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Legislative Intent vs. Executive Non-Enforcement: A New Bounty Statute as a Solution to Executive Usurpation of Congressional Power

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Legislative Intent vs. Executive Non-enforcement: A New Bounty Statute as a Solution to Executive Usurpation of Congressional Power[†]

GEORGE R. ROGERS*

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INTRODUCTION

The political lessons of the past twelve years¹ underscore the fact that it is no longer enough for the President of the United States to propose legislation, enforce laws, and handle foreign policy. In an emerging era of global regulation,² the President also must lead the federal bureaucracy.³ Executive oversight has been described “as a way to make unelected bureaucrats accountable to elected political officials.”⁴ For many years the bureaucracy, the unofficial “fourth” branch of the government, has wielded a quiet power to make and enforce (or not enforce) the regulations that actualize the laws

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The Author gratefully acknowledges comments and criticisms of this Comment by Mark Drewes, Mike Lotus, Matt Johnson, and Dean Alfred Aman.

1. This refers to the terms of the Reagan and Bush presidencies which collectively spanned January 1981 through January 1993.

2. See generally ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW IN A GLOBAL ERA* 131-56 (1992).

3. The increase in the scope and complexity of executive management, as well as the global interrelatedness of the issues and problems the United States will face, suggests that the President should take the lead in the 21st Century, to a greater extent than the President does today. Congress will not be able to do so, for “[b]y nature, Congress’s outlook is more domestic and regional, if not parochial, than that of the president.” *Id.* at 122.

4. Margaret Gilhooley, *Executive Oversight of Administrative Rulemaking: Disclosing the Impact*, 25 IND. L. REV. 299, 301 (1991); see Philip J. Harter, *Executive Oversight of Rulemaking: The President Is No Stranger*, 36 AM. U. L. REV. 557, 568-69 (1987).

of Congress.⁵ What originally was conceived as a logical, efficient delegation of functions, however, has become an impediment to the management of society.⁶ For these reasons, the Reagan and Bush administrations focused on making the government less burdensome on business through deregulation.⁷

To effectuate this policy, President Reagan built upon the efforts of past presidents⁸ by issuing executive orders designed to enhance executive branch management tools.⁹ Executive Order ("E.O.") No. 12,291, in particular, facilitated the Executive's control of the bureaucracy. Through the Office of Management and Budget ("OMB"), E.O. No. 12,291 imposed a number of requirements on executive agencies in promulgating new regulations and in reviewing existing ones. The most significant requirement, for purposes of this Comment's analysis states that:

"[T]o the extent permitted by law," regulatory action should not be taken unless the potential benefits outweigh the potential costs. To ensure adherence to its requirements, the Order [E.O. No. 12,291] accords to OMB supervisory power over the rulemaking process.¹⁰

This Comment does not examine the issues surrounding E.O. No. 12,291 further than to posit that through this Order, the Executive branch was usurping the power of the Legislature, and continues to do so¹¹ in a constitutionally questionable fashion.¹² As Alfred Aman, Dean and Professor

5. The existence of this unofficial fourth branch is problematic insofar as one accepts the democratic agency theory of governance. As Professor Richard Pierce writes, "the Constitution is premised on the belief that the government should act as the agent of the people." Pierce notes, however, that "[t]he vast bulk of governmental action is taken by multifunctional agencies. There is no direct principal-agent relationship between the people and any government agency." Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1239 (1989).

6. For an excellent analysis of how bureaucracies malfunction, see KEVIN PHILLIPS, *BOILING POINT: REPUBLICANS, DEMOCRATS, AND THE DECLINE OF MIDDLE-CLASS PROSPERITY* (1993). Mr. Phillips depicts the consequences of the lack of bureaucratic accountability and the usurpation of power by the bureaucracies of the 1980's. *Id.* at 50-55.

7. See AMAN, *supra* note 2, at 78-79 ("Deregulation and regulatory forbearance [sic] are the hallmarks of the global era in which we now live."); see also THE REAGAN REGULATORY STRATEGY (G.C. Eads et al. eds., 1984).

8. See, e.g., President Carter's Exec. Order No. 12,044, 3 C.F.R. 152 (1979) (requiring that "agencies address the anticipated economic impact of certain rules and detail available alternatives"); President Ford's Exec. Order No. 11,821, 3A C.F.R. 203 (1974) (requiring an estimate of the inflationary impact of all proposed regulations coming from executive agencies); see also Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193, 217 (1981).

9. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C.A. § 601 (West Supp. 1992); Exec. Order No. 12,498, 3 C.F.R. 323 (1986). For overview and analysis of OMB in an action, see Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989).

10. Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 185 (1986) (quoting the text of Exec. Order No. 12,291, *supra* note 9).

11. Dean Aman's theory is that no President relinquishes a power once it is attained. As Aman states: "Perhaps the most significant trend in administrative law, particularly since the beginnings of the environmental era, is the steady increase in presidential power over the administrative process." AMAN, *supra* note 2, at 121.

12. *Id.* at 94 ("Executive orders that have broad legislative effects could thus also be considered constitutionally suspect."); see *id.* at 94 n.90 (pointing out that the Reagan administration issued

of Law at the Indiana University School of Law—Bloomington writes, “No one can doubt the need for regulatory management. [But] there must be limits as well. Executive coordination can easily become aggressive management, and aggressive management can result in executive legislation.”¹³ Despite the constitutional issues involved, few courts,¹⁴ including the current United States Supreme Court, have addressed the possible ramifications of E.O. No. 12,291.¹⁵

One 1986 case, however, emerges as a particular example of this usurpation of legislative powers via E.O. No. 12,291. In *Environmental Defense Fund v. Thomas*,¹⁶ the District Court for the District of Columbia held that the OMB lacked the authority to use E.O. No. 12,291 review to delay, beyond the congressionally set deadlines, the making of Environmental Protection Agency (“EPA”) regulations stemming from the 1984 amendments to the Resource Conservation and Recovery Act (“RCRA”). As the court stated, “While this may be an intrusion into the degree of flexibility the executive agencies have in taking their time about promulgating the regulations, this is simply a judicial recognition of law as passed by Congress.”¹⁷ The court addressed the issue of the Executive’s usurpation of congressional power by stating that:

A certain degree of deference must be given to the authority of the President to control and supervise executive policymaking. Yet, the use of EO 12291 to create delays and to impose substantive changes raises some constitutional concerns. Congress enacts environmental legislation after years of study and deliberation, and then delegates to the expert judgment of the EPA Administrator the authority to issue regulations carrying out the aims of the law. Under EO 12291, if used improperly, the OMB could withhold approval until the acceptance of certain content thereby encroaching on the expertise of EPA. This is incompatible with the

Executive Order No. 12,291 after Congress failed to amend the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 et seq. (1988), to provide for similar regulatory analysis). *Id.* at 94; see Rosenberg, *supra* note 8, at 246 (alleging that E.O. No. 12,291 is unconstitutional).

13. AMAN, *supra* note 2 at 86.

14. One court addressed the issue in *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479 (D.C. Cir. 1986). Also known as one of the “Ethylene Oxide Cases,” *Tyson* involved an Occupational Safety and Health Act (“OSHA”) standard limiting the average daily exposure allowed for hospital workers to the sterilant, ethylene oxide. Top OSHA officials approved the rule on June 14, 1984, but when published the next day, it was changed to allow more exposure. The OMB was accused of improperly influencing OSHA.

One of the reasons for the relative dearth of cases litigating this undue executive influence is the secrecy in which the executive branch can act. The Executive has the power to influence via the “raised eyebrow” and through non-public view contacts, which gives the executive an advantage over Congress vis-à-vis the bureaucracy.

15. OMB’s participation in rulemaking “presents difficult constitutional questions concerning the Executive’s proper r[ole] in administrative proceedings and the appropriate scope of delegated power from Congress to certain executive agencies. Courts do not reach out to decide such questions.” *Tyson*, 796 F.2d at 1507; see *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

16. *Thomas*, 627 F Supp. 566 (D.D.C. 1986).

17. *Id.* at 571.

will of Congress and cannot be sustained as a valid exercise of the President's Article II powers.¹⁸

This Comment explores the issue of the usurpation of legislative power that *Thomas* and E.O. No. 12,291 highlight. Executive usurpation exists where the executive chooses not to enforce a law passed by Congress.¹⁹ For Executive usurpation to exist, the non-enforcement must go beyond mere exercise of executive discretion. Usurpation also can occur when the Executive unduly influences the contemplation and promulgation of public law enforcement regulations.²⁰

While it is too early in this administration to predict how President Clinton will utilize past executive orders, the overall question remains: How much power can and should the Executive exert on the bureaucracy via the "take Care that the Laws be faithfully executed" clause of the Constitution?²¹ The recent case of *Lujan v. Defenders of Wildlife*²² illustrates the Judiciary's acceptance of the Executive's broad powers in regulatory law even where it usurps congressional intent. More importantly, however, *Lujan* provides a framework and a means for limiting future usurpation of congressional power: the bounty-enhanced citizen suit.

This Comment focuses on whether the citizen suit, as amended with a "bounty"²³ provision, protects against usurpation of congressional law-making power. In *Lujan*, Justice Antonin Scalia made it clear that the citizen suit, as currently configured, conflicts with the Constitution's "take Care that the Laws be faithfully executed"²⁴ clause. He uses this clause as the paradigm for the principle of separation of powers. This Comment, however, will show that even if citizen standing does raise separation of powers issues, the fundamental constitutional principal of checks and balances substantiates the use of citizen suits. For who shall monitor that the "Laws be *faithfully* executed,"²⁵ but the courts?

18. *Id.* at 570 (citation omitted).

19. Executive and congressional power appears to ebb and flow. Nonetheless, when the Executive fails to enforce a law passed by Congress, under supposed authority of its power to see that the laws "be faithfully executed," the Executive usurps the legislative intent of Congress. Such usurpation is beyond the ebb and flow. The citizen suit provides one antidote to usurpation by allowing the Judiciary to review Legislative and Executive actions in light of both separation of powers and checks and balances principles. See AMAN, *supra* note 2, at 103.

20. Exec. Order No. 12,291 and Exec. Order No. 12,498 require cost-benefit analysis to be offered to the OMB during the contemplation stage of rulemaking. This allows the Executive to hinder and secretly impact the process through the resulting discussions and tradeoffs. See Gilhooley, *supra* note 4; Rosenberg, *supra* note 8.

21. U.S. CONST. art. II, § 3, cl. 3.

22. *Lujan*, 112 S. Ct. 2130 (1992).

23. Professor Cass Sunstein addressed the problem of standing for citizen suitors in *Lujan* through the creation of a "bounty" for successful citizen suitors. Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992). His source appears to be the text of *Lujan* itself. See *infra* note 94 and accompanying text. To quote a maxim from copyright law, "The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.'" Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 511 (1945).

24. U.S. CONST. art. II, § 3, cl. 3.

25. *Id.* (emphasis added).

Part I examines citizen standing generally Part II argues that allowing citizen standing does not interfere with the "take Care" clause, and that, even if it does, the checks and balances principle overcomes the constitutional question of any interference. Part III articulates a solution to the *Lujan* case: the establishment of a "bounty" for successful citizen suitors. Finally, Part IV discusses and presents a model of the type of legislation that is needed to enact this bounty

I. CITIZEN STANDING IN GENERAL

"Citizen suit" and, concomitantly, "citizen standing" refer to congressional authorization for private individuals and groups to sue the government or private defendants for failure to comply with the laws of Congress.²⁶ Congress chose the citizen suit as a means of enforcing some of its laws, particularly with regard to environmental legislation.²⁷ Congress authorizes "private individuals and organizations to enforce environmental regulatory schemes by directly suing violators in federal district courts when public authorities have not acted against the violators."²⁸

The concept underlying citizen standing is that citizens will act without personal injury either to help the government as "private attorneys general"²⁹ or to force the government to take action.³⁰ In *Associated Industries v. Ickes*,³¹ Judge Frank stated that the private attorney general mechanism

26. Sunstein, *supra* note 23, at 192-93.

27. See, e.g., 42 U.S.C. § 7604 (1988) (The Clean Air Act).

28. Adeb Fadil, *Citizen Suits Against Polluters: Picking up the Pace*, 9 HARV. ENVTL. L. REV. 23, 23 (1985), quoted in Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337, 337 n.1 (1988). Mr. Blomquist writes, "Congress should, by amendment to the Clean Water Act, reconcile the novel concept of allowing citizen groups to seek large public penalties for environmental infractions with the more traditional, and limited, adjudicative analogies of *private attorney general* actions under the federal antitrust laws, negligence per se tort actions for violations of criminal statutes, civil actions for punitive damages, and the law of citizen's arrest." *Id.* at 340 (emphasis added).

29. "Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers. Such persons, so authorized, are, so to speak, *private Attorney Generals*." *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) (emphasis added) (granting standing to group under Bituminous Coal Act of 1937), vacated as moot, 320 U.S. 707 (1943); see William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 225-26 (1988).

30. Professor Sunstein sums up the rationale for citizen suits, as well as Congress' belief in them, when he states:

Spurred by judicial developments and suspicion of agency "capture," Congress created a wide range of citizen's suits. These suits would be available against (a) private defendants operating in violation of statute and (b) administrators failing to enforce the law as Congress required. Congress was especially enthusiastic about such suits in the environmental area, addressing the fear that statutory commitments would be threatened by bureaucratic failure.

Sunstein, *supra* note 23, at 192-93 (citation omitted).

31. *Ickes*, 134 F.2d 694.

constituted "an important means of enforcing legislative policy decisions against agencies prone to capture by a faction."³²

In the current regulatory scheme, Congress assigns agencies the task of administering its laws according to a huge number of "highly centralized, rigid, and often draconian regulatory requirements."³³ Because the requirements frequently are not accompanied by the necessary resources to enforce full compliance, Congress sought to enlist the aid of courts and citizens via the citizen suit.³⁴ In fact, Congress' enthusiasm for citizen suits may reflect its "fear that statutory commitments would be threatened by bureaucratic failure"³⁵ and that some agencies may be "captured."³⁶ Thus, some authorities call for a "replace[ment of this] command-and-control system with more flexible, incentive-oriented measures."³⁷ The citizen suit can be an effective alternative to fundamental regulatory reform.³⁸

In the current system of American government, most decisions are made at the agency level,³⁹ but such decision-making is too far removed from the people. Constitutionally, government's legitimacy is grounded on the idea that the government serves the people. This fundamental tenet is embodied by the accountability that the branches of government owe the people. For example, the President and Congress are directly accountable to the people by way of the periodic election process.⁴⁰ The Judiciary is accountable at the nomination

32. Pierce, *supra* note 5, at 1281-82; see *Ickes*, 134 F.2d at 706. For a discussion of the capture of an agency, its effects, and the impact that citizen suits can have on capture see *infra* notes 36, 65-74 and accompanying text.

33. Sunstein, *supra* note 23, at 221.

34. *Id.*

35. *Id.* at 193.

36. *Id.* at 192-93. The capture theory states that:

An agency is captured when it favors the concerns of the industry it regulates, which is well-represented by its trade groups and lawyers, over the interests of the general public, which is often unrepresented.

[M]ost members of the public will be only marginally affected by policy changes. As a result, only industry members find it economically worthwhile to pay the substantial costs of forming an organization to influence policy decisions.

RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 18 (1992) (citations omitted); see also ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW AND PROCESS*, 250-51 (1993) (considering various scholars' interpretations of the capture theory).

37. Sunstein, *supra* note 23, at 222; see also AMAN, *supra* note 2, at 43 (stating that "[l]egislation is the most direct way of achieving major adjustment to our public system of law. It is the appropriate institutional response to major structural changes in industry and to any fundamental revision in the reality or perception of regulatory problems."); Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171 (1988) (urging reform based on market incentives and explaining the advantages of such reform over time).

38. Sunstein, *supra* note 23, at 222 ("The citizen suit may serve as an effective alternative to massive regulatory overhaul."); see also AMAN, *supra* note 2, at 43 (recommending interpretive change in agency policy as an alternative to legislative change).

39. Pierce, *supra* note 5, at 1241 ("Congress is no longer the source of most decisions. Most governmental decisionmaking occurs at the agency level.")

40. The President is elected for a "[t]erm of four Years" U.S. CONST. art. II, § 1, cl. 1. For the bicameral Congress, "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States" *Id.* at art. I, § 2, cl. 1. "The Senate of the United States shall be chosen for six Years" *Id.* at § 3, cl. 1.

and confirmation levels. But government agencies are farther removed from the people. Much more direct access to the President, the Congress, or the Judiciary can truly make the federal bureaucracy accountable.⁴¹

Professor Richard Pierce of the Columbia University Law School believes that the stronger the link between one of the three "core" branches of government and the people, the more that branch is able to link the people and the bureaucracy.⁴² Justice Scalia maintains that the elected executive and Congress should be responsible for all public policy decisions.⁴³ In contrast to Justice Scalia's position that the Judiciary cannot be an enforcer of public policy, Pierce believes that "judicial review [of agency actions] can enhance the principal-agent relationship between people and agencies by confining agency actions within statutorily determined boundaries."⁴⁴ The more that the Court restricts access to standing, the more that the democratically accountable administrative state suffers. Conversely, a liberal standing policy would allow the people to make the bureaucracy more accountable through the use of mechanisms such as the citizen suit.⁴⁵

II. FAITHFUL EXECUTION OF THE LAWS AND CITIZEN STANDING

A number of statutes already provide for citizen suits.⁴⁶ In practice, a citizen suit proceeds as follows: An individual or group such as the Sierra Club or the National Rifle Association would find an injured member in whose name they would bring suit against either the government or the statute-breaking private defendant. Simply put, the plaintiff would ask for judicial review of the actions of the defendant.

Although the citizen suit was utilized very little at first, its use has increased dramatically over the years.⁴⁷ For example, between 1984 and 1988, citizens filed eight hundred notices of suit under the Clean Water Act citizen-suit provisions alone.⁴⁸ Moreover, a large number of plaintiffs

41. Pierce, *supra* note 5, at 1239-42.

42. *Id.* at 1240.

43. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2145 (1992).

44. Pierce, *supra* note 5, at 1242.

45. *Id.* at 1243-44, 1280-85.

46. See Sunstein, *supra* note 23, at 165 n.12. See generally *INS v. Chadha*, 462 U.S. 919, 1003-13 (1983) (White, J., dissenting) (listing several statutes that provide for citizen suits). In fact, *Lujan* is ranked second behind *INS v. Chadha* for the number of statutes it effectively disables.

47. Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 852-68 (1985).

Until *Lujan*, environmental advocates saw citizen suits as both a means to solve problems and a way to heighten awareness of the problem itself. *Id.* Following *Lujan*, the use of citizen suits will likely drop off unless, and until, Congress enacts either a bounty for successful suitors or gives citizens property rights in the environment. See Sunstein, *supra* note 23, at 232-35.

48. In 1988, the EPA stopped keeping record of citizen suits. For a breakdown of the notices to sue under the Clean Water Act from 1984 through 1988, see Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 392-94 (1990).

prevailed.⁴⁹ The high number of suits and the high number of prevailing plaintiffs both testify to the usefulness of the citizen suit.

The *Lujan* opinion, however, undermines citizen suits on the basis of standing. Justice Scalia, writing a plurality opinion, states that citizen suits unconstitutionally interfere with the Executive's duty to "take Care that the Laws be faithfully executed."⁵⁰ Thus, the basis of Scalia's rejection of citizen standing is the language of Article II of the Constitution. He states, however, that the doctrine of standing is, at its core, an "essential and unchanging part of the case-or-controversy requirement of Article III."⁵¹

Justice Scalia makes a distinction between a plaintiff specifically harmed and one with "only a generally available grievance about [the] government—claiming only harm to his and every citizen's interest."⁵² The latter "does not state an Article III case or controversy" sufficient to give standing.⁵³ Justice Scalia states that to decide a case where a citizen only has a general grievance "would not be to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess."⁵⁴ Scalia further states:

To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed." It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department."⁵⁵

Thus, Justice Scalia clearly sees citizen standing as a violation of the principle of separation of powers, but the constitutional analysis of citizen standing cannot end with the separation of powers issues. While Justice Scalia does make convincing separation of powers arguments, the equally fundamental principle of checks and balances demands mechanisms such as citizen suits.

A. The Laws Must Be Faithfully Executed

The fallacy behind Justice Scalia's analysis is that he predicates his argument on the view that the courts' involvement in enforcing the laws via citizen standing will erode the traditional role and duty of the Executive and its agency administrators. In reality, Scalia seems to use standing to promote

49. Sunstein, *supra* note 23, at 220; see generally Greve, *supra* note 48, at 351-59 (discussing the pattern and practice of citizen suits brought by environmental advocacy groups).

50. U.S. CONST. art. II, § 3.

51. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). As Professor Sunstein admonishes, "it may not be unfair to say that Article II concerns are coming to dominate the interpretation of Article III." Sunstein, *supra* note 23, at 193.

52. *Lujan*, 112 S. Ct. at 2143-44.

53. *Id.*

54. *Id.* at 2144 (quoting *Frothingham v. Mellon*, 262 U.S. 447, 489 (1923)).

55. *Id.* at 2145 (citations omitted).

his tolerance for Executive usurpation of congressional power through executive non-action.⁵⁶

If anything, citizen suits potentially augment the Executive's duty to manage the bureaucracy with implied accountability from the "take Care" clause. Allowing the citizen suitor to act as a private attorney general in the service of the government would create an accountability mentality in members of the bureaucracy. As Professor Pierce writes: "Agencies' administrators recognize that they must respond to arguments made by parties that can challenge policy decisions in court, but they can ignore with relative impunity arguments made by parties that lack that power."⁵⁷

Furthermore, in adjudicating the actions of a defendant administrator, the courts can choose to find that she or he did "take Care that the Laws be faithfully executed,"⁵⁸ and such precedent would guide both future administrators and future courts. Allowing citizen suits would strengthen the Article II "take Care" clause.

In addition, a counter-point to Justice Scalia's "take Care" argument can be found within the language of the clause itself. The Constitution states that the Executive shall "take Care that the Laws be *faithfully* executed."⁵⁹ Who, other than the courts, shall monitor that the Executive *faithfully* executes the laws?

Justice Scalia posits that "[v]indicating the public interest (including the public interest in government observance of the Constitution and laws) is the function of Congress and the Chief Executive."⁶⁰ He sees the Judiciary as the wrong champion of the public interest primarily because the Judiciary is non-elected and not responsive to the demands of voters.⁶¹ Yet the principle of checks and balances requires that the courts, as a "co-equal department"⁶² monitor the faithfulness of the execution of the laws. The consolidation of the implementation of law and the evaluation of that implementation makes it easier for the Executive to usurp congressional power. Thus, the resulting

56. Had *Lujan* been a clearer case of usurpation, the Court still might not have ruled on such a "difficult constitutional question[]." *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1507 (D.C. Cir. 1986); see *supra* notes 14-15. Instead, the Court probably would retreat behind standing—no power to review because the harm was not individualized and concrete. Thus, in another area, the Executive would erode the Congress' power without a check by the Judiciary.

57. Pierce, *supra* note 5, at 1284.

58. U.S. CONST. art. II, § 3, cl. 3.

59. *Id.* (emphasis added).

60. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2145 (1992).

61. See George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990). Furthermore, Scalia's approach to jurisprudence consistently underscores that he does not want judges to be able to "mistake their own predilections for the law." *Id.* at 1308. The Supreme Court seems willing to ignore the destructive effect of limiting standing—that factionalism will grow within the agencies—in order to insure that lower court judges do not rule on personal preference and ignore precedent such as *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); Pierce, *supra* note 5, at 1284-85.

62. *Lujan*, 112 S. Ct. at 2144 (quoting *Frothingham v. Mellon*, 262 U.S. 447, 489 (1923)).

need for checks and balances implies that the courts must not limit standing in order to undertake the role of adjudicating faithful execution of the laws.⁶³

As seen in *Thomas*, the OMB usurped congressional power by arguing that the "take Care" clause somehow enabled it *not* to do what Congress specifically legislated. In the past, courts have found that this raised "difficult constitutional questions,"⁶⁴ but left these questions unanswered. Now, through the use of the "take Care" clause and standing, Justice Scalia has circumvented these difficult constitutional questions.

B. Limiting Standing Results in Capture

Justice Scalia's primary concern is that "judges will mistake their own predilections for the law" and will not follow the precedent of the Supreme Court.⁶⁵ The some seven hundred federal court judges beneath the Supreme Court do not always follow the current Court's goal of judicial restraint. The Court, in limiting standing, seeks to "reduce the opportunities for politically unaccountable federal judges to substitute their policy preferences for those of politically accountable institutions."⁶⁶

What Justice Scalia misses in his argument is that the effort to limit standing in order to limit judicial policy-making actually results in capture, which undermines his goal of increasing the democracy of the agency process. Instead of opening the agencies to the people, limiting standing results in a small group controlling the agency

The Framers of the Constitution were extremely concerned about factionalism controlling the government.⁶⁷ In the administrative law context, there have been numerous examples of agency capture.⁶⁸ Capture is a result of two things: information asymmetries and transactional costs. The prototypical capture of an agency involves a small group (usually an industry) that an agency is supposed to regulate for the benefit of a much larger group (usually

63. See *AMAN*, *supra* note 2, at 4 ("[T]he substitution of market values [cost-benefit analysis from Exec. Order No. 12,291] for the regulatory values Congress once sought to further may very well go beyond the supervisory role that the executive branch is expected to play, inappropriately converting the 'take care' clause of Article II into an unconstitutional source of executive legislation."); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, at 55 (1992) (unpublished manuscript on file with the *Indiana Law Journal*) ("The prevalence of political oversight during the Reagan-Bush years reduced the discretion of administrative agencies, but the result has not been more democracy or better regulatory policy. Elected officials have exercised unaccountable power over policy").

64. *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1507 (D.C. Cir. 1986).

65. *Kannar*, *supra* note 61, at 1304.

66. *Pierce*, *supra* note 5, at 1277; see also *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-86 (1984) (stating that unlike the Executive and the Congress, the Judiciary is unaccountable to the people, therefore it should not make policy decisions).

67. *Pierce*, *supra* note 5, at 1280.

68. See MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 86-91 (1955); PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* 3-21 (1981); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1684-87 (1975).

the public). Information asymmetries and transactional costs prohibit much participation by the larger group. As Professor Pierce writes:

[T]he small group has enormous advantages over the large group in shaping the agency's policies. The members of the small group have a powerful incentive to participate actively in every agency proceeding, obtaining valuable, detailed information and creating valuable political alliances with key agency staff members. [In contrast t]he low individual stake of each member of the larger group limits each member's incentive to participate in the agency's decisionmaking process. The high transaction costs of participating effectively limit[s] the group's ability to even obtain effective representation of their interests.⁶⁹

The problem of capture is partially solved with the Court's movement to a democratic administrative state model. Cases such as *Chevron v. NRDC*⁷⁰ hold that the President has the power to control agency policy-making. *Lujan* reinforces this power when it says that the Executive, and only the Executive, should see that the laws are faithfully executed.⁷¹ In theory, the Executive can prevent and override any such capture. This solution is flawed for two reasons. First, the Executive will not be able to exercise "effective, systematic control over agents who have responsibility to make policy in narrow, technical fields."⁷² Second, "the agents in the executive branch responsible for a narrow area of policymaking often develop a close political alliance with a small faction that is well positioned to capture the agency's decision-making process."⁷³ Thus, in attempting to prevent agencies from being dominated by federal judges' "own predilections," Scalia has opened the door to capture of those agencies.

III. SOLUTION TO *LUJAN*: GIVING A BOUNTY

A. Historical Arguments

Though the Scalia opinion seems to invalidate the idea of a public action, his analysis is not supported by historical evidence. As Professor William Fletcher of the Boalt Hall School of Law writes, "litigation in this country has always been used to articulate and enforce public values."⁷⁴ The public action itself, "an action brought by a private person primarily to vindicate the public interest in the enforcement of public obligations—has long been a feature of our English and American Law"⁷⁵

Another precedent closely analogous to the general public action and relevant to the citizen suit argued for here is the "*qui tam pro domino rege*,

69. Pierce, *supra* note 5, at 1280-81.

70. *Chevron*, 467 U.S. 837.

71. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2145 (1992).

72. Pierce, *supra* note 5, at 1281.

73. *Id.*

74. Fletcher, *supra* note 29, at 227.

75. Sunstein, *supra* note 23, at 174 (quoting Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 302 (1961)).

quam pro si ipso in hac parte sequitur,” or “*qui tam* action” for short. It literally means “who sues on behalf of the King as well as for himself.”⁷⁶ Professor Sunstein writes: “[A] citizen—who might well be a stranger—is permitted to bring suits against offenders of the law . . . Through this action, people can bring suit to enforce public duties; successful plaintiffs keep a share of the resulting damages or fines.”⁷⁷

The idea of a statute defining suits of an informer (or stranger), one who has no interest in the controversy other than that given by the statute, has “been in existence for hundreds of years in England, and in this country ever since the foundation of our Government.”⁷⁸ Professor Sunstein rejects Justice Scalia’s claim that “citizen suits are not the sort of business traditionally entertained.”⁷⁹ Sunstein writes: “[C]ourts had ‘traditionally entertained’ a wide variety of suits instituted by strangers.”⁸⁰

The *qui tam* action became popular again in America during the early 1970’s, when citizens and conservation groups tried to use it to prevent environmental destruction.⁸¹ The majority of these cases were dismissed and the *qui tam* action lost its reestablished popularity. However, the reasoning of the court in *United States v. Florida-Vanderbilt Development Corp.*⁸² is instructional for applying a new bounty statute to citizen suits because it states that there must be statutory authorization for a *qui tam* action:

The *qui tam* action depends entirely upon statutory authorization, as it has never found its way into common law. The action arises only upon a statutory grant. The fact that someone is entitled by statute to share in some penalty or forfeiture does not necessarily also give such person the right to bring an original action to recover such penalty or forfeiture. There must be statutory authority, either express or implied, for the informer to bring the *qui tam* action.⁸³

Thus, when the Congress authorizes “the payment of a bounty” and “action on behalf of the government,” the court would recognize the *qui tam* citizen suit.⁸⁴

76. BLACK’S LAW DICTIONARY (6th ed., 1990); see 3 WILLIAM BLACKSTONE, COMMENTARIES * 160.

77. Sunstein, *supra* note 23, at 175. Sunstein finds the *qui tam* action to be a powerful precedent and argument that Article III does not bar “stranger” or citizen standing actions once they have been congressionally authorized. *Id.*

78. *Id.* (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943)).

79. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983). Scalia’s article provides much more of his reasoning and thought process on the issue of standing than does his *Lujan* plurality opinion.

80. Sunstein, *supra* note 23, at 214.

81. See, e.g., *United States v. Florida-Vanderbilt Development Corp.*, 326 F Supp. 289 (S.D. Fla. 1971); *Durning v. ITT Rayonier, Inc.*, 325 F Supp. 446 (W.D. Wash. 1970).

82. *Florida-Vanderbilt*, 326 F Supp. 289.

83. *Id.* at 291 (quoting *Bass Anglers v. U.S. Plywood-Champion Papers, Inc.*, 324 F Supp. 302 (S.D. Tex. 1971)).

84. *Id.* at 290-91.

More recently, at least four federal courts have found standing for plaintiffs in *qui tam* actions.⁸⁵ None of these cases have been reversed or remanded. The court in *United States v. United Technologies Corp.* defines the appropriate legislative authorization for *qui tam* actions as when "the statutory *qui tam* bounty is 'inextricably intertwined with the underlying lawsuit,' thereby creating 'a concrete, identifiable interest that falls within the confines of Article III'"⁸⁶ Based on his reasoning in *Lujan*, Justice Scalia would almost certainly find this concrete, injury-in-fact type of language acceptable.⁸⁷

In another recent *qui tam* case, *United States v. Smith*,⁸⁸ the court, in effect, addressed Justice Scalia's separation of powers concern when it stated: "*Qui tam* actions . . . do nothing to force federal courts into exercising executive or legislative functions."⁸⁹ In fact, Scalia's constitutional concerns would seem to be allayed. Professor Sunstein states:

For present purposes, what is especially revealing is that there is no evidence that anyone at the time of the framing believed that a *qui tam* action or an informers' action produced a constitutional doubt. No one thought to suggest that the "case or controversy" requirement placed serious constraints on what was, in essence, a citizen suit.⁹⁰

The problem with *qui tam* as precedent for citizen suits centers on the fact that *qui tam* actions do not normally involve the government as the defendant, as is commonly the case with citizen suits. Also, the victor in a *qui tam* proceeding usually recovers money. Until now, citizen suitors did not normally receive money.⁹¹ The proposed statute in Part IV seeks to redress these problems and bestow standing to citizen suitors again.

B. Supreme Court Textual Arguments

Historical arguments aside, the Supreme Court itself provides the means by which to reestablish citizen standing. In *Lujan*, Justice Scalia writes, "Nothing in this [holding] contradicts the principle that '[t]he . . . injury required by

85. See *United States v. United Technologies Corp.*, 777 F. Supp. 195, 199 (N.D.N.Y. 1991), *aff'd*, 985 F.2d 1148 (2d Cir. 1993), *cert. denied*, 113 S. Ct. 2962; *United States v. Northrop Corp.*, 728 F. Supp. 615, 618-19 (C.D. Cal. 1989); *United States v. Lockheed Missiles and Space Co.*, 722 F. Supp. 607, 614-15 (N.D. Cal. 1989); *United States v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1098-99 (C.D. Cal. 1989).

86. *United States v. Smith*, 775 F. Supp. 172, 180 n.8 (E.D. Pa. 1991) (quoting *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1099 (C.D. Cal. 1989)).

87. See *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136-37 (1992).

88. *Smith*, 775 F. Supp. 172 (E.D. Pa. 1991).

89. *Id.* at 180 (holding that the *qui tam* provisions of the False Claims Act did not violate separation of powers and did not abrogate Article III standing requirements).

90. Sunstein, *supra* note 23, at 175-76. For specific examples of *qui tam* actions by early Congresses, see Act of May 19, 1796, ch. 30, s. 18, 1 Stat. 469, 474; Act of Mar. 22, 1794, ch. 11, s. 2, 1 Stat. 347, 349; Act of Feb. 20, 1792, ch. 7, s. 25, 1 Stat. 232, 239; Act of Mar. 3, 1791, ch. 15, s. 44, 1 Stat. 199, 209. For a discussion of early Congresses creating informer's actions, see generally Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1406-09 & nn.189-204 (1988).

91. Sunstein, *supra* note 23, at 176.

Art. III may exist solely by virtue of 'statutes creating *legal rights*, the invasion of which creates standing.'"⁹²

Moreover, Justice Scalia specifically recognizes the standing of suitors owed a bounty. He states: "Nor is it the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a *cash bounty* for the victorious plaintiff."⁹³ Therefore, it seems that where Congress has statutorily provided a cash bounty for victorious citizen suitors, the Court would grant standing.⁹⁴ For all of Scalia's text about the constitutionality of citizen standing, it is ironic that he allows for such a simple solution.

In addition, in his concurrence, Justice Kennedy (joined by Justice Souter) reinforces the idea that the Court would accept cases that have standing by virtue of a bounty statute. Justice Kennedy writes:

[C]ongress has the power to define injuries that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.⁹⁵

If Congress designates successful citizen suitors as receptors of a cash bounty, then Congress will have defined an injury that will give rise to a sufficient "case or controversy,"⁹⁶ and that will meet the *Lujan* test for "injury in fact."⁹⁷ Citizen suitors would have a direct economic injury through the bounty provision. Should a violation of law not be enforced, a citizen could sue for its enforcement or judicial review of the non-enforcement upon the grounds that she or he has a \$2500 stake in the outcome. Thus, Part IV suggests a bounty statute that meets the Court's standing requirements.

IV MODEL CITIZEN SUITOR BOUNTY STATUTE

A. Analysis of the Proposed Statute

The *Omnibus Citizen Suit Bounty Act* is a proposed solution to the constitutional issues raised in the *Lujan* opinion and discussed above. It explicitly creates a right to a civil action for all citizens. Moreover, it bestows a reward to enable a prospective plaintiff to have the requisite "injury-in-fact" upon suit.

Specifically, the statute will enact a \$2500 entitlement for any successful citizen suitor. This amount will likely raise objections from both sides of the

92. *Lujan*, 112 S. Ct. at 2145 (emphasis added) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973))).

93. *Lujan*, 112 S. Ct. at 2143 (emphasis added).

94. At least the Court would likely grant standing under a citizen-suit bounty action where the defendant is not the government. But see *infra* notes 100-01 and accompanying text for an argument as to why standing should also extend to cases where the government is a defendant.

95. *Lujan*, 112 S. Ct. at 2146-47 (citations omitted) (Kennedy and Souter, JJ., concurring).

96. U.S. CONST. art. III, § 2.

97. See *supra* notes 52-53 and accompanying text.

political fence, especially as we continue into a cost-conscious, global era of administrative law⁹⁸ Nevertheless, the \$2500 amount accomplishes two goals. First, it catapults the prospective citizen suitor past the standing objections of *Lujan*. Second, it does so without causing an avalanche of unscrupulous suits, for the costs of litigating will far exceed the \$2500 amount.

However, to bring the statute within the means of more citizens, it will include a provision for attorneys' fees to be paid to a successful suitor. This will better enable citizens and public interest groups to sue. The amount of attorneys' fees will be set at only fifteen percent above the going rate for public interest lawyers (instead of the more common use of the going rate of defense lawyers, which allows a "windfall" of excessive proportions).⁹⁹ Moreover, to avoid frivolous actions and bad faith suits, the statute will include provisions that allow defendants to counter-sue to recover attorneys' fees at a reasonable rate, and to sue for a punitive measure of fifteen percent of the attorneys' fees.

The more difficult question is whether these suitors, even given the entitlement, will be able to sue the government. William Fletcher thinks that this is not a problem:

So long as the substantive rule is constitutionally permissible, Congress should have plenary power to create statutory duties and to provide enforcement mechanisms for them, including the creation of causes of action in plaintiffs who act as 'private attorneys general.'¹⁰⁰

In some circumstances, the most desirable scheme [to determine who could force agencies to perform their legal duties] might be to permit standing broadly, conferring the right to sue on 'private attorneys general' who, for reasons of public policy, should be permitted to sue [the government] as appropriate guardians of the public interest.¹⁰¹

This matter, however, has yet to be resolved. The way to ensure the constitutionality of suing the government would be for Congress to create a bounty for the citizen suitors which is contiguous with a grant to act as "private attorneys general." This action would independently provide citizens the standing to sue the government. Such a dual grant would best serve the interests of instilling accountability in the bureaucracy. Moreover, the bounty

98. See generally *AMAN*, *supra* note 2.

99. Greve, *supra* note 48, at 358-59. While clients and attorneys cannot share in fines, private enforcers using a citizen suit or threat of citizen suit can:

gain by "converting" Treasury fines into attorneys' fees. A review of consent orders entered in 1983 revealed that 'an amount equivalent to about 400 percent of the penalties paid to the federal Treasury was paid to reimburse environmental groups for their attorneys [sic] fees.' Similarly, civil fines are "converted" into credit projects. Virtually every such project involves payments to environmental groups for research, "outreach" and education, or land acquisition. More than ninety percent of "penalties" that industry paid in response to citizen suits under the Clean Water Act in 1983 went to environmental organizations, not to the Treasury.

Id. (citations omitted).

100. Fletcher, *supra* note 29, at 251.

101. *Id.* at 225-26 (citation omitted).

statute would revitalize the ability of citizen suits to prevent executive usurpation of congressional power.

B. A Prototype Bounty Statute

OMNIBUS CITIZEN SUIT BOUNTY ACT

SHORT TITLE.

This Act shall be known as, and may be cited as, the "Omnibus Citizen Suit Bounty Act."

DEFINITIONS AND CONVENTIONS OF LANGUAGE.

Definitions:

"attorney's fees" includes reasonable costs.

"bad faith" means willful intent to unreasonably hinder or burden a defendant.

"case or controversy" refers to the constitutional requirement of the U.S. Constitution Art. III, § 2.

"citizen suitor" means a person who sues under statutorily provided citizen suit standing.

"entities" means all parties potentially liable to a citizen suitor.

"frivolous" means negligent or reckless abuse of process to hinder or otherwise burden a defendant.

"good faith" means honesty in fact. It means that a citizen suit is brought for the purpose of adjudicating the case or controversy at issue and for the obtaining of the bounty, but not for any purpose of unreasonably hindering or burdening a defendant.

"injury-in-fact" refers to United States Supreme Court doctrine bearing the same name.

"person" means:

natural persons with citizenship in the United States of America; or

legal persons (but not government entities) with articles of incorporation registered with the Secretary of State of any state(s) in the United States of America.

"private entity" means any non-public legal person or other business.

"public agency" means any congressionally enacted or funded agency of the United States.

"standing" means the ability to maintain a law suit.

"statutorily provided citizen suit standing" refers to any statute which expressly provides for a civil suit made on the person's own behalf for the purpose of enjoining, compelling, or otherwise reviewing any action, inaction, enforcement, or non-enforcement of the laws of Congress.

"victorious" means that the plaintiff-citizen suitor receives a verdict in favor of his or her case.

Conventions of Language:

plural also includes singular, unless otherwise specified.

PURPOSE.

The purpose of this Act is to entitle victorious citizen suitors to receive a cash bounty when acting pursuant to statutorily provided citizen suit standing.

DEFINING THE INJURY

Citizen suitors shall be "injured-in-fact" sufficient to give rise to a concrete, particularized case-or-controversy when:

any action or inaction by a private entity gives a cause of action pursuant to any statutorily provided citizen suit standing; or any enforcement or non-enforcement by a:

public agency;

division of government (at the municipal, county, city, state, or federal level);

licensee of the governmental body representing any level of government listed in this section;

United States employee or official; or

United States cabinet member,

gives a cause of action pursuant to any statutorily provided citizen suit standing.

The amount in controversy shall be the amount payable as bounty for a victorious citizen suit.

Entities Liable:

Entities liable to victorious citizen suitors are defendants of any citizen suit made in good faith, pursuant to any statutorily provided citizen suit standing.

PERSONS ELIGIBLE FOR BOUNTY· THE CITIZEN SUITOR.

The eligibility for bounty from a victorious citizen suit requires that the plaintiff be able to demonstrate compliance with all of the following factors:

That the suit was brought in good faith, pursuant to any statutorily provided citizen suit standing; and

That the plaintiff bringing the suit is a person as defined in this Act.

AMOUNT TO BE PAID, SOURCE OF FUNDS, BANKRUPTCY CLAIM STATUS.

Victorious citizen suitors shall be entitled:

to receive \$2500 as bounty upon victorious suit made pursuant to any statutorily provided citizen suit standing; and

to receive attorney's fees set at 115% of a reasonable rate for public interest attorneys. The court shall make a factual inquiry into the reasonable rate for public interest attorneys within its jurisdiction, and shall increase this amount to reflect inflation.

Source of Funds: The funds to pay for the bounty of a victorious citizen suitor shall be levied against:

the funds of a governmental entity sued;

the assets of a licensee sued; or

the assets of any other entity sued under this Act.

Notwithstanding the provisions of Title 11 of the United States Code (the "Bankruptcy Code"), the bounty entitlement shall be given first priority administrative expense claim status.

PROVISIONS FOR COUNTER-SUIT, PENALTIES FOR FRIVOLOUS OR BAD FAITH CITIZEN SUITS.

Upon a showing of frivolous or bad faith filing of a citizen suit, the defendant shall be entitled to sue the citizen suitor-plaintiff.

The burden of proof is upon the party defending the original citizen suit, and the burden must be met by a preponderance of the evidence.

Penalties: The party shown to have brought a frivolous or bad faith citizen suit shall be liable to the defendant of such suit for:

attorneys' fees calculated at 100% of a reasonable rate of attorneys practicing defense of citizen suits; and

a punitive measure of 15% of the total attorneys' fees awarded under this subsection.

The court shall make a factual inquiry as to the reasonable rate of attorneys practicing defense of citizen suits, and shall increase this amount to reflect inflation.

CONFORMING AMENDMENT.

This Act shall apply to all present and future acts which statutorily provide for citizen suit standing.

LEGISLATIVE HISTORY

This Act is made in response to *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), which denied standing for citizen suitors because the suitors did not have sufficient "injury-in-fact" to be a case or controversy within the requirement of Article III.

The Court in *Lujan* implied that standing for citizen suits would be recognized where Congress provided a bounty:

Nor is it the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a *cash bounty* for the victorious plaintiff.¹⁰²

The Act is designed to define an injury for which victorious citizen suitors will receive a "bounty." The amount of the bounty is set so as to provide a modest but greater than a *de minimis* amount, yet to provide the necessary standing as defined in *Lujan*. The relative modesty of the bounty and the inclusion of attorneys' fees at rates corresponding to that which the individual parties would normally earn is designed to prevent an avalanche of suits.

In addition, the Act provides defendants with the means to stave off multiple attacks as well as frivolous and bad faith citizen suits. Frivolous suits or bad faith suits have a punitive damage measure designed to keep the purpose of the citizen suit clearly in mind. This purpose is to allow citizens to serve themselves and the nation by suing in this way

102. *Lujan*, 112 S. Ct. at 2143 (emphasis added).

CONCLUSION

This Comment seeks to increase governmental accountability by restoring citizen standing. It proposes a model bounty statute to meet the required "injury in fact" of the *Lujan* case. Citizen standing must be reconsidered in order to keep unelected bureaucrats from being autocratic. Standards inherent in congressional legislation must be followed. Ideally, the executive branch should monitor bureaucrats through the enforcement of congressionally enacted laws. But where the executive usurps congressional power in its enforcement or lack of enforcement, "executive legislation" can result. The courts are then the legitimate arbiter of whether the laws are being *faithfully* executed.

