
NATURAL RESOURCES JOURNAL

Volume 12
Issue 2 *The Human Enviornment: Toward an International Solution*

Spring 1972

Citizen Enforcement of the Refuse Act: Qui Tam Pro Domino Rege Quam Pro Se Ipso In Hoc Parte Sequitur Flops; Mandamus Next

John Boyd

COMMENT

CITIZEN ENFORCEMENT OF THE REFUSE ACT: *QUI TAM PRO DOMINO REGE QUAM PRO SE IPSO IN HOC PARTE SEQUITUR*[1] FLOPS; MANDAMUS NEXT?

Government apathy toward the problem of water pollution and the recent rediscovery of the long-overlooked Refuse Act[2] have prompted conservation groups to attempt to invoke the provisions of the Act on their own initiative. Through *qui tam* actions[3] and, most recently, through attempted mandamus of government agencies charged with enforcement of the Act,[4] the conservation groups have unsuccessfully sought criminal penalties against major industrial polluters. This comment analyzes the reasons for the failure of the *qui tam* actions and the concept of prosecutorial discretion as it relates to the success or failure of mandamus actions brought to force government action under the Refuse Act.

The citizen-initiated actions have arisen from the wording of two sections of the Rivers and Harbors Act of 1899,[5] both within what is commonly known as the Refuse Act.[6] Section 411 of the Act sets up

1. "Who sues for the king as well as himself" [hereinafter *qui tam*]. Many old English criminal and civil penalties were enforceable by private citizens in *qui tam* as well as by the king, and private enforcement was an important weapon for gaining convictions under the king's laws when officialdom was either remiss or unavailable. The establishment of a right to a share of the fine as well as the right of action did much to promote the vigorous though often overzealous enforcement of many statutes by private citizens. Abuses of the *qui tam* action became so widespread, however, that the action was limited to a small number of statutes and could only lie when specifically provided for. It was only for a brief period near the end of the 16th Century that the action was available under a wide variety of statutes. 4 W. Holdsworth, A History of English Law 356-57 (7th ed. rev. 1956); *id.* Vol. 9 at 236, 237, 240; and W. Blackstone, Commentaries 712, 1009 (G. Chase ed. 1890).

2. Rivers and Harbors Act, 33 U.S.C. § § 407, 411 & 413 (1970).

3. Bass Angler Sportsman's Soc. v. United States Steel Corp., 324 F. Supp. 412 (S.D. Ala. 1971), aff'd sub nom., Bass Angler Sportsmen's Soc. v. Koppers Co., 447 F.2d 1304 (5th Cir. 1971); Durning v. I.T.T. Rayonier Inc., 325 F. Supp. 446 (W.D. Wash. 1971); Reuss v. Moss-American Inc., 323 F. Supp. 848 (E.D. Wis. 1971); Bass Angler Sportsman's Soc. v. United States Plywood-Champion Papers, 324 F. Supp. 302 (S.D. Tex. 1971); Matthews v. Florida Vanderbilt, 326 F. Supp. 2 (S.D. Fla. 1971); United States *ex rel.* Mattson v. Northwest Paper Co., 327 F. Supp. 87 (D. Minn. 1971); Enquist v. Quaker Oats Co., 327 F. Supp. 347 (D. Neb. 1971); Connecticut Action Now Inc. v. Roberts Plating Co., 330 F. Supp. 695 (D. Conn. 1971); Gerbing v. I.T.T. Rayonier,__F. Supp.__(M.D. Fla. 1971); Lavignino v. Port-Mix Concrete, Inc., 330 F. Supp. 323 (D. Colo. 1971); Mitchell v. Tenneco Chemical, Inc., 331 F. Supp. 1031 (D.S.C. 1971); Bass Angler Sportsman's Soc. v. Scholze Tannery, Inc., 329 F. Supp. 339 (E.D. Tenn. 1971).

4. Bass Angler Sportsman's Soc. v. Scholze Tannery, Inc., 329 F. Supp. 339 (E.D. Tenn. 1971).

5. 33 U.S.C. § § 411 and 413 (1970).

6. 33 U.S.C. § § 407, 411 and 413 (1970).

an informer's fee of half the fine[7] should the informer's information lead to prosecution and conviction for pollution of a navigable waterway. *Qui tam* actions arise under Section 411, while suits seeking writs of mandamus arise from the wording of Section 413, which reads, in part:

> The Department of Justice *shall* conduct the legal proceedings necessary to enforce . . . this Act; and *it shall be the duty* of district attorneys of the United States *to vigorously prosecute all offenders* against the same *whenever* requested to do so by the Secretary of War [Secretary of the Army] or by any of the officials hereinafter designated[8] . . . and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the [mentioned officers] shall have power and authority to swear out process and to arrest . . . any person . . . who may commit any of the acts or offenses prohibited.[9] [Emphasis added.]

The phrase *qui tam*, a shortened version of the phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, identifies the plaintiff as one "who sues on behalf of the king as well as for himself."[10] The *qui tam* action is a relic of the Middle Ages, when prosecutors were hard to find and officialdom was often remiss in enforcing criminal statutes against its own members or its favorites (although the action may be archaic, the reasons for its existence continue).[11] The essence of a statute which created a right in a private citizen to bring an action in *qui tam* was that the citizen was given a stake in the proceeds of the action as well as a right to bring suit.

Interest in the *qui tam* action as a possible technique for use by citizens who wished to prosecute polluters under the Refuse Act began in 1970 when a subcommittee report to the House Committee on Government Operations noted that "[t]he Supreme Court has ruled that where a statute provides for a reward to the informer, the statute authorizes him, if the Government has not previously instituted a prosecution against the violator, to institute his own suit in

7. 33 U.S.C. § 411 (1970).

8. The officials designated in the act are the Secretary of the Army, and "officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by the authority of the Secretary of War [Army], and the United States collectors of customs and other revenue officers . . . ." 33 U.S.C. § 413 (1970).

9. 33 U.S.C. § 413 (1970).

10. *Supra* note 1.

11. *See* Rogers, *Industrial Water Pollution and the Refuse Act: A Second Chance For Water Quality*, 119 U. Pa. L. Rev. 761 (1971).

the name of the United States. . . . "[12] The subcommittee's rationale was derived from its understanding of *qui tam* actions and its interpretation of some dicta by Justice Black in a 1943 Supreme Court decision.[13] The immediate effect of the report was to touch off a series of suits by conservation groups against industrial polluters whom the government had been unwilling to prosecute.[14]

The federal courts confronted with the *qui tam* actions failed to concur with the subcommittee's analysis and held unanimously that *qui tam* actions would not lie unless specifically provided for in the wording of the statute. The language of the court's decision in *Bass Angler Sportsman's Society v. United States Steel Corporation*[15] is representative of the lack of enthusiasm with which the *qui tam* actions were met:

> Such an implication [that the Refuse Act created a right of action in the informer] runs counter to the clear import of the statute which establishes a reward but not a right of private enforcement. Such an implication would also run contrary to fundamental principles of criminal law . . . .
>
> Plaintiff's denomination of this suit as a *qui tam* action adds nothing to its right to enforce a criminal statute such as [the Refuse Act] . . . . None of the many cases cited in briefs approved a *qui tam* action to collect a criminal fine . . . . All of the *qui tam* cases also recognize the statutory origin of the right of action. It arises not from a statutory right to share in the penalty but from the express or implied statutory grant of authority to maintain the action.[16]

With some variations, and with greater and lesser degrees of historical insight,[17] the federal courts in all *qui tam* actions have dismissed plaintiff's cases on similar grounds of lack of statutory authority.[18] Although only one of the cases cited has been heard on appeal,[19] the

12. House Comm. on Gov't. Operations, Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction and Pollution, H.R. Rep. No. 917, 91st Cong., 2d Sess. 17 (1970).

13. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n. 4 (1943); Justice Black said, "Statutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue, *Adams v. Woods*, 2 Cranch 336."

14. *See* note 3 *supra.*

15. 324 F. Supp. 412 (S.D. Ala. 1971).

16. *Id.* at 415.

17. The most thorough discussion of the appropriateness of *qui tam* actions under the Refuse Act appears in United States *ex rel* Mattson v. Northwest Paper Co., 327 F. Supp. 87 (D. Minn. 1971).

18. *See* note 3 *supra.*

19. Bass Angler Sportsman's Soc. v. United States Steel Corp., 324 F. Supp. 412 (S.D. Ala. 1971), *aff'd sub nom.* Bass Angler Sportsman's Soc. v. Koppers Co., 447 F.2d 1304 (5th Cir. 1971).

unhesitating refusal by the district courts to entertain such suits has an air of finality.

The unusually strong wording of the Refuse Act has, however, led at least one conservation group to look beyond *qui tam* to mandamus. In *Bass Anglers Sportsman's Soc. v. Scholze Tannery, Inc.*,[20] the plaintiff amended its *qui tam* complaint to request a writ of mandamus against the Secretary of the Army, the Chief of the Army Corps of Engineers and the Justice Department.[21] The plaintiffs alleged that under the terms of the Refuse Act the Army and the Engineers had a duty to set standards for the issuance of permits for dumping in waterways,[22] and that, once informed of a violation, the Justice Department had a non-discretionary duty to prosecute. To this the court replied that the duties of the Army and the Engineers were discretionary under the terms of the Act and that the discretion of the Attorney General and the Justice Department to prosecute was absolute.[23]

Given the elements of mandamus - a clear right on the part of the plaintiff and a non-discretionary, "ministerial" duty on the part of the official - the court's conclusion in *Bass Angler* appears correct. However, the law of mandamus is perhaps not as strict as the court suggests and it is at least arguable that Congress did not intend the Justice Department to have such a free hand in deciding whether or not to prosecute.

Courts in the past have recognized that every discretion has its abuse and mandamus may lie to correct such an abuse. Issuance of writs of mandamus may depend, where discretion is the issue, upon the determination by the court of whether such facts exist that a discretionary duty—ordinarily immune from mandamus—may have become non-discretionary by sheer weight of evidence in favor of performing the requested act.[24]

---

20. 329 F. Supp. 339 (E.D. Tenn. 1971).

21. *Id.* at 342.

22. *Id.*

23. "As the Court has heretofore observed, the direction of the Attorney General in choosing whether to prosecute or not to prosecute criminal violations is absolute and mandamus will not be to control the free exercise of this discretion." *Id.* at 350.

24. Roberts v. United States, 176 U.S. 221 (1900); Ott v. U.S. Board of Parole, 324 F. Supp. 1034 (W.D. Mo., 1971); Fifth Avenue Peace Parade Committee v. Hoover, 327 F. Supp. 238 (S.D.N.Y. 1971); Parrott v. Cary, 234 F. Supp. 572 (D. Colo. 1964); Grace Line, Inc. v. Panama Canal Co., 143 F. Supp. 539 (S.D.N.Y. 1956); Chesley v. Jones, 81 Ariz. 1, 299 P.2d 179 (1956); Arizona State Highway Commission v. Superior Court, 81 Ariz. 74, 299 P.2d 783 (1956); Manjares v. Newton, 49 Cal. Rptr. 805, 411 P.2d 901 (1966); Albonico v. Madera Irrigation District, 3 Cal. Rptr. 343, 350 P.2d 95 (1960); Le Strange v. City of Berkeley, 26 Cal. Rptr. 550 (Ct. App. 1962); State *ex rel.* Torrance v. City of Shreveport, 231 La. 840, 93 So. 2d 187 (1957); De Matteo v. O'Connell, 166 N.Y.S. 2d 938 (1957).

The Attorney General's prosecutorial discretion may be thought to be absolute in most areas in which he is charged with enforcement duties: However, the various statutes which have established the spheres of Justice Department authority suggest that Congress has not intended the discretion to be absolute in all areas.[25] While the wording of most legislation granting prosecutorial powers to the Justice Department also grants wide prosecutorial discretion,[26] the wording of some such legislation appears, at least on its face, to attempt to limit the Justice Department's discretion.[27]

For example, compare the Textile Fiber Products Identification Act[28] with the Wool Labeling Act.[29] The two acts are worded similarly except in the enforcement provisions. In the case of the Textile Fiber Products Identification Act, the charge to the Justice Department appears to grant wide discretion, while the wording of the Wool Labeling Act suggests that the Justice Department's discretion in enforcing the provisions dealing with wool labeling was at least intended to be strictly circumscribed. The wording in the Textile Act reads:

> Whenever the [Federal Trade] Commission has reason to believe that any person is guilty of a misdemeanor under this section, it may certify all pertinent facts to the Attorney General. *If*, on the basis of such facts certified, *the Attorney General concurs* in such belief, it shall be his duty to cause appropriate proceedings to be brought....[30] [Emphasis added.]

The corresponding section of the Wool Labeling Act reads:

> Whenever the Commission has reason to believe any person is guilty of a misdemeanor under this section, it *shall* certify all pertinent facts to the Attorney General, *whose duty it shall be* to cause appropriate proceedings to be brought....[31] [Emphasis added.]

Even the above-quoted wording of the Textile Act is stronger than

25. The following are examples of statutes which appear to attempt to limit the discretion of the Attorney General: Packers and Stockyards Act, 7 U.S.C. § 224 (1970); Perishable Agricultural Commodities Act, 7 U.S.C. § 4991 (1970); Wool Labeling Act, 15 U.S.C. § 68h (1970); Federal Communications Act, 47 U.S.C. § 401(c) (1964).

26. Examples of statutes which appear to give the Attorney General broad prosecutorial discretion are: Interstate Commerce in Seeds Act, 7 U.S.C. § 1601 (1970); Textile Fiber Products Identification Act, 15 U.S.C. § 70i (1970); Federal Anti-Riot Act, 18 U.S.C. § 2101(d) (1970); Civil Rights Act, 42 U.S.C. § 1971(c) (1970); Pandering Advertisements Act, 39 U.S.C. § 3008(d) (1970).

27. *See* note 23 *supra.*

28. 15 U.S.C. § 70i (1970).

29. 15 U.S.C. § 68h (1970).

30. 15 U.S.C. § 70i (1970).

31. 15 U.S.C. § 68h (1970).

some enforcement provisions. The Interstate Land Sales Act, for example, reads:

> The Secretary [of Housing and Urban Development] may transmit such evidence as may be available concerning such acts or practices to the Attorney General *who may, in his discretion,* institute the appropriate criminal proceedings. . . .[32] [Emphasis added.]

In reviewing the various acts granting authority to the Attorney General, the strongest wording found is in the Refuse Act, cited above. The question remains, of course, whether the doctrine of separation of powers[33] would permit Congress to legislate varying degrees of prosecutorial discretion in the Justice Department. At least one federal judge felt that the wording of the Act was so strong that it successfully limited the discretion of both agency and prosecutor in carrying out the terms of the Act:

> The provisions of Section 406 [of the Rivers and Harbors Act] must be construed in connection with all other provisions of Title 33, [the Rivers and Harbors Act] giving effect to each, so as to make a harmonious whole, since they all relate to the same subject matter. Such consideration will show that the respective use of the mandatory "shall be," and the permissive "may be," is deliberate and purposeful on the part of the Congress. The mandatory "shall be" is used in sections 1 and 413 [quoted on page 299] so as to require the Secretary of War to adopt and publish appropriate regulations, to require various federal officers charged with their enforcement to arrest all violators, and to require all district attorneys to prosecute them; *no discretion is to be exercised in these respects.*[34] [Emphasis added.]

Nevertheless, the court in the more recent case of *Bass Anglers Sportsman's Society v. Scholze Tannery, Inc.*,[35] refused even to consider the possibility that the Justice Department's prosecutorial discretion was anything less than absolute, even under the strong wording of the Refuse Act. Given the language of the Act,[36] the court's holding must be taken to mean that Congress is without the power to so "constrict" the Justice Department in this manner.

There is ample case law supporting this holding.[37] However, it is

32. 15 U.S.C. § 1714(a) (1970).

33. *See* 16 C.J.S. *Constitutional Law* 104,105, 130 (1956).

34. South Carolina *ex rel.* Maybank v. South Carolina Electric & Gas Co., 41 F. Supp. 111, 118 (E.D.S.C. 1941).

35. 329 F. Supp. 339 (E.D. Tenn. 1971).

36. 33 U.S.C. § 413 (1970).

37. Confiscation Cases, 74 U.S. (7 Wall) 454 (1869); Smith v. United States, 375 F.2d 243 (5th Cir. 1967); United States v. Cox, 342 F.2d 167 (5th Cir. 1965); Powell v. Katzenbach, 355 F.2d 108 (D.C. Cir. 1965), *cert. denied,* 384 U.S. 906 (1965).

questionable whether the Executive has this type of blanket discretion in deciding whether or not to carry out the terms of an act of Congress. The separation of powers doctrine dictates that Congress refrain from tying the executive's hands when he is engaged in purely executive functions.[38] It is another matter, however, when Congress, as with the Refuse Act, has delegated powers to the Executive and the Executive appears to subvert the intent of the act. Here again the separation of powers doctrine applies, but this time it dictates that the Executive act only within the terms of the act, neither expanding nor contracting the mandate.[39] Apparently the Justice Department has developed guidelines for enforcing the Refuse Act which emasculate the provisions of the Act almost entirely.[40] It is arguable that it is beyond the power of the Executive, under the guise of prosecutorial discretion, to formally constrict the provisions of an act of Congress in this manner. The doctrine of separation of powers dictates, in this respect, that any rules set up by the executive pursuant to an act of Congress must be consistent with the act:

> . . . Congress must tell the President what he can do by prescribing a standard which confines his discretion and which will guarantee that any authorized action he takes will tend to promote rather than flout the legislative purpose.[41]

This is not to suggest that the discretion of the Attorney General or his subordinates is not absolute insofar as it extends to a factual determination that a criminal prosecution is or is not capable of being maintained. To limit this type of discretion would be to tell the Attorney General to conduct prosecutions for their harrassment value alone.

There is a second facet of the Justice Department's discretion, however, the Department's political discretion. This is the discretion which allows the Department to refuse to prosecute simply because it doesn't want to prosecute. This protects the Executive's ability to make those "practical" decisions of who to sue when. The Justice Department's self-imposed guidelines for prosecuting under the Refuse Act, mentioned above, reflect the Department's desire to sue when and where it chooses and to be able to decline to prosecute for

38. 16 C.J.S. *Constitutional Law* § 130 (1956).

39. J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); United States v. Grimaud, 220 U.S. 506 (1911); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1907); Union Bridge Co. v. United States, 204 U.S. 364 (1907); Buttfield v. Stranahan, 192 U.S. 470 (1904); In re Kollock, 165 U.S. 526 (1897); Star-Kist Foods, Inc. v. United States, 47 C.C.P.A. 52 (1959).

40. *Supra* note 11, at 799-806.

41. Star-Kist Foods, Inc. v. United States, 47 C.C.P.A. 52, 60 (1959).

the flimsiest of reasons.[42] It seems, however, that this is precisely the type of discretion which Congress attempted to limit when it put in the Act the phrase ". . . it shall be the duty of United States attorneys to vigorously prosecute all offenders against [the Refuse Act]. . . ."[43]

There is much court language to the effect that the prosecutorial discretion of the Justice Department is absolute. As Judge Brown stated in his concurring opinion in *United States v. Cox*, "All must be aware now that there are times when the interests of the nation require that a prosecution be foregone."[44] The rationale behind this holding is at best obscure. In the case of the Refuse Act it seems in direct conflict with the intent of an act of Congress. In the *Bass Angler* attempt at mandamus the court did nothing more than put forth the assertion that the discretion of the Justice Department, even under the Refuse Act, was absolute.[45] This simple assertion begs the question of whether Congress is capable of limiting the political aspects of discretion and, if so, to what extent the Refuse Act has done so. It is worth noting that some state courts have held that there are circumstances under which district attorneys *must* prosecute, like it or not.[46] Given the recent recognition of citizens' interest in their environment, federal courts should be more willing to inquire into the responsibilities of the Executive.

JOHN BOYD

42. *Supra* note 11, at 799-806.
43. 33 U.S.C. § 413 (1970).
44. 342 F.2d 167, 182 (5th Cir. 1965).
45. 329 F. Supp. at 349-50 (E.D. Tenn. 1971).
46. *See* Blankenship v. Michalski, 155 Cal. App. 2d 853, 318 P.2d 727 (1957); O'Donnell v. Board of Appeals of Billerica, 349 Mass. 324, 207 N.E. 2d 877 (1965); City of Haverhill v. DiBurro, 337 Mass. 230, 148 N.E. 2d 642 (1957); Perazzo v. Lindsay, 55 Misc. 2d 767, 286 N.Y.S. 2d 309 (1967); Miles-Lee Auto Supply Co. v. Bellows, 260 Ohio 2d 452, 197 N.E. 2d 247 (1964).