, the data necessary to investigate the complaint resided with the Department of Housing and Urban Development, yet government attorneys refused to request or review it, even after the relator filed a FOIA request to provide the government with its own information.[268] Summing up the failure of the government to meet the statutory "diligently [ ] investigate" minimum, the court stated that "[w]hatever the precise contours of a 'full investigation' may be, the Government has not conducted such investigation in this case."[269]

264 *Academy Mortgage*, 2018 WL 3208157 at *1.
265 Id.
266 Id at *1–2.
267 Id at *1.
268 *Academy Mortgage*, 2018 WL 3208157 at *2.
269 Id at *2.

Though applying *Sequoia*, the court utilized many of the same tools that the proposed solution relies on. The basic procedural requirements of investigating the claim, as *Auerbach* requires, were shown to be missing, so the court held that the government did not establish a rational relationship between dismissal and its interests. Courts in *Sequoia* jurisdictions—and even *Swift* jurisdictions when relators allege issues of fraud on the court or other manifest procedural errors—are already performing the type of procedural investigation this proposed solution entails. However, simply incorporating judicial review of DOJ investigation is not enough. Adding the Executive Judgment Rule's analysis to *Sequoia* does not remedy the textually and constitutionally problematic review that encourages frivolous suits. Adding the Executive Judgment Rule's analysis to *Swift*, but only in situations of egregious fraud, denies any of the benefits of the rule and avoids none of *Swift*'s textual, constitutional, and policy problems. Under the Executive Judgment Rule, courts' analyses would be structured and guided by the statutory anchor of "diligently [ ] investigate." Only when a relator rebutted the presumption of proper investigation may the court then turn to a more searching review of the government's decision. This approach is attractive not simply because courts are well-placed to do it, but, crucially, because it fully embraces the text and history of the 1986 Amendment, the Constitution, and the purpose of the qui tam provision in drawing out strong relators and discouraging meritless ones.

Another illustrative example is *United States ex rel CIMZNHCA, LLC v UCB, Inc*[270] (*CIMZNHCA*). *CIMZNHCA* is useful in fleshing out the dividing line between a typical *Sequoia* analysis and the proposed solution. In *CIMZNHCA* the relator filed eleven claims, all of which the government sought to dismiss.[271] In denying the motion, the court held: "The Government's claim that it reached this conclusion after having conducted an extensive investigation was belied by the parties' briefing and the evidence adduced during the evidentiary hearing . . . [indicating] its investigation into the claims specifically asserted in this case was minimal and it conducted no meaningful cost-benefit analysis."[272]

270 2019 WL 2409576 (SD Ill).
271 Id at *1.
272 Id.

Under the Executive Judgment Rule, the inadequacy of the investigation, including the failure to interview crucial witnesses, is a proper factor, but the lack of "meaningful cost-benefit analysis" is not. A court is well positioned to review the process of fact-finding and investigation but is poorly positioned to evaluate what factors the government should have considered, and what weight to give them, in its decision to seek dismissal. The improvement over *Sequoia* is that the court does not, as the first step after a relator's objection, launch into a freewheeling investigation of whether the substantive decision was rationally related to an unlimited and varying set of conditions and government priorities. With a basis in court expertise and the text of the 1986 Amendment, the proposed standard instead wades into the muck only if the relator shows that the government's investigation was procedurally flawed.

Importantly, this is also the inquiry a relator is best positioned to undertake. Unlike substantive decisions, which force relators to guess at the government's calculus, procedural defects are more apparent to the relator as the length and depth of review, engagement with provided and suggested sources, and allegations of bad faith are all factors relators, as the government's main source of information, are well placed to observe.

The Executive Judgment Rule is an approach courts are well prepared to implement and that offers a solution to the central problems of the current approaches. This Rule offers a manageable and highly effective approach that properly balances the textual, legislative history, constitutional, and incentives considerations that the current approaches neglect.

CONCLUSION

This Comment advocates applying the *Auerbach* approach used in Special Litigation Committee dismissal reviews to the context of government motions to dismiss qui tam relator suits. *Auerbach* shields an SLC's decision to dismiss from substantive review by the court except where the plaintiff can show that the SLC was procedurally defective. Only once the business judgment presumption is broken can the court then move on to review of the decision to dismiss itself. Applied to the FCA context, the Executive Judgment Rule would permit relators to object to alleged procedural errors in the government's investigation of the complaint. If the objection shows a "substantial and particularized need" for a hearing, the court may grant one before passing judgment on the procedural defects of the government's investigation. If defects are found, the relator and court may then subject the government's substantive decisions to scrutiny. This solution is rooted in the False Claims Act's text, legislative history, constitutional concerns, and policy.

The two standards courts currently use, *Swift* and *Sequoia*, fail to accurately capture the text and purpose of the FCA. *Swift* renders the dismissal hearing a nullity, likely in violation of the relator's right to due process. *Sequoia* reads in a potentially unconstitutional burden on the government unsupported by the text. Similarly, the legislative history rejects *Swift*'s "unfettered right" language because Congress intended to expand protection of relators to encourage suits. The legislative history also rejects *Sequoia*'s approach in clearly requiring the government to explain its decisions only after the relator meets their burden to show a need for a hearing. Additionally, though not perfectly clear, the text and legislative history generally focus on procedural and constitutional concerns, rather than call for freewheeling court review of government policies to address every objection. Constitutionally, the current approaches raise serious concerns for due process (in stripping partial assignees' interests without review) and separation of powers (in burdening the government to explain itself as a matter of course in every dismissal hearing). Lastly, even if the approaches lacked these interpretive and constitutional problems, both standards fail to achieve the policy goals undergirding the FCA's qui tam provision and, thereby, offer no solution to the growing crisis of meritless suits.

By contrast, the Executive Judgment Rule gives meaning to the hearing and relator protection requirements by permitting procedural review after the relator justifies their objections—unifying the text and history of the 1986 Amendment. By ensuring a minimum of due process and no greater burdening of government prosecutorial discretion than is allowed in other contexts, the proposed solution neatly threads the constitutional needle in avoiding the concerns of either extreme. Lastly, the Executive Judgment Rule dually encourages high-quality tips and discourages low-quality tips by guaranteeing procedural protections.

The Executive Judgment Rule is not about interpretive hairsplitting or harmonizing for the sake of harmonizing. It is about respecting the valid, competing claims of the government and relators and harnessing these interests to achieve the greatest net benefit. The force of the Executive Judgment Rule is not constrained to the FCA either. With almost every state having its own False Claims Act and numerous other qui tam provisions dotting the federal and state statutory landscape, this Rule offers a compelling means of optimizing whistleblower and qui tam statutes across industries and jurisdictions.