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FRAUD AND CORRUPTION AGAINST THE GOVERNMENT: A PROPOSED STATUTE TO ESTABLISH A TAXPAYER REMEDY

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Fraud against governments is as old as government itself. Reports of corrupt dealings date back to Biblical times and ancient Athens.[1] Given the size of the United States government, it is hardly surprising that it, too, would be plagued by fraud. What is surprising though, is the magnitude of the government's losses. It is estimated that the United States Treasury is bilked out of between $25 and $70 *billion* a year.[2] In this era of budgetary austerity, it is imperative that action be taken to recover the lost funds and to deter future fraud.

Currently, the entire responsibility for enforcement rests with the federal government, primarily the United States Department of Justice. While government efforts are laudable, inherently they are capable of dealing with only a fraction of the problem.[3] The magnitude of the fraud far exceeds the resources that conceivably could be devoted to civil and criminal prosecutions. Combating government fraud requires the development of new strategies and techniques.

One approach is to permit taxpayers to bring civil suit on behalf of the government to recover money lost through fraud. Individual citi-

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1 *See* Geis & Edelheitz, *Criminal Law and Consumer Fraud: A Sociological View*, 11 AM. CRIM. L. REV. 989, 990 (1973).

2 Chicago Tribune, Jan. 18, 1981, at 1, col. 1. *See* discussion accompanying notes 8-58, *infra*.

3 A. BEQUAI, WHITE-COLLAR CRIME: A 20TH CENTURY CRISIS 150 (1978). *See also* discussion accompanying notes 59-104 *infra*.

zens would become private attorneys general, supplementing the government's inherently limited prosecutorial resources.

The concept of such taxpayer suits is hardly novel. In England, during the Middle Ages, a shortage of law enforcement officers was offset by creating authority for prosecutions by private litigants.[4] In fact, "[m]uch reliance was placed upon common informers to secure enforcement of laws affecting public order and safety."[5] Likewise, during the American Civil War, the exposure of massive fraud in the procurement process led to the adoption of authority for suits by private citizens to recover money for the government.[6] Quite simply, one well-established technique for increasing enforcement efforts is to allow taxpayer litigation on behalf of the government. Taxpayers, motivated by an opportunity to receive a share of the judgment, would greatly supplant federal law enforcement resources.

Unfortunately, today such suits by private citizens are not allowed. Restrictive doctrines limiting who has standing to sue in federal court preclude taxpayer actions except where they are specifically authorized by statute.[7] Currently, no statute exists to permit such litigation.

This article proposes that Congress enact a statute granting taxpayers standing to sue to recover money for the government in cases of fraud and corruption. Section I describes the need for such legislation. The magnitude of fraud, the inadequacy of current criminal and civil sanctions, and the desirability of taxpayer litigation are discussed in this section. Section II details the current barriers to taxpayer class actions, focusing both on restrictive standing doctrines and the absence of statutory authority for private litigation. Finally, a suggested legislative approach is outlined and potential objections to it are analyzed.

I. GOVERNMENT FRAUD AND CORRUPTION: THE NEED FOR A TAXPAYER REMEDY

A. THE MAGNITUDE OF FRAUD AND CORRUPTION AGAINST THE GOVERNMENT

The size and pervasiveness of the United States government has no precedent in history. In 1980, the federal budget was over $579 billion.[8]

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[4] Note, *Qui Tam Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions*, 67 NW. U.L. REV. 446, 451 (1972).

[5] 2 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, 143 (1957).

[6] False Claims Act of March 2, 1863, 12 Stat. 696, R.S. §§ 3490-94, § 438, *codified as* 31 U.S.C. § 231, *et seq.*, as amended December 23, 1943. Authority for citizen suits was found in R.S. § 3491, 31 U.S.C. § 232 (1976).

[7] *See* discussion accompanying notes 145-215 *infra*.

[8] Chicago Tribune, Jan. 18, 1981, at 10, col. 5. The estimate for government spending in

Approximately 54 percent of this total represents payments to individuals and grants to states and localities.[9] In 1978, direct transfer payments accounted for $224 billion in annual spending, an amount that increases annually.[10] In addition, private industry receives billions of dollars each year in exchange for goods and services provided under contracts with the federal government.[11]

Each dollar the government distributes creates an opportunity for illicit profit by fraud. The General Accounting Office, after a comprehensive review of government programs concluded:

> Opportunity for defrauding the government is virtually limitless because of the number, variety, and value of federal programs . . . The involvement of so much money, and so many people and institutions makes the federal programs vulnerable to fraud.[12]

The schemes developed to cheat the government are as varied as the programs themselves. Government grants and contracts are exploited by false claims for benefits, payments for goods and services not delivered, deliberate overcharging, collusion, kickbacks and bribery of public officials.[13] The growth in government programs and regulations has created a concommitant rise in fraud and corruption.

No precise measure of the dollar losses from fraud can be obtained.[14] Difficulties in detection insure that only a small percentage of graft ever will be uncovered.[15] Nonetheless, the magnitude of fraud can be estimated.[16] The United States Department of Justice approximates

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1981 is $662 billion. This compares to Federal spending of $194.9 billion in 1970. *Id. See also* THE BUDGET OF THE UNITED STATES: FISCAL YEAR 1981, 3-5.

9 REPORT TO THE CONGRESS OF THE UNITED STATES BY THE COMPTROLLER GENERAL OF THE UNITED STATES, GENERAL ACCOUNTING OFFICE 9 (1978) [hereinafter cited as REPORT TO THE CONGRESS]. In 1981, it is estimated that 58% of the Budget will be spent on direct payments to individuals and grants to states and localities. BUDGET OF THE UNITED STATES, *supra* note 8, at M-2.

10 U.S. DEP'T OF COMMERCE, 59 SURVEYS OF CURRENT BUSINESS 16 (July 1979).

11 A. BEQUAI, *supra* note 3, at 65; LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, THE INVESTIGATION OF WHITE-COLLAR CRIME 17 (1977).

12 U.S. GOV'T ACCOUNTING OFFICE, FEDERAL AGENCIES CAN, AND SHOULD DO MORE TO COMBAT FRAUD IN GOVERNMENT PROGRAMS (Report to Congress by the Comptroller General) 11 (1978) [hereinafter cited as AGENCIES CAN DO MORE].

13 REPORT TO THE CONGRESS, *supra*, note 9, at ii. *See* discussion accompanying notes 20-55 *infra*.

14 The General Accounting Office concluded that "no one knows the magnitude of the fraud against the government." AGENCIES CAN DO MORE, *supra* note 12, at 1.

15 REPORT TO THE CONGRESS, *supra* note 9, at 9; Chicago Sun Times, May 8, 1981, at 34, col. 2 (quoting the General Accounting Office, "Actual losses due to fraud and other illegal archives will never be known because most go undetected"); Heymann, *White-Collar Crime Symposium Introduction*, 17 AM. CRIM. L. REV. 271, 272 (1980).

16 The Inspector General of the Department of Health, Education, and Welfare concluded that "best estimates" are the only available measures for Federal dollars lost to fraud, abuse, and waste in the Department's programs. U.S. DEP'T OF HEALTH, EDUCATION, AND

that one to ten percent of federal funds in programs such as Medicaid, food stamps, and Defense Department purchasing is lost through fraud.[17] A 1980 inquiry conducted by the Republican Study Committee concluded that $34 billion in "waste, fraud, abuse, and mismanagement" could be saved.[18] Other estimates of money lost through fraud and waste range as high as $51 billion to $77 billion a year.[19]

Most of these losses occur in one of three ways. "Program fraud" involves fraud against the United States government in its direct provision of services and benefits to individuals, businesses, and other levels of government.[20] "Contract fraud" occurs when the government enters into contracts with private industry for property, materials and services.[21] Finally, there is fraud by public officials, including receipt of bribes and kickbacks.[22] Developing a clear picture of the magnitude of fraud and corruption requires an examination of each type of illicit activity.

Since the New Deal, the federal government has administered a vast array of social programs designed to provide benefits to citizens and businesses. In part, the benefit programs exist to help the needy. Programs such as Medicaid and Medicare, food stamps, Aid to Families with Dependent Children, and federal housing subsidies, reflect society's commitment to assist those who, for whatever reason, are unable to take

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WELFARE, OFFICE OF INSPECTOR GENERAL ANNUAL REPORT: APRIL 1, 1977—DECEMBER 31, 1977, 8 (1978).

17 REPORT TO THE CONGRESS, *supra* note 9, at 9. Additionally, a Department of Justice estimate puts the loss to taxpayers from violations of federal regulations by corporations at $10 to $20 billion each year. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, ILLEGAL CORPORATE BEHAVIOR 16 (1979).

18 Chicago Tribune, Jan. 18, 1981, at 10, col. 5.

19 *Id.* at 1, col. 2. In part, the tremendous variance in estimates of losses from fraud reflects the impossibility of precise measurement. In part, too, there is some difficulty in defining the terms "fraud and abuse." *See* LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, FRAUD AND ABUSE IN GOVERNMENT BENEFIT PROGRAMS 14-16 (1979) [hereinafter cited as L.E.A.A., Fraud and Abuse]. For the purpose of this article fraud is defined by its traditional common law meaning: "all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue advantage is taken of another." 1 STORY, EQUITY JURISPRUDENCE § 187 (6th ed. 1853); *see also* Green v. Lombard, 28 Md. App. 1, 13, 343 A.2d 905, 913 (1975); People v. Wilson, 205 Mich. 28, 33, 171 N.W. 474, 478 (1919); Adamson v. Union Ry. Co., 26 N.Y.S. 136, 141 (1893); Schwartz v. Tanner, 576 P.2d 873, 875 (Utah 1978). Of course, this article is concerned only with fraud against the government.

20 For example, it is estimated that in 1978, the Department of Health, Education, and Welfare (now the Department of Health and Human Services) alone lost $7.4 billion in taxpayer funds through fraud, abuse, and waste in benefit programs. *Fraud, Abuse, Waste, and Mismanagement by the Department of Health, Education, and Welfare: Hearings Before the Senate Comm. on Governmental Affairs*, 95 Cong., 2d Sess. 3 (1978).

21 A. BEQUAI, *supra* note 3, at 67-71.

22 *Id.* at 44-45.

care of themselves.[23] Anti-poverty programs have grown tremendously over the last twenty years. Income transfer payments rose from 4.1 percent to 10.7 percent of the Gross National Product between 1956 and 1978.[24] One prominent example of this increase is in health expenditures where federal spending rose from $7.4 billion to $68 billion between 1966 and 1979.[25]

Benefit programs, however, have not been limited to helping the needy. Businesses, too, have been major recipients of federal largesse. For example, the farm income stabilization program involves direct government payments to owners of farm land. The government provides price supports and income in years of abundant supply to discourage excess production, and funds the creation of grain reserves for use in years of short supply.[26] Federal money supports commodities including cotton, tobacco, grain, peanuts and sorghum. Similarly, the Small Business Administration oversees a variety of loan programs to aid business growth and development.[27]

Each of these benefit programs is beset by fraud, committed both by recipients and by third party providers. Recipients, those persons who directly receive program benefits, commit fraud by misrepresenting eligibility, falsifying data such as income, birth date, social security identification, veteran status, and marital status.[28] A well-publicized case of a major fraud accomplished through false statements involved the International Telephone and Telegraph Company (ITT) and its receipt of $92 million in expropriation insurance from the Overseas Private Investment Corporation (OPIC).[29] After ITT's assets were nationalized in Chile, ITT applied for compensation from OPIC. As a condition to receipt of aid, ITT officials certified that the company had no involvement in domestic politics in Chile.[30] Pursuant to this certification, ITT received government compensation. Subsequent Congressional hearings revealed that ITT officials had perjured themselves and that the company was not legally entitled to the money it received.[31]

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23 L. THUROW, THE ZERO-SUM SOCIETY 155 (1980).

24 COUNCIL OF ECONOMIC ADVISORS, ECONOMIC REPORT OF THE PRESIDENT 268-269 (1979).

25 BUDGET OF THE UNITED STATES, *supra* note 8, at 242.

26 *Id.* at 170.

27 *Id.* at 182, 213.

28 L.E.A.A., FRAUD AND ABUSE, *supra* note 19, at 21 (1979). For example, the General Accounting Office estimated that in 1977 the government lost $600 million in the food stamp program alone. Chicago Sun Times, May 8, 1981, at 34.

29 A. SAMPSON, THE SOVEREIGN STATE OF ITT 261 (1974).

30 Szulc, *ITT Under the Gun*, NEW REPUBLIC, Aug. 6, 1977, at 20-21.

31 STAFF OF SELECT SENATE COMM. TO STUDY GOVERNMENTAL OPERATIONS, REPORT ON COVERT ACTION IN CHILE 1963-1973, 94th Cong., 1st Sess. 11-13 (1975); *see also* Szulc, *supra* note 30, at 18-22.

Recipients also defraud programs by creating "ghost eligibles," fictitious persons who are awarded benefits.[32] A well-constructed plan for creating "ghost eligibles" can cost the government millions of dollars. For example, two individuals with vast landholdings in west Texas devised a scheme which defrauded the federal government of more than $4,500,000 through the creation of "ghost eligibles."[33] Under the Upland Cotton Program[34] each individual owning or renting land was entitled to a maximum subsidy of $55,000.[35] To circumvent this payment limitation, bogus leases and fraudulent representations on government forms were executed to create the appearance of having dozens of persons eligible to receive payments, when in fact, only two were legally entitled to receive subsidies.

Fraud in benefit programs also occurs through the actions of third party providers.[36] In many benefit programs, government agencies contract with the private sector to deliver services to qualified recipients.[37] For example, in the Medicare and Medicaid programs, pharmacies, hospitals, nursing homes, and physicians are third party providers, supplying medical services to eligible beneficiaries.[38] Fraud by providers in these health programs alone is significant.[39] Numerous examples exist of submission of false claims, delivery of unnecessary services, and delib-

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32 L.E.A.A., FRAUD AND ABUSE, *supra* note 19, at 22.

33 United States v. Thomas, 593 F.2d 615 (5th Cir. 1974), *modified on rehearing*, 604 F.2d 450 (5th Cir. 1979), *aff'd* 617 F.2d 436 (5th Cir. 1977). Civil actions were brought in United States v. John H. Thomas, *et al.*, Civil Action No. 5-78-75 (N.D. Tex., *settled*, 1980).

34 The Upland Cotton Program was created by Section 602 of the Agricultural Act of 1970, Pub. L. No. 91-524, 84 Stat. 1375, 7 U.S.C. § 1444(e) (1970).

35 7 U.S.C. § 1307 (1970); 7 C.F.R. § 795.1 (1971).

36 *See* L.E.A.A., FRAUD AND ABUSE, *supra* note 19, at 23-30.

37 *Id.* at 23-24. For example, the Community Services Administration provides grants to community groups to provide social services. Diversion of funds, embezzlement, and use of federal money for fraudulent purposes is widespread in this program. *Fraud and Abuse in Community Services Administration: Hearing before the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 28-33 (1979).

38 L.E.A.A., FRAUD AND ABUSE, *supra* note 19, at 24. In 1981, it is estimated that Medicaid outlays of $15.9 billion will finance care of 23 million poor Americans. Medicare provides services to 25 million aged and 3 million disabled at a cost of $37.3 billion annually. BUDGET OF THE UNITED STATES, *supra* note 8, at 245. For a detailed discussion of fraud in these programs, *see* Laudicina & Schneider, *The Medicare-Medicaid Anti-Fraud and Abuse Amendments of 1977: Implications for the Poor*, 11 CLEARINGHOUSE REV. 843 (1978); Lee, *Fraud and Abuse in Medicare and Medicaid*, 30 AD. L. REV. 1 (1978); Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 YALE L.J. 243 (1978).

39 A. BEQUAI, *supra* note 3, at 70. Another example of fraud by third-party providers is the actions of trade and proprietary schools which receive Federal money given to students to pay tuition. Fraud, ranging from misuse of funds to embezzlement, is widespread. *See Hearings, Fraud, Abuse, Waste and Mismanagement of Programs by the Department of Health, Education, and Welfare*, *supra* note 20, at 85-95.

erate overbilling in the Medicare and Medicaid systems.[40]

A second major area of fraud is in government contracts. The government purchases billions of dollars worth of goods and services.[41] Investigations, audits, and prosecutions indicate that the procurement process is regularly exploited for illegal profits. The government loses billions of dollars each year through claims for payments for non-delivery of goods and services, intentional overcharging, and collusion among contractors and suppliers to frustrate competitive bidding processes.[42] A few examples illustrate the techniques and pervasiveness of contract fraud.

Major grain companies intentionally defrauded the United States Food for Peace Program by providing grain of a quality inferior to that which they contracted to provide.[43] This practice, together with deliberate "short-weighting," supplying less than the amount paid for, and rigging of bids, cost the government millions of dollars.[44] More generally, cost overruns on government contracts are so prevalent that some believe contractors intentionally inflate claims for millions of dollars.[45] The indictment of Litton Industries, a major defense contractor, for fraudulently overcharging the government by more than $37 million is but one example.[46]

Bid-rigging is prevalent, but often never discovered. Competitive bidding is designed to allow the government to obtain goods at the lowest possible cost.[47] Companies, however, avoid the requirement for competitive bidding through collusion and mutual agreements. For example, millions of dollars in fraud were traced to contractors constructing the Byrd International Airport in Richmond, Virginia. Major companies responsible for constructing the airport and a nearby road

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[40] A. BEQUAI, *supra* note 3, at 70; LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, FRAUD AND ABUSE AMONG MEDICAID PRACTITIONERS (1976).

[41] A. BEQUAI, *supra* note 3, at 67.

[42] L.E.A.A., THE INVESTIGATION OF WHITE-COLLAR CRIME, *supra* note 11, at 17; A. BEQUAI, *supra* note 3, at 67. For example, procurement contracts by the General Services Administration to obtain office furniture and supplies for the Federal government have been beset by all of these types of fraud. *See Continued Investigation Into Fraud and Mismanagement in the General Services Administration: Hearings before the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. parts 1-5 (1979).

[43] See *Grain Inspection, Hearings before the Senate Comm. on Agriculture and Forestry*, 94th Cong., 1st Sess. (1975).

[44] MORGAN, MERCHANTS OF GRAIN (1977); Webster, *An Examination of FBI Theory and Methodology Regarding White-Collar Crime Investigation and Prevention*, 17 AM. CRIM. L. REV. 275, 277 (1980).

[45] A. BEQUAI, *supra* note 3, at 68.

[46] *Litton is indicted in $37 Million Overcharge Case*, Washington Post, April 7, 1977, at A-1.

[47] Maltz & Pollock, *Analyzing Suspected Collusion Among Bidders*, in WHITE-COLLAR CRIME 174-176 (Geis & Stotland eds. 1978).

were convicted on bid-rigging charges.[48]

Yet another example of major contract fraud involves the Small Business Administration's minority business program.[49] Under this program, businesses controlled by minorities are given preference in the award of federal contracts. White-control led companies, however, established shell firms, which they controlled to qualify as minority businesses. In this way, white-controlled "fronts" "have siphoned off millions of dollars in SBA contracts by simply hiring blacks as executive officers."[50]

Finally, fraud occurs in the form of corruption of public officials. Bribes and kickbacks are not unusual. Companies pay bribes and kickbacks to gain a competitive edge, to acquire or retain businesses or services, and to coverup provision of inferior products.[51] Bribes and kickbacks are frequent in programs such as Medicaid, Unemployment Insurance, Small Business Administration minority business programs, the Summer Food Service, the Department of Housing and Urban Development's Rehabilitation Housing Program, the Department of Agriculture's Rural Housing Program, and the Comprehensive Employment and Training Act programs.[52] Public officials may be given bribes and kickbacks in exchange for awarding government contracts.[53]

Furthermore, some public officials directly defraud federal programs. As the Law Enforcement Assistance Administration explains:

> Employees usually commit crimes successfully because they know how benefits are conveyed, and the timing and methods of delivery. Collusion with clients to defraud, creation of fictitious clients and client records, and creation of fictitious postal addresses to collect defrauded benefits are crimes committed by some employees as a result of their inside knowledge and their ability to use that knowledge.[54]

For example, eight employees in a Detroit welfare office were indicated for fraudulently obtaining $143,000 in food stamps by falsifying 37 family files.[55]

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48 Chicago Tribune, Jan. 21, 1981, at 15, col. 3. *See generally* Maltz & Pollock, *supra* note 47, at 147-98.

49 A. BEQUAI, *supra* note 3, at 68.

50 *Id.*

51 *Id.* at 41; J. JESTER, AN ANALYSIS OF ORGANIZED CRIME INFILTRATION OF LEGITIMATE BUSINESS 24 (1976) ("[o]ne of the greatest sources of unfair competitive advantage is the assistance of corrupt public officials in securing contracts and other favors").

52 L.E.A.A., FRAUD AND ABUSE, *supra* note 19, at 29.

53 A. BEQUAI, *supra* note 3, at 65.

54 L.E.A.A., FRAUD AND ABUSE, *supra* note 19, at 33-34. For example, one well-known instance involved an accountant in the Department of Transportation's Urban Mass Transit Administration who was charged in 1977 with embezzling $800,000. *Legislative Branch Appropriations Fiscal Year 1981: Hearings before the Senate Subcomm. on Legislative Appropriations*, Part 2, 96th Cong., 2d Sess. 738 (1980) (testimony of Elmer Staats).

55 Chicago Tribune, Jan. 21, 1981, at 15, col. 1.

Every dollar lost via fraud is one less dollar that can be spent constructively. The losses because of program fraud, contract fraud, and bribery,[56] must be met either by raising taxes to pay for higher costs or decreasing availability of benefits.[57] Either way, both taxpayers and intended recipients lose. Additionally, fraud in federal programs may "diminish public support for the programs" and ultimately "undermine public trust and confidence in governmental institutions."[58]

B. THE INADEQUACY OF GOVERNMENT CRIMINAL AND CIVIL SANCTIONS

Given the magnitude of fraud and corruption, systematic imposition of criminal and civil sanctions is essential both to recoup lost money[59] and to deter others from committing fraud.[60] The government consistently "has placed heavy reliance on the criminal justice system as its main line of defense in combating program fraud and abuse."[61] Numerous federal laws make it a crime to defraud government programs. The most important statute is the False Claims Act[62] which prohibits the making of false, fraudulent, and fictitious claims against the federal government.[63] The False Claims Act has been used to prosecute many

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56 In instances of bribery it can be assumed that bribers inflated the cost of their contracts with the government by at least the amount of the bribes. Continental Management, Inc. v. United States, 527 F.2d 613, 619 (Ct. Cl. 1975) ("the amount of the bribe provides a reasonable measure of damage. . . . that is, after all, the value the [bribers] placed on their corruption of the [government's] employees; the other side of the coin is that the [bribers] hoped and expected to benefit by more than the sum of the bribes").

57 L.E.A.A., THE INVESTIGATION OF WHITE-COLLAR CRIME, *supra* note 11, at 17; AGENCIES CAN DO MORE, *supra* note 12, at 6.

58 *Id.*

59 L.E.A.A., FRAUD AND ABUSE, *supra* note 19, at 45.

60 *Id.* For a general discussion of the importance of deterrence as a means for achieving compliance with the law, *see* J. BENTHAM, PRINCIPLES OF PENAL LAW, Pt. II, Bk. 1, ch. 3 in Bentham's work 396, 402 (Bowring ed. 1843); B. WOOTTON, CRIME AND CRIMINAL LAW 97-103 (1963); Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 954-56, 960-70 (1966). It should be noted that the concept of deterrence and its morality have been challenged. *See, e.g.*, H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 337-38 (2d ed. 1951); Gardiner, *The Purpose of Criminal Punishment*, 21 MOD. L. REV. 117, 122-25 (1958). Nonetheless, "[a]cademicians, all levels of the judiciary, enforcement officials, and Congress have accepted the idea that the use of the criminal penalty is a legitimate means of checking an offense not yet committed, by associating with it a deterrent threat." Comment, *Criminal Sanctions for Corporate Illegality*, 69 J. CRIM. L. & C. 40, 45 (1978).

61 L.E.A.A., FRAUD AND ABUSE, *supra* note 19, at 89.

62 Act of March 2, 1863, ch. 67, 12 Stat. 696. The criminal proscription against making false claims is found in 18 U.S.C. § 287 (1976). The civil remedies against false claims are found at 31 U.S.C. § 231 (1976). Also, 18 U.S.C. § 1001 (1976) forbids the making of "false statements to any department or agency of the United States." For an in-depth analysis of this statute, *see* Note, *The Federal False Claims Act: A Remedial Alternative for Protecting the Government from Fraudulent Practices*, 52 S. CAL. L. REV. 159 (1978).

63 18 U.S.C. § 287 (1976).

different types of program abuse,[64] including Medicaid, Medicare, and Social Security fraud;[65] claims for services not actually provided to the government;[66] and contract fraud through collusive bidding.[67] Additionally, many statutes creating federal programs contain separate provisions specifically tailored to prevent fraud. For example, in 1977, Congress passed the Medicare-Medicaid Anti-Fraud and Abuse Amendments, making fraud in those programs a felony, with penalties not to exceed a $25,000 fine or five years imprisonment or both.[68]

While criminal sanctions are one weapon, they are not by themselves sufficient to control fraud and corruption. Experts, almost without exception, agree that:

> there is virtually no evidence that the criminal sanction has succeeded in controlling white collar crime. In general, deterrence has not been realized, rehabilitation has been ignored, repeat offenders have not been removed from society, and victims have not been compensated. In large measure, these results are a product of the natural limits of the criminal justice system.[69]

Government sanctions, both civil and criminal, are inherently inadequate for three major reasons.

First, institutional limits, the inevitable shortage of investigative and prosecutorial resources, insure the inadequacy of government enforcement efforts.[70] Fraud cases are significantly more complex and time consuming to develop than are more common crimes.[71] In fact, as a rule, the larger the magnitude of the fraud, the more complex and intricate the investigation is likely to be.[72] For example, prosecution of third-party providers for fraud usually requires a lengthy trial with hundreds of exhibits and witnesses.[73]

Because the prosecution of these cases "entails an enormous expenditure of . . . resources in relation to the number of cases prosecuted

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64 *See White-Collar Crime: A Survey of the Law*, 18 AM. CRIM. L. REV. 169, 281 (1980).

65 *See, e.g.*, United States v. Precision Medical Laboratories, 593 F.2d 434 (2d Cir. 1978); United States v. Beasly, 550 F.2d 261 (5th Cir.), *cert. denied*, 434 U.S. 938 (1977); United States v. Catena, 500 F.2d 1319 (3d Cir.), *cert. denied*, 419 U.S. 1047 (1974).

66 *See, e.g.*, United States v. Young, 575 F.2d 828 (10th Cir. 1978); United States v. Buigues, 568 F.2d 269 (2d Cir. 1978).

67 *See, e.g.*, United States v. Hedgeman, 564 F.2d 763 (7th Cir.), *cert. denied*, 434 U.S. 1070 (1977); United States v. Cripps, 460 F. Supp. 969 (E.D. Mich. 1978).

68 Pub. L. No. 95-142, 91 Stat. 1179 42 U.S.C. §§ 1395nn(b)(2), 139bh(b)(1) (Supp. III 1979).

69 Ogren, *The Ineffectiveness of the Criminal Sanction in Fraud and Corruption Cases: Losing the Battle Against White-Collar Crime*, 11 AM. CRIM. L. REV. 959, 960 (1973).

70 A. BEQUAI, *supra* note 3, at 150.

71 L.E.A.A., THE INVESTIGATION OF WHITE-COLLAR CRIME, *supra* note 11, at 2.

72 *Id.*

73 L.E.A.A., FRAUD AND ABUSE, *supra* note 19, at 100.

. . . comparatively few" are pursued.[74] Ultimately, even if resources allocated to enforcement efforts were increased, government prosecutors still would be able to deal with only a small fraction of current fraud and corruption.[75] Charles Ruff, former Watergate Special Prosecutor and Assistant Deputy Attorney General, explains:

> I think it is clear that we have to recognize, and this is something which I think was not recognized in earlier years, that criminal prosecution simply cannot be the answer to this problem. We cannot deal with anything much more than a very small percentage of the loss that occurs through fraud, abuse and waste, by criminal prosecutions, nor do we realistically have the resources to detect, through law enforcement personnel, those losses.[76]

Similarly, resource limitations restrict government civil suits to a small percentage of the fraud. The total dollar amount of pending civil suits filed by the Justice Department as of March, 1978 was only $250 million.[77] Even Justice Department officials concede that this "is only a fraction of the amount defrauded the government."[78]

The low level of government enforcement efforts insures not only that recovery of the sums lost through fraud will remain a small percentage, but also that deterrence will be minimal. Deterrence depends in large measure on the likelihood of punishment being imposed.[79] To the extent that limited resources mean that relatively few cases of fraud will be prosecuted, there is little to deter perpetrators of fraud.[80]

Second, even in those cases prosecutors pursue, the sanctions imposed are so minimal as to provide little deterrent effect.[81] Traditionally, penalties for white-collar crime, including fraud, have been small.[82] Jail sentences are rarely imposed.[83] For example, one study examined sentencing practices by judges in the United States District Court for the District of Columbia in fraud and corruption cases over a three year

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74 Ogren, *supra* note 69, at 960. In fact, the Reagan administration has announced a policy of shifting resources away from enforcement against fraud and white-collar crime. New York Times, Jan. 16, 1981, § 2 at 5, col. 6.

75 A. BEQUAI, *supra* note 3, at 150; Ogren, *supra* note 69, at 973.

76 *Fraud in Government: Hearings before the House of Representatives Task Force on Government Efficiency of the Committee on the Budget*, 96th Cong., 1st Sess. 18 (1979) (testimony of Charles Ruff).

77 AGENCIES CAN DO MORE, *supra* note 14, at ii.

78 *Id.*

79 *See* A. DERSHOWITZ, FAIR AND CERTAIN PUNISHMENT 3 (1976); N. MORRIS & G. HAWKINS, THE HONEST POLITICIANS GUIDE TO CRIME CONTROL 255-61 (1970); F. ZIMRING, PERSPECTIVES ON DETERRENCE 1-2 (1971).

80 L.E.A.A., FRAUD AND ABUSE, *supra* note 19, at 81, 99-101; Ogren, *supra* note 69, at 960.

81 Ogren, *supra* note 69, at 959-60.

82 L.E.A.A., ILLEGAL CORPORATE BEHAVIOR, *supra* note 17, at 207-12.

83 *See, e.g.*, W. SEYMOUR, WHY JUSTICE FAILS 45-46 (1973); L.E.A.A., ILLEGAL CORPORATE BEHAVIOR, *supra* note 17, at 208.

period.[84] In only 24 percent of the cases was a prison term with a maximum jail time of three years imposed. Moreover, in a quarter of these cases, the judge reduced the sentence.[85] In another study of 56 federally convicted executives, 62.5 percent received probation, 21.4 percent had their sentences suspended, and only 28.6 percent were incarcerated.[86] The average prison sentence for all those convicted in this study was 2.8 days.[87] Similarly, out of 40,000 cases of fraud uncovered by investigators in the Medicare program, only 220 resulted in successful prosecution, and only 37 offenders were sentenced to prison terms.[88]

Thus, the widely held conception that white-collar criminals rarely experience jail sentences or meaningful criminal sanctions is quite accurate.[89] It is highly doubtful that this pattern will change. In part, the lax approach to white-collar crime exists because perpetrators of major frauds are "usually community leaders with excellent educational backgrounds and high social status."[90] As such, from a sociological perspective, light sentences are easily explainable:

> One reason for lenient treatment is the high degree of cultural homogeneity among the defendants, the legislators who pass the laws regulating businessmen, and the judges who determine guilt and mete out sentences to violators of those laws. Because businessmen, lawmakers and judges come from similar social backgrounds, are of similar age, have often been educated at the same universities, associate with the same people, and have similar outlooks on the world, it is not surprising that legislators and judges are unwilling to treat business offenders harshly.[91]

Similarly, juries are likely to sympathize with white-collar defendants.[92]

Furthermore, because much fraud is committed by corporations, it is often difficult to identify which individuals within the business are culpable.[93] Most often in fraud cases, individuals accused and indicted plead nolo contendere and then receive mild sentences.[94] Together, these factors create a system where probation and short prison sentences

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84 Ogren, *supra* note 69, at 962.

85 *Id.* Furthermore, even when jail sentences were imposed, defendants never had to serve more than one-third of their sentences before being eligible for parole. *Id.*

86 L.E.A.A., ILLEGAL CORPORATE BEHAVIOR, *supra* note 17, at 209.

87 *Id.*

88 A. BEQUAI, *supra* note 3, at 70. One prominent case involved two physicians found guilty of submitting false claims in the Medicaid program. These doctors could have been sentenced to 205 years in prison for the offenses involved. They were given suspended sentences. *Id.* at 71.

89 *See* Ogren, *supra* note 69, at 959.

90 L.E.A.A., ILLEGAL CORPORATE BEHAVIOR, *supra* note 17, at 207.

91 J.E. CONKLIN, "ILLEGAL BUT NOT CRIMINAL": BUSINESS CRIMES IN AMERICA 112 (1977).

92 Comment, *supra* note 60, at 49.

93 L.E.A.A., ILLEGAL CORPORATE BEHAVIOR, *supra* note 17, at 206-07.

94 J.E. CONKLIN, *supra* note 91, at 119; L.E.A.A., ILLEGAL CORPORATE BEHAVIOR, *supra* note 17, at 208.

are common in cases of fraud and corruption.[95]

Nor are substantial fines imposed in fraud cases. In most instances, the profit received from the illegality is greater than the fine to be paid.[96] A corporation usually gains "more financially from its crimes than it pays in a fine if convicted."[97] And criminal sanctions do not require that the defendant repay the amount fraudulently gained.[98]

Ultimately, the small penalties imposed in fraud cases insure minimal deterrence of corruption.[99] Though there are serious problems in attempting to measure the precise deterrent effect of various levels of punishment,[100] there is widespread agreement that substantial penalties are necessary to deter fraud.[101] The improbability of ever being prosecuted for fraud, combined with the likelihood of a small sentence, produces a situation where there is little to deter perpetrators.[102]

Finally, political pressure and corruption of public officials charged with enforcement often means that the government chooses not to bring suit or seek the imposition of criminal or civil actions. Political considerations may directly influence whether prosecutions are undertaken and if they are, who is indicted.[103] As one expert notes:

> white-collar criminals have access to large sums of money and can influence powerful political officials . . . Federal prosecutors are no exception. They sustain the political process that produced them. Since the end of World War II, the majority of those who held the office of U. S. Attorney General were political figures who played key roles in the election of the President.[104]

Especially where high level government officials are implicated, the concentration of all enforcement machinery in the hands of the government may mean that no prosecutorial action will be taken.

None of the above analysis is meant to suggest that criminal and civil prosecution by the government is undesirable or that it should not be pursued. Rather, the point is that government action by itself is not sufficient to control fraud. Resource limitations, minimal sanctions, and political pressure, insure that only a fraction of fraud cases ever will be

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95 Ogren, *supra* note 69, at 962-63.

96 Ogren, *supra* note 69, at 968; Comment, *supra* note 60, at 48.

97 J.E. CONKLIN, *supra* note 91, at 103.

98 Ogren, *supra* note 69, at 980-81.

99 *Id.* at 962.

100 *See generally* A. BLUMSTEIN, J. COHEN, & D. NAGIN, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (1978).

101 *See* K. LLEWELLYN, JURISPRUDENCE 403-04 (1962); Geis, *Deterring Corporate Crime*, in CORPORATE POWER IN AMERICA 182 (R. Nader & M. Green eds. 1972); Ogren, *supra* note 69, at 960.

102 L.E.A.A., FRAUD AND ABUSE, *supra* note 19, at 100-01; Comment, *supra* note 60, at 46.

103 L.E.A.A., ILLEGAL CORPORATE BEHAVIOR, *supra* note 17, at 9.

104 A. BEQUAI, *supra* note 3, at 147.

prosecuted and hence that deterrence is unlikely. Simply put, given the magnitude of fraud and corruption and the inadequacy of criminal sanctions, additional remedies are essential.

C. ADDING A NEW WEAPON TO THE ARSENAL: THE TAXPAYER CLASS ACTION

One way to increase both the number of lawsuits against fraud and the size of the penalty is to permit individual taxpayers to sue to recover money for the government. In cases involving substantial government losses,[105] citizens would be able to bring civil suit on behalf of the United States.[106] The person bringing suit, if successful, would receive a fraction of the amount recovered, with the majority of the funds returned to the Treasury.[107]

Such a remedy would not substitute for government enforcement efforts, but rather would supplement them. A taxpayer's suit would "not prevent the bringing of either a criminal action by the government . . . or, where appropriate, an ordinary action in tort."[108] The taxpayer's class action would be "an ancillary remedy, designed to add to, rather than substitute for more conventional law enforcement methods."[109]

Authority for such suits is premised on the belief that public money or property ultimately belongs to the taxpayers and is held in trust for them by the government.[110] Thus, taxpayers have a legitimate interest

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105 The statute creating authority for the taxpayer's suit would set a minimum dollar amount as a precondition for federal court jurisdiction. For example, by only allowing suits for more than $50,000 it can be insured that taxpayers' suits will focus only on major frauds. See Section 3(b) of the proposed statute *infra*.

106 "The taxpayer does not assert a private cause of action but, instead, that of his government. Therefore, a taxpayers' suit is essentially a 'derivative proceeding akin to a corporate shareholders' suit." Note, *Taxpayers Actions: Public Invocation of the Judiciary*, 13 WAKE FOREST L. REV. 397, 398 (1977). Throughout this article the terms "citizen's suits" and "taxpayer's suits" are used interchangeably because it is expected that most citizens pay some federal taxes. The statute itself should limit plaintiffs to federal taxpayers because they can allege a monetary injury, more easily meeting the standing requirement for injury in fact. See discussion at pp. 1516-18 *infra*.

107 The amount recovered would include the sum gained by fraud together with any penalties (*e.g.*, double damages) or forfeitures provided for in the statute. *See* discussion accompanying notes 236-40 *infra*.

108 Comment, *Qui Tam Actions: The Role of the Private Citizen in Law Enforcement*, 20 U.C.L.A. L. REV. 778, 795 (1973).

109 *Id.*

110 74 AM. JUR. 2d, *Taxpayers' Actions* § 26 at 233 (1974) ("public money or property belongs to the taxpayers and is simply held in trust by public officers for the benefit of the taxpayers, and consequently such taxpayers have an interest in protecting the same in case the trustees neglect or fail to do so.") *See, e.g.*, Lord v. City of Wilmington, 332 A.2d 414, 418-19 (1975); People *ex rel.* Hamer v. Board of Education, 22 Ill. App. 3d 130, 133, 316 N.E.2d 820, 823 (1974); Chippawa Bridge Co. v. Durand, 122 Wis. 85, 99 N.W. 603, 611 (1904).

in bringing suit to recover money lost by fraud if the government fails to do so.[111] Taxpayer suits would increase the resources available for investigating and prosecuting fraud.[112] Citizens would become "private attorneys general,"[113] with a monetary incentive to initiate litigation in instances where the government fails to act.[114]

The concept of allowing citizens' suits as a vehicle for the government to recover money is not new. In fact, in the fourteenth century, England enacted statutes allowing private individuals to initiate litigation on behalf of the Crown.[115] Such citizen suits were called "*qui tam*" actions.[116] A *qui tam* suit is:

> an action brought by a private litigant pursuant to a statute which establishes a penalty, fine or forfeiture for a proscribed act and permits the qui tam plaintiff to recover a portion of the penalty. The private litigant, without prior approval of the government, brings suit on behalf of the government, as well as himself.[117]

Qui tam actions were initially designed "to supplement England's insufficient legal machinery in order to bring more offenses to the cognizance of the courts."[118] The private citizen, "stimulated by his share of the penalty, was expected to play a considerable part" in enforcing England's laws.[119]

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111 *See, e.g.*, Bernstein v. Krom, 111 N.J. Super. 559, 270 A.2d 51 (1970); Stetler v. McFarlane 230 N.Y. 400, 130 N.E. 591 (1921); Faden v. Philadelphia Housing Authority, 424 Pa. 273, 227 A.2d 619 (1967).

112 As one commentator expressed, citizen suits are desirable "where more effective law enforcement is desired, either because the crime involved is serious enough to require extra attention or because existing remedies are for some reason inadequate." Comment, *supra* note 108, at 795. As the earlier discussion demonstrated, fraud and corruption are serious crimes where prosecutorial resources are inadequate.

113 The phrase "private attorneys general" seems to have been first used in Associated Industries, Inc. v. Ickes, 134 F.2d 694, 704 (2d. Cir. 1943).

114 "Taxpayers litigation seems designed to enable a large body of citizenry to challenge governmental action which would otherwise go unchallenged. . . ." Note, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L. J. 895, 904 (1960).

115 Note, *The Qui Tam Doctrine: A Comparative Analysis of Its Application in the United States and the British Commonwealth*, 7 TEX. INT'L L. J. 415, 418 (1972).

116 The term "qui tam" comes from the Latin phrase "qui tam pro domino rege quam quo se imposo sequitur," meaning "Who brings the action as well for the king as for himself." Bass Anglers Sportsmen's Soc'y of America v. U.S. Plywood-Champion Paper's, Inc., 324 F. Supp. 302, 305 (S.D. Tex. 1971).

117 Note, *supra* note 4, at 449-50. *See also* United States *ex rel.* Varce v. Westinghouse Electric Corp., 363 F. Supp. 1038, 1040 (W.D. Pa. 1973); United States v. Florida Vanderbilt Developments Corp., 326 F. Supp. 289 (S.D. Fla. 1971); Fritz v. Gorton, 83 Wash. 2d 275, 517 P.2d 911 (1974).

118 Note, *supra* note 115, at 417.

119 2 L. RADZINOWICZ, *supra* note 5, at 146. "Under [qui tam] statutes, financial incentives were provided, the purpose of which was to create and keep active a vast number of 'voluntary policemen', who were to be paid on the results achieved by their own zeal and enterprise. . . . It was hoped that they would be of great assistance in the administration of criminal justice, solely because of the spur provided by the offer of reward." *Id.* at 145-46.

Qui tam actions existed for hundreds of years in England until they were abolished by an act of Parliament in 1951.[120] In part, such suits were eliminated because law enforcement efforts became increasingly effective,[121] and in part, because of their abuse.[122] Nonetheless, the concept of citizen suits remains firmly ingrained in British and American jurisprudence. Many states have laws permitting *qui tam* actions[123] and a number of federal statutes explicitly allow for enforcement by private citizens.[124]

The concept of the *qui tam* action is especially well-suited to dealing with fraud and corruption. As explained above, the "two primary reasons for permitting *qui tam* actions—insufficient police personnel and government inaction—exist today."[125] Allowing successful plaintiffs to receive a portion of the money recovered through their efforts creates an incentive for private citizens to investigate fraud. Such non-governmental investigations are most likely to be successful in cases of "consensual crimes."[126] For example, bribery involves two willing parties, both of whom consent to participate in the crime.[127] Because there is no victim directly injured by the criminal act, no complaint is filed and police detection is obviously difficult. Often, however, private citizens may be aware of the scheme and lack any incentive to come forward with their information. Allowing citizen suits provides a strong incentive for individuals to act on their knowledge. In fact, it is for this reason that *qui tam* actions frequently have been called "informers' suits."[128] As one Senator, advocating authority for *qui tam* suits, expressed over one hundred years ago: "the old fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue' . . . is the safest and most expedi-

120 Common Informers Act, 14 & 15 Geo. 6 ch. 39 (1951).

121 Comment, *supra* note 108, at 779.

122 *Id.* It has been suggested that most of the abuse of *qui tam* actions resulted from their application to inappropriate statutes, "rather than from a basic fault with the action itself." Note, *supra* note 115, at 419.

123 Examples of state statutes authorizing citizen-taxpayer suits include: CAL. CIV. PROC. CODE § 526(a) (West 1979); 19 GA. CODE ANN. § 64-104 (1979); IND. CODE ANN. § 34-4-17-3 (Burns 1973); NEBR. REV. STAT. § 19-2907 (1977); N.Y. STATE FIN. § 123 (McKinney Supp. 1980); N.C. GEN. STAT. § 128-10 (1981).

124 *See, e.g.*, Clean Air Act of 1970, 42 U.S.C. § 7604 (Supp. III 1979); Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) (1976); Refuse Act of 1899, 33 U.S.C. §§ 407, 411, 413 (1976). For a discussion of *qui tam* actions under the Refuse Act of 1899, *see* Kafin & Needlemar, *The Use of Qui Tam Actions to Protect the Environment*, 17 N.Y.L.F. 130 (1971); Note, *Qui Tam Actions and the Rivers and Harbors Act*, 23 CASE W. RES. L. REV. 173 (1971); Note, *Qui Tam Actions for Citizen Enforcement of the Refuse Act of 1899 Against Polluters*, 21 CLEV. ST. L. REV. 182 (1972).

125 Note, *supra* note 4, at 451 n.23.

126 Comment, *supra* note 108, at 801.

127 Note, *supra* note 4, at 451-52 n.23.

128 Note, *supra* note 4, at 449 n.16.

tious way I have discovered of bringing rogues to justice."[129]

Furthermore, authority for citizen suits will not only increase the investigation of fraud, but its prosecution as well. Prosecutors have inherently limited resources and can act only on a small fraction of the cases involving governmental corruption.[130] Taxpayers can supplement government prosecutions by bringing civil suits in cases where otherwise no action would be taken. Moreover, "the availability of such litigation is insurance against the instances in which the responsible prosecutors, usually political officers, are themselves allied with the action challenged. . . ."[131] Especially in situations involving corruption of public officials, the "need for taxpayers' suits arises from the absence of alternative means of correcting illegal practices of government officials which would otherwise be irreparable."[132]

Additionally, in many cases, citizen suits would increase the penalties imposed by providing for recovery of the illicitly gained sums. At the very least, this would return funds to the program and provide greater benefits for recipients.[133] By recovering the full amount defrauded, and perhaps double or treble damages, the profitability of graft is significantly reduced.

In theory, the increased investigation, prosecution, and penalties should lead to greater deterrence of future fraud and corruption. Though it is impossible to estimate how much fraud would be deterred, a higher level of certainty that prosecution will occur and that larger penalties imposed should translate into less crime.[134] Thus, citizen suits would "serve to deter future unlawful acts . . . as well as to redress past transgressions."[135]

Though such civil suits would in no way substitute for criminal prosecutions, it should be recognized that civil litigation has many advantages over criminal actions.[136] Civil litigation is initiated with a complaint, which can be amended. Criminal proceedings begin with an indictment which must be founded on probable cause and cannot be

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129 *Id.* at 450 n.16 (quoting CONG. GLOBE, 37th Cong., 3d Sess. 956 (1863)).

130 A. BEQUAI, *supra* note 3, at 150; *see also* discussion accompanying notes 70-80 *supra*.

131 *Note*, *supra* note 114, at 911.

132 *Id.* at 910.

133 81a C.J.S. *States* § 265 (1976) ("The purpose of statutes providing for a taxpayer's suit to recover funds improperly paid out by state officials . . . is to encourage the recovery of money illegally expended. . . .").

134 *See* F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 90-141 (1973).

135 Note, *supra* note 106, at 399 n.16.

136 *See generally* Kovel, *A Case for Civil Penalties: Air Pollution Control*, 46 J. URB. L. 153, 156-58 (1968).

amended.[137] If a criminal defendant fails to appear, proceedings must be delayed until the defendant's presence can be secured. If a civil defendant is not present, a default judgment is entered, decreasing delay.[138] In criminal proceedings, proof of guilt must be established beyond a reasonable doubt. Civil actions only require proof of liability to be established by a preponderance of the evidence. In criminal trials, the fifth amendment privilege against self-incrimination allows a defendant to refuse to testify and prevents any adverse inference to be drawn from the defendant's silence. By contrast, in civil proceedings, the fifth amendment does not forbid adverse inferences against a party who refuses to testify in response to probative evidence offered against him.[139] In criminal cases, the government may not appeal a verdict for the defendant. In civil actions, on the other hand, either party may appeal if it loses in the trial court.[140]

Perhaps the most important advantage of civil proceedings in cases involving fraud is the broader scope of civil discovery. In civil cases, a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the pending action."[141] The benefits of the expansive civil discovery provisions extend "beyond the particular defendant since it can be used to obtain information about the entire operation in which the defendant was involved, including the methods employed and the identities of other participants."[142] Discovery can greatly aid the investigation and detection of fraud, providing private litigants with a powerful tool for uncovering corruption.

The experience of states which allow taxpayer suits indicates that taxpayer actions could become a major weapon in the arsenal against fraud and corruption. Citizens have brought many successful suits to recover money for the government which otherwise would have been lost.[143] Likewise, the experience in foreign countries such as Australia

137 NAT'L ASS'N OF ATTORNEYS GENERAL, THE USE OF CIVIL REMEDIES IN ORGANIZED CRIME CONTROL 3 (rev. ed. 1977).

138 Comment, *supra* note 60, at 43; NAT'L ASS'N OF ATTORNEYS GENERAL, *supra* note 137, at 4 ("[a] civil action may be both faster and less costly [than a criminal prosecution]").

139 NAT'L ASS'N OF ATTORNEYS GENERAL, *supra* note 137, at 3.

140 Comment, *supra* note 60, at 43 n.28.

141 FED. R. CIV. P. 26(b).

142 NAT'L ASS'N OF ATTORNEYS GENERAL, *supra* note 137, at 8.

143 *See, e.g.*, McMillen v. Agnew, Equity No. 23, 638 (Cir. Ct. Md. 1981) (taxpayer suit to recover kickbacks received by Spiro Agnew while Governor of Maryland); Munson v. Abbott, 602 S.W.2d 649 (Ark. 1980) (taxpayer suit to obtain restitution of improperly spent public funds); Nelson v. Berry Petroleum Co., 242 Ark. 273, 413 S.W.2d 46 (1967) (taxpayer suit to recover more than $3 million the State lost as a result of a fraudulent scheme to fix prices for asphalt used in constructing State highways); Richardson v. Blackburn, 41 Del. 54, 187 A.2d 823 (1963) (taxpayer suit to recover funds illegally paid to employees of Delaware's Youth Service Committee); Wertz v. Shane, 216 Iowa 768, 249 N.W. 661 (1933) (taxpayer suit to recover money illegally received by state legislators).

and Canada indicates that taxpayer suits can be effectively used against fraud.[144] Given the magnitude of graft and corruption, and the inadequacy of governmental civil and criminal sanctions, authority for taxpayer suits would be of tremendous benefit.

II. THE BARRIERS TO TAXPAYER CLASS ACTIONS AGAINST FRAUD AND CORRUPTION

Despite the desirability of citizen suits against fraud and corruption, such litigation is not currently allowed in federal courts. The law of standing bars taxpayer suits in non-constitutional cases unless they are explicitly authorized by statute. Unfortunately, the only statute which could be used as a vehicle for these actions has been interpreted so as to totally preclude taxpayer initiated proceedings.

A. STANDING BARRIERS TO TAXPAYER CLASS ACTIONS

1. The Concept of Standing

Article III of the United States Constitution restricts the jurisdiction of the federal courts to "cases and controversies."[145] This constitutional mandate has been interpreted to require that a party seeking to invoke a federal court's jurisdiction must allege "a personal stake in the outcome of a controversy."[146] The question of whether a particular plaintiff has a sufficient stake in the outcome of the controversy is termed standing. Standing is the determination "of whether a person is the proper party to present a particular issue to the court for adjudication."[147]

The requirement that a plaintiff have a personal stake in the outcome of a controversy before he or she can ask the court to act is deeply embedded in the traditional notion of the powers and duties of the court. In *Marbury v. Madison*,[148] Justice Marshall stated that although the courts are the final arbiters of the Constitution, their power to act is triggered only by an obligation to decide disputes properly before them. The Supreme Court concluded that the "province of the court is solely to decide on the rights of individuals."[149] Under this model, the court

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144 *See* Note, *supra* note 115, at 422-24.

145 U.S. CONST. art. III § 2. *See generally* P. BATOR, P. MISHKEN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 64-241 (2d ed. 1973); Brilmayer, *The Jurisprudence of Aricle III: Perspectives on the "Case or Controversy" Requirements*, 93 HARV. L. REV. 297 (1979).

146 Baker v. Carr, 369 U.S. 186, 204 (1962).

147 Homburger, *Private Suits in the Public Interest of the United States of America*, 23 BUFFALO L. REV. 343, 388 (1976).

148 5 U.S. (1 Cranch) 137 (1803).

149 *Id.* at 177.

has an important function as lawmaker, but may only exercise that function when two individuals "butting heads" over a particular disagreement bring their dispute to a judge.[150]

Though many critics have suggested that nothing in the Constitution requires that each plaintiff be an individual who will gain or lose depending on the outcome of the case,[151] for two hundred years courts never have waivered on their requirement that the judicial power only may be invoked by parties with standing.[152] The standing doctrine has been justified by two policy considerations: the functioning of the courts and separation of powers.

Since courts cannot conduct investigations or actively collect information,[153] they must rely upon the parties to present sufficient evidence to delineate the issues.[154] A party with a stake in the outcome of the controversy presumably has had the greatest incentive to gather relevant evidence and marshal available arguments. As one renowned legal commentator observed almost a half century ago:

> [C]ourts are more apt to formulate or apply rules soundly if the opposite sides are prevented from sitting around a table together in friendly conference. . . . Bitter partisanship in opposite directions is supposed to bring out the truth.[155]

Thus, courts have held that Article III requires that a plaintiff allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[156] Courts are unwilling to trust plaintiffs suing solely for ideological reasons to adequately prepare and present the issues.[157] Accordingly, the Supreme Court has held that a "mere abstract concern about a problem of general interest" does not provide "that 'essential dimension of specificity' that informs judicial decisionmaking."[158] Furthermore, standing requirements also are believed to

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150 *See*, Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365 (1973).

151 *See, e.g.*, Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969).

152 *Cf.* Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792) (federal court jurisdiction limited to "cases and controversies"); Jaffe, *The Citizen as a Litigant in Private Actions: The Non-Hohfeldran or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

153 Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 221 n.10 (1974).

154 *Id.* at 221.

155 Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913, 922 (1934).

156 Baker v. Carr, 386 U.S. at 204.

157 Flast v. Cohen, 392 U.S. 83, 425 (1968) (Harlan, J., dissenting); *See also* Jaffe, *supra* note 152, at 1037.

158 Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 263 (1977) (quoting Schlesinger v. Reservists Committee to Stop the War, 418 U.S. at 221).

improve the functioning of the courts by reducing the judiciary's caseload. Courts long have declared that without limiting litigation through a narrow standing doctrine, class suits would flood the courts' dockets.[159]

Additionally, the Supreme Court has explained the standing requirement as one "founded in concern about the proper—and properly limited—role of the courts in a democratic society."[160] This reasoning defines the limits of judicial power in part as the differences between legislative and judicial functions. As an elected body, the legislature has the general consent of the voters to pass laws. In contrast, the courts' power is not obtained democratically.[161] Therefore, the courts have concluded that laws of broad applicability should be made by Congress, and that the courts only should decide specific concrete issues affecting the parties before them.[162] The broader the issues addressed by a court and the broader the class of persons affected, the more a court action resembles the legislature's function. Actions brought on behalf of the public are thought to "strain the judicial function and press to the limit judicial authority."[163] Thus, the Supreme Court has declared that:

> [s]hould the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories. Such abuse of judicial power would properly meet rebuke and restriction from other branches.[164]

2. Restrictions on Taxpayer Standing

The Supreme Court has held that the "cases and controversies" requirement of Article III requires a plaintiff to demonstrate " 'a distinct and palpable injury to himself' that is likely to be redressed if the requested relief is granted."[165] Furthermore, the policy considerations de-

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159 *See, e.g.*, Roosevelt v. Draper, 23 N.Y. 318 (1861); Doolittle v. Supervisors of Broome County, 18 N.Y. 155 (1858).

160 Warth v. Seldin, 422 U.S. 490, 498 (1975).

161 *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

162 Schlesinger v. Reservists Committee to Stop the War, 418 U.S. at 221 n.10; Brilmayer, *supra* note 145, at 303. The premise of this argument, that judicial review is countermajoritarian and therefore should be restricted, has been attacked by many commentators. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW iii-v., 9-14 (1978); Brilmayer, *supra* note 145, at 304.

163 Flast v. Cohen, 392 U.S. at 130.

164 United Public Workers v. Mitchell, 330 U.S. 75, 90-91 (1947).

165 Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979). Thus, there are two constitutional standing requirements: "injury in fact" (*see* United States v. SCRAP, 412 U.S. 669, 686 (1973); Sierra Club v. Morton, 405 U.S. 727, 735 (1972); Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 613 (1973)) and "redressability"—that a favorable court decision will redress the injury suffered (*see* Duke Power Co. v. Caroline Environmental States Group, Inc. 438 U.S. 59, 72 (1978); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976); Warth v. Seldin, 422 U.S. at 500).

scribed above have led the Court to adopt additional prudential, nonconstitutional, standing barriers. That is, even where a plaintiff's case is constitutionally justiciable:

> a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim. For example, a litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one 'shared in substantially equal measure by all or a large class of citizens.'[166]

The primary difference between the prudential bar against plaintiffs asserting generalized grievances and the constitutional standing requirements, is that Congress, by legislation, may expand standing to overcome the prudential barrier but may not abrogate the constitutional requirements.[167]

Taxpayer standing is precluded by the prudential rule forbidding the assertion of a grievance "shared in substantially equal measure by all or a large class of citizens." The Court first announced this barrier to taxpayer and citizen standing in *Frothingham v. Mellon*,[168] decided almost sixty years ago. In *Frothingham*, the plaintiff, suing as a taxpayer, sought to restrain expenditures under the federal Maternity Act of 1921, which provided financial grants to the states to reduce maternal and infant mortality. The plaintiff, Ms. Frothingham, asserted that the expenditures violated the Tenth Amendment's reservation of powers to the states. The Supreme Court ruled that the plaintiff lacked standing because her "interest in the moneys of the Treasury . . . is comparatively minute and indeterminable."[169] The Court held that federal court review must be based on a plaintiff's alleging a direct injury and "not merely that he suffers in some indefinite way in common with people generally."[170]

Similarly, a few years later in *Ex Parte Levitt*,[171] the Supreme Court ruled that citizenship is not in itself a source of standing. *Levitt* involved a citizen's suit to have Justice Hugo Black's appointment to the Supreme Court invalidated on the grounds that Justice Black had voted, while a Senator, to increase Supreme Court justices' retirement benefits. This was alleged to violate Article I, § 6 of the Constitution,

166 Gladstone, Realtors v. Village of Bellwood, 441 U.S. 99-100 (quoting Warth v. Seldin, 422 U.S. at 499).

167 *Id.*

168 262 U.S. 447 (1923). In a companion case, Massachusetts v. Mellon, 262 U.S. 447 (1923), the Supreme Court denied the State of Massachusetts standing to attack the constitutionality of the Maternity Act. *Id.* at 480, 482.

169 *Id.* at 487.

170 *Id.* at 488.

171 302 U.S. 633 (1937).

which states that "No Senator . . . shall during the time for which he was elected, be appointed to any civil office the emoluments whereof shall have increased during such time." The Court, however, held that the plaintiff lacked standing because he did not assert a direct injury and "it is not sufficient [for standing] that he has merely a general interest common to all members of the public."[172]

Frothingham and *Levitt* establish the prudential bar to taxpayer and citizen standing. With only one notable exception, this rule has been applied repeatedly and continues in force today. The exception in which taxpayer standing was permitted is *Flast v. Cohen*.[173] In *Flast*, the Court upheld a taxpayer's standing to challenge federal subsidies to parochial schools as violating the clause of the first amendment forbidding the establishment of religion. Both the majority and the dissent in *Flast* agreed that the rule preventing plaintiffs from asserting generalized grievances was prudential rather than constitutional in origin.[174] The majority concluded that this prudential bar should not apply in cases where the taxpayer establishes both "a logical link between [the status asserted] and the type of legislative enactment attacked" and a "nexus between that status and the precise nature of the constitutional infringement alleged."[175] In *Flast*, the Court concluded that the Establishment Clause of the first amendment created a specific limitation on the taking and spending power, thereby creating a sufficient "nexus" to justify taxpayer standing.[176]

Predictions that *Flast* would open the door widely to taxpayer standing in federal court were premature.[177] In two 1974 decisions, *United States v. Richardson*[178] and *Schlesinger v. Reservists Committee to Stop the War*,[179] the Supreme Court clearly restated the bar against taxpayer and citizen standing. In *Richardson*, the plaintiff suing as a federal taxpayer, contended that the statutes providing for the secrecy of the Central Intelligence Agency budget were unconstitutional. The plaintiff argued that such secret expenditures violated the Constitution's requirement that "a regular statement and account of the receipt and expenditure of all public money shall be published from time to time."[180] The Court held that the plaintiff was "seeking 'to employ a federal court as a forum in which to air his generalized grievences about the conduct of

172 *Id.* at 634.
173 392 U.S. 83 (1968).
174 *Id.* at 101; 392 U.S. at 119-20 (Harlan, J., dissenting).
175 *Id.* at 102.
176 *Id.* at 103-05.
177 *See, e.g.*, Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).
178 418 U.S. 166 (1974).
179 418 U.S. 208 (1974).
180 U.S. CONST. art. I, § 9.

government.' "[181] Accordingly, the Court ruled that because the plaintiff's interest as a taxpayer was "undifferentiated and common to all members of the public" he lacked standing.[182]

Similarly, in *Schlesinger*, the Supreme Court held that plaintiffs, suing as taxpayers and citizens, lacked standing to raise the claim that the incompatability clause of Article I, § 6 "renders a member of Congress ineligible to hold a commission in the Armed Forces Reserve during his continuance in office."[183] Chief Justice Burger's majority opinion concluded that "the generalized interest of all citizens in constitutional governance" was not sufficient to justify standing.[184] A citizen or taxpayer cannot claim standing if his or her adversely affected interest is "held in common by all members of the public."[185]

After *Richardson* and *Schlesinger*, taxpayer and citizen standing in federal court is virtually eliminated. Under current law, it appears that a taxpayer only has standing if he or she alleges a challenge to expenditures based on the Establishment Clause.[186] As such, a taxpayer may not sue to recover money for the government in cases of fraud and corruption. Because the injury to any single taxpayer is undifferentiated from that suffered by all others, standing is barred. The prudential rule against plaintiffs asserting a generalized grievance precludes taxpayer class actions unless statutory authority exists for such litigation.

B. THE ABSENCE OF STATUTORY AUTHORITY FOR TAXPAYER CLASS ACTIONS

Unfortunately, there is currently no statutory authority for taxpayer class actions against fraud and corruption. The only potential basis for such suits, the False Claims Act,[187] has been restricted by legislative and judicial action so that it no longer provides a realistic opportunity for private litigation.

Congress enacted the False Claims Act in 1863 in response to widespread fraud and corruption during the Civil War.[188] Passage of the Act was motivated by revelations of significant fraud perpetrated by contractors supplying material for the war effort and by government officials who received substantial bribes and kickbacks.[189] To better de-

181 418 U.S. at 175 (quoting Flast v. Cohen, 392 U.S. at 106).
182 *Id.* at 176-77.
183 *Id.* at 209.
184 *Id.* at 217.
185 *Id.* at 220.
186 Note, *supra* note 106, at 425.
187 31 U.S.C. § 231, *et seq.* (1976).
188 Act of March 2, 1863, ch. 67, 12 Stat. 696, *codified in* Revised Statutes §§ 3490-94, 5438.
189 The Congressional debates over the False Claims Act were not extensive. They are found in CONG. GLOBE, 37th Cong., 3d Sess. 952-58 (1863).

ter fraud, the Act provided that anyone found to have submitted false claims to the government would be liable for double the amount of damages sustained and a forfeiture of $2,000 for each false claim submitted.[190] Liability was created in three instances: submission for payment or approval of false, fictitious, or fraudulent claims against the United States government; use of fraudulent or fictitious statements to obtain approval of a claim; and conspiracies to obtain government payment of a false claim.[191]

The Act also provided authority for *qui tam* actions. That is, private citizens could bring suits against those alleged to have submitted false claims and, if successful, would receive a percentage of the amount recovered.[192] The Act's legislative history indicates "that Congress chose to permit enforcement by private citizens, as well as by the government, because of a belief that public officials, many of whom were deeply involved in the corrupt practices complained of during the Civil War era, would fail to initiate actions for reasons of selfish advantage."[193] As a result of its *qui tam* provisions, the False Claims Act was commonly referred to as the "Informer's Act."

The False Claims Act remained unchanged until Congress amended its *qui tam* provisions in 1943. The 1943 amendments were largely a reaction to the Supreme Court's decision in *United States ex rel., Marcus v. Hess*.[194] In *Hess*, the defendants, electrical contractors, were charged with defrauding Public Works Administration funded projects. Through bid-rigging and collusion, the contractors were alleged to have cheated the government out of more than $100,000.[195] The contractors were indicted and entered pleas of nolo contendere. Soon thereafter, a private plaintiff copied the government's indictment and brought suit against the defendant under the False Claims Act. The trial court ruled

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190 31 U.S.C. § 231 (1976); R.S. 3490. For a discussion of how forfeitures are to be calculated, *see* United States v. Bornstein, 423 U.S. 303 (1976).

191 R.S. § 5438 provided liability for:

> Every person who makes or causes to be made, or presents or causes to be presented for payment or approval . . . any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination or conspiracy to defraud the government . . . by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claims. . . .

See 31 U.S.C. § 231 (1976).

192 R.S. § 3491.

193 *Note, supra* note 4, at 453 n.32.

194 317 U.S. 537 (1943).

195 *Id.* at 539-40.

in favor of the plaintiff and awarded a judgment of $315,000, $203,000 for double damages and $112,000 for 56 forfeitures at $2,000 each.

The court of appeals reversed the district court, holding that such civil liability violated the constitutional proscription against double jeopardy.[196] The Supreme Court reversed the court of appeals, affirming the district court's decision. The Court held "that there was no double jeopardy since the former governmental action was criminal and the instant *qui tam* action was civil and remedial."[197] Justice Jackson dissented arguing that it was absurd to allow plaintiffs to bring suit and recover simply by copying an indictment previously filed by the government.[198]

Immediately after the Court announced the *Hess* decision, the Justice Department asked Congress to amend the False Claims act to bar suits based on information possessed by the government.[199] Congress quickly amended the Act's *qui tam* provisions so as to virtually eliminate citizen suits. Most importantly, Congress established a jurisdictional limitation on private litigation. The False Claims Act was amended to provide that:

> The court shall have no jurisdiction to proceed with any such suit . . . whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer, of employee thereof, at the time such suit was brought.[200]

The amendment "was clearly aimed at limiting the use of the *qui tam* provisions of the statute."[201] In part, the restriction was designed to prevent "races to the courthouse" by private litigants copying indictments in the hope of obtaining an easy recovery.[202] The legislative history of the amendment reveals that there was even fear that underworld figures would file *qui tam* suits to gain a quick profit. The chairman of the Senate Judiciary Committee stated that "today [*qui tam* suits under the False Claims Act have] become one of the worst sources of racketeering since the days of Al Capone in the Prohibition Era."[203] In part, too, *qui tam* suits were eliminated because the Justice Department believed that civil litigation based on the same information as criminal indictments would hinder prosecutions by giving defendant's discovery of the

196 127 F.2d 233 (3d Cir.), *rev'd*, 317 U.S. 537 (1943).

197 Note, *supra* note 115, at 435 n.186.

198 317 U.S. at 558 (Jackson, J. dissenting).

199 89 CONG. REC. 7571 (1943).

200 31 U.S.C. § 232(c) (1976).

201 Comment, *supra* note 108, at 793.

202 *See* United States *ex rel.* Bayarsky v. Brooks, 110 F. Supp. 175, 179-80 (D.N.J. 1953).

203 89 CONG. REC. 7571 (1943).

government's case.[204]

Federal courts have strictly interpreted the restrictions on *qui tam* suits contained in the 1943 amendments. For example, the jurisdictional limitation has been held to apply even where the information had been furnished to the United States by the person who later instituted the *qui tam* suit.[205] Similarly, a *qui tam* plaintiff who was previously a government employee and acquired information in the course of his or her duties, may not bring suit. This bar exists even when the employee brought the facts to the attention of his superiors and no governmental action was taken.[206]

Furthermore, the court does not have jurisdiction over a citizen's suit if *anyone* in the government knows of the information on which the suit is based.[207] It is irrelevant that the government does not plan to utilize the information or bring suit. So long as someone in the government knows the information, all private citizens are forever barred from initiating litigation.

This provision, and its restrictive interpretation, virtually eliminated *qui tam* suits. "It is hard to imagine a situation where a private plaintiff will learn enough about the government's dealing with a defendant to bring an action before the government itself learns of the information."[208] The False Claims Act is not an authorization for taxpayer actions against fraud and corruption because it is "unlikely that more than a very few civilian plaintiffs will acquire enough sufficiently solid information to justify the expense of filing an action without having the information on which the suit is based also being known by the government."[209]

One recent example of the effect of the jurisdictional bar is *United States v. Burmah Oil Co. Ltd.*[210] Plaintiffs alleged that a fraudulent application to the Maritime Administration induced the government to pay out millions of dollars in construction subsidies to Burmah Oil Company. The court dismissed the plaintiff's case on the grounds that "[j]urisdiction is defeated by the government's possession of the information."[211] The court held that the public service in assembling, organiz-

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204 Comment, *supra* note 108, 793 n.85; *see also* United States v. Pittman, 151 F.2d 851, 853 (5th Cir. 1945).

205 United States v. Aster, 176 F. Supp. 208 (E.D. Pa. 1959), *aff'd*, 275 F. 2d (3rd Cir.), *cert. denied*, 364 U.S. 894 (1960).

206 *See* United States *ex rel.* McCans v. Armour & Co., 146 F. Supp. 546 (D.D.C. 1956), *aff'd*, 254 F.2d 90 (D.C. Cir.), *cert denied*, 358 U.S. 834, *rehearing denied*, 358 U.S. 901 (1958).

207 Comment, *supra* note 108, at 793.

208 *Id.*

209 *Id.* at 794.

210 558 F.2d 43 (2d Cir. 1977), *cert. denied*, 99 S. Ct. 511 (1978).

211 558 F.2d at 46.

ing and integrating the information in the government's possession is not sufficient to create jurisdiction. The citizen's suit to recover money for the United States was dismissed even though the government has never taken action to recover the money.

Furthermore, even in the unlikely circumstance that a plaintiff files suit based on information the government does not possess, the 1943 amendments authorize the United States to intervene and assume full control over the litigation.[212] The amended False Claims act requires a plaintiff to give notice to the Attorney General, including "disclosure in writing of substantially all evidence and information . . . material to the effective prosecution of such suit."[213] The United States then may enter the action and completely supersede the *qui tam* plaintiff without being bound by anything previously done in the litigation.

Thus, the 1943 amendments to the False Claims Act, and its judicial constructions, make the statute "an ineffective tool for the civilian plaintiff."[214] The Act simply cannot be used effectively as a basis for taxpayer actions against fraud and corruption.

III. ESTABLISHING A TAXPAYER REMEDY: A SUGGESTED LEGISLATIVE APPROACH

Although taxpayer class actions would be a valuable weapon against fraud and corruption, standing barriers preclude such suits absent explicit statutory authority. This section outlines a proposal for legislative authorization of private litigation to recover money for the government. The first part of the section establishes Congressional power to create taxpayer standing by statute. The second part details what the statutory provisions should contain. Finally, the possible objections to allowing this type of taxpayer litigation are analyzed.

A. CONGRESSIONAL AUTHORITY TO CREATE TAXPAYER STANDING BY STATUTE

As discussed earlier, taxpayer litigation is barred by the rule preventing suits involving generalized grievances.[215] The rule against cases presenting generalized grievances is not a constitutional principle based on Article III, but rather is prudential.[216] Congress may, by statute, overcome the standing barrier, because it is well established that Congress may permit litigation by one "who otherwise would be barred

212 31 U.S.C. § 232(C) (1976).
213 *Id.*
214 Comment, *supra* note 108, at 794.
215 *See* discussion accompanying notes 165-86 *supra*.
216 Gladstone, Realtors v. Village of Bellwood, 441 U.S. at 100.

by the prudential standing rules."[217]

Thus, Congress may grant standing to taxpayers to initiate litigation on behalf of the public interest where otherwise such actions would be precluded. Even Justice Harlan, advocating a restrictive interpretation of standing, noted in his dissent in *Flast v. Cohen* that "individual litigants have standing to represent the public interest, despite their lack of economic or other personal interests, if Congress has appropriately authorized such suits."[218] This notion is hardly novel because it long has been recognized that "there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding . . . , even if the sole purpose is to vindicate the public interest."[219] Simply stated, because standing principles are, in large part, motivated by considerations of separation of powers, the "question whether the litigant is a 'proper party to request an adjudication of a particular issue' . . . is one within the power of Congress to determine."[220]

Congress, of course, may not abrogate the Article III standing barriers.[221] Taxpayer litigation pursuant to Congressional authorization, however, would fulfill all of the constitutional standing requirements. First, "injury in fact" would be present in such taxpayer suits. A statute allowing individuals to sue to recover money for the government would create a legal right on the part of all taxpayers to have government money spent without fraud.[222] Therefore, a citizen seeking to recover money against the government would allege a sufficient injury because "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."[223] Under the current standing law, "someone is 'injured in fact' by an action for purposes of Article III if the person has a statutory right to complain of the action in federal court."[224]

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217 Warth v. Seldin, 422 U.S. at 501; Gladstone, Realtors v. Village of Bellwood, 441 U.S. at 100. For a discussion of the rationale for congressional authority to create standing, *see* Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 665-80 (1977).

218 Flast v. Cohen, 392 U.S. at 131 (Harlan, J., dissenting).

219 Associated Industries v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943).

220 Sierra Club v. Morton, 405 U.S. at 732 n.3 (quoting Flast v. Cohen, 392 U.S. at 100).

221 Gladstone, Realtors v. Village of Bellwood, 441 U.S. at 100; *cf.* Brubaker—Board of Education, School District No. 149, Cook County, Illinois, 502 F.2d 973, 989 (7th Cir.), *cert. denied*, 421 U.S. 965 (1974) ("Congress may not by its legislation override the Constitution.").

222 Courts frequently have held that public officials have a fiduciary duty to the citizens they serve. United States v. Mandel, 591 F.2d 1347, 1362 (4th Cir.), *vacated on other grounds*, 602 F.2d 653 (1979); United States v. Carter, 217 U.S. 286, 305-06 (1910).

223 Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973). *See also* Warth v. Seldin, 422 U.S. at 500 ("The actual or threatened injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing'.").

224 L. TRIBE, *supra* note 162, at 80. *See also* Sierra Club v. Morton, 402 U.S. at 732 n.3.

It is irrelevant that the injury would be common to all members of the public. In *United States v. Students Challenging Regulatory Agency Proceedings*,[225] the Supreme Court upheld the standing of a group of citizens to challenge an Interstate Commerce Commission decision to raise freight rates. The plaintiff's contended that higher freight rates would discourage recycling, increasing pollution and sacrificing aesthetic beauty. This injury was held to be sufficient to create standing, despite the fact that virtually any citizen could have been a potential plaintiff:

> [A]ll persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here. But we have already made it clear that standing is not to be denied simply because many people suffer the same injury.[226]

Because fraud against government ultimately translates into higher taxes, every taxpayer is "adversely affected financially by an illegal public disbursement."[227] Hence, a plaintiff suing pursuant to Congressional authorization of taxpayer suits would meet the constitutional standard for "injury in fact."

Furthermore, the other Article III standing requirement, redressability, would be satisfied. A plaintiff would allege that the defendant's fraud has caused the government to lose funds which *but for* the illicit act would be available to be properly spent.[228] The Court's relief would redress the injury by returning the misgotten funds to the Federal Treasury.

There are many precedents for Congress' authority to create standing by statute. For example, the 1968 Civil Rights Act provides that "any person who claims to have been injured by a discriminatory housing practice" may sue in federal court.[229] In *Trafficante v. Metropolitan Life Insurance Co.*,[230] a group of white tenants sued, claiming that the defendant's discriminatory renting policy deprived them of the social and professional benefits of living in an integrated community. The Supreme Court explicitly upheld the plaintiffs' standing on the basis of Congress' authorization for suit in the Civil Rights Act.[231]

Numerous other statutes create citizen standing to sue in federal

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225 412 U.S. 669 (1973).

226 *Id.* at 687. *SCRAP* is not inconsistent with *Richardson* and *Schlesinger* because the latter cases involved citizen and taxpayer standing which is barred by the rule against generalized grievances, whereas *SCRAP* involved a claim of a specific injury to the plaintiffs, albeit one potentially shared by the entire country.

227 Davis, *supra* note 165, at 632.

228 *See* Duke Power Co. v. Caroline Environmental States Group, Inc., 438 U.S. at 80-81 (*but for* causation meets the Article III requirement).

229 Civil Rights Act of 1968 § 801(a); 42 U.S.C. § 3610(a) (1976).

230 409 U.S. 205 (1972).

231 *Id.* at 209-10.

court. The Freedom of Information Act allows any person whose request for information has been denied to sue in federal district court to compel the government to release the requested documents.[232] Under the Clean Air Act "any person may commence a civil action on his own behalf . . . against the Administrator [of the Environmental Protection Agency] where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."[233] The Federal Election Campaign Act of 1974 authorized "any individual eligible to vote in any election for the office of President of the United States . . . [to] initiate such actions as may be appropriate to construe the constitutionality of any provision of the Act."[234]

In all of these statutes, citizens who share an injury common to all members of the public are given authority to sue in federal court. Not a single statute granting citizen or taxpayer standing ever has been struck down. Because the bar against taxpayer litigation is prudential, and not constitutional, Congress clearly has the authority to enact legislation authorizing taxpayer suits to recover money for the government in instances of fraud and corruption.

B. PROPOSED STATUTORY PROVISIONS AUTHORIZING TAXPAYER CLASS ACTIONS TO RECOVER MONEY AND PROPERTY FOR THE GOVERNMENT

The statute creating authority for taxpayer litigation to recover money and property for the government should contain provisions setting forth the cause of action, jurisdiction, the relationship of the citizen's suit to the government, and remedies. Each of these areas merits separate consideration.

1. The Cause of Action

Currently, many statutes allow the United States to sue to recover government money and property from those who are not entitled to pos-

232 5 U.S.C. § 552(a)(4)(B) (1976). *See, e.g.*, Alfred A. Knopf v. Colby, 509 F.2d 1362, 1367 (4th Cir. 1975), *cert. denied*, 421 U.S. 992 (1976) ("any citizen now can compel the production of information").

233 42 U.S.C. § 7604(a)(2) (Supp. III 1979). *See* Friends of the Earth v. Carey, 535 F.2d 165 (2d Cir. 1976) (purpose of the standing grant is to permit plaintiff's to sue without having suffered a direct injury in fact). *See also* Federal Water Pollution Control Act, 33 U.S.C. § 1365(a)(2) (1976), which has been interpreted as creating standing the same as under the Clean Air Act. Natural Resources Defense Council v. Train, 510 F.2d 692, 699 (D.C. Cir. 1975).

234 2 U.S.C. § 437h(a) (1976). The Supreme Court mentioned this provision in Buckley v. Valeo, 424 U.S. 1, 11-12 (1976), where it construed the constitutionality of the Act, but did not address the constitutionality of the standing provision.

sess it. For example, the False Claims Act,[235] the Anti-Kickback Act,[236] and the Medicare-Medicaid Anti-Fraud and Abuse Amendments,[237] create civil causes of action to recover government funds.

Rather than create a new cause of action for taxpayer suits, the most effective approach is to grant taxpayer's standing to sue under existing laws. A law enacting a new cause of action would present numerous problems of definition, both in drafting the statute and in subsequent judicial interpretation. A bill to establish a new cause of action would have to define who may be liable; the bases for liability; and the mental state required for liability. By relying on existing statutory causes of action, the drafting problems are avoided, because each of these elements have been defined and case law has developed interpreting them.[238]

Thus, the statute simply would establish authority for taxpayer standing to sue to recover money or property for the government under any statute which would allow such suits by the United States Attorney General. The taxpayer would have standing in federal court if he or she alleged grounds sufficient to state a cause of action under any statute which would authorize such suit to be brought by the federal government. The taxpayer plaintiff would sue on behalf of the United States of America to recover money for it.[239] The only exception would be for tax cases. Because of the complexity of the tax laws and the need for uniform enforcement, the government should not allow private citizens to bring suits to recover tax deficiencies for the government. In fact, the existence of a large enforcement agency, the Internal Revenue Service, makes taxpayer standing less essential to enforcement than it is in fraud cases.

2. Jurisdictional Provisions

Standing to bring a civil suit in cases of government fraud should be granted to any taxpayer of the United States. That is, if a complaint alleges that the plaintiff paid *any* taxes to the United States government within the previous year, standing exists. Though the grant of standing could be drafted more expansively to allow any citizen to sue, it would be best to restrict jurisdiction to taxpayer suits. Although non-taxpayers

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235 31 U.S.C. § 231, *et seq.* (1976).

236 41 U.S.C. § 51 (1976).

237 Pub. L. No. 95-142; 42 U.S.C. §§ 1395 nn.(b)(2), 1396h(b)(1) (Supp. III 1979).

238 For example, there are dozens of cases interpreting each element of the False Claims Act. Supreme Court cases include United States v. Bornstein, 423 U.S. 303 (1976); United States v. Neifert-White Co., 390 U.S. 228 (1968); United States v. McNinch, 756 U.S. 595 (1958).

239 Of course, the taxpayer bringing suit would receive a portion of the money recovered. *See* discussion accompanying notes 243-44 *infra*.

are arguably injured, to insure that the constitutional standing requirement for "injury in fact" is met, jurisdiction should be limited to taxpayers. Given the large number of taxpayers, this limitation on standing hardly should prove restrictive. Since wasted government funds injure every taxpayer, any taxpayer, individual, partnership, or corporation, would be entitled to bring suit in federal court.

Venue should exist in any district in which the plaintiff resides, or where the fraud occurred, or in Washington, D.C. Since the purpose of the law is to facilitate suits by private citizens, it would be self-defeating to force plaintiffs to travel long distances to conduct litigation.

Subject matter jurisdiction will be created by the statute establishing authority for taxpayer suits in federal court. There should be an amount in controversy requirement. The amount in controversy should be set so that the federal courts are not flooded with insignificant fraud cases. Accordingly, it is suggested that the court shall have jurisdiction only if there is an allegation that the government has lost more than $50,000 in money or property. This figure is arbitrary, but seems appropriate as a dividing line between major and minor losses.

3. Relationship to the Government

Since the government will continue to bring civil, as well as criminal actions, it is necessary to define the relationship between the taxpayer litigation and government enforcement efforts. First, the statute should provide that taxpayers do not have standing if there is a pending civil action brought by the United States against the same defendant and based on the same transaction. Because the purpose of citizen suits is to increase resources devoted to enforcement, there is no point in allowing duplicative litigation.

Second, the statute must allow the government to act to protect its criminal case. Since discovery in criminal cases is far more restrictive than in civil actions, the government fears that concurrent civil and criminal litigation will jeopardize criminal prosecutions as defendants use civil discovery to learn the details of the government's case.[240] This problem can be prevented by allowing the government to request that the district court grant a continuance in the civil proceedings until the completion of the criminal prosecutions. The government would be required to demonstrate why in the particular case concurrent proceedings would prejudice the criminal litigation.

Finally, there is the question of whether the government should be able to intervene and assume complete control over the taxpayer's action. Of course, if the plaintiff does not object, there would be no prob-

240 *See* Comment, *supra* note 108, at 798.

lem with the government replacing the taxpayer as plaintiff. If, however, the taxpayer wishes to remain as plaintiff, the United States should be able to assume control of the litigation, but only by demonstrating to the district court strong grounds for the government replacing the taxpayer as plaintiff. The substitution of the United States as plaintiff should be made only upon order of the district court and should be conditioned upon the government's diligent and good faith pursuit of the litigation. If subsequent to the government's assumption of control over the litigation, the taxpayer plaintiff believes that the government is not handling the litigation in good faith, the plaintiff should be able to petition the district court to be reinstated as plaintiff.[241]

Such authority would prevent the government from assuming control over cases to have them dismissed, as could happen in cases of corrupt enforcement. At the same time, it would allow government intervention in situations where that would be desirable to increase prosecutorial resources and to coordinate litigation. Thus, the statute should provide that the government may intervene and replace the taxpayer only if there is either consent from the original plaintiff or an order of the court based on the showing of good cause for the substitution.

4. Remedies

The statutes which create the causes of action also provide for the basic remedies. For example, the False Claims Act provides for recovery of double the amount of damages sustained by the government and a $2,000 forfeiture for each false claim.[242] The statute creating taxpayer standing must provide for payment to the plaintiff of a share of the funds recovered, since it is the chance of recovery that motivates private citizens to investigate and prosecute fraud.[243]

The share to be given to the plaintiff should be set high enough to encourage citizen enforcement, but not so high as to create a windfall. At the very least, in successful suits, taxpayers should recover all costs they have incurred in pursuing the matter. Additionally, taxpayers should receive a fraction of the sum returned to the Treasury. Obviously, no formula can exist to precisely set the percentage to be given to the plaintiff. The court should have discretion to determine the size of

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241 This is similar to the traditional *qui tam* action "where [if] the government takes over prosecution . . . and fails to prosecute diligently, the private plaintiff can resume command and prosecute, thereby preventing loss of his rights by the government's improper handling of his case." *Id.* at 785.

242 31 U.S.C. § 231 (1976).

243 Note, *supra* note 4, at 451 n.22.

the plaintiff's recovery.[244] The statute should specify that the court must consider such factors as the difficulty of the suit, the duration of the plaintiff's involvement (did the plaintiff just initiate the action or did the plaintiff conduct the entire litigation), the importance of the matter (precedential value, the magnitude of the fraud, etc.), and the size of the total recovery. Based on these factors, the court should award the plaintiff between five and twenty-five percent of the total sum returned to the Treasury. Thus, all plaintiffs initiating successful litigation will be assured of recovering their costs and a sizeable reward for their efforts.

C. POSSIBLE OBJECTIONS TO AUTHORITY FOR TAXPAYER STANDING

Three major arguments can be advanced against taxpayer suits to recover money for the government: court overload, interference with Justice Department enforcement efforts, and strike suits by unscrupulous plaintiffs. Upon examination, however, it is apparent that each of these objections lacks merit.

A major justification for restrictive standing doctrines is to limit the number of potential plaintiffs bringing suit in federal court.[245] Opponents of taxpayer standing argue that if such suits were permitted, there would be a flood of litigation swamping the federal judiciary.[246] This fear seems greatly exaggerated. Past experience with taxpayer suits at both the state and federal levels refutes the notion that court overload would result. As Professor Kenneth Culp Davis explains:

> The figment about floods of litigation if taxpayer suits are allowed is demonstrably false. Nearly all states allow taxpayers to challenge disbursements, and anyone who cares to look at the facts can readily find that taxpayer suits are few, not numerous. Supreme Court law from 1899 to 1923 allowed taxpayers to challenge federal disbursements, with no resulting flood of litigation. . . .[247]

Logically, it is difficult to imagine that the number of citizen initiated suits against frauds of greater than $50,000 will be so great as to overwhelm the court system.

Furthermore, the court overload argument assumes that the cost to the Treasury of increased suits will be greater than the benefits returned. It is likely that taxpayer suits to recover money for the government will

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244 *See* Comment, note 108, at 800 ("[o]n balance . . . reliance on trial judges to set the share of the judgement awarded to the private plaintiff seems the best way of insuring that the reward plays the proper role in *qui tam* actions").

245 *See, e.g.*, Flast v. Cohen, 392 U.S. at 130 (Harlan, J., dissenting) (arguing for restricting taxpayer standing on the grounds that "public actions . . . may involve important hazards for the contrived effectiveness of the federal judiciary").

246 Wall Street Journal, Nov. 29, 1971, at 1, col. 4.

247 Davis, *supra* note 165, at 634.

more than pay for themselves. Frivolous suits can be dismissed by the courts at an early stage in the proceedings.[248] Successful suits will return a minimum of $37,500 to the United States Treasury.[249] The cost of the judiciary's handling one case is certainly a fraction of this amount. While, of course, not every suit will be successful, there is every reason to believe that the total amount recovered will far exceed the costs to the court system. And if increased enforcement does succeed in deterring fraud,[250] that is an additional financial gain for the government justifying the costs of taxpayer suits.

A second objection to authority for taxpayer suits is that such litigation would interfere with the government's exclusive control over enforcement efforts. The Justice Department has argued that it alone should prosecute, criminally and civilly, violations of federal law.[251] In part, this argument "appears to reflect a desire to purposely avoid prosecution of some violations."[252] Yet, it is difficult to imagine a situation in which fraud against the government should not be remedied at least by recovery of the illicitly gained sum. If the government fails to act, citizen suits should be welcomed. As one commentator notes:

> If, on the one hand, the government declined to act in a particular case because of lack of manpower, there would seem no reason why the government would not welcome the initiation of a suit by a *qui tam* plaintiff. In such a situation, the *qui tam* plaintiff could maintain the suit on behalf of the government, and yet the government would collect three-fourths of the amount recovered. . . . If, however, the government declined to prosecute for corrupt or political reasons, permitting a *qui tam* plaintiff to initiate proceedings would implement the purpose of the statute.[253]

In part, too, the Justice Department's opposition to citizen suits is based on a fear that such litigation would interfere with criminal enforcement efforts. As explained above, civil actions give defendants far greater discovery tools than are available in criminal cases.[254] Thus, the government fears that taxpayer suits will hamper prosecutions by enabling defendants to use civil discovery to gain information which otherwise would not be available.[255] This problem is easily dealt with by

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248 *Hearings on S. 3005, Citizens Right to Standing in Federal Courts Act of 1978, Before the Senate Judiciary Comm.*, 95th Cong., 2d Sess. 53-59 (1978) (dialogue between Senator Metzenbaum and Erwin Griswold).

249 Under the proposed statute there is a $50,000 amount in controversy requirement and a maximum recovery for the plaintiff of twenty-five percent, assuring the government of at least $37,000 for each successful suit.

250 *See* discussion accompanying notes 134-35 *supra*.

251 *See* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 547 n.11 (1943).

252 Comment, *supra* note 108, at 797.

253 Note, *supra* note 4, at 473 n.130.

254 *See* discussion accompanying note 240 *supra*.

255 *See* Comment, *supra* note 108, at 798.

including a provision within the statute permitting the government to request a delay in the civil litigation until completion of the criminal proceedings.[256]

Likewise, statutory provisions can eliminate the fear that private plaintiffs will prejudice the government by incompetently handling suits which would then, because of res judicata, bar subsequent Justice Department civil actions.[257] The statute creating authority for taxpayer standing requires the plaintiff to notify the Justice Department at the time suit is initiated. Additionally, it allows the Justice Department to intervene and even control the litigation to insure that the suit is handled effectively.

The final objection to taxpayer suits is that "strike suits" would result. That is, plaintiffs would initiate litigation and then quickly "settle the suit for the amount that severely prejudices the government interest."[258] This fear is not purely hypothetical. When *qui tam* suits were allowed in England, "the filing of a[n] . . . action was often followed by a collusive settlement for a nominal amount, designed to bar the government from subsequent prosecution for an appropriate recovery."[259]

This practice, however, can be made virtually impossible by including within the statute a provision preventing dismissal or settlement of a suit without the consent of the judge and the United States government.[260] Again, the ability of the Justice Department to intervene assures that the case will not be improperly handled or prematurely settled. Furthermore, a preliminary hearing, held early in the proceedings, can prevent strike suits by insuring that there is sufficient reason to believe that the litigation should continue.

The objections to taxpayer suits to recover money for the government are unfounded. Careful drafting of the statute can prevent the anticipated problems from ever occurring.

IV. CONCLUSION

Unfortunately, fraud against the government is probably inevitable. The sheer size of federal expenditures makes it virtually impossible to ever eliminate all corruption. Nonetheless, the political realities of the 1980s make it imperative that new and innovative solutions be tried to combat fraud. Every dollar lost to graft is one less that can be spent for useful ends. Every example of fraud is a potential argument against

256 *See* Section 4(b) of the proposed statute *infra*.

257 *See, e.g.*, Brilmayer, *supra* note 145, at 306-07 (res judicata as a justification for restricting standing).

258 Comment, *supra* note 108, at 797.

259 *Id.*

260 *Id.*; Note, *supra* note 114, at 906.

the program itself. In this era of budget austerity, legislation to decrease fraud must be given a high priority.

There, of course, is no single action which by itself will succeed in dramatically reducing fraud. A plethora of approaches to various aspects of the problems must be attempted. Recent actions, such as the creation of Inspector Generals within Cabinet level agencies[261] and designing programs to minimize opportunities for fraud,[262] are important steps. But these actions are simply not enough in light of the magnitude of fraud and corruption. New weapons must be added to the arsenal.

One way to substantially increase enforcement efforts is to allow taxpayers to bring suits to recover money for the government. Over 500 years ago, the *qui tam* action was devised as a way to supplement inadequate prosecutorial resources. Its fundamental concept—having private citizens bring civil suits where the government fails to do so—seems perfectly suited to America in the late twentieth century. At minimal cost, a multitude of private attorneys general can be unleashed. Funds will be recovered that otherwise would be lost. In the long term, increased enforcement can deter future fraud. While it is difficult to predict the effect of any law, there is every reason to believe that legislation authorizing taxpayer suits could significantly reduce fraud and corruption.

APPENDIX

Proposed statute to establish taxpayer standing to bring civil suit to recover money for the government in instances of fraud and corruption.

Section 1: **Legislative purpose.** It is the purpose of Congress to recognize that each taxpayer of the United States has an interest in the proper disbursement of federal monies and in recovering funds lost through fraud and corruption against the government. Civil enforcement actions brought by individual United States taxpayers are intended to substantially aid government civil and criminal prosecution of fraud.

Section 2: **Actions by private citizens to enforce federal laws.** Any taxpayer of the United States may file civil suit in federal district court to recover money or property for the government under and statute which authorizes the Attorney General of the United States to bring such suit.

a) Definition of taxpayer. Taxpayer of the United States shall be defined

261 Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, 5 Appx. 1 *et seq.*

262 ECONOMIC OFFENSES: RECOMMENDATIONS OF THE AMERICAN BAR ASSOCIATION, SECTION OF CRIMINAL JUSTICE 7 (1977); *see, e.g.*, Medicare-Medicaid Anti-Fraud and Abuse Amendments, Pub. L. No. 95-142 (codified in scattered sections of 5, 26, 42 U.S.C. (1976)).

as a person who has paid any tax to the United States Treasury within twelve months of filing suit.

b) Exception. No suit may be brought by any taxpayer to enforce the Internal Revenue Code of the United States.

Section 3: **Jurisdiction and Venue.**

a) The district courts shall have original jurisdiction of all civil actions brought by taxpayers of the United States to recover money or property for the government under any statute which authorizes the Attorney General of the United States to bring such suit, and where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs.

b) Venue shall be in any district in which the plaintiff resides, or where the fraud occurred, or where the defendant resides, or in the District of Columbia.

Section 4: **Relationship of Private suits to the United States Government.**

a) Notice to the Attorney General. Whenever any such suit shall be brought by any person under this Act, notice of the pendency of such suit shall be given to the United States by serving upon the United States Attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered or certified mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill.

b) The Attorney General or his designee may intervene in any such suit for the purpose of requesting that the suit be continued until completion of pending criminal proceedings. The court shall grant such continuances upon the showing of good cause to believe concurrent civil proceedings would prejudice the government's criminal prosecution.

c) The Attorney General or his designee may intervene in any such suit and replace the taxpayer who initiated suit as plaintiff upon approval of the original plaintiff or upon order of the district court. If subsequent to the government's assumption of control over the litigation, the taxpayer plaintiff alleges that the government is not diligently pursuing the litigation in good faith, the taxpayer plaintiff may petition the district court to be reinstated as plaintiff in the litigation.

d) Such suits brought under this Act shall not be dismissed except upon approval of the Attorney General or his designee and the district court.

Section 5: **Award to taxpayer plaintiffs.** In any such suit, the court may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, an amount which in the judgment of the court is fair and reasonable compensation to such person, together with reimbursement for all costs incurred in bringing suit. The court in determining the award, shall consider the difficulty of the suit, the efforts of the plaintiff, the importance of the action, and the size of the recovery. In no event shall the amount given to a plaintiff in

a successful suit be less than five percent nor more than twenty-five percent of the amount recovered, exclusive of costs. All other funds shall be returned to the United States.