

PUBLIC REGULATION OF PRIVATE ENFORCEMENT: EMPIRICAL ANALYSIS OF DOJ OVERSIGHT OF QUI TAM LITIGATION UNDER THE FALSE CLAIMS ACT

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ABSTRACT—In recent years, a growing chorus of commentators has called on Congress to vest agencies with litigation “gatekeeper” authority across a range of regulatory areas, from civil rights and antitrust to financial and securities regulation. Agencies, it is said, can rationalize private enforcement regimes through the power to evaluate lawsuits on a case-by-case basis, blocking bad cases, aiding good ones, and otherwise husbanding private enforcement capacity in ways that conserve scarce public resources for other uses. Yet there exists strikingly little theory or evidence on how agency gatekeeper authority might work in practice. This Article begins to fill that gap by offering the first systematic study of an often invoked but little studied example: Department of Justice (DOJ) oversight of qui tam litigation brought pursuant to the False Claims Act (FCA). Using an original dataset encompassing some 4000 qui tam lawsuits filed between 1986 and 2011, this Article offers evidence on numerous issues that have occupied recent judicial, scholarly, and popular debate, including the extent to which DOJ utilizes its various oversight tools, the mix of factors that drives DOJ intervention decisions, and whether DOJ’s seemingly powerful impact on case outcomes can be ascribed to its merits-screening or merits-making role. The analysis mostly rejects heated claims that DOJ decisionmaking has a partisan political cast or is unconnected to case merit. At the same time, however, it uncovers substantial evidence that DOJ makes case decisions strategically, separate and apart from pure merits considerations, in response to simple resource constraints, judicial threats to its ability to police collusive relator–defendant settlements, and the identity (and corporate power) of the defendant. These findings have important implications for judicial evaluation of qui tam suits as well as leading FCA reform proposals. More broadly, the analysis opens up new theoretical and empirical avenues for thinking about optimal regulatory design at the border of litigation and administration, with applications well beyond the FCA.

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INTRODUCTION

One of the most controversial developments in the American regulatory state in recent decades is a marked shift away from administrative regulation and enforcement and toward private lawsuits as a regulatory tool.¹ Champions of that trend assert that deputizing “private attorneys general” to enforce legal mandates taps private information, resources, and expertise while serving to check agency capture by regulated

¹ See THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* (2002); SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010).

parties.² Critics counter that private enforcement yields wasteful and uncoordinated regulatory efforts and trenches on government enforcement prerogatives.³ From an institutional-design perspective, a core challenge is how to exploit private enforcement's virtues while mitigating its vices.⁴ More broadly, how can we achieve optimal coordination of public and private enforcement mechanisms?

One way to rationalize private enforcement regimes, some contend, is to grant public agencies the power to oversee private litigation efforts.⁵ In particular, agencies might be given the authority to manage private enforcement efforts on a case-by-case basis, evaluating private lawsuits and either joining and co-prosecuting them or dismissing them outright.⁶ Armed with such authority, agencies can efficiently manage private enforcement capacity, delegating enforcement duties to capable and well-incentivized

² See Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 95, 107 (2005).

³ *Id.* at 114.

⁴ See David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1253 (2012) (framing institutional-design challenge as "harnessing" in twin sense of leveraging and constraining).

⁵ See generally David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. (forthcoming 2013) (offering a taxonomy of different types of agency gatekeeper proposals).

⁶ Numerous commentators have advanced such proposals across a range of policy contexts, as to an already existing litigation regime or in combination with a proposal to grant individuals a private right of action to enforce legal mandates on the government's behalf. See, e.g., Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1517–18 (1996) (securities); Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 52–53, 72, 76 (2002) (environmental protection and securities); Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, LAW & CONTEMP. PROBS., Autumn 1997, at 198–202 (securities); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1387–88, 1421–24 (2000) (civil rights); William E. Kovacic, *Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels*, 69 GEO. WASH. L. REV. 766, 796 (2001) (antitrust); Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 941 (2001) (antitrust); Geoffrey Christopher Rapp, *False Claims, Not Securities Fraud: Towards Corporate Governance by Whistleblowers*, 15 NEXUS 55 (2009–2010) (securities); Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10B-5*, 108 COLUM. L. REV. 1301 (2008) (securities); Heidi Mandanis Schooner, *Private Enforcement of Systemic Risk Regulation*, 43 CREIGHTON L. REV. 993, 1012–13 (2010) (securities); Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 206, 233–34 (environmental protection); Dennis J. Ventry, Jr., *Whistleblowers and Qui Tam for Tax*, 61 TAX LAW. 357 (2008) (tax); Jennifer Arlen, *Public Versus Private Enforcement of Securities Fraud* 46 (2007) (unpublished manuscript) (on file with the Northwestern University Law Review) (securities). As I explain elsewhere, we might call this type of agency authority *retail* gatekeeper authority. As an alternative, agencies might be vested with *wholesale* gatekeeper authority in which they use their synoptic perspective to weigh costs and benefits and determine whether private rights of action should lie at all. See Engstrom, *supra* note 5, at 28–29 (coining the "wholesale" and "retail" terminology); see also Stephenson, *supra* note 2, at 95 (arguing that agencies should be given greater authority "to create and delimit private rights of action"); Richard J. Pierce, Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 ADMIN. L. REV. 1 (1996) (same).

private enforcers and thus conserving scarce public resources for other uses.⁷

But a long literature on public bureaucracies also suggests reason for caution. Given that private enforcement is designed at least in part to counter possible agency capture, bringing agencies back into the equation risks returning the fox to the henhouse. Calls for expanded agency oversight authority also raise concerns about the capacity and will of agencies to optimally perform gatekeeper duties, whether because of limited ability to gauge case merit, pursuit of political rewards, or imperfect managerial control over line-level personnel.⁸

Despite growing debate around these issues, there exists strikingly little theory or evidence on how agency gatekeeper authority should or would work in practice. This Article begins to fill that gap by offering the first comprehensive study of an often invoked but little-studied example: United States Department of Justice (DOJ) oversight of lawsuits brought pursuant to the *qui tam* provisions of the False Claims Act (FCA). The FCA's *qui tam* provisions empower private persons, dubbed "relators," to sue private parties alleging fraud against the United States and earn a cash "bounty" equal to a portion of any proceeds returned to the federal treasury.⁹ The Act also grants DOJ expansive gatekeeper powers. Among other things, DOJ can intervene in *qui tam* lawsuits, taking primary control over their prosecution, or even dismiss them out from under private relators entirely.¹⁰ This unique public-private hybrid enforcement approach has become the gold standard among those who advocate a heightened agency oversight role across a range of litigation contexts, including civil rights,¹¹ environmental protection,¹² and financial and securities regulation.¹³ None

⁷ Cf. Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 879 (1985) (proposing that the EPA "cede[] control over routine penalty actions to private enforcers, and concentrate[] its efforts on the novel, difficult and expensive areas of enforcement"); Wendy Naysnerski & Tom Tietenberg, *Private Enforcement of Federal Environmental Law*, 68 LAND ECON. 28, 46 (1992) ("The very existence of private enforcement allows the public sector greater flexibility in targeting its limited enforcement resources."); Steven D. Shermer, *The Efficiency of Private Participation in Regulating and Enforcing the Federal Pollution Control Laws: A Model for Citizen Involvement*, 14 J. ENVTL. L. & LITIG. 461, 469 (1999) ("By delegating to private citizens authority to perform certain tasks, . . . the EPA can relieve some of the burden on its dwindling budget thereby allowing it to concentrate on areas where its resources and expertise are more sorely needed."); Stephenson, *supra* note 2, at 109 (noting that agencies can "economize" on scarce resources by selectively relying upon private enforcement where it makes sense to do so).

⁸ For detailed theoretical discussion of each of these concerns, including the possibility of regulatory capture noted previously, see *infra* Part I.B.

⁹ See 31 U.S.C. § 3730 (2006) (setting forth FCA's *qui tam* provisions).

¹⁰ See *id.* § 3730(c)(1)–(2) (vesting the government with these powers).

¹¹ See Gilles, *supra* note 6, at 1387–88.

¹² See Bucy, *supra* note 6, at 76; Thompson, *supra* note 6, at 233–34.

of these calls, however, is accompanied by more than superficial consideration of the merits or demerits of the FCA approach.¹⁴

Even beyond its frequent invocation, the FCA's qui tam regime is worthy of study. The regime is big and growing fast, producing nearly 3000 lawsuits and roughly \$12 billion in recoveries in the last five years alone—numbers that rival, and even eclipse, those achieved by private enforcement efforts in other, much-analyzed areas of law such as securities and antitrust over the same period.¹⁵ And qui tam's explosive growth has stoked heated debate about DOJ's discharge of its statutory gatekeeper duties in particular.

One flashpoint is how to interpret the fact that most qui tam recoveries come where DOJ has intervened while most cases in which DOJ declines to intervene end in dismissal. Qui tam's critics assert that declined cases should thus be presumed meritless and accuse DOJ of too meekly exercising its authority to terminate cases or argue that relators should be precluded from pursuing cases at all where DOJ refuses to become involved.¹⁶ Some federal courts adopt a similar view, explicitly inferring a

¹³ See Bucy, *supra* note 6, at 76; Fisch, *supra* note 6, at 198–202; Rose, *supra* note 6; Arlen, *supra* note 6, at 2–4.

¹⁴ For instance, Rose makes a thought-provoking, article-length call to vest the SEC with gatekeeper powers akin to what DOJ wields under the FCA, but devotes only a few pages to potential challenges to such an oversight regime. See Rose, *supra* note 6, at 1358–63; see also Bucy, *supra* note 6, at 53–54 (offering a brief descriptive overview of qui tam filing and recovery trends as evidence that the FCA's hybrid public-private enforcement approach has been “extraordinarily successful as a regulatory tool”); Gilles, *supra* note 6, at 1421–24 (concluding without substantial empirical or other analysis that the FCA's hybrid public-private enforcement model is the “most effective” approach to deterring fraud).

¹⁵ For the most up-to-date aggregated statistics on qui tam filings and recoveries, see Civil Div., U.S. Dep't of Justice, Fraud Statistics—Overview: October 1, 1987–September 30, 2012 (Oct. 24, 2012), http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf [hereinafter Fraud Statistics], which reported approximately \$2.8 billion in qui tam recoveries in 2011 and \$3.4 billion in 2012, with more than 600 new filings in both years. For securities litigation statistics, see Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2012 Review and Analysis*, CORNERSTONE RESEARCH 2 (2013), available at http://securities.stanford.edu/Settlements/REVIEW_1995-2012/Settlements_Through_12_2012.pdf, which reported \$2.9 billion in settlements in 2012 and \$1.4 billion in 2011, and Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Filings: 2012 Year in Review*, CORNERSTONE RESEARCH 3 (2013), available at http://securities.stanford.edu/clearinghouse_research/2012_YIR/Cornerstone_Research_Securities_Class_Action_Filings_2012_YIR.pdf, which reported 152 filings in 2012 and 188 filings in 2011. For antitrust filing statistics, see *Sourcebook of Criminal Justice Statistics Online*, Table 5.41.2010, ST. U. N.Y. ALBANY (2010), <http://sourcebook.mybigcommerce.com/sections/courts/antitrust-cases-filed-in-u-s-district-courts-1975-2012/>, which reported an average of roughly 650 private antitrust lawsuits in 2009 and 2010.

¹⁶ See Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 PUB. CONT. L.J. 813, 826 (2012) (“The immense disparity between recoveries in qui tam actions in which the Government intervened and those in which it did not suggests that most qui tam actions brought without government intervention assert meritless or frivolous claims.”). For other versions of this argument as well as the claim that DOJ too stingily uses its termination authority, see Christopher M. Alexion, *Open the Door, Not the Floodgates: Controlling Qui*

lack of case merit from DOJ declinations, with many more presumably making implicit judgments along those same lines.¹⁷ In stark contrast, qui

Tam *Litigation Under the False Claims Act*, 69 WASH. & LEE L. REV. 365, 404 (2012); J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 638–40 (2000); William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201, 238 (1998); William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1849 (1996) [hereinafter Kovacic, *Monitoring Devices*]; Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281, 334 (2007); and 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, 1256–58 (2008).

¹⁷ See ROBIN PAGE WEST, *ADVISING THE QUI TAM WHISTLEBLOWER* 51 (2d ed. 2009) (“Unfortunately, a declination is often a death knell for the case, because many judges view it as a statement by the government on the merits even though it is not.”). Many court decisions imply a connection between DOJ case-election decisions and case merit. See, e.g., *United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 331 (5th Cir. 2011) (noting that DOJ decision to intervene as to seven defendants but not more than 400 others meant that the unintervened claims “presumably lacked merit”); *United States ex rel. Karvelas v. Melrose–Wakefield Hosp.*, 360 F.3d 220, 242 n.31 (1st Cir. 2004) (noting that “the government’s decision not to intervene in the action also suggested that [relator’s] pleadings of fraud were potentially inadequate”); *United States ex rel. Doe v. Dow Chem. Co.*, 343 F.3d 325, 330 (5th Cir. 2003) (noting that “the United States had declined to intervene in the suit, . . . which could be interpreted . . . as substantially weakening [the] case”); *Riley v. St. Luke’s Episcopal Hosp.*, 252 F.3d 749, 775 n.38 (5th Cir. 2001) (Smith, J., dissenting) (“[I]n cases . . . in which the government has declined to intervene, it is likely that that decision is not a result of limited resources, but instead because the government has decided for some reason that to pursue the claim is inappropriate.”); *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 999 (2d Cir. 1995) (“[A] defendant’s reputation is protected to some degree when a meritless *qui tam* action is filed, because the public will know that the government had an opportunity to review the claims but elected not to pursue them.”); *Minotti v. Lensink*, 895 F.2d 100, 104 (2d Cir. 1990) (“[T]he Attorney General’s refusal ‘to enter the suit may be taken as tantamount to the consent of the District Attorney to dismiss the suit.’” (quoting *United States ex rel. Laughlin v. Eicher*, 56 F. Supp. 972, 973 (D.D.C. 1944))); *United States ex rel. Fender v. Tenet Healthcare Corp.*, 105 F. Supp. 2d 1228, 1231 (N.D. Ala. 2000) (“The decision by the Attorney General not to intervene in and conduct the lawsuit is tantamount to consent by the Attorney General to have the action dismissed.” (citing *Minotti*, 895 F.2d at 104)); *United States ex rel. Mikes v. Straus*, 78 F. Supp. 2d 223, 225–26 (S.D.N.Y. 1999) (suggesting that “the reason the Government chose not to intervene in this matter is its recognition that Relator’s allegations . . . were a ‘stretch’ under the False Claims Act”); *United States v. Fiske*, 968 F. Supp. 1347, 1350 (E.D. Ark. 1997) (“[T]he filing and service requirements protect defendants’ reputations to some degree by making public the United States’ decisions not to intervene and thereby flagging some meritless allegations.” (citing *Pilon*, 60 F.3d at 999)).

Other courts take a more measured view and assume that intervention decisionmaking is driven by a range of factors, from bureaucratic resource constraints to a simple risk–benefit calculation. See, e.g., *United States ex rel. Williams v. Bell Helicopter Textron Inc.*, 417 F.3d 450, 455 (5th Cir. 2005) (noting that Attorney General may choose not to intervene “for any number of reasons” and that “a decision not to intervene may not [necessarily be] an admission by the United States that it has suffered no injury in fact, but rather [the result of] a cost–benefit analysis” (citations and internal quotation marks omitted)); *United States ex rel. Berge v. Bd. of Trs. of Univ. of Ala.*, 104 F.3d 1453, 1458 (4th Cir. 1997) (noting that intervention decision was based on “cost–benefit analysis”); *United States ex rel. Downy v. Corning, Inc.*, 118 F. Supp. 2d 1160, 1170 (D.N.M. 2000) (noting that intervention decision may have been driven by a “lack of available Assistant United States Attorneys” or “respect for the skill of the relator’s attorneys”); *United States ex rel. Roberts v. Lutheran Hosp.*, No. CIV. 1:97C–174, 1998

tam's champions complain that DOJ intervention decisions border on random and assert that high success rates in intervened cases stem not from DOJ's case-screening prowess but rather its litigation leverage, particularly its unique ability to threaten defendants with debarment from future government business (a "corporate death sentence" for many government contractors) in cases it joins.¹⁸ Some have also accused DOJ of shielding politically connected companies from FCA liability, particularly defense contractors accused of fraud in connection with controversial military ventures in Iraq and Afghanistan.¹⁹ In short, while DOJ oversight plainly plays a critical role, it remains unclear whether the FCA's hybrid public-private enforcement structure should be seen as an exemplary design or a cautionary tale.

WL 1753335, at *3 (N.D. Ind. Apr. 17, 1998) (noting that "the government has limited resources to devote to FCA investigations").

¹⁸ See Christopher D. Zalesky, *Pharmaceutical Marketing Practices: Balancing Public Health and Law Enforcement Interests; Moving Beyond Regulation-Through-Litigation*, 39 J. HEALTH L. 235, 241 & n.27 (2006) (noting "corporate death sentence" of debarment for health care providers); Tara L. Ward, Note, *Amending the Qui Tam Intervention Provisions: Setting Debar Higher?*, 38 PUB. CONT. L.J. 297, 302-04 (2008) (describing government's debarment power under federal procurement regulations).

¹⁹ See *The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 2 (2008) [hereinafter *False Claims Act Judiciary Hearing*] (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary) ("In light of the politicization of the Justice Department, many wonder whether it has resisted pursuing certain false claims cases for political reasons—most notably those involving contracting fraud related to the war in Iraq and Afghanistan."). DOJ Civil Division head Tony West seemed to imply a lack of prosecutorial vigor during the previous Administration in recent congressional testimony: "Using the False Claims Act, the Department is aggressively pursuing fraud in connection with the wars in Southwest Asia. Thus far, we have reached settlements in cases involving goods and services provided in connection with the war effort amounting to \$77 million, and since January 2009, procurement fraud cases have accounted for approximately \$645 million in recoveries—more than the Department's procurement fraud recoveries in 2007 and 2008 combined." *Civil Division of the United States Department of Justice: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 14-15 (2010) [hereinafter *Civil Division*] (statement of Tony West, Assistant Att'y Gen., Civil Division, U.S. Department of Justice). It is also noteworthy that DOJ's annual press release announcing its 2011 FCA case-outcome statistics made particular mention of DOJ's enhanced efforts in war-related cases. See Press Release, Dep't of Justice, *Justice Department Recovers \$3 Billion in False Claims Act Cases in Fiscal Year 2011* (Dec. 19, 2011), available at <http://www.justice.gov/opa/pr/2011/December/11-civ-1665.html>. Newspaper accounts have sounded many of the same themes. See Carrie Johnson, *A Backlog of Cases Alleging Fraud*, WASH. POST, July 2, 2008, at A1 ("Critics argue that the delays are at least partly the result of foot-dragging by Justice and the federal agencies whose position it represents, especially in the touchy area of suppliers that may have overbilled the government for equipment, food and other items used by troops in Iraq and Afghanistan."); Yochi J. Dreazen, *Lawyer Uses Civil War-Era Law to Go After Firms for Corruption, but Administration Won't Help*, WALL ST. J., Apr. 19, 2006, at B1 (quoting qui tam relator attorney as follows: "The Bush Administration has made a conscious decision to sweep the cases under the rug for as long as possible And the more bad news that comes out of Iraq, the more motivation they have to do so."); Glenn R. Simpson, *U.S. Rebuffed Food-Fraud Case*, WALL ST. J., Oct. 22, 2007, at A6 (noting allegation by qui tam relator attorney that DOJ "has turned down numerous Iraq fraud cases to protect the administration from political damage").

Using an original dataset encompassing more than 4000 qui tam cases filed since 1986, this Article moves beyond anecdote and begins the process of adjudicating competing claims about agency gatekeeping in general and DOJ's qui tam oversight in particular. Deploying multiple identification strategies, I offer evidence on three issues that have occupied recent debate. First, my findings confirm that DOJ rarely uses its termination authority, raising questions about DOJ's will or capacity to play a welfare-maximizing role. Second, I reject heated claims about DOJ politicization, finding what is at best only tentative evidence that DOJ oversight has a partisan political cast, whether in defense-procurement cases or otherwise. Third, I find that DOJ appears to have substantial merits-*screening* capacity, contrary to the view that DOJ intervention decisions are wholly arbitrary. At the same time, however, I uncover substantial evidence that DOJ makes intervention decisions strategically, separate and apart from pure "merits" considerations, in response to simple resource constraints, judicial threats to its ability to police collusive relator-defendant settlements, and the identity (and corporate power) of the defendant. My analysis thus suggests that courts should exercise great caution in drawing merits-based inferences from DOJ declination decisions going forward.

More broadly, anatomizing DOJ intervention decisions highlights underappreciated challenges in the optimal design of agency oversight mechanisms, with applications to the FCA context and beyond. As just one example, my twin findings that DOJ is resource-constrained yet substantially more likely to intervene in cases brought by more sophisticated, repeat plaintiffs' counsel are striking, for they suggest a potentially perverse allocation of public enforcement resources. This is directly contrary to idealized models of hybrid public-private enforcement in which public enforcers optimally manage private enforcement capacity, delegating enforcement duties to competent and trustworthy private enforcers and thus freeing up scarce public resources for other purposes. My analysis suggests a reason: the FCA's tiered bounty system, which pays successful relators a higher bounty in cases DOJ declines in order to encourage private enforcers to go it alone and serve an agency-forcing or anticapture role, may undermine optimal agency reliance on private enforcement by raising the "price" of delegation. The result is a basic institutional-design trade-off: a legislator cannot incentivize private enforcers to play an agency-forcing or anticapture role without distorting a good faith agency's ability to efficiently deploy private enforcement capacity. In these and other ways, my analysis offers fresh perspective on some classic puzzles of administrative law, particularly how to design institutional structures that balance the need for administrative expertise and some measure of bureaucratic autonomy with the demands of democratic accountability.

The remainder of this Article proceeds as follows. Part I sketches an informal theory of the optimal agency oversight role and develops some testable hypotheses for likely deviations from that ideal. Part II provides a descriptive overview of the FCA's unique public-private hybrid structure and summarizes a range of mostly anecdotal claims made about DOJ's oversight role within the regime. Part III presents the data and empirical results. Part IV discusses some implications of my findings for proposals to amend the FCA, assesses proliferating calls to export the FCA's unique public-private structure to other regulatory areas, and suggests ways to revitalize scholarly debate around the optimal structure of law enforcement at the border of administration and litigation.

I. AGENCIES AS LITIGATION GATEKEEPERS: THEORETICAL FRAMEWORK

A. *The Ideal Gatekeeper Role*

Any attempt to construct a coherent analytical framework for evaluating agency gatekeeper authority must first specify how an ideal agency would use such powers. Put another way, if an ideal agency were vested with the power to control or terminate private litigation efforts, what core tasks would such an agency perform? The scholarly literature on private enforcement's merits and demerits suggests at least five possibilities.

First, an ideal gatekeeper agency will use its gatekeeper authority to quash or cabin what would otherwise be wasteful and inefficient private enforcement efforts. Because a private enforcer will enforce whenever the expected return exceeds her costs, she may do so even where the *social* cost of enforcement (e.g., the transaction costs consumed by both sides, including judicial resources) exceeds the social benefit.²⁰ Put another way, private enforcers do not exercise prosecutorial discretion. Profit-motivated private enforcers may also seek to apply legal mandates in ways that go beyond legislative purposes²¹ or inefficiently piggyback on public enforcement efforts and one another.²² Finally, private enforcers may

²⁰ See generally Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997) (modeling this dynamic).

²¹ See Engstrom, *supra* note 5, at 22 (noting ways in which the interstitial and incremental nature of private enforcement efforts can drive the elaboration of legal mandates in ways that frustrate democratic control efforts); see also Stephenson, *supra* note 2, at 119 (“As neither the citizens bringing private enforcement suits nor the judges who decide them are subject to electoral discipline, private enforcement may undermine a valuable democratic feature of American governance.”).

²² See Engstrom, *supra* note 5, at 16 (noting longstanding concern that private enforcers will “piggyback” on public enforcement initiatives or other private lawsuits in an effort to free ride on other litigants’ work or take advantage of any adverse judgments that result); see also Stephenson, *supra* note 2, at 128 n.117 (citing long literature on “piggyback” actions); Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass*

simply bring meritless claims, whether driven by irrational motives, mistaken evaluation of case merit, or a desire to extract settlements by threatening high discovery or other costs.²³ Where such cases arise, an ideal gatekeeper agency will terminate private enforcement efforts before substantial costs have accrued or take over control of a case and steer it in more public-interested directions.

A second core gatekeeper task is unique to the situation in which private enforcers are deputized to collect fines on the government's behalf rather than damages: policing collusive settlements between private enforcers and regulatory targets. Private enforcement regimes typically pay private enforcers only a portion of any fines imposed as a way to reduce private enforcement activity to something approximating a socially optimal level. But doing so incentivizes private settlements for an amount greater than the bounty but less than the full fine.²⁴ An ideal gatekeeper agency will thus step in and thwart collusive private settlements that threaten to dilute deterrence or are otherwise inconsistent with the government's goals.

The remaining gatekeeper tasks are more subtle. As just noted, an ideal public enforcer will simply terminate private enforcement efforts that lack merit or whose costs outweigh any benefits. But an agency gatekeeper can still play an epistemic, merits-screening role in borderline cases. By neither joining nor terminating a case whose social cost-benefit profile is ambiguous, an ideal agency will signal its skepticism to courts and highlight the need for careful judicial scrutiny and case development.²⁵

A final pair of ideal gatekeeper tasks entails leveraging deficient (but socially desirable) private enforcement efforts. In general, an ideal public enforcer will maximally rely on fully competent and well-incentivized

Litigation, 34 U.C. DAVIS L. REV. 1, 42–43 (2000) (noting concern about “coattail” actions and considering their possible efficiencies); James D. Cox & Randall S. Thomas with the assistance of Dana Kiku, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737, 745, 763 (2003) (empirically testing claims about “overlap between private and SEC suits”); Thomas E. Kauper & Edward A. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared*, 74 GEO. L.J. 1163, 1202–08 (1986) (same, in antitrust context).

²³ See generally Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519 (1997) (modeling incentive structures and informational challenges that yield frivolous lawsuits); Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988) (same); Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 INT’L REV. L. & ECON. 3 (1990) (same); see also Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1 (2000) (arguing that “irrational plaintiffs” have a salutary effect because they counteract the repeat-play advantages that defendants enjoy in complex litigation regimes).

²⁴ See William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 24 (1975) (noting criticism that private enforcement “creates incentives for bribery and corruption because the gain to the enforcer from enforcement is generally less than the offender’s potential penalty”); A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105, 123 (1980) (noting same concern).

²⁵ See Engstrom, *supra* note 5, at 39–40.

enforcers, freeing up scarce public resources for other uses. But private enforcement efforts may also prove deficient, typically for one of two reasons.²⁶

The first stems from failures in the market for the retention and referral of legal services. Of particular concern are so-called “queuing” effects in which the best qualified attorneys cherry-pick the highest yielding cases, thus matching the best lawyers to the cases to which they add the least value and leaving the remaining, more difficult cases to less skilled counsel.²⁷ Further mismatches may occur where sophisticated plaintiffs’ counsel erroneously pass on a high quality case, leaving it to lower order counsel in the queue, and enforcement targets, with full information about the extent of illegality, respond by investing heavily in defense. A public enforcer focused on achieving optimal deterrence will compensate for the resulting “adversarial asymmetries” by joining and leveraging the enforcement capacities of overmatched private enforcers who cannot fully vindicate the public interest.²⁸

A second reason private enforcement may prove deficient is scaling problems. Because private enforcers will act only if the expected recovery exceeds expected costs, they may not initiate enforcement at all where the cost of doing so is high (e.g., where they suffer high psychic or other costs from taking action, such as reporting on colleagues or engaging in

²⁶ An implicit assumption in the discussion that follows is that counsel quality affects litigation outcomes, which is relatively uncontroversial in the scholarly literature. See Sean Farhang & Douglas M. Spencer, *Economic Incentives for Attorney Representation in Civil Rights Litigation* (Sept. 10, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1882245 (collecting literature); see also W. VAUGHAN STAPLETON & LEE E. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS 85, 91 (1972) (finding improved outcomes for individuals represented by more experienced counsel in juvenile proceedings); James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154 (2012) (finding that public defenders achieve better outcomes for clients accused of murder than appointed counsel); Engstrom, *supra* note 4, at 1267 (finding substantial returns to specialization and experience among plaintiff-side counsel in qui tam litigation). But see D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2150 (2012) (finding no improvement in litigation outcomes for individuals who were offered and used representation from legal aid organizations in appeals of denials of unemployment benefits); *id.* at 2175–82 & 2175 n.154 (reviewing literature on the effect of legal representation in civil disputes and criticizing the methodology used therein).

²⁷ See Robert H. Mnookin, *Negotiation, Settlement and the Contingent Fee*, 47 DEPAUL L. REV. 363, 368 (1998) (noting how queuing effects ensure that “top contingent fee lawyers end up with portfolios of better cases”); John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 280 (2007) (noting the “queuing effect” within referral networks that leaves the hardest cases to “the middle or lower ranks of lawyers,” with the result “that the best lawyers do not select the cases to which they might be able to add the most value”).

²⁸ See Engstrom, *supra* note 5, at 18, 40.

“organizational dissent,”²⁹ or where whistleblower protections are not perfectly binding), even if *post-initiation* enforcement costs are low and enforcement would improve social welfare.³⁰ Scaling problems complicate optimal calibration at the high end of the harm spectrum as well: private enforcement may be deficient where the targeted harm—and, by extension, available fines or damages—exceeds the malefactor’s ability to pay³¹ or where well-resourced regulatory targets are able and willing to mount a vigorous defense.³² Here, the ideal agency gatekeeper role is to secure desired deterrence across the full spectrum of misconduct by committing to assist such claims, thus inducing reluctant private enforcers with privately held information about misconduct to come forward.

B. *Deviations from the Gatekeeper Ideal*

Table 1 corrals the above insights and characterizes the role of an optimal, welfare-maximizing public enforcer with respect to each of the five core gatekeeper tasks. As the rest of Table 1 reflects, however, there is also good reason to be skeptical about the willingness of public enforcers to optimally perform these tasks. Modern governance delegates enforcement authority to administrative agencies that may or may not share ideal policymaker goals. One possibility is deterrence-diluting corruption or agency capture by regulated interests.³³ A subtly different but potentially more important insight is that a gatekeeper agency may allocate resources with an eye to collecting political rewards by emphasizing production of

²⁹ See generally Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 433, 434, 461, 486–87 (2009) (coining the term “organizational dissent” and noting the high psycho-emotional cost of whistleblowing).

³⁰ See Engstrom, *supra* note 5, at 15; see also Polinsky, *supra* note 24, at 119–20 (noting possible deficiency of private enforcement at low end of harm spectrum); David Kwok, *Coordinated Private and Public Enforcement of Law: Deterrence Under Qui Tam 12* (Feb. 8, 2010) (unpublished manuscript), available at https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=ALEA2010&paper_id=375 (same).

³¹ See Naysnerski & Tietenberg, *supra* note 7, at 42 (“Civil sanctions have a serious defect when the assets of the firm are limited relative to its obligations.”); Polinsky, *supra* note 24, at 119 (noting superiority of public enforcement where defendants are judgment proof).

³² See Reza Rajabiun, *Private Enforcement and Judicial Discretion in the Evolution of Antitrust in the United States*, 8 J. COMPETITION L. & ECON. 187, 202 (2012) (noting that “risk-averse plaintiffs with knowledge about illegal acts might be reluctant to file cases against resourceful enterprises”).

³³ In its standard form, capture theory predicts that certain groups will systematically win out over other groups in the regulatory process, either because they face more concentrated benefits or costs and so have greater incentive to invest in information or lobbying efforts, or because they can better solve the collective action problems that can stymie group-based political action. For recent and comprehensive treatments of the capture concept, see PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David Moss eds., forthcoming 2013), and STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* (2008).

certain observable bureaucratic outputs over others.³⁴ The result is three additional agency “types” beyond the optimal *welfare-maximizer* agency, each with its own distinct maximand, and each deviating from the normative ideal.

³⁴ See JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 251–53 (2000) (noting agency tendency to pursue certain observable bureaucratic outputs over others). On political rewards more broadly, public choice scholars have long theorized that agencies will seek to maximize their budgets—a view sometimes dubbed the “self-aggrandizement” hypothesis. See WILLIAM A. NISKANEN JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 38–42 (1971) (offering the classic account of this view); GORDON TULLOCK, THE POLITICS OF BUREAUCRACY 134–36, 167–70 (1987) (same); see also Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 932–34 (2005) (offering an updated and more skeptical view).

TABLE 1: AGENCY GATEKEEPER TASKS BY STYLIZED AGENCY "TYPE"

| Agency Type/Agency Action | Terminate/Redirect Inefficient Private Enforcement Efforts | Anticollusion: Police Private Settlements | Merits Signaling | Anti-Queuing: Leverage Under-Resourced/Over-Matched Private Enforcers | Antifiscaling: Induce/Pursue Lower Value Cases |
|--|--|---|--|---|--|
| Agency as Welfare Maximizer (optimize deterrence) | Yes, to curb private overenforcement | Yes, to avoid dilution of deterrence | Yes (but note possible impairment by other gate-keeper tasks) | Yes, because overmatched private enforcers won't optimally deter | Yes, because profit-driven private enforcers won't optimally deter |
| Agency as Rent-Seeker (maximize recoveries) | No | No, except in larger value cases where agency can recoup monitoring costs | No | Only to the extent it maximizes recoveries | No |
| Agency as Politicker (maximize <i>public</i> recoveries) | No | No | No | Only to the extent it maximizes agency's haul | No |
| Agency as Belt-Notcher (maximize agency win-loss ratio) | No | No | Yes, but only as an incident to picking winning cases and with potential bias in favor of small and/or easier-to-win cases | Only to the extent it maximizes agency win rate | Yes, but win-focused agency may do so beyond what is necessary to achieve optimal deterrence |

For instance, Table 1's *rent-seeker* agency will privilege total monetary recoveries over harder-to-measure and empirically contestable goals such as total illegal activity deterred or aggregate welfare gains.³⁵ This is problematic, for the gatekeeper decisions of an agency that seeks to maximize total recoveries will yield an overall enforcement strategy that is not substantially different from that of profit-seeking private enforcers left to their own devices.³⁶ To that extent, a gatekeeper agency focused on maximizing recoveries may perpetrate, rather than mitigate, socially costly overdeterrence.

Other possible agency maximands can yield even more substantial deviations from the gatekeeper ideal. A *politicker* agency will go a step further than a *rent-seeker* agency, maximizing recoveries in which public enforcers actively participate. The motive should be obvious: a press conference touting yet another agency win may be better than one announcing a mix of public and private successes, even where private enforcers do not need assistance and marginal public enforcement resources would be better spent elsewhere, producing either greater deterrence or a larger recovery pie. Finally, Table 1's *belt-notcher* agency will maximize its win-loss ratio. It might do so because cherry-picking strong cases and creating a substantial spread between win rates in cases it joins and those it does not will confirm its pivotal role to political overseers.³⁷

³⁵ See Nuno Garoupa & Daniel Klerman, *Optimal Law Enforcement with a Rent-Seeking Government*, 4 AM. L. & ECON. REV. 116 (2002) (modeling public enforcement as an effort to maximally appropriate the rents of illegal conduct); see also John C. Coffee, Jr., *Is the SEC's Bark Worse than Its Bite?*, NAT'L L.J., July 9, 2012, at 10, 10 (noting tendency of SEC to curry favor with Congress by structuring enforcement activities with an eye to "obtaining greater aggregate penalties, in order to obtain a larger budget"); John C. Coffee, Jr., *SEC Enforcement: What Has Gone Wrong?*, NAT'L L.J., Dec. 3, 2012, at 23, 24 ("[T]he SEC needs to be able to use objective metrics to justify its request for budget increases. By bringing many actions and settling them cheaply, it can point to an increase in the aggregate penalties collected, even if the median penalty is at the same time decreasing."); Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J.L. & PUB. POL'Y 639, 646 (2010) (noting the tendency of internal and external evaluators of SEC performance to employ "readily available evaluative heuristics," including a focus on "the number of cases brought by the Division, and, to a lesser extent, on the size of the fines collected by the SEC").

³⁶ See Garoupa & Klerman, *supra* note 35, at 133–34 (comparing public and private enforcement mechanisms where government seeks to maximize fine revenue and arguing that enforcement outcomes and concomitant social welfare effects will not differ between the two except as to "very high" harm misconduct or where public enforcement is substantially more or less costly than private enforcement).

³⁷ For a recent and innovative argument that legislative oversight can lead to so-called "accountability pathologies," see Jacob E. Gersen & Matthew C. Stephenson, *Accountability Pathologies in Public Law: Diagnosis and Treatment* (2013) (unpublished manuscript) (on file with author). A further analogy can be found in the economics literature on "high-powered incentives." See Daron Acemoglu, Michael Kremer & Atif Mian, *Incentives in Markets, Firms, and Governments*, 24 J.L. ECON. & ORG. 273, 292, 297 (2007) (theorizing that "high-powered incentives" linked to performance can generate "unproductive signaling effort"). Agency use of a high win rate to keep political overseers at bay might also be consistent with the view of some political scientists that

To be sure, an agency might seek to maximize wins for other reasons. Among other things, an agency might consider a neutral sorting-and-signaling role in which it focuses on case winnability to be most consistent with its statutory mandate or its self-perceived role in a system of separated powers. To that extent, it may not always be possible to distinguish a *belt-notcher* agency from an ideal, *welfare-maximizing* agency that sees itself as a merits-signaling adjudicatory adjunct to the courts. And yet, maximizing an agency's win rate may not be the socially optimal approach. Easier-to-win cases might be systematically smaller than more difficult cases if case size correlates with complexity or defense-side deployment of resources.³⁸ A win-maximizing agency might thus unduly focus scarce agency resources on low-harm cases, leaving more consequential misconduct undeterred.³⁹

More broadly, none of Table 1's alternative agency types will optimally terminate inefficient private enforcement efforts. One reason is that each agency type can be expected to privilege affirmative enforcement successes over passive case termination, particularly where termination costs, both actual and reputational, can be reliably shifted to the judiciary.⁴⁰

agencies may adopt a position of "strategic neutrality," deploying relatively objective decisionmaking criteria (here, case winnability) to avoid taking political heat for their enforcement approach. *See, e.g.*, GREGORY A. HUBER, *THE CRAFT OF BUREAUCRATIC NEUTRALITY: INTERESTS AND INFLUENCE IN GOVERNMENTAL REGULATION OF OCCUPATIONAL SAFETY* (2007) (finding substantial evidence for this general proposition in OSHA inspection and enforcement patterns).

³⁸ *See, e.g.*, EMERY G. LEE III & THOMAS E. WILLGING, *FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS* 5, 7 (2010) (finding relationship between case "stakes" and plaintiff- and defendant-side litigation costs); Joni Hersch & W. Kip Viscusi, *Tort Liability Litigation Costs for Commercial Claims*, 9 *AM. L. & ECON. REV.* 330, 353 (2007) (offering evidence that litigation costs tend to rise with case stakes and complexity); Reza Rajabiun, *Private Enforcement of Law*, in *CRIMINAL LAW AND ECONOMICS* 60, 81 (Nuno Garoupa ed., 2d ed. 2009) ("Even without regulatory capture, economizing practices by public enforcers reveal the presence of incentives to divert resources to actions against firms less likely to be able to defend themselves.").

³⁹ *See, e.g.*, Stavros Gadinis, *The SEC and the Financial Industry: Evidence from Enforcement Against Broker-Dealers*, 67 *BUS. LAW.* 679, 725 (2012) (finding that the SEC pursued smaller cases in the area of broker-dealer regulation); Cox & Thomas, *supra* note 22, at 764, 777 (finding that the SEC brought more enforcement actions against smaller firms than did private enforcers where there was no parallel SEC action).

⁴⁰ *See* Matthew, *supra* note 16, at 300 (noting a similar dynamic). Part of this is a continuation of the logic of a self-aggrandizing agency: a politically conscious gatekeeper agency focused on maintaining access to needed resources will not steer its efforts toward purely reactive case terminations in preference to the pursuit of objective and observable measures of enforcement success. Moreover, agencies, in addition to being "self-aggrandizing," are also often excessively cautious regarding risks within their regulatory bailiwicks and are thus just as likely to be "defensive" and "scandal-minimizing." James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 377–78 (James Q. Wilson ed., 1980); *see also* Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 *HARV. L. REV.* 1075, 1080 (1986) ("[R]egulation tends to be excessively cautious (forcing investments in risk reduction far in excess of the value that individuals place on avoiding the risks involved."); DENNIS C. MUELLER, *PUBLIC CHOICE III*, at 370–71 (2003) (summarizing the literature on "[t]he risk-avoiding bureaucrat"). A useful analogy here is the "bailout

Worse, politically conscious agencies may in fact *aid* inefficient private enforcement efforts, since even socially costly enforcement efforts will add to recovery tallies or the agency's win rate. Nor are such agencies likely to engage in systematic efforts to leverage deficient private enforcement or police collusive settlements except where doing so serves the agency's own instrumental goals.

Beyond Table 1, agency gatekeeping may deviate from the ideal not because agencies lack the *will* to optimally perform oversight tasks but because they lack the *capacity* to do so. One possibility is that an agency vested with gatekeeper authority will simply be unable to accurately gauge case merits, or do so any more quickly or cheaply than courts.⁴¹ Another possibility is imperfect managerial control: careerist line-level prosecutors who perform screening tasks may bias agency decisions toward larger and more consequential cases, smaller and potentially more winnable cases, or cases brought by more sophisticated private enforcers deemed to be better litigation partners, all in search of résumé-burnishing successes.⁴²

A final capacity-related problem is that even a good faith agency may not be able to solve the commitment problem inherent in leveraging efforts. Recall that an important part of an agency's leveraging task is to induce reluctant private enforcers to come forward with socially beneficial claims they would not bring on their own by committing to support those claims,

effect" that legal scholars and political scientists have noted in the context of judicial review. See Justin Fox & Matthew C. Stephenson, *Judicial Review as a Response to Political Posturing*, 105 AM. POL. SCI. REV. 397, 397 (2011) (describing a "bailout effect" in which "judicial review may rescue elected officials from the consequences of ill-advised policies"); see also MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57–58 (1999) (arguing that "judicial overhang" can distort legislative behavior); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 261 (2006) (offering a similar account that likens judicial review to an "insurance policy against erroneous legislative determinations," thus creating a moral hazard problem for legislative behavior). Another analogy is found in the classic concern that public regulators are systematically biased against the more tangible harms that flow from Type II errors (i.e., "false negatives" in the form of an erroneous conclusion that a dangerous product is safe) and in favor of less observable Type I errors (i.e., "false positives" in the form of an erroneous conclusion that a safe product is dangerous). See MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* 358–60 (2009) (summarizing the literature).

⁴¹ See Engstrom, *supra* note 5, at 41–49 (noting the inherently comparative nature of any inquiry regarding the competence or capacity of agencies to perform gatekeeper tasks and questioning whether agencies can gauge case merits any more accurately or efficiently than courts can).

⁴² See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1106, 1115–16 (1995) (noting "the unique difficulties associated with monitoring the behavior of government lawyers"); see also R. Preston McAfee, Hugo M. Mialon & Sue H. Mialon, *Private v. Public Antitrust Enforcement: A Strategic Analysis*, 92 J. PUB. ECON. 1863, 1872 (2008) ("[S]ome government actors are likely to be partly motivated by factors other than efficiency, including career concerns . . ."); *id.* ("In reality, the government's lawyers may have incentives to win (big) cases independent of their actual welfare consequences."); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1444–45 (1998) (noting tendency of civil rights prosecutors to bring relatively small and politically uncontroversial cases).

thus ensuring enforcement efforts across the full spectrum of misconduct.⁴³ However, because public enforcers may not be able to credibly commit to joining those efforts in the face of other enforcement opportunities, there is a potential holdup problem: private enforcers rightly worried about being left holding the bag will not surface the claims in the first place.⁴⁴

* * *

The goal up to this point has been to fix ideas and generate testable predictions about agency behavior. The resulting analysis has necessarily traded in stylized types. In reality, a gatekeeper agency, particularly one facing resource constraints, will likely pursue multiple objective functions simultaneously, maximizing a weighted mix of total recoveries, public recoveries, and its win rate. Note as well the uneasy relationship between leveraging efforts and other core gatekeeper tasks. An enforcement agency that seeks to husband private enforcement capacity by fully delegating enforcement authority to competent private enforcers and leveraging the litigation efforts of less competent ones risks muddying its merits signal unless it has a way to distinguish for courts cases it has deliberately left to private enforcers and cases of uncertain quality. Likewise, a merits-signaling agency must exercise its power to terminate truly meritless cases or it risks sending a noisy or even illegible signal about case quality regarding the rest. Future research—including more formal work—might consider these and other possibilities.

II. THE CASE OF QUI TAM AND THE PUZZLE OF DOJ OVERSIGHT

The False Claims Act (FCA)⁴⁵ is both an exemplar of the coordination challenges in hybrid public–private enforcement regimes and a natural laboratory to test Part I’s theoretical predictions. But it is also byzantine in its design. This Part lays the foundation for Part III’s empirical analysis by offering a brief overview of the FCA’s public–private hybrid structure and summarizing anecdotal claims made about DOJ’s discharge of its statutory oversight duties in particular.

A. *Qui Tam* Basics

Though enacted during the Civil War, the FCA’s modern incarnation dates to 1986 when Congress, faced with rising concern about defense-procurement fraud, passed strengthening amendments.⁴⁶ Since then, the

⁴³ See *supra* notes 29–32 and accompanying text.

⁴⁴ See Ben Depoorter & Jef De Mot, *Whistle Blowing: An Economic Analysis of the False Claims Act*, 14 SUP. CT. ECON. REV. 135, 150–53 (2006) (offering a game-theoretic model of this dynamic).

⁴⁵ See 31 U.S.C. §§ 3729–33 (2006).

⁴⁶ See Beck, *supra* note 16, at 561–62 (recounting the FCA’s “1986 [r]evival”).

FCA has quickly become the government's chief weapon against fraud in connection with federal programs and expenditures.⁴⁷ Penalties are steep, including civil penalties of \$5500 to \$11,000 for each "false claim" made to the government as well as treble the amount of any proven fraud.⁴⁸

While the FCA empowers the United States to bring enforcement actions, the far more common mode of enforcement is private lawsuits initiated under the FCA's qui tam provisions.⁴⁹ These provisions authorize private persons, dubbed "relators," to sue private parties alleging fraud against the United States and earn a cash bounty equal to a portion—ranging from 15% to 30%—of any recovery.⁵⁰

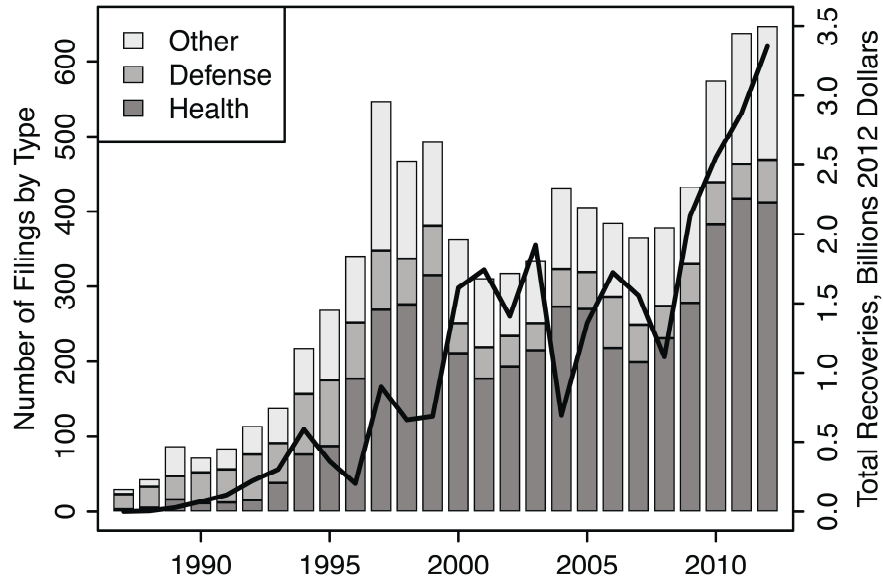
⁴⁷ CLAIRES M. SYLVIA, *THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT* § 1.1 (2d ed. 2010).

⁴⁸ § 3729(a) (setting range of penalty amounts).

⁴⁹ *See id.* § 3730 (setting forth FCA's qui tam provisions); Fraud Statistics, *supra* note 15 (reporting more than 600 qui tam suits in 2011 and 2012, but only 124 and 135 government-initiated "non qui tam" new matters under the FCA for those same years).

⁵⁰ *See* § 3730(b)–(d) (outlining relator rights and bounty shares).

FIGURE 1: QUI TAM FILINGS BY CASE TYPE AND TOTAL RECOVERIES, 1987–2012



As shown in Figure 1, qui tam litigation has grown rapidly since the FCA’s revival, rising from 30 lawsuits in 1987 to more than 600 per year in 2011 and 2012.⁵¹ Monetary recoveries have grown just as quickly, from negligible amounts at the dawn of the regime to a whopping \$3.4 billion in 2012, a sum that rivals or exceeds private litigation efforts in the antitrust and securities areas.⁵² Rising recoveries have in turn attracted a dizzying array of claims. The most common qui tam complaints assert fraud in connection with federally funded health care services under Medicare and Medicaid and defense procurement.⁵³ Other types of claims include underpayment of oil and gas royalties for extraction from federal lands as well as myriad frauds in connection with federally insured education and housing loans, federally funded research and construction projects, Hurricane Katrina relief, and the Troubled Asset Relief Program.⁵⁴

⁵¹ These numbers, and the data presented in Figure 1 more generally, are taken from DOJ’s most recent figures on qui tam filings and recoveries, after adjustment for inflation. See Fraud Statistics, *supra* note 15.

⁵² See *supra* note 15 and accompanying text.

⁵³ See Fraud Statistics, *supra* note 15 (reporting that roughly one-half to two-thirds of qui tam filings over the past decade concern health care fraud).

⁵⁴ For a comprehensive overview of claim types, see *Common Types of Qui Tam Cases*, PHILLIPS & COHEN LLP, <http://www.phillipsandcohen.com/Common-Types-of-Qui-Tam-Cases/> (last visited July 22, 2013).

Not anyone can initiate a qui tam suit. The FCA contains several provisions designed to minimize wasteful private enforcement efforts, including: (i) a “first-to-file” provision precluding claims that mirror a previously filed qui tam suit;⁵⁵ (ii) a bar on claims related to an already existing government enforcement proceeding;⁵⁶ and (iii) a bar on claims that were previously “publicly disclosed” except where the relator is an “original source”—that is, has direct, firsthand knowledge—of the information underlying the fraud claim.⁵⁷ Together, these provisions are designed, as the Supreme Court has noted, to achieve “the golden mean between adequate incentives for whistle-blowing insiders . . . and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own.”⁵⁸

A final set of FCA provisions vests the Attorney General—and, by further delegation, DOJ’s Civil Fraud Division—with substantial authority

⁵⁵ See § 3730(b)(5) (“When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.”).

⁵⁶ See *id.* § 3730(e)(3) (barring actions “based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party”).

⁵⁷ For the currently operative language in the FCA regarding the public disclosure and original source jurisdictional bars, see Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 31 U.S.C. § 3730(e)(4)(A)), which mandates that “[t]he court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.” What constitutes a “public disclosure” and an “original source” within the meaning of this provision (as well as its predecessor version) has generated significant judicial debate. See, e.g., *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1893 (2011) (holding that responses to a Freedom of Information Act request, and the records attached thereto, constitute a “public disclosure” within the FCA’s meaning); *Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 471, 475–76 (2007) (holding qui tam relator must, to satisfy FCA’s “original source” requirement, possess sufficient firsthand knowledge of information underlying fraud claim at time of filing complaint). Recent amendments made in connection with the PPACA altered the regime in two ways. See Patient Protection and Affordable Care Act, 124 Stat. at 119, amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified as amended in scattered sections of 42 U.S.C.). First, the PPACA added the above phrase “unless opposed by the Government,” thus depriving defendants of the ability to independently challenge a relator’s claim on public disclosure or original source grounds by vesting the government with what amounts to a right to veto a court’s dismissal on such grounds. See Engstrom, *supra* note 4, at 1250–51, 1251 n.18. Second, the PPACA clarified that a relator may qualify as an original source if she “materially adds” to publicly disclosed allegations, thus permitting relators to bring FCA claims with only secondhand information so long as they received that information from sources separate from any public disclosure. See Elameto, *supra* note 16, at 821.

⁵⁸ See *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1406 (2010) (quoting *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)).

to oversee and control *qui tam* litigation. For instance, DOJ may dismiss or settle a *qui tam* case out from under a private relator, subject only to a basic fairness hearing,⁵⁹ or veto private dismissals or settlements.⁶⁰ This latter power is critically important: because a relator stands in the shoes of the United States and sues on its behalf, any judgment will have preclusive effect on the government's later assertion of transactionally related claims, creating incentives for relators and defendants to trade an unduly wide release of liability for a larger settlement pot.⁶¹ Such concerns are especially pronounced in *qui tam* cases litigated within the United States Court of Appeals for the Ninth Circuit, which has held—contrary to all other circuits to consider the issue—that DOJ does not possess an absolute settlement veto unless it has previously intervened.⁶² I exploit the Ninth Circuit's unique holding in the empirical analysis to come.

⁵⁹ See § 3730(c)(2)(B) (“The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances.”). Note that some courts have interpreted DOJ's termination and settlement authority as something less than absolute. The Ninth Circuit, for instance, requires that DOJ show a “rational relation” between dismissal and a valid government purpose. See *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (“A two step analysis applies here to test the justification for dismissal: (1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose.” (quoting *United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325, 1341 (E.D. Cal. 1995))). However, this is a low bar, akin to arbitrary and capricious review under the APA.

⁶⁰ See § 3730(b)(1) (“The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.”).

⁶¹ See, e.g., *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 160 (5th Cir. 1997) (noting the “danger that a relator can boost the value of settlement by bargaining away claims on behalf of the United States”). DOJ's settlement-veto authority is also important where a relator asserts both FCA and other, often employment-related claims (e.g., wrongful termination) because of incentives to shift settlement proceeds away from FCA fraud claims, where a relator receives only a portion of the winnings under the FCA's bounty provisions, and toward the other claims, where recovery is dollar-for-dollar. *Id.* at 159 (noting the concern that a relator could “short-chang[e] the government by settling both a False Claims Act suit and a private wrongful termination suit at the same time and shifting most of the recovery into the wrongful termination settlement in order to reduce the percentage of the overall amount that would ordinarily go to the government”).

⁶² See *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 722 (9th Cir. 1994) (holding that DOJ may only seek to halt a private settlement by showing “good cause” where it has not intervened previously). Other circuit courts have come out the other way. See, e.g., *United States ex rel. Schweizer v. Océ N.V.*, 677 F.3d 1228, 1233–34 (D.C. Cir. 2012) (rejecting argument that DOJ dismissal or settlement authority is conditional on prior intervention); *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 931 n.8 (10th Cir. 2005) (“Even where the Government has declined to intervene, relators are required to obtain government approval prior to entering a settlement or voluntarily dismissing the action.”); *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 339 (6th Cir. 2000) (holding that “a relator may not seek voluntary dismissal of any *qui tam* action without the Attorney General's consent”); *Searcy*, 117 F.3d at 158, 160 (finding “absolute veto power over voluntary settlements in *qui tam* False Claims Act suits”). DOJ has publicly chafed at the Ninth Circuit's restriction on its authority. See *False Claims Act Technical Amendments of 1992: Hearing on H.R. 4563 Before the Subcomm. on*

Perhaps the most significant form of oversight authority is DOJ's ability to intervene in qui tam suits.⁶³ By statute, a qui tam relator files her complaint with the court under seal, serving it only on the government.⁶⁴ A statutory sixty-day period (often subject to extensions⁶⁵) follows, during which DOJ investigates the allegations and decides whether to terminate or settle the case out from under the relator, intervene and take "primary responsibility" for the litigation of the case, or decline to intervene and allow the relator to proceed alone.⁶⁶ Importantly, the amount of the bounty paid to a successful relator turns, at least in part, on DOJ's case-election decision: where DOJ declines intervention, a successful relator earns 25% to 30% of any recovery; if DOJ intervenes, a relator keeps only 15% to 25%.⁶⁷ During legislative debates leading up to the FCA's 1986 revival, this tiered system of payoffs was seen as essential to incentivize relators to go it alone where a politicized bureaucracy refused to enforce.⁶⁸

Admin. Law & Governmental Relations of the H. Comm. on the Judiciary, 102d Cong. 29 (1992) (statement of Stuart M. Gerson, Assistant Att'y Gen., Civil Division, U.S. Department of Justice).

⁶³ See § 3730(c)(1) ("If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action . . ."); *id.* § 3730(c)(2)(C) (authorizing the court to "impose limitations on [a relator's] participation" upon a government showing that "unrestricted participation during the course of the litigation . . . would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment").

⁶⁴ *Id.* § 3730(b)(2).

⁶⁵ *Id.* § 3730(b)(3) ("The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal . . .").

⁶⁶ *Id.* § 3730(b)(2) ("The Government may elect to intervene and proceed with the action within 60 days after it receives . . . the complaint . . ."); *id.* § 3730(c)(2)(C) (authorizing the court to "impose limitations on [a relator's] participation" upon a government showing that "unrestricted participation during the course of the litigation . . . would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment"); *id.* § 3730(c)(1) (noting that government has "primary responsibility for prosecuting the action" where it elects to intervene); *id.* § 3730(c)(3) ("If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action.").

⁶⁷ See *id.* § 3730(d)(1)–(2).

⁶⁸ See Beck, *supra* note 16, at 563–64 (noting congressional concern during debate surrounding the 1986 amendments that "political considerations" led to "prosecutorial timidity" (citation omitted) (internal quotation marks omitted)); see also *False Claims Act Amendments: Hearings Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 99th Cong. 174 (1986) (statement of Rep. Howard Berman) (noting that because of institutional and practical constraints, DOJ is unable to bring cases for every act of fraud and "qui tam offers a real potential . . . to provide that prodding, that nudging, that will get the Justice Department into some of these areas"); *id.* at 326 (statement of Sen. Charles E. Grassley) (stating that "[p]essimism about the likelihood of disclosures leading to results is not surprising" when one considers that more than 2000 fraud investigations were completed in 1984, "[y]et the Justice Department successfully prosecuted in that same year just 181 cases, including only one against one of the top 100 defense contractor[s]"); REP. DANIEL GLICKMAN, FALSE CLAIMS AMENDMENTS ACT OF 1986, H.R. REP. NO. 99-660, at 22–23 (1986) ("[T]he Committee is concerned that there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action."); 132 CONG. REC. 22,340 (1986) (statement of Rep. Berkley Bedell) ("[I]n many cases, the authorities will

B. *The Puzzle of DOJ Oversight*

Despite its finely wrought design, the FCA has generated enormous controversy, with DOJ's exercise of its oversight authority acting as a particular lightning rod. Critics complain that DOJ too stingily deploys its termination authority.⁶⁹ And statements by DOJ officials suggest that DOJ, at least in recent years, has had little inclination to put scarce public enforcement resources toward dismissing meritless cases over other, more affirmative enforcement efforts.⁷⁰

DOJ's intervention decisionmaking has also engendered controversy, and for good reason. Among all of DOJ's oversight powers, intervention appears to have the most powerful systemic effect: DOJ statistics have long suggested that intervened cases overwhelmingly generate recoveries while declined cases overwhelmingly end in dismissal. One common interpretation of this discrepancy is that DOJ selects cases on pure merits grounds such that the residuum of unintervened cases can be presumed meritless.⁷¹ Some federal courts—including the Fifth Circuit in a recent

not prosecute for political reasons [T]he Justice Department has neither the political will nor the resources to always enforce all of the laws.”)

⁶⁹ See Matthew, *supra* note 16, at 301; Rich, *supra* note 16, at 1236. Only a few published opinions involve DOJ's invocation of its termination authority. See, e.g., *United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325, 1346, 1354 (E.D. Cal. 1995), *aff'd*, 151 F.3d 1139 (9th Cir. 1998) (granting DOJ motion to dismiss where the Government argued that continuation of the *qui tam* action would thwart implementation of key USDA policies related to the preservation and promotion of the citrus industry); *United States v. Fiske*, 968 F. Supp. 1347, 1354–55 (E.D. Ark. 1997) (“[T]he Government's proffered reason for urging dismissal—that the allegations are without merit—is a legitimate governmental reason and that dismissal is rationally related to the Government's desire to clear from the Court docket a meritless claim.”)

⁷⁰ See *False Claims Act Judiciary Hearing*, *supra* note 19, at 56 (statement of Michael F. Hertz, Deputy Assistant Att'y Gen., Civil Division, U.S. Department of Justice) (“We do not routinely devote the additional resources that would be needed to determine that a *qui tam* action is frivolous or to move to dismiss on those grounds.”); see also *id.* at 41 (letter from John T. Boese to Sen. Patrick Leahy) (noting that “once the DOJ has decided not to intervene in a particular case, its commitment of resources to that case going forward is quite limited” and that there is “little incentive” for DOJ to stop a case “given the possibility, however remote, of some return on the Government's limited ‘investment’ in the case once the DOJ has declined to intervene”). Even so, DOJ occasionally exercises its authority to dismiss cases. See, e.g., *Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008) (holding DOJ decision to dismiss relator claim to be unreviewable).

⁷¹ See, e.g., Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 975 tbl.2 (2007) (reporting data showing that 92% of cases where the U.S. declined to intervene and 73% of all *qui tam* actions were dismissed and noting that such a high rate of dismissal suggests a large number of *qui tam* actions are meritless); Elameto, *supra* note 16 (“The immense disparity between recoveries in *qui tam* actions in which the Government intervened and those in which it did not suggests that most *qui tam* actions brought without government intervention assert meritless or frivolous claims.”); *Proposals to Fight Fraud and Protect Taxpayers: Hearing on H.R. 1788 Before the H. Comm. on the Judiciary*, 111th Cong. 2, 12–13 (2009) (statement of Marcia G. Madsen, Chamber of Commerce and U.S. Chamber Institute for Legal Reform) (noting “[t]he inescapable data regarding the low success rate of non-intervened *qui tam* cases” and concluding that “[w]hile the FCA—when deployed by the Government—has been effective in targeting fraud, the

opinion—appear to take this view as well.⁷² On this account DOJ is, invoking Part I’s stylized agency types, a *welfare-maximizer* engaged in faithful and accurate merits signaling.

Others, however, question DOJ’s ability to gauge case merits and even suggest that DOJ intervention decisions are wholly arbitrary, with some relator counsel reporting that they can predict intervention based on which line-level DOJ attorney is quarterbacking the case investigation.⁷³ These same voices further contend that the intervened–declined outcome discrepancy stems from the litigation leverage DOJ involvement brings. Some of this is simple optics: intervention ratchets up the negative publicity of fraud allegations by denying defendants the ability to cast litigation as the product of an overzealous and profit-driven private relator. Another possibility is that DOJ intervention makes discovery more efficient and thorough because DOJ attorneys can work directly with officials at the affected agency to identify and collect evidence.⁷⁴ Finally, government involvement brings with it a powerful remedial option—debarment from further federal contracting, a corporate “death sentence” for many federal contractors and health care organizations—that is unavailable to relators litigating alone.⁷⁵

use of *qui tam* actions to detect and deter fraud has not”). Similar statements come from DOJ officials themselves. *See, e.g., False Claims Act Judiciary Hearing, supra* note 19, at 193 (statement of Michael F. Hertz, Deputy Assistant Att’y Gen., Civil Division, U.S. Department of Justice) (asserting that the discrepancy in outcomes shows DOJ has been “appropriately judicious in its review of *qui tam* matters and has been highly successful in intervening in those cases that have *true merit*.” (emphasis added)).

⁷² *See supra* note 17.

⁷³ *See, e.g.,* Interview with Former Attorney, Civil Fraud Section, U.S. Dep’t of Justice, in Palo Alto, Cal. (June 13, 2012).

⁷⁴ DOJ attorneys can work internally with relevant agency officials to identify evidence pertaining to the alleged false claims. They can also tap law enforcement agents at the FBI and Office of the Inspector General to assist with any additional investigatory efforts. By contrast, relators litigating unintervened cases can obtain evidence only through blind formal discovery requests. *See False Claims Act Judiciary Hearing, supra* note 19, at 102–03 (written statement of John T. Boese, Chamber of Commerce and U.S. Chamber Institute for Legal Reform) (“Agency documents are particularly critical, since the agency’s interpretation of a regulation or contract or grant term is essential to determining whether a particular claim or statement is ‘false’ and to calculating the amount of damages suffered by the Government.”). Importantly, there is evidence that DOJ does not necessarily share the fruits of its investigation with private relators. *See* Bradford A. Penney, *Help Citizens Help Government*, CHRISTIAN SCI. MONITOR, June 5, 1990, at 18 (“If the Justice Department elects not to intervene, the task of the relator in carrying forward with the case is a difficult one. The department typically resists handing over investigative files, requiring the relator to duplicate the department’s investigation without the government’s subpoena power and other investigative tools.”).

⁷⁵ *See supra* note 18 and accompanying text. Note that the opposite logic seems possible as well: certain top defense contractors might be too large and too important to the provision of military hardware to debar from future contracting. *See False Claims Act Judiciary Hearing, supra* note 19, at 32 (testimony of Tina M. Gonter) (noting, regarding a case that DOJ had declined to intervene in, that “there are only, you know, a few shipbuilders, you know, yards that actually can build submarines”); *id.* at 36 (statement of Sen. Grassley) (contending that government was reluctant to pursue a defense contractor accused of fraud “due to their future contracts with the Government”); *Improved Efforts to*

If DOJ intervention drives case outcomes separate and apart from pure case merit, then a natural question arises as to what mix of factors motivate DOJ intervention decisions in the first place. A standard view is that DOJ bases decisions on a simple risk–return calculus focused on case merits, likely recovery size, and agency resource constraints.⁷⁶ According to some, resource constraints were especially acute in the aftermath of the 9/11 attacks when government investigatory resources were diverted to counterterrorism efforts.⁷⁷ Other proffered theories resemble Part I’s ideal *welfare-maximizer* agency: commentators suggest that DOJ is less likely to intervene where relator and relator’s counsel are perceived to have sufficient competence and resources to fully prosecute the action.⁷⁸

Remaining views are less charitable. Some critics cast DOJ as a *politicker* agency that pursues outsized recoveries it can tout as proof of agency prowess, extracting unfair settlements⁷⁹ or joining cases, often belatedly, even where private enforcers are fully capable of vindicating government interests.⁸⁰ A further charge is that politics drives intervention decisions. Thus, a sitting United States Senator has openly accused DOJ of declining or sitting on politically-charged *qui tam* cases, particularly defense-procurement fraud cases related to controversial military ventures in Iraq and Afghanistan during the administration of President George W. Bush (Bush43).⁸¹ And a top DOJ official in the Obama administration has

Combat Health Fraud: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means, 112th Cong. 33 (2011) (testimony of Lewis Morris, Chief Counsel to the Inspector General, U.S. Department of Health & Human Services) (“[S]ome major pharmaceutical corporations that have been convicted of crimes and paid hundreds of millions of dollars in False Claims Act settlements continue to participate in the Federal health care programs, in part because of the potential patient harm that could result from an exclusion.”).

⁷⁶ 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. AM. U. 409, 439 (1993); WEST, *supra* note 17.

⁷⁷ See Robert Fabrikant & Nkechinyem Nwabuzor, *In the Shadow of the False Claims Act: “Outsourcing” the Investigation by Government Counsel to Relator Counsel During the Seal Period*, 83 N.D. L. REV. 837, 852 (2007).

⁷⁸ See Kolis, *supra* note 76, at 438; WEST, *supra* note 17.

⁷⁹ See, e.g., Channing Turner, *Amid Health Care Fraud and Abuse Crackdown, Lawyers Call for Reassessment*, MAIN JUSTICE (July 14, 2011, 11:07 AM), <http://www.mainjustice.com/2011/07/14/amid-health-care-fraud-and-abuse-crackdown-industry-lawyers-call-for-reassessment/> (noting position of top *qui tam* defense lawyers that FCA enforcement “has created a disconnect between enforcement efforts and the goal of encouraging compliance” because investigators “are pressured to seek greater and greater settlements instead of helping companies understand the statute’s complexities”).

⁸⁰ See Interview with Former Attorney, Civil Fraud Section, U.S. Dep’t of Justice, in Washington, D.C. (Mar. 9, 2011) (noting concern among relator’s bar that DOJ often intervenes on eve of settlement, thus reducing the bounty share in cases litigated mostly or entirely by the relator). *Cf.* Kolis, *supra* note 76, at 453 (noting that some relators resist DOJ intervention).

⁸¹ See *supra* note 19; *False Claims Act Judiciary Hearing*, *supra* note 19 (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary) (decrying the “politicization of the Justice Department” and asking if DOJ has “resisted pursuing certain false claims cases for political reasons—most notably those involving contracting fraud related to the war in Iraq and Afghanistan”); *see also*

likewise implied a lack of prosecutorial vigor by his Bush43 predecessors in defense-procurement cases in particular.⁸²

Still others assert that what matters most is not the merit of the fraud claim but its object. Nearly all qui tam cases allege fraud not on DOJ itself, but rather on some other federal agency. This is important, as, in the civil context, DOJ traditionally treats its relationship with such agencies as that of attorney and client and so is unlikely to pursue a claim without the primary agency's support.⁸³ Many declinations, DOJ critics assert, thus come from DOJ yielding to its client's (i.e., the primary agency's) desire to cover up lax oversight or other mistakes.⁸⁴ They further maintain that personnel at certain agencies—among them the Departments of Defense and the Interior—resist government involvement in qui tam suits because of ignorance of the qui tam regime or because a revolving door with industry yields an agency leadership and organizational culture resistant to whistleblowing.⁸⁵

III. EMPIRICAL ANALYSIS OF DOJ OVERSIGHT IN QUI TAM CASES

This Part moves beyond anecdote by offering an empirical analysis of DOJ's discharge of its oversight duties under the FCA. Deploying multiple identification strategies, I offer preliminary evidence on three types of questions raised above. First, which of Part I's stylized agency types, if any, best fits DOJ's oversight efforts? In particular, to what extent does DOJ terminate cases, leverage deficient private enforcement efforts, or intervene in order to police collusive settlements? Second, do DOJ intervention decisions appear merits-based, or do political or other "strategic" considerations also seem to drive DOJ intervention decisionmaking? And finally, can the sharp discrepancy in outcomes between intervened and uninvolved cases be ascribed to DOJ's merits-screening capacity, or is it primarily an artifact of DOJ's potent litigation leverage? In other words, and as framed previously, to what extent is DOJ a merits *screeener* or a merits *maker*?

Mark Thompson, *Stealth Law: Whistleblowers and Their Lawyers Are Maneuvering to Cash in on Military Fraud*, CAL. LAW., Oct. 1988, at 33, 36 (noting belief by one qui tam lawyer that officials in a "military-minded" administration "have every interest in seeing whistleblower lawsuits fail").

⁸² See *Civil Division*, *supra* note 19. In addition, a former federal prosecutor reported during an interview that he repeatedly watched his "career pass before [his] eyes" while working a qui tam case against Halliburton subsidiary Kellogg Brown & Root relating to Iraq war contracting because of heightened oversight by Main Justice. See Telephone Interview with Former Assistant U.S. Attorney, U.S. Dep't of Justice (Feb. 11, 2011).

⁸³ See Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 562 (2003).

⁸⁴ See, e.g., Interview with Former Attorney, Civil Fraud Section, U.S. Dep't of Justice, in Washington, D.C. (June 13, 2012).

⁸⁵ *Id.*

A. Data

In an effort to answer these questions, I collected unique data from two sources. First, I obtained a list of the more than 4000 unsealed qui tam lawsuits filed since 1986 along with certain case-level information via Freedom of Information Act requests served on DOJ.⁸⁶ Second, I retrieved electronic docket sheets for the same set of cases and merged information from them with DOJ-provided data.⁸⁷ The result is complete case information, including litigation dates, recoveries and relator shares, and party and counsel information for roughly 4000 qui tam cases over the period 1986–2011. Third, I supplemented this data by drawing a random sample of 500 cases and constructing a hand-coded dataset with a more fine-grained accounting of case characteristics for the 460 cases for which case file materials could be obtained.⁸⁸ Finally, I conducted two dozen interviews with plaintiff- and defense-side qui tam lawyers and present and past officials and attorneys at DOJ’s Civil Fraud section and regional U.S. Attorneys’ offices to gain a more textured understanding of the regime.

B. Descriptive Evidence on DOJ Gatekeeping

An initial set of inferences can be drawn regarding the extent to which DOJ oversight deviates from Part I’s gatekeeper ideal via a range of descriptive evidence. To that end, this Section sets forth evidence regarding: (i) the frequency with which DOJ invokes its authority to terminate cases; (ii) DOJ’s use of its intervention authority, including its overall intervention rate and its success rate in intervened cases relative to

⁸⁶ Roughly 3000 qui tam suits remain under seal and likely fall into one of three categories. First, a substantial portion of the 3000 cases were filed in the past five years and remain under seal pending the completion of DOJ investigations. Second, a very small fraction of the 3000 cases are closed cases subject to various privileges, including the state secrets privilege, perhaps because the case implicates national security concerns. According to present and former DOJ attorneys, the rest of the 3000 cases are likely closed cases that remained sealed for a variety of reasons, including neglect by the judge to unseal the case, accidental failure by the relevant DOJ attorney to request unsealing upon case termination, or a successful relator effort to persuade the trial judge to keep the case sealed, typically because he or she remains employed by the company named in the suit. Some interviewees suggested that the latter type of case is likely to be concentrated in the time period prior to 2000 or 2001, when DOJ, under pressure from congressional overseers, changed policy and began to take a more aggressive stance in advocating unsealing of any terminated case. *See* Interview with Former Attorney, Civil Fraud Section, U.S. Dep’t of Justice, in Washington, D.C. (Mar. 9, 2011); Interview with Relator Counsel, in S.F., Cal. (Oct. 7, 2010). Before that, the interviewees suggested, the likelihood that a case would remain sealed likely reflected the idiosyncratic approaches of U.S. Attorney offices as opposed to particular case attributes. *See id.* In sum, my sample is likely unrepresentative in at least two respects, containing more interventions than the full qui tam case population since 1986, and also more cases brought by current, as opposed to former, company employees.

⁸⁷ I used a PERL programming script to “scrape” information from particular fields on each docket sheet, including litigation dates and party and counsel names, and place it in an Excel spreadsheet.

⁸⁸ The forty cases for which case file materials could not be obtained were dropped from the sample, raising the possibility of some minor sampling bias.

unintervened ones, both across presidential administrations and case types; (iii) the timing of DOJ settlements; and (iv) the distribution of recoveries and recovery amounts.

1. DOJ's Use of Its Termination Authority.—A clear finding that emerges from the data is that DOJ rarely invokes its authority under the FCA to terminate qui tam cases. Indeed, analysis of the 460-case subsample of qui tam cases revealed exactly *none* in which DOJ exercised its termination authority. Applying standard principles of sampling error, this implies that DOJ invokes its termination authority in no more than roughly 4% of qui tam cases and likely far less than that.⁸⁹ One interpretation is that DOJ is unconcerned with screening meritless cases or has concluded that doing so does not warrant expenditure of scarce public enforcement resources over other uses, such as affirmative enforcement efforts. This would confirm Part I's theoretical prediction.⁹⁰ It is also possible, however, that DOJ achieves the same ends in other, informal ways. For instance, DOJ might achieve case termination by privately conveying its disinterest in a case to relators, inducing them to dismiss cases prior to a DOJ case-election decision. DOJ terms such an outcome a “pre-election dismissal,” and former DOJ officials and attorneys confirmed that such dismissals nearly always come after DOJ has conveyed its intention to decline intervention.⁹¹ However, such cases appear to be limited in number: out of roughly 4000 cases, DOJ's internal records assigned the “Dismissed Pre-Election” label to only 312 total cases.

A second possibility is that DOJ sees no need to invoke its termination authority because it can induce “voluntary” dismissals by relators via intervention decisions by simply declining cases. The data offer at least

⁸⁹ I also attempted a rough assessment of the frequency of DOJ's invocation of its termination authority by conducting electronic searches on case docket sheets across the full 4000-plus-case dataset of 31 U.S.C. § 3730(c)(2)(A), the FCA statutory provision authorizing DOJ termination. Doing so identified only 30 cases across the study period in which DOJ exercised its authority to dismiss cases out from under private relators. Nearly all of these dismissals, moreover, were based on DOJ's determination that a relator's claim was jurisdictionally barred, typically on “public disclosure,” “original source,” or “first-to-file” grounds, or because of national security concerns relating to disclosure of classified information, and not a judgment about underlying case merits. *See, e.g.,* United States *ex rel.* Wickliffe v. EMC Corp., 2009 WL 911037, at *1, *6 (D. Utah Mar. 30, 2009) (dismissing case upon government motion urging lack of subject matter jurisdiction as a result of FCA's first-to-file bar); United States *ex rel.* Fay v. Northrop Grumman Corp., 2008 WL 877180, at *1, *10 (D. Colo. Mar. 27, 2008) (granting dismissal upon government motion on basis of disclosure of classified information relating to national security).

⁹⁰ This should perhaps not come as a surprise: as noted previously, a top DOJ official recently testified before a congressional committee that lawyers under his direction do not direct scarce resources toward assessing case merits and weighing termination once DOJ has determined not to intervene. *See supra* note 70. My findings suggest that this has been true throughout the life of the post-1986 regime.

⁹¹ *See, e.g.,* Interview with Former Assistant Dir., Civil Fraud Section, U.S. Dep't of Justice, in Washington, D.C. (Mar. 10, 2011).

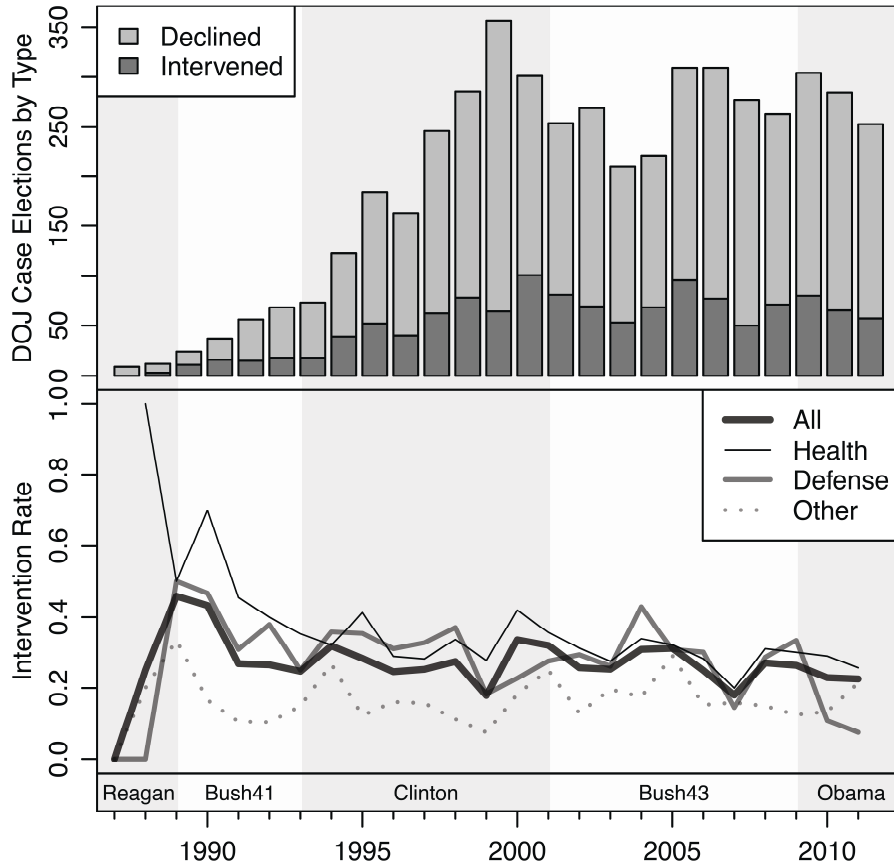
some evidence of this: in the 460-case subsample, roughly 60% of cases in which DOJ declined intervention appeared to generate no further litigation prior to a voluntary dismissal by the relator. This, however, leaves 40% of cases in which DOJ declined intervention that did in fact generate postdeclination litigation prior to dismissal by the relator, making this a questionable strategy from a pure efficiency standpoint.

2. *DOJ's Use of Its Intervention Authority.*—Figures 2 and 3 use the data to explore DOJ's exercise of its intervention authority. Figure 2 tracks DOJ interventions and declinations over the period 1986–2011, reporting annual intervention and declination tallies (the top stack), and intervention rates, both overall and across case types (the bottom stack).⁹²

⁹² Several points warrant mention regarding my coding of the data. The first two concern my coding of interventions and declinations, both here and in the regression analysis to come. First, I treat the small number of pre-election dismissals in my sample that lack an FCA recovery as declinations, in keeping with assurances from former DOJ attorneys, as just discussed, that such dismissals invariably result from DOJ's signaling of its intention to decline intervention. A publicly available memo from the United States Attorney's Office for the Eastern District of Pennsylvania offers further grounds for doing so. See Memorandum from the U.S. Attorney's Office, E. Dist. Pa., False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits 2 [hereinafter Eastern District Memo], available at <http://www.justice.gov/usao/pae/Documents/fcaprocess2.pdf> (noting that DOJ will sometimes "advise the relator that the Department of Justice intends to decline intervention" and that "[t]his usually, but not always, results in dismissal of the qui tam action"). Further confirmation of the propriety of my approach is found in relators' motions for voluntary pre-election dismissal referencing an unofficial indication that DOJ will decline to intervene. See, e.g., Motion to Dismiss of Globe Composite Solutions, Ltd. at 1–2, United States *ex rel.* Globe Composite Solutions v. Solar Constr., Inc., 528 F. Supp. 2d 1 (D. Mass. 2007) (No. 1:05-cv-10004-JLT) ("As of the date of the filing of this motion, the relator has received no official notice from the United States as to whether it intends to intervene. However, all 'unofficial' indications have been that the United States intends to decline, and that a declination letter has been drafted and has been under review at the Department of Justice since May of this year."). As a final validity check, a former DOJ attorney suggested during an interview that a unilateral relator decision to dismiss prior to DOJ's election decision is a very unusual and rare event. See Interview with Former Assistant Dir., Civil Fraud Section, U.S. Dep't of Justice, in Washington, D.C. (Mar. 10, 2011). This is especially true because even pre-election dismissals will typically result in the unsealing of the case. Thus, a relator who is reconsidering her filing decision may not be able to reliably protect her identity upon a pre-election dismissal, creating large incentives to continue with her claim once filed. See Kathleen McDermott, *Qui Tam: An AUSA's Perspective*, TAXPAYERS AGAINST FRAUD Q. REV., Oct. 1997, at 23 ("[E]ven after the government declines to intervene and the relator determines not to proceed there is a danger that the public record will reveal the filing of suit that both the relator and the United States declined to pursue."). Second, I coded the few pre-election dismissals in cases that generated a FCA recovery as interventions. Former DOJ attorneys uniformly agreed that these are cases in which DOJ negotiated a rapid settlement of the FCA claim after investigation, obviating the need for a formal intervention decision that was otherwise all but certain. See Interview with Former Assistant Dir., Civil Fraud Section, U.S. Dep't of Justice, in Washington, D.C. (Mar. 10, 2011); Interview with Former Attorney, Civil Fraud Section, U.S. Dep't of Justice, in Washington, D.C. (June 13, 2012); see also Eastern District Memo, *supra*, at 2 (noting that DOJ may "settle the pending qui tam action with the defendant prior to the intervention decision").

A second coding note concerns my effort to control for the possibility that relators in multidefendant actions can choose between filing numerous serial suits or a single omnibus suit. As

FIGURE 2: DOJ INTERVENTION TALLIES AND RATES IN QUI TAM CASES, 1986–2011



At least two broad conclusions can be drawn. First, DOJ intervenes approximately one-quarter of the time, with relatively higher intervention rates in health and defense cases and relatively lower intervention rates in “other” case types. Yet there is also considerable variability: even after the qui tam regime reached maturity in the mid- to late-1990s, intervention rates have ranged from as low as 18% (in 1999 and 2007) to as high as 34% (in 2000), with similar peaks and valleys within case types—e.g., health cases in 2000 (high) and 2007 (low); defense cases in 2004 (high) and 2011 (low); “other” cases in 2005 (high) and 1999 (low). Some of

described in more detail in prior empirical work, *see* Engstrom, *supra* note 4, at 1290–91, I have minimized the resulting measurement concerns by collapsing together and treating as a single “action” any suits with a common relator or relator law firm and at least two common litigation dates (filing date, DOJ case-election date, or settlement/termination date).

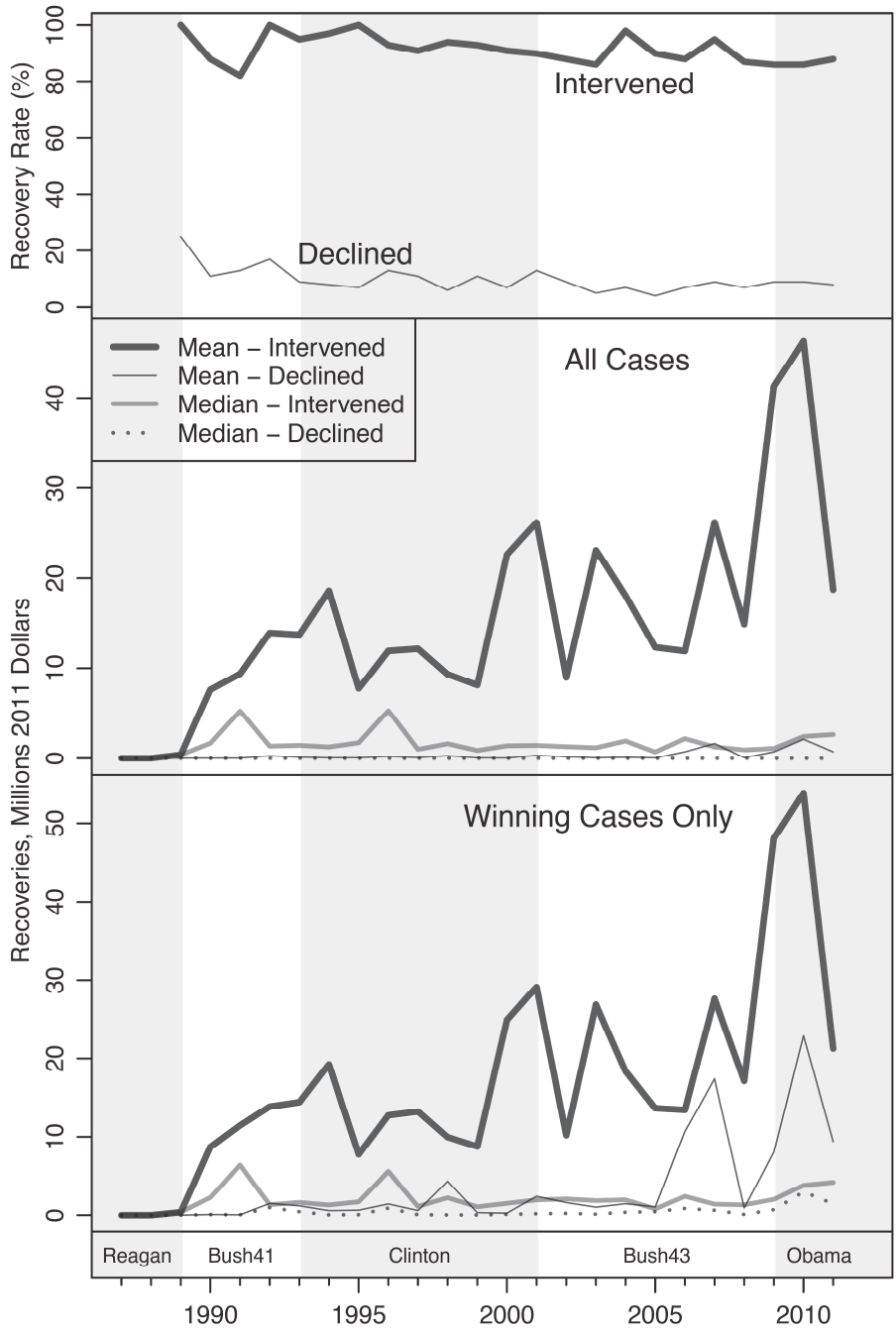
these differences, of course, may simply reflect sample-size limitations, but the overall pattern is still striking.

A second broad observation is that the data offer little facial support for the notion, advanced by some critics, that DOJ intervention decisions have had a partisan political cast over time.⁹³ Rather, intervention rates appear similarly variable within and across presidential administrations. Perhaps most important of all in this regard, Figure 2 seems, on its face at least, to contradict the claim that the Bush⁴³ Administration was less interventionist in defense-procurement cases in particular. Indeed, intervention rates in defense cases reached their peak (at 43%) in 2004, when George W. Bush was well into his presidency. I return to this issue in Part III.D and use more sophisticated statistical techniques to interrogate the data.

Figure 3 shifts away from intervention rates and turns to the impact of DOJ intervention on qui tam litigation outcomes. The top stack shows that intervened cases have generated recoveries a whopping 90% of the time, with declined cases failing to achieve recoveries at the same overwhelming rate. This state of affairs has remained steady since 1986. This is consistent with the more anecdotal claims made about DOJ oversight.

⁹³ See *supra* notes 19, 81–82 and accompanying text.

FIGURE 3: DOJ RECOVERY RATES AND MEAN AND MEDIAN DOLLAR AMOUNTS BY INTERVENTION STATUS IN QUI TAM CASES, 1986–2011



The bottom two stacks enrich the story by tracing the impact of DOJ intervention decisions on recovery dollar amounts rather than success rates. The second (middle) stack reports mean and median recoveries by intervened or declined status in *all* cases, whether the case ultimately produced a recovery (i.e., returned funds to the federal fisc) or not. The third (bottom) stack examines those same trends constraining the sample to only those cases that produced a recovery.⁹⁴ Interestingly, while the gap between win rates in intervened and declined cases has remained wide and steady, the gap between the average recovery in successful intervened and declined cases has not. Rather, recoveries in intervened cases have risen steadily over the life of the regime, with mean recoveries in declined cases showing a more recent increase, driven by a handful of large wins in cases DOJ declined.⁹⁵ Even so, examining the data as a whole and focusing on recovery dollars rather than success rates, the centrality of DOJ intervention is hard to ignore: between 1986 and 2011, intervened cases generated roughly \$24 billion in recoveries, or 94% of the total recovery, while declined cases generated only \$1.5 billion in recoveries, or 6%.

3. *The Timing of DOJ Settlements.*—We might also draw inferences about DOJ decisionmaking by considering the timing of recoveries. An important assumption of Part I’s theoretical analysis is that an agency vested with gatekeeper authority akin to DOJ’s powers under the FCA will use those powers in politically conscious ways, seeking to maximize certain outcomes—total wins, total dollars recovered—over other, less politically salient measures.⁹⁶ It follows that we might also expect to see patterns in the timing of case outcomes, as a politically conscious agency seeks to bring home successful cases prior to the end of a measurement period. This might be especially true in the FCA context because of DOJ’s continuing practice of holding a press conference and issuing a press release soon after the conclusion of the government fiscal year on September 30 announcing the agency’s annual FCA take.⁹⁷

⁹⁴ This does not include cases that produced a damages recovery via a claim for retaliation under the FCA’s anti-retaliation provisions.

⁹⁵ See, e.g., *United States & State of Illinois ex rel. Mason v. Medline Indus., Inc.*, No. 07-cv-05615 (N.D. Ill. filed Oct. 4, 2007) (recovery of \$85 million in 2011 in uninvolved case); *United States ex rel. Oberg v. Nynet, Inc.*, No. 07-cv-00960 (E.D. Va. filed Sept. 21, 2007) (recovery of \$57.7 million in 2010 in uninvolved case); *United States ex rel. Hendow v. Univ. of Phoenix*, No. 03-cv-0457 (E.D. Cal. filed Mar. 7, 2003) (recovery of \$67.5 million in 2009 in uninvolved case). Note that the listed settlement amounts for each of these cases are, as with the other empirical findings reported herein, drawn from my dataset as constructed from information reported by DOJ pursuant to my FOIA requests and the cases’ electronic docket sheets. See *supra* notes 86–87 and accompanying text.

⁹⁶ See *supra* notes 35–39 and accompanying text.

⁹⁷ See, e.g., Press Release, Dep’t of Justice, Justice Department Recovers Nearly \$5 Billion in False Claims Act Cases in Fiscal Year 2012 (Dec. 4, 2012), available at <http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html> (announcing “the largest annual recovery in the Department’s history”); Press Release, Dep’t of Justice, Justice Department Recovers \$3 Billion in False Claims Act Cases in

FIGURE 4: TOTAL RECOVERY COUNTS AND DOLLARS BY CALENDAR QUARTER IN QUI TAM CASES, 1986–2011

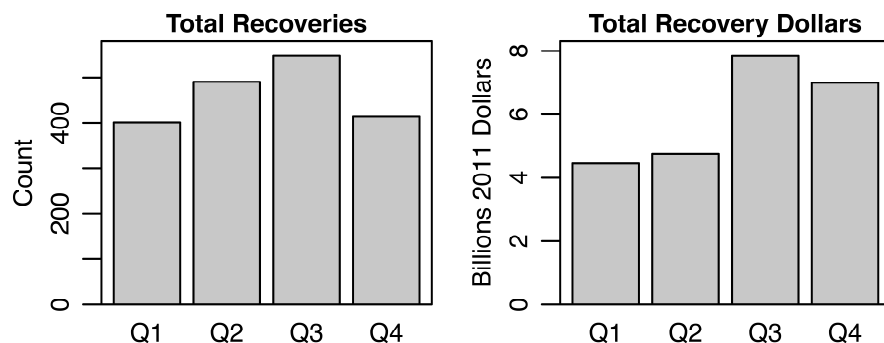


Figure 4 reports total qui tam recovery counts and dollars by calendar-year quarter across the life of the post-1986 FCA regime. As expected, recovery counts and amounts have spiked substantially in Q3, the end of the federal government’s fiscal year. This strongly suggests (but does not prove) that DOJ rushes to conclude settlements—perhaps even altering its settlement calculus—to “book” recoveries prior to the end of the government fiscal year. Harder to explain under this theory is the roughly comparable Q4 spike in recovery amounts. One possibility is that DOJ lawyers endeavor to close out cases before the fiscal year’s end but fail to do so, with the result that many recoveries spill over into Q4.⁹⁸ Another possibility is that corporate defendants, not DOJ, are more receptive to settlements in Q4 as the tax year draws to a close.⁹⁹ Either of these dynamics offers a plausible explanation for why Q4 also shows a pronounced uptick in recovery amounts relative to the other two quarters.

Fiscal Year 2011 (Dec. 19, 2011), available at <http://www.justice.gov/opa/pr/2011/December/11-civ-1665.html> (announcing that DOJ had set “[r]ecords for [r]ecoveries” in 2011).

⁹⁸ A useful analogy comes from the tax context: one former enforcement official at the Internal Revenue Service noted that May of each year was euphemistically referred to within the Service as “May Madness” as agents hurried to reach provisional agreement on settlement terms so that they could secure the necessary authorization up the agency management chain in time for September closure. But the resulting logjam during the final months of the government fiscal year meant that some agents could not obtain sign off in time. See Telephone Interview with former IRS Div. Comm’r, Internal Revenue Serv. (Sept. 12, 2012).

⁹⁹ The same IRS enforcement official noted above, however, suggested that this may be a secondary factor. Perhaps more important are reporting requirements in connection with end-of-year financial filings. Once settlement negotiations have begun, public and even private companies assume reporting obligations regarding “contingent liabilities.” This can also constrain stock trading and other strategic moves by the company. For these and other reasons, a defendant company might have strong incentives to simply settle a matter in advance of year-end regulatory and shareholder filings. *Id.*

4. *The Distribution of Qui Tam Recoveries.*—A final descriptive view seeks to draw inferences about DOJ’s intervention calculus by expanding on earlier work by Kwok examining recovery patterns across intervened and declined qui tam cases.¹⁰⁰ It is a plausible assumption that the fraud perpetrated on the government—and, in turn, DOJ intervention decisions based on objective case “merit”—would produce a frequency distribution of recoveries that resembles a normal or log-normal curve, with relatively larger numbers of recoveries taking middling values and relatively smaller numbers of recoveries taking higher or lower values. By contrast, strategic DOJ action might generate deviations from normality. If, for instance, DOJ adopts a strategy of systematically leveraging lower value cases, then qui tam recoveries in intervened cases will exhibit a “humped” distribution at lower recovery values. Similarly, a *politicker* agency—invoking Part I’s stylized agency types—might generate a skew toward relatively larger recoveries as the agency seeks out marquee enforcement opportunities. Finally, DOJ pursuit of a combined *politicker* and *merits-maximizer* strategy—that is, an agency that seeks to pad its recovery total by cherry-picking larger, marquee cases while at the same time bolstering its win–loss record by taking up a stream of relatively smaller, easier-to-win cases—might yield a bimodal, “double-humped” distribution in which relatively higher and lower value awards predominate. In such a situation, recoveries in declined cases will occupy more of a middle band of recovery value, since these cases pad neither DOJ’s recovery total nor its win rate.

Kwok previously found no evidence of a “double-humped” distribution from which to infer DOJ was actively leveraging smaller value cases.¹⁰¹ However, any analysis of possible DOJ leveraging should also take account of the strategic nature of interactions between DOJ, relators, and relator counsel. As noted previously, relators and their counsel may not have sufficient incentive to bring lower value cases except where DOJ can credibly commit to playing a leveraging role.¹⁰² Indeed, without DOJ intervention—and, more importantly, the possible boost in the probability of a recovery that goes along with it—relators and their counsel may not surface certain cases at all. But, as noted previously, DOJ efforts to signal such commitment will suffer from a basic exchange problem, since DOJ cannot perfectly assure relators it will not renege and engage in ex post opportunism.¹⁰³ One implication is that repeat players within the system should be better positioned to overcome such problems.¹⁰⁴ A further

¹⁰⁰ See Kwok, *supra* note 30.

¹⁰¹ See *id.* at 12–14.

¹⁰² See *supra* notes 43–44 and accompanying text.

¹⁰³ See *supra* notes 43–44 and accompanying text.

¹⁰⁴ See, e.g., Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 141–42 (1988).

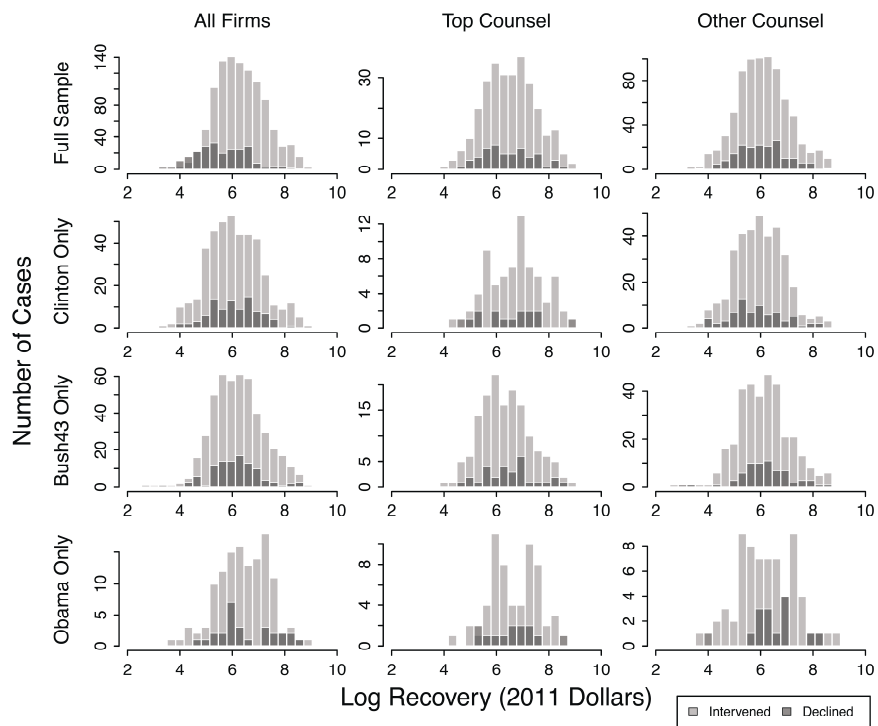
implication is that, to the extent DOJ seeks to leverage small-value claims, we should see the greatest evidence of it with respect to cases brought by repeat players within the regime. We might also expect that a DOJ leveraging role will only emerge over time as a cooperative, endogenous equilibrium among DOJ, relators, and relator counsel is established.

Figure 5 presents histograms of logged recovery amounts (in 2011 dollars) in intervened and declined qui tam cases between 1986 and 2011.¹⁰⁵ The first histogram in the top row presents frequencies of logged recovery amounts for intervened and declined cases, respectively, in the full sample. Successive histograms in the top row present the same analysis subset by whether the case was brought by “Top Counsel,” defined as any case brought by a firm with ten or more prior qui tam filings at the time of DOJ’s election decision, or “Other Counsel,” defined as a firm with nine or fewer prior filings. The remaining rows duplicate the top-row analysis, constraining the sample to cases elected during the Clinton, Bush43, and Obama Administrations, respectively.¹⁰⁶

¹⁰⁵ A histogram is a graphical method for displaying the shape of a distribution by breaking data into intervals and reporting the frequency with which observations fall into each. Using a logarithmic transformation is a common means of reducing the number of intervals, thus providing a more meaningful visual representation.

¹⁰⁶ I omit the first Bush (Bush41) Administration from the presentation because of the limited number of cases during that time period.

FIGURE 5: FREQUENCY OF LOGGED RECOVERY AMOUNTS IN INTERVENED AND DECLINED QUI TAM CASES BY FULL SAMPLE, FIRM EXPERIENCE, AND PRESIDENTIAL ADMINISTRATION AT INTERVENTION, 1986–2011



The results offer critical perspective on DOJ’s intervention calculus. First, in the sample as a whole, recoveries in intervened cases are characterized by a modest rightward skew, with the right-hand tail plainly longer than the left-hand tail.¹⁰⁷ One interpretation is that this confirms a weak DOJ preference for higher value cases. But a counter-interpretation is possible as well: a shortened left-hand tail might also suggest a DOJ that is eager to take relatively lower value cases—either because they will not otherwise attract sufficient private enforcement or to pad its win rate—so long as the expected return rises above a basic break-even threshold. Put another way, low-value cases are likely to be lower bounded, while high-value cases will not be upper bounded.

¹⁰⁷ A distribution is “skewed” if one tail—that is, one end—extends out further than the other. Note that, because Figure 5’s histograms are based on logarithmic transformations of recovery amounts, the visual presentation will underrepresent the degree of rightward skew compared to a nonlogged distribution by compressing recovery amounts at the higher end of case value.

Whatever the interpretation on this point, the distribution of recoveries in the sample as a whole plainly allows us to reject some of the more overheated claims about DOJ's intervention calculus. Indeed, to the extent DOJ pursues high-value claims, it is not a dominant strategy, as DOJ clearly pursues plenty of middle- and low-value claims as well. Note, however, that this does not rule out the possibility that DOJ is nonetheless acting as a *politicker* agency, intervening even where its presence in a case adds little or no value.

The portrait grows more complicated, however, when the subsetted results are considered. Indeed, the histograms reveal at least *some* double humping of recovery frequencies, both in cases initiated by "Top Counsel" in particular and during more recent time periods. Importantly, the spread between humps is quite large: for "Top Counsel" cases in the full sample (the first row, middle histogram), the two peaks in evidence represent average recoveries of roughly \$630,000 and \$6.3 million, respectively, leaving a nontrivial middle-value trough in between.¹⁰⁸ Note, however, that double humping is not confined to "Top Counsel," particularly during the Bush43 and Obama periods, as "Other Counsel" recoveries in these more recent time periods likewise show at least some evidence of double humping, complicating interpretation. On one hand, if we believe that only more experienced counsel can solve the exchange problem that afflicts initiation of lower value cases, then double humping in cases brought by less experienced counsel tends to cut against the possibility that DOJ is actively seeking to leverage lower value cases. And yet, it may simply be the case that time, rather than counsel experience, is more important to the emergence of a cooperative equilibrium in which private enforcers confidently feed DOJ a supply of lower value cases.¹⁰⁹

* * *

Taken together, the above descriptive results permit an initial set of conclusions about DOJ's discharge of its oversight duties and possible deviations from Part I's ideal gatekeeper role. First, the paucity of DOJ termination efforts strongly suggests that DOJ is not playing a pure *welfare-maximizer* role—or, at the least, views its main responsibilities

¹⁰⁸ I obtained these numbers by undoing the logarithmic transformation at 5.8 and 6.8, respectively. One way to gauge the significance of the double humping in evidence in the "Top Counsel" portion of the "Full Sample" analysis is to use a Kolmogorov–Smirnov test to compare its distribution to the distribution in the "Other Counsel" portion of the "Full Sample" analysis to its immediate right. Doing so finds a highly significant result ($p = 0.000$), implying that there exists a difference between the two distributions that cannot be explained by chance.

¹⁰⁹ See *supra* notes 47–48 and accompanying text (noting ways that DOJ and private enforcers might overcome their exchange problem).

otherwise. Part IV's discussion returns to this issue and discusses ways policymakers might alter DOJ incentives in that regard.

A similar, though more tentative, conclusion follows from the distribution of recoveries across intervened and declined *qui tam* cases. In particular, the dearth of recoveries in declined cases and the lack of "double humping" in the histogram analysis together suggest that DOJ, in making intervention decisions, does not prioritize leveraging overmatched relator counsel or inviting and pursuing lower value claims. To be sure, this does not preclude the possibility that DOJ is playing a *welfare-maximizer* role. For instance, it remains possible that DOJ intervenes in all cases with a threshold level of merit but then allocates very different amounts of resources to cases postintervention, thus effectively delegating greater amounts of enforcement authority to fully competent enforcers as a way to conserve resources for other cases.¹¹⁰ But because so few declined cases yield recoveries, it will be difficult to observe such efforts empirically.

As a final note, while the histograms defy definitive interpretation, the analysis nonetheless highlights some of the difficult trade-offs implicit in available DOJ intervention strategies. A resource-constrained DOJ that systematically makes intervention decisions with an eye to leveraging smaller value claims will give up recovery value—likely middle-value cases—in so doing. Thus, if the current DOJ de-emphasized cases falling at or near the lower value hump in evidence in Figure 5 and shifted its efforts to declined cases that occupy the more middling range of recovery value, the overall result might be greater total recoveries. To that extent, leveraging may, at least from the perspective of a *rent-seeker* agency, come at a substantial cost.

C. "Strategic" Correlates of DOJ Intervention: *Logistic Regression Analysis*

Further progress in understanding DOJ's gatekeeper activities requires a push beyond simple descriptive statistics. To explore more fully possible correlates of DOJ intervention decisions in particular, I next specify a logit model, with the case as the unit of analysis, of the following form:

$$\Pr [y_i = 1] = 1/(1 + \exp(-(\alpha + \beta_1 X_{i1} + \beta_2 Y_{i2} \dots \beta_k Z_{ik})))$$

¹¹⁰ To that extent, a Florida district court's 2001 decision reveals what may be a pattern: DOJ reportedly "sought and received assurances from [relator's] counsel of their ability and willingness to commit the necessary resources to the case and to undertake the principal role in prosecuting the litigation." *United States ex rel. Alderson v. Quorum Health Grp., Inc.*, 171 F. Supp. 2d 1323, 1329 (M.D. Fla. 2001). Interviews with top relator counsel likewise established that DOJ has in the past conditioned intervention on a relator firm's willingness to commit to provide an itemized list of litigation resources to the effort, including a defined number of private lawyers (requiring the firm to associate with other firms) as well as experts and computer equipment necessary to analyze large amounts of data. Interview with Relator Counsel, in S.F., Cal. (Oct. 7, 2010).

where y represents the probability of winning DOJ intervention and X , Y , and Z represent independent variables of interest.

Existing theory and evidence suggest a number of variables that will be important determinants of DOJ intervention or are logically necessary control variables. The Appendix presents descriptive statistics for these variables as well as those used in the separate regression analysis in Part III.D.

An initial pair of variables explores the impact of resource constraints on DOJ decisionmaking.¹¹¹ I first constructed a measure, DOJRESOURCECONSTRAINT, equal to the number of active, intervened qui tam cases divided by the number of attorneys at DOJ's Civil Fraud section during the year of each intervention decision in each sample case.¹¹² My expectation is that DOJ will be less likely to intervene in cases as resource constraints rise and vice versa. In addition, and as noted previously, some have suggested that the 9/11 terrorist attacks redirected substantial civil investigatory resources previously available to DOJ to counterterrorism efforts.¹¹³ To test for a resource-based effect on DOJ decisionmaking in 9/11's aftermath, I constructed a measure, 911RESOURCECONSTRAINT, equal to 730 minus the number of days after September 11, 2001, that DOJ rendered an election decision for two years following the attacks.¹¹⁴ The result is a measure running from zero to 730, with cases elected immediately following September 11, 2001, taking the highest value and

¹¹¹ It is relatively uncontroversial that resource constraints affect agency enforcement action. *See, e.g., Cox & Thomas, supra* note 22, at 757–60 (reviewing literature linking SEC resource limitations to a more selective enforcement strategy and slower agency action). For commentary on the effect of resource constraints on DOJ intervention decisionmaking in particular, see *supra* notes 76–78 and accompanying text.

¹¹² Attorney counts were constructed using congressional testimony characterizing the number of Civil Fraud attorneys in a given year as well as historical office phone lists provided by former Civil Fraud attorneys, with missing years then filled in via linear interpolation. Note further that, while my case-level data allow me to precisely track the total number of intervened cases at any point in time, I can only imperfectly observe the extent to which DOJ lawyers are actively litigating open cases. In complex litigation, cases often lay fallow for long stretches of time, flaring up around bouts of discovery (e.g., document review, depositions) and motion practice, with only the latter reflected on docket sheets. Regardless, my construction of the variable assumes that DOJ officials understand and take account of litigation's cadence when deciding whether to intervene in the marginal case. All else equal, a DOJ that is litigating more intervened cases is more resource constrained than one litigating fewer.

¹¹³ *See supra* note 77 and accompanying text.

¹¹⁴ Alternative specifications of this variable include a simple dummy variable taking a value of one during the year following the attacks or a logarithmic transformation of the number of days after 9/11 to reflect more substantial resource constraints in the period immediately following the attacks, with the effect diminishing over time. In addition, one could employ different assumptions about the duration of post-9/11 resource constraints, thus constructing a variable pegged to, say, 365 days (assuming the resource constraints lasted one year) or 1095 days (three years). None of these variants yielded a materially different result in the models reported below.

reflecting relatively greater 9/11-related resource constraints, cases elected two years later, on September 11, 2003, taking the lowest value and reflecting relatively lower post-9/11 resource constraints, and cases before or after the two-year window taking a value of zero. The expectation is that this variable will negatively predict intervention, as resource scarcity compelled DOJ to concentrate its investigatory and litigation efforts on a smaller set of cases following the attacks.

A second set of variables follows other research exploring the relationship of repeat play among qui tam enforcers and DOJ intervention decisions, with more experienced (repeat) relators being relatively less likely to win DOJ intervention and more experienced counsel relatively more likely to do so.¹¹⁵ EXPERIENCEDRELATOR is a simple indicator variable set to one if the relator in question has filed at least one prior case. TOPRELATORFIRM and MIDRELATORFIRM are also indicator variables, set to one in any case in which the most experienced firm providing relator-side representation had previously filed ten or more or between one and nine prior cases, respectively. In the regression models, “one-shotter” counsel thus serve as the baseline category.

Empirical studies of regulatory enforcement have found that government enforcement officials are less likely to file enforcement actions against larger companies, perhaps because such companies have greater political clout or resources to put toward legal defense.¹¹⁶ Either possibility could impact the risk–return calculus of a strategic DOJ or primary agency. Accordingly, I created an indicator variable, FORTUNE100, denoting cases in which at least one defendant in the action is listed among Fortune 100 companies during one or more years of the study period.¹¹⁷ I also created an indicator variable, DEFENSE50, denoting cases brought against firms reported by the Department of Defense in one or more years of the study period as one of the top fifty recipients of defense-procurement dollars. A DOJ focused on maximizing recovery dollars or win rates might shy away from cases involving either type of defendant not only because of their relative size but also because they might be thought too important to debar

¹¹⁵ See Engstrom, *supra* note 4, at 1289, 1299, 1313.

¹¹⁶ See, e.g., Gadinis, *supra* note 39, at 682–83 (summarizing findings that larger Wall Street firms and their employees fared better in SEC enforcement actions along multiple dimensions, including the severity of sanctions sought and imposed and the likelihood that individual employees as opposed to the firm as an entity would be subject to regulatory action); Wayne B. Gray & Mary E. Deily, *Compliance and Enforcement: Air Pollution Regulation in the U.S. Steel Industry*, 31 J. ENVTL. ECON. & MGMT. 96, 108, 110 (1996) (finding evidence that the Environmental Protection Agency was less likely to bring pollution-related enforcement actions against larger steel companies); Rajabiun, *supra* note 38 (noting possible public enforcer preference for actions against “firms less likely to be able to defend themselves”).

¹¹⁷ Prior to the mid-1990s, *Fortune* maintained separate lists for manufacturing and service companies. For those years, I combined the lists based on market capitalization to generate a measure that is comparable to subsequent years.

from further government contracts, reducing DOJ's litigation leverage upon intervention.¹¹⁸

To test the extent to which DOJ might seek to leverage the efforts of less experienced or less sophisticated counsel, I interacted the two counsel measures described previously, TOPRELATORFIRM and MIDRELATORFIRM, with FORTUNE100. If DOJ takes account of imbalances in relator and defense capacities, then we might expect to see higher intervention rates in cases pitting MIDRELATORFIRM counsel against Fortune 100 companies (where imbalances are small but remediable) compared to cases brought by TOPCOUNSEL firms against similarly well-heeled defendants (where imbalances are small or nonexistent). That said, and as noted previously, there is little clear evidence that DOJ has adopted a strategy of delegating enforcement authority to more competent enforcers by declining cases, making it unlikely that the interaction terms will detect a leveraging effect.¹¹⁹

A fourth set of variables explores possible political correlates of DOJ intervention decisionmaking. To test for the possibility of overhead political control at DOJ or the primary agency, I constructed a dummy variable, CASEELECTEDDEM, indicating whether the case reached a DOJ intervention decision during the Clinton or Obama Administrations, the two periods of Democratic control of the Executive Branch in my sample. A related dummy variable, CASEFILEDDDEM, indicates if the case was filed during the Clinton or Obama Administrations and thus seeks to control for once-removed effects of partisan control: if would-be relators perceive a partisan political slant to DOJ intervention decisionmaking, then they may be more likely to file suit when DOJ is controlled by a sympathetic administration, resulting in more and more marginal (weaker) complaints.¹²⁰

A fifth cluster of indicator variables is designed to test whether intervention is more or less likely when the alleged fraud concerns federal programs overseen by particular primary agencies. As noted previously, DOJ treats its relationship with primary agencies as that of attorney and client, and some have suggested that certain departments and agencies are less likely to support intervention, either because of overhead political

¹¹⁸ See, e.g., Duff Wilson, *Side Effects May Include Lawsuits*, N.Y. TIMES, Oct 3, 2010, at 1 (noting the possibility that "some companies are 'too big to debar' from government contracts, since doing so would just hurt patients needing medicine" (quoting Lew Morris, chief counsel for the inspector general of the Department of Health and Human Services)).

¹¹⁹ See *supra* note 110 and accompanying text.

¹²⁰ See John M. de Figueiredo, *Strategic Plaintiffs and Ideological Judges in Telecommunications Litigation*, 21 J.L. ECON. & ORG. 501, 502–03 (2005) (accounting for strategic litigant selection effects in model of judicial decisionmaking); see also David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013) (noting importance of taking account of litigant selection effects in deriving empirical estimates related to civil litigation).

control or organizational resistance.¹²¹ The models reported below include dummy variables that take a value of one in any case alleging fraud on each of three executive departments, including the Departments of Health and Human Services (HEALTH), Defense (DEFENSE), and the Interior (INTERIOR). These three are the agencies most frequently implicated in qui tam suits—and, in the case of Defense and Interior, are also commonly perceived by relators' counsel as most subject to patterns of political control or organizational opposition to qui tam.

A final set of variables explores the extent to which DOJ makes intervention decisions in order to police collusive settlements. Here I exploit the Ninth Circuit's *Killingsworth* decision, as described previously, which held that DOJ possesses an absolute veto right over a proposed settlement *only* where it has previously intervened in the case.¹²² To test for *Killingsworth*'s possible impact, I created a dummy variable, NINTHCIRCUITRULING, taking a value of one in any sample case filed and drawing a DOJ election decision in a federal district court within the Ninth Circuit after *Killingsworth*. I also include a further pair of dummy variables, AFTERNINTH and NINTHCIRCUIT, to ensure I am measuring the differences-in-differences effect of the Ninth Circuit's ruling.¹²³ If DOJ has been more likely to intervene in district courts bound by *Killingsworth* in order to preserve its ability to veto private settlements, then the main variable of the three should show a positive effect on DOJ's propensity to intervene.

The remaining variables in the models are time controls, including a pair of variables, CASEFILEDYEAR and CASEELECTEDYEAR, which account for the possibility of a simple time trend keyed either to litigant filings or DOJ case elections.

Column (A) in Table 2 presents the regression results without the counsel and Fortune 100 interaction terms designed to detect DOJ efforts to leverage private enforcement capacity. Column (B) reports the full model. In a logit model, raw coefficients are not directly interpretable and so are reported as odds ratios. In the discussion below, the results are further transformed into marginal effects, defined as the change in probability of

¹²¹ See *supra* notes 84–85 and accompanying text.

¹²² See *supra* note 62 and accompanying text.

¹²³ These additional variables wash (or “difference”) out any trends that are common to the Ninth Circuit and other circuits and might otherwise obscure *Killingsworth*'s true effect. For further explanation of the “differences-in-differences” approach, see *infra* notes 133–35 and accompanying text. Note, however, that I do not include similar dummy variables for the decisions of other U.S. Courts of Appeals that have come out the other way. See *supra* note 62. This is based on my view that the weight of authority at the district court level in all circuits apart from the Ninth is that DOJ enjoys an absolute veto right, leaving little theoretical reason to believe DOJ would seek to protect its veto rights any more vigorously within those circuits with published decisions declining to follow *Killingsworth* than in any other district court outside the Ninth Circuit. Accordingly, I include only variables for the Ninth Circuit's unique decision.

DOJ intervention based on a one-unit rise or fall in the independent variable in question or, for dummies, a move from zero to one.¹²⁴

As Table 2 indicates, a number of variables are statistically significant and substantively important. First, the findings suggest that DOJ's intervention calculus is sensitive to resource constraints. All else equal, a one-unit increase in DOJRESOURCECONSTRAINT—admittedly a substantial increase for a variable ranging from zero to 1.07—correlates with a roughly 11% drop in the likelihood of DOJ intervention. In practical terms, DOJ was significantly less likely to intervene in cases in the late 1990s and early 2000s, as DOJ's inventory of intervened cases reached its peak, compared to earlier in the post-1986 regime's lifespan, with relatively greater likelihood of intervention, all else equal, during the later 2000s as a drop in *qui tam* filings eased resource constraints somewhat. That said, the September 11 terrorist attacks do not appear to have affected DOJ intervention decisions, contrary to what some commentators have claimed.¹²⁵

¹²⁴ More specifically, a “marginal effect” measures the change in the dependent variable for each one-unit increase in the relevant independent variable holding all other independent variables at their means. For a useful primer on odds ratios in logistic regression and why marginal effects provide a more behaviorally interpretable metric, see *FAQ: How Do I Interpret Odds Ratios in Logistic Regression?*, UCLA: STATISTICAL CONSULTING GRP., http://www.ats.ucla.edu/stat/mult_pkg/faq/general/odds_ratio.htm (last visited July 22, 2013).

¹²⁵ See *supra* note 77 and accompanying text. Note that the fact that the 911RESOURCECONSTRAINT coefficient is precisely estimated at 1 raises the concern that the variable might be perfectly collinear with another variable. However, and as reported in note 114, *supra*, the inclusion of alternative specifications of the 9/11 variable in the models did not produce materially different results.

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TABLE 2: LOGIT MODEL PREDICTING DOJ INTERVENTION IN QUI TAM CASES, 1986–2011

| | (A) | (B) |
|---------------------------|----------------------|----------------------|
| | Odds Ratio (S.E.) | Odds Ratio (S.E.) |
| DOJRESOURCECONSTRAINT | 0.513** (0.174) | 0.514** (0.175) |
| 911RESOURCECONSTRAINT | 1.000 (0.000349) | 1.000 (0.000349) |
| EXPERIENCEDRELATOR | 0.666*** (0.0728) | 0.666*** (0.0728) |
| TOPRELATORFIRM | 1.760*** (0.227) | 1.726*** (0.233) |
| MIDRELATORFIRM | 1.056 (0.0884) | 1.062 (0.0921) |
| FORTUNE100 | 0.657*** (0.103) | 0.654** (0.140) |
| DEFENSE50 | 0.588** (0.122) | 0.588** (0.122) |
| TOPRELATORFIRM*FORTUNE100 | | 1.189 (0.468) |
| MIDRELATORFIRM*FORTUNE100 | | 0.933 (0.292) |
| HEALTH | 1.548*** (0.156) | 1.550*** (0.156) |
| DEFENSE | 1.613*** (0.215) | 1.614*** (0.215) |
| INTERIOR | 1.065 (0.385) | 1.067 (0.386) |
| NINTHCIRCUITRULING | 2.356** (0.834) | 2.348** (0.832) |
| CASEFILEDDM | 0.980 (0.123) | 0.979 (0.123) |
| CASEELECTEDDM | 0.965 (0.102) | 0.965 (0.102) |
| CASEFILEDYEAR | 0.484*** (0.0147) | 0.484*** (0.0147) |
| CASEELECTEDYEAR | 1.866*** (0.0539) | 1.867*** (0.0540) |
| Observations | 4326 | 4326 |
| Pseudo R2 | 0.172 | 0.172 |
| Chi square test | 0 | 0 |

Notes: Dependent variable in both models is a binary indicator as to whether DOJ intervened in the case. Lower order interaction terms (AFTERNINTH, NINTHCIRCUIT) are omitted from the presentation. All coefficients are reported as odds ratios, with marginal effects of significant variables presented in the text. Significance as follows: *** p < 0.01, ** p < 0.05, * p < 0.1.

My results likewise confirm the findings of past research regarding the role of repeat play within the qui tam regime: experienced relators who have filed at least one prior qui tam suit (EXPERIENCEDRELATOR) are 10% *less* likely to achieve DOJ intervention than one-shotters, while relator-side counsel with ten or more cases in their past portfolio of representations (TOPRELATORFIRM) are roughly 9% *more* likely to win DOJ intervention.¹²⁶ This latter result, when combined with the finding that DOJ is resource constrained, is troubling. If DOJ selects more meritorious cases brought by more experienced and capable qui tam plaintiffs' firms, but its decisionmaking also appears sensitive to resource constraints, then this may suggest a perverse allocation of public resources. To be sure, and as noted previously, DOJ might commit fewer resources to cases brought by more competent private enforcers, effecting an implicit delegation of enforcement authority.¹²⁷ And yet, intervention still entails assigning a line-level attorney to the case who must then fully engage in motions practice and discovery. To that extent, DOJ participation is not costless, particularly if doing so precludes intervention in other meritorious cases. I return to this issue in Part IV.

The results for FORTUNE100 and DEFENSE50 are consistent with expectation and statistically significant. All else equal, DOJ is roughly 7% less likely to intervene in cases brought against Fortune 100 companies, and 8% less likely to intervene in cases brought against top defense contractors. Of course, the precise causal mechanism here cannot be pinpointed. Low intervention rates might result from political influence, DOJ timidity in the face of the greater litigation resources such defendants can deploy, or, in the case of large, critically important defense contractors, the reduced litigation leverage DOJ can expect to have because of the unavailability of debarment from government business as a remedial option. An alternative explanation is that Fortune 100 companies draw more marginal qui tam complaints because they are perceived by relators as having deeper pockets or being more sensitive to public relations concerns. Neither of these latter possibilities, however, offers a fully persuasive rejoinder, particularly plaintiff perceptions of deeper pockets, which should also translate into greater available defense-side litigation resources.

Another striking finding is the substantial effect of the Ninth Circuit's *Killingsworth* ruling on DOJ intervention decisions. All else equal, post-*Killingsworth* cases initiated in district courts encompassed by the Ninth Circuit were roughly 14% more likely to win intervention, suggesting that the doctrinal threat to DOJ's ability to veto collusive settlements had a

¹²⁶ These effects are broadly consistent with findings from an earlier regression analysis using the same data as here: first, that repeat relators are substantially less likely to win DOJ intervention but achieve larger recoveries when they do; and second, that repeat counsel are both more likely to win intervention and achieve larger recoveries. See Engstrom, *supra* note 4, at 1313.

¹²⁷ See *supra* note 110 and accompanying text.

substantial impact on its intervention calculus. Rerunning the analysis using placebo versions of NINTHCIRCUITRULING—that is, artificially moving the date of the Ninth Circuit’s decision forward or backward in time—confirmed the robustness of this finding.¹²⁸

The variables designed to capture partisan political drivers of DOJ decisionmaking or the effect of political control or organizational resistance at particular primary agencies returned mixed results. First, neither CASEELECTEDDEM, nor its litigant-expectation variant, CASEFILEDDM, produced statistically significant results. I return to the question of whether partisan political control of DOJ might be driving intervention decisionmaking using a more sophisticated empirical approach in Part III.D. By contrast, the agency dummies yielded strong and statistically significant results, in keeping with Figure 2’s presentation of different intervention rates across case types. All else equal, cases alleging fraud on the Department of Health and Human Services or the Department of Defense were 7% and 8% more likely, respectively, to draw DOJ intervention. By contrast, cases alleging fraud on the Department of the Interior, which has drawn significant fire for internal corruption and alleged partisanship of agency leaders,¹²⁹ did not show a statistically significant difference relative to other case types.

Finally, the cluster of variables designed to test possible DOJ efforts to leverage less competent counsel in cases brought against Fortune 100 companies reveals no evidence that DOJ is playing such a role, with neither interaction term returning a statistically significant result. This may just confirm that, to the extent DOJ leverages the litigation efforts of less competent counsel, it manifests in the amount of resources DOJ allocates across cases rather than formal intervention decisions.

To be sure, the regression findings should be viewed with caution. The most obvious problem is omitted variable bias: because we cannot directly observe case quality, estimates of the marginal effect of various covariates

¹²⁸ Despite the apparent robustness of the *Killingsworth* findings, it remains possible that some other factor explains DOJ’s greater post-*Killingsworth* propensity to intervene in cases within the Ninth Circuit. For instance, some qui tam practitioners suggested that an alternative explanation for DOJ’s more liberal intervention stance is the California presence of law firm Phillips & Cohen LLP, which enjoys one of the highest DOJ intervention rates among highly active relator-side firms. However, the data tend to point away from a Phillips & Cohen effect. Among other things, Phillips & Cohen was just as active in the pre-*Killingsworth* period. More importantly, California is also home to one of the other most active relator-side law firms, Warren Benson Law Group, which has one of the lower DOJ intervention rates among relator-side firms. See Engstrom, *supra* note 4, at 1302 (reporting firm-specific success rates).

¹²⁹ See Ian Urbina, *Inspector General’s Inquiry Faults Actions of Federal Drilling Regulators*, N.Y. TIMES, May 25, 2010, at A16 (noting critics’ concerns about “a culture of lax oversight and cozy ties to industry”); Thomas Frank, Op-Ed., *The Gulf Spill and the Revolving Door*, WALL ST. J., May 12, 2010, at A17 (noting similar concerns). For a more skeptical scholarly view, see Christopher Carrigan, *Captured by Disaster? Reinterpreting Regulatory Behavior in the Shadow of the Gulf Oil Spill*, in PREVENTING REGULATORY CAPTURE, *supra* note 33.

on DOJ intervention may be biased. Even so, a convincing composite picture begins to emerge. DOJ makes intervention decisions *strategically*, in the sense that its decision calculus appears driven at least in part by factors separate and apart from consideration of pure merits, whether resource constraints, judicial threats to its ability to police collusive settlements, or the defendant's identity. This suggests that judicial inferences linking DOJ decisions to case merit may be wrongheaded.

D. Merits-Screening Versus Merits-Making and Partisan Political Control of DOJ: Quasi-Differences in Differences and Defense-Specific Analysis

The empirical portrait presented thus far establishes that DOJ intervention decisionmaking is, at least in part, strategic in nature. But none of the results makes substantial headway on a pair of critically important questions. First, to what extent is DOJ a merits screener or a merits maker? Second, to what extent is DOJ gatekeeping, particularly its intervention decisionmaking, subject to partisan political control? As noted previously, these questions go to the core of debates about whether courts should draw merits inferences from DOJ intervention decisions and the extent to which private enforcement might serve an agency-forcing or anticapture role.¹³⁰

On the first question, disentangling DOJ's merits-screening and merits-making ability is difficult because of a classic causal inference problem: DOJ intervention stands as both a selection mechanism and a treatment effect in ways that ordinary least squares (OLS) regression of recovery amounts on DOJ intervention cannot distinguish. Worse, DOJ intervention is endogenous with unobserved variables—namely, case merit—and will thus be correlated with the error term, risking inconsistent OLS estimates. A standard approach to work around such problems is instrumental variables estimation.¹³¹ By using an instrumental variable that separately (and exogenously) predicts DOJ intervention, one can derive an estimate of DOJ's merits-making power that, when compared to an unadjusted measure of DOJ intervention on recoveries, yields an unconfounded estimate of DOJ's merits-screening effect. The logit analysis presented previously contains a promising instrument: the Ninth Circuit's *Killingsworth* decision strongly increased DOJ's propensity to intervene in cases initiated within that circuit—presumably because of DOJ's desire to preserve its absolute-settlement-veto rights—and yet should not have separately impacted the likelihood or size of an eventual recovery. However, results of a standard two-stage least squares (“2SLS”) analysis using *Killingsworth* as an instrument are heavily dependent on the choice

¹³⁰ See *supra* notes 16–18, 71–75 and accompanying text.

¹³¹ See JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, *MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST'S COMPANION* 114, 131–33 (2009).

of dependent variable, with postestimation diagnostics suggesting a relatively weak instrument.¹³²

An alternative, but more tentative, identification strategy likewise exploits the Ninth Circuit's *Killingsworth* decision and its apparent effect on DOJ's propensity to intervene, this time by estimating the resulting impact on recovery size in intervened as against declined cases. The result is an estimation strategy that resembles a differences-in-differences approach. Suppose, for instance, that DOJ has an ability and desire to screen cases on the basis of expected value (i.e., the probability of a recovery times the recovery amount), thus creating a pool of relatively stronger intervened cases and a pool of relatively weaker declined cases. *Killingsworth*, by inducing DOJ to intervene in a tranche of cases it would not have taken previously, should thus yield a decline in average case value among intervened cases, as DOJ dips more deeply into the case pool and takes cases it would not have before.¹³³ Interestingly, this should also reduce average case value in the declined pool, since a DOJ with merits-screening capacity can be expected to select the higher-expected-value cases from the previously declined pool, for which collusive settlements impose the greatest cost. Further erosion of average case value in the declined pool may also result from a strategic response by relators: if DOJ is perceived to be more interventionist than before, then rational relators will file more and more marginal cases, since the expected value of any particular case—with that value a function, at least in part, of DOJ's

¹³² Using recovery dollars as the dependent variable, the *Killingsworth* instrument yields a strong and statistically significant coefficient at the first stage ($p = 0.014$) but a weak overall first-stage prediction of DOJ intervention (F-stat = 3.43, $p = 0.016$), well below the F-statistic of 10 that some see as a threshold requirement. Worse, the second-stage prediction of the impact of DOJ intervention on recovery dollars produces large standard errors ($p = 0.819$), yielding a highly imprecise estimate of DOJ's merits-making power. By contrast, when a logarithmic transformation of recovery dollars (i.e., the log of 1-plus-the-recovery-amount, to account for zero recoveries) is substituted as the dependent variable, the 2SLS analysis performs far better, yielding a positive and strongly significant coefficient on government intervention at the second stage, implying that DOJ intervention has a substantial merits-making impact. Post-estimation diagnostics, including a Durbin and Wu-Hausman test, reject the null hypothesis that GOVTINTERVENED is exogenous, implying that 2SLS is preferable to OLS. But there is a problem: comparing the second-stage estimate of the effect of DOJ intervention to a simple (one-stage) OLS estimate of intervention's effect on logged recovery-dollar amounts suggests that DOJ intervention, stripped of its merits-making effect, *negatively* impacts recovery size. In other words, DOJ merits screening *reduces* case value. This seems highly unlikely, suggesting that a weak instrument is biasing the results.

¹³³ A rational DOJ focused on maximizing total recoveries will intervene in additional cases post-*Killingsworth* only until the marginal return on resources devoted to doing so equals the return on those resources if spent elsewhere. Put more concretely, additional interventions impose a cost on DOJ, reducing the resources it can put towards litigating cases already in the intervened pool. As a result, DOJ will intervene in additional cases only until the value of the prevented collusion equals the loss of case value due to the diminished resources available to litigate cases already in the intervened pool. Note that diminished resources available to litigate intervened cases should also further erode average case value within the intervened pool, strengthening the prediction of a negative quasi-differences-in-differences estimator.

propensity to intervene—will be higher than before. The end result is no clear directional hypothesis, with a net effect on recovery amounts across intervened and declined cases before and after *Killingsworth* that could be positive, negative, or zero.

Still, measuring *Killingsworth*'s impact in this way may permit recovery of an informative estimate. Indeed, apart from the likely decrease in average case value in the intervened pool, all of the remaining predicted impacts—the removal of the strongest cases from the declined pool and relator adjustment to a more interventionist DOJ—point to a *positive* net effect. Thus, a *negative* net effect on recovery size across intervened and declined cases before and after *Killingsworth* can be interpreted as a lower bound measure of DOJ's ability to engage in merits screening of qui tam cases relative to a DOJ without any merits-screening capacity at all.¹³⁴

To derive estimates of *Killingsworth*'s net effect along these lines, I specify a regression model:

$$y_{it} = \alpha + \beta_1 X_{it} + \beta_2 \text{INTERVEN}_i + \beta_3 \tau_i + \beta_4 \gamma_i + \beta_5 (\tau_i * \text{INTERVEN}_i) + \beta_6 (\gamma_i * \text{INTERVEN}_i) + \beta_7 (\gamma_i * \tau_i) + \beta_8 (\gamma_i * \tau_i * \text{INTERVEN}_i) + e_i$$

where y is recovery dollars in case i at time t , with $t = \{0,1\}$ specifying the time period before ($t = 0$) and after ($t = 1$) *Killingsworth*, INTERVEN is an indicator variable equal to one if DOJ intervened in case i and zero otherwise, τ is an indicator variable equal to one if DOJ made its election decision after *Killingsworth*, γ is an indicator variable equal to one if the case falls within the Ninth Circuit, and X_{it} is a vector of other observable case characteristics. The main coefficient of interest is β_8 , which captures the “treatment” effect of DOJ intervention via a triple interaction term predicting recoveries in (i) intervened cases (ii) initiated within the Ninth Circuit (iii) after *Killingsworth*.

To be sure, this identification strategy has shortcomings. It is not a true differences-in-differences approach, in that we are analyzing the treatment effect of DOJ decisions within a common pool of cases rather than, say, the effect of adopting a minimum wage law in a state compared to a state that did not adopt such a law.¹³⁵ The approach does, however, retain at least

¹³⁴ Implicit in the above is the observation that changes in the intervention propensity of a DOJ without any capacity to accurately screen case merits but with a strong *merits-making* effect will not generate any net effect on recovery size in intervened as compared to declined cases, as DOJ's decisions before and after any change in its intervention calculus will be random draws from the case pool. In particular, even if relators file more and more marginal cases in response to DOJ's more interventionist stance, this should not impact the spread between the mean intervened recovery and the mean declined recovery, as DOJ's allocation of the more marginal population of cases to the intervened and declined pools will remain random.

¹³⁵ In technical terms, we thus lack an exogenously determined group that is subject to treatment. In addition to this problem, estimating net effects across intervened and declined cases does not solve the endogeneity problem that an instrumental variables approach would: it remains the case that

some of the advantages of differences in differences: by estimating what amounts to a pre-post, within-subjects difference of treatment and control groups, it controls for (i.e., “differences out”) unobserved features of the qui tam enforcement environment, such as changes in average case value over time, mitigating some of the concern about omitted variable bias.

The approach also has the advantage of flexibility, as it can be used to explore other aspects of DOJ intervention decisionmaking, including the relationship between partisan political control of DOJ and qui tam litigation outcomes. Suppose, as some critics have claimed, that a Republican-controlled DOJ has a “taste” for a less interventionist approach compared to a Democrat-controlled DOJ. A choosier Republican DOJ with the capacity to screen good and bad cases will thus intervene in *stronger* cases relative to its Democratic counterparts, resulting in higher average recoveries in intervened cases.¹³⁶ But by taking fewer cases, a Republican DOJ with merits-screening capacity will also consign to the declined pool a tranche of cases that a Democratic DOJ would take, and these cases will tend to be stronger than the cases that previously made up the declined pool, increasing average case value. As with the *Killingsworth* example, relators may also adjust, this time filing fewer and stronger cases, further boosting average case value among declined cases. As before, the end result may be a net effect that is positive, negative, or zero, depending on the magnitude of the various effects. And yet, a *positive* net effect on average case value in intervened and declined case pools across a changeover from Democratic to Republican control can be interpreted as the result of a choosier DOJ with merits-screening capacity, as all other predicted effects—the relatively higher recovery value in the declined pool and a possible strategic response by relators—point to a *negative* net difference.

As a final application of the differences-in-differences approach, consider a DOJ that, as some critics have contended, has a fully arbitrary “distaste” for defense-procurement cases—perhaps as part of an effort to deflect attention from politically unpopular war efforts. In contrast to the previous example, DOJ’s purely political refusal to take up defense-procurement cases that would normally draw intervention will not affect average case value in the intervened pool, since those decisions are arbitrary from a merits (or expected-value) perspective. But arbitrary expulsions of cases from the intervened pool *will* boost average case value

unobservable case merit affects both the probability of a recovery and DOJ’s decision to intervene, risking inconsistent OLS estimates.

¹³⁶ Cf. Sanford C. Gordon, *Assessing Partisan Bias in Federal Public Corruption Prosecutions*, 103 AM. POL. SCI. REV. 534, 537 (2009) (using a similar approach to identify and estimate partisan bias in political corruption investigations and prosecutions). Intervening in fewer cases will also free up resources that can then be put toward the intervened cases that remain, further boosting average case value.

in the declined pool relative to the cases already there, as all cases in the previously intervened pool will be stronger than those in the declined pool. Following the same logic as above (including a possible strategic relator response), a negative net effect on average case value in intervened and declined defense-procurement cases across the Bush43 Administration and other administrations can thus be interpreted as evidence of politicized decisionmaking.

Table 3 presents regression results using many of the same independent variables from before but with unlogged and logged inflation-adjusted recovery dollar amounts (RECOVERYDOLLARS and LOGRECOVERYDOLLARS) as the dependent variables in Columns (A) and (B), respectively, and GOVTINTERVENED now included as an independent variable.¹³⁷ New variables include: (i) CASECLOSEDYEAR, a time trend variable; (ii) indicator variables capturing whether a case drew a DOJ election decision during each of three presidential administrations (CASEELECTEDCLINTON, CASEELECTEDBUSH43, CASEELECTEDOBAMA) with Bush41 thus serving as the baseline category; and (iii) TRIPLEBUSH43DEFENSE, a triple interaction term of DEFENSE, CASEELECTEDBUSH43, and GOVTINTERVENED designed to gauge differences between the Bush43 and other administrations in defense cases. Descriptive statistics for these variables, as well as associated lower order interaction terms also included in the models,¹³⁸ are set forth in the Appendix.

¹³⁷ As is customary when using logarithmic transformations to re-express variables, I take the log of inflation-adjusted recovery dollars plus \$1 to account for losing (zero-dollar) cases.

¹³⁸ These include: (i) INTERVENDEFENSE, a variable interacting GOVTINTERVENED and DEFENSE; (ii) BUSH43DEFENSE, a variable interacting DEFENSE and CASEELECTEDBUSH43; (iii) INTERVENEDCLINTON, INTERVENEDBUSH43, INTERVENEDOBAMA, variables interacting each administration election variable with GOVTINTERVENED; and (iv) TRIPLEKILLINGSWORTH, INTERVENNINTHCIRCUIT, INTERVENKILLINGSWORTH, additional interaction terms for the triple-differences *Killingsworth* analysis.

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TABLE 3: OLS MODEL PREDICTING RECOVERY DOLLARS IN QUI TAM CASES, 1986–2011

| | (A) | (B) |
|-----------------------|----------------------|-----------------------|
| TRIPLEKILLINGSWORTH | -29.64** (12.79) | -1.921 (1.374) |
| INTERVENEDCLINTON | 9.396 (11.58) | 0.529 (1.244) |
| INTERVENEDBUSH43 | 11.08 (12.02) | 0.397 (1.292) |
| INTERVENEDOBAMA | 15.23 (12.34) | 0.785 (1.325) |
| TRIPLEBUSH43DEFENSE | -3.046 (6.904) | 0.500 (0.742) |
| GOVTINTERVENED | 8.368 (8.896) | 11.17*** (0.956) |
| DOJRESOURCECONSTRAINT | -2.330 (4.810) | -0.712 (0.517) |
| EXPERIENCEDRELATOR | 6.166*** (1.625) | -0.397** (0.175) |
| TOPRELATORFIRM | 4.242** (2.029) | 0.310 (0.218) |
| FORTUNE100 | 5.941** (2.347) | -0.381 (0.252) |
| DEFENSE50 | 0.496 (3.194) | 0.870** (0.343) |
| HEALTH | 1.616 (1.498) | 0.0167 (0.161) |
| DEFENSE | -1.157 (2.840) | -0.217 (0.305) |
| INTERIOR | 15.65*** (4.993) | -0.549 (0.536) |
| CASEFILEDYEAR | -2.703*** (0.358) | -0.369*** (0.0384) |
| CASECLOSEDYEAR | 2.045*** (0.334) | 0.366*** (0.0359) |
| Observations | 3817 | 3817 |
| Adjusted R2 | 0.074 | 0.666 |
| F-Stat (p-value) | 0.000 | 0.000 |

Notes: Dependent variable is inflation-adjusted recovery in (A) and logged inflation-adjusted recovery plus \$1 in (B). Standard errors are in parentheses. Lower order interaction terms (AFTERNINTH, NINTHCIRCUIT, INTERVENNINTHCIRCUIT, INTERVENKILLINGSWORTH, CASEELECTEDCLINTON, CASEELECTEDBUSH43, CASEELECTEDOBAMA, BUSH43DEFENSE, INTERVENDEFENSE) are omitted from presentation. Significance as follows: *** p < 0.01, ** p < 0.05, * p < 0.1.

As reflected in Table 3, regression analysis returned only a single statistically meaningful result among the five main coefficients of interest, and only in the unlogged version of the model. Specifically, the difference in the recovery between intervened and declined cases within the Ninth Circuit before versus after *Killingsworth* is roughly \$29 million smaller than the difference before versus after *Killingsworth* in district courts outside the Ninth Circuit. To be sure, this result is hardly authoritative, especially given the lack of a significant result, even at the 90% confidence level, in the logged version of the model (i.e., Column (B)). Still, the analysis offers at least some empirical evidence that DOJ possesses merits-screening capacity, contrary to claims that DOJ decisionmaking is wholly arbitrary. Indeed, a DOJ without the ability to sift more and less meritorious cases (but a greater post-*Killingsworth* propensity to intervene, as suggested by Table 2's earlier regression analysis) would generate no change in average case value in intervened cases relative to declined cases in the Ninth Circuit before versus after *Killingsworth* compared to other cases. Rerunning the models with placebo versions of the *Killingsworth*-related variables—moving the date of the Ninth Circuit's decision forward or backward in time—suggests that the finding is robust.¹³⁹

¹³⁹ Beyond placebo tests, we can also test the validity of the results of the *Killingsworth* analysis by examining the decision's other effects within the system, including filing rates (to explore whether *Killingsworth* or DOJ's response to it induced a strategic relator response) and recovery rates (to ensure that DOJ's greater propensity to intervene translated into a comparably higher win rate as well). One way to test for a post-*Killingsworth* filing increase is a full-blown time-series model focused on filing rates (i.e., number of filings per capita in the Ninth Circuit before and after *Killingsworth* relative to cases outside the Ninth Circuit). A simpler way to gain at least some empirical purchase on the issue is a more modest descriptive comparison of filing trends, measured both in terms of filing counts and also as a proportion of total filings. A simple filing-count analysis, however, reveals little discernible difference inside and outside the Ninth Circuit, with filing trends roughly mirroring each other—e.g., increases during the mid- to late-1990s and a pronounced decline in the early- to mid-2000s. Results for filings measured as a proportion of total activity are more interesting: the Ninth Circuit's proportion of filings jumped substantially in 1995 and 1996 in *Killingsworth*'s wake, from 18% in 1994 to 23% and then 26% in 1995 and 1996, respectively, then fell thereafter to a steady state of 14% to 20% for the remainder of the study period. This, then, would appear to support, if only weakly, the possibility of a strategic relator response immediately following *Killingsworth*. Measuring changes in DOJ's post-*Killingsworth* win rate can be accomplished in either of two ways. One is to use the same logit model as in Table 2, but substituting an indicator variable for whether each case produced a recovery, and omitting GOVINTERVENED as a right-hand variable. However, given the tight coupling of DOJ intervention and the probability of a recovery, doing so will not tell us much. And indeed, the analysis returned results that are quite similar to Table 2's logit analysis, implying a 14% greater likelihood of achieving a recovery after *Killingsworth* in cases within the Ninth Circuit, with the difference strongly statistically significant. An alternative is to use the same quasi-differences-in-differences approach deployed in Table 3 but replacing logged recovery amounts with an indicator variable capturing whether or not each case generated a recovery at all. Doing so returns a coefficient on the *Killingsworth* triple-interaction term implying a 4% decline in the probability of a recovery in intervened cases relative to declined cases before and after *Killingsworth*, but the result is not statistically significant. Neither of these analyses of recovery rates is contrary to expectation or otherwise raises red flags for the above account.

Turning to the question of possible partisan political control of DOJ, none of the three variables designed to test differences in outcomes across the Clinton, Bush43, and Obama Administrations, respectively, returned statistically significant coefficients. This suggests little or no relationship between overhead political control of DOJ and litigation outcomes across the run of *qui tam* cases. Rerunning the models across all case types with narrower bandwidth—e.g., running regressions on pairs of administrations, or constraining the sample to the final three years of an administration and the first three years of the next—likewise yielded no results that are statistically different from zero.

While the variable TRIPLEBUSH43DEFENSE likewise did not yield a meaningful coefficient in Table 3's regression model, suggesting the absence of any partisan dynamic in defense-procurement cases in particular, further analysis paints a more complicated portrait. First, rerunning the regression model constraining the sample to defense-only cases elected during the Bush43 and Obama Administrations finds a positive difference of \$3.4 million in average recoveries across intervened and declined cases during the Obama Administration compared to intervened and declined cases during the Bush43 Administration, with the result statistically significant at the 90% level. Put another way, this offers weak evidence that the Obama DOJ did better in defense cases it joined compared to cases it declined than did the Bush43 DOJ. A more direct, pairwise comparison thus lends at least some credence to recent public statements of the Assistant Attorney General for the Civil Division implying that the Obama DOJ has been more aggressive and achieved greater success in defense cases than the Bush43 DOJ.¹⁴⁰

This does not exhaust analysis of partisan political dynamics in DOJ oversight, however. Recall that the critique of the Bush43 DOJ's handling of defense-procurement cases is not just that DOJ was less likely to intervene in defense cases related to controversial war efforts, but also that DOJ affirmatively sat on such cases, avoiding case-election decisions altogether.¹⁴¹ If true, the result should have been a pool of relatively meritorious "holdover" cases on which DOJ deferred action during the Bush43 Administration and that the Obama DOJ then took up. This would help to explain the relatively higher mean recoveries since the beginning of

As a final quality check, note that alternative regression approaches did not produce materially different results from those presented in Table 3. In particular, using a tobit (rather than OLS) model produced a similar result for the main *Killingsworth* interaction term, narrowly missing statistical significance at the 95% level in the unlogged version of the model. Alternatively, rerunning the regressions constraining the sample to winning cases only (that is, dropping cases for which the dependent variable was zero in Table 3's models), weakens the significance of the *Killingsworth* result substantially, perhaps reflecting the smaller sample size, but is still consistent with theoretical expectation in terms of sign. Results of these further modeling efforts are available upon request.

¹⁴⁰ See *Civil Division*, *supra* note 19.

¹⁴¹ See *supra* notes 81–82 and accompanying text.

the Obama Administration. But any systematic Bush43 DOJ practice of sitting on defense cases should also be directly observable in the form of longer investigation times—that is, the elapsed time between filing and a DOJ case-election decision—for defense cases taken up by the Obama DOJ compared to defense cases taken up by the Bush43 DOJ and all other case types during either administration.

FIGURE 6: MEAN DOJ INVESTIGATION TIME BY CASE-ELECTION YEAR AND QUI TAM CASE “TYPE,” 1986–2011

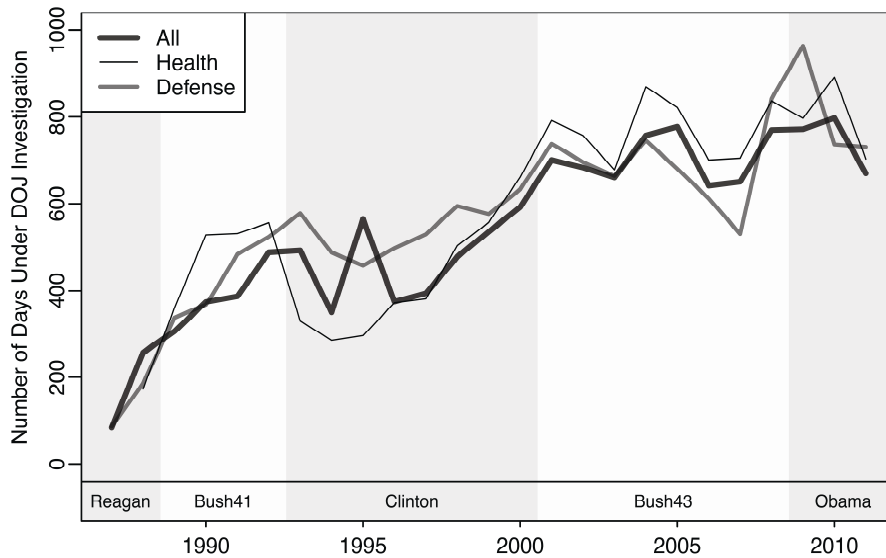


Figure 6 explores this possibility by plotting the mean number of days that cases were under DOJ investigation prior to a DOJ case-election decision over the period 1986–2011, in all cases and by case type (health, defense). As an initial matter, the line plots show that investigation times have risen steadily over the life of the regime. More arresting for our narrower purposes is the substantial recent variability of defense cases: investigation times in defense cases fell precipitously in 2007 at the tail end of the Bush43 Administration, then climbed to a historic peak in 2009 during the first year of the Obama Administration, falling again thereafter. This combination of a steep decline as war efforts proceeded followed by a steep increase is consistent with a view that the Bush43 DOJ was quickly dispatching some defense-oriented cases and sitting on others, leaving the newly installed Obama DOJ with a large number of “holdover” cases on which the Bush43 DOJ had deferred decision.

TABLE 4: ATTRIBUTES OF QUI TAM DEFENSE-PROCUREMENT CASES DRAWING DOJ CASE-ELECTION DECISIONS ACROSS THE BUSH43 AND OBAMA ADMINISTRATIONS, 2007–2010

| Case Type | Case Tally | Mean/Median Days Under Investigation | DOJ Intervene Rate (%) | Recovery Rate (%) | Mean Recovery (\$) (Winning Cases Only) |
|--|------------|--------------------------------------|------------------------------|--------------------------------|---|
| Bush43—All Defense Cases | 56 | 635/582 | 23.2 | 18.9 | \$15.9 |
| Bush43—Afghanistan/Iraq Connection | 8 | 538/404 | 12.5 | 12.5 | \$4.1 |
| Bush43—No Afghanistan/Iraq Connection | 48 | 652/597 | 25.0 | 20.0 | \$17.2 |
| Obama—All Defense Cases | 82 | 744/624 | 14.6 | 23.2 | \$13.6 |
| Obama—Afghanistan/Iraq Connection | 25 | 827/875 | 16.0 | 16.7 | \$24.0 |
| Obama—No Afghanistan/Iraq Connection | 57 | 708/595 | 14.0 | 26.3 | \$10.4 |
| t-test (<i>p</i> value) (across shaded categories only) | — | -1.3800 (<i>p</i> = 0.170) | 1.2834 (<i>p</i> = 0.20) | -0.5515 (<i>p</i> = 0.582) | 0.2555 (<i>p</i> = 0.801) |

Table 4 offers a still more granular analysis by presenting findings from a review of all 138 defense-procurement cases with and without a connection to war efforts in Iraq and Afghanistan that drew a DOJ case-election decision during the time window straddling the final two years of the Bush43 Administration and the first two years of the Obama Administration.¹⁴² None of the findings meet conventional levels of statistical significance—which is expected given sample-size limitations—and so interpretation should proceed with caution.¹⁴³ Still, several broad findings stand out.

¹⁴² The analysis that follows excludes twenty-seven defense-related cases for which case file materials (and, in particular, complaints) were not available on PACER and could not otherwise be obtained.

¹⁴³ Table 4 reports simple t-tests across the shaded categories (“Bush43—All Defense Cases”; “Obama—All Defense Cases”). Joint F-tests of equalities performed on the nonshaded categories (Bush43 in war versus nonwar cases, Obama in war versus nonwar cases; Bush43 versus Obama in war cases; Bush43 versus Obama in nonwar cases) similarly found a lack of statistical significance at conventional (95%) levels.

First, even apart from the lack of statistical significance, certain measures reveal only small differences across administrations. Thus, defense cases that reached DOJ election decisions during the Bush43 and Obama Administrations within the four-year time window were under DOJ investigation for roughly comparable periods of time (a mean of 635 days versus 744 days, and a median of 582 versus 624 days). Similarly, successful defense-related cases (with or without a direct link to war efforts) across the two administrations during the time window produced roughly comparable recovery amounts (a mean of \$15.9 million versus \$13.6 million).

Other measures, however, suggest wider cross-administration differences. As an initial matter, the Obama DOJ may have been choosier in defense cases than its predecessor, intervening roughly 15% of the time as against a 23% intervention rate during the Bush43 Administration. But even more striking are the differences across the two administrations in cases with and without a connection to the Iraq and Afghanistan wars. Breaking out cases in this way confirms that the pronounced uptick in investigation times for defense cases at the beginning of the Obama Administration was substantially driven by war-related cases, with war cases under investigation for an average of nearly 300 more days under Obama than Bush43 (827 days versus 538 days). And indeed, closer examination of the underlying cases reveals eleven war-related cases, all filed during the Bush43 Administration, that had been under investigation for more than 1000 days by the time the Obama DOJ reached a case-election decision. Four of these eleven cases resulted in DOJ interventions, including a case which had been open for more than five years alleging that a military contractor had forged expiration dates in supplying food to military bases in Iraq.¹⁴⁴

The remaining measures further suggest potentially important differences across administrations. Thus, the Obama DOJ's propensity to intervene appears consistent across cases with and without a war connection (16% versus 14%). But the Bush43 DOJ was nearly half as likely to intervene in cases with a war connection than in those without (roughly 13% versus 25%). Perhaps most arresting of all are the patterns in recovery amounts. War-related cases drawing DOJ election decisions during the Bush43 Administration have achieved far lower recoveries than cases without a war connection (approximately \$4 million versus \$17 million). But during the Obama Administration, that relationship has flipped, with war-related cases yielding substantially larger recoveries (\$24

¹⁴⁴ See Relator Delma Pallares's First Amended Complaint at 11–15, *United States ex rel. Pallares v. Itani*, No. 4:05-cv-03018 (S.D. Tex. June 10, 2009); *United States ex rel. Al-Sultan v. Pub. Warehousing Co., K.S.C.*, No. 1-05-cv-02968 (N.D. Ga. Jan. 17, 2013); *United States ex rel. Brown v. APL Ltd.*, No. 3:04-cv-04424 (N.D. Cal. Jan. 18, 2012); *United States ex rel. Good v. Taylor*, No. 5:08-cv-00894 (W.D. Tex. Oct. 3, 2011).

million versus around \$10 million). The result is that war-related cases that reached DOJ decisions under an Obama-controlled DOJ have generated substantially higher recoveries—roughly six times higher—than war-related cases drawing case-election decisions under Bush43.¹⁴⁵

To be sure, there are alternative explanations for these defense-specific findings that cannot be ruled out. The most significant inferential threat is that the data suffer from a type of left-censoring problem: because war-related cases could not by definition be initiated until the outbreak of hostilities, longer investigation times in cases drawing a DOJ decision during the Obama Administration might reflect nothing more than the fact that bigger, more complex cases take longer to investigate and so were more likely to be held over from the Bush43 Administration.¹⁴⁶ Even apart from the lack of statistical significance, then, the analysis falls well short of a definitive test regarding partisan political influence. Put another way, while the data offer tentative evidence of a partisan political cast to DOJ oversight, the above analysis can neither confirm nor exclude that possibility, particularly the longstanding claim that the Bush43 DOJ disfavored or soft-pedaled war-related defense-procurement cases.

IV. IMPLICATIONS

In 1990, Senator Charles Grassley, the FCA's most forceful champion and quarterback of the 1986 amendments, assailed DOJ for timid prosecution of fraud on the government during a congressional oversight hearing: "It has been said in another context that war is too important to leave to generals," he intoned. "So too with antifraud efforts. They are too

¹⁴⁵ This pattern holds when considering per-case recoveries: Iraq/Afghanistan per-case recoveries are \$4.0 million during Obama, compared to \$0.5 million during Bush43, with nonwar recoveries during Obama substantially lower at \$2.7 million, and nonwar recoveries during Bush43 substantially higher at \$3.4 million.

¹⁴⁶ A second alternative explanation is that uncertainty as to whether the Iraq Coalition Provisional Authority (CPA) was an instrumentality of the United States government within the meaning of the FCA delayed DOJ consideration of Iraq cases in particular. See *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 562 F.3d 295, 307–08 (4th Cir. 2009) (reversing district court's dismissal on the basis that CPA was not a government instrumentality); Jessica C. Morris, Note, *Civil Fraud Liability and Iraq Reconstruction: A Return to the False Claims Act's War-Profiteering Roots?*, 41 GA. L. REV. 623, 635–46 (2007) (providing overview of CPA issue). But here the data offer a definitive response: dropping Iraq-related cases from the sample (and thus including only cases with or without a link to the Afghanistan war, including cases with links to *both* wars) does not materially alter and even strengthens the differences across the Bush43 and Obama Administrations. As just one example, the difference in time under investigation across Afghanistan-war-related cases widens relative to the difference in the sample that includes Iraq-related cases as well, with Bush43 cases under investigation for an average of 269 days and Obama cases under investigation for 722 days. A more plausible alternative explanation is that DOJ waited to intervene in war-related cases until combat operations had wound down in both war efforts to avoid compromising the flow of needed supplies (e.g., a weapon system exclusively provided by a single company that, though not manufactured to contract specification, was nonetheless valuable to military operations). Unfortunately, the data do not speak to this possibility.

important to leave just to the Justice Department.”¹⁴⁷ And yet Senator Grassley had only a few years before he presided over a legislative revival of the FCA that placed substantial power in DOJ’s hands to shape and control qui tam litigation. The goal of this Article—twenty years later and after repeated unanswered calls for empirical exploration of the FCA regime¹⁴⁸—has been to provide the first systematic assessment of DOJ’s discharge of those statutory duties. The resulting findings have rich legal and policy implications, both for the FCA—now a \$3 billion behemoth¹⁴⁹—and beyond.

A. FCA Design Implications

Looking first to the FCA, the above analysis confirms the longstanding criticism that DOJ too meekly deploys its authority to terminate qui tam cases out from under relators.¹⁵⁰ On this score, Congress might consider ways to incentivize greater use of DOJ’s termination authority. Perhaps the most plausible proposal would seek to alter DOJ incentives by making DOJ jointly liable for attorney fee claims by prevailing defendants in declined cases.¹⁵¹ Similarly, Congress might consider amending the FCA to provide for a minimum recovery (at, say, \$200,000), with DOJ paying the difference if a successful unintervened qui tam action recovers less.¹⁵²

Beyond this, my analysis rejects the claim made by some that DOJ intervention decisionmaking is random or that DOJ is solely a merits maker that arbitrarily places the enormous weight of the government behind cases and drives them to settlement. To the contrary, the evidence presented above suggests that DOJ has the capacity to screen cases on merits grounds, even at the margins. At the same time, however, my findings that DOJ intervention is also driven by a host of strategic and plainly non-merits-based factors casts doubt on claims advanced by the FCA’s detractors that declined cases can and should be presumed meritless.

These findings have two critical implications. First, the findings suggest that we should be concerned about the possibility that judicial deference to DOJ intervention decisions with only an imperfect connection to merits may be driving qui tam litigation outcomes.¹⁵³ Simply put, forces

¹⁴⁷ *False Claims Act Implementation: Hearing Before the Subcomm. on Admin. Law and Governmental Relations*, 101st Cong. 1, 2 (1990) (statement of Sen. Charles E. Grassley).

¹⁴⁸ See, e.g., Kovacic, *Monitoring Devices*, *supra* note 16, at 1841–42, 1856–57 (noting limited nature of “[p]ublicly available data” on FCA regime and calling for “careful empirical assessment”); Elameto, *supra* note 16, at 835 (calling for “increased transparency” regarding DOJ decisionmaking).

¹⁴⁹ See Fraud Statistics, *supra* note 15 (noting 2012 qui tam recoveries of \$3.35 billion).

¹⁵⁰ See *supra* note 69 and accompanying text.

¹⁵¹ See Rich, *supra* note 16, at 1275.

¹⁵² See Kwok, *supra* note 30, at 17.

¹⁵³ See *supra* note 17 (collecting cases suggesting judicial deference to DOJ decisions).

other than case merit contribute to DOJ intervention decisions; courts and commentators should stop assuming otherwise.

Second, and for the same reason, the findings undercut proliferating calls to eliminate the *qui tam* mechanism entirely by precluding relators from going forward with cases in the absence of DOJ intervention. Doing so might make sense for those who seek to facilitate greater DOJ control over the direction and core purposes of the regime, or because the transaction costs consumed by losing cases outstrip any social welfare gains (a famously difficult calculation to make). But doing away with the *qui tam* mechanism is not warranted on the ground that declined cases necessarily lack objective indicia of merit.

B. Beyond the FCA

Stepping back and looking beyond the FCA, my analysis reveals a number of underappreciated challenges in the institutional design of litigation-oversight regimes. As noted previously, recent years have seen proliferating calls to export the FCA's *qui tam* and agency-oversight mechanisms to regulatory arenas as diverse as civil rights, environmental protection, tax, and securities.¹⁵⁴ It is the securities context that has seen the most frequent and vocal proposals. And it is also there that a *qui tam*-like enforcement and oversight mechanism is most likely: the recent Dodd-Frank Wall Street Reform and Consumer Protection Act created a simple cash-for-information whistleblower program that pays individuals for information leading to a successful SEC enforcement action but does not, in contrast to the FCA, grant them a private right of action to sue independently on the government's behalf.¹⁵⁵ But that could change: Dodd-Frank also ordered the SEC's Inspector General to conduct a study to determine whether that program should be built out into a full-on *qui tam* regime that vests whistleblowers who have already tried to pursue the case via the Commission with a private right of action.¹⁵⁶ Published in early 2013, the Office of Inspector General's report did not rule out a *qui tam*

¹⁵⁴ See *supra* notes 11–13 and accompanying text.

¹⁵⁵ See 15 U.S.C. § 78u-6(b) (2010) (providing for awards of ten to thirty percent of total monetary sanctions collected to whistleblowers who voluntarily provide information to the Commission that leads to a successful enforcement action). In 2011, the SEC promulgated substantial regulations governing the bounty regimes. See Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,368 (June 13, 2011) (codified at 17 C.F.R. § 240.21F).

¹⁵⁶ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(a), 124 Stat. 1841 (codified at 15 U.S.C. § 78u-6) (instructing the Inspector General to conduct a study of the whistleblower bounty regime, including “whether, in the interest of protecting investors and identifying and preventing fraud, it would be useful for Congress to consider empowering whistleblowers or other individuals, who have already attempted to pursue the case through the Commission, to have a private right of action to bring suit based on the facts of the same case, on behalf of the Government and themselves, against persons who have committed securities fraud”).

approach, noting the need for further study.¹⁵⁷ Importantly, Congress's possible interest in bringing *qui tam* to Dodd–Frank may be a bellwether: in an era of deepening fiscal austerity, private enforcement should be an increasingly attractive alternative to traditional—and on-budget—regulatory mechanisms.¹⁵⁸

To be sure, the applicability of my findings to securities or other regulatory areas must confront the usual questions of generalizability. And it is important to concede that the advisability of agency oversight elsewhere in the American regulatory state will be heavily context dependent. It is also relevant that the FCA is, in a number of key respects, unusual or even *sui generis* in its structure and subject matter. FCA cases are famously complex compared to, say, employment discrimination cases because of their intersection with dense Medicare and Medicaid reimbursement regulations or the notoriously complex Federal Acquisition Regulations. FCA lawsuits are also quite different from other private enforcement regimes, such as securities or antitrust, in that the government has unique access to information about FCA case merits, making DOJ a potentially more reliable evaluator and signaler of case merits.¹⁵⁹ One should therefore be cautious about generalizing the above findings to other contexts.

Even so, the findings presented above suggest some broad lessons that can and should guide regulatory architects in the design of litigation-oversight regimes while also pointing to potentially fruitful avenues for future research. First, it is noteworthy that many existing calls for expanded agency oversight of private litigation focus on the ability of agency gatekeepers to terminate undesirable enforcement efforts.¹⁶⁰ Yet the theory and evidence presented above suggest that this is the task that a rational agency, buffeted by political winds, is *least* likely to pursue.¹⁶¹ To the extent policymakers hope that the SEC, for instance, could play a substantial gatekeeper role by ensuring that certain securities class actions never get off the ground, they should consider building in direct incentives

¹⁵⁷ See OFFICE OF INSPECTOR GEN., U.S. SEC. & EXCH. COMM'N, EVALUATION OF THE SEC'S WHISTLEBLOWER PROGRAM vi (2013), available at <http://www.sec-oig.gov/Reports/AuditsInspections/2013/511.pdf> (“Upon collecting additional data and assessing the effectiveness of the program after a reasonable amount of time has passed, OIG will be in a better position to opine on the usefulness of adding a private right of action to the SEC’s whistleblower program.”).

¹⁵⁸ See BURKE, *supra* note 1, at 179 (hypothesizing that budgetary constraints may fuel a shift from public to private enforcement); David Freeman Engstrom, *Whither Whistleblowing? Bounty Regimes, Regulatory Context, and the Challenge of Optimal Design*, 15 THEORETICAL INQUIRIES L. (forthcoming 2015) (noting possible effect of fiscal conditions on legislative creation of bounty regimes); Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 827 (2008) (detailing a “budget constraint hypothesis” for rising use of private litigation as a regulatory tool).

¹⁵⁹ See Engstrom, *Gatekeepers*, *supra* note 5, at 48.

¹⁶⁰ See, e.g., Rose, *supra* note 6, at 1354.

¹⁶¹ See Engstrom, *Gatekeepers*, *supra* note 5, at 58–59 (making this point).

in order to induce the agency to carry out desired levels of case termination. The best way to do so, as noted previously, may be to hold the agency liable for a prevailing defendant's fees or costs in declined cases or establish a minimum recovery and put the agency on the hook for any shortfall.¹⁶²

A second broad lesson concerns the challenge of designing litigation-oversight structures that promote the optimal mix of politically insulated expertise and bureaucratic autonomy on the one hand and democratic accountability on the other—an issue that echoes across theories of regulation and administrative law.¹⁶³ Consider as an example the FCA's tiered bounty system, whereby relators receive a higher proportion of recoveries in declined cases. As noted previously, this structure was initially designed as an agency-forcing measure to incentivize relators to go it alone in the face of a bureaucracy unable or unwilling to enforce. But the foregoing analysis suggests that tiered bounties create strong disincentives for DOJ to fully delegate enforcement authority to capable and well-resourced private enforcers. This will be particularly true in large cases because tiering raises the opportunity cost and, from the perspective of a DOJ with *rent-seeker* tendencies, the "price" of full delegation.

To be sure, weighing the welfare gains of tiering's agency-forcing or anticapture effect against the welfare losses from suboptimal delegation of enforcement authority to private enforcers is difficult. Even so, it is not hard to see that tiering, initially crafted to incentivize relators to litigate cases opposed by a risk-averse or captured bureaucracy, may instead confound efficient management of private enforcement capacity by making gatekeeper agencies less likely to rely on competent private enforcers. Further research should model the likely consequences of eliminating tiered recoveries, both on an agency's oversight proclivities as well as the willingness of private enforcers to initiate enforcement efforts in the first place.

A third insight—and a third possible design lesson—concerns the optimal degree of transparency within litigation oversight regimes, an issue that once more implicates classic trade-offs among core administrative-design values, particularly bureaucratic expertise/autonomy and political accountability. Consider in this vein a recent bill in Congress designed to increase the transparency of the FCA's *qui tam* regime by imposing heightened case-level reporting requirements on DOJ.¹⁶⁴ In some ways, the bill's main provisions should strike experienced litigators as nonsensical, as it would have required DOJ to report the "actual" amount of fraud, apparently so that congressional overseers can measure the falloff in the

¹⁶² See *supra* notes 151–52 and accompanying text.

¹⁶³ See generally DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928* (2001).

¹⁶⁴ Fighting Fraud to Protect Taxpayers Act of 2011, S. 890, 112th Cong. (2011).

ultimate settlement or judgment.¹⁶⁵ In other ways, however, transparency proposals promise a welcome improvement over the current situation, providing much-needed information about the basic contours of a critically important litigation regime that has, until now at least, remained largely opaque to the public and legislative overseers alike.

And yet, my analysis also suggests that greater transparency might be a double-edged sword. It is possible, for instance, that efforts to improve transparency may be self-defeating because they will exacerbate agency pursuit of political rewards.¹⁶⁶ Simply put, a gatekeeper agency subject to pervasive political oversight may be more likely to privilege observable bureaucratic outputs, such as public recoveries or win–loss ratios, over other, potentially more public-interested tasks, such as minimizing costly meritless litigation by terminating cases.¹⁶⁷ Here, the above-noted reform measures that more directly impact DOJ incentives—such as holding DOJ liable for defendant fees and costs in declined cases that do not generate recoveries or, alternatively, any shortfall below a statutorily set minimum recovery—may prove the better reform avenue.¹⁶⁸

Finally, and more broadly, my analysis suggests the need to revitalize and reorient scholarly debate around regulatory design and the optimal structure of law enforcement. Much of the existing theoretical literature treats public and private enforcement as pure substitutes and a binary choice in which a government that seeks to regulate undesirable behavior chooses between purely public and purely private enforcement or specifies a strict division of labor between the two.¹⁶⁹ Yet all the while, many of our most consequential regulatory regimes have evolved into hybrids of public and private enforcement in which multiple enforcers—including federal and state administrative agencies, private litigants, and state attorneys general—operate and interact within complex “ecologies of enforcement.”¹⁷⁰ The institutional-design challenge in the present regulatory

¹⁶⁵ *Id.* at 14–18.

¹⁶⁶ *See supra* note 34 and accompanying text (noting concern that agencies with gatekeeper powers will pursue political rewards rather than the public interest); *see also* Gersen & Stephenson, *supra* note 37, at 40 (arguing that increased transparency may exacerbate agency vulnerability to “accountability pathologies”). For a more technical working out of similar ideas, *see* Andrea Prat, *The Wrong Kind of Transparency*, 95 AM. ECON. REV. 862 (2005); and Justin Fox, *Government Transparency and Policymaking*, 131 PUB. CHOICE 23 (2007).

¹⁶⁷ *See supra* notes 34–43.

¹⁶⁸ *See supra* notes 151–52 and accompanying text.

¹⁶⁹ *See* Engstrom, *supra* note 5, at 9. Classic contributions in this line of inquiry include Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974); Landes & Posner, *supra* note 24; and Polinsky, *supra* note 24.

¹⁷⁰ *See* Engstrom, *supra* note 5, at 7. A number of legal scholars have remarked on the evolution of multienforcer regimes and have begun to explore the various political, social, and economic forces that have fueled their emergence. *See, e.g.*, BURKE, *supra* note 1; FARHANG, *supra* note 1; Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698

landscape is not just determining whether public or private enforcement should be given primary or exclusive domain labor, but also how to structure institutions—or combinations of institutions—that can optimally coordinate multiple, overlapping, and interdependent enforcement mechanisms.

Going forward, two types of inquiry are in order, one theoretical and the other empirical. On the theoretical side, we need better theories for understanding what the ideal public enforcer role should be in a world of coordinated public–private enforcement. By extension, we need better models to understand how particular institutional designs—including the FCA as well as a range of competing design proposals—might best facilitate desired public management of available private enforcement capacity. On the empirical side, we need more micro-institutional analyses that can help us gauge how agency oversight works, or does not work, and when it is likely to deviate from Part I’s gatekeeper ideal.¹⁷¹ This Article hopefully takes a small step in both directions.

(2011); Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173 (2010). Others have noted the increasingly blurred line between administration and litigation, as agencies utilize litigation to achieve broad regulatory ends, see ANDREW P. MORRISS, BRUCE YANDLE & ANDREW DORCHAK, REGULATION BY LITIGATION 1 (2009), or step into a role normally reserved for private litigation efforts, pursuing monetary judgments via “agency settlements” and then distributing the proceeds to private individuals or entities who have suffered harm, see Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 539–40 (2011). See generally Engstrom, *supra* note 5, at 7–8 (reviewing a growing scholarly literature that increasingly focuses on the border between litigation and administration).

¹⁷¹ A good example is Quinn Mulroy, *Public Regulation Through Private Litigation: The Regulatory Power of Private Lawsuits and the American Bureaucracy* (Ph.D. dissertation, Columbia University, 2012) (examining the relationship of the Equal Employment Opportunity Center (EEOC), the Environmental Protection Agency (EPA), and the Office of Fair Housing and Equal Opportunity (FHEO) to private enforcement under Title VII and cognate antidiscrimination statutes).

APPENDIX
Descriptive Statistics

| Variable | Mean | Std. Dev. | Min | Max |
|---------------------------|----------|--------------|------|----------|
| GOVT_INTERVENED | 0.279 | 0.449 | 0 | 1 |
| RECOVERYDOLLARS | 5.913 | 38.365 | 0 | 1131.854 |
| LOGRECOVERYDOLLARS | 4.819 | 6.870 | 0 | 20.847 |
| DOJRESOURCECONSTRAINT | 0.721 | 0.170 | 0 | 1.070 |
| 911RESOURCECONSTRAINT | 38.436 | 130.588 | 0 | 729 |
| EXPERIENCEDRELATOR | 0.163 | 0.369 | 0 | 1 |
| TOPRELATORFIRM | 0.110 | 0.313 | 0 | 1 |
| MIDRELATORFIRM | 0.378 | 0.485 | 0 | 1 |
| FORTUNE100 | 0.095 | 0.294 | 0 | 1 |
| DEFENSE50 | 0.064 | 0.246 | 0 | 1 |
| TOPRELATORFIRM*FORTUNE100 | 0.015 | 0.122 | 0 | 1 |
| MIDRELATORFIRM*FORTUNE100 | 0.034 | 0.181 | 0 | 1 |
| HEALTH | 0.557 | 0.497 | 0 | 1 |
| DEFENSE | 0.188 | 0.391 | 0 | 1 |
| INTERIOR | 0.015 | 0.121 | 0 | 1 |
| NINTHCIRCUITRULING | 0.172 | 0.378 | 0 | 1 |
| CASEFILEDDM | 0.506 | 0.500 | 0 | 1 |
| CASEELECTEDDM | 0.519 | 0.500 | 0 | 1 |
| CASEFILEDYEAR | 2000.971 | 5.231 | 1987 | 2011 |
| CASEELECTEDYEAR | 2002.720 | 5.380 | 1987 | 2012 |
| CASECLOSEDYEAR | 2003.474 | 5.006 | 1989 | 2012 |
| TRIPLEKILLINGSWORTH | 0.047 | 0.211 | 0 | 1 |
| AFTERNINTH | 0.947 | 0.224 | 0 | 1 |
| NINTHCIRCUIT | 0.194 | 0.395 | 0 | 1 |
| INTERVENNINTHCIRCUIT | 0.172 | 0.378 | 0 | 1 |
| INTERVENKILLINGSWORTH | 0.264 | 0.441 | 0 | 1 |
| BUSH43DEFENSE | 0.051 | 0.220 | 0 | 1 |
| INTERVENDEFENSE | 0.066 | 0.248 | 0 | 1 |
| CASEELECTEDCLINTON | 0.055 | 0.228 | 0 | 1 |
| CASEELECTEDBUSH43 | 0.342 | 0.475 | 0 | 1 |
| CASEELECTEDOBAMA | 0.449 | 0.497 | 0 | 1 |
| TRIPLEBUSH43DEFENSE | 0.177 | 0.381 | 0 | 1 |

