Deterring Misuse of Confidential Government Information: A Proposed Citizens' Action

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DETERRING MISUSE OF CONFIDENTIAL GOVERNMENT INFORMATION: A PROPOSED CITIZENS’ ACTION

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The federal government, in order to plan federal programs and formulate policy for the public benefit, compiles great stores of information through its innumerable departments and agencies. Many government employees will have access to this information in the course of their official duties, and valid objectives may require that much information be permanently or temporarily withheld from outsiders. It is expected that a government employee will neither attempt to use confidential government information for his own gain nor improperly disclose the information for use by others. When an employee breaches this confidence his act constitutes more than a moral wrong; it may cause significant economic injury either to the government or to particular individuals, and it may have grave social effects. Consequently, feasible methods of preventing misappropriation or disclosure of confidential government information must be developed and applied.

Part I of this article offers two examples—predicated on historical fact—that illustrate the possible adverse consequences of dis-


1. As used in this Article, “confidential government information” means “information obtained under Government authority which has not become part of the body of public information.” 5 C.F.R. § 734.03(2) (1973).

Some confidential government information is analogous to trade secrets, a type of confidential information that the employee of a business concern is under a duty not to disclose or make use of for personal gain. See Restatement of Restitution § 200, Illustration 1 (1937); 5 A. Scott, The Law of Trusts §§ 505.1, 506 (3d ed. 1967).

2. This Article discusses only situations in which a government employee or a third-party recipient uses confidential information for private financial profit. The discussion may be irrelevant for cases in which disclosures of confidential information are made for political purposes, as illustrated by the Pentagon Papers case, New York Times Co. v. United States, 403 U.S. 713 (1971).

3. The first example is based upon reports that in August 1972 six grain exporters were notified by a Department of Agriculture employee of an impending change in export subsidy rates on sales of United States wheat to the Soviet Union. The grain exporters allegedly used this information to reap a windfall of approximately $2 million dollars. See N.Y. Times, Sept. 19, 1972, at 1, col. 4 (late city ed.); id., Sept. 15, 1972, at 1, col. 1 (late city ed.); Wall St. J., Sept. 14, 1972, at 17, col. 2 (eastern ed.). The results of official attempts to recover the excess subsidy payments are not known. See U.S. Dept. of Agriculture, Pub. No. 3383-72, Facts About the Russian Grain Sale 6 (1972) (interview with Secretary of Agriculture Butz) [hereinafter Butz Interview].

The second example is based upon the case of Haas v. Henkel, 216 U.S. 462 (1910), and the companion cases of Peckham v. Henkel, 216 U.S. 483 (1910), and Price v.
closure of confidential government information. Part I also examines present statutory and regulatory safeguards against such disclosure and analyzes their effect. Part II sets forth a proposal for reducing the possibility that confidential government information will be improperly used and for recouping government losses by means of a citizens' action when it is so used.

I. MISUSE OF CONFIDENTIAL GOVERNMENT INFORMATION AND REMEDIES UNDER PRESENT LAW

A. The Potential for Misuse

Although opportunities for misuse of confidential information abound, illustrations from the area of government programs affecting the marketing of agricultural products adequately demonstrate the potential for and the possible consequences of misuse of information. Pursuant to federal regulations, the Department of Agriculture (Department) may pay a subsidy to wheat exporters based on the quantity of their wheat export shipments. The subsidy is part of a comprehensive government policy designed to maintain domestic wheat prices at a level that provides American wheat farmers with a fair return but allows excess grain to be exported at lower world prices. The amount of the payment depends upon the Department's

4. Accurate statistical data on the frequency of improper disclosures of confidential government information by government employees do not exist. There is evidence that such disclosures do occur, see, e.g., materials cited note 3 supra, but it is probable that many disclosures go undetected, unreported, or unprosecuted.

Even if precise data could be obtained, evaluation of the problem at the quantitative level only is inadequate. The qualitative effect—the effect of unprosecuted instances of misuse of confidential government information on the public's perceptions of government efficacy, on the integrity of the system of justice, and on the government's capacity adequately to serve the perceived needs of the people, all manifested in the degree of public confidence in government and in the government's ability to obtain cooperation and trust—is at least as significant as the number of disclosures. Discovered but unprosecuted instances of misuse are publicized by the mass media and are the basis upon which public opinion is formed. If uncorrected, publicized misuse of confidential government information for personal gain has a potentially adverse socio-political effect upon the relationship of the government and the people, the problem deserves attention regardless of the number of violations.

5. See 7 C.F.R. § 1483.104 (1973) (allows a base subsidy of zero and permits different rates for different coasts or ports of export, different classes and qualities of wheat, different destinations, and different export periods); Wheat Subsidies: A Game Rigged Against the House, Bus. Week, Sept. 23, 1972, at 23 [hereinafter Bus. Week].

6. See T. Nichols, Feed Grains and Wheat Situation and Outlook 13 (unpublished working materials 1972); Butz Interview, supra note 3, at 2-4. See generally D. Hadweber,
determination of the support necessary to permit wheat exporters to purchase at the traditionally higher domestic price and still export at the lower world price. At the time he purchases goods for overseas delivery, the exporter may register with the Department the quantity of wheat he will ship and the purchase price per bushel. If the purchase qualifies, the exporter receives a subsidy payment determined in accordance with current Department policies and guidelines.

Assume that in July 1973 the Department had been paying a subsidy of fifty cents per bushel on all registered wheat export shipments. A Department report completed on July 10, 1973 finds that the world market price has risen to within thirty cents of the higher domestic price, and a decision is therefore made that beginning the next morning the Department will reduce the subsidy to thirty cents per bushel. It is further decided that a public statement to this effect will be released on July 11, before the opening of the grain commodity market. After the meeting, a Department employee telephones three large wheat exporters and notifies them of the planned change. Knowing that under current conditions the world price will probably remain steady, the wheat exporters immediately purchase 1,000,000 bushels of wheat for delivery and export in late July. The purchases are timely registered and qualify for subsidy payments of 500,000 dollars.

The resultant economic injury is clear. By receiving advance notice the wheat exporters obtained 200,000 dollars from the public treasury that would not otherwise have been paid, and that need not have been paid to achieve the goal of stabilizing wheat prices at the desired level.

The wrongdoers in the above example are the government employee and the wheat exporters who knowingly used the confidential information to their advantage.

7. See 7 C.F.R. § 1483.102(a) (1973); Bus. Week, supra note 5 (export subsidies equal difference between domestic and world price).

8. Technically the wheat exporter submits an offer to the Commodity Credit Corporation. Acceptance of the offer forms a contract under which the exporter agrees to export the stated quantity of wheat in consideration for an export subsidy payment. 7 C.F.R. §§ 1483.102(a), .110 (1973). The payment rate per bushel is the rate in effect when the offer is submitted to the Commodity Credit Corporation. The exporter files an application for payment with documentary evidence of the export. 7 C.F.R. §§ 1483.102(d), .163 (1973). See 7 C.F.R. §§ 1483.130-.139 (1973); Bus. Week, supra note 5, at 23.

9. A variation of the above hypothetical finds the government employee himself purchasing wheat and registering it for the subsidy before the public announcement of the change in departmental policy. This action would violate departmental regulations. See 7 C.F.R. § 0.735–20(a) (1973).
information before the public announcement. There are three in­
jured parties: the government, which has paid more in subsidies than
it otherwise would have paid; the taxpayers, who will ultimately
bear the cost of excess subsidy payments; and other wheat exporters,
who may now be at a competitive disadvantage.10

A second example of misappropriation of government informa­
tion, which involves no immediate economic injury either to the
government or to taxpayers, deserves consideration. The Department
of Agriculture compiles statistics and prepares a report relating to
the probable quality, quantity, and market price of future crops.11
Because the Department report is accurate, it has an admitted impact
upon the wheat market;12 consequently, it is available only to au­
thorized personnel13 until the Department distributes the information
to the public.

Assume that such a report predicts that wheat prices will rise, and
a departmental statistician reveals the contents or delivers copies of
the report to several wheat future traders prior to public disclosure.14
Armed with this information the traders make a number of highly
advantageous purchases on the wheat market.15

Again the wrongdoers are the government employee and the
wheat traders who made use of the information. The injured parties
and the nature of the injuries, however, vary from those of the pre­
vious example. Wheat farmers are injured to the extent that they
receive less than the price at which their wheat would have sold if
the information had been publicly disclosed. Other wheat traders
are harmed to the extent that the recipients of the report acquired a
more advantageous competitive position by purchasing the com­
modity at a lower price. Neither the government nor taxpayers as a
group suffer immediate economic injury. We cannot, however, rule
out future economic injury. If farmers sell great quantities of wheat
to exporters who would have purchased at a higher price had they

10. Domestic consumers could be harmed if the exporters purchased much more
wheat than they otherwise would have bought. The purchases would diminish
the supply of wheat for domestic use, possibly resulting in increased prices.
summations); 7 U.S.C. § 2248 (1970) (annual turpentine and rosin report); 7 C.F.R.
note 6.
14. This act would violate Department of Agriculture regulations. See 7 C.F.R.
§ 0.735-50 (1975).
15. The government employee could, of course, illegally use the information himself.
not become privy to inside information the government may eventually be forced to make up the farmers' loss in the form of increased wheat subsidy payments.

B. The Government Employee as a Fiduciary Agent

The basic tools for the prevention of abuses such as those described above, and the basis of the legal consequences that follow, are the principles governing fiduciary relationships. These principles have been applied to many situations that involve an entrustment by one person (the principal) to another (the fiduciary agent) of the authority to control or manage all or part of the principal's property or affairs. They impose upon the fiduciary agent an enforceable duty of absolute loyalty, which requires him to act solely in the best interests of the principal in the management of the latter's affairs. Furthermore, any confidential information acquired by the agent as a consequence of the fiduciary relationship may not be communicated to third parties or used by the agent for his own benefit without the principal's authorization.

The application of fiduciary duties to activities of government employees is not novel. It reflects not only a desire to avoid eco-

16. Common examples of fiduciary relationships are guardian and ward, e.g., American Sur. Co. v. Hayden, 112 Fla. 17, 150 S. 114 (1933); attorney and client, e.g., In re Goldstein, 45 Del. 450, 85 A.2d 361 (1951); executor or administrator and decedent's legatees or next of kin, e.g., Michoud v. Girod, 45 U.S. (4 How.) 503 (1846); directors and officers of a corporation and the corporation or its shareholders, e.g., Brophy v. Cities Serv. Co., 31 Del. Ch. 241, 70 A.2d 5 (1949); and agent and principal, e.g., Jansen v. Williams, 36 Neb. 869, 55 N.W. 279 (1893). See generally D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES § 10.4 (1973); Scott, The Fiduciary Principle, 37 CALIF. L. REV. 539 (1949).

17. D. Dobbs, supra note 16, § 10.4; RESTATEMENT (SECOND) OF AGENCY, Introductory Note to Chapter 13 (1958); id. §§ 13-14.

18. D. Dobbs, supra note 16, § 10.4; RESTATEMENT OF RESTITUTION § 200 (1937); RESTATEMENT (SECOND) OF AGENCY § 395 (1958); 5 A. Scott, supra note 1, § 505.

19. See, e.g., United States v. Carter, 217 U.S. 286 (1919); J. Kirby, CONGRESS AND THE PUBLIC TRUST 34-43 (1970). In Mammoth Oil Co. v. United States, 275 U.S. 13 (1927), the Supreme Court affirmed a district court decision entitling the government to cancel a lease of the Naval Petroleum Reserve. The government representative who handled the transactions had conspired with the lessee in disregard of official policy concerning preservation of oil reserves and in a manner that favored the lessee over other competitors without accounting for government interests. See also Coos County v. Elrod, 125 Ore. 409, 416, 267 P. 530, 532-33 (1929) (county employee had fiduciary obligation to disclose to superiors that he accepted a low bid in a tax sale and discouraged others from submitting high bids).

Numerous cases have stated that a public office is a public trust created in the interest and for the benefit of the people. See, e.g., Crocker v. United States, 260 U.S. 74, 79-80 (1919); Oconee v. Armes Co., 103 U.S. 261, 272-73 (1880); Trist v. Child, 88 U.S. (21 Wall.) 441, 450 (1874) (dictum); Dresbach v. Burlington-Bristol Bridge Co., 10 N.J. Super. 545, 567, 77 A.2d 225, 226 (Ch. 1950). See generally Lenhoff, The Constructive Trust as a Remedy for Corruption in Public Office, 54 COLUM. L. REV. 214 (1954);
onomic costs such as those discussed in the foregoing examples, but moral and functional concerns. Three related moral beliefs shape the public's opinion on the proper uses of confidential government information. First, deeply engrained in the American people is a belief that public office, and confidential information acquired as a result of holding such office, should not be used for private gain. Second, strongly felt notions of fair play, free competition, and equal-

55 COLUM. L. REV. 1085, 1086 (1955); 40 MINN. L. REV. 880 (1956). The "public trust" concept is another way of stating that the public employee is a fiduciary agent.

20. The Supreme Court articulated the moral basis for imposing duties upon fiduciaries in Michaud v. Girod, 45 U.S. (4 How.) 503, 555 (1846): "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private . . . ." See also United States v. Mississippi Valley Generating Co., 364 U.S. 520, 549 (1961), in which the Court interpreted a federal conflict of interest statute and stated: "The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, Matt. 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest."

21. RESTATEMENT (SECOND) OF AGENCY § 395, comment a (1958), states that part of the rationale for restricting a fiduciary's use of confidential information is the need to maintain "the freedom of communication which should exist between the principal and his agent." In the same vein, the Supreme Court has stated that federal conflict of interest statutes seek to "prohibit government officials from engaging in conduct that might be inimical to the best interests of the general public." United States v. Mississippi Valley Generating Co., 364 U.S. 520, 548 (1961).

22. In August 1973 the Subcommittee on Intergovernmental Relations of the U.S. Senate Committee on Government Operations engaged the public opinion firm of Louis Harris & Associates, Inc. to measure public attitudes relating to the responsiveness and efficiency of government. The completed survey and accompanying analysis was published in a committee print. SUBCOMM. ON INTERGOVERNMENTAL RELATIONS OF THE U.S. SENATE COMM. ON GOVERNMENT OPERATIONS, CONFIDENCE AND CONCERN: CITIZENS VIEW AMERICAN GOVERNMENT, 93d CONG., 1st SESS. pt. 1 (1973) [hereinafter SUBCOMM. ON INTERGOVERNMENTAL RELATIONS]. Fifty-seven per cent of the people surveyed stated they had less confidence in the federal government than they had five years ago. The main reason given by surveyed public officials for lack of confidence in the federal government was "corruption, use of office and public funds for personal gain." Id. at 47, 221, 223. The report of the New York Bar Association on federal conflict of interest legislation more fully states this moral belief:

[It is possible to imagine the case of an official who acts impartially, does not play favorites, and is a model of public decorum, but who, for example, speculates on the grain market on the basis of inside government information. The universal condemnation of such action indicates that the prevention of the use of public office for private gain is an independent and separate objective involved in the field of official conflicts of interest.

ity of men under the law make objectionable the prospect that certain individuals will receive government information on the basis of whom they know.23 Finally, government information that has been obtained through the use of public funds and personnel is perceived as a public asset, which if disclosed should be shared by all.24

These beliefs are buttressed by concern for the functional ramifications of the misuse of information. Government requires public cooperation and confidence at several stages of the decision-making process. In many circumstances accumulation of information upon which policy is based depends upon voluntary compliance with governmental reporting schemes.25 If individuals fear that the information they provide will be used to their economic disadvantage, perhaps through disclosure to other parties, they may refuse to cooperate unless faced with substantial additional government enforcement efforts.26 Such efforts might divert funds from other equally important activities, and the higher cost of the data might make programs requiring data collection infeasible or undesirable.27

Misuse of data may further hinder implementation of federal programs. Unchecked, such misuse may lower popular opinion of the government as an effective vehicle for obtaining public objectives. This would make it more difficult for the government to obtain the public cooperation essential to effectuate its policies and programs.28

23. "A government that plays favorites among its citizens is fundamentally objectionable to American conceptions of the equality of men under the law, notions of fair play, and the assumptions of free competition. Few things make an American citizen angrier than to find out that he did not get a fair shake; and a secret personal interest of a deciding official is a kind of dice loading." ABCNY, supra note 22, at 6. See also R. GETZ, supra note 22, at 4; Note, The Federal Conflicts of Interests Statutes and the Fiduciary Principle, 14 VAND. L. REV. 1485, 1502 (1961).


Courts have recognized that trust in the integrity of government employees is essential to achieving government policy objectives. In Haas v. Henkel, 216 U.S. 462 (1910), a Department of Agriculture employee conspired to falsify Department cotton reports, which normally have a substantial effect upon cotton prices. Activity of this nature would 'deprive these reports of most of their value to the public and degrade
Fiduciary principles seek to ensure that government employees behave consistently with these moral and functional concerns by eliminating the possibility of improper pecuniary gain. Regardless of whether the government can prove actual financial loss, an employee who uses confidential information for his own financial advantage is liable to the government for all profits so acquired. Furthermore, if the government can prove an actual loss, it may seek remuneration from the employee.

Personal civil liability, however, is of little practical value if the employee has not personally profited from the misuse of the information. In Reading v. Attorney-General, [1951] A.C. 567, an army officer was paid to ride on a truck carrying black-market goods in Cairo during World War II. The court held that the Crown could recover the money the officer had received. At least one rationale for the opinion was the belief that such activities, even if they caused no direct injury to the Crown, would lower the public opinion of the military. But cf. Harris, Americans Willing To Make Sacrifice To Conserve Energy (Harris Survey, Dec. 3, 1975).

The Civil Service Commission prefaces its regulations concerning employee responsibilities and conduct with the statement that “[t]he maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by Government employees and special Government employees is essential to assure . . . the maintenance of confidence by citizens in their Government.” 5 C.F.R. § 735.101 (1973). To the same effect, the Association of the Bar of the City of New York concluded: “Ultimately every government depends upon the confidence of its people. This is most obviously the case in a democracy. If the people are persuaded that government officials use their office unfairly and for personal rather than public advantage, government by consent of the governed and voluntary compliance with government orders become virtually unattainable.” ABCNY, supra note 22, at 6-7. Cf. Harris, 54% Say They Have “Less Trust” in Public Officials (Harris Survey, Oct. 18, 1975); Harris, Nixon Rating Shows No Change in Month Despite Growing Scandal (Harris Survey, June 28, 1973); Mathews & Sullivan, Criminal Liability for Violations of the Federal Securities Laws: The National Commission’s Proposed Federal Criminal Code, S. 1, and S. 1400, 11 AM. CRIM. L. REV. 883, 900-01 (1973); Chicago Tribune, Nov. 25, 1971, at 26, col. 3 (final ed.).

29. Misuse could also be curtailed by limiting severely the number of employees with access to confidential information. Limiting access may have adverse consequences, however. Decision makers may be deprived of valuable evaluations of decisional data and policy assessments by employees and consultants. ABCNY, supra note 22, at 163-64. See generally id. at 165-79; R. Hall, supra note 27; Peabody & Rourke, Public Bureaucracies, in HANDBOOK OF ORGANIZATIONS, supra note 27, at 802. Also, different agencies are often directed to coordinate efforts to implement a program or policy more effectively. See, e.g., 7 U.S.C. § 1798(a) (1970) (food for peace program). Cf. Kriesberg, Organizations and Interprofessional Cooperation, in COMPARATIVE ORGANIZATIONS (W. Heydebrand ed. 1973) at 262, 267-68. Coordination cannot be achieved unless large numbers of employees are privy to confidential information. Thus, increasing rather than decreasing the number of employees who have access to information may be essential to the effectiveness of the decision-making process and the accomplishment of government goals.

30. United States v. Carter, 217 U.S. 286 (1919). See also RESTATEMENT OF RESTITUTION § 200 (1937); RESTATEMENT (SECOND) OF AGENCY § 408 (1958); 5 A. Scott, supra note 1, §§ 503, 503.1. See generally Note, supra note 29.

31. See materials cited note 30 supra. See also RESTATEMENT (SECOND) OF AGENCY § 404 (1958). If the principal suffers an actual loss and the fiduciary agent has received a profit by reason of the breach of duty, the principal may have to elect between suing for his losses or for recovery of profits. Id. § 407.
mation, since few employees have sufficient assets to satisfy a large
judgment. Fiduciary principles are thus augmented by the doctrine
that acceptance of confidential information by a third party knowing
of its confidentiality makes him liable for the principal's actual losses
under a theory of tortious interference with a fiduciary relation­
ship.82 Furthermore, even if the principal cannot prove actual losses,
the third party must disgorge any profits obtained through the use
of the information under the theory of unjust enrichment, which
declares the third party to be the constructive trustee of the profits
for the benefit of the principal.83 These remedies recognize that the
fiduciary relationship is important, that the fiduciary agent may be
unable to compensate the principal fully, and that third parties
should be legally forced to respect the relationship. They are also
appropriate because in most cases appropriation of confidential infor­
mation would not occur without the participation of a third-party
recipient.84 Stripping the recipient of his illicit gains or forcing him
to pay the government's losses substantially reduces his motivation to
seek out or receive such information, and materially aids the achieve­
ment of fair, efficient government.85

C. The Inadequacy of Current Legal Remedies for Abuse
of Fiduciary Duty by Government Employees

1. Civil Remedies

The civil remedies outlined above will neither prevent nor cor­
correct breaches of fiduciary duties unless the government vigorously
pursues its rights. This has not happened. Only a few reported cases
involve suits against government employees to recover money ob­
tained as the result of a breach of a fiduciary obligation.86 On oc­

82. See RESTATEMENT (SECOND) OF AGENCY § 312 (1958); 5 A. SCOTT, supra note 1,
§ 506. It would be difficult for a third party who received confidential information to
defend on the ground that he did not know that the government employee was breach­
ing a fiduciary duty by disclosing the information. Persons dealing with government
employees are under an affirmative duty to inquire and determine whether the govern­
ment employee is acting consistently with his fiduciary duties. See Hume v. United
545, 569-70, 77 A.2d 255, 267 (Ch. 1950).

83. See D. DODGE, supra note 16, § 10.4; RESTATEMENT OF REStITUITION § 201(2)
(1957); RESTATEMENT (SECOND) OF AGENCY § 312, comment c, at 51-52 (1958); 5 A. SCOTT,
supra note 1, § 506. See also Restatement (Second) of Agency, supra, § 314.

84. See United States v. Carter, 217 U.S. 286 (1919); B. MANNING, FEDERAL CONFLICT
OF INTEREST LAW 270 (1964).

85. See B. MANNING, supra note 34, at 270. The importance of a sense of moral
responsibility in the economic development of a country is briefly explored in H.

86. See United States v. Carter, 217 U.S. 286 (1919); United States v. Drumm, 329
F.2d 109 (1st Cir. 1964) (action against poultry inspector for compensation received
occasion the government has successfully asserted the violation of a government employee's fiduciary duty as the basis for the cancellation or rescission of a contract or as an affirmative defense to a lawsuit brought to enforce a contract. Aside from these cases, however, civil suits against government employees or third-party participants in the employee's breach of fiduciary duties are nonexistent. The reasons for the government's failure actively to pursue its civil remedies are difficult to ascertain. The allocation of investigative and legal personnel always plays a significant role in litigation decisions, but

from poultry processor for consulting done while employed by the Department of Agriculture); United States v. Bowen, 290 F.2d 40 (5th Cir. 1961) (action by United States against civilian engineer for damages arising out of alleged promotion of personal interests while employed by United States); United States v. Drisko, 303 F. Supp. 858 (E.D. Va. 1969) (suit against Department of Agriculture employee to recover gratuities received for information and assistance given to participant in Department programs). In *Carter* the defendant, an army captain and engineer, was placed in charge of an operation to improve the Savannah harbor. His position allowed him to exercise considerable discretion in planning, preparing, and modifying contracts; advertising for and accepting bids; and supervising work. The government contracts were drawn so as to leave the government the option of choosing work methods and the right to substitute one material for another. The evidence showed that Carter granted contracts to two contractors with whom he had made a secret agreement to divide profits. Upon discovery of the secret agreement the government brought suit to recover any profits that Carter had received. Even though the government was unable to prove any actual injury, it was allowed to recover on the theory that Carter had breached his fiduciary duty. 217 U.S. at 298-300.

Application of fiduciary principles is necessary in cases such as *Carter* because of the difficulty of proving actual wrongdoing in light of the discretionary nature of the employee's duties; the belief that a personal interest will, despite the individual's attempt to ignore it, affect his ability to make objective decisions; and the belief that if completely objective decisions are not made the government is deprived of the full benefit of the individual's skill, expertise, and mental capacities, which were the basis for allowing him to exercise discretion in the first place. *See also* Crocker v. United States, 240 U.S. 74 (1916); Oscanyan v. Arms Co., 103 U.S. 261 (1880).

37. *See* United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961). A narrow reading of this case would limit its application to situations in which a government employee violates a specific conflict of interest statute in connection with the grant of a government contract. Such a reading would not reach the setting aside of contracts procured through the use of confidential government information obtained pursuant to a breach of a government employee's common law fiduciary duties.

38. *See* Crocker v. United States, 240 U.S. 74 (1916). This defense may be used by nongovernment parties as well. *See, e.g.*, Oscanyan v. Arms Co., 103 U.S. 261 (1880); Tool Co. v. Norris, 69 U.S. (2 Wall.) 45 (1864). One commentator has noted that with relative frequency, court cases have arisen in which the plaintiff is suing for a fee for services and is met with the defense that the services rendered violate the conflict of interest statute. Apparently, no court has questioned the premise underlying this defense. It seems to be unchallenged that if the services are in violation of the conflict of interest statute, the third party for whom the services were performed may raise the point as a defense and thus receive the services without paying for them. If this were widely understood it might have some useful preventive effect: but once the services have been performed, it does seem a strange result to permit the third party—often the instigator of the transaction—to be the beneficiary of the government employee's infraction.

B. Manning, *supra* note 34, at 270.
that factor alone cannot explain the paucity of civil litigation. There are other possible explanations.

If the employee lacks sufficient assets to satisfy a judgment, a civil suit against him may be deemed economically unwise despite its prophylactic value. Imposition of administrative sanctions may be judged more appropriate. Furthermore, a civil suit against the employee could create legislative, judicial, or public pressure to sue the third party as well. Government officials may not wish to sue the third party, and they may therefore forgo civil action against the employee. In certain situations such forbearance may be justified if one balances the rights of the government against those of innocent parties. For instance, cancellation or rescission of a prime contract obtained through misuse of confidential information may cause substantial economic injury to subcontractors and others who have acted in reliance upon the contract but who were not involved in the wrongdoing. Concern for innocent parties, however, cannot always justify failure to pursue available remedies. The government could still sue the third-party recipient to recover its losses or the third party's profits, often without causing injustice.

Perhaps civil litigation is rare because all damages are recovered through negotiation. More likely and more plausible, however, is the possibility that suits are not filed because of political considerations. When the beneficiaries of misbegotten information are powerful industries or prominent individuals, it may be deemed politically inexpedient to pursue civil claims in the absence of a sustained public outcry. Whatever the explanation, civil litigation as a means of enforcing the fiduciary obligations of government employees is seldom used.

39. But see text accompanying notes 66-81 infra.
42. See text accompanying notes 32-33 supra.
44. A partial step toward more stringent enforcement of the fiduciary duties of government employees would be to accept the idea that the duties are owed to individual citizens as well as to the government. Those who experience direct economic injury as a result of the employee's breach of duty could then sue individually or as a class to recover their losses. For example, individual sellers of wheat in the hypothetical discussed in the text accompanying notes 11-15 supra may be able to trace their sales
2. Criminal Statutes

Federal criminal statutes provide another ostensible means of deterring unauthorized disclosures of confidential information. Current statutes have little effect, however, in part because of limitations in scope. Most federal conflict of interest statutes have as their target either the acceptance of a bribe by a government employee in exchange for information or the participation by the employee in outside activities that give the appearance that he has used his position of trust for personal gain. The statutes that do prohibit unauthorized disclosure of confidential information generally are directed only at particular classes of government employees or employees of particular agencies. No federal statute makes criminal either willful disclosure of confidential government information to a person not authorized to receive the information or the misuse of such information by the employee for personal gain.

If the history of the enforcement of conflict of interest statutes is any gauge of the effectiveness of the criminal process as a deterrent in this area, however, the enactment of a criminal statute expressly to recipients of the unlawfully disclosed wheat crop reports. If the sellers can prove that their wheat would have sold at a higher price if the information had not been disclosed, they may be able to recover from the buyers the difference between the actual price and the price they would have otherwise received. Problems of tracing sales, proving damages, and even determining the injured parties, however, may make such a suit impractical. The citizens' action proposed in Part II of this Article would be a more effective and efficient means of enforcing the fiduciary obligations of government employees.

47. See, e.g., 18 U.S.C. §§ 1901 (Treasury personnel), 1903 (Department of Agriculture and Federal Crop Insurance Corporation employees), 1904 (Reconstruction Finance Corporation employees), 1906 (bank examiners), 1907 (farm credit examiners) (1970). One statute, 18 U.S.C. § 1902 (1970), is somewhat more broad. It prohibits any government employee from willfully disclosing official confidential government information "which might influence or affect the market value of any product of the soil grown within the United States" to any person not entitled to receive such information prior to the time the information is made public through official channels. Speculation in the product by the employee before the information is made public is also prohibited. Neither disclosure nor speculation violates the statute, however, unless the employee had actual knowledge of agency regulations requiring that the information be withheld.

Another statute, 18 U.S.C. § 1905 (1970), prohibits disclosure by any employee of the United States of any information that "relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association." Although interpretive data are scarce, the congressional intent was apparently to make criminal the divulgence by federal employees of information obtained from income tax returns or in connection with government investigations or examinations. See, e.g., United States v. Stern, 418 F.2d 198 (2d Cir. 1969). Disclosure of nonprivate information, such as a wheat report, would apparently not be reached.
prohibiting the disclosure of any confidential government information would not solve the problem. History reveals many misuses of public office that could have been prosecuted under then-existing law, but the incidence of prosecution is rare. 48

Although the isolation of particular factors is difficult, 49 and formulation of a predictive test impossible, one may identify the general considerations that deter criminal prosecution. First, political pressures may prevent prosecution if sensitive issues or prominent personalities are involved in the case. 50 The pressure may come from

48. See ABCNY, supra note 22, at 117. There were several possible violations of federal conflict of interest statutes committed by Adolphe H. Wenzell, then vice-president of the First Boston Corporation and a part-time government consultant, in the transactions surrounding the 1954 Yates-Dixon contract, but no criminal prosecutions were initiated. See United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961). See also ABCNY, supra, at 163; R. Gerz, supra note 22, at 15-16; Staff Report, supra note 22, at 5.

49. Decisions to decline, dismiss, negotiate, or compromise a case are rarely committed to writing. See Rabin, supra note 43, at 1042.

50. See id. at 1066-67. Cf. H. Edelhertz, The Nature, Impact and Prosecution of White-Collar Crime 42 (1970). Prosecution of the government employee may lead to demands that the third party be prosecuted as well. Political pressure may be used to prevent a prosecution that may have what are perceived as undesirable or unpredictable repercussions. Recently many examples of alleged failures to investigate or prosecute due to the political influence of the alleged violators have been reported. See, e.g., Newsweek, Dec. 10, 1973, at 37 (alleged White House pressure to prevent investigation of financier Robert Vesco’s connection with a drug smuggling operation). See also materials cited note 43 supra. But see Department of Justice Hearings, supra note 48, at 983: “The Attorney General told me also to tell this committee that he . . . [intends] to prosecute when there has been a violation, and he said that he intends, when any cases are brought to his attention, to proceed immediately with grand juries in connection with them.” See also ABCNY, supra, note 22, at 163. The vigor with which such declarations are followed, especially in sensitive cases, is questionable when one considers that the Attorney General, his immediate subordinates, and United States attorneys are political appointees.

There may, of course, also be political pressure in the opposite direction. The opposition party seeks to expose conflicts of interest within the administration in order to embarrass it. ABCNY, supra, at 163. This may result in some pressure to prosecute, but partisan cries subside once the alleged malefactor leaves his position and maximum political advantage has been gained.
superiors, as the result of high-level intra-agency conferences, or from other sources. 51

Second, numerous internal pressures within the prosecutor's office, some completely unrelated to the merits of the controversy, may play a decisive role. The availability of economic and physical resources, the caseload demand, 52 and the difficulty of proving guilt 53 may be determining factors. Conflict of interest cases are often complex; 54 proof of intent may depend upon the interpretation of ambiguous conversations and written documents and may require many witnesses. Proof of more common crimes, such as armed robbery, is more simple and usually involves less ambiguous facts. Furthermore, the complexity of the case may make it relatively time consuming. The prosecutor thus must select between probably successful prosecutions of a number of "ordinary" criminal cases and devotion of substantial manpower to one conflict of interest case, with perhaps marginal chances of success. 55 Other sanctions already imposed upon the alleged culprit, such as job dismissal or demotion, may add to the disincentives to prosecute. 56

Still other pressures, reflected in the attitudes of judges and jurors, may discourage prosecutions. Despite general public indignation against dishonesty and undue influence in government, it is questionable whether judges, juries, or the public, for that matter, really believe that the less flagrant conflict of interest violations deserve criminal sanctions. 57 Jurors may be unwilling to convict government

51. See H. EDELHERTZ, supra note 50, at 42.
55. One author concludes, on the basis of extensive empirical study, that conviction rate is the principal criterion by which the effectiveness of a United States attorney's office is judged. A tendency thus exists to initiate prosecutions only in cases in which there is a strong possibility that the defendant will be convicted or plead guilty. Rabin, supra note 43, at 1045, 1047, 1062, 1071. Cf. D. STANLEY & M. GUTH, BANKRUPTCY 154-55 (1971) (inaction of United States attorneys on criminal bankruptcy complaints attributable in part to pressures of higher priority or more attractive cases).
56. See Rabin, supra note 43, at 1059-61. A jury's willingness to convict may also be influenced by the extent to which administrative or nonlegal sanctions have already been imposed. See H. KALVEN & H. ZEISEL, THE AMERICAN JURY 804-05 (1966).
57. There is some evidence that juries are relatively sympathetic toward white-collar criminals. A 1983 study of the public's evaluation of penalties imposed for certain violations of the Pure Food and Drug Act revealed dissatisfaction with administrative
employees or third parties of felonies when, as in many cases, the injury to the public is not immediately identifiable. Prosecutors may view indictments as futile in light of such attitudes. Even when convictions are obtained, light sentences are often imposed, a factor that may also deter prosecution. Finally, judges faced with calendars crowded with what they deem to be more important cases may exert overt or subtle pressures on prosecutors to ignore the less politically volatile cases.

Of course, prosecutions may not occur because the interest in holding the wrongdoer accountable may be outweighed by other valid concerns. Conflict of interest cases often present a delicate balance between the desire to prevent employee misconduct and the governmental need adequately to staff programs and positions with citizens drawn on a temporary basis from private life. The Justice Department may forgo prosecution of some apparent violations of the conflict of interest laws in order not to frustrate government recruiting operations by causing private individuals to fear criminal prosecution for making inadvertent or minor missteps in a proffered public position.


60. See Ogren, supra note 52, at 962-64; Seymour, Social and Ethical Considerations in Assessing White-Collar Crime, 11 AM. CRIM. L. Rev. 821, 822, 828 (1973).


62. STAFF REPORT, supra note 22, at 2, states: “In periods of national stress . . . Congress] has tended to carve out exceptions and exemptions from the conflict of interest statutes, in apparent response to the thesis that to insist upon strict accountability between a citizen and his employer-Government might deter the able from accepting public office and thus impair the national effort.” See also ABCNY, supra note 22, at 152-64; B. Manning, supra note 34, at 5-7; STAFF REPORT, supra, at 3-4; McElwain & Vorenberg, The Federal Conflict of Interest Statutes, 65 HARV. L. Rev. 955-56 (1952); Wheeler, supra note 48, at 323.

63. The Association of the Bar of the City of New York, in its report on the pre-1963 conflict of interest laws, states:

At many critical points the statutes defy understanding or prediction . . . . Conviction, prosecution followed by acquittal, or even indictment under one of
The limited scope of current statutes may also influence the incidence of prosecutions. The laws are directed primarily at the government employee, and not at the third party who may have abetted the breach of duty. Judges, jurors, and prosecutors may be reluctant to convict a government employee while the third-party beneficiary goes free.

Enforcement of new legislation making criminal the disclosure and receipt of any confidential government information would be subject to many of the pressures that hinder the enforcement of existing sanctions. Offenses would continue to be difficult to prove and there is no reason to suspect that internal and political pressures against prosecution would dissipate. Principal enforcement of the fiduciary duties of government employees may be better left to mechanisms other than the criminal process.

3. Administrative Controls

Administrative controls are another weapon in the government's arsenal. Prior to 1965 there was little agency supervision of the fiduciary duties of employees. Some agencies promulgated regulations that were enforced in varying degrees while others undertook neither regulations nor enforcement efforts. In 1965 an attempt was made to unify agency positions and to promote a policy of vigorous enforcement. An Executive Order directed the United States Civil Service Commission to formulate comprehensive regulations governing the conduct of federal employees. The resulting Civil Service

these statutes can disgrace a man for life. And so when the prospective appointee asks his lawyer for counsel on the application of the conflict statutes to his particular situation, the careful lawyer tends to be especially cautious. The more strict the lawyer's interpretation, the more likely that the appointee will decide that the personal costs of compliance with the statutes are too great and that he had better decline the appointment.

ABCNY, supra note 22, at 163.


65. There may be a tendency on the part of juries to acquit defendants who have either played a minor role or have received no direct monetary benefit from the transaction. When the principal criminal actor is not prosecuted, juries may acquit the remaining defendant in the belief that he has been "left holding the bag." An example is the acquittal in a bribery trial of an employee who accepts a bribe, but who receives no monetary benefit and acts only on behalf of a superior. H. Kalven & H. Zeisel, supra note 56, at 317.

66. "Agency" as used in this section includes any executive department, independent federal office, or government corporation.

67. See ABCNY, supra note 22, at 79-84, 149; B. Manning, supra note 34, at 272; Staff Report, supra note 22, at 2.

orders expressly prohibit both the use of confidential information by government employees for personal gain and the advance disclosure of such information to outsiders. All agencies were ordered to supplement Commission rules with appropriate regulations of their own. Each agency now identifies classes of information falling within the prohibitions.

Enforcement of these comprehensive regulations would offer advantages over criminal prosecution. Administrative action can reach conduct that, although a breach of fiduciary duty, does not constitute a crime or warrant criminal punishment. Agencies can also improvise methods of dealing with their particular conflict of interest problems with a flexibility not possible in a more general criminal code. Also, a change in agency activities may create different conflict of interest problems, and regulations may be easily updated to meet new situations. Finally, the administrative process offers a more flexible choice of sanctions than the criminal process. Discipline may range from an oral reprimand to the employee's dismissal.

Unfortunately, these advantages may be more apparent than real. The deterrent effect of the regulations depends on vigorous agency enforcement, and evidence that a new enforcement attitude has accompanied the new regulations is inconclusive. On the one hand, an agency's desire to protect itself from embarrassment and from outside investigations may be a strong incentive for internal enforcement. On the other hand, agency exposure of employee misconduct may invite adverse publicity and congressional inquiry that agency officials wish to avoid, and therefore lead them to the conclusion that formal action is not in the agency's best interest.

Furthermore, agencies are subject to the same internal and external pressures as other organizations. Organizational politics may play a role in enforcement decisions. A superior may not report
parent violations by employees in the fear that the illegal activity may adversely reflect on his own supervisory role or that investigation may implicate others more highly placed.⁷⁶ Also, agencies are frequently criticized for becoming too subservient to the industries and producer groups they supposedly regulate.⁷⁷ Where such an environment exists agency personnel may regard some leaks of confidential information to selected members of an industry or producer groups as unobjectionable.⁷⁸

For still other reasons it seems naive to place heavy reliance upon the administrative process. Many government employees serve on only a part-time or temporary basis.⁷⁹ The threat of administrative sanctions may be less significant to such employees and have less of a deterrent effect on them than it would have on permanent employees.⁸⁰

Even if the regulations were strenuously enforced, they are aimed at the employee and do not reach the outsider. Normally, however, it is the outsider who has the "deep pocket," and thus administrative action, unless supplemented by other remedial devices, cannot recover government losses or recoup unjust profits.⁸¹

D. Conclusion

The principles governing fiduciary relationships adequately define the government employee's duties and the consequences of any interference with or breach of those duties. No substantive changes in these principles are necessary. Current procedures, however, are unable to guarantee enforcement of fiduciary duties or protection of confidential information. The enforcement mechanisms are in the control of those who, for a variety of reasons, may have an interest in their nonuse. What is needed is a mechanism, less subject to political

⁷⁷ See note 3 supra.
⁷⁹ The federal government increasingly uses temporary employees as consultants and experts. See ABCNY, supra note 22, at 145-48, 161-62, 196. They assist agency personnel on matters of policy as well as on technical and scientific matters. Id. at 145. For an example of an intermittent employee improperly using confidential information see United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961).
⁸⁰ Temporary employees who maintain their ties with previous employers while doing work for the government may also have the incentive and the opportunity to leak information to those businesses with which they are associated. See United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961).
⁸¹ Even if agency procedures could be used to cancel contracts with or otherwise sanction the outsider, the agency may not take such action for the same reasons that civil and criminal actions are not commenced. See notes 48, 50 supra and accompanying text. Cf. Ariz. Republic, July 5, 1970, at A-18, col. 1.
or internal pressures, that can be used both to protect the public interest and, perhaps, to stimulate government agencies and officials whose responsibility is to enforce the fiduciary duties owed to the government.

II. A PROPOSED CITIZENS' ACTION

A. Introduction

The balance of this Article discusses a proposal for a new citizens' action to augment the government's civil, criminal, and administrative remedies. The citizens' action would be (1) a representative action (2) brought on behalf of the federal government and the public (3) by a qualified citizen or group of citizens (4) alleging that a third party (5) has been improperly made privy (6) to confidential government information and (7) has used it for personal economic profit (8) with knowledge of its confidential nature. Any recovery obtained by means of a citizens' action would accrue to the government; the plaintiff would receive reasonable attorney's fees and litigation costs.

The citizens' action proposal is not intended to authorize any private citizen to sue any government employee or third party for all misuses of government position or power. Rather, the action is advocated as an independent, supplemental enforcement device by which qualified unofficial representatives of the public, in a manner con-

82. The United States, like the corporation in a shareholder derivative suit, would be the real party in interest. See 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1822 (1972).


the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, . . . out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: Provided, That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefor on the United States.

sistent with constitutional imperatives, may bring suit when confidential government information has been misused by third persons for their personal benefit. The action is independent in that its prosecution will not be controlled by any political branch of the government; it is supplemental in that it is designed to prevent and correct the adverse social and economic consequences of misuse of information when the primary enforcement devices fail. Thus, a plaintiff would not be able to commence the action at his whim, but only if no action by the government has been taken and a written request asking the Justice Department to institute action has been filed and refused or ignored.

Insofar as the citizens' action is a representative action, it shares

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84. The citizens' action, unlike the private antitrust suit, should not be allowed to proceed simultaneously with a government civil action. Because the citizen sues on behalf of the government the appropriate analogy is to the shareholder derivative suit, which under federal law is allowed only where the corporation has refused to assert its rights. FED. R. CIV. PR. 23.1. Thus, where the government objects to a citizens' action on the ground that it is going to file its own action, the appropriate procedure would be to stay the citizens' action. The plaintiff would have the right to request that the stay be lifted if the government fails to file suit or if it files suit but fails to prosecute vigorously.

A problem may arise where the government files suit before the initiation of a citizens' action but settles the case for an insubstantial sum, or dismisses the case with prejudice. The very act of filing suit, motivated by the threat of a citizens' action, would be an improvement of present government practices, and once a suit is filed the executive branch may not wish to influence the manner in which the case is prosecuted, especially if the public interest is aroused. However, some safeguard should exist against the filing of suit by the government without serious intent to prosecute and solely for the purpose of foreclosing a future citizens' action. One solution would be to require that any settlement or dismissal of a civil action brought by the government to recoup its losses or to capture another's profits on the basis of unauthorized disclosure or use of confidential government information be approved by the court, and that there be a 60-day hiatus between the filing of the proposed settlement or dismissal and the court approval. During this time a citizen could object to the settlement or dismissal on the ground that it contravenes the public interest and could request that the action proceed as a citizens' action. A hearing would be held to determine the validity of the objections. A citizen could similarly be allowed to intervene when a government action has been filed but not actively prosecuted. Cf. Federal False Claims Act, 31 U.S.C. § 232(C) (private party may maintain an action if the government fails to prosecute "with due diligence" within six months of its initial appearance). The court could permit the initiation of a separate citizens' action, or, if the statute of limitations has run, the government action could be converted into a citizens' action. Cf. Federal False Claims Act, 31 U.S.C. §§ 231-35 (1970); FED. R. CIV. P. 17(a); 6 C. WRIGHT & A. MILLER, supra note 82, § 1555. A government showing of the reasonableness of its action would be entitled to great weight, and probably few settlements or dismissals would not be approved. Nevertheless, the suggested procedure would at least require the government to state publicly the reasons for its actions.

85. Cf. Federal False Claims Act, 31 U.S.C. §§ 231-35 (1970). See note 95 infra. Arguably the citizens' action should not be preempted by criminal prosecution of the defendants. The law contemplates parallel private enforcement in other areas despite the potential interference with criminal investigations based upon the same underlying facts. See notes 109-11 infra. Any potential interference could be mitigated by allowing the Justice Department to intervene in citizens' actions against defendants who will be the subject of criminal prosecution.
some characteristics of a class action, a shareholder derivative suit, and a *qui tam* action. It is designed to incorporate the strengths and to avoid the theoretical and practical weaknesses of these procedures. For instance, an attempt to enforce a government employee’s fiduciary duties by means of a class action brought by a taxpayer on behalf of himself and other taxpayers would face several difficult obstacles. First, it is not clear whether the unauthorized disclosure of confidential information by a government employee would be a breach of a duty owed directly to individual citizens. Assuming that it would be, the recent decision of the Supreme Court in *Eisen v. Carlisle & Jacquelin* appears to require that individual notice be given to all affected citizens who can be identified by reasonable efforts. The cost of fulfilling this requirement would probably make a class action infeasible. Furthermore, there are many situations in which the employee’s disclosure of confidential information would not result in immediate economic injury to the United States treasury. Without a recognizable injury to citizen taxpayers a class action could not be maintained. Finally, even if damages were recoverable, their distribution to the injured class would be a problem unless a fluid class theory were accepted. The proposed citizens’ action does not suffer from any of these difficulties.

86. See note 44 *supra*.
87. 42 U.S.L.W. 4804 (U.S. May 28, 1974).
88. 42 U.S.L.W. at 4809.
89. Whether the Supreme Court would accept notice by publication in the context of a broadly based class action is uncertain. The answer depends upon how much effort must be made to ascertain the names and addresses of the individual members of the class. See *Eisen v. Carlisle & Jacquelin*, 42 U.S.L.W. 4804, 4809-10 (U.S. May 28, 1974); in *Eisen* the Court stated that individual notice by ordinary mail had to be given to 2,250,000 identifiable members of the class, which would have cost approximately $15,000 dollars at current first-class postage rates. 42 U.S.L.W. at 4807 n.7.
90. See text accompanying notes 11-15 *supra*.
91. But see note 44 *supra*.
92. The fluid class idea was proposed by the United States District Court in *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 265 (S.D.N.Y. 1971), but was rejected by the Second Circuit in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973), vacated and remanded on other grounds, 42 U.S.L.W. 4804 (U.S. May 28, 1974). The plaintiff in *Eisen* was suing for himself and on behalf of 2,250,000 others similarly situated. The Supreme Court explained the district court’s proposal as a “fluid class” recovery whereby damages would be distributed to future odd-lot traders rather than to the specific class members who were actually injured. The district court suggested that “a fund equivalent to the amount of unclaimed damages might be established and the odd-lot differential reduced in an amount determined reasonable by the court until such time as the fund is depleted.” 52 F.R.D., at 265. The need to resort to this expedient of recovery by the “next best class” arose from the prohibitively high cost of computing and awarding multitudinous small damage claims on an individual basis. 42 U.S.L.W. at 4807. The fluid class theory as applied to class actions based on disclosures of confidential information could in theory result in a general reduction of taxes pursuant to payment of the recovery to the United States treasury, but the
The citizens' action is similar to the shareholder derivative suit in that the plaintiff would not sue to recover for an injury to his personal interests; the suit would be on behalf of the government. This raises a standing issue. Citizens generally lack standing to litigate on behalf of the United States because federal law places the exclusive power to conduct litigation in which the United States has an interest in the Department of Justice, except where Congress provides otherwise. The citizens' action would thus require authorizing legislation.

Precedent for such legislation may be found in federal *qui tam* statutes, which, for instance, permit one private citizen to sue another benefit to an individual taxpayer, even in cases involving millions of dollars, would be negligible.

93. Congress apparently has the authority to designate anyone to act as the legal representative of the United States in any case in which the government has an interest. Article IV, section 3, clause 2, of the Constitution grants to Congress the exclusive "Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States." In United States v. California, 332 U.S. 18, 26-29 (1947), the Court recognized that Congress could limit the Attorney General's authority to pursue claims of the United States. Although the cases that discuss Article IV, section 3, clause 2, have usually involved land or other physical property, *e.g.*, United States v. City & County of San Francisco, 310 U.S. 16, 29-30 (1940), it may be assumed that "Property" as used in that clause includes intangible property, such as an enforceable legal right, as well. Article IV, section 3, clause 2, is apparently the constitutional basis for *qui tam* statutes, which allow a private citizen to sue on behalf of the United States in certain circumstances. *E.g.*, Federal False Claims Act, 31 U.S.C. §§ 231-35 (1970). See note 95 infra. Although the present *qui tam* statutes allow intervention by the Attorney General or the Department of Justice, 31 U.S.C. § 232 (1970), an earlier version placed exclusive control of the litigation in the hands of the private plaintiffs. See Bush v. United States, 13 F. 625, 629 (C.C. Ore. 1882).


Once Congress has vested the citizen with the power to sue as the representative of the United States the standing of the representative depends only upon whether the represented party—the real party in interest—has the "requisite personal stake in the outcome of the litigation" that is being prosecuted on his behalf. *E.g.*, Workmen's Compensation Exch. v. Chicago, M., St. P. & P. R.R., 45 F.2d 895 (D. Idaho 1930); McFerren v. First Natl. Bank, 214 Iowa 198, 238 N.W. 914 (1931). The rights of the United States—the represented party in the proposed citizens' action—would certainly be sufficient to satisfy the "case or controversy" requirement.

94. The statutory grant of authority would distinguish the citizens' action from the situation in which all citizens share an undifferentiated interest in the case. See Schlesinger v. Reservists Comm. To Stop the War, 42 U.S.L.W. 5088 (U.S. June 25, 1974) (respondents, suing as representatives of all United States citizens, denied standing).
pursuant to a statute that establishes a fine, penalty, or forfeiture for fraudulent claims or misuse of federal funds and allows the successful private litigant to retain a portion of the penalty, with the government receiving the balance. The qui tam statutes were instituted to augment inadequately staffed enforcement agencies; they became unnecessary as official law enforcement bodies grew and unpopular as the prospect of large recoveries led to significant abuses. The proposed citizens' action would avoid the latter difficulty by limiting the plaintiff's recovery to reasonable attorney's fees and litigation costs. Damages would accrue to the government. Furthermore, maintenance of the citizens' action would depend on the quality of the purported representation and the reasons for nonprosecution by the government, matters closely linked to possibility of abuse and not dealt with in the traditional qui tam action.


Whenever any . . . suit [seeking to enforce a penalty from one who has made fraudulent claims against the United States] shall be brought by any person under clause (B) of this section notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: Provided, That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) of this section.

For explanation of the history and operation of qui tam statutes see Comment, Qui Tam Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions, 67 NW. U. L. REV. 446 (1972); Comment, Qui Tam Actions: The Role of the Private Citizen in Law Enforcement, 20 UCLA L. REV. 778 (1973).

96. Although the relevant legislative material is somewhat sparse, the congressional debates suggest that there were two reasons for decreasing the qui tam plaintiff's share of the recovery. First, the potential rewards from bringing qui tam suits under the False Claims Act were so great that underworld figures apparently were enticed to file actions. The Chairman of the Senate Committee on the Judiciary stated that "today the qui tam proceeding under the False Claims Act has become one of the worst sources of racketeering since the days of Al Capone in the prohibition era." . . . Second, it was noted that, of the qui tam actions then pending, each case involved a potential recovery of between $100,000 and $40,000,000. It was believed that a reduction in the qui tam plaintiff's share of the award would not work a hardship if the action were a bona fide attempt to assist the government in enforcing the law.

Comment, 67 NW. U. L. REV. 446, supra note 95, at 457 n. 54. See also id. at 451 n.21.
B. Controlling the Citizens’ Action: The Evidentiary Hearing

A statute allowing private suits involving government officials is uniquely susceptible to abuse. Questionable suits could be filed, either to induce large out-of-court settlements or to harass government officials. Members of political parties not in power could allege misuse of information in order to embarrass the opposition. Such dangers may be forestalled by applying procedural safeguards developed in other settings. The first stage of the judicial proceedings could thus be an inquiry, patterned after the evidentiary hearings used under Federal Rules of Civil Procedure 23 and 23.1 in connection with class actions and shareholder derivative suits, that would determine whether and under what conditions the citizens’ action would be allowed to proceed.

1. Phase One—Determining the Proper Parties

a. Government objection to suit by a private plaintiff. Because the private citizen is not the duly authorized representative of the public interest, private suits should not be allowed unless it can be shown that they will not frustrate valid government political or operational concerns. Government inaction, or, analogously, government objection to the maintenance of a citizens’ action, might be presumed to reflect important public interests that are neither perceived nor adequately represented by the citizens’ action plaintiff.

The most sensitive objection would be an assertion that a particular citizens’ action is not in the national interest. Conceivably the prosecution of a legitimate government claim, although promoting the public interest in honest and efficient government, might require the disclosure of confidential information or conflict with the fulfillment of another national policy objective. One may argue that the Constitution delegates the primary responsibility for choosing among conflicting policies to the executive branch, which is more representative, politically responsive, and informed than the individual citizen. Arguably, a particular citizens’ action might interfere with the functioning of the executive branch and involve courts in an area that is not entrusted to their judgment. If a citizen has a

97. For a discussion of similar arguments in the area of administrative law see Jaffe, 84 HARv. L. Rev. 633, supra note 93, at 637-38. With respect to shareholder derivative suits see Swanson v. Tyner, 249 F.2d 854, 858 (7th Cir. 1957). Allowing a citizen to press a claim that would normally be prosecuted by a public official is not without precedent. See, e.g., MICH. COMP. LAWS ANN. § 775.12 (1968) (private prosecution of criminal charge allowed if bond posted after prosecutor refuses to prosecute). See also note 95 supra.
grievance concerning the management of the government, the argument proceeds, his redress is through the ballot box rather than through court action.98

This last point deserves primary attention. The conclusion that the citizens' role in deterring misuse of information should be limited to the electoral process is hardly realistic. Questions of the integrity of subordinate executive officials or employees usually do not determine the outcome of national elections.99 The proposed action provides a more convenient and realistic means for citizens to exercise on a day-to-day basis their role as the ultimate check in a government predicated upon checks and balances. Instead of leaving citizens with the impression that important concerns will be lost in the immediacy of the election process, or with a feeling of helplessness or exclusion from the operation of their government,100 the citizens' action provides a vehicle for effective citizen participation in correcting breaches of fiduciary duty and in promoting responsible and honest government.

Nevertheless, one may contend that citizens should not be allowed to usurp functions intended to be delegated to the executive branch. This argument has merit if one is willing to make the dubious assumption that government actions are always the consequence of reasoned judgment and are never the result of improper motives inconsistent with the reasons for placing the primary decisional power in the executive branch. Because these assumptions are not always true101 the real question is not whether citizens, acting through the courts, should be allowed to second-guess the executive branch as to what is in the national interest. Rather, a government objection to the maintenance of a civil action should be evaluated in terms of whether the executive action is in fact predicated upon a choice be-

98. See Jaffe, 116 U. Pa. L. Rev. 1033, supra note 93, at 1036.
99. See, e.g., Harris, Nixon Maintains Wide Lead in Final Poll (Harris Survey, Nov. 6, 1972); Harris, I.T.T. Case—Kleindienst Appointment (Harris Survey, May 1, 1972). See also Jaffe, 116 U. Pa. L. Rev. 1033, supra note 93, at 1036, 1038. Such issues tend to be obscured by more pressing questions of foreign policy, domestic economic problems, and defense. See V. Key, The Responsible Electorate 130-31 (1966).
100. See Jaffe, 116 U. Pa. L. Rev. 1033, supra note 93, at 1044-45.
101. See, e.g., note 50 supra and text accompanying notes 43, 50-51 supra. One commentator has noted that there exists a “premise that public parties need not be allowed to litigate the public interest since the administrators themselves are the representatives and protectors of the public interest. One possible explanation for the shift in the law [away from this premise] is the skepticism on the part of the public and the courts that the administrators adequately fulfill such roles on behalf of the public” (footnotes omitted). Note, Citizen Organizations Intervening in Federal Administrative Proceedings: The Lingering Issue of Standing, 51 B.U. L. Rev. 403, 407 (1971). See also Hamburger, supra note 93, at 370.
between conflicting national interests. If it is not, and if one assumes that nonprosecution should not be tolerated in these circumstances, the intervention of private parties should be allowed. Resolution of this more narrow issue is not an unwarranted intrusion upon executive power. On the contrary, it would be consistent with the well-recognized function of the courts as a check upon the misuse of executive power.102

The citizens' action should not be quashed simply because the government's national interest objection may be based on national security or on the need to protect confidential information.103 In this situation the court could order an in camera hearing at which it would determine the validity of the objection.104 The government would have to show that national security would be undermined by the maintenance of the citizens' action and that the confidentiality of sensitive information could not be adequately protected by appropriate discovery orders and rulings on objections at trial.105 If the


103. A civil lawsuit based upon the unauthorized use of confidential government information for private profit would rarely involve continuing national security, even in sensitive cases. The fact that the plaintiff was able to acquire sufficient information to file a complaint may indicate that security is no longer possible.


105. See Fed. R. Civ. P. 26(c). See also E. WRIGHT & A. MILLER, supra note 82, § 2035.

The government could claim that even an in camera hearing would be inappropriate, and that its assertions concerning national security must be accepted at face value. Recent cases dealing with the analogous subject of executive privilege indicate that such an argument would not succeed. See, e.g., Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973):

We of course acknowledge the longstanding judicial recognition of Executive privilege. Courts have appreciated that the public interest in maintaining the secrecy of military and diplomatic plans may override private interests in litigation. They have further responded to Executive pleas to protect from the light of litigation "intra-governmental documents reflecting • • • deliberations comprising part of a process by which governmental decisions and policies are formulated." In so doing, the Judiciary has been sensitive to the considerations upon which the President seems to rest his claim of absolute privilege: the candor of Executive aides and functionaries would be impaired if they were persistently worried that their advice and deliberations were later to be made public. However, counsel for the President can point to no case in which a court has accepted the Executive's mere assertion of privilege as sufficient to overcome the need of the party subpoenaing the documents. To the contrary, the courts have repeatedly asserted that the applicability of the privilege is in the end for them and not the Executive to decide. They have, moreover, frequently ordered

government is unable to show that the suit is not in the national interest or that it would compromise national security, the citizens' action should be permitted to proceed to the next phase.\textsuperscript{108}

The government's failure to prosecute may also be based on valid operational concerns. In deciding whether to pursue a case the government may legitimately weigh the possibility of a favorable outcome, the value of the relief sought, the precedential importance of the case, the national interest involved, and the court's possible response to the facts of the case as opposed to its response to the facts of another case involving the same issue,\textsuperscript{107} a consideration important if the government is attempting to create a uniform trend of decision.

A government objection to the maintenance of a citizens' action arguing that the government's decision not to proceed was legitimately based on these or similar concerns and that the decision should not be "second-guessed" by a citizens' action plaintiff should, however, be overruled. The private plaintiff's funds will be used to investigate and prosecute the claim, producing little if any drain on government prosecutorial resources.\textsuperscript{108} Concern over the proper allocation of legal resources is thus largely irrelevant in the citizens' action context. Only the government's interest in developing uniform case law merits attention, and this interest is insubstantial when measured against the potential benefits of allowing citizens' actions. Our legal enforcement system contemplates private prosecution of claims in many situations in which government prosecution is possible. Thus, private suits are allowed in the areas of antitrust,\textsuperscript{109} securities,\textsuperscript{110} and environmental law,\textsuperscript{111} even though there is the danger

\begin{itemize}
\item \textit{in camera} inspection of documents for which a privilege was asserted in order to determine the privilege's applicability. 487 F.2d at 719-14, quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), affd. sub. nom. V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967).
\item \textsuperscript{106} See text accompanying notes 135-41 infra.
\item \textsuperscript{107} See also text accompanying notes 52-65 supra.
\item \textsuperscript{108} Some government resources may be involved. Government attorneys monitor the action, and may become actively involved if government information is sought through discovery or pursuant to the Freedom of Information Act, 5 U.S.C. \textsection 552 (1970).
\item \textsuperscript{110} E.g., J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Eagle v. Horvath, 241 F. Supp. 345 (S.D.N.Y. 1965).
\item \textsuperscript{111} E.g., Federal Water Pollution Control Act Amendments of 1972 \textsection 505, 33 U.S.C. \textsection 1365 (Supp. 1972); Clean Air Amendments of 1970 \textsection 12(a), 42 U.S.C. \textsection 1857h-2(a) (1970); Noise Control Act of 1972 \textsection 12, 42 U.S.C. \textsection 4911 (Supp. 1972); Michigan Environmental Protection Act of 1970 \textsection 2(1), Mich. Comp. Laws Ann. \textsection 691.1202 (Supp. 1974). Both the Water Pollution Control and the Clean Air amendments contain provisions to coordinate private litigation with administrative enforcement. See Cramton &
that uniform development of the law will suffer. The basic rationale, applicable to the citizens' action as well as to private suits in other areas, is that parallel private enforcement augments official actions, which are limited by available resources, and that the combined effort causes greater adherence to the law at the relatively low cost of occasional deviations in the case law.112

b. Does the plaintiff fairly and adequately represent the interests of other citizens? Assuming that the citizens' action survives a government objection based on political or operational concerns, the next step would be to assess whether the particular plaintiff will fairly and adequately represent the interests of other citizens.113 Here again, existing representative actions, such as class actions and shareholder derivative suits, provide useful models. Relevant factors would include the plaintiff's integrity,114 determination to prosecute the claim,115 and ability to pursue the litigation.116 Evidence of a conflict between the interests of the plaintiff and the interests of other citizens would disqualify him.117 Finally, the experience and qualifications of the plaintiff's attorney would be considered.118 The

Boy, Citizen Suits in the Environmental Field: Peril or Promise?, 2 Ecology L.Q. 407, 427 n.70 (1972). As in the proposed citizens' action, a plaintiff may sue under the Clean Air Amendments only after notice to the proper governmental authorities followed by government inaction or refusal to institute suit. Id.


113. See generally 7 C. WRIGHT & A. MILLER, supra note 82, §§ 1765-69, 1789.


The capacity of the plaintiff to bear the cost of litigation would seem to be a necessary element of his ability to represent adequately the absent members of the class. Lack of financial resources has been a problem in the environmental area, and the amount of litigation instituted by public interest organizations has consequently been less than expected. See Cramton & Boyer, supra note 111, at 417; Sax & Conner, Michigan's Environmental Protection Act of 1970: A Progress Report, 70 Mich. L. Rev. 1003, 1080 (1972); note 141 infra. Such a requirement would eliminate the need for requiring the plaintiff to put up a bond for costs, as is often required in shareholder derivative suits. See, e.g., N.Y. BANK. LAW § 6026 (McKinney 1971).


118. See, e.g., Hohmann v. Packard Instrument Co., 399 F.2d 711, 714 (7th Cir. 1969); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968); Carpenter v. Hall, 311 F. Supp. 1099, 1114 (S.D. Tex. 1970); Epstein v. Weiss, 50 F.R.D. 387, 392...
evaluation of the plaintiff and his counsel should be no more difficult in the citizens' action than in class actions or shareholder derivative suits. The body of law developed under Federal Rules of Civil Procedure 23 and 23.1 should provide courts with the necessary guidelines.110

The practical effect of the inquiry into adequacy of representation bears note. Although the proposal does not explicitly preclude individuals from filing a citizens' action, as a practical matter the average citizen will normally be foreclosed because of his inability to establish that he can fairly and adequately represent the interests of other citizens.120 The plaintiff will more likely be a community leader or an organization that has demonstrated concern with the proper administration of government.121 When the plaintiffs in class actions are community leaders or organizations, courts have often assumed that representation is adequate or have required less of a showing of the representative capacity of the plaintiff.122 When more than one group purports to represent the class, the court has the power to choose the "best" representative to conduct the litigation.123 There is no reason why these ideas should not be carried over to the citizens' action.

c. Proper defendants and possible exclusions. The potential defendants in a citizens' action are government employees and third-party recipients of confidential government information. A breach of fiduciary duty by an employee is normally an ingredient of the misuse of confidential information for private gain, and, under the principles discussed in Part I of this Article, such a breach makes the employee liable for the consequences.


119. See 7 C. WRIGHT & A. MILLER, supra note 82, §§ 1765-70, 1833. The ability of the court to control the adequacy of the representation would not end with the determination at the evidentiary hearing, but would continue throughout the action. See generally id. § 1765.

120. Self-appointed representatives such as individual plaintiffs or ad hoc organizations have "no credentials to vouch for [their] degree of representativeness, and the court can see this as making its judgment more difficult." Scott, supra note 93, at 681.


123. See MANUAL FOR COMPLEX LITIGATION (pt. I) § 1.44 (West ed. 1975).
It is not clear, however, that the technical culpability of the government employee should in fact subject him to liability in a citizens’ action. Many cases have granted to government employees an absolute or qualified immunity from private suit for actions taken in their official capacity.\textsuperscript{124} The cases represent a judicial attempt to balance the rights of the injured individual against the necessity that a government employee not be unduly hampered in exercising his duties.\textsuperscript{122} Fairness to the employee demands that he receive some protection against liability for error in his exercise of discretion when he has acted in good faith,\textsuperscript{126} and the employee should not be deterred from executing his official responsibilities “with the decisiveness and the judgment required by the public good.”\textsuperscript{127}

A citizens’ action directed at a government employee would not conflict with these concerns. The fiduciary principle and the law governing the permissible uses of confidential government information define an area in which we do not want the government employee to have a choice of actions and, in fact, an area in which we wish to restrict his discretion severely. Even when some discretion regarding disclosure of confidential information is required, vigorous enforcement of the fiduciary principle assures that that discretion will be exercised with disinterested judgment and that it will not be influenced by factors such as personal financial interest.\textsuperscript{128}

The opinions in cases granting immunity to government employees, however, also express the fear that private actions may be used to harass government employees and to disrupt government operations.\textsuperscript{129} The citizens’ action presents a similar potential for abuse. A requirement that the plaintiff make a showing of substantial likelihood of success on the merits\textsuperscript{130} would significantly reduce po-

\textsuperscript{124} See, e.g., Barr v. Matteo, 360 U.S. 564, 571, 574-75 (1959) (absolute immunity if within the limits of employee’s authority). \textit{See also} Scheuer v. Rhodes, 42 U.S.L.W. 4545, 4548 (U.S. April 17, 1974).

\textsuperscript{125} See \textit{Scheuer v. Rhodes}, 42 U.S.L.W. 4545, 4546 (U.S. April 17, 1974); Barr v. Matteo, 360 U.S. 564, 565 (1959); Garner v. Rathburn, 346 F.2d 55, 56 (10th Cir. 1965); Kelley v. Dunne, 344 F.2d 129 (1st Cir. 1965).

\textsuperscript{126} In Barr v. Matteo, 360 U.S. 564, 571 (1959), the Supreme Court granted an executive officer broad immunity against charges of libel. The Court has since articulated a “good faith” requirement for state officials prosecuted under 42 U.S.C. § 1983 (1970). \textit{See} Scheuer v. Rhodes, 42 U.S.L.W. 4543, 4548 (U.S. April 17, 1974) (“good faith belief” a prerequisite to granting immunity to any “executive officer”). At least one court has applied a similar standard to federal officers. \textit{See} Kelley v. Dunne, 344 F.2d 129 (1st Cir. 1965).


\textsuperscript{128} \textit{See}, e.g., United States v. Carter, 217 U.S. 286 (1910), discussed at note 36 \textit{supra}.

\textsuperscript{129} \textit{See}, e.g., Barr v. Matteo, 360 U.S. 564, 571 (1959).

\textsuperscript{130} \textit{See} text accompanying notes 135-41 \textit{infra}.
tential harassment or disruption, but the financial and human costs involved in defending a citizens’ action even at the preliminary stage may have an adverse effect upon government operation and employee morale. These possible costs, combined with the facts that the government employee may be judgment-proof and may not have personally profited from the disclosure, argue convincingly that the citizens’ action should not reach the government employee.

The target of the citizens’ action would thus be the third-party recipient of confidential information. As pointed out above, the third party is usually the instigator and principal beneficiary of the employee’s breach of fiduciary duty. Striking at the third-party recipient should therefore substantially prevent the misuse of government resources.

2. Phase Two—A Substantial Likelihood of Success on the Merits

By its nature the citizens’ action may challenge not only the integrity of the government employee who releases confidential information and the third party who uses it, but also the integrity of those who control executive institutions. Unwarranted but highly publicized citizens’ actions might unnecessarily erode the public’s confidence in the government. Also, attempts to secure evidence to substantiate claims of unauthorized disclosure by deposing employees and inspecting records may disrupt agency operations. There is

133. See text accompanying note 34 supra.
134. The objection might be raised that the potential threat of a citizens’ action would discourage dealings with the government. The high degree of regulation of government contracts, however, does not seem significantly to discourage dealing. The economic gains to be derived from government contracts seem to outweigh the possible risks. There is no reason to believe that the honest businessman will be dissuaded from dealing with the government because of the existence of a citizens’ action any more than he is dissuaded by regulation of government contracts.
136. Note, however, that the citizens’ action plaintiff may have some difficulty obtaining access to government information and records. See Environmental Protection Agency v. Mink, 410 U.S. 73 (1973); 5 U.S.C. § 552 (1970); Fed. R. Civ. P. 26(b)(1). One treatise states:
The United States has, or claims to have, a number of privileges that are unique to it.
The United States has, or has claimed, (1) a privilege not to disclose the identity of informers, (2) a privilege for military or state secrets, (3) a privilege for certain reports to the government that are made confidential by statute, (4) a general privilege under the “housekeeping” statute, and (5) a constitutional privilege to
even some possibility that unscrupulous plaintiffs would use the threat of a citizens’ action, with its resulting adverse publicity, to coerce out-of-court settlements from potential defendants.\(^{187}\)

These adverse consequences are not completely avoidable. Qualitatively similar dangers pervade shareholder derivative suits,\(^{138}\) however, and they have been minimized by a judicial requirement that the plaintiff make a preliminary showing of substantial likelihood of success on the merits before the action proceeds further.\(^{130}\) A similar requirement in the citizens’ action context would substantially diminish the danger that unfounded suits would be filed for improper purposes.\(^{140}\) The point at which the showing would be required could be varied with the need for preliminary discovery. Harassment in the discovery process could be controlled by the courts’ issuance of appropriately restrictive discovery orders.\(^{141}\)


\(^{140}\) The recent Supreme Court Decision in Eisen v. Carlisle & Jacquelin, 42 U.S.L.W. 4804 (U.S. May 28, 1974), held that rule 23 does not authorize or permit a court to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Such “mini-hearings,” the Court reasoned, could result in substantial prejudice to the defendant because the tentative findings made by the judge at the hearing, which is not governed by the traditional rules of evidence, might color his views of the subsequent proceedings. 42 U.S.L.W. at 4810. The Court did not suggest that there was any constitutional prohibition upon the procedure.

Although Eisen was a rule 23 class action case, its rationale appears to apply also to shareholder derivative actions under rule 23.1, and it could reach the proposed citizens’ action as well. The easy solution would be to enact specific authorization for a preliminary hearing on the merits. There is no suggestion in Eisen that such a statute would be invalid. In any case, the preliminary hearing is not an indispensable element of the proposed citizens’ action. It is intended to reduce the likelihood of frivolous claims, but it could be eliminated if the Supreme Court’s assertion that the defendant may be substantially prejudiced is accepted. An alternative to elimination that might meet the Court’s argument would be to require different judges for the preliminary hearings and the trial.

\(^{141}\) Time limits may be set, Fed. R. Civ. P. 26(c)(2); the method of discovery may be specified, Fed. R. Civ. P. 26(c)(3); and limitations on the scope of discovery and the persons present at discovery may be imposed. Fed. R. Civ. P. 26(c)(4), (5). Cf., e.g.,
C. Comparison and Conclusions

Many proposals are being advanced to deal with government corruption and misuse of government office, perhaps because of the Watergate affair and related events. Most of these proposals have weaknesses not shared by the citizens' action. For example, some reformers would depoliticize the Department of Justice by separating it from the White House.\footnote{142} Presently, however, the priorities of the Department of Justice are the priorities of the executive branch. Usually these priorities are in harmony with the philosophical and policy goals of the administration and upon which the administration was elected. Excellent examples are the civil rights priority of the Kennedy and Johnson administrations and the antitrust activity of the Taft administration. The ability of the executive branch to channel legal enforcement toward new national priorities might be lost if the Department of Justice were "depoliticized."\footnote{143}


The potential for harassment may also be reduced by application of the res judicata doctrine. The fear that an ill-prepared, underfunded, or hasty action would foreclose the vindication of the public's interest, cf. Cramton & Boyer, supra note 111, at 427-38 n.70, should be discounted in light of the court's power to require adequate representation. Cf. Michigan Environmental Protection Act of 1970 § 5(5), Mich. Comp. Laws Ann. § 691.1205(5) (Supp. 1974) (allows doctrines of res judicata and collateral estoppel to be applied despite possibility that an adverse decision in a citizens' action under that Act may foreclose a government agency action based upon the same facts).

The prediction that federal courts and government officials will be overburdened with citizens' actions, cf. Sax & Conner, supra note 116, at 1007; Weinstein, Some Reflections on the "Abusiveness" of Class Actions, 58 F.R.D. 299, 300 (1973), would also be groundless when the high cost of such litigation is considered. See, e.g., Scott, supra note 93, at 673-74:

Litigation in general is decidedly expensive. \ldots The initial litigation over the FPC's approval of Consolidated Edison's Storm King reservoir cost the plaintiff conservationist organization over $250,000. While hardly typical, it dramatizes the fact that despite the subsidization of court costs, the remaining private costs of litigation are quite sufficient to serve as an initial screening barrier of considerable height. When the "floodgates" of litigation are opened to some new class of controversy by a decision, it is notable how rarely one can discern the flood that the dissenters feared. The plaintiff \ldots must feel strongly enough about the issue in question to pay the bill, and that \ldots cuts down the flood \ldots .\ldots.\footnote{Footnote omitted.}

In any case, the costs of litigation must be weighed against the interests served by allowing the litigation.

\footnote{142. E.g., S. 2808, 93d Cong., 1st Sess. (1973) ("A Bill To insure the Separation of Constitutional powers by establishing the Department of Justice as an independent establishment of the United States"); 120 CONG. REC. S. 6116 (daily ed. April 29, 1974) (Senator Byrd on behalf of Senator Bentsen); Lewis, Quis Custodiet?, N.Y. Times, Feb. 11, 1974, at 85, col. 1 (late city ed.); N.Y. Times, March 21, 1974, at 33, col. 5 (late city ed.) (panel of public administration experts recommend to Senate Watergate Committee that Justice Department be depoliticized).}

\footnote{143. See, e.g., Lewis, supra note 142; Witnesses Oppose Independent Justice Department, 32 CONG. Q. WEEKLY REP. 796 (1974) (testimony of Ramsey Clark, Theodore}
Another suggestion is that internal government problems become the responsibility of a permanent special prosecutor\textsuperscript{144} or an independent agency that would have as its sole responsibility the investigation and prosecution of violations of federal conflict of interest statutes and civil actions involving alleged breaches of fiduciary duty by government employees.\textsuperscript{146} The wisdom of establishing another bureaucracy to deal with problems of this nature is questionable. If the special prosecutor or the agency were to rely on other departments for investigative and legal personnel, the possibility that improper influence would be used to prevent prosecution of claims and individuals would still exist. In any case, there is little reason to believe that even an independently staffed and funded office would not ultimately become subject to the same political, monetary, or manpower constraints that hamper present enforcement efforts.

In contrast to other alternatives, the citizens' action would not use government resources or personnel and it would not require a new bureaucracy with all of the attendant costs. Furthermore, established procedures, such as government civil or criminal suits and administrative action, would not be discarded. The citizens' action would only supplement these procedures and perhaps stimulate their use by those who are primarily responsible for protecting the public interest. The goal of all the proposals is the same—efficient, responsible government—but the citizens' action offers the most effective means of achieving this goal at the least cost and with minimum departure from established methods.

Sorenson, and Robert Dixon, Jr., on proposals to separate the Justice Department from the executive branch (S. 2803) and to authorize a study of the need for a permanent special prosecutor (S. 2978)).

\textsuperscript{144}. See, e.g., Lewis, supra note 142 (discusses proposed by Lloyd Cutler, prominent Washington lawyer, at conference of Committee for Public Justice).

\textsuperscript{145}. See, e.g., Lewis, supra note 142 (discusses proposal of Professor Paul Mishkin for creating an office of Counsel General of the United States with broad warrant to investigate and respond to complaints of abuses of official power); N.Y. Times, May 17, 1973, at 49, col. 7 (late city ed.) (proposal of former Manhattan District Attorney Frank Hogan in speech before New York Criminal Bar Association).