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91st Congress
2d Session } HOUSE OF REPRESENTATIVES

QUI TAM ACTIONS AND THE 1899 REFUSE ACT: CITIZEN LAWSUITS AGAINST POLLUTERS OF THE NATION'S WATERWAYS

CONSERVATION AND NATURAL RESOURCES SUBCOMMITTEE

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
CONSERVATION AND NATURAL RESOURCES SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C., August 13, 1970.

Hon. CHET HOLIFIELD,
Acting Chairman, Committee on Government Operations,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: On March 18, 1970, the Committee on Government Operations issued its twenty-first report entitled "Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction and Pollution" (H. Rept. 91–917). This report, particularly that part discussing the possible use of a *qui tam* action to implement the Refuse Act of 1899, has generated tremendous interest among both Members of Congress and private citizens.

In response to inquiries from Members of Congress the subcommittee staff has prepared memorandums discussing more fully the nature of the *qui tam* action and its applicability to the Refuse Act. The subcommittee believes that these memorandums will substantially aid Members of Congress, as well as private citizens, in gaining fuller understanding of, and performing additional research and investigation into, the *qui tam* action as a basis for implementing the Refuse Act of 1899. We therefore recommend that you approve publication of these memorandums as a committee print.

Sincerely,

HENRY S. REUSS,
Chairman, Conservation and Natural Resources Subcommittee.

PREFACE

On March 18, 1970, the Committee on Government Operations issued a report entitled "Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction and Pollution" (House Report No. 91–917). This report analysed how the Corps of Engineers might more adequately fulfill its responsibilities under the River and Harbor Act of 1899 (act of March 3, 1899, c. 425, 30 Stat. 1151), including those statutory provisions more commonly known as the Refuse Act (33 U.S. Code 407, 411, 413). In discussing the latter, the report stated as follows:

"1. Violations of the Refuse Act are subject to criminal prosecution and penalties of fine not exceeding $2,500 nor less than $500 or imprisonment for not less than 30 days nor more than 1 year, or both such fine and imprisonment (33 U.S. Code 411). Officers and employees of the Corps of Engineers are authorized "to arrest and take into custody" and request prosecution of, and it is "the duty of United States attorneys to vigorously prosecute all offenders" of the Refuse Act. (33 U.S. Code 413.) The law further specifies that "one-half of said fine" shall be "paid to the person or persons giving information which shall lead to conviction." This provision buttresses the Corps' efficacy in carrying out the Refuse Act in two ways:

(*a*) The informer payment provides a monetary incentive to citizens to furnish information to the Corps concerning violations of the Refuse Act.

(*b*) The Supreme Court has ruled that where a statute provides for a reward to the informer, the statute authorizes him, if the Government has not previously instituted a prosecution against the violator, to institute his own suit in the name of the United States (a *qui tam* action) to collect his moiety of the penalty. Such *qui tam* statutes, vesting in an informer the right to recover a moiety of a penalty for a violation in which he otherwise would have no financial interest, "have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government." By making the violator subject to action by private persons stimulated by the hope of a reward, such provisions help to insure against laxity by public officials in enforcing statutes effectuating important public policies." [1]

The committee's report, particularly that part quoted above, has generated tremendous interest. Since its publication numerous Members of Congress and thousands of citizens have asked the subcommittee for additional information concerning the nature of the *qui tam* action and how it can be used to effectuate the Refuse Act. The subcommittee staff prepared two memorandums on these subjects. These memorandums will undoubtedly be helpful to Members of Congress and the public interested in further research into the origins,

[1] H. Rept. 91-917—"Our Waters and Wetlands: How The Corps of Engineers Can Help Prevent Their Destruction and Pollution" pp. 17-18.

judicial precedents, and scope of the *qui tam* action, and its possible use in implementing the Refuse Act of 1899.[2] These memorandums amplify and complement the legal analyses upon which the committee based its views in House Report 91–917, *supra*, concerning the *qui tam* cause of action in connection with the Refuse Act. However, the details of the memorandums do not necessarily embody any judgments of the committee, or any of its Members, beyond the views expressed in that report.[3]

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[2] The staff memorandums here reprinted are equally applicable to the Act of June 29, 1888 (25 Stat. 209, secs. 1, 3; 33 U.S.C. 441, 444), prohibiting discharge of refuse in New York Harbor and adjacent waters, which has provisions similar to those of the Refuse Act.

[3] The committee's report was cited, quoted, and relied on by the U.S. Court of Appeals for the Fifth Circuit in *Zabel* v. *Tabb*, —— F. 2d ——, 1 Env. Rep. 1449 (No. 27555; July 16, 1970) to "judge the ebb and flow of the national tide" of concern about the degradation of our Nation's waterways.

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STAFF MEMORANDUM A

The *Qui Tam* Action and Its Possible Use in Implementing the Refuse Act of 1899

I. Corporations or Persons Who Violate the Refuse Act Are Guilty of a Misdemeanor Punishable by a Fine of $500 to $2,500. Persons Are Also Subject to the Alternative Sanction of Imprisonment. Informers Are Entitled to One-Half of Any Fine Imposed

Corporations or persons who discharge or deposit refuse matter onto the banks of or into the navigable waters of the United States or their tributaries, without a permit, or in violation of the terms of a permit, from the Corps of Engineers, violate section 407 of the Refuse Act. 33 United States Code section 411 provides that such persons or corporations:

> * * * shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500, nor less than $500, * * * or by imprisonment (in the case of a natural person) for not less than 30 days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

II. May a Citizen Who Finds a Violation of the Refuse Act Bring a *Qui Tam* Civil Action Against the Violator?

A *qui tam* action is a civil action brought by a citizen to collect a fine, penalty, or forfeiture, a share (usually one-half) of which he is allowed to keep for himself by the statute imposing the fine or penalty. The action's name is derived from the Latin, "qui tam pro domino rege quam pro se ipso sequitur," meaning "who brings the action as well for the king as for himself."

The issue is whether a citizen who possesses information of a violation of the act sufficient to lead to conviction, can bring a *qui tam* action to impose the fine on the violator and collect one-half thereof.

III. *Qui Tam* Actions Are Civil Actions Brought by Citizens Under Penal Statutes Whose Sanction Is a Fine, Penalty or Forfeiture of Which Citizens are Entitled to a Share

Bouvier's Law Dictionary (3d ed.) defines "*qui tam*" to mean:

> An action under a statute which imposes a penalty for the doing or not doing an act, and gives that penalty in part to whomsoever will sue for the same, and the other part to the commonwealth, or some charitable, literary, or other institution, and makes it recoverable by action. The plaintiff describes himself as suing *as well* for the commonwealth * * * as for himself * * *. [Emphasis in original.]

Blackstone in his "Commentaries," vol. III, writes:

> But, more usually these forfeitures [meaning forfeiture of goods, fine, or penalty] created by statute are given at large, to any common informer; or, in other words,

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to any such person or persons as will sue for the same: and hence, such actions are called *popular* actions, because they are given to the people in general. Sometimes one part is given to the king, or to the poor, or to the public use, and the other part to the informer or prosecutor; and then the suit is called a *qui tam* action * * *.[1]

Henry Stephen, in his "New Commentaries on the Laws of England," vol. III (1844), elaborated as follows:

We have now sufficiently considered the injuries which affect such things in action as arise out of contracts, but there are some things in action which cannot properly be said to have that origin, and the withholding of which will nevertheless constitute a wrong or injury, viz. such debts as result from the obligation to pay money pursuant to a sentence of the law, or an enactment of the legislature; as when in a court of law, judgment is obtained by one man against another, for a specific sum of money; or when by an act of parliament, of that class called penal statutes, a pecuniary forfeiture is inflicted for committing some specified offense, and such forfeiture is made recoverable, as it usually is, by the crown, or the party aggrieved, or a common informer, as the case may be. This obligation or liability to pay a specific sum of money constitutes * * * a *debt*, so that the party against whom the judgment is obtained is immediately considered as owing to his adversary the amount awarded, and the party who transgresses the penal statute is immediately owing to the crown, the party aggrieved, or the common informer, as the case may be, the amount of the penalty. The remedy for the recovery of such debt, or chose in action, when withheld, is by action of debt on the judgment, or on the penal statute respectively; and in the latter case this remedy is generally designated as a penal action, or, where one part of the forfeiture is given to the crown, and the other part to the informer, a * * * *qui tam* action because it is brought by a person *qui tam pro domino rege quam pro se ipso sequitur*.[2]

IV. English Governments From the 14th Through the 19th Centuries Frequently Relied Upon Citizen Participation in Law Enforcement by Passing Criminal Statutes Authorizing *Qui Tam* Actions

Because of the absence of adequate professional police forces and an adequate prosecutorial administration[3] until well into the 19th century and, during certain periods, because of Parliament's lack of confidence in the Crown's intentions to enforce the law,[4] citizens in England were frequently given the right to enforce criminal statutes.

Sir William Holdsworth writes in his "History of English Law":

We have seen that in the Middle Ages [14th and 15th centuries] it was a common expedient to give the public at large an interest in seeing that a statute was enforced by giving to any member of the public the right to sue for the penalty imposed for its breach, and allowing him to get some part of that penalty. This expedient was largely used by the legislature in [the 16th and 17th centuries] both in the case of * * * statutes dealing with trade, and in the case of statutes dealing with many other subjects * * *.

* * * * * * *

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[1] Blackstone, Commentaries, vol. III, at p. 160. (Emphasis in original.)

[2] At pp. 535–6.

[3] Viscount Simon, in presenting the common informers bill to the House of Lords for second reading, stated (Parliamentary debates (Lords), Apr. 3–June 7, 1951, vol. 171, at p. 1052):

If we go back to the old days when there was no efficient police force, when, indeed, in some parts of the country there was no police force at all, and consider the importance of enforcing the law against criminal offenses, it would seem that it was not altogether unnatural for our ancestors * * * to set up the system of common informers * * *

[4] Viscount Simon in the same speech stated (Ibid., at p. 1052):

There may be another class of case where it [the system of common informers] would have been justified. If we lived in an age when the authorities could be suspected of refusing, out of favouritism or fear, to prosecute a particular kind of person, it might be a very useful thing to have this machinery of the common informer to secure that in proper cases a man would be brought to book * * *.

Mr. Hollis, in the debate during the second reading of the common informers bill before the House of Commons, stated (Parliamentary Debates (Commons), Jan. 23–Feb. 9, 1951, vol. 483 at p. 2098):

The second historical reason [for the common informer suit] is this. The reason for such legislation as the Act of Uniformity was because at a certain time, during the reigns of the last two Stuart Kings, Parliament had very little confidence in the will of the Executive to enforce the law that it had seen fit to pass. The Government were thought to be less keen on enforcing the Act of Uniformity than Parliament wished them to be.

The number of statutes, old and new, in which the public at large was encouraged to enforce obedience to statutes by the promise of a share of the penalty imposed for disobedience was very large.[5]

Professor Radzinowicz writes of a later period:

Throughout the 18th century, and in the early years of the 19th, a number of statutes were passed, which so widened the activity of common informers that *an important section of criminal law came to depend upon them for its enforcement.* It was hoped to extend their usefulness and vigilance to all the lesser infringements of the law * * *.[6] [Emphasis added.]

* * * * * *

Much reliance was placed upon common informers to secure the enforcement of laws affecting public order and safety * * *.[7]

* * * * * *

[T]he common informer, stimulated by his share in the penalty, was expected to play a considerable part in setting the machinery of justice in motion with regard to lesser infringements of the law. Thousands of these were committed every day, and although *most of them were nonindictable offences or misdemeanors*, they had nevertheless considerable social significance * * *. [Emphasis added.]

* * * * * *

The incentive of the "moiety of the appointed penalty" was not confined to a few isolated penal statutes selected at random. *It formed part of the deliberate and consistent policy of the legislature and pervaded the entire body of the criminal law.* It acquired the character of a regular system in process of continual expansion. The result was a social situation in which the common informer was expected to act as a policeman, and a protector of the community against a vast mass of delinquency.[8] [Emphasis added.]

Even during the later years of the 19th century, as police administration became more sophisticated in England, the common informer's "status as an adjunct of criminal justice was so generally accepted that * * * laws still continued to be enacted giving [him] powers and privileges * * *".[9]

V. In This Country Congress Has Often Expressly Given Citizens the Right To Bring *Qui Tam* Actions To Implement the Criminal Laws

The Supreme Court of the United States observed in 1905:

Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence * * * in this country ever since the foundation of our Government.[10]

Still later, in 1943, the Court, in rejecting the view of the third circuit court of appeals that informer actions "have always been regarded with disfavor," stated:

Qui tam suits have been frequently permitted by legislative action . . .[11]

Among the Federal statutes authorizing a *qui tam* action by the common informer are the following:

Act of September 2, 1789, 1 Stat. 65, 67 (sec. 8), now 31 U.S.C. section 155, 163, 1003 (re abuse of office by Treasurer, or Secretary of Treasury);

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[5] Sir William Holdsworth, "A History of English Law," vol. IV, at pp. 355–6.
[6] Leon Radzinowicz, "A History of English Criminal Law and its Administration," from 1850, vol. 2, at p. 142.
[7] Ibid., at p. 143.
[8] Ibid., at pp. 146–147.
[9] Ibid. at p. 155
[10] *Marvin* v. *Trout*, 199 U.S. 212, 225 (1905).
[11] *U.S. ex. rel. Marcus* v. *Hess*, 317 U.S. 537, 541 (1943).

Act of March 3, 1791, 1 Stat. 199, 209 (sec. 44) (re collection of duties on liquor);

Act of March 22, 1794, 1 Stat. 347, 349 (sec. 2, 4), now 46 U.S.C. sections 1351–1356 (re slave trade);

Act of June 30, 1834, 4 Stat. 729, 733 (sec. 27), now 25 U.S.C. section 201 (re trade and intercourse with Indian tribes);

Act of August 30, 1852, 10 Stat. 61, 75 (sec. 41) (re regulation of steamboats);

Act of August 5, 1861, 12 Stat. 292, 296 (sec. 11) (re collectors of revenue);

Act of March 2, 1863, 12 Stat. 696, 698 (sec. 4), now 31 U.S.C. 231, 232, 233 [re defrauding the Government];

Act of July 8, 1870, 16 Stat. 198, 203 (sec. 39), later 35 U.S.C. section 50 (now repealed) [re falsely marking article as patented];

Act of February 26, 1885, 23 Stat. 332, 333 (sec. 3) [re importation of alien labor];

Cf Act of June 17, 1930, 46 Stat. 590, 758 19 U.S.C. section 1619 [re enforcement of customs and navigation laws].

VI. Citizens Can Bring *Qui Tam* Actions To Collect Fines or Penalties Imposed by Criminal Statutes Where the Statutes Do Not Expressly Authorize or Forbid the Citizens' Suits

The Refuse Act of 1899 states that "one-half of [the] fine [imposed for violation of the Act is] to be paid to the person or persons giving information which shall lead to conviction." The issue is whether Congress by the use of this language has allowed citizens the right to bring *qui tam* actions to enforce the Refuse Act. The Act does not explicitly state that citizens have such a right. But, it does not explicitly deny to citizens this right.

There is American case law which supports the proposition that where a statute providing for a reward to informers does not specifically either authorize or forbid the informer to institute a *qui tam* action, such statute is to be construed as authorizing such suit.

In *U.S. ex. rel. Marcus* v. *Hess*, 317 U.S. 537 (1942) an informer brought an action under R.S. 5438 and R.S. 3490–93, 31 U.S.C. 231 et. seq., the *Informer's Act* (prior to its 1943 amendments). Section 5438 made certain efforts to defraud the Government a crime punishable by fine and imprisonment. Section 3490 separately provided that whoever committed "any" of the prohibited acts should "forfeit and pay to the United States the sum of two thousand dollars, and in addition, double the amount of damages * * * sustained * * *; and such forfeiture and damages [should] be sued for in the same suit." Under sections 3491 and 3493, the suit for the fine and double damages could be instituted by "any person" in behalf of the Government, and, when successfully brought, the person instituting suit could keep one half the judgment.

The Supreme Court held in this case that an informer could bring suit under R.S. 3491 against certain parties, which had defrauded the Government by engaging in collusive bidding on PWA projects in Allegheny County, Pa., even though the informer relied for his information on an indictment filed by the Department of Justice in a previous uncontested criminal action. In reaching its result the Court rejected the view of the Court of Appeals, Third Circuit, that the statute (31 U.S.C. 231, et seq.) should be construed "with utmost

strictness," as *qui tam* actions "have always been regarded with disfavor" (127 F. 2d at 233). The Supreme Court retorted: "*Qui tam* suits have been frequently permitted by legislative action, and have not been without defense by the courts" (at p. 541).

The Supreme Court further stated: [12]

> Statutes providing for a reward to informers which do not *specifically* either authorize or forbid the informer to institute the [qui tam] action are construed to authorize him to sue, *Adams* v. *Woods*, 2 Cranch 336. (Italics added.)

In *Adams, qui tam*, v. *Woods*, 6 U.S. (2 Cranch) 336 (1805) an informer brought an action of debt under the second section of the act of Congress of 22d March 1794, "to prohibit the carrying on the slave trade from the United States to any foreign place or country," 1 U.S. Stat. 347. This section provided that violators "shall forfeit and pay the sum of two thousand dollars; one moiety thereof to the use of the United States, and the other moiety to the use of him or her who shall sue for and prosecute the same." The issue in the case was whether the 2-year statute of limitations period set out in section 32 of the act of Congress of April 30, 1790, 1 U.S. Stat. 119, applied not only to indictments and informations but also to the informer's debt action to enforce a criminal statute. Section 32 of 1 U.S. Stat. 119 provided:

> * * * nor shall any person be prosecuted, tried or punished for any offense not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offense, or incurring the fine or forfeiture * * *

In holding the above statute applicable to the informer's civil action, Chief Justice Marshall stated:

> [I]n the statute under consideration, a distinct member of the sentence, describing one entire class of offenses [i.e., ones where the sanction is fine or forfeiture], would be rendered almost totally useless, by the construction insisted on by the attorney for the United States. Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt, as well as by information; [13] and to declare that the information was barred, while the action of debt was left without limitation, would be to attribute a capriciousness on this subject to the legislature, which could not be accounted for; and to declare that the law did not apply to cases on which an action of debt is maintainable, would be to overrule express words, and to give the statute almost the same construction which it would receive, if one distinct member of the sentence [i.e., "no person shall be prosecuted, tried or punished"] was expunged from it. *In this particular case. the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently, either debt or information would lie.* It would be singular, if the one remedy should be barred and the other left unrestrained.[14] (Emphasis added.)

Thus, although the 1794 act did not specifically either authorize or forbid the informer to institute a *qui tam* action, Chief Justice Marshall construed it to authorize such a procedure.

In *United States* v. *Laescki*, 29 Fed. 699 (D.C., N.B. Ill., 1887), the United States sought an indictment under secs. 5188 and 3708 of the revised statutes which stated:

> It shall not be lawful to design, engrave, print or in any manner make or execute or to utter, issue, distribute, circulate, or use, any business or professional card,

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[12] 317 U.S. at p. 541, footnote 4.

[13] At common law the *informer* could bring either a civil action of debt *qui tam* or an information *qui tam*. Edward Deacon stated in *A Digest of The Criminal Law of England*, vol. 1 (1831): "Informations are of two sorts; first, those which are partly at the suit of the king, and partly at that of a subject; and secondly, such as are only in the name of the king. The former * * * are usually brought before justices of the peace upon penal statutes, which inflict a penalty upon conviction of the offender—one part to the use of the king, and another to the use of the informer—and are, in fact, a sort of *qui tam action*, only carried on by a criminal, instead of a civil, process" (at p. 671).

[14] 6 U.S. at p. 341. Justice Marshall also held that the 1790 statute applied to prosecutions under criminal statutes enacted after, as well as before, the act of limitations was passed.

notice, placard, circular, hand-bill or advertisement, in the likeness or similitude of any circulating note, or other obligation or security, of any banking association organized or acting under the laws of the United States, which has been or may be issued under this title, or any act of congress, or to write, print, or otherwise impress upon any such note, obligation, or security, any business or professional card, notice, or advertisement * * * of any matter or thing whatever. *Every person who violates this section shall be liable to a penalty of one hundred dollars, recoverable, one-half to the use of the informer.* (Emphasis added.)

In sustaining defendant's motion to quash the indictment the court stated:

It is well settled that when a statute makes it unlawful to do an act, and a penalty is given for doing such act, and no special mode of enforcing the penalty is provided, such penalty may be recovered in an action of debt, or by indictment or information; but when the statute creates the offense, prescribes the penalty, and the mode of enforcing it, it would seem that the penalty can only be enforced in the mode provided by the statute (at p. 699).

These statutes, in effect, say to all persons: "If you print or stamp upon a United States note or bond, or a national bank-note, any business card or advertisement, you are liable to a penalty of one hundred dollars, recoverable at the suit of an informer,"—and do not say that the offender can be indicted by a grand jury, and tried as a criminal (at p. 701).

Although the word "recoverable" might suggest a civil proceeding was intended for the collection of the $100 penalty,[15] nevertheless, the statute did not specifically or explicitly authorize the informer to initiate that civil proceeding. The Court construed the statute to authorize a qui tam action despite the absence of language expressly giving such authorization.

In *United States* v. *Stocking*, 87 Fed. 857 (D. Mont., 1898), the United States brought an indictment to enforce R. S. 2148, the act of August 18, 1856, 11 Stat. 80, sec. 2, which read:

That if any person who has been removed from the Indian country under the provisions of the tenth section of the act of Congress approved the 30th of June, 1834 * * * shall thereafter at any time return or be found within the Indian territory, such offender shall forfeit and pay the sum of one thousand dollars.

Under the same title (28) as R.S. 2148 was R.S. 2124, formerly the act of June 30, 1834, 4 Stat. 733, sec. 27, which stated:

That all penalties which shall accrue under [this title] shall be sued for and recovered in an action of debt in the name of the United States before any court having jurisdiction of the same in any state or territory in which the defendant shall be arrested or found, one half to the use of the informer, and the other half to the use of the United States; except where the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

The defendant argued that an indictment did not lie to enforce R.S. 2148, as R.S. 2124 only authorized a civil debt action for the penalty. In rejecting this argument the court stated:

In order to justify a court in holding that congress has by any act narrowed the rights of the United States in any particular as to any remedy, that intention ought to clearly appear. The cases of *U.S.* v. *Payne*, 22 F. 426, and *In re Seagraves*, (Okl.), 48 P. 272, are based upon the view that section 2124 applies only to an action by the United States, and does not establish the rights and remedy of an informer, and that the United States alone can maintain the action named therein. I do not believe a correct interpretation of that section will support this view. The first clause of that section evidently refers to what is termed a "*qui tam* action," and the government does not maintain *qui tam* actions (at p. 862).

Earlier in the opinion the court stated.

Upon the examination of title 28, I find no express provisions that an informer would be entitled to any portion of the penalties named therein. Under the provi-

[15] *United States* v. *Atlantic Fruit Co.*, 206 Fed. 440 (1913).

sions of said section 2124, an informer is entitled to one-half of the penalty sued for, unless the action is first prosecuted by the United States. *Any words of a statute which show that a part of the penalty named therein shall be for the use of an informer will entitle him to maintain an action therefor* if he complies with the conditions of the statute * * *. While there is no express provision of the Revised Statutes * * * which gives an informer any part of the penalties named in title No. 28, yet I think the provisions of section 2124 impliedly give him one-half of the said penalties. *If he has this right, then this section gives him, in my judgment, the right to sue therefor in the name of the United States.* * * *. If an informer is given no right, under * * * section 2124, it is difficult to discover its meaning (at pp. 861–2).

Although the language in Rev. Stat., sec. 2124 "except where the prosecution shall be first instituted on behalf of the United States" might imply that another mode of prosecution was available under the statute, and the court found this language helpful in construing the statute to authorize an informer action, nevertheless Revised Statutes 2124 did not specifically authorize or prohibit a *qui tam* action. The opinion supports the Supreme Court's position in *U.S. ex rel. Marcus* v. *Hess, supra.*

In *Chicago and Alton R.R. Co.* v. *Howard*, 38 Ill. 415 (1865), the Supreme Court of Illinois sustained a lower court ruling that plaintiff Howard could sue *qui tam* to collect a $1,000 penalty for defendant's violations of an act requiring a railroad to blow a whistle or ring a bell at and near railroad crossings. One section (38) of the act in question provided for payment of "a penalty of $50 for each neglect to be paid by the corporation owning the railroad, one-half thereof to go to the informer, and the other half to the State" (sec. 38, act of Nov. 5, 1849). Another section (42) stated that "all penalties imposed by this act *may* be sued for by the District Attorney." In upholding the *qui tam* suit the court stated:

> If the 42d section had contained the only provision for bringing suit, then it would have to be brought by the State's attorney, and in the name of the people. But under the 38th section a common informer may sue, in the common law mode, in his own name, as well as on behalf of the people (at p. 418).

Here also, although the statute in question did not specifically authorize an informer's *qui tam* action, the court construed it to authorize such an action.

VII. English Statutes Not Specifically Authorizing or Forbidding Citizens To Bring *Qui Tam* Actions Have Been Understood To Authorize Such Actions

In England, also, statutes, like the Refuse Act, which neither specifically authorize nor forbid informers to bring *qui tam* actions, have been understood to authorize such actions.

For example, the Apothecaries Act of 1815, 55 Geo. 3 c. 194 (Halsbury's "Statutes of England," 2d ed., vol. 15, pp. 3–66), which prohibited persons from practicing as apothecaries without a license, provided (sec. 26):

> All penalties and forfeitures * * * shall [if greater than £5] be recovered by action * * * in the name of the master wardens, and society of the art * * * of apothecaries of the city of London * * * [or, if less than £5], * * * by distress and sale of the goods and chattels of the offender.

It further provided (sec. 25):

> All sums * * * arising from convictions and recovery of penalties * * * shall be * * * disposed of in manner following: one-half thereof to the informer or informers, * * *

This statute has been understood to authorize a *qui tam* action by the informer.[16]

Another example is the Universities (Wine Licenses) Act of 1743, 17 Geo. 2. c. 40 (Halsbury's "Statutes of England," 2d ed., vol. 13, at p. 118), which prohibited the sale of liquor on the campuses of Oxford and Cambridge Universities without a license from the chancellor of either university. Violation of the act subjected one to a forfeiture of "five pounds, one moiety to the use of his Majesty * * * and the other moiety to the informer" (sec. 11).

Section 11 further provided:

> all persons offending against this Act shall * * * be prosecuted * * * in the courts of the chancellors * * * of the said universities * * * in a summary way * * *

The summary enforcement procedures set forth in the act make no reference to participation by informers. This statute also has been understood to authorize *qui tam* actions by informers.[17]

VIII. Section 413 of Title 33 of the United States Code Does Not Specifically Forbid the Informer From Instituting a *Qui Tam* Action Under the Refuse Act

It has been assumed so far in this memorandum, without discussion, that the Refuse Act does not specifically forbid a *qui tam* action by the informer. Is this the case?

Section 413 of 33 U.S.C. states in part:

> The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 403, 404, 406, 407, 408, 409, 411 * * *, and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of Army or by any of the officials hereinafter designated * * *

This section quite plainly says that the Department of Justice shall conduct the criminal proceedings to *enforce* the act. It does not prohibit the informer from conducting civil *qui tam* proceedings to recover his moiety of the penalty. Thus, in *United States* v. *Griswold*, 5 Sawy. 25, Fed. Cas. No. 15,266 (D.C., D. Oregon, 1877), an informer sued to enforce the Informers Act of March 2, 1863, 12 Stat. 696, later set forth as R.S. 5438, 3490–3493, cited above as one of numerous Federal statutes authorizing *qui tam* actions.[18] The Informer Act established two modes of prosecuting those who filed false claims or otherwise committed fraudulent acts against the United States Government. One mode was a criminal action prosecuted by the Government for fine and imprisonment. The second mode was an informer action for a monetary forfeiture of $2,000 plus double the damages sustained by the United States. R.S. 3491 specifically stated that suit "to recover the forfeiture and damages may be brought and carried on by any person, as well for himself as the United States." The informer could keep one-half the amount recovered.

In *United States* v. *Griswold* the court denied defendant's motions to (a) strike the complaint because not properly subscribed, and (b)

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[16] See schedule of statutes attached to the Common Informers Act, 14 and 15 Geo. 6. c. 39, 22d June 1951, Halsbury's *Statutes of England*, 3d ed., vol. 8, at p. 391. See also Radzinowicz, vol. II, at p. 145, set forth in footnote 17, *infra*.

[17] See schedule of statutes attached to the Common Informers Act, cited in note 16, *supra*. See also Radzinowicz, vol. II, at p. 145: "Common informers were also empowered to bring an action against anyone who * * * retailed wine within the precincts of the Universities of Oxford and Cambridge without a license from the Chancellor or the Vice Chancellor (citing 17 Geo. 2, c. 40, s. 11) * * * or practised as an apothecary without the necessary certificate (citing 55 Geo. 3, c. 194)."

[18] See pt. V, *supra*.

vacate the writ of arrest because improperly issued. In ruling on the first motion the court observed that, as a private citizen could bring the action in the name of the United States, his attorneys were the attorneys for the United States and proper subscription of the complaint merely required their, and not the district attorney's, signature(s). After noting that the action was one *qui tam*, the court stated (26 Fed. Cas. at p. 44):

> When, as in this case, a statute imposed a penalty for the commission of an act, and also gave such penalty in part to whoever would sue for it, and the remainder to the king or other public use, the action to recover such penalty, if brought by a private person, was brought in his own name and subject to his control. Although a judgment obtained therein was for the benefit of the king or other public use as well as the plaintiff, yet the action was, to all intents and purposes, the private action of the latter. 3 Blackstone, Commentaries 160.

The court also stated (*Id.*, p. 44):

> For all purposes, except the discontinuance of the action, the attorney employed by the informer to commence and conduct the same is the attorney of the United States therein. *Neither does the fact that the district attorney is required to be diligent to enforce the statute against persons violating it, make him the attorney of the United States in that action* * * * [W]hichever—the informer or the district attorney—first commences an action for a particular violation of the statute, thereby excludes the other from so doing. (Emphasis added.)

The court concluded (*Id.*, p. 44):

> *Neither does the provision in section 771 of the Revised Statutes* [19] *which makes it the duty of the "district attorney to prosecute in his district* * * * all *civil actions in which the United States are concerned," authorize or require him to act as attorney for the plaintiff in this action.* This section is general in its terms and necessarily qualified and restrained by the sections above cited [i.e., the Informer Act], which relate to the commencement and conduct of this particular action. For that matter the United States is concerned in all *qui tam* actions, whether brought in its own name or that of a private person, because it is entitled to a share of the penalty or forfeiture that may be recovered therein. But the rule of law is, and the practice always has been, that a *qui tam* action is the action of the party who brings it, and the sovereign, however much concerned in the result of it, has no right to interfere with the conduct of it, except as specially provided by statute. [Emphasis added.]

Section 5 of the Informers Act instructed the U.S. attorneys "to be diligent in inquiring into *any* violation of the provisions of this act * * * and to cause [persons liable to suit] to be proceeded against." [20] The court, nevertheless, held that the private citizen could bring a *qui tam* action to enforce the act and that the U.S. attorney could not interfere with this action.

Thus, in light of the *Griswold* opinion, section 413 of the Refuse Act of 1899, directing the U.S. attorneys "to vigorously prosecute all offenders," does not bar the private citizen from hiring his own counsel and bringing a *qui tam* action. Nor does this language of section 413 authorize the U.S. attorneys to assume control of civil litigation begun by the citizen to recover the penalty provided in section 411.

IX. Public Policy Arguments Strongly Favor the Right of the Private Citizen To Bring A *Qui Tam* Action Under the Refuse Act

The Refuse Act of 1899 prohibits the discharge or deposit into the navigable waters of the United States of "refuse matter of any kind * * * other than that flowing from streets and sewers and

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[19] Provision in current law similar to R.S. 771 is sec. 4(c), 80 Stat. 618, 28 U.S.C. 547(2).
[20] Sec. 5, 12 Stat. 696 (emphasis added).

passing therefrom in a liquid state," unless such discharge or deposit is done in accordance with a permit from the Corps of Engineers. The Supreme Court has defined "refuse" as including "all foreign substances and pollutants" apart from municipal sewage.[21] Other language of the act has been interpreted with similar broad scope.[22]

The usefulness of the Refuse Act has been substantially increased by liberal judicial interpretation over the years together with the passage of many statutes and the issuance of Executive orders designed to minimize pollution, maximize recreation, protect esthetics, and preserve natural resources to enhance the public interest rather than private gain.[23] It is apparent that the Refuse Act is a broad charter of authority and a powerful legal tool for preventing the pollution of all navigable waters.

Its present usefulness is not reduced by more recent water pollution control legislation. The Federal Water Pollution Control Act specifically states (33 U.S.C. 466k) that it "shall not be construed as (1) superseding or limiting the functions, under any other law, of * * * any other officer or agency of the United States, relating to water pollution, or (2) affecting or impairing the provisions of * * * sections 13 through 17 of" the River and Harbor Act of 1899, i.e., the Refuse Act.

However, the executive branch of the Federal Government has indicated it does not intend to enforce the Refuse Act against many polluters. In response to inquiries to Attorney General John Mitchell from Congressman Henry S. Reuss, chairman of the House Conservation and Natural Resources Subcommittee, Assistant Attorney General Shiro Kashiwa wrote on June 2, 1970:

> In our opinion, it would not be in the genuine interest of the Government to bring an action under the Refuse Act to secure a criminal sanction against a company *which admittedly is discharging refuse into the navigable waters of the United States*, but which, pursuant to a program being conducted by the Federal Water Quality Administration, is spending significant amounts of money to secure the abatement of that pollution. (Emphasis added.)

The Justice Department has formalized this position in a directive to all U.S. attorneys entitled "Guidelines for Litigation Under the Refuse Act" adopted July 10, 1970.

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[21] See *United States* v. *Standard Oil Co.*, 384 U.S. 224, 230 (1966) and *United States* v. *Republic Steel Corp.* 362 U.S. 482, 490 (1960).

[22] See "Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction, and Pollution," H. Rept. 91-917, 91st Cong., 2d sess., pp. 15-16; *Zabel* v. *Tabb*, ——F. 2d——, 1 Env. Rep. 1449, No. 27555 (U.S. Ct. of App., 5th Circ., July 16, 1970).

[23] Some of these statutes and orders are:

Federal Water Power Act of 1920, as amended (16 U.S.C. 701, et. seq.);

Federal Water Pollution Control Act (33 U.S.C. 466, et seq.) as amended by Water Quality Act of 1965 (Public Law 89-234; 79 Stat. 903); Clean Water Restoration Act of 1966 (Public Law 89-753; 80 Stat. 1246); Water Quality Improvement Act of 1970 (Public Law 91-224; 84 Stat. 91);

Delaware River Basin Commission Act of Sept. 27, 1961 (Public Law 87-328; 75 Stat. 688);

Bureau of Outdoor Recreation Act of May 28, 1963 (Public Law 88-29, 77 Stat. 49; 16 U.S.C. 460 l);

Section 212, Appalachian Regional Development Act of Mar. 9, 1965 (79 Stat. 5, 16; Public Law 89-4; 40 U.S.C., App., sec. 212);

Water Resources Planning Act of July 22, 1965 (Public Law 89-80; 79 Stat. 244; 42 U.S.C. 1962a);

Section 702, Housing and Urban Development Act of Aug. 10, 1965 (79 Stat. 451, Public Law 89-117; 42 U.S.C. 3102);

Section 106, Public Works and Economic Development Act of Aug. 26, 1965 (79 Stat. 552, 554; 42 U.S.C.: 3136; Public Law 89-136);

Estuarine Study Act of Aug. 3, 1968 (Public Law 90-454; 82 Stat. 625; 16 U.S.C. 1221);

National Water Commission Act of Sept. 26, 1968 (Public Law 90-515; 82 Stat. 868; 42 U.S.C. 1962a, note)

National Environmental Policy Act of 1969 (Public Law 91-190; 83 Stat. 852);

Fish and Wildlife Act of 1956, as amended (16 U.S.C. 742a-742j);

Migratory Bird Conservation Act, as amended (16 U.S.C. 715, et seq).

Executive Order 11288 of July 2, 1966 (3 C.F.R. 423); superseded by Executive Order 11507 of Feb. 4, 1970 (35 F.R. 2573) (prescribing requirements for control and abatement of air and water pollution at Federal installations).

Executive Order 11472 of May 29, 1969 (34 F.R. 8693), as amended by Executive Order 11514 of Mar. 5, 1970 (35 F.R. 4247), (prescribing responsibilities of Federal agencies and the Council on Environmental Quality under the National Environmental Policy Act of 1969, *supra*).

The Justice Department's position is contrary to the mandate of the 1899 act which forbids discharges without a Corps permit.

If the U.S. attorney fulfills his duty to vigorously enforce the Refuse Act, the polluter who wants to continue discharging refuse will have to obtain a permit from the Corps. Section 21(b) of the Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970 (Public Law 91–224; 84 Stat. 91, 108), specifies that the applicant for such permit must first obtain a certification from the appropriate State agency that the applicant will conduct this activity "in a manner which will not violate applicable water quality standards." Thus, proper enforcement of the Refuse Act is essential to, rather than in conflict with, the Federal Government's water pollution abatement program under the Federal Water Pollution Control Act.

As noted above one reason why English Parliaments established criminal statutes authorizing *qui tam* suits was their lack of confidence in the Crown's willingness to enforce the statutes passed. Viscount Simon pithily expressed this reason during debate in Parliament in 1951 [24]:

> If we lived in an age when the authorities could be suspected of refusing, out of favouritism or fear, to prosecute a particular kind of person, it might be a very useful thing to have this machinery of the common informer to secure that in proper cases a man would be brought to book * * *

In this country today, when the Justice Department is apparently reluctant to vigorously enforce the Refuse Act, the citizen informer who brings a civil *qui tam* suit under that Act performs a very useful and essential function.

Even if the Department of Justice did "vigorously prosecute" violators of the Refuse Act, as it is directed to do by section 17 of the act, the citizen informer could substantially aid the Government. For the Corps of Engineers, which investigates alleged violations of the Refuse Act, and the Department of Justice, which prosecutes violators, do not have the funds and personnel to do battle in court with the thousands of industries in this country which are unlawfully discharging wastes into our navigable waters without a permit from the Corps of Engineers. The Corps has testified before Congress regarding its lack of funds and personnel.[25] *Qui tam* statutes were first passed in circumstances such as this, where the police and prosecutorial forces of the government are inadequate to secure proper enforcement of the law.

The active participation of America's citizenry can help to bring a halt to the degradation and irrevocable alteration of our waters and environment.

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[24] See footnote 4.

[25] See Corps of Engineers fact sheet of Aug. 4, 1970, set forth in Cong. Rec. of Aug. 24, 1970 (p. S 13993), and referred to in Senator Hart's letter of Aug. 7, 1970, appended to speech of Congressman Henry S. Reuss in Cong. Rec. of Aug. 14, 1970 (p. H 8362 at p. H 8364).

X. At a Time When the Federal Courts Are Increasingly Willing To Allow Citizens To Act as Private Attorneys General To Enforce Policies of Various Federal Statutes Bearing on Environmental Questions, the Courts Should Not Hesitate To Allow Citizens to Bring *Qui Tam* Actions Under the Refuse Act

In recent years the Federal courts have shown an increased willingness to allow suits by private citizens interested in seeing that the policies of various Federal statutes bearing on environmental questions are properly carried out.

In *Scenic Hudson Preservation Conference* v. *FPC*, 354 F. 2d 608 (C.A. 2, 1965), several conservation organizations, together with three towns, petitioned the second circuit court of appeals to set aside orders of the Federal Power Commission authorizing Consolidated Edison Company of New York to construct a pumped storage hydroelectric project on the west side of the Hudson River at Storm King Mountain in Cornwall, N.Y. The court, in allowing the citizen organizations the right to challenge the FPC's decision that construction of the pumped storage plant was consonant with the policies of the Federal Power Act, stated:

> In order to insure that the Federal Power Commission will adequately protect the public interest in the esthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved" parties under sec. 313(b) [of the Federal Power Act, 16 U.S. Code sec. 825(b)]. We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.[26]

Subsequently, in *Road Review League, Town of Bedford et al* v. *Boyd*, 270 F. Supp. 650 (S.D.N.Y., 1967), a Federal district court upheld the right of the Road Review League, a nonprofit association concerned with community problems (primarily those involving the location of highways), the town of Bedford, and others to challenge the location of an interstate highway. In allowing the citizens and citizen groups the right to question whether the Secretary of Transportation had followed the directive in the Federal Highways Act (23 U.S.C. 138) to "use maximum effort to preserve Federal, State, and local government parklands and historic sites and the beauty and historic value of such lands and sites," the court stated:

> towns, local civic organizations, and conservation groups are to be considered "aggrieved" by agency action which allegedly has disregarded their interests. I see no reason why the word "aggrieved" should have a different meaning in the Administrative Procdure Act from the meaning given to it under the Federal Power Act.[27]

In *Gandt et al.* v. *Hardin* (N.D. Mich., N. Div., Dec. 11, 1969), civil action 1334, the Federal district court followed the *Scenic*

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[26] *Scenic Hudson Preservation Conference* v. *FPC*, 354 F. 2d 608, 616 (C.A. 2, 1965), cert. denied, 384 U.S. 941. In *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 830 (Mar. 3, 1970), the Supreme Court, citing the *Scenic Hudson* case, noted that the legal interests of a person aggrieved by agency action within the meaing of a relevant statute to whom the Administrative Procedure Act (5 U.S. Code 702) grants the right of judicial review "may reflect aesthetic, conservational, and recreational as well as economic values." See also Kenneth Culp Davis, "The Liberalized Law of Standing," 37 Univ. Chi. L. Rev. 450 (Spring 1970); *Environmental Defense Fund* v. *Department of Health, Education, and Welfare*, ——— F. 2d ——— (No. 23,812, C.A. D.C. May 28, 1970), 1 Env. Rep. 1341; *Environmental Defense Fund* v. *Hardin*, ——— F. 2d ——— (No. 23,813, C.A. D.C. May 28, 1970), 1 Env. Rep. 1347; *Citizens Committee for the Hudson Valley* v. *Volpe*, 425 F. 2d 97 (C.A. 2d Apr. 16, 1970).

[27] 270 F. Supp. at p. 661. The court also pointed out (p. 661) that the "plaintiffs were not [as in *Scenic Hudson*] previously parties in a formal sense to any administrative proceedings, although as a practical matter they participated actively in attempting to secure an administrative determination favorable to their interest."

Hudson and *Road Review League* precedents, holding that conservation organizations and private citizens (nonabutting landowners) could challenge the Forest Service's decision to change the Sylvania portion of the Ottawa National Forest in Michigan from a primitive forest area into a managed recreation area.

In *Citizens to Preserve Overton Park, Inc. et al.* v. *Volpe, et al.*, 309 F. Supp. 1189 (W.D. Tenn., W.D., Feb. 26, 1970), citizens of Memphis organized as the Citizens to Preserve Overton Park, Inc., together with two national conservation organizations and two individual residents of Memphis, sought to enjoin the Secretary of Transportation from releasing Federal funds to the highway department of the State of Tennessee for construction of part of an expressway in the city of Memphis through Overton Park, a zoological garden and recreational area. The court held that the plaintiffs had the right to question whether the Secretary's planned action accorded with policies and procedures set forth in the Department of Transportation Act, 49 United States Code 1653(f) and 23 United States Code 128, 138, and a memorandum of the Bureau of Public Roads.[28]

Given the Federal courts' recent willingness to entertain civil suits by citizens acting as private attorneys general to enforce the policies of Federal statutes applicable to projects significantly affecting this Nation's natural environment, the courts should readily allow citizens to bring civil *qui tam* actions to implement the prohibitions of the Refuse Act.

XI. The *Pressprich* Case

In *United States ex rel. Pressprich Son Co.* v. *James W. Elwell & Co.*, 250 Fed. 939 (CA 2d, 1918), a suit in admiralty was instituted to recover a penalty for violation of sec. 5 of the Carriage of Goods by Sea Act (Harter Act, 49 U.S.C. 194), which provided:

> For a violation of any of the provisions of sections 190–193 of this title the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading provided for, shall be liable to a fine not exceeding $2,000. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

Judge Learned Hand, speaking for a unanimous court of appeals, stated (250 Fed. at p. 941):

> We think that the District Court had no jurisdiction in admiralty over the collection of a penalty by proceedings in personam. * * * Nevertheless, we have no doubt that the fine might be collected by a *qui tam* action in the District Court * * * and that the jurisdiction of the District Court over the subject-matter was, therefore, complete. It is quite true that an indictment will also lie under the Harter Act * * *, but our decision in *United States* v. *Atlantic Fruit Co.* * * * is to be taken as holding that the United States has the option in such cases of suing in what would have been in earlier times an action of debt, despite the unliquidated character of the recovery. We see no reason to make a distinction between an action by the United States to collect the fine and an action *qui tam* like that at bar.

The language of section 5 entitling the informer to sue *qui tam* for one-half the penalty is essentially the same as in the Refuse Act.

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[28] A similar case is *Nashville I–40 Steering Committee* v. *Ellington*, 387 F. 2d 179 (C.A. 6, 1967), cert. denied, 390 U.S. 921, 88 S. Ct. 857 (1968). See also *Izaak Walton League* v. *Hardin*, —— F. Supp. ——, 1 E.R. 1401 (No. 5–69 Civ. 70; June 1, 1970).

XII. Outline of Citizen Action Under the 1899 Refuse Act

1. *What is Prohibited and Where.*—The 1899 Refuse Act is a powerful, but little used, weapon in our Federal arsenal of water pollution control enforcement legislation. Section 13 of the act (33, U.S. Code 407) prohibits *anyone*, including any individual, corporation, municipality, or group, from throwing, discharging, or depositing any refuse matter of any kind or type from a vessel or from a shore-based building, structure, or facility into either (a) the Nation's navigable lakes, rivers, streams, and other navigable bodies of water, or (b) any tributary to such waters from which the refuse floats or is washed into the navigable water, unless he has first obtained from the Corps of Engineers a permit to do so. Courts have held that streams and bodies of water which are sufficient, at high water, to float boats, canoes, or rafts of logs in commerce are navigable waters. This section of the Act applies to inland waters, coastal waters, and waters that flow across the boundaries of the United States into Canada and Mexico.

The term "refuse" has been broadly defined by the Supreme Court to include all foreign substances and pollutants. It includes solids, oils, chemicals, and other liquid pollutants. The only materials excepted from this general prohibition are those flowing from streets, such as from storm sewers, and from municipal sewers, which pass into a waterway in liquid form.

In addition, the section prohibits anyone, without a corps permit, from placing on the bank of any navigable waterway, or of any tributary to such waterway, any material that could be washed into waterways by ordinary or high water, or by storms or floods, or otherwise, and would result in the obstruction of navigation.

2. *Permits to Discharge.*—Section 13 of the act authorizes the Secretary of the Army, acting through the Corps of Engineers, to permit the deposit of material into navigable waters under conditions prescribed by him. Regulations governing the issuance of permits are published in title 33 of the Code of Federal Regulations, part 209.

3. *Penalty for Violations.*—Violations of the Refuse Act are subject to criminal prosecution and penalties of a fine of not more than $2,500 nor less than $500 for each day or instance of violation, or imprisonment for not less than 30 days nor more than 1 year, or both a fine and imprisonment (33 U.S. Code 411). A citizen who informs the appropriate U.S. Attorney about a violation and gives sufficient information to lead to a conviction is entitled to one-half of the fine set by the court.

4. *Procedure for Citizen to Seek Enforcement of the Refuse Act.*—

A. The citizen having information about any discharge of refuse into navigable waters or tributaries thereof should first ascertain whether the discharge is authorized by corps permit. If a permit is in effect, the citizen should ascertain whether the permittee is complying with its terms. This information can be obtained from the appropriate office of the Corps of Engineers with jurisdiction over the particular waters into which the discharge occurs. Such information is available under the Freedom of Information Act (5 U.S. Code 552; Public Law 90–23).

B. The Refuse Act specifically directs that the appropriate U.S. attorney shall "vigorously prosecute all offenders" (33 U.S.C. 413). In order to do so he needs adequate information to prove that the discharges were made and that they violated the law or the condi-

tions of the permit. Furthermore, the statute specifies that the citizen's right to one-half of the fine is conditioned on his providing to the U.S. attorney information sufficient to lead to a conviction of the violator.

In providing information to the U.S. attorney, the citizen should make a detailed statement, sworn to before a notary or other officer authorized to administer oaths, setting forth:

1. The nature of the refuse material discharged.
2. The source and method of discharge.
3. The location, name, and address of the company, person, or persons causing or contributing to the discharge.
4. The name of the waterway into which the discharge occurred.
5. Each date on which the discharge occurred.
6. The names and addresses of all persons known to the citizen, including himself, who saw or knows about the discharges and could testify about them if necessary.
7. A statement that the discharge is not authorized by corps permit. If a permit was granted, the statement should set forth facts showing that the alleged violator is not complying with one or more of the conditions of the permit.
8. The navigability of the waterway at the area of discharge. If the waterway into which the discharge occurred is not commonly known as "navigable," or is a tributary to a navigable waterway, the statement should set forth facts to show its status as a navigable waterway or tributary thereof.

Where possible, photographs should be taken, and samples of the pollutants or foreign substance collected in a clean jar which is then sealed. These should be labeled with information showing who took the photograph or sample, where, and when, and how, and who retained custody of the film or jar.

Where the material is liable to float or to be washed into the waterway from its bank, in violation of the act, similar information should also be provided to the U.S. attorney.

C. When a citizen furnishes information to the U.S. attorney for the purpose of aiding in the prosecution of violators of the Refuse Act for past discharges, the citizen may also point out to the U.S. attorney that injunctions may be sought under the same act (i) to preclude future discharges; (ii) to require the dischargers to remove pollutants already discharged; and (iii) to require the discharger to apply to the Corps of Engineers for a permit unless he promptly ceases all discharges.

5. *Qui tam suits.*—As shown in this staff memorandum, the informer has a financial interest in the fine and therefore can institute a *qui tam* suit to recover it. The U.S. district courts have exclusive jurisdiction to hear and decide such a suit, 28 U.S.C. 1355. In such suit, the citizen plaintiff must prove that the alleged violator did, in fact, violate the Refuse Act. Since the suit is a civil action, the proof of such violation need be only by a preponderance of the evidence, rather than beyond a reasonable doubt as is required in a criminal case. *United States* v. *Regan*, 232 U.S. 37 (1914); *Hepner* v. *United States*, 213 U.S. 103 (1909): *United States* v. *Zucker*, 161 U.S. 475 (1896).

If the citizen loses his *qui tam* suit, he would have to bear his lawyer's fees and costs, and may be required to pay all court costs, including such costs of the defendants as the judge may include within the taxable court costs.

STAFF MEMORANDUM B

Issue 1: Whether *Qui Tam* Action Can Be Used To Implement a Penal Statute Which Gives a Share of the Penalty to the Informer but Does Not Specifically Authorize His Suit To Collect That Share

I. Cases Supporting *Qui Tam* Action

A. CASES HOLDING *QUI TAM* ACTION CAN BE BROUGHT

1. *United States* v. *Laeseki*, 29 F. 699 (N.D. Ill., 1887). Indictment by United States to enforce R.S. 5188.

Statute construed: (R.S. 5188): "It shall not be lawful to design, engrave, print or in any manner make or execute, or to utter, issue, distribute, circulate, or use, any business or professional card, notice, placard, circular, handbill or advertisement, in the likeness or similitude of any circulating note, or other obligation or security, of any banking association organized or acting under the laws of the United States, which has been or may be issued under this title, or any act of congress, or to write, print, or otherwise impress upon any such note, obligation, or security, any business or professional card, notice, or advertisement of any matter or thing whatever. *Every person who violates this section shall be liable to a penalty of one hundred dollars, recoverable, one-half to the use of the informer.*" (Emphasis added.)

Holding: Penalty set forth in Rev. Stat., sec. 5188 is recoverable *only* by a *qui tam* action, so indictment by United States does not lie.

Reasoning: "[W]hen the statute creates the offense, prescribes the penalty, and the mode of enforcing it, it would seem that the penalty can only be enforced in the mode provided by the statute." [1]

"These statutes, in effect, say to all persons: 'If you print or stamp upon a United States note or bond, or a national bank-note, any business card or advertisement, you are liable to a penalty of one hundred dollars, recoverable at the suit of an informer,'—and do not say that the offender can be indicted by a grand jury, and tried as a criminal." [2]

2. *Chicago and Alton R.R.* v. *Howard*, 38 Ill. 415 (Sup. Ct. Ill. 1865). Informer's action under statute requiring railroads to blow whistle or ring bell at or near crossings.

Statute construed: A bell of at least 30 pounds weight, or a steam whistle, shall be placed on each locomotive engine, and shall be rung or whistled, at the distance of at least 80 rods from the place where the said road shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, *under a penalty of $50 for each neglect*, to be paid by the corporation owning the railroad, *one-half thereof to go to the informer*, and the other half to the State, and also be liable for all damages which shall be sustained by any person by reason of neglect. (Sec. 38, Illinois Act of November 5, 1849) (emphasis added). "All penalties imposed by this act *may* be sued for by the District Attorney, and in the name of the people of the State of Illinois * * *" (Sec. 42, Illinois Act of November 5, 1849) (emphasis added).

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[1] 29 Fed. at p. 699.
[2] 29 Fed. at p. 701.

Holding: Informer can bring *qui tam* action to collect penalties for alleged violations of section 38.

Reasoning: "It is declared by the 42d section that all penalties imposed by the act may be sued for by the State's Attorney, and in the name of the people of the State. It is insisted that the word *may* in this act must be construed to mean *shall*. That such is its meaning in all cases where the public, alone, have an interest, or the duty is imposed upon a public officer, there seems to be no question * * *

* * * * * *

"If the 42d section had contained the only provision for bringing suit then it would have to be brought by the State's attorney, and in the name of the people. But under the 38th section a common informer may sue, in the common law mode, in his own name, as well as on behalf of the people." [3]

B. OTHER CASES SUPPORTING *QUI TAM* ACTION

1. *U.S. ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943). Informer's action under R.S. 5438, 3490–3493.

Statutes construed: R.S. 5438. "Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, 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 commits other fraudulent acts against the Government] shall be imprisoned at hard labor for not less than 1 nor more than 5 years, or fined not less than $1,000 nor more than $5,000."

R.S. 3490. "Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section [5438] shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

R.S. 3491. "* * * Such suit may be brought and carried on *by any person, as well for himself as for the United States;* the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, * * *." (Emphasis added.)

SEC. 3492. "It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several territories, to be diligent in inquiring into any violation of the provisions of section 3490 by persons liable to such suit, and found within their respective districts or territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of $2,000, and twice the amount of the damages sworn to in the affidavit of the persons bringing the suit."

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[3] 38 Ill. at pp. 417–18.

SEC. 3493. "The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant * * *: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States."

Holding: Collusive bidding for P.W.A. contracts with local governmental units in Allegheny County, Pa., constituted violation of R.S. 5438. Informer could bring civil suit under the statute, even though he relied for his information on an indictment previously filed by the Federal Government wherein the defendants pleaded nolo contendere.

Reasoning: "Statutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue. *Adams* v. *Woods*, 2 Cranch 336." [4]

2. *United States* v. *Stocking*, 87 F. 857 (D. Mont., 1898).

Indictment by United States to enforce R.S. 2148.

Statutes Construed: R.S. 2148 (Act of August 18, 1856): "That if any person who has been removed from the Indian country under the provisions of the tenth section of the act of congress approved the 30th of June, 1834 * * * shall thereafter at any time return or be found within the Indian territory, such offender shall forfeit and pay the sum of one thousand dollars."

Under the same title (28) as R.S. 2148 was R.S. 2124, formerly the act of June 30, 1834, sec. 27, 4 Stat. 733, which stated:

"That all penalties which shall accrue under [this title] shall be sued for and recovered in an action of debt in the name of the United States before any court having jurisdiction of the same in any state or territory in which the defendant shall be arrested or found, one half to the use of the informer, and the other half to the use of the United States; *except where the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.*" [Emphasis added.]

Holding: Indictment valid. R.S. 2124 did not limit United States to civil debt action to recover penalty set forth in R.S. 2148.

Reasoning: Act of August 18, 1856, prior to incorporation into the Revised Statutes, was enforceable by action of debt, information, or indictment. Inclusion of act of June 30, 1834, together with act of August 18, 1856, under title 28 of Revised Statutes and change of language of act of June 30, 1834, from "That all penalties which shall accrue under this *act* * * *" to "That all penalties which shall accrue under this *title*" did not result in limiting the remedies available to the United States for recovery of the penalty provided by R.S. 2148. In revising and consolidating the laws, Congress here did not clearly express an intent to change the procedures for enforcement of R.S. 2148 (act of August 18, 1856).

The court noted that R.S. 2124 not only refers to civil actions by the United States, but also authorizes *qui tam* actions by informers.

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[4] 317 U.S. at p. 541, footnote 4. See also 28 U.S.C. 2461(a): "Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress, without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action." In adding sec. 2461(a) to the Judicial Code in 1948, the code revisers cited *U.S. ex rel. Marcus* v. *Hess, supra.*

"Under the provisions of said section 2124, an informer is entitled to one-half of the penalty sued for, unless the action is first prosecuted by the United States. *Any words of a statute which show that a part of the penalty named therein shall be for the use of an informer will entitle him to maintain an action therefore if he complies with the conditions of the statute.*" [5]

3. *Bradlaugh* v. *Clarke*, 8 App. Cas. 354, 1 Eng. Rul. Cas. 667 (1883). Informer's suit for penalties imposed by the statute 29 and 30 Vict., c. 19 upon a member of House of Commons sitting and voting without having taken the oath prescribed by the statute.

Statute construed: "If any member of the House of Peers votes * * * in the House of Peers, or sits as a Peer during any debate in the said House, without having made and subscribed the oath hereby appointed, he shall for every such offense be subject to a penalty of £500, to be recovered by action in one of Her Majesty's superior courts at Westminster; and if any member of the House of Commons votes as such in the said House, or sits during any debate after the Speaker has been chosen, without having made and subscribed the oath hereby appointed, he shall be subject to a like penalty for every such offense." (29 and 30 Vict. C. 19)

Holding: Informer had no right of action under this statute. (It should be noted that the statute says nothing about any part of the penalty being payable to the informer.)

Reasoning: "It was acknowledged [by the lower court], as an incontestable proposition of law, that "where a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offense is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it. * * * It rests on a very plain and clear principle. No man can sue for that in which he has no interest; and a common informer can have no interest in a penalty of this nature, *unless it is* expressly, or *by some sufficient implication*, given to him by statute. The Crown, and the Crown alone, is charged generally with the execution and enforcement of penal laws enacted by public statutes for the public good, and is interested, jure publica, in all penalties imposed by such statutes, and therefore may sue for them in due course of law, where no provision is made to the contrary. The *onus* is upon a common informer to show that the statute has conferred upon him a right of action to recover the particular penalty which he claims.

"*I do not agree * * * that for such a purpose express words are necessary. If an intention to confer such a right ought to be implied from what the legislature has said, upon any sound principle of construction, that implication cannot, in my opinion, be excluded by reasons derived from the special prerogatives of the Crown.*

"Express words, giving a right of action to anyone who may sue for the penalty, are certainly not found in this statute. Nor is there anything from which, upon ordinary principles of construction, such a right of action can be implied * * *." [6]

4. *Colburn* v. *Swett*, 42 Mass. 232 (1840). Informer's action under Mass. Stats. 1833, ch. 151, as amended by Mass. Stats. 1837, ch. 99.

Statute construed.—"Any person, who shall keep, have or possess any gunpowder within the city of Boston, contrary to the provisions

[5] 87 Fed. at p. 861 (emphasis added).
[6] 1 Eng. Rul. Cas. at pp. 670–671 [emphasis added].

of the [1833 act] or to the rules and regulations of the board of engineers therein mentioned, or who shall sell any gunpowder in said city, without having a license therefor * * * shall forfeit a sum not less than $100, and not exceeding $500, for each offense." (Sec. 1, Mass. Stat. 1837, ch. 99.)

"The several fines, penalties, and forfeitures, mentioned in this act, and in the [1833 act] shall enure to the sole use of the board of engineers of the fire department of said city of Boston * * *." (Sec. 2, Mass. Stat., 1837, ch. 99.)

Holding.—Informer cannot bring action to collect the penalty provided in above statute.

Reasoning.—A section of the 1833 statute giving a moiety of all fines, penalties, or forfeitures "to the use of any person or persons who shall prosecute for the same" had been repealed by the 1837 statute, thus destroying the basis for an informer action.

"Whether an action would lie in the name of the engineers [of the city of Boston] we give no opinion. *It seems to be held, that when a penalty is given wholly to one or more persons, an action will lie for it in the name of those persons, although no express authority to sue for it is contained in the statute.*" [7]

5. *Adams, Qui tam* v. *Woods*, 2 U.S. (2 Cr.) 336 (1805). This case was cited in footnote 4 of *U.S. ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541 (1942), which stated: "Statutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the [*qui tam*] action are construed to authorize him to sue." The *Adams* case involved a *qui tam* civil action by an informer under section 2 of the act of Congress of March 22, 1794 (1 Stat. 347).

Statute construed.—"Sec. 2. That all and every person, so building, fitting out, equipping, loading, or otherwise preparing, or sending away, any ship or vessel, knowing or intending that the same shall be employed in such [slave] trade or business, contrary to the true interest and meaning of this act, or any ways aiding or abetting therein, shall severally forfeit and pay the sum of $2,000, one moiety thereof to the use of the United States, and *the other moiety thereof to the use of him or her who shall sue for and prosecute the same.*" [Emphasis added.]

"[N]or shall any person be prosecuted, tried or punished for any offense not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within 2 years from the time of committing the offense, or incurring the fine or forfeiture aforesaid * * *." (Sec. 32, act of Congress of April 30, 1790, 1 Stat. 119.)

Holding.—Section 32 of act of April 30, 1790, barred a qui tam civil action under section 2 of the act of March 22, 1794, not brought within the 2-year period of limitations.

Reasoning.—"Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt, as well as by information; and to declare that the information was barred, while the action of debt was left without limitation, would be to attribute a capriciousness on this subject to the legislature, which could not be accounted for; and to declare that the law did not apply to cases on which an

[7] 42 Mass. at pp. 234–235. [Emphasis added.]

action of debt is maintainable, would be to overrule express words, and to give the statute almost the same construction which it would receive, if one distinct member of the sentence [i.e., "no person shall be prosecuted, tried or punished"] was expunged from it. *In this particular case, the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently either debt or information would lie.*[8] It would be singular, if the one remedy should be barred and the other left unrestrained".[9]

The 1794 act discussed in the *Adams* case did not specifically indicate whether the informer's suit should be a civil action or a criminal information. Chief Justice Marshall read the act to authorize either procedure.

II. Distinguishable Case Containing Unfavorable Language

Wheeler v. *Goulding*, 79 Mass. 539 (1859). Petition by informer to be admitted as party to carry forward suit initiated by treasurer of city of Worcester against alleged violator of Mass. Stat., 1843, ch. 98.

Statute construed.— "If any shareholder shall fraudulently transfer any share in either of the corporations mentioned in the first section of this act, for the purpose of avoiding taxation, he shall forfeit one-half of the par value of the shares thus transferred, *to be recovered* in any court of competent jurisdiction, *by the treasurer of the city or town* in which such shareholder may reside; one-half of the amount so recovered for the use of the town, and the other half for the use of the person or persons furnishing the necessary evidence in the case." (Sec. 3, Mass. Stat, 1843, ch. 98.) (Emphasis added.)

Holding.—Informer cannot join as party to prosecute violation of Mass. Stat., 1843, ch. 98. Only treasurer of city of Worcester can sue for penalty provided by the statute.

Reasoning.—"It is perfectly clear * * * that no other person but the treasurer of the city of Worcester could sue for this penalty. We are all of opinion that, except so far as he may be bound to act under such orders and directions of the city government, or is disposed to exercise his discretionary power, in subordination to such directions, not only the right to institute such suit is vested in such treasurer, but the right to prosecute and discontinue it * * *. The right of the petitioner does not arise until some penalty has been recovered."[10]

Dicta.—"This action is quite distinguishable from a *qui tam*. That is a well established remedy, known to and regulated by the common law, as a mode of securing the execution of penal laws, *where it is expressly given by statute*, * * * *But it can be used only in cases where it is expressly given.*"[11]

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[8] At common law an *informer* could bring either a civil action *or* criminal information qui tam. See Edward Deacon, *A Digest of the Criminal Law of England*, vol. 1 (1831): "Informations are of two sorts; first, those which are partly at the suit of the king, and partly at that of a subject; and, secondly, such as are only in the name of the king. The former * * * are usually brought before justices of the peace upon penal statutes, which inflict a penalty upon conviction of the offender—one part to the use of the king, and another to the use of the informer—and are, in fact, a sort of *qui tam action*, only carried on by a criminal, instead of a civil process" (at p. 671).

[9] 2 U.S. at p. 341 (emphasis added).

[10] 79 Mass. at pp. 542–543.

[11] 79 Mass. at p. 542 (emphasis added).

III. Cases Holding *Qui Tam* Action Does Not Lie

1. *Omaha and Republican Valley Railway Co.* v. *Hale*, 45 Neb. 418 (1895). Informer's *qui tam* action under section 104, Compiled Statutes of Nebraska (1893).

Statutes construed.—"A bell of at least 30 pounds weight or a steam whistle shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least 80 rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of $50 for every neglect * * * one-half thereof to go to the informer, and the other half to this state * * *" (Sec. 104, ch. 16, Compiled Statutes of Nebraska, 1893).

"If any informer, under a penal statute, to whom the penalty, or any part thereof, if recovered, is given, shall dismiss his suit or prosecution, or fail in the same, he shall pay all costs accruing on such suit or prosecution, unless he be an officer whose duty it is to commence the same." (Sec. 617 of Nebraska Code of Civil Procedures.)

Holding.—Informer cannot bring *qui tam* action under above statute.

Reasoning.—"[The] authorities, we think, without serious conflict, recognize this rule, an informer cannot maintain an action in his own name to recover a penalty unless authorized so to do by statute. The statute on which this action is based does not expressly authorize the penalty denounced by said statute to be sued for and recovered by an informer, nor does the statute contain any language from which such an authority may be inferred. The act provides that the penalty shall be paid by the corporation owning the railroad. Paid to whom? We think, paid to the State" * * *[12]

The court further held that section 617 of the Nebraska Code of Civil Procedures provided no independent basis for the informer's *qui tam* action.

2. *Smith.* v. *Look*, 108 Mass. 139 (1871). Informer's *qui tam* action under Mass. Stat., 1869, ch. 384.

Statute construed.—"One-half of the money recovered as a penalty, in any case arising under the laws relating to inland fisheries, shall be paid to the person making the complaint in the case in which the same is recovered, and the remainder to the Commonwealth." (Sec. 33; Mass. Stat., 1869 ch. 384.)

Holding.—Informer cannot maintain *qui tam* action under above statute.

Reasoning.—(After reviewing numerous Massachusetts statutes): "In the few cases in which any special provision is made for * * * disposition of * * * forfeitures [to someone other than the Commonwealth], the language is explicit, and the phraseology is, 'recoverable in an action of tort to the use of the party suing therefor,' or 'to the use of any person suing for the same,' or 'recoverable in an action of tort by selectmen to the use of the town or city,' etc. We find no case in which a right of action to any private person in his own name is given in terms less explicit * * *."

"The statute in question does not in express terms give a right to any private prosecutor to bring an action in his own name, nor does it, in our judgment, by any necessary implication. * * * A *qui tam*

[12] 45 Neb. at p. 423.

action is a well established remedy, which is to be resorted to only in cases where it is expressly given." [13]

3. *O'Kelly* v. *The Athens Manufacturing Co.*, 36 Ga. 51 (1876). Informer's *qui tam* action under Act of December 9, 1862, Georgia Laws.

Statute construed: Section 1: "That all companies chartered under the laws of this State for the manufacture of cotton or woolen goods, or cotton yarn or thread, shall be required to have published twice during each year, in a public gazette nearest to their respective places of business, a list containing the names of each and every stockholder, with the amount of stock owned by him or her.

Section 2: "Any such corporation failing to have such publication made, shall forfeit, for each failure to have published, the sum of $5,000, to be recovered by action in the superior court of the county in which the business of such company or companies may be located, one-half to go to the informer, and the other half to go to the county where suit may be instituted." (Act of Dec. 9, 1862, Georgia Laws.)

Holding: Qui Tam action does not lie under above statute.

Reasoning: "[W]e have a distinct statutory provision in our code, section 3178, which prescribes that in penal actions allowed in pursuance of public justice under particular laws, if no special officer is authorized by such particular laws to be *the plaintiff* therein, the State, or the Governor,[14] or the Attorney or Solicitor General, may be the plaintiff * * * The suit here was instituted since this enactment. Neither the pleading nor testimony show O'Kelly to be such an officer, *or to be authorized by the act which imposed the forfeiture* sued for, to be the plaintiff in the suit." [15]

Issue 2: Whether the Informer's *Qui Tam* Action Is Barred Because 33 U.S.C. 413 States That "The Department of Justice Shall Conduct the Legal Proceedings Necessary To Enforce the [Refuse Act]" and "It Shall Be the Duty of U.S. Attorneys To Vigorously Prosecute All Offenders Against the Same * * *"

I. Case Supporting Argument That Section 413 Does Not Bar the *Qui Tam* Action

United States v. *Griswold*, 5 Sawyers 25, Fed. Cas. No. 15,266 (D. Oregon, 1877). Informer's suit under Informer's Act of March 2, 1863, R.S. 5438, 3490–3493.

Statutes construed: See R.S. 5438, 3490–93, set forth in discussion of *U.S. ex rel. Marcus* v. *Hess, supra.*

Holding; Plaintiff/informer's complaint did not have to be signed by the U.S. attorney. Statutory direction to the U.S. attorney to be diligent in enforcing the Informer's Act and to prosecute all civil actions in which the United States is concerned did not authorize the U.S. attorney to interfere with informer's action.

Reasoning: "When, as in this case, a statute imposed a penalty for the commission of an act, and also gave such penalty in part to whoever would sue for it, and the remainder to the king or other

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[13] 108 Mass. at p. 141 (emphasis added).

[14] The Governor was allowed under sec. 3178 to sue on behalf of the informer and the county school fund in *McDaniel, Governor* v. *The Gate City Gas Light Co.*, 79 Ga. 58 (1887).

[15] 36 Ga. at p. 53 (emphasis added).

public use, the action to recover such penalty, if brought by a private person, was brought in his own name and subject to his control. Although a judgment obtained therein was for the benefit of the king or other public use as well as the plaintiff, yet the action was, to all intents and purposes, the private action of the latter. 3 Blackstone, Commentaries 160".[16]

The court also stated: "For all purposes, except the discontinuance of the action, the attorney employed by the informer to commence and conduct the same is the attorney of the United States therein. *Neither does the fact that the district attorney is required to be diligent to enforce the statute against persons violating it, make him the attorney of the United States in that action* * * * [W]hichever—the informer or the district attorney—first commences an action for a particular violation of the statute, thereby excludes the other from so doing".[17]

The court concluded: "*Neither does the provision in section 771 of the Revised Statutes which makes it the duty of the 'district attorney to prosecute in his district * * * all civil actions in which the United States are concerned,' authorize or require him to act as attorney for the plaintiff in this action.* This section is general in its terms and necessarily qualified and restrained by the sections above cited [i.e., the Informer Act], which relate to the commencement and conduct of this particular action. For that matter the United States is concerned in all *qui tam* actions, whether brought in its own name or that of a private person, because it is entitled to a share of the penalty or forfeiture that may be recovered therein. *But the rule of law is, and the practice always has been, that a qui tam action is the action of the party who brings it, and the sovereign, however much concerned in the result of it, has no right to interfere with the conduct of it, except as specially provided by statute*".[18]

II. Cases Which Bar *Qui Tam* Action but Which Are Distinguishable

1. *Williams* v. *Wells Fargo Co.*, 177 Fed. 352 (C.A. 8, 1910), Informer action under R.S. 4059.

Statutes construed: "Unless a different disposal is expressly prescribed, one-half of all penalties and forfeitures imposed for violations of law affecting the [Post Office] Department, its revenues or property, shall be paid to the person informing and prosecuting for the same * * * (R.S. 4059).

"[A]ll suits arising under the postal laws, shall be brought *in the name of the United States*. (R.S. 919) (emphasis added).

"The Sixth Auditor [of the Treasury] shall superintend the collection of * * * *all* penalties and forfeitures imposed for *any* violation of the postal laws * * * and take all such other measures * * * to enforce * * * the recovery of such penalties and forefeitures" (R.S. 292). (Emphasis added.)

Holding: R.S. 919 and 292 evince congressional intent that only the United States can bring actions to enforce the postal laws. Informer's *qui tam* action, therefore, does not lie.

Reasoning: "[W]hile the language employed in section 4059, 'one-half to the use of the person informing and prosecuting for the same,' would, in the absence of any statutory provision to the contrary, by

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[16] 26 Fed. Cas. at p. 44.
[17] 26 Fed. Cas. at p. 44 (emphasis added).
[18] 26 Fed. Cas. at p. 44 (emphasis added).

necessary implication, authorize the informer to bring and maintain this action as a private citizen in his own name and to the use of himself and the government, yet, as has been seen, this is beyond all peradventure a suit to recover a penalty arising under the postal laws as provided in section 919 above quoted, and as that section forms a part of the procedure act in the federal courts, and as it in express terms commands that all such suits shall be brought "in the name of the United States," we are inclined to the opinion no other person than the United States may bring and prosecute an action to recover the penalty prescribed * * *."

* * *

"[T]he lawmaking power, in its wisdom, deemed wise that the lawfully constituted authorities of the government should act on their official responsibility in cases of violation of the postal laws, as would seem to be indicated by the terms of section 292 above quoted." [19]

2. *Rosenberg* v. *Union Iron Works*, 109 Fed. 844 (D.C., N.D. Calif., 1901). Informer's action (suing for self alone) under Alien Contract Labor Law of February 26, 1885, (23 Stat. 332), as amended.

Statute construed: "That * * * it shall be unlawful for any person, company, [etc.] * * * to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens * * * into the United States * * * under contract * * * made previous to the importation * * * (Sec. 1, 23 Stat. 332).

"That for every such violation of any of the provisions of section one of this act the person, [etc.] * * * shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States or by any person who shall first bring his action therefor * * * as debts of like amount are now recovered in the circuit court of the United States; the proceeds to be paid into the Treasury of the United States * * * And it shall be the duty of the district attorney * * * to prosecute *every such suit at the expense of the United States*." (Sec. 3, 23 Stat. 332) [Emphasis added.]

"[The Secretary of the Treasury shall] pay to an informer who furnishes original information that the law has been violated such share of the penalties recovered as he may deem reasonable and just, not exceeding fifty per centum, when it appears that the recovery was had in consequence of the information thus furnished." [25 Stat. 565, 567.]

Holding: Only the United States can enforce 23 Stat. 332 as amended. The informer's action does not lie.

Reasoning: "The act provides that the penalty therein given 'may be sued for and recovered by the United States, or by any person who shall first bring his action therefor.' If this language stood alone, the right of the plaintiff to recover the judgment sought would be clear * * *; but it does not, and is qualified by the clause immediately following, which provides that any penalty recovered shall be paid into the Treasury of the United States, and by the further provision making it the duty of the district attorney * * * 'to prosecute every such suit at the expense of the United States' * * *. The statute is highly penal, and it was the evident intention of congress that no prosecutions should be had thereunder unless commenced by

[19] 177 Fed. at p. 356.

the United States district attorney * * *. [T]he only interest which any person can have in the penalty which may be recovered in an action under this act * * * is that given by the [1888 amendment which] authorizes the Secretary of the Treasury 'to pay to an informer who furnishes original information * * * such share of the penalties recovered as he may deem reasonable and just,' * * *".[20]

[20] 109 Fed. at p. 846.

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