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Controlling Fraud Against The Government: The Need for Decentralized Enforcement

Erwin Chemerinsky*

The magnitude of fraud against the government demands serious and creative attention. It is estimated that the United States treasury is cheated out of \$25 to \$70 billion a year.¹ Although it is impossible to measure precisely the costs of graft,² study after study has concluded that losses due to fraud and corruption are enormous.³ In this era of budget austerity, it is imperative that effective action be taken to recover misspent funds and to deter future fraud. Each dollar lost through corruption is one dollar less that can be spent constructively. Such losses must be met either by decreasing the availability of benefits or by raising taxes to pay for the higher costs. Fraud in federal programs ultimately may diminish public support for the programs and cause useful programs to be reduced because they are perceived as little more than an opportunity for illicit

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1 Chicago Tribune, Jan. 18, 1981, at 1, col. 1. As the term "fraud" is used throughout this article, it refers to three types of government losses. "Program fraud" involves fraud against the government in its provision of benefits to individuals, businesses, and other levels of government. For example, included within the concept of program fraud are losses suffered by the Department of Health and Human Services in its administration of benefit programs. See *Fraud, Abuse, Waste, and Mismanagement of Programs by the Department of Health, Education and Welfare: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 3 (1978) (estimating losses of \$7.4 billion in taxpayer funds through fraud, abuse, and waste in benefit programs).

Second, the term "fraud" includes contract fraud which occurs when the government is cheated in its contracts for property, services, and materials. See A. BEQUAI, *WHITE-COLLAR CRIME: A 20TH CENTURY CRISIS* 67-71 (1978). Finally, "fraud" includes the receipt of bribes and kickbacks by government employees and agents. *Id.* at 44-45.

2 Chicago Sun Times, May 8, 1981, at 34, col. 2 (quoting the General Accounting Office: "Actual losses due to fraud and other illegal activities will never be known because most go undetected"). See also Heymann, *White Collar Crime Symposium Introduction*, 17 AM. CRIM. L. REV. 271, 272 (1980).

3 See, e.g., GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS OF THE UNITED STATES BY THE COMPTROLLER GENERAL OF THE UNITED STATES 9 (1978) (estimating that one to ten percent of federal funds in programs such as Medicaid, food stamps, and Defense Department spending is lost through fraud); Chicago Tribune, Jan. 18, 1981, at 10, col. 5 (quoting a 1980 study by the Republican Study Committee that \$34 billion in fraud can be saved; also quoting estimates of fraud ranging from \$51 billion to \$77 billion a year).

profit.⁴

In 1981, the United States General Accounting Office released a report concluding that current efforts to control fraud are insufficient to address the magnitude of the problem.⁵ The report concluded that the centralization of enforcement authority in the United States Department of Justice results in relatively few criminal or civil cases against fraud.⁶ The General Accounting Office proposed that a statute be enacted to permit federal agencies to impose monetary penalties against those engaging in fraud against the government.⁷ In October 1981, Senator William Roth introduced the "Program Fraud Civil Penalties Act of 1981," Senate Bill 1780, which would enact the General Accounting Office's recommendations.⁸

Section one of this article examines why such decentralization of enforcement is essential to combat fraud and corruption against the government. Senator Roth's bill, however, at best offers only a limited attempt to decentralize enforcement. Under the bill, the Justice Department retains control over an agency's ability to commence administrative proceedings.⁹ Even though the proposed statute is inspired by the Justice Department's failure to initiate adequate litigation, the bill allows the Justice Department to retain its sole authority to pursue court remedies.¹⁰ There is a need for even greater decentralization of enforcement authority against fraud and corruption than this bill offers. The traditional assumption that only the Justice Department should represent the United States in court does not hold true in this area.¹¹ Rather than creating a new admin-

4 U.S. GOVERNMENT ACCOUNTING OFFICE, *FEDERAL AGENCIES CAN AND SHOULD DO MORE TO COMBAT FRAUD IN GOVERNMENT PROGRAMS* 6 (Report to Congress by the Comptroller General of the United States 1978) [hereinafter cited as *FEDERAL AGENCIES*].

5 U.S. GOVERNMENT ACCOUNTING OFFICE, *FRAUD IN GOVERNMENT PROGRAMS, HOW EXTENSIVE IS IT, HOW CAN IT BE CONTROLLED* (Report to Congress by the Comptroller General of the United States 1981) [hereinafter cited as *FRAUD IN GOVERNMENT PROGRAMS*].

6 *Id.* See also text accompanying notes 30-36 *infra*.

7 *FRAUD IN GOVERNMENT PROGRAMS*, *supra* note 5.

8 Program Civil Fraud Act of 1981, S. 1780, 97th Cong., 1st Sess., 127 CONG. REC. S12,226-28 (1981).

9 Section 806 of S. 1780 provides that for the agency to initiate administrative proceedings, the agency head must notify the Attorney General and either receive direct approval or wait 120 days for the Justice Department to disapprove such proceedings.

10 The statute contains no authority for agencies to initiate legislation. Even collection of agency-imposed penalties requires the Attorney General to initiate proceedings in federal court. S. 1780, 97th Cong., 1st Sess. § 805(a) (1981) ("Any penalty or assessment imposed in a determination which has become final pursuant to section 803(g) of this chapter may be recovered in a civil proceeding brought by the Attorney General.").

11 See text accompanying notes 59-73 *infra*.

istrative procedure against fraud, it would be preferable to allow agencies in instances of major fraud to go directly to court for their remedy.¹² Furthermore, an effective program to counter corruption should include authority for taxpayers to bring civil suits on behalf of the government to recover funds lost through fraud.¹³

Accordingly, section two of this article considers why legislation should go even further than the Roth bill and provide authority for both agencies and citizens to sue to recoup money for the United States treasury. Finally, section three attempts to answer the potential objections to such a legislative proposal, arguing that decentralized enforcement against fraud can result in major savings for the government with minimal cost.

I. The Need for Decentralized Enforcement Authority Against Fraud and Corruption

The primary purpose of Senator Roth's pending legislation is to permit administrative agencies to take direct action to recover money lost through fraud and corruption. Under the proposed statute, agencies may conduct administrative proceedings against persons accused of defrauding the government. Agencies are given authority to order those who have cheated the United States to pay back twice the amount of their illicit gain plus \$10,000 for each false claim or statement made to the government.¹⁴ This legislation, if enacted, would be a marked change from current policies; it emphasizes civil penalties and would give each federal agency some potential authority¹⁵ to act on its own against graft. As such, the proposed statute

12 See text accompanying notes 74-92 *infra*.

13 See text accompanying notes 93-120 *infra*. For a detailed description of a proposed statute to create taxpayer authority to sue on behalf of the government to recover money in instances of fraud and corruption, see Chemerinsky, *Fraud and Corruption Against the Government: A Proposed Statute to Establish a Taxpayer Remedy*, 72 J. CRIM. L. & CRIMINOLOGY 1482, 1512-21 (1981). As used herein, I refer to suits by private individuals on behalf of the United States as "citizen suits." However, the statute which creates authority for citizen suits should probably limit actions to those brought by taxpayers because taxpayers could more easily claim to have an "injury in fact" which is required for standing in an Article III court. *Id.* at 1495 n.106, 1513-14. Nonetheless, for the sake of simplicity, I will refer to all such litigation as "citizen suits" throughout this article.

14 Section 803 of S. 1780 provides for administrative proceedings, § 803(b)(1), to recover "the amount of damages suffered by the United States as a result of the false claim or statement creating such liability," § 803(b)(1), and to impose penalties against those found to have defrauded the government, § 803(b)(1)(B).

15 The agencies only have *potential* authority under the proposed bill because they cannot initiate administrative proceedings if the Attorney General disapproves. S. 1780, 97th Cong., 1st Sess. § 806(a)(1981).

seeks to correct the major defects in the current enforcement mechanism: over-reliance on criminal sanctions and the inevitable insufficiency of the Justice Department's prosecutorial resources.

A. *The Inadequacy of Current Enforcement Efforts*

Under the present system, virtually the entire responsibility for combatting fraud against the federal government rests with the United States Department of Justice.¹⁶ Fraud cannot be effectively controlled, however, with purely criminal sanctions¹⁷ or so long as only one government agency can act against it. Senator Roth's proposed statute supplements criminal prosecutions by allowing agencies to conduct civil proceedings and to recover both the amount lost by the government and substantial civil penalties.¹⁸

Civil proceedings against fraud are needed because criminal actions are inadequate by themselves. In most criminal cases against fraud, the penalties imposed are so small that they provide little deterrent effect.¹⁹ Jail sentences are rarely imposed.²⁰ For example, in one study of 40,000 cases of fraud uncovered by investigators in the Medicaid program, only 220 were successfully prosecuted and only thirty-seven offenders were sentenced to prison terms.²¹ Another study examined sentencing practices by judges in the United States District Court for the District of Columbia in fraud and corruption cases over a three year period.²² In only twenty-four percent of the cases was a prison term with a maximum jail sentence of three years imposed, and in a quarter of these cases the judge reduced the

16 FRAUD IN GOVERNMENT PROGRAMS, *supra* note 5 (current efforts to control fraud are primarily directed to filing criminal and civil actions by the Department of Justice).

17 LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, FRAUD AND ABUSE IN GOVERNMENT BENEFIT PROGRAMS 89 (1979) (noting that the government traditionally "has placed heavy reliance on the criminal justice system as its main line defense in combatting program fraud and abuse") [hereinafter cited as FRAUD AND ABUSE].

18 The agency is entitled to recover double the amount lost by the government plus a penalty of \$10,000 for each false statement or claim made to the government. S. 1780, 97th Cong., 1st Sess. § 802(b)(1) (1981).

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

20 W. SEYMOUR, WHY JUSTICE FAILS 45-46 (1973); LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, ILLEGAL CORPORATE BEHAVIOR 208 (1979).

21 A. BEQUAI, *supra* note 1, at 70. Bequai offers an example involving two physicians found guilty of submitting false claims in the Medicaid program. Although these doctors could have been sentenced to 205 years in prison, they were given suspended sentences. *Id.* at 71.

22 Ogren, *supra* note 19, at 962.

sentence.²³

Furthermore, civil actions are needed because criminal sanctions do not require the defendant to repay the money fraudulently gained.²⁴ Even when the Justice Department initiates criminal prosecutions, separate actions are necessary to recoup the lost funds for the agency. Nor are the monetary penalties imposed in criminal cases sufficient to recover the illicitly earned funds. In most cases the perpetrator gains "more financially from its crimes than it pays in a fine if convicted."²⁵

In fact, even if criminal actions did recoup the lost funds, there would still remain many situations in which civil recovery proceedings would be preferable.²⁶ For example, in criminal cases, guilt must be proven beyond a reasonable doubt, whereas in civil actions liability can be established by a preponderance of the evidence. In criminal prosecutions, the fifth amendment privilege against self-incrimination permits the defendant to refuse to testify and prevents any adverse inference to be drawn from the defendant's silence. By contrast, in civil proceedings the fifth amendment does not forbid adverse inferences against a party who refuses to testify in response to probative evidence.²⁷ Furthermore, the scope of discovery is much

23 It is very unlikely that the pattern of low sentences in cases of fraud and corruption will change in the foreseeable future. As Professor Conklin explains,

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

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

24 See Ogren, *supra* note 19, at 979-81.

25 J.E. CONKLIN, *supra* note 23, at 103. See also Ogren, *supra* note 19, at 968.

26 See generally Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, 2 ADMIN. CONF. OF THE U.S. 896 (1973); Kovel, *A Case for Civil Penalties: Air Pollution Control*, 46 J. URB. L. 153, 156-58 (1968). In fact, in some instances civil remedies might be more desirable than criminal prosecutions. See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 361-62 (1968):

Where economic gain is the motive for the infraction and where the ability to impose significant economic deprivation on the offender exists, it may well be questioned whether the criminal sanction's contribution offers value equivalent to cost. To impose criminal standards of procedure and criminal criteria of proof for the end result of nothing more than a financial exaction may well be to pay a higher social cost than is necessary. Indeed, the conventional monetary fine structure of the criminal sanction may limit the deprivation far beyond what would be possible with a more flexible public or private damage action.

27 NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *THE USE OF CIVIL REMEDIES IN*

broader in civil cases than it is in criminal prosecutions.²⁸ Expansive discovery can greatly aid the detection and investigation of fraud, providing a powerful tool for uncovering corruption. Additionally, civil proceedings are often advantageous because they permit the government to appeal a verdict for the defendant, which the government may not do if it loses in a criminal action.²⁹ Of course, this is not meant to suggest that criminal prosecutions are uniformly undesirable or should be avoided in cases of fraud and corruption. Rather, the point is that civil proceedings can play an important and unique role in combatting such illicit activity. The proposed legislation is desirable in that it provides much-needed additional authority for civil actions against fraud.

Second, in addition to the over-reliance on criminal prosecutions, current efforts to control fraud are inadequate because of the inherent insufficiency of the Justice Department's resources. The Government Accounting Office study revealed that the Justice Department prosecutes relatively few fraud cases.³⁰ In even fewer instances does the Justice Department initiate a civil suit to recoup the lost funds or impose monetary penalties on perpetrators of fraud.³¹ The Government Accounting Office found that of 393 cases referred by agencies to the Justice Department for the commencement of a civil fraud suit, only twenty-eight actions were filed in court.³²

The complexity of litigation against corruption means that these cases "entail an enormous expenditure of . . . resources in relation to the number of cases prosecuted"; hence "comparatively few" are pursued.³³ In fact, even if Justice Department resources were increased, prosecutors still would be able to deal with only a small fraction of the potential fraud and corruption cases.³⁴ Charles Ruff, former Watergate Special Prosecutor and Assistant Deputy Attorney General, observed:

ORGANIZED CRIME CONTROL 3 (rev. ed. 1977) [hereinafter cited as CIVIL REMEDIES]. See generally Heidt, *The Conjuror's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 YALE L.J. 1062 (1982).

28 CIVIL REMEDIES, *supra* note 27, at 8.

29 See generally Comment, *Criminal Sanctions for Corporate Illegality*, 69 J. CRIM. L. & CRIMINOLOGY 40, 43 n.28 (1978).

30 FRAUD IN GOVERNMENT PROGRAMS, *supra* note 5.

31 *Id.* An earlier study by the General Accounting Office revealed that the total amount of all Justice Department civil suits against fraud was only \$250 million, an amount that even Justice Department officials conceded "is only a fraction of the amount defrauded the government." FEDERAL AGENCIES, *supra* note 4, at ii.

32 FRAUD IN GOVERNMENT PROGRAMS, *supra* note 5.

33 Ogren, *supra* note 19, at 960.

34 A. BEQUAL, *supra* note 1, at 150; Ogren, *supra* note 19, at 973.

I think it is clear that we have to recognize . . . that criminal prosecutions simply cannot be the answer to this problem. We cannot deal with anything much more than a small percentage of the loss that occurs through fraud, abuse and waste, by criminal prosecutions, nor do we realistically have the resources to detect, through law enforcement personnel, those losses.³⁵

Centralized enforcement authority means that if the Justice Department chooses to make fraud prosecutions a low priority, little will be done to stop graft and corruption.³⁶ And even if the Justice Department chooses to invest heavily in trying to stop fraud, it has the resources to handle only relatively few cases.

Accordingly, centralized enforcement authority insures not only that little of the money lost through fraud will be recovered, but also that deterrence of future corruption will be minimal. Deterrence depends on two factors: the likelihood of punishment³⁷ and the magnitude of the penalties imposed.³⁸ Because limited resources mean that few cases will be prosecuted by the Justice Department, there is little to deter perpetrators of fraud.³⁹ Moreover, when actions are pursued the penalties are so small as to obviate an adequate deterrent effect.⁴⁰ Centralized enforcement authority can never adequately control the vast fraud that exists in government programs.

B. *Decentralizing Enforcement Against Fraud: S. 1780*

Currently, the False Claims Act provides the primary statutory authority for government actions against fraud.⁴¹ It was enacted by Congress in 1863 in response to widespread fraud and corruption during the Civil War.⁴² The Act imposes both criminal and civil

35 *Fraud in Government: Hearings Before the House of Representatives Task Force on Government Efficiency of the Comm. on the Budget*, 96th Cong., 1st Sess. 18 (1979) (testimony of Charles Ruff) [hereinafter cited as *Fraud in Government*].

36 Ogren, *supra* note 19, at 960.

37 See N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 255-61 (1970); TWENTIETH CENTURY FUND, *FAIR AND CERTAIN PUNISHMENT* 3 (1976); F. ZIMRING, *PERSPECTIVES ON DETERRENCE* 1-2 (1971).

38 See K. LLEWELLYN, *JURISPRUDENCE* 403-04 (1962); Geis, *Deterring Corporate Crime*, in *CORPORATE POWER IN AMERICA* 182 (R. Nader and M. Green eds. 1972); Ogren, *supra* note 19, at 960.

39 FRAUD AND ABUSE, *supra* note 17, at 100-01; Ogren, *supra* note 19, at 960.

40 FRAUD AND ABUSE, *supra* note 17, at 100-01; Comment, *supra* note 29, at 46.

41 18 U.S.C. §§ 287, 1001 (1976); 31 U.S.C. §§ 231-233, 235 (1976), as amended by Act of Nov. 2, 1978, Pub. L. No. 95-582, § 1, 92 Stat. 2479 (1978). Sections 287 and 1001 are criminal provisions; sections 231-233 and section 235 provide for civil liability. For an excellent discussion of the Act and its provisions, see Note, *The Federal False Claims Act: A "Remedial" Alternative for Protecting the Government from Fraudulent Practices*, 52 S. CAL. L. REV. 159 (1978).

42 False Claims Act of 1863, ch. 67, 12 Stat. 696 (originally codified at Rev. Stat.

liability for the presentation of false claims.⁴³ Liability is created in three instances: submission for payment or approval of false, fictitious, or fraudulent claims against the United States government; use of fraudulent or fictitious statements to obtain approval of a claim; and conspiracies to obtain government payment of a false claim.⁴⁴ The Act provides for imposition of civil penalties; each person found to have submitted false claims is liable to "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."⁴⁵ Although the False Claims Act has been recodified, the basic statutory provisions remain almost exactly the same.⁴⁶

The proposed statute, S. 1780, adopts many of the provisions of the False Claims Act,⁴⁷ but would change it in two significant ways.⁴⁸

§§ 3490-94, 5438 (1874)). The Act was motivated by revelations of fraud by contractors supplying materials for the Civil War effort and by reports of government officers receiving bribes and kickbacks. The congressional debates over the False Claim Acts were not extensive. *See* CONG. GLOBE, 37th Cong., 3d Sess. 952-58 (1863).

43 False Claims Act of 1863, ch. 67, §§ 1-3, 12 Stat. 696 (originally codified at Rev. Stat. §§ 3490, 5438 (1874)).

44 Revised Statutes § 5438 provided liability for:

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

Rev. Stat. § 5438 (1874).

45 Rev. Stat. § 3490 (1874).

46 The civil and criminal provisions have been reenacted into two separate statutes. The criminal sections were slightly altered and became 18 U.S.C. § 287 and § 1001 (1976); the civil provisions became 31 U.S.C. § 231 (1976).

47 For example, the proposed statute would create a six year statute of limitations from the time of the submission of the false claim. S. 1780, 97th Cong., 1st Sess. § 806(b)(1) (1981), identical to that contained in the False Claims Act. Similarly, many of the definitions in the bill are identical to those in the False Claims Act, *see, e.g.*, S. 1780, 97th Cong., 1st Sess. § 801(b) (1981).

48 The proposed act does clarify other aspects of the False Claims Act. Most notably, the Act resolves a current conflict among the federal courts of appeals by providing that the term "knowingly" as used within the Act "means with reckless disregard for whether a claim or statement is false." S. 1780, 97th Cong., 1st Sess. § 801(b)(2) (1981). Some circuits have held that proof of an intent to defraud is necessary for recovery under the False Claims Act. *See, e.g.*, *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1007 (5th Cir. 1972); *United States v. Mead*, 426 F.2d 118, 122 (9th Cir. 1970). Other circuits have held that proof of a specific

First, whereas the False Claims Act provides for recovery only upon adjudication by a federal court, the pending legislation would permit agencies to conduct administrative proceedings and determine liability for submission of false claims.⁴⁹ Second, while the bill continues to allow the United States to recover double the amount of damages sustained by the government, it increases the size of the monetary penalty from \$2,000 to \$10,000 per false claim submitted.⁵⁰

These revisions in the False Claims Act would substantially alleviate the deficiencies in current enforcement mechanisms. Permitting each agency to conduct enforcement proceedings would eliminate the Justice Department's monopoly over enforcement, resulting in significant increases in the number of actions brought against fraud. Allowing agencies to recover double the amount of the government's loss, plus a substantial penalty,⁵¹ would insure that perpetrators will not keep their ill-gotten profits.⁵² Thus the pending legislation should increase both the frequency of prosecutions and the severity of punishments, and thereby better deter future fraud.

Although many states have interpreted their constitutions to forbid state administrative agencies from imposing such civil penalties,⁵³ at the federal level it appears "well-settled that Congress has the power to provide civil sanctions as an aid to effecting its purpose . . . and, further, that it can delegate that power to administrative agencies."⁵⁴ Recently, the Supreme Court unanimously held that

intent to defraud is unnecessary, and liability may be premised on reckless disregard for whether a claim is false. *See, e.g.*, *United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47, 56-81 (8th Cir. 1973); *Fleming v. United States*, 336 F.2d 475, 479 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965).

49 S. 1780, 97th Cong., 1st Sess. § 803 (1981).

50 S. 1780, 97th Cong., 1st Sess. § 802(b)(1)(A) (1981) (providing for \$10,000 penalty).

51 The \$10,000 penalty is especially important because a single fraudulent scheme can involve many separate false vouchers or invoices, each of which counts as a separate false claim, and each of which warrants the imposition of a separate penalty of \$10,000. *See United States v. Bornstein*, 423 U.S. 303 (1976) (determining the number of false claims); *Gondelman, False Claims Against the Government: Defense Tactics in a False Claims Prosecution*, 17 AM. CRIM. L. REV. 399, 402-03 (1980) (discussing *United States v. Bornstein*).

52 Goldschmid, *supra* note 26, at 946 ("Where improper profits have been made or other pecuniary benefits derived, penalties should deprive the offender of more than his gain if they are to prevent future violations.").

53 *See, e.g.*, *State v. Public Service Comm'n*, 259 S.W. 445 (Mo. 1924); *State ex rel. Lanier v. Vines*, 274 N.C. 486, 164 S.E.2d 161 (1968); *Tite v. State Tax Comm'n*, 89 Utah 404, 57 P.2d 734 (1936).

54 *N.A. Woodworth Co. v. Kavanagh*, 102 F. Supp. 9, 13-14 (E.D. Mich. 1952), *aff'd*, 202 F.2d 154 (6th Cir. 1953) (affirming authority of the National War Labor Board to impose civil penalties). *See also Helvering v. Mitchell*, 303 U.S. 391 (1938); *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329 (1932); *Elting v. North German Lloyd*, 287 U.S. 324 (1932); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909).

Congress may delegate to an administrative agency the power to impose a penalty of up to \$10,000 for a violation of the Occupational Safety and Health Act.⁵⁵ Administratively imposed civil penalties, such as contained in the pending legislation, are increasingly used throughout the federal bureaucracies.⁵⁶

In sum, the proposed bill is a laudable step towards decentralizing enforcement authority against fraud and corruption. However, it must be recognized that while the pending legislation would accomplish some decentralization, the Justice Department would remain to a large extent in exclusive control of the government enforcement efforts. The proposed act does not permit an agency to begin administrative proceedings to impose civil penalties without the consent of the Attorney General.⁵⁷ An agency cannot collect its own penalties, but rather would have to rely on the Justice Department to bring collection actions in federal district court.⁵⁸ In short, the bill, which is premised on the Justice Department's inadequacies, allows the Justice Department to retain control of government efforts against fraud. A more effective solution to fraud and corruption would be to decentralize enforcement authority further than the Roth bill by permitting agencies and citizens to sue in federal courts to recover money for the United States.

55 *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977).

56 Goldschmid, *supra* note 26, at 897, 903. The Administrative Conference of the United States has recommended:

Increased use of civil money penalties is an important and salutary trend. When civil money penalties are not available, agency administrators often voice frustration at having to render harsh "all or nothing decisions" . . . , sometimes adversely affecting innocent third parties, in cases in which enforcement purposes could be better served by a more precise measurement of culpability and a more flexible response. In many areas of increased concern . . . availability of civil money penalties might significantly enhance an agency's ability to achieve its statutory goals.

1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 191 (1978).

57 S. 1780, 97th Cong., 1st Sess. § 806(a) (1981).

58 S. 1780, 97th Cong., 1st Sess. § 805 (1981). The Justice Department's exclusive authority to initiate litigation to collect judgments provides the Justice Department with the ability to settle suits for far less than the amount of the penalty imposed by the agency. Agencies are currently concerned that the Justice Department is settling fraud cases for far too little money. *See, e.g.*, *Chicago Tribune*, March 16, 1983, at 20, col. 3 (NASA officials angry that the Justice Department settled for only \$1.5 million with the Rockwell Corp. for illegally billing the space shuttle project for time that the employees actually spent working on other projects).

II. Aiding the Battle Against Fraud and Corruption: Decentralizing Litigation Authority

In granting the Attorney General ultimate authority over all government actions against fraud, Senator Roth's proposed legislation follows the customary practice of allowing the Justice Department to control all litigation by the United States.⁵⁹ In many situations, however, such as civil actions against fraud and corruption, the traditional assumption of Justice Department hegemony should be reconsidered. Exclusive Justice Department control is not only unnecessary, but also counterproductive in providing an effective strategy for enforcement against fraud.

Three primary arguments are usually advanced to support the Attorney General's control over all civil litigation by the United States; none is applicable here. First, the Constitution⁶⁰ provides the President with prosecutorial discretion which, it has been contended, is best preserved by allowing the Justice Department to choose when to initiate litigation.⁶¹ Yet it is clearly established that no constitutional usurpation of presidential authority results when Congress allows administrative agencies to possess independent enforcement authority.⁶² More specifically, there is no reason why the Justice De-

59 Federal statutes provide the Attorney General with exclusive authority to litigate on behalf of the United States. *See* 28 U.S.C. § 516 (1976) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or an officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."); 28 U.S.C. § 519 (1976) ("Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys . . . in the discharge of their respective duties."). This exclusive authority has been interpreted to mean that administrative agencies may not initiate court litigation or secure judicial remedies without the approval of the Attorney General. *See, e.g.,* *I.C.C. v. Southern Ry.*, 543 F.2d 534, 537-38 (5th Cir. 1976) (denying the I.C.C. authority to obtain an injunction to enforce its order in federal district court); *In re Ocean Shipping Antitrust Litigation*, 500 F. Supp. 1235, 1238-39 (S.D.N.Y. 1980) (denying authority to the Federal Maritime Commission to intervene in court proceedings without the approval of the Attorney General).

60 The United States Constitution provides that the President "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. For an excellent discussion of the meaning of this clause, see Ledewitz, *The Uncertain Power of the President to Execute the Laws*, 46 TENN. L. REV. 757 (1979).

61 The prosecutorial responsibility is considered an executive function. *See* *United States v. Nixon*, 418 U.S. 683, 693 (1974); *United States v. Alessio*, 528 F.2d 1079, 1081-82 (9th Cir. 1976); *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975).

62 *See, e.g.,* *I.C.C. v. Chatsworth Coop. Mktg. Ass'n*, 347 F.2d 821, 822 (7th Cir.), *cert. denied*, 382 U.S. 938 (1965) (upholding the I.C.C.'s independent enforcement authority in response to a challenge that it was an unconstitutional infringement upon the President's constitutional powers). *See also* Ledewitz, *supra* note 60, at 783 ("The absence of constitu-

partment should have the exclusive right to determine whether to bring an action to recover government money lost through fraud. The argument for preserving the Attorney General's sole prosecutorial discretion in cases of fraud "appears to reflect a desire to purposely avoid prosecution of some violations."⁶³ It is hard to imagine a situation in which fraud against the government should not be remedied, at least to the extent of recovering the illicitly gained sum. In situations where the Justice Department chooses not to exercise its prosecutorial discretion because of a shortage of resources, there would be an obvious advantage to allowing others to act on behalf of the government.⁶⁴ And in those instances when prosecutorial discretion is not exercised for corrupt or political reasons, it is imperative that someone else be able to initiate proceedings against the fraud.⁶⁵ Because perpetrators of fraud should never be allowed to keep their ill-gained profits, traditional considerations of prosecutorial discretion have no applicability here.

Second, exclusive Justice Department control over litigation is often urged as a way to insure coordination of government actions. Given the size and varied activities of the United States government, there is a real danger that agencies with independent litigating authority could take contradictory positions on important questions of public policy.⁶⁶ Former Attorney General Griffin Bell noted that permitting agencies to litigate on their own "can and sometimes does result in two sets of government lawyers opposing each other at taxpayer expense."⁶⁷ This fear, however, is groundless when dealing with fraud and corruption because it is highly unlikely that one agency would sue another for fraud. Prosecution of cases against corruption does not involve the kinds of public policy questions that require Justice Department coordination.

tional challenges to independent agency enforcement power is itself an indication that the power of Congress to create independent law enforcement is accepted").

63 Comment, *Qui Tam Actions: The Role of the Private Citizen in Law Enforcement*, 20 U.C.L.A. L. REV. 778, 797 (1973).

64 Comment, *Qui Tam Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions*, 67 NW. U.L. REV. 446, 471 n.130 (1972) (describing the desirability of citizen suits against fraud to compensate for government shortages of prosecutorial resources).

65 *Id.* See also text accompanying notes 111-15 *infra* (value of citizen suits in situations where otherwise no prosecution would occur).

66 L.A. HUSTON, A.S. MILLER, S. KRISLOV & R.G. DIXON, ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 64-65 (1968) [hereinafter cited as L.A. HUSTON]; A.G. LANGELOTTIG, THE DEPARTMENT OF JUSTICE OF THE UNITED STATES 115-16 (1927); Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1058 (1978).

67 Bell, *supra* note 66, at 1058.

A related argument points out that permitting agencies or citizens to sue on behalf of the United States might compromise a criminal prosecution being pursued by the Justice Department.⁶⁸ This danger, however, could be avoided by careful drafting of the legislation granting the agency or citizen litigating authority.⁶⁹ The statute could authorize the Justice Department to assume control over the litigation⁷⁰ or request the court to stay the civil case until after completion of the criminal proceeding.⁷¹ Thus, the traditional argument that there is a need for the Justice Department to coordinate enforcement is inapplicable in the area of fraud where the emphasis is on numerous separate, independent actions against perpetrators of corruption.

The final argument advanced for allowing the Attorney General to control all of the government's civil proceedings is the Justice Department's expertise in litigation.⁷² But there is no reason why agencies cannot hire or train litigators to handle fraud cases. Even former Attorney General Bell recognized the desirability of having non-Justice Department attorneys handle litigation initiated by agencies.⁷³ Furthermore, even if the Justice Department does have superior litigators, it would seem preferable to have a fraud case brought by a less experienced lawyer than to have no proceeding at all and allow the corruption to go unremedied.

In sum, although in most situations there are strong reasons why the Justice Department should have exclusive authority to represent the United States in federal courts, these reasons are not applicable in fraud and corruption cases. In fact, there are compelling reasons why agencies and private citizens should be able to sue to recover money for the government.

68 It is feared the independent litigation against fraud could compromise the Justice Department's criminal prosecutions because discovery in civil cases is much broader than discovery in criminal cases. The Justice Department fears that concurrent civil and criminal litigation will jeopardize criminal prosecution because defendants will use civil discovery to learn the details of the government's case. Comment, *supra* note 63, at 798.

69 For a suggestion of such statutory provisions, see Chemerinsky, *supra* note 13, at 1514-15, 1520.

70 The statute should provide that if the Justice Department assumes control over a civil suit and does not pursue it in good faith, the previous plaintiff who initiated the action should be able to petition the district court to be reinstated as plaintiff. *Id.* at 1515; Comment, *supra* note 64, at 457 n.22.

71 Chemerinsky, *supra* note 13, at 1514-15, 1520.

72 L.A. HUSTON, *supra* note 66, at 64-65; Bell, *supra* note 66, at 1062.

73 Bell, *supra* note 66, at 1062.

A. *The Need for Agency Litigating Authority*

The proposed act, S. 1780, is premised on the Justice Department's failure to adequately prosecute civil actions against fraud.⁷⁴ Yet, the act seeks to correct this not by permitting agencies to initiate such suits, but rather by shifting cases from judicial to administrative forums.⁷⁵ For a number of reasons, it would be preferable to permit agencies to commence civil litigation in federal courts under the False Claims Act, at least in instances where the Justice Department fails to do so.⁷⁶

First, federal court litigation rests on constitutionally sounder ground than administrative proceedings against fraud. Currently, all cases under the False Claims Act must be brought in federal courts, but the pending legislation would permit agencies to determine liability in false claims cases through administrative proceedings.⁷⁷ Thus, the act proposes to substitute decisions by agency personnel⁷⁸ for those now made by federal article III judges.⁷⁹ While the

74 The proposed bill, S. 1780, would enact the recommendations of the General Accounting Office, *supra* note 3, which argued for administrative penalties in light of the inadequacy of Justice Department efforts against fraud. See text accompanying notes 30-36 *supra*.

75 The False Claims Act now makes no provision for administrative proceedings to recover false claims. See 31 U.S.C. § 231 (1976). Section 803 of S. 1780 would expressly provide for administrative actions in false claims cases.

76 Other statutes provide authority for agencies to litigate in court when the Justice Department fails to do so. For example, the Federal Trade Commission may commence, defend, or intervene in civil judicial proceedings if the Justice Department does not act to control the litigation. 15 U.S.C. § 56(a)(4) (1976). "Some thirty-one separate federal governmental units have . . . authority to conduct at least some of their own litigation." Bell, *supra* note 66, at 1057.

77 S. 1780, 97th Cong., 1st Sess. § 803 (1981).

78 Section 803 of S. 1780 provides:

(b)(1) The authority head shall conduct a hearing on the record regarding any allegation referred to him pursuant to this section to determine—(A) whether a person is liable under section 802(b) of this chapter; (B) the amount of damages suffered by the United States as a result of the false claim or statement creating such liability; and (C) the amount of any penalty and assessment to be imposed upon such person.

Section 803(b)(2) provides for procedural due process in the form of written notice, right to counsel, confrontation, and an opportunity to present evidence.

79 U.S. CONST. art. III, § 1 provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Thus, article III courts are those created by Congress whose judges are given life tenure, whose salary cannot be decreased, and who are assigned inherently judicial tasks. See *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). See generally M. REDISH, *FEDERAL JURISDICTION:*

Supreme Court has traditionally upheld Congress' authority to delegate judicial duties to administrative agencies,⁸⁰ the Court's recent decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁸¹ raises new questions about the constitutionality of shifting from judicial to administrative decisionmaking in fraud cases.

In *Northern Pipeline*, the Supreme Court considered the constitutionality of the Bankruptcy Reform Act of 1978, which created bankruptcy judges with fourteen year terms to hear all claims arising in or related to petitions for bankruptcy.⁸² The Court held the Act unconstitutional on the ground that it vested the judicial power in judges who did not have the guarantee of life tenure required by article III of the Constitution.⁸³ The plurality stated that non-article III courts are permitted only in limited circumstances.⁸⁴ One of the situations in which they are allowed is cases "involving 'public rights,' . . . suits between the government and others."⁸⁵

The Court's reasoning, however, raises doubts about whether fraud cases come within the definition of "public rights" cases. The Court stated that administrative agencies could replace article III

ALLOCATIONS IN THE TENSIONS OF ALLOCATION OF JUDICIAL POWER 35-51 (1980) (discussing the difference between article I and article III courts).

80 See, e.g., *Crowell v. Benson*, 285 U.S. 22 (1932) (approving power of administrative agency to decide workmen's compensation cases); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855). The Court in *Murray's Lessee* stated:

At the same time these are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the Courts of the United States as it may deem proper.

Id.

81 102 S. Ct. 2858 (1982) (plurality opinion).

82 28 U.S.C. §§ 151-160, 771-775, 1471-1482 (Supp. III 1979). The Bankruptcy Act creates bankruptcy judges who are appointed to office for 14-year terms by the President, with the advice and consent of the Senate. 28 U.S.C. §§ 152, 153(a) (Supp. III 1979). The Act grants the bankruptcy courts jurisdiction over all "civil proceedings arising under Title 11 or arising in or relating to cases under Title 11." 28 U.S.C. § 1471(b) (Supp. III 1979). For an excellent discussion of the unconstitutionality of the Bankruptcy Act, see Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L.J. 297 (1981); Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560 (1980).

83 102 S. Ct. at 2879 (holding the bankruptcy courts unconstitutional as an impermissible assignment of the judicial power to non-article III courts).

84 Although the Court concluded that "the judicial power of the United States must be exercised by tribunals having the attributes prescribed in Art. III," 102 S. Ct. at 2865, the Court recognized three situations in which Congress may create legislative courts: courts to govern the territories, see *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828); military courts, see *Dynes v. Hoover*, 63 U.S. (20 How.) 65 (1858); and courts to adjudicate cases involving public rights, see *Crowell v. Benson*, 285 U.S. 22 (1932). 102 S. Ct. at 2868-69.

85 102 S. Ct. at 2869-70.

courts in public rights cases only in matters that traditionally have not been reserved for judicial determination.⁸⁶ It explained that the authority for non-article III courts to decide public rights cases is based on the "principle of sovereign immunity, which recognizes that the government may attach conditions to its consent to be sued."⁸⁷ Since the United States may be sued only if it consents, the government may limit its agreement to those suits litigated before non-article III judges. Cases involving fraud and corruption, however, always have been litigated in article III courts, and it is the United States, not the private party, who is the plaintiff.

Even if *Northern Pipeline* is not extended to prevent Congress from shifting false claims cases to non-article III forums, the case offers reasons why article III courts provide a constitutionally superior decisionmaking process. In *Northern Pipeline*, the Supreme Court emphasized the desirability of keeping the judicial function separate from the executive or legislative branches.⁸⁸ Yet permitting agencies to decide false claims cases allows administrative bodies to serve as judge as well as prosecutor. A private party sued by the agency would be better assured of independent decisionmaking if the case was heard, as it is now, in an article III court.

In fact, apart from separation of power considerations, there are strong reasons to doubt the fairness of agency proceedings to recover false claims. The proposed act would permit the agency head to hear and decide such cases.⁸⁹ It is questionable whether the agency head

86 *Id.* at 2870.

87 *Id.* at 2869.

88 The Court stated:

To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct. . . . The Federal judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial.

102 S. Ct. at 2864.

The proposed act, S. 1780, provides for judicial review of agency determinations in article III courts in § 804(a): "Any person who has been determined pursuant to section 803 of this chapter to be liable . . . may obtain review of such determination in the United States Court of Appeals for the circuit in which such person resides or in which the claim or statement . . . was made, presented, or submitted" Section 804(b) limits such review to determining whether the agency's decision is supported by substantial evidence. The Supreme Court in *Northern Pipeline* explicitly concluded that such limited judicial review is insufficient to insure adequate preservation of separation of powers. 102 S. Ct. at 2874-79.

89 S. 1780, 97th Cong., 1st Sess. § 803 (1981)(authorizing the "authority head" to conduct a hearing and determine liability).

would provide impartiality, especially in instances where the agency stands to profit from the recovery of the illicit sums.⁹⁰ At the very least, permitting agencies to sue in article III courts would provide far greater assurances of the appearance of impartiality and fairness.

By contrast, there is no reason not to allow agencies to commence litigation against fraud. The traditional reasons for relying on administrative rather than judicial bodies, expertise and efficiency,⁹¹ are not present here. Courts, rather than agencies, possess the experience in deciding false claims cases. In fact, deciding cases is by definition a judicial function, not a typical administrative responsibility where the agency is asked to implement a legislative program.⁹² Thus, while much of the proposed legislation, S. 1780, is laudable, a superior alternative would be to permit agencies to sue perpetrators of frauds in federal courts to recover money for the government.

B. *The Need for Citizen Suits Against Fraud and Corruption*

Although the pending bill would somewhat expand the role of agencies in enforcement proceedings against fraud, it would essentially retain all prosecutorial authority in the hands of government officers. To be most effective, legislation should confer authority on private citizens to bring civil suits on behalf of the government to recover money lost through fraud and corruption.⁹³ Control of graft can best be achieved by this complete decentralization of enforcement authority.

Allowing private citizen suits to aid in the enforcement of fed-

90 Senate Bill 1780 is unclear as to whether the agency will receive the money which it recovers through administrative proceedings against perpetrators of fraud. Returning the money to the agency budget would be desirable because it would allow the money to be spent as Congress intended and it would give the agencies an incentive to initiate proceedings against fraud. The problem is that if the agency will benefit monetarily, then the agency head has a clear incentive for finding liability. Such a financial interest in the outcome of proceedings would violate due process. *See Tumey v. Ohio*, 273 U.S. 510 (1927) (invalidating a scheme whereby the judge received funds from traffic violator's fines); B. SCHWARTZ, *ADMINISTRATIVE LAW* 304 (1976). In fact, even if the proceeds recovered are not returned to the agency, there is still reason to question the impartiality of the agency head. *See Calamari, The Aftermath of Gonzalez and Horne on the Administrative Debarment and Suspension of Government Contractors*, 17 *NEW ENG. L. REV.* 1137, 1139-40 (1982) ("[I]t has been suggested that debarment or suspension determinations made by agency heads involved in daily agency business suffer from a lack of impartiality.").

91 *See generally* S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 10-35 (1978).

92 *See* Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1669, 1675 (1975) (describing the traditional agency role as serving as a "transmission belt" to implement legislative policy choices).

93 This proposal is detailed in Chemerinsky, *supra* note 13, at 1512-21.

eral laws is hardly novel. For example, the federal antitrust laws explicitly authorize private citizens to sue to enjoin antitrust violations and recover damages for injuries.⁹⁴ The Supreme Court has praised such authority for private suits because it "stimulates one set of private interest[s] to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement which relieves the government of the cost of enforcement."⁹⁵ Similarly, citizens are allowed to sue to enforce the antifraud provisions of the federal securities acts.⁹⁶ The United States Court of Appeals for the Second Circuit explained the desirability of such suits:

There are compelling reasons why the courts have been particularly willing to recognize private rights of action under the antifraud provisions of the federal securities laws. . . . [T]he SEC—the agency charged with enforcement and administration of the federal securities laws—does not have sufficient resources alone to enforce many provisions of the statutes. Absent judicial recognition of private rights of action, the federal securities laws most assuredly would fail to provide the effective regulation over the securities industry which Congress intended.⁹⁷

There are many other areas, as well, where Congress has authorized citizen suits as a way to improve enforcement of federal laws.⁹⁸

94 The Clayton Act provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1976); 15 U.S.C. § 26 (1976) (authorizing private suits for injunctive relief).

95 *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751 (1947) (authorizing private suit under the Robinson-Patman Act, 15 U.S.C. §§ 13, 13a (1976)). *But see* *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958) (denying a private right of action to enforce the Robinson-Patman Act). Courts repeatedly have sustained private rights of action to enforce the Clayton Act, 15 U.S.C. § 4 (1976). *See, e.g.*, *Flinkote Co. v. Lysfjord*, 246 F.2d 368, 398 (9th Cir. 1957) ("The private antitrust action is an important and effective method of combatting unlawful and destructive business practices. The private suitor complements the Government in enforcing the antitrust laws."); *Maltz v. Sax*, 134 F.2d 2, 4 (7th Cir. 1943) ("This grant to person damaged—a cause of action for treble damages—was for the purpose of multiplying the agencies which could help enforce the Act and therefore make it more effective."). Private actions to enforce the antitrust laws have increased in recent years. ABA ANTITRUST SECTION, MONOGRAPH NO. 1, MERGERS AND THE PRIVATE ANTITRUST SUIT: THE PRIVATE ENFORCEMENT OF SECTION 7 OF THE CLAYTON ACT 44 (1977) [hereinafter cited as ABA ANTITRUST SECTION].

96 Securities Exchange Act of 1934, 15 U.S.C. § 78j(b)(1976).

97 *Abrahamson v. Fleschner*, 568 F.2d 862, 872 (2d Cir. 1978).

98 *See, e.g.*, Clean Air Act of 1970, 42 U.S.C. § 7604 (Supp. III 1979); Civil Rights Act of 1964, 42 U.S.C. § 2000e-05e (1976); Refuse Act of 1899, 33 U.S.C. §§ 407, 411, 413 (1976).

There is substantial precedent for allowing citizen suits to recover money for the government in cases of fraud and corruption. In England during the Middle Ages, a shortage of law enforcement officers was offset by authorizing prosecutions by private litigants.⁹⁹ These suits, termed "qui tam" actions,¹⁰⁰ were designed "to supplement England's insufficient legal machinery in order to bring more offenses to the cognizance of the courts."¹⁰¹ Private litigants, without the prior approval of the government, were authorized to sue on behalf of the Crown and recover a portion of the penalty imposed.¹⁰²

Similarly, in the United States during the Civil War, Congress enacted legislation to allow citizens to enforce the False Claims Act.¹⁰³ Concerned about the magnitude of corruption within the government, Congress authorized private citizens to sue federal officials alleged to have committed fraud, and permitted successful plaintiffs to receive a percentage of the amount recovered.¹⁰⁴ The Act's legislative history indicates that "Congress chose to permit enforcement by private citizens, as well as by the government, because of a belief that public officials, many of whom were deeply involved in the corrupt practices complained of during the Civil War era, would fail to initiate actions for reasons of selfish advantage."¹⁰⁵ Although the federal authority for qui tam suits has been almost completely repealed,¹⁰⁶ many states continue to permit such citizen-

99 Comment, *supra* note 64, at 451 n.21; Note, *The Qui Tam Doctrine: A Comparative Analysis of its Application in the United States and the British Commonwealth*, 7 TEX. INT'L L.J. 415, 418 (1972).

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

101 Note, *supra* note 99, at 417.

102 One commentator has explained:

Under [qui tam] statutes, financial incentives were provided, the purpose of which was to create and keep active a vast number of "voluntary policemen", who were to be paid on the results achieved by their own zeal and enterprise. . . . It was hoped that they would be of great assistance in the administration of criminal justice, solely because of the spur provided by the offer of reward.

2 L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, at 146 (1957). Parliament repealed authority for qui tam suits in 1951. *Common Informers Act*, 1951, 14 & 15 Geo. 6, ch. 39. In large part, such suits were eliminated because law enforcement efforts were increasingly effective, making citizen actions unnecessary. Comment, *supra* note 63, at 779.

103 *False Claims Act of 1863*, 12 Stat. 696 (originally codified at Rev. Stat. §§ 3490-3494 (1874)). Authority for citizen suits was found in Rev. Stat. § 3491.

104 Rev. Stat. § 3491 (1874).

105 Comment, *supra* note 64, at 453 n.32.

106 Congress amended the False Claims Act to provide that: "The court shall have no

initiated litigation.¹⁰⁷

Decentralized enforcement through citizen-initiated civil litigation is desirable even if agencies also are granted authority to sue in cases of fraud and corruption. First, citizens can supplement government prosecutions by bringing civil suits in cases where no action otherwise would be taken. Because agencies necessarily will have only limited resources to devote to investigating and prosecuting fraud,¹⁰⁸ it is unrealistic to believe that agencies could afford to initiate actions in all major cases of fraud. Allowing citizen suits would subject perpetrators of fraud "to the prosecutorial resources not only of the government but also of [private citizens]."¹⁰⁹ The increase in suits against fraud should enhance the deterrence of future unlawful acts, as well as help redress past violations.¹¹⁰

Second, authority for citizen suits is desirable as "insurance against the instances in which the responsible prosecutors, usually political officers, are themselves allied with the action challenged."¹¹¹ In situations where there is corruption within the agency, private citizens can initiate litigation when otherwise no enforcement would be pursued. Such actions brought by private citizens would be especially useful where government officials are accused of receiving bribes.¹¹² In states that permit taxpayer suits on behalf of the government, there are many successful examples of citizens suing to recover money lost through fraud by state officials.¹¹³ In one highly

jurisdiction to proceed with any such suit . . . whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States or any agency, officer, or employee thereof, at the time such suit was brought." 31 U.S.C. § 232(c) (1976). The effect of the amendment is to create an almost absolute bar to citizen suits under the False Claims Act. Comment, *supra* note 63, at 793-94.

107 See, e.g., CAL. CIV. PROC. CODE § 526(a) (West 1979); 19 GA. CODE ANN. § 64-104 (1979); IND. CODE ANN. § 34-4-17-3 (Burns 1973); NEB. REV. STAT. § 19-2907 (1977); N.Y. STATE FIN. § 123 (McKinney 1980); N.C. GEN. STAT. § 128-10 (1981).

108 A. BEQUAI, *supra* note 1, at 150.

109 Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 371 (1972).

110 Note, *Taxpayers' Actions: Public Invocation of the Judiciary*, 13 WAKE FOREST L. REV. 397, 399 n.16 (1977).

111 Note, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895, 904 (1960) ("Taxpayers' litigation seems designed to enable a large body of citizenry to challenge governmental action which would otherwise go unchallenged"). It is also possible that agencies might not bring actions against fraud because the prosecutions would reveal the agencies' incompetence in devising administrative procedures.

112 Comment, *Defending the Public Interest: Citizen Suits for Restitution Against Bribed Officials*, 48 TENN. L. REV. 347, 347-48 (1981).

113 See, e.g., *Munson v. Abbott*, 602 S.W.2d 649 (Ark. 1980) (taxpayer suit to obtain restitution of improperly spent public funds); *Nelson v. Berry Petroleum Co.*, 242 Ark. 273, 413 S.W.2d 46 (1967) (taxpayer suit to recover more than \$3 million which the state lost as a result of a fraudulent scheme to fix prices for asphalt used in constructing state highways); *Richardson v. Blackburn*, 41 Del. 54, 187 A.2d 823 (1963) (taxpayer suit to recover funds

publicized case, Maryland taxpayers sued Spiro Agnew and forced him to pay the state the amount of illegal bribes and kickbacks he had received while governor of Maryland.¹¹⁴ In short, decentralizing enforcement authority against fraud provides a desirable "means of correcting illegal practices of government officials which would otherwise be irreparable."¹¹⁵

Finally, authority for citizen suits is desirable as a way to increase the investigation of fraud. Private citizens often can discover information that the government is unable to unearth. Many types of fraud against the government are "consensual crimes" where there is no victim directly injured by the criminal act.¹¹⁶ In instances of bribery, for example, there are willing parties who voluntarily participate in the crime.¹¹⁷ It is difficult for the government to detect these types of offenses because no one comes forward to complain about the illegality. Often, however, private citizens may be aware of the scheme but lack any incentive to inform the government about the fraud. Allowing citizen suits in which successful plaintiffs receive a share of the recovery provides a strong incentive for individuals to act on their knowledge.¹¹⁸

Although litigation by private citizens acting on behalf of the United States would be desirable, such suits are not currently allowed. Restrictive doctrines limiting standing to sue in federal courts preclude taxpayer or citizen actions in federal courts unless they are explicitly authorized by a federal statute.¹¹⁹ Currently, no law exists to permit such litigation.¹²⁰ Accordingly, legislation to combat fraud and corruption in government should include provisions authorizing both agencies and citizens to sue in federal court to recover money for the United States.

III. Decentralizing Enforcement Authority Against Fraud: Analyzing the Objections

My proposal is fairly simple: allow administrative agencies and

illegally paid to government employees); *Wertz v. Shane*, 216 Iowa 768, 249 N.W. 661 (1933) (taxpayer suit to recover money illegally received by state legislators).

114 *McMillen v. Agnew*, Equity No. 23,638, slip op. (Cir. Ct. Md. 1982).

115 Note, *supra* note 111, at 910.

116 Comment, *supra* note 63, at 801.

117 Comment, *supra* note 64, at 451-52 n.23.

118 *Qui tam* actions frequently have been called "informers suits" because informers have an economic incentive to come forward. *Id.* at 449 n.16.

119 For a discussion of the standing barrier to citizen or taxpayer actions against fraud, see Chemerinsky, *supra* note 13, at 1500-05.

120 *Id.* at 1505-09.

private citizens to sue in federal courts to enforce the False Claims Act. The pending legislation, S. 1780, would be improved if it implemented even greater decentralization of enforcement authority. Undoubtedly the Justice Department, which has argued that it alone should prosecute, criminally and civilly, violations of federal law,¹²¹ would oppose such decentralization of prosecutorial powers. However, a close examination of the arguments against decentralization reveals that each of the potential objections lacks merit.

The most likely objection to allowing citizens and agencies to sue in federal court is that such litigation would deluge the courts, exacerbating congestion in already over-crowded dockets.¹²² At the outset, it should be noted that this objection concedes that there are many fraud cases not being prosecuted. Since courts can screen out frivolous cases at an early stage in the proceedings,¹²³ a huge increase in litigation could mean only that there is significant fraud which is now being ignored. As such, the argument against permitting increased suits must be based on the assumption that it is better to allow fraud to go unremedied than it is to invest scarce judicial resources in trying these cases. At the very least, additional court cases are desirable when those actions more than pay for themselves. If litigation yields a net profit for the Treasury, then it will subsidize whatever judicial resources are invested in trying the cases. Neither agencies nor private citizens have reason to bring suits against fraud if recovery is unlikely. It is quite probable, therefore, that in a large percentage of cases the government will recoup lost funds, and that the benefits of such suits will almost certainly exceed the costs to the judiciary.

There remains a legitimate concern that countless small fraud

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

122 See, e.g., *Flast v. Cohen*, 392 U.S. 83, 130 (1968) (Harlan, J., dissenting) (arguing for restricting taxpayer standing on the ground that "public actions . . . may involve important hazards for the continued effectiveness of the federal judiciary"); *Wall St. J.*, Nov. 29, 1971, at 1, col. 4.

123 David Berger stated,

It seems to me that the basic rationale of the opposing point of view rests on a fundamental lack of confidence in the ability of federal judges to distinguish between a frivolous case, a meritorious case and one which is in between—a borderline case. The remedy, I submit, is to get better federal judges, not to deny the right of access to the courts to a private individual.

ABA ANTITRUST SECTION, *supra* note 95, at 53. See also *Citizens Right to Standing in Federal Courts Act of 1978: Hearings on S. 3005 Before the Senate Judiciary Comm.*, 95th Cong., 2d Sess. 53-59 (1978) (dialogue between Senator Metzenbaum and Erwin Griswold). Furthermore, a flood of frivolous suits is highly unlikely. See Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 634 (1973).

cases, each non-frivolous, might clog the courts. The appropriate solution to this problem is not to bar all suits from the courts. Rather, the simple answer is to require that a given amount be in controversy. For example, the statute could rely on administrative proceedings for cases involving less than \$50,000, reserving court time for major fraud litigation.¹²⁴

In short, the fear of court backlog is unwarranted when discussing fraud and corruption cases. Centralized enforcement authority decreases court congestion only if the enforcement agency is bringing an inadequate number of prosecutions.

A second potential objection to authorizing litigation by agencies and citizens is that the suits will themselves become a source of graft. Corrupt agency officials might commence litigation and agree to end the proceedings in exchange for bribes or other favors. Similarly, it is feared that taxpayers will file "strike suits," litigation initiated for the sole purpose of coercing the defendant into a quick settlement of the case rather than going through the expense of litigating it.¹²⁵

The danger of corrupt agency action is a strong argument for requiring agencies to sue in court rather than handling false claims cases within administrative proceedings. Senator Roth's pending legislation, which allows agencies to determine liability in fraud cases in administrative actions,¹²⁶ presents the possibility that a corrupt agency official could agree to settle the proceeding. With minimal scrutiny outside the agency, it would be difficult to uncover such fraud. By contrast, if agencies are required to sue in court, the judge could review the dismissal of prosecutions and thereby reduce the likelihood of corruption.

Similarly, individual strike suits can be made virtually impossible by including within the statute a provision preventing dismissal without the consent of the judge and the United States government. As explained earlier, a statute authorizing citizen suits should permit the Attorney General to intervene to prevent any interference with Justice Department prosecutions.¹²⁷ The ability of the Justice Department to intervene can assure that the interest of the United

124 See, e.g., Chemerinsky, *supra* note 13, at 1514, 1520 (proposing a \$50,000 amount in controversy requirement for fraud suits brought by citizens or taxpayers).

125 Comment, *supra* note 63, at 797.

126 Section 803 of S. 1780 permits agencies to determine liability for the submission of false claims to the government.

127 See text accompanying notes 69-71 *supra*.

States will not be compromised through strike suits or improvident settlements.

None of the potential objections to decentralizing enforcement authority against fraud is insurmountable. Careful drafting of the statutory authority for agencies and citizens to initiate civil litigation can prevent the anticipated problems from occurring.

IV. Conclusion

An effective solution to a problem as great as fraud against the government requires decentralized enforcement authority. The arguments I have advanced might be extended to other areas, such as environmental protection, where there are similar concerns—inadequate enforcement efforts and a problem so large its solution exceeds any realistic commitment of government resources. At the very least, however, one place to start rethinking traditional assumptions in favor of centralized enforcement is in the area of government fraud and corruption, where decentralized enforcement could make a major difference in reducing illicit behavior and restoring confidence in government programs.