

2022

## Should the Government Have the Unrestricted Power To Dismiss Meritorious Qui Tam Actions Brought Under the False Claims Act?: A Closer Look at Why the Government Should Not be Held to a Judicially Imposed Standard

Wallace Stage

Florida International University College of Law, wstag002@fiu.edu

Follow this and additional works at: <https://ecollections.law.fiu.edu/lawreview>



Part of the [Civil Procedure Commons](#)

---

Online ISSN: 2643-7759

### Recommended Citation

Wallace Stage, *Should the Government Have the Unrestricted Power To Dismiss Meritorious Qui Tam Actions Brought Under the False Claims Act?: A Closer Look at Why the Government Should Not be Held to a Judicially Imposed Standard*, 16 FIU L. Rev. 857 (2022).

DOI: <https://dx.doi.org/10.25148/lawrev.16.3.13>

This Comment is brought to you for free and open access by eCollections. It has been accepted for inclusion in FIU Law Review by an authorized editor of eCollections. For more information, please contact [lisdavis@fiu.edu](mailto:lisdavis@fiu.edu).

**SHOULD THE GOVERNMENT HAVE THE UNRESTRICTED  
POWER TO DISMISS MERITORIOUS *QUI TAM* ACTIONS  
BROUGHT UNDER THE FALSE CLAIMS ACT?: A CLOSER  
LOOK AT WHY THE GOVERNMENT SHOULD NOT BE HELD  
TO A JUDICIALLY IMPOSED STANDARD**

*Wallace Stage\**

**ABSTRACT**

*The False Claims Act was originally enacted during the Civil War as a result of concerns that the Union Army would attempt to defraud the Government. Since then, the False Claims Act has evolved and grown into an extremely useful tool that allows individuals to bring civil actions for various reasons on behalf of the United States Government. Under the False Claims Act, an individual may bring a civil action, often referred to as a qui tam action, on behalf of the United States Government for violations of the False Claims Act. After an individual brings this type of action, the Government may then decide whether to intervene as a party. Additionally, the Government has the right to decide whether to move to dismiss the action. As a result of the development of the False Claims Act and individuals' bringing various qui tam actions, however, federal circuits have developed conflicting interpretations of what the appropriate standard should be when determining whether to grant a motion to dismiss filed by the Government. Multiple circuits, including the Ninth and Seventh circuits, have imposed standards that the Government must meet before obtaining a dismissal. In contrast, the D.C. Circuit has explained that the Government should not be required to meet any standard because the statute itself does not impose any standard. The Government should not be held to a judicially imposed standard when it decides to move to dismiss a qui tam action brought on its behalf.*

I.	Introduction.....	858
II.	Background.....	859
	A. <i>The False Claims Act</i> .....	859
	B. <i>A Brief History of Qui Tam Actions</i> .....	860

---

\* J.D. 2022, Florida International University College of Law.

III.	The Government’s Unrestricted Power to Dismiss a Qui Tam Action .....	863
A.	<i>The D.C. Circuit’s Standard for Government Dismissal of Qui Tam Actions</i> .....	863
IV.	The Judicially Imposed Standards of the Ninth and Seventh Circuits .....	865
A.	<i>The Ninth Circuit’s ‘Valid Governmental Purpose and Rational Relation’ Standard</i> .....	865
B.	<i>The Seventh Circuit’s Added Procedural Requirement</i> .....	868
V.	The Granston Memo .....	871
VI.	Lawmakers’ Proposed Amendments to the False Claims Act in Response to COVID-19 .....	874
VII.	Conclusion .....	876

## I. INTRODUCTION

The Supreme Court recently denied a petition for writ of certiorari that would have answered the question of whether the Government is entitled to dismiss a relator’s suit over the relator’s objection without review.<sup>1</sup> In the case below, the D.C. Circuit affirmed the district court’s dismissal of the appellant’s *qui tam* action brought under the False Claims Act.<sup>2</sup> The D.C. Circuit upheld the standard that the Government has the “unfettered” right to dismiss a *qui tam* action as long as there is no evidence of fraud on the court or other exceptional circumstances.<sup>3</sup> The False Claims Act provides a way for an individual to bring a civil action for a violation of the False Claims Act on behalf of both the person and the United States Government.<sup>4</sup> These actions, often referred to as *qui tam* actions, are brought by individuals who are seeking to expose instances where another person is defrauding the Government.<sup>5</sup>

The Government should have the absolute power to dismiss *qui tam* actions brought on its behalf under the False Claims Act. Currently, the circuits are split on what the proper standards should be when deciding whether the Government has such power. The D.C. Circuit Court of Appeals

1 See U.S. *ex rel.* Schneider v. JPMorgan Chase Bank, Nat’l Ass’n, 140 S. Ct. 2660 (2020).

2 U.S. *ex rel.* Schneider v. JPMorgan Chase Bank, Nat’l Ass’n, No. 19-7025, 2019 WL 4566462, at \*1 (D.C. Cir. Aug. 22, 2019), cert. denied, 140 S. Ct. 2660 (2020).

3 *Id.*

4 31 U.S.C. § 3729(b)(1) (2010).

5 U.S. Dep’t of Justice, *The False Claims Act: A Primer*, [https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS\\_FCA\\_Primer.pdf](https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf) (last visited Feb. 19, 2022) [hereinafter *The False Claims Act: A Primer*].

has held that the Government has the absolute power to dismiss a *qui tam* action brought under the False Claims Act.<sup>6</sup> In contrast, the Ninth Circuit Court of Appeals has held that the Government must demonstrate a valid Governmental purpose and a rational relation between dismissal and accomplishment of such purpose.<sup>7</sup> Further, the Seventh Circuit Court of Appeals has required that the Government must first intervene as a party before the Government can exercise its power to dismiss the action despite the Tenth Circuit Court of Appeals' contrary precedent.<sup>8</sup>

In this paper, I will discuss why courts should follow the D.C. Circuit's lead and adopt the standard that the Government has the unrestricted power to dismiss *qui tam* actions brought under the False Claims Act so long as there is no fraud on the court or other similarly extreme circumstances. This paper will further address how the current circuits' standards differ and analyze the implications of each standard when applied.

## II. BACKGROUND

### A. *The False Claims Act*

The False Claims Act was originally enacted in 1863 because Congress was concerned that suppliers of the Union Army would attempt to defraud the Army during the Civil War.<sup>9</sup> In 1863, a series of congressional investigations revealed that war-profiteering military contractors had billed the Federal Government for nonexistent or worthless goods, charged inflated prices for goods, and essentially robbed the Government.<sup>10</sup> In response, President Lincoln signed the False Claims Act into law, which provided that any person who knowingly submitted false claims to the Government was liable for double the Government's damages in addition to a penalty of \$2,000 for each individual false claim.<sup>11</sup> Since its enactment, the False Claims Act has been amended various times to, among other changes, increase the damages and penalties that may be awarded pursuant to its provisions.<sup>12</sup> Today, an individual who brings a successful claim may receive

---

6 *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003).

7 *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1147 (9th Cir. 1998).

8 *Compare United States ex. rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 839 (7th Cir. 2020), with *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 932 (10th Cir. 2005).

9 *The False Claims Act: A Primer*, *supra* note 5.

10 *CIMZNHCA, LLC*, 970 F.3d at 839.

11 *Id.*

12 *Id.*

up to thirty percent of the proceeds of the action or settlement.<sup>13</sup> Additionally, prior to 1986, if the Government intervened in the action, the relator could not participate from that point on.<sup>14</sup> However, after Congress amended the False Claims Act in 1986, the relator was granted the chance to participate even after Government intervention.<sup>15</sup>

An individual must knowingly submit a false claim to the Government to violate the False Claims Act.<sup>16</sup> “Knowingly” means that a person, with respect to the information, has actual knowledge of the information, acts in deliberate ignorance of the truth or falsity of the information, or acts in reckless disregard of the truth or falsity of the information and does not require proof of the person’s specific intent to defraud.<sup>17</sup> The False Claims Act provides that a person may be held liable and, therefore, the False Claims Act does not subject a State, or a state agency, to liability in *qui tam* actions.<sup>18</sup> Additionally, a claim broadly constitutes any request or demand for money or property that is made to an agent of the United States or to an individual if the money or property is to be spent or used on the Government’s behalf.<sup>19</sup> Such claims do not encompass requests for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual’s use of the money.<sup>20</sup> Further, the False Claims Act does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.<sup>21</sup>

### B. *A Brief History of Qui Tam Actions*

The False Claims Act provides that a private party may file a civil action in the name of the Government to recover for legal wrongs committed against the United States.<sup>22</sup> This type of suit is known as a *qui tam* action, and the individual who brings the suit is referred to as a relator.<sup>23</sup> *Qui tam* laws originated in England, when the king relied on private citizens and private

---

13 31 U.S.C. § 3730(d)(2).

14 *CIMZNHCA, LLC*, 970 F.3d at 841.

15 *Id.*

16 *The False Claims Act: A Primer*, *supra* note 5.

17 31 U.S.C. § 3729(b)(1).

18 *Stevens ex rel. Vt. Agency of Nat. Res. v. United States*, 529 U.S. 765, 787–88 (2000).

19 31 U.S.C. § 3729(b)(2).

20 31 U.S.C. § 3729(b)(2)(B).

21 31 U.S.C. § 3729(d).

22 31 U.S.C. § 3730(b)(1).

23 *The False Claims Act: A Primer*, *supra* note 5.

prosecutors to bring *qui tam* actions and paid them a reward if they won.<sup>24</sup> *Qui tam*, which is a shortened Latin phrase, roughly translates to “he who brings an action for the king as well as for himself.”<sup>25</sup> The False Claims Act provides the modern-day basis for this concept.<sup>26</sup>

Whistleblowing occurs when an employee alleges that his or her own company engaged in some wrongdoing or illegal conduct.<sup>27</sup> Employees who report such wrongdoing or illegal conduct are referred to as whistleblowers, and whistleblowers are protected by both federal and state laws.<sup>28</sup> In 1986, Congress added antiretaliation protections to the False Claims Act that entitle individuals who bring *qui tam* actions against their employer to reinstatement with seniority, double back pay, and additional compensation.<sup>29</sup> The False Claims Act provides that any employee shall be entitled to relief necessary to make that employee whole if that employee is discharged, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee in furtherance of an action under this section.<sup>30</sup> The section further provides that relief may include reinstatement with the same seniority status that employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for other related damages.<sup>31</sup>

Once a *qui tam* action has been filed, a copy of the complaint and written disclosure of substantially all material evidence and information the person possesses must be given to the Government, and the complaint must remain under seal for at least sixty days.<sup>32</sup> During the sixty days, the Government must investigate the allegations in the complaint.<sup>33</sup> “The Government may elect to intervene and proceed with the action” after it receives the evidence and accompanying information.<sup>34</sup> Even if the Government elects to intervene, the individual may remain a party to the action.<sup>35</sup> However, the Government also has the option to decline to take over the action, and the individual who

---

24 Phillips & Cohen LLP, *False Claims Act History*, <http://www.phillipsandcohen.com/False-Claims-Act-History/> (last visited Feb. 19, 2022) [hereinafter *False Claims Act History*].

25 *Id.*

26 *Id.*

27 Hillary J. Collyer, *The Whistleblower*, 19 NO. 10 VA. EMP. L. LETTER 3 (2007) [hereinafter *The Whistleblower*].

28 *Id.*

29 *Id.*

30 31 U.S.C. § 3730(h)(1).

31 *Id.*

32 31 U.S.C. § 3730(b)(2).

33 *The False Claims Act: A Primer*, *supra* note 5.

34 31 U.S.C. § 3730(b)(2).

35 31 U.S.C. § 3730(c)(1).

brought the action would then have the right to conduct the action.<sup>36</sup> In *Vermont Agency of National Resources*, a relator brought a *qui tam* action in the United States District Court for the District of Vermont against the Vermont Agency of Natural Resources, his former employer.<sup>37</sup> The relator alleged that the Vermont Agency of Natural Resources had submitted false claims to the Environmental Protection Agency.<sup>38</sup> The United States initially declined to intervene in the action but later decided to intervene in support of the relator.<sup>39</sup>

If the Government does not intervene, the relator maintains control of the action.<sup>40</sup> However, the relator must obtain consent of the Government to settle or dismiss the *qui tam* action.<sup>41</sup> If the Government intervenes in a *qui tam* action, the Government has the primary responsibility for prosecuting the action.<sup>42</sup> The False Claims Act further provides that the Government may move to dismiss a relator's action despite the relator's objections if the relator has been notified by the Government of the motion, and the court has provided the relator with an opportunity for a hearing on the motion.<sup>43</sup>

Since 1986, the United States Government has accrued more than \$62 billion from settlements and judgments involving fraud and false claims against the Government.<sup>44</sup> During the 2019 fiscal year alone, the Department of Justice obtained over \$3 billion in settlements and judgments from these types of civil actions.<sup>45</sup> This marks the tenth consecutive year that this number has exceeded \$2 billion.<sup>46</sup> Assistant Attorney General Jody Hunt of the Department of Justice's Civil Division highlighted that the volume of settlements and judgments obtained "demonstrate the high priority this administration places on deterring fraud against the Government and ensuring that citizens' tax dollars are well spent."<sup>47</sup> Assistant Attorney General Hunt accredited the civil servants who aid in these important cases and report fraud.<sup>48</sup> Today, the False Claims Act helps to combat health care

---

36 31 U.S.C. § 3730(b)(4)(B).

37 *Stevens ex rel. Vt. Agency of Nat. Res. v. United States*, 529 U.S. 765, 770 (2000).

38 *Id.*

39 *Id.*

40 31 U.S.C. § 3730(c)(3).

41 31 U.S.C. § 3730(b)(1).

42 31 U.S.C. § 3730(c)(1).

43 31 U.S.C. § 3730(c)(2)(A).

44 U. S. DEP'T OF JUSTICE, JUSTICE DEPARTMENT RECOVERS OVER \$3 BILLION FROM FALSE CLAIMS ACT CASES IN FISCAL YEAR 2019 (2020), <https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019>.

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

fraud, prevent false claims for federal funds and property involving Government operations, and protect military, first responders, American businesses and workers, and other critical Government programs.<sup>49</sup>

### III. THE GOVERNMENT'S UNRESTRICTED POWER TO DISMISS A *QUI TAM* ACTION

#### A. *The D.C. Circuit's Standard for Government Dismissal of Qui Tam Actions*

The D.C. Circuit Court of Appeals currently holds that the Government has the unrestricted power to dismiss *qui tam* actions brought pursuant to the False Claims Act.<sup>50</sup> In *Swift*, an employee of the Department of Justice appealed the dismissal of a *qui tam* action that she brought against one current employee and two former employees of the Justice Department's Office of Legal Counsel.<sup>51</sup> The relator alleged that they had conspired to defraud the Government and presented a false claim to the Government, which violated sections 3729(a)(1), (2), and (3) of the False Claims Act.<sup>52</sup> The Government, without intervening in the action, moved to dismiss the complaint and argued that the amount of money did not justify the expense of litigation.<sup>53</sup> After the district court held a hearing on the motion, the district court dismissed the claim, and the relator appealed.<sup>54</sup>

On appeal, the relator argued that the Government could not move to dismiss her claim without first intervening and that the Government neither investigated her claim nor justified its decision to dismiss her claim.<sup>55</sup> The D.C. Circuit held that the False Claims Act gives the Government an unfettered right to dismiss a *qui tam* action and the Government is not required to intervene to seek dismissal.<sup>56</sup> The D.C. Circuit reasoned that separation of power prevents judicial review of the Executive Branch's decision to dismiss the action and that the Government's decision not to prosecute is unreviewable.<sup>57</sup> The D.C. Circuit relied upon the Supreme Court's holding in *Heckler*, which emphasized that an agency's decision not

---

49 *Id.*

50 *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003).

51 *Id.* at 250.

52 *Id.*

53 *Id.*

54 *Id.* at 251.

55 *Id.*

56 *Id.* at 251–52.

57 *Id.*



to prosecute or enforce, whether in a civil or criminal manner, is generally within an agency's absolute discretion.<sup>58</sup> Additionally, the court explained that this standard is consistent with the Federal Rules of Civil Procedure because Rule 41 allows a plaintiff to dismiss a civil action without a court order.<sup>59</sup> The D.C. Circuit Court of Appeals did not create a judicially imposed standard that would require the Government to meet requirements that the statute does not impose itself. The circuit aligned its decision with the text of the statute and proper procedural requirements according to the Federal Rules of Civil Procedure.<sup>60</sup>

Further, the D.C. Circuit Court of Appeals explained that although the Government's discretion to dismiss an action it has already brought may not be absolute, courts must still presume that the Executive is acting rationally and in good faith.<sup>61</sup> The Constitution mandates that the Executive branch take care that the laws be faithfully executed, which necessarily incorporates a good-faith requirement.<sup>62</sup> The plain language of the False Claims Act does not set out substantive priorities that must be met for the Government to dismiss a *qui tam* action, and the statute does not incorporate any other specific language that attempts to restrict the Government's power to do so.<sup>63</sup> The D.C. Circuit Court of Appeals emphasized this point because when Department of Justice attorneys move to dismiss *qui tam* actions, their decisions must be treated the way that the Constitution mandates. Federal courts must keep in mind the good-faith requirement that the Executive Branch abides by.

Following the *Swift* decision, the D.C. Circuit Court of Appeals upheld this standard of dismissal in another case involving the dismissal of a *qui tam* action. In *Hoyte*, a former employee of American National Red Cross appealed the district court's dismissal of her *qui tam* action.<sup>64</sup> The D.C. Circuit Court of Appeals affirmed the district court's dismissal of the action because the Government has the "virtually 'unfettered' discretion" to dismiss a *qui tam* action.<sup>65</sup> The court upheld the dismissal and rejected the notion that the court routinely reviews the Government's decision to dismiss a *qui tam*

---

58 *Id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)); *see also Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (emphasizing the importance of the Executive's discretion when making the decision to dismiss a proceeding).

59 *Swift*, 318 F.3d at 252; *see also Fed. R. Civ. P.* 41(a)(1)(A).

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

61 *Id.* at 253.

62 U.S. CONST. art. II, § 3.

63 *Swift*, 318 F.3d at 253.

64 *Hoyte ex rel. U.S. v. Am. Nat'l Red Cross*, 518 F.3d 61, 63–64 (D.C. Cir. 2008).

65 *Id.* at 65.

action.<sup>66</sup> Further, the Court explained that unless rare exceptional circumstances are present, such as evidence of fraud on the court, the court should not depart from the usual deference owed to the Government.<sup>67</sup> The court concluded that the statutory requirements of the False Claims Act were met because the court held a hearing that afforded the relator the opportunity to convince the Government not to dismiss the action.<sup>68</sup>

#### IV. THE JUDICIALLY IMPOSED STANDARDS OF THE NINTH AND SEVENTH CIRCUITS

##### A. *The Ninth Circuit's 'Valid Governmental Purpose and Rational Relation' Standard*

Unlike the D.C. Circuit Court of Appeals, the Ninth Circuit Court of Appeals has imposed certain standards that must be met before the Government may dismiss a *qui tam* action. In *Sequoia Orange*, a fruit processor and an orange grower appealed the district court's dismissal of their *qui tam* action brought under the False Claims Act.<sup>69</sup> The relators alleged that various citrus industry growers and packinghouses violated the orange and lemon marketing orders promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937.<sup>70</sup> The district court, after a four-day evidentiary hearing, dismissed the relators' claims because the Government sought dismissal for legitimate Government purposes, and the reasons offered by the Government were rationally related to such purposes.<sup>71</sup> The relators appealed the district court's dismissal and argued that the Government could not dismiss the action unless their claim lacked merit.<sup>72</sup> The Ninth Circuit Court of Appeals upheld the district court's dismissal and adopted the following two-step analysis to determine whether dismissal was justified: (1) identification of a valid Government purpose; and (2) a rational relation between dismissal and accomplishment of such purpose.<sup>73</sup>

The Ninth Circuit Court of Appeals explained that, although the False Claims Act itself does not create a particular standard, its two-prong test is

66 *Id.*

67 *Id.*

68 *Id.*

69 U.S. *ex rel.* *Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1141–43 (9th Cir. 1998).

70 *Id.* at 1142.

71 *Id.* at 1143.

72 *Id.*

73 *Id.* at 1145.

supported by the Senate Report to the False Claims Amendments Act of 1986.<sup>74</sup> The Senate Report to the False Claims Amendments Act of 1986 provides that Section 3730(c)(1) of the False Claims Act gives *qui tam* plaintiffs a more direct role in acting as a check that the Government does not drop the false claims without a legitimate reason.<sup>75</sup> Additionally, the relator is allowed to formally object to any motions to dismiss or proposed settlements between the Government and the defendant.<sup>76</sup> The Ninth Circuit Court of Appeals further explained that the two-step test effectively avoids any potential separation of powers issues.<sup>77</sup> The court explained that the two-step test respects the Executive Branch's prosecutorial authority because it requires no greater justification for the dismissal than that required by the Constitution.<sup>78</sup> Although the Ninth Circuit Court of Appeals justifies its standard by stating that it requires no greater justification than the Constitution, the circuit admits that it does require greater justification than the False Claims Act itself. The circuit relies on the False Claims Act Amendments, but those amendments do not impose a two-step analysis or standard on the Government's decision to move to dismiss.

The Ninth Circuit Court of Appeals has stood behind this type of judicial involvement in the past involving similar claims. In *Kelly*, the Boeing Company appealed the district court's denial of its motion to dismiss a *qui tam* action brought against Boeing alleging that Boeing fraudulently charged the United States.<sup>79</sup> The Ninth Circuit affirmed the district court's denial of the motion to dismiss.<sup>80</sup> The court reasoned that judicial involvement authorized by the False Claims Act does not offend the separation of powers principle.<sup>81</sup> Further, the court pointed out that "ample precedent exists for judicial oversight of the Government's decision to dismiss a *qui tam* action."<sup>82</sup> The Ninth Circuit Court of Appeals explained that courts do possess a certain degree of judicial authority to determine whether the Government had demonstrated good cause to take over a case prosecuted in the name of the United States.<sup>83</sup> The court acknowledged that while this authority may affect the Government's prosecutorial discretion to some degree, it does not amount to a power great enough to supervise the conduct

---

74 *Id.*

75 S. REP. NO. 99-345, at 26 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5290-91.

76 S. REP. NO. 99-345, at 26 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5291.

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

78 *Id.* at 1145-46.

79 U.S. *ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 745 (9th Cir. 1993).

80 *Id.*

81 *Id.* at 756.

82 *Id.*

83 *Id.*

of the Attorney General or a relator.<sup>84</sup> The Ninth Circuit Court of Appeals relies heavily upon the Supreme Court's decision in *Morrison* as its boundary for exactly how far this judicial authority extends.<sup>85</sup>

In *Morrison*, the Supreme Court held that the Constitution permits Congress to vest power in a special federal court to decide whom to appoint to the office of independent counsel and a variety of other functions that require the exercise of some judgment and discretion.<sup>86</sup> The Court also acknowledged that the special court's powers were not a significant judicial encroachment on executive authority even though they were not typically judicial powers.<sup>87</sup> The Ninth Circuit Court of Appeals believes that, in light of the Supreme Court's decision in *Morrison*, it is not dispositive that no exact equivalent exists for the exercise of judicial authority.<sup>88</sup> The Ninth Circuit Court of Appeals fails to recognize that unlike the situation in *Morrison*, here, the False Claims Act does not confer power to a special federal court to give it more control over the decisions of the Executive branch.<sup>89</sup> Accordingly, the Ninth Circuit Court of Appeals' application of the Supreme Court's decision is overreaching and does, in fact, encroach upon executive authority.

In a more recent decision, the Ninth Circuit employed a strict application of the test created in *Sequoia Orange*.<sup>90</sup> In *Thrower*, a relator brought a *qui tam* action against a mortgage lender.<sup>91</sup> The relator alleged that the mortgage lender certified loans for Federal Housing Administration insurance even though the loans did not actually meet the Government's requirements.<sup>92</sup> The Government declined to intervene and filed a motion to dismiss the action, but the district court denied the motion because the Government failed to meet its burden to demonstrate a valid Governmental purpose related to the dismissal and because it failed to fully investigate the allegations in the action.<sup>93</sup> The Government thereafter appealed the district court's decision, but the court did not find sufficient grounds to reverse the denial of the Government's motion to dismiss.<sup>94</sup> The Government sought dismissal to avoid burdensome discovery expenses that the Government did not think

---

84 *Id.*

85 *Id.* at 757.

86 *Morrison v. Olson*, 487 U.S. 654, 696–97 (1988).

87 *Id.* at 682.

88 *Kelly*, 9 F.3d at 756.

89 *Id.* at 754–55.

90 *Thrower ex rel. U.S. v. United States*, 968 F.3d 996, 1001 (9th Cir. 2020).

91 *Id.* at 1000–01.

92 *Id.* at 1001.

93 *Id.* at 1000.

94 *Id.* at 1008.

would ultimately be worth the cost, which the court regarded as a legitimate reason for moving to dismiss.<sup>95</sup> Despite the Government's demonstration of legitimate reasons for dismissal, the court did not find the interest important enough to expand the scope of the collateral order doctrine.<sup>96</sup>

The court further explained that the Ninth Circuit Court of Appeals' previous decisions addressing the motion to dismiss procedures of the False Claims Act clearly demonstrate that the Government's interests in such action are qualified.<sup>97</sup> The court went as far as saying that the *Sequoia Orange* test, which requires the Government to make an adequate showing to justify dismissal, essentially implies that there are circumstances where a False Claims Act case may proceed over the Government's objection.<sup>98</sup> Additionally, the court pointed out that in cases where the Government chooses not to intervene as a party, the Government's rights are especially limited.<sup>99</sup> The court emphasized the language of the statute, which provides where the Government declines to intervene, the relator has the right to conduct the action.<sup>100</sup> In furtherance of this view, the court referenced its earlier decision in *Killingsworth*.<sup>101</sup> In *Killingsworth*, the Ninth Circuit found that Congress intended to place full responsibility for False Claims Act litigation on private parties, absent intervention by the Government.<sup>102</sup> In light of the *Killingsworth* holding, the court in *Academy Mortgage* comfortably concluded that the district court's denial of Government's motion to dismiss did not force the Government to actively prosecute an action against its will.<sup>103</sup> Although the circuit court's decision in *Thrower* concluded that it did not force the Government to prosecute an action against its will, the circuit court did not address the inevitable fact that the Government would likely be obligated to participate at some point in discovery or other stages of the proceeding.

### B. *The Seventh Circuit's Added Procedural Requirement*

Although the Seventh Circuit Court of Appeals does not go as far as imposing a judicial standard on whether the Government may dismiss a *qui tam* action, the Seventh Circuit does impose a procedural requirement. In

---

95 *Id.*

96 *Id.*

97 *Id.* at 1007.

98 *Id.*

99 *Id.* at 1008.

100 *Id.*

101 *Id.*

102 U.S. *ex rel.* *Killingsworth v. Northrop Corp.*, 25 F.3d 715, 722 (9th Cir. 1994).

103 *Thrower*, 968 F.3d at 1008.

*CIMZNHCA, LLC*, the Government appealed the district court's denial of its motion to dismiss a *qui tam* action.<sup>104</sup> The relator brought the action alleging that the defendants illegally bribed physicians to prescribe or recommend certain medications.<sup>105</sup> The Government chose not to intervene as a plaintiff in the action and decided to move to dismiss the action.<sup>106</sup> The district court denied the Government's motion to dismiss the action because the Government's decision to dismiss was not rationally related to a valid Governmental purpose.<sup>107</sup> The Seventh Circuit reversed the district court's decision with instructions to dismiss the action but added the procedural requirement that the Government must intervene as a party before moving to dismiss the action.<sup>108</sup>

First, the Seventh Circuit Court of Appeals held that the False Claims Act required the Government to intervene before it could exercise the right to move to dismiss the action.<sup>109</sup> The court justified this decision based on both the text and structure of the statute itself.<sup>110</sup> Section 3730(c) of the False Claims Act provides for the rights of parties to *qui tam* actions, and the Government is not a party to the action unless it intervenes.<sup>111</sup> The Seventh Circuit upheld this requirement despite the Tenth Circuit Court of Appeals' decision in *Ridenour*, which held the exact opposite.<sup>112</sup> The Tenth Circuit Court of Appeals found that the False Claims Act does not require the Government to intervene for good cause as a party in a *qui tam* action before moving to dismiss.<sup>113</sup> The Tenth Circuit reasoned that a plain reading of the statute does not impose such a requirement, canons of statutory construction do not support that result, and reading such a requirement into the statute would leave the False Claims Act constitutionally weak.<sup>114</sup> The Seventh Circuit rejected the Tenth Circuit's reasoning and held that the constitutional doubt canon does not mean that any reading of a statute not expressly banned must be adopted if it will alleviate the executive of a burden that the judiciary decides, absent any analysis, to be unnecessary.<sup>115</sup> The Seventh Circuit concluded that including dismissal in the list of powers reclaimable by the

---

104 U.S. *ex rel.* *CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 840 (7th Cir. 2020).

105 *Id.* at 839–40.

106 *Id.* at 840.

107 *Id.*

108 *Id.* at 840, 844.

109 *Id.* at 844.

110 *Id.*

111 *Id.*

112 *Id.* at 846.

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

114 *Id.* at 933–34.

115 U.S. *ex rel.* *CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 846 (7th Cir. 2020).

Government only for good cause does not create a marginal risk of unconstitutionality.<sup>116</sup>

Second, the Seventh Circuit held that the standard for the dismissal of the *qui tam* action is governed by the Federal Rules of Civil Procedure, subject to any additional specific limitations proscribed by the False Claims Act and any relevant constraints on executive conduct in general.<sup>117</sup> In the case at issue, the court found that no further substantive limits apply, so the only necessary source of analysis is the Federal Rules of Civil Procedure.<sup>118</sup> The Federal Rules of Civil Procedure provide that a “plaintiff may dismiss an action without a court order by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment.”<sup>119</sup> The court highlighted that this is an absolute right of the plaintiff.<sup>120</sup> In *Marques*, the Seventh Circuit explained that an individual does not need to provide any reason to dismiss a suit.<sup>121</sup> Under the False Claims Act, the Government may dismiss the action over the objections of the relator if the relator has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.<sup>122</sup> The Seventh Circuit pointed out that “this procedural limit is the only authorized statutory deviation from Rule 41.”<sup>123</sup> The court determined that because the relator received notice and took its opportunity to be heard, the case should have ended there.<sup>124</sup>

The Seventh Circuit emphasized that its interpretation of section 3730(c) of the False Claims Act does not render its process pointless.<sup>125</sup> The court explained that its interpretation simply means that there are circumstances where the relator will simply not have a substantive case to make at the hearing to which the statute entitled it.<sup>126</sup> Further, the Seventh Circuit highlighted that the risk of the hearing serving little purpose does not justify imposing the two-step test adopted by the Ninth Circuit.<sup>127</sup> The court emphasized that if Congress intended to require some additional

---

116 *Id.* at 848.

117 *Id.* at 849.

118 *Id.*

119 FED. R. CIV. P. 41(a)(1)(A)(i).

120 *CIMZNHCA, LLC*, 970 F.3d at 849; *see Marques v. Fed. Rsrv. Bank of Chi.*, 286 F.3d 1014, 1017 (7th Cir. 2002).

121 *Marques*, 286 F.3d at 1017.

122 False Claims Act, 31 U.S.C. § 3730(c)(2)(A) (2010).

123 *CIMZNHCA, LLC*, 970 F.3d at 850.

124 *Id.*

125 *Id.* at 853.

126 *Id.*

127 *Id.*

constitutional minimum of fairness, reasonableness, or adequacy of the Government's decision to dismiss a *qui tam* action, Congress must say so.<sup>128</sup>

In a more recent decision, a district court within the Seventh Circuit again acknowledged the circuit split regarding the standard of review that judges should employ when deciding on motions to dismiss under the False Claims Act.<sup>129</sup> In *Suarez*, the district court references the False Claims Act and acknowledges that the statute itself does not provide a standard.<sup>130</sup> The court further explains that the Seventh Circuit declined to follow the Ninth Circuit's test that examines whether there is a rational relationship between dismissal and accomplishing a valid Governmental purpose.<sup>131</sup> Even though the Seventh Circuit Court of Appeals declined to follow the Ninth Circuit's two-step analysis, the Seventh Circuit still imposes an unnecessary procedural standard. The Seventh Circuit reads the False Claims Act as though it leaves a gap regarding the procedural requirement to intervene as a party, rather than reading it to eliminate such procedural requirement.

## V. THE GRANSTON MEMO

In January of 2018, Michael Granston, Deputy Assistant Attorney General in the Civil Division of the United States Department of Justice, wrote a memorandum (the "Granston Memo") that addressed the factors for evaluating dismissal of *qui tam* actions pursuant to the False Claims Act.<sup>132</sup> The Granston Memo acknowledges that in the years leading up to 2018, the Department of Justice saw an unprecedented increase in the number of *qui tam* actions filed under the False Claims Act.<sup>133</sup> Although the number of *qui tam* actions was significantly increasing, the Department of Justice's rate of intervention remained comparatively stagnant.<sup>134</sup> With that, the Granston Memo highlighted that even in cases where the Government declines to intervene, the Government still utilizes substantial resources to monitor those cases and, in some cases, is later required to produce discovery or participate in other ways.<sup>135</sup> Accordingly, the Granston Memo urged Department of

---

128 *Id.*

129 U.S. *ex rel.* *Suarez v. AbbVie, Inc.*, 503 F. Supp. 3d 711, 728 (N.D. Ill. 2020).

130 *Id.*

131 *See id.*

132 *See generally* Memorandum from Michael D. Granston, Deputy Assistant Att'y Gen., Civil Div. of the U.S. Dep't of Justice to Attorneys, Com. Litig. Branch, Fraud Section, and Assistant United States Attorneys Handling False Claims Act Cases, Offices of the United States Attorneys (Jan. 10, 2018) [hereinafter *The Granston Memo*].

133 *Id.* at 1.

134 *Id.*

135 *Id.*



Justice attorneys to not only consider declining to intervene in certain *qui tam* actions, but also to consider whether to seek dismissal pursuant to 31 U.S.C. § 3730(c)(2)(A).<sup>136</sup>

Section 3730(c)(2)(A) is an important tool that the Government can utilize to advance its interests, preserve limited resources, and avoid potentially adverse precedent.<sup>137</sup> The False Claims Act provides the Government with the authority to dismiss *qui tam* actions to preserve the Department of Justice's role in protecting the False Claims Act.<sup>138</sup> The Granston Memo provides various factors, based on a review of previous decisions, that should be evaluated when attorneys within the Department of Justice are deciding whether to seek dismissal.<sup>139</sup> These factors include, but are not limited to: (1) "curbing meritless *qui tams*," (2) "preventing parasitic or opportunistic *qui tam* actions," (3) "preventing interference with agency policies and programs," (4) "controlling litigation brought on behalf of the United States," (5) "safeguarding classified information and national security interests," (6) "preserving Government resources," and (7) "addressing egregious procedural errors."<sup>140</sup>

The Department of Justice should consider moving to dismiss *qui tam* actions when the face of the complaint lacks merit or the allegations are frivolous.<sup>141</sup> This may occur when the Government, after careful investigation, concludes that the relator's case lacks merit.<sup>142</sup> Additionally, moving to dismiss *qui tam* actions may prevent duplication of any pre-existing Government investigations that would not lead to finding any new useful information.<sup>143</sup> In *United States ex rel. Amico*, the relators brought a *qui tam* action and alleged that the defendants submitted false claims to the Government in connection with the defendants' marketing and sale of residential mortgage-backed securities.<sup>144</sup> The Government moved to dismiss the case to avoid duplicative litigation of the claims it had already settled with the defendants, to deter parasitic claims, to protect the funds recovered in its settlement with the defendants, and to avoid the monetary and human capital

---

136 *Id.*

137 *Id.* at 2.

138 *Id.*

139 *Id.*

140 *Id.* at 3–7.

141 *Id.* at 3.

142 *Id.*; see also *U.S. ex rel. Stierli v. Shasta Servs., Inc.*, 440 F. Supp. 2d 1108, 1114–15 (E.D. Cal. 2006) (granting the Government's motion to dismiss because there were no false claims approved or paid by the Government).

143 *The Granston Memo*, *supra* note 132, at 4.

144 *U.S. ex rel. Amico v. Citigroup, Inc.*, No. 14-CV-4370 (CS), 2015 WL 13814187, at \*1 (S.D.N.Y. Aug. 7, 2015).

costs to the Government that the case would require.<sup>145</sup> The court found that the Government demonstrated several valid purposes for dismissal and granted the motion to dismiss.<sup>146</sup>

The Granston Memo posed that the Government should also consider moving to dismiss a *qui tam* action that may potentially threaten to interfere with an agency's policies or the administration of its programs, especially where the agency has recommended dismissal for this particular purpose.<sup>147</sup> In *United States ex rel. Ridenour*, the court granted the Government's motion to dismiss the relators' *qui tam* action because the litigation would have delayed the clean-up and closure of a nuclear weapons manufacturing facility by diverting personnel and resources.<sup>148</sup> The court found that the Government demonstrated that the litigation would require the reassignment of various personnel from the clean-up project and add a financial burden on the project through a requirement to shift funds from clean-up to the litigation.<sup>149</sup> Similarly, the Government should consider moving to dismiss *qui tam* actions when dismissal would serve to protect the Government's litigation prerogatives, such as avoiding interference in the Government's ability to litigate the intervened claims.<sup>150</sup>

Furthermore, the dismissal of *qui tam* actions may be the best way to preserve safeguarding classified information and national security interests.<sup>151</sup> The Government need only demonstrate that the litigation leads to the potential risk of disclosure of classified information, not that litigation will result in disclosure.<sup>152</sup> Additionally, the Department of Justice should consider dismissal when the anticipated costs of litigation exceed the potential gains.<sup>153</sup> In *Swift*, the relator argued that the costs of litigation would be relatively small.<sup>154</sup> The Government asserted that the dollar recovery was too small to warrant expending resources to monitor the case, comply with discovery requests, and that spending time and effort on this case would take away resources from other cases.<sup>155</sup> The court found that the Government's goal of minimizing expenses warranted dismissal despite the relator's

---

145 *Id.* at \*4.

146 *See id.* at \*4–6.

147 *The Granston Memo*, *supra* note 132, at 4.

148 *U.S. ex rel. Ridenour v. Kaiser-Hill Co., LLC*, 397 F.3d 925, 937–38 (10th Cir. 2005).

149 *Id.* at 937.

150 *The Granston Memo*, *supra* note 132, at 5.

151 *Id.* at 6.

152 *Id.*

153 *Id.*

154 *Swift v. United States*, 318 F.3d 250, 254 (D.C. Cir. 2003).

155 *Id.*

objections.<sup>156</sup> Finally, the Government should seek to dismiss a *qui tam* action when the action disturbs its attempts to conduct a proper investigation.<sup>157</sup>

The Granston Memo acknowledges the current split regarding which standard should be utilized to decide a motion to dismiss submitted by the Government under 31 U.S.C. § 3730(c)(2)(A).<sup>158</sup> The Department of Justice supports the D.C. Circuit's standard, which affords the "unfettered" right to the Government to dismiss *qui tam* actions; however, the Department of Justice asserts that even if the more stringent standards set by the other circuits are to be followed, those standards should still afford significant deference to the Government.<sup>159</sup> The aforementioned factors are not mutually exclusive, nor are they an exhaustive list.<sup>160</sup>

The Granston Memo demonstrates that when the Department of Justice moves to dismiss a relator's *qui tam* action, the Department of Justice may have various justifications for doing so. Moreover, the decision to move to dismiss may not only be coming from the Department of Justice.<sup>161</sup> The Department of Justice may decide to move to dismiss a *qui tam* action on its own discretion and, after further investigation and discussion, on the recommendation of the affected Government agency as well.<sup>162</sup> The Granston Memo demonstrates why the dismissal of certain *qui tam* actions, even those that may be meritorious, is in the best interest of the Department of Justice, the affected Government agency, and the public. These interests are best served by following the D.C. Circuit's standard of dismissal, which provides the greatest deference to the Government's decision to move to dismiss a *qui tam* action.

## VI. LAWMAKERS' PROPOSED AMENDMENTS TO THE FALSE CLAIMS ACT IN RESPONSE TO COVID-19

The COVID-19 pandemic has caused the Government to spend more money than it ever has before, which, in turn, increases the risk that taxpayers will be defrauded.<sup>163</sup> The Government is spending trillions of dollars to

---

156 *Id.*

157 *The Granston Memo*, *supra* note 132 at 7.

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.* at 8.

162 *Id.*

163 Stephen M. Kohn & Todd Yoder, *Fix the False Claims Act to Effectively Combat COVID-19 Frauds*, NAT'L L. REV. (July 30, 2020), <https://www.natlawreview.com/article/fix-false-claims-act-to-effectively-combat-covid-19-frauds> [hereinafter *Fix the False Claims Act*].

attempt to contain the spread of the disease, help those who have been affected, and develop and distribute a vaccine.<sup>164</sup> This necessarily means that the Government will also be putting significant amounts of money into federal and state programs, such as Medicare and Medicaid.<sup>165</sup> United States Attorney General William Barr instructed all United States attorneys to prioritize the investigation and prosecution of COVID-19 related fraud given the vast amount of Government spending in response to the pandemic.<sup>166</sup> In furtherance of this message, Attorney General Barr urged the public to report any suspected fraudulent schemes related to COVID-19 and even created a whistleblower hotline specifically for such claims.<sup>167</sup> The False Claims Act and its *qui tam* provisions are some of the most effective tools that the federal Government can utilize to discover and impede fraudulent conduct.<sup>168</sup>

In light of the COVID-19 pandemic, Senator Charles Grassley gave the keynote address at the National Whistleblower Center's National Whistleblower Day 2020 celebration.<sup>169</sup> Senator Grassley announced various proposed amendments to the False Claims Act, which he claimed would strengthen the False Claims Act and provide for more efficient policing of Government contract fraud.<sup>170</sup> Senator Grassley stated that the need for reform of the False Claims Act is pressing now more than ever due to the massive amounts of money that the Government is spending in response to the pandemic.<sup>171</sup> There are allegedly two major setbacks of the False Claims Act that Senator Grassley's proposals would rectify. First, the proposed amendments would reverse a 2018 Department of Justice policy, the Granston Memo, that encourages Department of Justice Attorneys to dismiss False Claims Act cases brought by *qui tam* whistleblowers.<sup>172</sup> The Granston Memo allows and encourages Department of Justice attorneys to seek to dismiss *qui tam* actions that may be meritorious.<sup>173</sup> Reversing the policy in

---

164 *Id.*

165 *Id.*

166 Sean Bosack & Nina Beck, *Qui Tam Actions: Managing Risk in the Wake of COVID-19*, A.B.A. (Sep. 1, 2020), <https://www.americanbar.org/groups/litigation/committees/corporate-counsel/articles/2020/summer2020-qui-tam-actions-managing-risk-in-the-wake-of-covid-19/> [hereinafter *Qui Tam Actions: Managing Risk*].

167 *Id.*

168 *Fix the False Claims Act*, *supra* note 163.

169 *Senator Grassley Announces Proposed Amendments to Strengthen the False Claims Act Against COVID-19 Fraud*, WHISTLEBLOWERS BLOG (Aug. 6, 2020), <https://whistleblowersblog.org/2020/08/articles/featured-story/senator-grassley-announces-proposed-amendments-to-strengthen-the-false-claims-act-against-covid-19-fraud/> [hereinafter *Proposed Amendments to Strengthen the FCA Against COVID-19 Fraud*].

170 *Id.*

171 *Id.*

172 *Id.*

173 *Fix the False Claims Act*, *supra* note 163.

the Granston Memo would essentially make the D.C. Circuit's standard even more difficult to follow. The D.C. Circuit, in line with the Granston Memo issued by the Department of Justice, essentially allows for the unilateral dismissal of *qui tam* actions regardless of whether they are meritorious. By contrast, the reversal of this policy would likely fit more with the standards of the Ninth and Seventh Circuits, which have imposed different substantive and procedural standards.

Second, the proposed amendments would reverse a section of the 2016 U.S. Supreme Court ruling in *Universal Health Services Inc.*, which allows for the dismissal of *qui tam* actions if the Government had knowledge of the fraud.<sup>174</sup> The Supreme Court decision clarified certain limitations on a person's liability under the False Claims Act.<sup>175</sup> The Supreme Court also emphasized that the False Claims Act is not a means of imposing treble damages and other penalties for insignificant regulatory or contractual violations.<sup>176</sup> Stephen Kohn, a whistleblower attorney at a *qui tam* law firm, advocated for the amendments and voiced his disapproval of the Government's ability to dismiss meritorious *qui tam* actions in addition to the threat of political and corrupt inferences with the justice system that such conduct raises.<sup>177</sup> Kohn further pointed out that the pandemic is obligating the Government to pay certain claims regardless of the circumstances, and fraudulent contractors should not avoid liability under the False Claims Act because of the Government's decision to prioritize human life.<sup>178</sup>

## VII. CONCLUSION

Courts should follow the precedent set forth in the D.C. Circuit regarding what judicial standard of review to apply to the dismissal of *qui tam* actions, absent circumstances such as fraud on the court. The Government should be free to dismiss *qui tam* actions, even though they may be meritorious, without the obligation to demonstrate a valid Governmental purpose or to first intervene as a party before seeking dismissal. The Government should not have to justify dismissing a suit that is essentially brought on its behalf.

Pursuant to standard rules of statutory interpretation and, as the D.C. Circuit has laid out, courts should not read a standard into the statute that was not placed in the language of the statute. The False Claims Act provides that,

---

174 *Proposed Amendments to Strengthen the FCA Against COVID-19 Fraud*, *supra* note 169.

175 U.S. *ex rel.* Escobar v. Universal Health Servs., Inc., 579 U.S. 176, 194 (2016).

176 *Id.* at 196.

177 *Proposed Amendments to Strengthen the FCA Against COVID-19 Fraud*, *supra* note 169.

178 *Id.*

“[t]he Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.”<sup>179</sup> In *Consumer Product Safety Commission*, the Supreme Court emphasized that where there is no clearly expressed legislative intention to the contrary, statutory language must be regarded as conclusive.<sup>180</sup>

The Ninth and Seventh Circuits have essentially added judicial and procedural standard of review requirements into the dismissal provisions of the False Claims Act, which are not explicitly provided for in the text of the statute. In the Ninth Circuit’s leading decision on the issue, the Ninth Circuit explicitly concedes that the statute itself does not create the standard that the Circuit imposes.<sup>181</sup> Recent Ninth Circuit decisions have demonstrated how strictly the court is applying the two-prong test outlined in *Sequoia Orange*. The *Academy Mortgage* court even held that although the Government sufficiently demonstrated a legitimate reason for dismissing the action, the reason did not warrant revisiting the district court’s denial of the motion to dismiss.<sup>182</sup> This effect goes directly against the interests advocated for in the Granston Memo, which operate to protect individual interests as well.

Further, the separation of powers doctrine dictates that the judiciary should not exercise control over the executive branch’s decision-making powers. In *Morrison*, the case heavily relied upon by the Ninth Circuit, the Supreme Court emphasized the importance of maintaining separation between the judiciary and other branches of the federal Government.<sup>183</sup> Additionally, the Supreme Court noted that the separation of powers doctrine ensures that judges do not encroach upon executive or legislative authority or take on duties that should be accomplished by other branches.<sup>184</sup> Additionally, the Supreme Court has held that an agency’s decision not to prosecute or enforce, whether in a civil or criminal manner, is generally within an agency’s absolute discretion.<sup>185</sup> The Ninth Circuit’s two-prong test not only imposes a standard of judicial review over what should be within the executive branch’s discretion, but also violates the direct text of the statute.

---

179 31 U.S.C. § 3730(c)(2)(A) (2010).

180 *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

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

182 *Thrower ex rel. U.S. v. United States*, 968 F.3d 996, 1008 (9th Cir. 2020).

183 *Morrison v. Olson*, 487 U.S. 654, 680–81 (1988).

184 *Id.*

185 *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Moreover, the Government may move to dismiss a *qui tam* action for a variety of purposes. The Granston Memo circulated throughout the Department of Justice provides various factors that the Government has taken into account in the past when deciding whether to move to dismiss an action.<sup>186</sup> The Government may move to dismiss a *qui tam* action to prevent parasitic *qui tam* actions, prevent potential interference with agency policies and programs, control litigation brought on behalf of the United States, or even safeguard classified information and national security interests.<sup>187</sup> These reasons not only benefit the Government, but also the potential affected Government agencies and the general public.<sup>188</sup> Courts should not read unnecessarily burdensome standards into the False Claims Act, which, in turn, aid relators in potentially disrupting ongoing Government investigations or compel the Government to continue with a litigation where the potential costs outweigh any benefits.

The Government should maintain the unfettered power to move to dismiss *qui tam* actions, regardless of whether the actions may be meritorious, despite certain public critique of policies that are currently in place regarding the False Claims Act. The Granston Memo supports this notion, and the Government's power to dismiss such actions does not jeopardize the Government's potential risk of being subjected to fraudulent conduct. Even though the COVID-19 pandemic has spurred unprecedented levels of Government spending, the Government's discretion over whether to dismiss *qui tam* actions brought on its behalf does not mean that it will always do so. The Government is not ignorant to the fact that a relator may proceed with a *qui tam* action absent Government intervention. If anything, the Government's decision to move to dismiss a *qui tam* action despite the circumstances surrounding the COVID-19 pandemic should be given that much more deference as opposed to under normal circumstances. If the Government chooses to move to dismiss a *qui tam* action brought on its behalf despite the extenuating circumstances of a pandemic, the Government should be allowed to do so.

---

186 *The Granston Memo*, *supra* note 132, at 3–7.

187 *Id.* at 4–6.

188 *Id.* at 4–5.