WHAT WOULD SCALIA DO?—A TEXTUALIST APPROACH TO THE *QUI TAM* SETTLEMENT PROVISION OF THE FALSE CLAIMS ACT

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I. THE FALSE CLAIMS ACT AND ITS SETTLEMENT PROVISION

Originally enacted more than 140 years ago, the civil False Claims Act[1] has undergone a revival in the last two decades due to an increase in potential recovery for false claims made to the Federal Government. For claims arising after September 29, 1999, each false claim results in penalties of $5,500 to $11,000.[2]

Claims for violations of the Act may be brought by the Federal Government or by private plaintiffs, called *qui tam* relators. Specifically, § 3730(b)(1) of the False Claims Act provides that "[a] person may bring a civil action for

1. *See* 31 U.S.C. §§ 3729–3733 (2000). For more background on the False Claims Act, *see The History and Development of Qui Tam*, 1972 Wash. U. L.Q. 81; Valerie Park, *The False Claims Act, Qui Tam Relators, and the Government: Which Is the Real Party to the Action?* 43 Stan. L. Rev. 1061 (1991); Gretchen L. Forney, *Qui Tam Suits: Defining the Rights and Roles of the Government and the Relator Under the False Claims Act*, 82 Minn. L. Rev. 1357 (1998); Christopher C. Frieden, *Protecting the Government's Interests: Qui Tam Actions Under the False Claims Act and the Government's Right to Veto Settlements of Those Actions*, 47 Emory L.J. 1041 (1998); Gregory G. Brooker, *The False Claims Act: Congress Giveth and the Courts Taketh Away*, 25 Hamline L. Rev. 373 (2002); Qui Tam Litigation Under the False Claims Act (Howard W. Cox & Peter B. Hutt II eds., 2d ed. 1999); Am. Bar Assoc., The Civil False Claims Act and *Qui Tam* Enforcement (2004).

2. Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (28 U.S.C. § 2461 note); 28 C.F.R. § 85.3(9) (2006).

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a violation of Section 3729 for the person and for the United States Government."[3] Even when a *qui tam* relator is the plaintiff, "[t]he action shall be brought in the name of the Government."[4] Additionally, the Act provides that an action brought by a private plaintiff "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."[5]

The Federal Government must then decide whether to participate in the case as a plaintiff. Aside from any extensions "for good cause shown," the Government must determine "within 60 days after it receives both the complaint and the material evidence and information" whether to "elect to intervene and proceed with the action"[6] or to "notify the court that it declines to take over the action."[7] When the Government declines to intervene and conduct the action, "the person bringing the action shall have the right to conduct the action."[8] Moreover, § 3730(d)(2) provides that "[i]f the Government does not proceed with [the] action . . . , the person bringing the action *or settling the claim* shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages."[9]

On the other hand, "[i]f the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action."[10] Indeed, the Government "may dismiss the action notwithstanding the objections of the person" and "may settle the action with the defendant notwithstanding the objections of the person . . . if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable."[11]

II. TEXTUALISM IN A NUTSHELL

Justice Antonin Scalia is, without question, the foremost proponent of a method (or, more accurately, a philosophy) of statutory interpretation called

3. 31 U.S.C. § 3730(b) (2000) ("Actions by private persons").
4. *Id.*
5. *Id.*
6. 31 U.S.C. § 3730(b)(2).
7. *Id.* § 3730(b)(4)(B). In truth, there is another alternative: "the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty." *Id.* § 3730(c)(5).
8. *Id.* § 3730(b)(4)(B); *see also 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."). These two sections seemingly are redundant. It is also important to note that even "[w]hen a person proceeds with the action"—*i.e.*, where the Government chooses not to intervene—"the court . . . *without limiting the status and rights of the person initiating the action*, may nevertheless permit the Government to intervene at a later date upon a showing of good cause." *Id.* § 3730(c)(3) (emphasis added).
9. *Id.* § 3730(d) ("Award to qui tam plaintiff") (emphasis added).
10. *Id.* § 3730(c)(1) ("Rights of the parties to qui tam actions").
11. *Id.* § 3730(c)(2)(A) and (B).

textualism.[12] This article will focus on Justice Scalia's approach to textualism because, when the circuit split addressed by this article ultimately is resolved by the Supreme Court, Justice Scalia's textualism will actually matter.[13]

It is perhaps best to start with what textualism is not. "Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute."[14] According to Justice Scalia, "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."[15] Thus, "the good textualist is not a literalist."[16] On the other hand, "neither is [the textualist] a nihilist."[17] Fundamentally, Justice Scalia believes that "[w]ords do have a limited range of meaning, and no interpretation that goes beyond that range is permissible."[18]

The goal of textualism—in terms of statutory interpretation—is not to "look for subjective legislative intent."[19] Rather, textualists "look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[20] Justice

12. *See* Frank Easterbrook, *Textualism and the Dead Hand*, 66 Geo. Wash. L. Rev. 1119, 1120 (1998); *see also* Caleb Nelson, *What is Textualism?* 91 Va. L. Rev. 347 (2005) (explaining that textualism has been "championed by Justices Scalia and Thomas on the Supreme Court and by Judge Easterbrook on the Seventh Circuit"); Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 23 (1997).

13. *See* Nelson, *supra* note 12, at 347 (noting that "[t]he range of [statutory interpretation] theories is not quite so broad in actual American coutrooms" as "[i]n the academy" but that "judges too are of different minds about how to approach statutes"). It is, as of yet, unclear how the jurisprudential philosophy of Chief Justice John Roberts and that of Justice Samuel Alito compare to Justice Scalia's. *See*, *e.g.*, Jeffrey Rosen, *Alito vs. Roberts*, *Word by Word*, Int'l Herald Trib., Jan. 15, 2006, *available at* http://www.iht.com/articles/2006/01/15/america/web.0115rosen.php.; Julia K. Stronks, *Breyer v. Scalia: Will Alito Be an Activist or a Textualist?* Seattle Times, Jan. 15, 2006, *available at* http://seattletimes.nwsource.com/html/opinion/2002738527_sundaystronks15.html; Editorial, *The Roberts-Alito Court*, Wall St. J., Jan. 26, 2006, *available at* http://www.opinionjournal.com/editorial/feature.html?id=110007870. *But compare* Zedner v. United States, 126 S. Ct. 1976, 1985–86 (2006) (Alito, J.) (discussing the Speedy Trial Act's legislative history), *with id.* at 1990–91 (Scalia, J., concurring) (criticizing Justice Alito's reliance on legislative history and explaining that "the only language that constitutes 'a Law' within the meaning of the Bicameralism and Presentment Clause of Article I, § 7, and hence the only language adopted in a fashion that entitles it to our attention, is the text of the enacted statute").

14. Scalia, *supra* note 12, at 23.

15. *Id.*

16. *Id.* at 24.

17. *Id.*

18. *Id.*

19. *Id.* at 17.

20. *Id.* ("As Bishop's old treatise nicely put it, elaborating upon the usual formulation: '[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; *or*, *exactly*, *the meaning which the subject is authorized to understand the legislature intended*.'" (quoting Joel Prentiss Bishop, Commentaries on the Written Laws and Their Interpretation 57–58 (1882)) (emphasis and alteration in original)); *see also* Nelson, *supra* note 12, at 348 ("[N]o 'textualist' favors isolating statutory language from its surrounding context, and no critic of textualism believes that statutory text is unimportant."); *id.* at 355 ("[T]extualists freely admit that statutory provisions should be interpreted in light of their apparent purposes, as long as those purposes can be gleaned from evidence of the sort that textualists permit interpreters to consider.").

Scalia believes that "the reason we adopt this objectified version is . . . that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated."[21]

In short, Justice Scalia is "inclined to adhere closely to the plain meaning of a text"[22] because "[t]he text is the law, and it is the text that must be observed."[23] It is hardly surprising then that textualists eschew "reliance upon unexpressed legislative intent."[24] In particular, Justice Scalia decries the use of "legislative history" in statutory interpretation: "My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning."[25]

21. Scalia, *supra* note 12, at 17. "Textualists have no account for allowing the 'will of the dead' to govern because textualists deny that the will of any person or group, living or dead, should govern. 'Will' means intent or hope or expectation or belief. Yet the project of textualism is to deny that intent should matter (and not only because collective bodies lack any intent) and to affirm the primacy of text, the joint product of a group in a constrained political system." Easterbrook, *supra* note 12, at 1119.

22. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1184–85 (1989). "[J]udges whom we think of as textualists have explicitly noted their relative affinity for rules. When a statutory directive seems rule-like on its face, the typical textualist is less inclined than the typical intentionalist to apply background principles of interpretation that effectively push in the direction of standards." Nelson, *supra* note 12, at 350–51 (hypothesizing that "someone seeking to predict how textualist judges will diverge from intentionalist judges is well-advised to start with the distinction between rules and standards" rather than focusing on "more highfalutin' talk about the fundamental goals of interpretation or the distinction between 'objective' meaning and 'subjective' intent").

23. Scalia, *supra* note 12, at 22 (discussing Church of the Holy Trinity v. United States, 143 U.S. 457 (1892), and concluding that "the decision was wrong because it failed to follow the text").

24. *Id.* at 21–22 (criticizing the view that "it is proper for the judge who applies a statute to consider 'not only what the statute means abstractly or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of our present day society'" (quoting William N. Eskridge Jr., Dynamic Statutory Interpretation 50 (1994))). "It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is." Scalia, *supra* note 12, at 22.

25. Scalia, *supra* note 12, at 29–30 (disapproving of lawyers who "make no distinction between words in the text of a statute and words in its legislative history"). By "legislative history," Justice Scalia means "statements made in the floor debates, committee reports, and even committee testimony, leading up to the enactment of the legislation." *Id.* at 29. Justice Scalia explains that while he "object[s] to the use of legislative history on principle" because he "reject[s] intent of the legislature as the proper criterion of the law[,]" the use of legislative history "does not even make sense for those who *accept* legislative intent as the criterion" given that "[i]t is much more likely to produce a false or contrived legislative intent than a genuine one." *Id.* at 31–37; *see also id.* at 35 ("The only conceivable basis for considering committee reports authoritative, therefore, is that they are a genuine indication of the will of the entire house—which, as I have been at pains to explain, they assuredly are not."). While one commentator has cited Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring), for the proposition that "[e]ven Justice Scalia's interpretation of a statute will sometimes depend on what committee reports and floor statements reveal about the actual intent of members of Congress," *see* Nelson, *supra* note 12, at 360, Justice Scalia himself implicitly disclaimed that case by pointing out that he has "not used legislative history to decide a case for . . . the past nine terms." Scalia, *supra* note 12, at 36; *see also supra* note 13 (citing Justice Scalia's critique of legislative history in Zedner v. United States, 126 S. Ct. 1976 (2006)).

III. THE INTERPRETATIVE PROBLEM

The statutory interpretation problem posed by the False Claims Act's *qui tam* provisions is readily apparent. The basic difficulty concerns the proper meaning of two statutory commands. The first is that a *qui tam* action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."[26] The second provides that, when the Government declines to intervene and conduct the action, "the person bringing the action shall have the right to conduct the action."[27] The obvious question is whether the settlement consent requirement applies "across the board"—and thus a relator must *always* seek the Government's consent in order to settle—or whether a relator's "right to conduct the action" supersedes the consent provision, allowing a relator to settle an action even when the Government withholds its consent. The answer to that question is, contrary to the view expressed in several court decisions and law review articles,[28] far from straightforward.

This section first examines the four federal appellate opinions that attempt to reconcile these two *qui tam* provisions, and then this section demonstrates that the basic tenets of textualism arguably support the Ninth Circuit's approach.

A. *Minotti v. Lensink*

In *Minotti*, the Second Circuit reviewed a district court's dismissal of a *qui tam* action due to the relator's failure to comply with various discovery orders.[29] The relator argued that the district "court's failure to obtain the prior consent of the Attorney General rendered [the] dismissal inappropriate."[30]

26. 31 U.S.C. § 3730(b)(1) (2000).

27. *Id.* § 3730(b)(4)(B).

28. *See* Frieden, *supra* note 1, at 1078 ("The consent requirement/veto power language of § 3730(b)(1) is clear. . . . [The Ninth Circuit's] construction goes against the plain import of § 3730(b)(1) and can be justified by neither the text of the FCA nor its legislative history. The *Killingsworth* court should not have resorted to the legislative history, as the language of the FCA, and § 3730(b)(1) in particular, is clear and unambiguous."); Brooker, *supra* note 1, at 396–97 ("The *Killingsworth* decision is a major affront to the unambiguous language of the FCA. Congress did not place a time limit on the Attorney General's right to consent to the dismissal of *qui tam* actions, nor did it restrict the Attorney General's right to consent to only those cases where the government intervenes. The FCA provision mandating the written consent of both the court and the Attorney General could not be clearer."). Other commentators are more equivocal. *E.g.*, Park, *supra* note 1, at 1093 ("[T]he situational context in which the real party issue arises should control its resolution. In cases in which the decision concerns a particular action taken during the course of litigation, the litigation theory should apply and the *qui tam* relator should be treated as the real party to the lawsuit. In a case in which the decision implicates the underlying governmental interest, the cause of action theory should control and the government should be considered the real party."); Forney, *supra* note 1, at 1381–82 ("Unfortunately, the courts will probably need to look some place other than the actual text for guidance. . . . [C]ourts must find an intermediary ground that is consistent with the language and spirit of the qui tam provision.").

29. Minotti v. Lensink, 895 F.2d 100, 102 (2d Cir. 1990).

30. *Id.* at 103 (quoting 31 U.S.C. § 3730(b)(1) (permitting dismissal of a civil action brought by a private person "only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting")).

The Second Circuit, noting that "no previous court has interpreted this particular consent provision," held that a "court-ordered dismissal, as opposed to voluntary dismissal, of a *qui tam* action brought under the False Claims Act does not require prior consent of the Attorney General of the United States."[31]

The Second Circuit's justification for its holding was rather terse and primarily relied on legislative history. First, the court argued that the previous version of the consent provision[32] "clearly applied only to cases in which a plaintiff, purportedly representing the interests of the United States, sought to withdraw an action before the United States had opportunity to assess its merits or intervene in its conduct."[33] Because the Second Circuit's review of the legislative history convinced it that Congress had expressed an "intention not to allow changes in terminology to alter the substance of the statutory provision[ ]," the court held "that the provision requiring consent of the Attorney General prior to dismissal of a private action . . . continues to apply only where the plaintiff seeks voluntary dismissal of the action pursuant to Federal Rule of Civil Procedure 41(a), and not where the court orders dismissal."[34] The court also commented that "requiring the Attorney General's consent before dismissal is particularly inappropriate in this case, in light of the decision of the Attorney General, acting through a United States Attorney, to decline intervening or proceeding with Minotti's claims on behalf of the Government."[35]

For a textualist, however, the court's most crucial point was relegated to a footnote, in which the Second Circuit—following its discussion of the legislative history upon which the court primarily relied—correctly observed: "If the consent provision were intended to apply even to court-ordered dismissals, its language requiring permission of the court, as well as of the Attorney

31. *Id.* at 102–03.

32. *Id.* at 103 (discussing 31 U.S.C. § 232(B) (1976) (private citizen suit under the False Claims Act "shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the United States attorney. . . .")). Thus, "the phrase 'withdrawn or discontinued' became transformed to 'dismissed.'"

33. *Id.* (citing United States *ex rel.* Laughlin v. Eicher, 56 F. Supp. 972, 973 (D.D.C. 1944)).

34. *Id.* at 103–04 (discussing H.R. Rep. No. 97-651, at 1–4 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 1895–98); *see also* Fed. R. Civ. P. 41(a) ("Voluntary Dismissal: Effect Thereof"). While textualism takes no issue with the court's reference to the previous version of the statutory text to the extent it informs a reader about the likely meaning of the current language, textualism would not find the congressional report relevant.

35. Minotti v. Lensink, 895 F.2d 100, 104 (2d Cir. 1990). The court elaborated: "Integral to the *qui tam* enforcement scheme, therefore, is the option retained by the United States to act on its own behalf by intervening in or conducting an action brought by a private person. Under this conception of *qui tam* enforcement, the consent provision ensures that legitimate claims against an alleged wrongdoer are not dismissed before the United States has been notified of the claims or has had the opportunity to proceed with the action. Once the United States formally has declined to intervene in an action (*as it has in this case*), however, little rationale remains for requiring consent of the Attorney General before an action may be dismissed." *Id.* (quoting *Laughlin*, 56 F. Supp. at 973, for the proposition that the attorney general's refusal "to enter the suit may be tantamount to the consent of the District Attorney to dismiss the suit").

General, before dismissal of a private action would make little sense."[36] In other words, a provision requiring the court's explicit consent is superfluous—and therefore makes "little sense"—where the court itself has ordered the dismissal.

In sum, there are three distinct rationales underlying the Second Circuit's holding: (1) Congress did not intend "to alter the substance of the statutory provision" and thus the current consent clause—presumably like its predecessor—applies only to cases in which a plaintiff seeks "to withdraw an action before the United States [has] opportunity to assess its merits or intervene in its conduct";[37] (2) it does not make sense to require the Government's explicit consent where it constructively has consented to a suit's dismissal by declining to intervene; and (3) the language requiring the court's consent would be superfluous if the consent provision applied to involuntary, court-ordered dismissals.

The first two grounds—at least as explained by the Second Circuit—are remarkably weak in that both are premised on dicta in a *single* district court case from 1944: *United States ex rel. Laughlin v. Eicher*.[38] In that *qui tam* case, the defendant filed a motion to dismiss or, in the alternative, for summary judgment.[39] The plaintiff objected to the motion to dismiss, arguing that the consent provision in effect at that time precluded the dismissal of his suit.[40] The district court disagreed, stating:

> That language, in my opinion, only refers to voluntary dismissals and was intended to discourage the repeated bringing of suits which are without merit but which might be brought merely to satisfy the complainant's personal spleen and desire for revenge, and also to discourage private compromise settlements. The refusal of the Acting Attorney General to enter the suit may be taken as tantamount to the consent of the District Attorney to dismiss the suit.[41]

The court's "opinion," however, is rank dicta. Indeed, the plaintiff objected to the motion for summary judgment on different grounds,[42] and the district court ultimately granted summary judgment, rather than dismissal.[43] Moreover, the consent language was not directly at issue and was not considered in any depth. The district court cited no authority for its conclusory interpretation nor did it explain how its interpretation was consistent with the plain meaning of the statutory language.[44]

36. *Id.* at 104 n.1.
37. *Id.* at 103.
38. 56 F. Supp. 972.
39. *Id.* at 973.
40. *Id.* (discussing statutory language quoted *supra* note 33).
41. *Id.*
42. *Id.* ("The motion for summary judgment is objected to on the grounds that no answer has been filed.").
43. *Id.* at 976 (concluding that "there are no issuable facts under the showing made and the motion for summary judgment should be sustained").
44. *See id.* The language itself makes no distinction between voluntary and involuntary dismissals. Moreover, the court did not explain why the Government's refusal to enter the suit

The Second Circuit's extensive reliance on *Laughlin*, while troubling and misplaced, does not necessarily detract from its remaining decisional ground—that statutory language requiring a court's consent to effectuate a court-ordered, involuntary dismissal would make little sense.[45] On the other hand, it is ironic that *Laughlin* provides a retort to the Second Circuit's most textualist-oriented argument: "The consent of the Court is obtained if the motion [to dismiss] is sustained."[46] Due to its brevity, if nothing else, *Minotti*—while perhaps reaching the correct decision—properly should be read as limited to its facts.

B. *United States ex rel. Killingsworth v. Northrop Corp.*

In *Killingsworth*, the Government argued to the Ninth Circuit that "the district court erred in dismissing the action without the consent of the Attorney General, in contravention of its absolute right under the Act to block a settlement."[47] The Government objected to the settlement based on its belief that it reflected "a deliberate attempt by Northrop and Killingsworth to divert money from the False Claims Act claim to Killingsworth's personal claim."[48] Northrop, in contrast, maintained "that having chosen not to intervene earlier, the government cannot now block the settlement and force Killingsworth to litigate against his will."[49]

The Ninth Circuit correctly recognized that "[t]he substantive issue in this case—whether the district court erred in dismissing the action without the consent of the government—requires the interpretation of § 3730(b)(1) and is subject to de novo review."[50] The court acknowledged "the difficult and novel question presented by this appeal."[51] Rather than first undertaking a

should be "tantamount to the consent . . . to dismiss the suit." *Id.* at 973. The plain language of the statute—considered in isolation at any rate—suggests the opposite.

45. Minotti v. Lensink, 895 F.2d 100, 104 n.1 (2d Cir. 1990).

46. United States *ex rel.* Laughlin v. Eicher, 56 F. Supp. 972, 973 (D.D.C. 1944).

47. United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d 715, 720 (9th Cir. 1994).

48. *Id.*; *see also id.* at 718 ("The government thought that the parties might have specifically structured the settlement so as to reduce the amount the government realized; normally entitled to roughly seventy percent of any False Claims Act settlement under 31 U.S.C. § 3730(d)(2), the government would not receive any compensation from the wrongful termination claim.").

49. *Id.* at 717 ("During an extended course of litigation, the United States declined to exercise its right to intervene under §§ 3730(b)(2) and (c)(3) of the False Claims Act. . . .").

50. *Id.* at 721. The court also asked the parties to brief two additional issues not addressed in their briefs:

> (1) Assuming 31 U.S.C. § 3730(b)(1) is inapplicable: If the government does not formally intervene, does it have standing to object to the proposed settlement on grounds that the settlement allocates the proceeds among multiple claims in a way that deprives the government of its legitimate share under 31 U.S.C. § 3730(d)(2); and (2) If the government does have standing to object to the proposed settlement, to what extent does the trial court have the power to reallocate the settlement proceeds among the various claims.

Id. at 721 n.3. As expected, the Government asserted that it does not have to intervene formally to object to a settlement, while the settling parties agreed that the Government must intervene formally to object. In answering the second question, all of the parties—including the Government—agreed "that the district court has no power to reallocate settlement proceeds." *Id.*

51. *Id.* at 721.

"careful[] review [of] the provisions of the False Claims Act outlining the interrelationship of the *qui tam* plaintiff and the government[,]" the court began its analysis with a discussion of the Act's legislative history.[52] Indeed, *before* examining the statutory text of the Act at all, the court concluded "that Congress' intent to place full responsibility for False Claims Act litigation on private parties, absent early intervention by the government or later intervention for good cause, is fundamentally inconsistent with the asserted 'absolute' right of the government to block a settlement and force a private party to continue litigation."[53]

In beginning its opinion with a discussion of the False Claims Act's legislative history, the Ninth Circuit certainly did not hew to a textualist methodology.[54] Nonetheless, the court's actual exposition of the statutory text is itself a model of a textualism. The court first noted that that § 3730(b)(1) "must be read in conjunction with § 3730(b)(2) . . . and § 3730(c)(3)."[55] Reading the statute "as a whole," the court concluded that "the consent provision contained in § 3730(b)(1) applies only during the initial sixty-day (or extended) period."[56] Rejecting the Government's interpretation "as contradictory to the express language of § 3730(b)(4)(B), which gives the *qui tam* plaintiff 'the right to conduct the action,'"[57] the Ninth Circuit reasoned that "[t]he right to conduct a *qui tam* action obviously includes the right to negotiate a settlement in that action."[58] Moreover, the court pointed out that § 3730(d)(2) specifically refers to "the person bringing the action *or settling the claim* . . . ."[59]

52. *Id.* at 721–22 ("To place the contested provision in an appropriate context, we first examine the legislative history of the Act.").

53. *Id.* at 722.

54. Criticizing the Supreme Court's use of legislative history, Justice Scalia commented:

> That the Court should refer to the citation of three District Court cases in a document issued by a single committee of a single house as the action *of Congress* displays the level of unreality that our unrestrained use of legislative history has attained. I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote [and] that very few of those who did read them set off for the nearest law library to check out what was actually said in the four cases at issue. . . . As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of these references was not primarily to inform the Members of Congress what the bill meant . . . , but rather to influence judicial construction. . . . I decline to participate in this process.

Blanchard v. Bergeron, 489 U.S. 87, 98–100 (1989) (Scalia, J., concurring in part) (interpretation of a statute should be "reasonable, consistent, and faithful to its apparent purpose"); *see also* Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 73 (2004) (Scalia, J., dissenting) ("I have often criticized the Court's use of legislative history because it lends itself to a kind of ventriloquism. The Congressional Record or committee reports are used to make words appear to come from Congress's mouth which were spoken or written by others. . . .").

55. United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d 715, 722 (9th Cir. 1994).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 722–23.

The key part of the court's exegesis, however, was its observation that "the government's assertion of an absolute right to block a settlement and dismissal by withholding its consent may represent a meaningless privilege in terms of present-day *qui tam* litigation."[60] The court explained:

> Here neither the government nor the relator desires to engage in further litigation. If the parties settle the action without a dismissal and thereby effectively stop litigating the case, the trial court would undoubtedly dismiss the suit for failure to prosecute. Conversely, the government may not force Killingsworth and Northrop to continue litigation by refusing to consent to a settlement.[61]

Thus, in analyzing the False Claims Act's text, the Ninth Circuit adhered to the Supreme Court's oft-repeated statement that "[s]tatutory construction . . . is a holistic endeavor."[62] The court of appeals correctly understood that § 3730(b)(1) could not be interpreted in a vacuum such that the Government could lock two private parties into forced litigation.[63] The court's conclusion is further justified if the provision's instruction, i.e., that a *qui tam* "action may be dismissed only if the court and the Attorney General give . . . consent,"[64] is not a categorical one. In this regard, the court noted that "[i]n some

60. *Id.* at 723.

61. *Id.*

62. United Sav. Assoc. of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (unanimous decision) (Scalia, J.) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."). *See also* Koons Buick Pontiac GMC, Inc. v. Nigh, 125 S. Ct. 460, 466–67 (2004); *id.* at 472 (Scalia, J., dissenting) (explaining that "dispositive weight" should be given "to the structure of" the statute under dispute); O'Gilvie v. United States, 519 U.S. 79, 95 (1996) (Scalia, J., dissenting). "It is . . . a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" Smith v. United States, 508 U.S. 223, 241–42 (1993) (quoting Deal v. United States, 508 U.S. 129, 132 (1993)). Context, noted Justice Scalia, is particularly important when interpreting the meaning of a word that is fairly "elastic." *Smith*, 508 U.S. at 241.

63. In United States *ex rel.* Green v. Northrop Corp., 59 F.3d 953, 969 (9th Cir. 1995), the court held "that *prefiling* releases of *qui tam* claims, when entered into without the United States' knowledge or consent, cannot be enforced to bar a subsequent *qui tam* claim" (emphasis added). In so holding, the Ninth Circuit rejected the argument "that failure to enforce the release would, in effect '*force* individuals to become *qui tam* plaintiffs. . . .'" *Id.* at 968 n.13. "Refusing to enforce a Release such as that entered into in this case does not *compel*, although it certainly will *encourage*, a relator to file suit." *Id.* (emphasis in original). In a later case, the Ninth Circuit explained that "[t]he effect of enforcing releases when the government has no knowledge of the *qui tam* claims would be to encourage relators to settle privately and release their claims, thus retaining 100 percent of the recovery, instead of providing the government with information and retaining at most the 30 percent recovery available in a *qui tam* action." United States *ex rel.* Hall v. Teledyne Wah Chang Albany, 104 F.3d 230, 233 (9th Cir. 1997). Similarly, in *Killingsworth*, the court acknowledged the Government's concern that a plaintiff and defendant could "artificially structur[e] a settlement to deny the government its proper share of the settlement proceeds." United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d 715, 724 (9th Cir. 1994). "Thus, while the government may not obstruct the settlement and force a *qui tam* plaintiff to continue litigation, the government nevertheless may question the settlement for good cause, . . . with or without formal intervention and without proceeding with the litigation under § 3730(b)(2) or (c)(3)." *Id.*

64. 31 U.S.C. § 3730(b)(1) (2000).

circumstances, the government's consent to a dismissal is not required. These situations include court-ordered dismissals and other involuntary dismissals."[65] Once it is concluded that the provision is not to be read literally (i.e., by its terms, and viewed in isolation, § 3730(b)(1) would apply even to involuntary dismissals), its applicability should be limited by the other clauses of the statute cited by the court.

C. *Searcy v. Philips Electronics North America Corp.*

In contrast, the Government's view of § 3730(b)(1)—rejected by the Ninth Circuit—ultimately prevailed in the Fifth Circuit.[66] In *Searcy*, the Government asked the Fifth Circuit "to sanction an absolute veto power over voluntary settlements in qui tam False Claims Act suits."[67] As in *Killingsworth*, the issue in *Searcy* was "whether the False Claims Act gives the government the power to veto a settlement after it has declined to intervene."[68]

Finding "the last sentence of 31 U.S.C. § 3730(b)(1) unambiguous in its declaration that courts may not grant a voluntary dismissal in a False Claims Act suit unless the U.S. Attorney General consents to the dismissal[,]" the Fifth Circuit rejected the statutory analysis in *Killingsworth*, calling it "unpersuasive."[69] In particular, the Fifth Circuit was disturbed by *Killingsworth*'s reliance on legislative history:

> [W]e are unimpressed with the [Ninth Circuit] court's contention that the legislative history of 1986 False Claims Act amendments militates against giving the government the power to veto a settlement. . . . Even if we assume that *Killingsworth* gauged Congressional intent accurately, intentions alone cannot work a repeal of the last sentence of § 3730(b)(1).[70]

Thus, before addressing any of the Ninth Circuit's textualist arguments, the Fifth Circuit had already declared the statutory text unambiguous and determined that it clearly resolved the question presented by the case: "[W]e must follow our usual procedure of reading the statute and enforcing its dictates if its language is clear."[71]

Indeed, only after deciding that "[t]he statutory language relied on by the government is as unambiguous as one can expect" did the Fifth Circuit attempt to blunt specific textualist points raised by *Killingsworth*.[72] The court responded, however, to only two such points. First, while *Searcy* acknowledged that "[s]ection 3730(b)(4)(B) gives the relator 'the right to conduct the action' when the government declines to assume control[,]" it concluded that "[a] relator has 'conducted' an action if he devises strategy, executes discovery, and

65. *Killingsworth*, 25 F.3d at 722 n.5 (citing *Minotti* and *Laughlin*).
66. Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154 (5th Cir. 1997).
67. *Id.* at 158.
68. *Id.* at 155.
69. *Id.* at 155, 159.
70. *Id.* at 159.
71. *Id.*
72. *Id.* at 159–60.

argues the case in court, even if the government frustrates his settlement efforts."[73] Second, *Searcy* noted that "the government's power to block settlements does not mean that the relator will never be the person settling the claim."[74] As a result, the Fifth Circuit reasoned that § 3730(d)(2)—which refers to "the person . . . settling the claim"—"does not purport to create an iron-clad 'right to settle.'"[75]

In sum, "[u]nlike the *Killingsworth* court," the Fifth Circuit could "find nothing in § 3730 to negate the plain import of [the] language" in subsection (b)(1) of that statute.[76] The Fifth Circuit acknowledged that "a profound gap in the reasonableness of the provision" would "justify ignoring [the plain] language" of § 3730(b)(1).[77] It is thus virtually inexplicable that the court in *Searcy* ignored *Killingsworth*'s primary contention: the necessary implication of the Government's view is that "the government may . . . force [the parties] to continue litigation by refusing to consent to a settlement."[78] The Ninth Circuit reasonably viewed such an outcome as absurd and accordingly refused to adopt the Government's interpretation.[79] *Killingsworth* posited that the Government's interpretation would result in "a profound gap in the reasonableness of the provision." The *Searcy* court, however, did not address that particular critique advanced by the Ninth Circuit against the Government's interpretation.

But *Searcy*'s difficulties do not end there. The language of § 3730(b)(1)—even aside from the wider statutory structure or context—is hardly as "clear" or "plain" as the Fifth Circuit asserted. For example, § 3730(b)(1), by its terms, makes no distinction between voluntary and involuntary dismissals. Yet, in *Searcy*, the Fifth Circuit complimented the Government for "forthrightly" conceding "that requiring the government's consent to an involuntary dismissal would raise separation-of-powers concerns."[80] Of course, the Government's concession is simply one plausible means of avoiding the constitutional problem—whether a court can be required to obtain the Government's consent prior to effectuating an involuntary dismissal—otherwise inherent in the statute.[81] Another way to avoid that "constitutional doubt" is the interpretive

73. *Id.* at 160 ("The power to veto voluntary settlements . . . does not conflict with the relator's statutory right to control the litigation when the government chooses to remain passive.").

74. *Id.*

75. *Id.*

76. *Id.* at 159.

77. *Id.* at 160.

78. United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d 715, 723 (9th Cir. 1994).

79. *See* Deal v. United States, 508 U.S. 129, 132–33 (1993) (Scalia, J.) (interpreting statute to avoid "absurd result" and noting that the Court is "not disposed to give [a] statute a meaning that produces such strange consequences").

80. Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 158 (5th Cir. 1997) (discussing *Minotti*).

81. The "canon of constitutional avoidance" is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." Clark v. Martinez, 543 U.S. 371, 381–82 (2005) (Scalia, J.). *See also* Almendarez-Torres v. United States, 523 U.S. 224, 249–50 (1998) (Scalia, J., dissenting) (explaining that the application of the canon of constitutional

approach of *Killingsworth*, in which the Ninth Circuit "held that the statute's requirement of government consent to a dismissal applied only at the initial stage, before DOJ decides [whether] to intervene."[82] Moreover, the *Killingsworth* interpretation avoids a new constitutional problem that the Government's approach creates—according to the Government, it may object to a settlement and thereby "improperly request[] the Court to force [a] relator to continue litigating the claims himself."[83] One district court described such a result as "involuntary servitude" of the relator;[84] it is not difficult to see that due process concerns may be implicated.[85]

Finally, as yet another district court succinctly explained, *Searcy* failed to account adequately for the structure of the statute:

> Subsection 3730(b)(1) is included in that part of section 3730 addressing the initial procedures for filing a qui tam action. The subsection requires the qui tam complaint and all of the relator's material evidence to be served first upon the government and filed under seal for 60 days. During the 60-day period, which may be

avoidance "requires merely a determination of serious constitutional *doubt*, and not a determination of *unconstitutionality*" (emphasis in original)). "The doctrine of constitutional doubt does not require that the problem-avoiding construction be the *preferable* one—the one the Court would adopt in any event. Such a standard would deprive the doctrine of all function. 'Adopt the interpretation that avoids the constitutional doubt if that is the right one' produces precisely the same result as 'adopt the right interpretation.' Rather, the doctrine of constitutional doubt comes into play when the statute is 'susceptible of' the problem-avoiding interpretation . . . when that interpretation is *reasonable*, though not necessarily the best." *Id.* at 270 (Scalia, J., dissenting) (emphasis in original); Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 787 (2000) (Scalia, J.) (holding that "the term 'person'" does not "include[] States for purposes of *qui tam* liability" in part based on "the doctrine that statutes should be construed so as to avoid difficult constitutional questions").

82. United States v. Alliant Techsystems, Inc., 50 F. Supp. 2d 942, 947 (C.D. Cal. 1999) (discussing *Killingsworth*, 25 F.3d at 722).

83. *Id.* at 950.

84. *Id.*; *see also* United States *ex rel.* Hullinger v. Hercules, Inc., 80 F. Supp. 2d 1234, 1241 (D. Utah 1999) ("The court believes that, were the government to have such a right, it would have the power to hold the relator and the defendant hostage indefinitely, forcing the litigation to continue, regardless of the fact that a settlement had been reached. . . . Such a result cannot be tolerated."); United States *ex rel.* Summit v. Michael Baker Corp., 40 F. Supp. 2d 772, 775 (E.D. Va. 1999) ("The relator . . . has tried to dismiss himself from the action, however, was prevented from doing so by the Government. He has represented to this Court that he will not proceed with the False Claims Act action due to the lack of merit for the claims. The Government has refused to intervene and proceed with action, leaving this case to sit on this Court's docket. The Government has tied the relator's hands behind his back, not allowing him to settle the claims or to dismiss the claims, yet refusing to proceed with the claims on its own. As a result, nothing has occurred until this time where the Government has finally moved to dismiss Counts I–III of the action.").

85. United States *ex rel.* Fender v. Tenet Healthcare Corp., 105 F. Supp. 2d 1228, 1231 (N.D. Ala. 2000) (following *Killingsworth* and concluding: "The Government cannot force contractor and former employee to continue litigation by refusing to consent to settlement. . . . Parties have the right to contract settlement without interference. The Justice Department has no right to nullify a settlement agreement in a case in which it is not a party. Such Government intervention and interference is tantamount to armed intrusion into a person's home, showing no consideration of individual rights."); *see also id.* at 1232 ("It has long been the province of the courts to encourage settlement of cases—a practice which this court has followed. To paraphrase Aretha Franklin's 'A Rose Is Still A Rose,' the 'Government Non-Party' still wants to have all the rights and privileges of a party. It cannot have its cake and eat it, too.").

> extended upon the government's motion, and before the defendant is notified of the suit, the government is given the opportunity to investigate the case. Then, before the 60-day period or its extensions expire, the government must notify the court of its decision to proceed with or decline to take over the action. Thus, placing section 3730(b)(1) in context, it appears to the court that requiring the Attorney General's written consent to a dismissal is limited to the initial period in which the government is deciding whether to intervene.[86]

D. *United States v. Health Possibilities, P.S.C.*

The Sixth Circuit in *Health Possibilities* reversed the district court's conclusion "that the consent provisions of the FCA apply only to attempts to dismiss *qui tam* actions prior to the government's initial intervention decision, and then when the government affirmatively declines to intervene, a private plaintiff can settle a *qui tam* action notwithstanding the government's disapproval."[87] The Sixth Circuit's opinion and interpretation of § 3730(b)(1) mirrors that of the Fifth Circuit in *Searcy* and accordingly suffers from the same analytical deficiencies.

The Sixth Circuit began its decision by observing that "[t]his appeal turns entirely on the scope of the FCA's command [in § 3730(b)(1)] that *qui tam* suits may not be dismissed without the Attorney General's consent." Noting the disagreement between the Ninth Circuit in *Killingsworth* and the Fifth Circuit in *Searcy*, the Sixth Circuit joined the latter in rejecting the Ninth Circuit's analysis and held "that a relator may not seek voluntary dismissal of any *qui tam* action without the Attorney General's consent." The Sixth Circuit suggested that *Killingsworth* unduly focused on the legislative history of the FCA and that statute's structure and framework, whereas the Fifth Circuit correctly analyzed "the plain language" of § 3730(b)(1):

> This language clearly does not limit the consent provision to the sixty-day intervention period. If Congress wanted to limit the consent requirement to the period before the United States makes its initial intervention decision, we presume that it knew the words to do so.[88]

Section 3730(b)(1) is not nearly so "plain" or "clear" as the Sixth Circuit claims, and the court's characterization of the statute as such is remarkably

86. *Hullinger*, 80 F. Supp. 2d at 1240 ("The government contends that such a construction would render the Attorney General's consent virtually meaningless. The court disagrees. While it is true that, because a defendant is not served with the complaint during the initial 60-day period, the relator and the defendant would have no opportunity to settle during this time; nevertheless, the Attorney General must give written consent in order for the relator to dismiss the action before the government's opportunity to investigate the case ends with the expiration of the 60-day period."). *Hullinger*, while agreeing with the Ninth Circuit, also claimed—as did the Fifth Circuit in *Searcy*—that its "reasonable interpretation and understanding of subsection 3730(b)(1) is clear from the plain language of the statute." *Id.* at 1241.

87. United States v. Health Possibilities, P.S.C., 207 F.3d 335, 336 (6th Cir. 2000).

88. *Id.* at 339–40. The court found that the "clear import" of the language of § 3730(b)(1) "is strengthened by the FCA's purpose, structure and legislative history." *Id.* at 340 ("In our view, the power to veto a privately negotiated settlement of public claims is a critical aspect of the government's ability to protect the public interest in a *qui tam* litigation. The FCA is not designed to serve the parochial interests of relators, but to vindicate civic interests in avoiding fraud against public monies.").

disingenuous given its admission that it would have reached a different conclusion had it "construed the consent requirement to apply to involuntary dismissals."[89] The court thus agreed with other federal courts that "have held that the § 3730(b)(1) 'consent' provision applies 'only where the plaintiff seeks voluntary dismissal . . . and not where the court orders dismissal.'"[90] But, as explained above, the terms of the statute admit no distinction between voluntary and involuntary dismissals.[91] The Sixth Circuit nevertheless exhibited no compunction in ignoring the "plain language" by limiting the reach of the statute to only voluntary settlements. Of course, it did so to avoid the "separation of powers issues" that would exist were the statute construed otherwise (i.e., to require that a court seek the Government's consent to an involuntary dismissal).[92] In so doing, the Sixth Circuit impliedly conceded that the text of § 3730(b)(1) is hardly "clear," contrary to its assertions otherwise.[93]

89. *Id.* at 344.

90. *Id.* (quoting Minotti v. Lensink, 895 F.2d 100, 103–04 (2d Cir. 1990).

91. *See supra* note 88 and accompanying text.

92. *Id.* at 343–44.

93. The appellees in *Health Possibilities* had argued "that because § 3730(b)(1) requires the Attorney General's consent for 'dismissal,' and not just settlements, separation of powers and mootness issues would arise" if the court were to construe that section "to apply after the sixty day period." United States v. Health Possibilities, P.S.C., 207 F.3d 335, 343 (6th Cir. 2000). In particular, they contended "that such a construction would impermissibly enable the Executive Branch to infringe upon the Article III jurisdiction for federal courts, and that when the relator and the defendant have agreed to a putative settlement, mootness problems arise if courts are forced to keep these cases on their active dockets." *Id.* This argument is virtually identical to the one adopted by the Ninth Circuit. United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d 715, 723 (9th Cir. 1994) ("Here neither the government nor the relator desires to engage in further litigation. If the parties settle the action without a dismissal and thereby effectively stop litigating the case, the trial court would undoubtedly dismiss the suit for failure to prosecute. Conversely, the government may not force Killingsworth and Northrop to continue litigation by refusing to consent to a settlement."). The Sixth Circuit was not persuaded: "To the extent any separation of powers issues exist, they are not abated by limiting the consent provision to the sixty day period. If the consent provision impermissibly infringes upon Article III jurisdiction, the constitutional harm is not cured by limiting the infraction to sixty days." *Health Possibilities*, 207 F.3d at 343–44. The Sixth Circuit was arguably mistaken. Once parties reach a settlement, as the Ninth Circuit acknowledged, the Government cannot "force" them "to continue litigation," *Killingsworth*, 25 F.3d at 723, if for no reason other than the fact that a court has the power to control its docket and can *involuntarily* dismiss a suit for lack of prosecution. *See, e.g.*, United States *ex rel.* Smith v. Lampers, 69 Fed. Appx. 719, 723 (6th Cir. 2003) (implying that involuntary dismissal appropriate where district court finds that plaintiff "failed to diligently prosecute"). Moreover, the entire concept of forcing parties to litigate is impractical, if not nonsensical. The Sixth Circuit's position in *Health Possibilities* was that the "mootness argument fails to appreciate that relator acts on the government's behalf, acts to vindicate governmental interests, and that the government is the real party in interest." 207 F.3d at 344 (concluding that "if the government's interests are adverse to those reflected in a putative settlement agreement, a live controversy undoubtedly exists"). But that is, at best, a non sequitur; if the Government declines to intervene, it is not a party and, although it may not favor the settlement, the case is moot to the extent that the Government cannot force the parties to continue to litigate. Indeed, at least one district court, purporting to follow *Searcy*, has held that "a qui tam relator may settle their private causes of action in a qui tam suit, leaving the False Claims Act Counts active in the Court's file, without the consent of the government." United States *ex rel.* Summit v. Michael Baker Corp., 40 F. Supp. 2d 772, 775 (E.D. Va. 1999) ("The Government has refused to intervene and proceed with the action, leaving this case to sit and do nothing on this Court's docket. The Government has tied the relator's hands behind his back, not allowing him to settle the claims or to dismiss the claims,

The Sixth Circuit's holding in *Health Possibilities* also was premised on the court's belief that the *Killingsworth* approach would exacerbate "[t]he potential for . . . profiteering" where "a relator couples FCA claims with personal claims."[94] In such circumstances, "a relator can avoid the FCA's recovery division requirements by allocating settlement monies to the personal claims. Relators can thereby use the bait of broad claim preclusion to secure large settlements, while steering any monetary recovery to the personal action."[95] Because "the potential for abuse exists[,]" the Sixth Circuit concluded that the Government's "veto authority is essential to ensuring [that] the public interest is vindicated" and that the Government's "status as the real-party-in-interest renders a relator's unilateral attempt to settle akin to impermissibly bargaining away the rights of a third party."[96] Inexplicably, the court ignored *Killingsworth*'s holding "that although the government could not permanently obstruct the settlement and force continued litigation because it had chosen not to intervene in the action, the government could challenge the settlement for good cause."[97] In fact, the Ninth Circuit in that case specifically found that "the government's objection to the structure of the settlement constituted good cause" and, as a result, remanded the case to the district court to determine whether the settlement was fair and reasonable.[98] The Sixth Circuit thus

yet refusing to proceed with the claims on its own."). In *Summit*, Judge Hilton thus recognized that "the relator does *not* need permission from the Government to settle the private actions, as long as the Court finds that the settlement is not being used to disguise awards and misappropriate the amounts away from what the Government is duly owed under the False Claims Act." *Id.* at 776 (citing Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 160 (5th Cir. 1997)) (emphasis added). Judge Hilton continued: "The Government has not convinced this Court that there were viable claims against the defendants to amount to the settlement agreement being misallocated." It seems, then, even under *Searcy*—at least according to Judge Hilton—that the Government cannot force the relator to continue to litigate *qui tam* claims.

94. 207 F.3d at 341.

95. *Id.*

96. *Id.* at 341–42 (quoting Evans v. Jeff D., 475 U.S. 717, 726 (1986) ("[T]he power to approve or reject a settlement negotiated by the parties . . . does not authorize the court to require the parties to accept a settlement to which they have not agreed.")). But the point made by the Supreme Court in *Evans* plausibly supports the Ninth Circuit's approach in *Killingsworth*. *See* United States v. Alliant Techsystems, Inc., 50 F. Supp. 2d 942, 950 (C.D. Cal. 1999) (following *Killingsworth* and holding that "mere speculation of falsity [of the relator's claims], absent further investigation, should not preclude settlement without a demonstration of the likelihood that the terms themselves are unfair or unreasonable. Having declined to intervene, DOJ has no entitlement under Ninth Circuit law to refashion the Settlement agreement to its liking"). Moreover, while the Sixth Circuit described the Government as "*the* real-party-in-interest," the Fifth Circuit has pointed out that it is more accurate to view the United States as "*a* real party in interest." United States *ex rel.* Foulds v. Tex. Tech Univ., 171 F.3d 279, 291 (5th Cir. 1999) (discussing *Searcy*, 117 F.3d at 156) (emphasis in original). *Foulds* conceded that "the FCA's structure distinguishes between cases in which the United States is an active participant and cases in which the United States is a *passive beneficiary* of the relator's efforts." *Id.*; *see also* United States *ex rel.* Russell v. Epic Healthcare Mgmt. Group, 193 F.3d 304, 307 (5th Cir. 1999) ("the False Claims Act distinguishes cases in which the government is and is not an active litigant").

97. United States *ex rel.* Ericson v. City Coll. of S.F., 1999 WL 221057, at *1 (N.D. Cal. Jan. 22, 1999) (discussing *Killingsworth*, 25 F.3d at 718).

98. *Id.* (holding that "[i]t is clear that a settlement structured to defeat the government's recovery in an FCA *qui tam* action is not a fair and reasonable settlement and should not be approved by the court"); *see also* United States *ex rel.* Sharma v. Univ. of S. Cal., 217 F.3d 1141

appears unduly alarmist in declaring that "[w]ithout the power to consent to a proposed settlement of an FCA action, the public interest would be largely beholden to the private relator."[99] Moreover, it must not be forgotten that a settlement also must be approved by the court in any event, another check on the potential abuse about which the Sixth Circuit was concerned.

IV. A PROPOSED TEXTUALIST SOLUTION

In resolving whether the Government, having declined to intervene in a case, may unilaterally veto a settlement between a *qui tam* relator and a defendant, recall that the Fifth and Sixth Circuits viewed the "plain language" of § 3730(b)(1) as decisive. Of course, § 3730(b)(1), standing alone, *does* unequivocally provide that a *qui tam* action "may be dismissed *only* if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."[100] But a textualist does not read statutory phrases in isolated snippets, divorced from their broader context.[101] And, in this case, the statutory context unquestionably complicates the otherwise clear meaning of § 3730(b)(1). As explained at the outset of our discussion, § 3730(b)(4) gives the relator "the right to conduct the action" if the Government does not intervene. Absent the "consent" clause in § 3730(b)(1), "the right to conduct the action" undoubtedly would be read to include the right to settle the *qui tam* action. Moreover, "[s]ubsection 3730(b)(1) is included in that part of § 3730 addressing the initial procedures for filing a qui tam action. . . . Thus, placing § 3730(b)(1) in context, it appears . . . that requiring the Attorney General's written consent to a dismissal is limited to the initial period in which the government is deciding whether to intervene."[102] Finally, § 3730(d)(2)

(9th Cir. 2000) (holding that district court has power to modify settlement agreement in *qui tam* suit in order to bring the agreement into compliance with the False Claims Act); *id.* at 1145 ("[T]he *Killingsworth* court noted that 'the district court plays an important role in allocating the proceeds of a settlement by determining the amount to be received by the *qui tam* plaintiff within the overall limitation [of the FCA].'" (quoting *Killingsworth*, 25 F.3d at 724)).

99. United States v. Health Possibilities, P.S.C., 207 F.3d 335, 341 (6th Cir. 2000); *see also Alliant*, 50 F. Supp. 2d at 947 ("Despite the relator's scope of responsibility to settle the action, the Ninth Circuit has interpreted the FCA to also require the consideration of government interests. Therefore, upon a showing of good cause, the United States has the right to a hearing in court during which it can object to [a] proposed settlement in a qui tam case in which it has not intervened.").

100. 31 U.S.C. § 3730(b)(1) (2000) (emphasis added).

101. *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 786 n.17 (2000) (Scalia, J.) ("But it is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted."). A textualist, if not every jurist, would almost surely disagree with one commentator's assertion that "[n]othing . . . requires that . . . individual [*qui tam*] provisions must be read together." Frieden, *supra* note 1, at 1074.

102. United States *ex rel.* Hullinger v. Hercules, Inc., 80 F. Supp. 2d 1234, 1240 (D. Utah 1999); *see also* Forney, *supra* note 1, at 1379 ("When read in the context of the whole statute, it appears the consent provision was included as a method of ensuring that the government had an opportunity to evaluate the merits of the qui tam plaintiff's claim before the parties settled."). By no means, however, does Forney adhere to a textualist approach in proposing a resolution to our question of statutory interpretation. *See id.* at 1382 (concluding that because *Searcy*'s approach

provides that "[i]f the Government does not proceed with [the] action . . . , the person bringing the action *or settling the claim* shall receive an amount which the court decides is reasonable."

Given the above data, a textualist jurist would have to conclude *either* that (1) § 3730(b)(1)'s consent clause, standing alone, is both sufficiently clear and broadly written such that none of the other statutory provisions quoted in the previous paragraph justify a reading different than that of the Fifth and Sixth Circuits *or* (2) the other statutory provisions quoted in the foregoing paragraph require that § 3730(b)(1) be interpreted differently than it would be if its terms were read in isolation.

To illustrate the point, let us suppose that the False Claims Act provided elsewhere—perhaps subsequent to § 3730(b)(1)—that "notwithstanding any provision to the contrary, where the Government has declined to intervene in a *qui tam* action, a court may approve a settlement between a relator and a defendant, and dismiss the action without the Government's consent." Given such (hypothetical) statutory language, no jurist could possibly concur with the interpretation of § 3730(b)(1) offered by the Fifth and Sixth Circuits in the cases discussed above because, despite the straightforward language of § 3730(b)(1), the hypothetical provision more directly and more clearly answers the question about the power of the Government to prevent a settlement and dismissal where it has declined to intervene. Ultimately, what *is* clear is that statutory interpretation—even for a textualist—is not an exercise in mathematics, but rather requires an imprecise evaluation of the *relative* ambiguity (or lack thereof) of various statutory clauses.[103] Thus, in analyzing the False Claims Act as actually written, the question becomes whether the other provisions in the previous paragraph and the statute's structure—taken

forces the parties "into a position that dissolves the common goal" of combating fraud and is therefore "not consistent with the purposes behind the FCA . . . , courts must find an intermediary ground that is consistent with the language and spirit of the qui tam provision"); *id.* at 1387 ("If the government wants the qui tam provision to remain useful, the courts must find a satisfactory solution for the tension[s] that have been created between the government and the qui tam plaintiff. . . . The most effective compromise seems to be the Ninth Circuit's approach."). It is relatively safe to surmise, though, that a textualist such as Justice Scalia cares neither about what Congress ought to have enacted nor about reaching some sort of judicially imposed interpretational "compromise" to effectuate the purpose of the statute. *See* Deal v. United States, 508 U.S. 129, 136 (1993) (Scalia, J.) (criticizing the dissent for interpreting a statute based on "nothing but personal intuition[,]" and concluding that "[l]ike most intuitions, it finds Congress to have intended what the intuitor thinks Congress *ought* to intend").

103. Thus, when the Fifth Circuit—towards the end of its decision in *Searcy*—addressed the provisions discussed in the text above (*e.g.*, § 3730(b)(4)(B) and (d)(2)), the court is somewhat analytically disingenuous. *See* Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 160 (5th Cir. 1997) (concluding, for example, that "[a] relator has 'conducted' an action if he devises strategy, executes discovery, and argues the case in court, even if the government frustrates his settlement efforts"). That is, once the court concludes that § 3730(b)(1) is "as unambiguous as one can expect" and that "nothing in § 3730 . . . negate[s] the plain import of [its] language[,]" that conclusion is transformed into a *premise*. And, if one's premise is that the language in § 3730(b)(1) resolves the issue of the Government's power to veto a settlement, it is a simple matter to explain how the other provisions are consistent with that language. *Cf.* Frieden, *supra* note 1, at 1075 ("[N]othing in the Act suggests that the right to conduct the action *necessarily* means that the relator should have absolute control of the litigation." (emphasis added)).

together—are as unambiguous as the hypothetical statutory language, or at least clear enough to demonstrate that the consent clause in § 3730(b)(1) is not nearly so "clear" as the Fifth and Sixth Circuits contended.[104]

The problem with *Searcy* and *Health Possibilities* is that they concede—as does apparently every court—that the terms of § 3730(b)(1) cannot possibly require the Government's consent as a prerequisite to a court-ordered, involuntary dismissal, the situation addressed by *Minotti*.[105] But the literal terms of § 3730(b)(1) do not permit such qualification, and the Fifth and Sixth Circuits simply fail to address how the language of that section can be characterized as "unambiguous" while simultaneously grafting a limitation onto the "consent" clause that simply does not exist in the text. Moreover, as discussed above, limiting § 3730(b)(1) to involuntary dismissals does not avoid all constitutional problems. For example, permitting the Government to veto a *qui tam* settlement even where it has declined to intervene would result in moot cases stagnating on a court's docket and therefore also implicate "separation of powers" concerns.[106] And, finally, as a practical matter, it seems absurd to interpret § 3730(b)(1) to permit the Government to force two private parties to remain locked in litigation in which the Government itself refuses to participate despite its ability to do so.[107] On balance, we conclude that these difficulties—presented squarely in, but inadequately addressed by, *Searcy* and *Health Possibilities*—suggest that the Ninth Circuit's holding in *Killingsworth* yields an equally valid, if not superior, textualist construction of § 3730(b)(1).[108]

104. Even this description of the interpretative decision is somewhat simplistic, as it essentially *assumes* that § 3730(b)(1), absent the statute's structure and other provisions, *does* mean that a court cannot dismiss, without the Government's consent, the *qui tam* claims of relator pursuant to a settlement with a defendant. The remainder of this section suggests that such an assumption is not warranted.

105. *See supra* notes 30–47 and accompanying text.

106. *See supra* notes 80–81 and accompanying text. Courts have the inherent right to control their dockets and to dismiss cases for lack of prosecution. *See*, *e.g.*, Zaczek v. Fauquier County, 764 F. Supp. 1071, 1074–75 (E.D. Va. 1991) (citing Link v. Wabash R.R., 370 U.S. 626, *reh'g denied*, 371 U.S. 873 (1962), and White v. Raymark Indus., Inc., 783 F.2d 1175 (4th Cir. 1986), for the proposition that courts possess "inherent authority to dismiss to control docket"); Crowther v. Malfi, 2006 WL 1550551, at *1 (E.D. Cal. June 1, 2006) (slip op.) ("[C]ourt may dismiss an action, with prejudice, based on a party's failure to prosecute an action, failure to obey a court order, or failure to comply with local rules.").

107. *See Deal*, 508 U.S.at 132 (rejecting construction that produced an "absurd result").

108. In this respect, we are in good company. *See* Ralph C. Nash & John Cibinic, 13 Nash & Cibinic Rep. ¶ 22, Apr. 1999 ("It seems to us that the Ninth Circuit has the better view. First, its decision is based on the entire statute rather than a single sentence in one section. More importantly, by directing the District Court to determine whether the Government had 'good cause' to oppose the settlement between the relator and the defendant, the *Killingsworth approach* gives the Government ample protection against the very abuse that Searcy would protect with the 'absolute' veto power."); John T. Boese, Civil False Claims and Qui Tam Actions 4-160.4 to 4-160.5 (3d ed. 2006) (opining that "[t]he rationale and conclusions in the *Searcy* and *Health Possibilities* decisions are questionable" and concluding that those cases "fail[] to explain the practical question of how a court or the government can force parties to continue to litigate"). We do *not* view, however, the *Killingsworth* panel's *approach* as a model of textualist jurisprudence. Indeed, the panel's heavy—if not primary—reliance on the False Claims Act's legislative history would be an anathema to a textualist judge in general, and to Justice Scalia in particular. *See* Brooker, *supra* note 1, at 397 ("Rather than applying the plain language of the FCA provision to

V. CONCLUSION

Viewing *all* of the relevant statutory text as a whole—an approach that Justice Scalia (and others) would likely use to resolve the above-discussed circuit split—the Ninth Circuit's *Killingsworth* opinion arguably presents the better textualist solution. In any event, what *is* clear is that the statutory text is not as straightforward as the other circuit courts have suggested. Ultimately, given the limited number of *qui tam* cases in which the Government intervenes, the Supreme Court will be forced to settle the conflict, assuming, of course, that Congress does not act first.

the facts at hand, the *Killingsworth* court delved into legislative history and manufactured a conflict between the FCA provision and [other] sections of the Act. . . ."). It does not follow, of course, that a textualist must disagree with *Killingsworth*'s conclusion. While commentator Frieden concludes that the *Killingsworth* panel erred, and that "[t]he consent requirement/veto power language of § 3730(b)(1) is clear[,]" he does not grapple with the significant problems we posit would accompany the interpretation advanced by the Fifth and Sixth Circuits. *See* Frieden, *supra* note 1, at 1078 (stating that the text of "[t]he FCA does not condition or limit this governmental right" but failing to address the concession of *Searcy* or *Health Possibilities* that the Government's right *is* confined to voluntary dismissals).