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## How *Qui Tam* Actions Could Fight Public Corruption

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# HOW QUI TAM ACTIONS COULD FIGHT PUBLIC CORRUPTION

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Aaron R. Petty\*

*This Note argues that public corruption at the state and local levels is a serious problem throughout the United States. Because public corruption decreases confidence in the democratic system at all levels of government, a strong response is necessary. Due to difficulties inherent in the deterrence, detection, and prosecution of state and local corruption, innovative methods to respond to this problem are needed. The author argues that amending the federal criminal statutes most commonly used to prosecute state and local public corruption, to allow a private citizen to bring a qui tam civil action against the public official for violations of those criminal statutes, would contribute substantially to the deterrence, detection, and prosecution of public corruption.*

*“Power corrupts the few, while weakness corrupts the many.”*

—Eric Hoffer<sup>1</sup>

## INTRODUCTION

Honest government is the cornerstone of democracy. When a public official abuses a position of trust, it undermines the foundation upon which our society is built. Combating public corruption should therefore be a priority at all levels of government. The question is “How?” Because it is nearly always the case that more than one individual is involved in corrupt official activity (e.g. a bribe-giver and a bribe-taker), obtaining first-hand knowledge of public corruption is, or should be, an important public goal. By exploiting this knowledge—by giving a voice to those who may not be powerful enough to challenge a public official—prosecutors may be able to improve detection and prosecution of public corruption, which in turn will also improve general deterrence among public officials.

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1. ERIC HOFFER, *THE ORDEAL OF CHANGE* 14 (1952).

This Note proposes that federal criminal statutes commonly used to prosecute state and local officials for public corruption should be amended to include a *qui tam* cause of action similar to that found in the False Claims Act. Part I will illustrate the pervasive and current problem of public corruption in the United States at the state and local levels. Part II will introduce the *qui tam* action, specifically as it exists and has been used under the False Claims Act. *Qui tam* statutes grant standing to private parties to sue in the name of the government for specified wrongs against the government. A successful party is then entitled to a share of the government's recovery, as well as statutory damages. Part III will argue that the addition of a *qui tam* cause of action against state and local officials to certain federal criminal statutes would provide a significant benefit to the public by aiding in the deterrence, detection and prosecution of those crimes. Part IV will address concerns raised by this proposal, including federalism issues, the measurement of damages, and the accrual of private benefits from knowledge gained as a public official. This Note concludes that such concerns, although important, are outweighed by the potential benefits offered by the proposed amendments and the overriding necessity of minimizing public corruption.

## I. PUBLIC CORRUPTION

Public corruption is number four on the FBI's list of top ten priorities, following only terrorism, espionage, and cybercrimes.<sup>2</sup> It holds this position of prominence in large part because it "strikes at the core of what our country's [sic] about. Our democracy depends on a healthy, efficient, and ethical government—whether it's in the courtroom or the halls of Congress."<sup>3</sup> Additionally, public corruption can have significant specific consequences. For instance, corruption can directly impact national security if state employees are bribed for fake IDs and licenses.<sup>4</sup> But public corrup-

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2. Fed. Bureau of Investigation, *Public Corruption*, <http://www.fbi.gov/hq/cid/pubcorrupt/pubcorrupt.htm> (last visited July 2, 2006) (on file with the University of Michigan Journal of Law Reform). The term "public corruption," as used in this Note, means a criminal breach of trust or abuse of power by a public official.

3. Dan O'Brien, *Cracking Down on Public Corruption*, June 20, 2005, <http://www.fbi.gov/page2/june05/obrien062005.htm> (on file with the University of Michigan Journal of Law Reform).

4. *Id.*

tion also has a broad reach; it can create economic inefficiencies<sup>5</sup> for which the public foots the bill.<sup>6</sup> Because of its significant potential economic and political impact on a national scale, public corruption at the state and local level is a proper target of federal prosecutors. While there is unfortunately no shortage of potential cases to prosecute, the difficulties inherent in prosecuting public corruption suggests that supplementary measures may be useful in deterring, detecting, and prosecuting public corruption.

### A. State-level Corruption

On December 17, 2003, George Ryan was indicted as the sixty-sixth defendant in Operation Safe Road on charges of racketeering, conspiracy, mail fraud, tax fraud, and making false statements to federal investigators during his terms as the Illinois Secretary of State and later Governor of Illinois.<sup>7</sup> Ryan allegedly received illegal cash payments, gifts, vacations, personal services, and loans totaling more than \$167,000 in exchange for the performance of official government acts, including awarding lucrative contracts and leases.<sup>8</sup> Additionally, the government alleged that Ryan used state resources for his and his family's personal benefit, his campaign organization, and some of his associates, and that Ryan lied to federal agents about facts material to their investigation.<sup>9</sup>

The racketeering charge alleged that Ryan and others were engaged in a pattern of racketeering activity that included "multiple acts of mail fraud, money laundering, extortion, state bribery and obstruction of justice," defrauding the people and the state of Illinois of money, property, and the honest services of Ryan in his

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5. See SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES CONSEQUENCES, AND REFORM 4 (1999); Posting of Richard A. Posner to The Becker-Posner Blog, <http://www.becker-posner.blog.com/archives/2005/09/corruption-pos.html> (Sept. 3, 2005).

6. ROSE-ACKERMAN, *supra* note 5, at 4. The argument that is sometimes made, that corruption (political patronage, in particular) is tolerated because it works better than honest government, is beyond the scope of this Note. This Note will proceed on the assumption that public corruption, writ large, is bad for society, primarily because it is anti-democratic.

7. Press Release, U.S. Dep't of Justice, U.S. Indicts Former Illinois Gov. George Ryan for Alleged Public Corruption During Terms as Secretary of State and Governor 1 (Dec. 17, 2003), available at [http://www.usdoj.gov/usao/iln/pr/chicago/2003/pr121703\\_01.pdf](http://www.usdoj.gov/usao/iln/pr/chicago/2003/pr121703_01.pdf) (on file with the University of Michigan Journal of Law Reform).

8. *Id.*

9. *Id.*

official capacity, as well as those of other officials.<sup>10</sup> The mail fraud allegations suggested that associates were paid from proceeds obtained by vendors doing business with the State of Illinois; that Ryan received prohibited cash and gifts, vacation benefits, and loan services; and that during the time that Ryan was accepting financial benefits, some of his associates were provided with material nonpublic information relating to official decisions and participation in the official decision-making process, resulting in financial benefit to those associates.<sup>11</sup>

The indictment also alleged that Ryan made false statements to federal investigators on three separate occasions concerning vacations, state leases, appointments to state commissions, his financial relationship with co-defendant businessman Lawrence Warner, and campaign contributions.<sup>12</sup> Ryan was also charged with income tax fraud, in that he corruptly obstructed and impeded the Internal Revenue Service from making a correct determination of his income and from collecting the taxes and penalties he owed the government.<sup>13</sup> Specifically, the government alleged that Ryan used funds from his campaign organization to pay for his own and his family members' personal expenses, and for the benefit of third parties; that he diverted funds to conceal his true income, and caused his campaign funds to issue paychecks, which were actually gifts; and that he deposited campaign contributions into his personal account without reporting them.<sup>14</sup>

Some of the official actions taken by Ryan for the benefit of Warner included a contract for a company he was involved with, American Decal, to manufacture and print vehicle registration stickers that are required on all cars registered in Illinois;<sup>15</sup> a contract for title laminates<sup>16</sup> currently held by a different vendor to be awarded to American Decal;<sup>17</sup> purchase of IBM computers at the Secretary of State's office for which Warner received nearly \$1 million under an existing contract with IBM;<sup>18</sup> awarding of contracts for heating and cooling in state government buildings to a company in which Warner was later granted a percentage of the

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10. *Id.* at 4.

11. *Id.* at 6-13.

12. *Id.* at 13-14.

13. *Id.* at 14.

14. *Id.* at 15-16.

15. *Id.* at 8.

16. *Id.* A title laminate is a physical security device attached to title documents for cars.

*Id.*

17. *Id.*

18. *Id.* at 8-9.

contract revenues;<sup>19</sup> and the execution of three leases at properties in which Warner stood to profit if leased by the Secretary of State's office.<sup>20</sup>

At the conclusion of a six-month trial, on April 17, 2006 Governor Ryan was convicted on all eighteen counts against him.<sup>21</sup> Warner was likewise convicted on each of the twelve counts that he was facing.<sup>22</sup> Ryan was sentenced to six and a half years in prison.<sup>23</sup>

In contrast to Governor Ryan's well-publicized trial for mail fraud, Rhode Island State Senator John Celona pleaded guilty to three counts of honest services mail fraud<sup>24</sup> on August 25, 2005 amidst minimal fanfare.<sup>25</sup> Senator Celona admitted that he had accepted money and gifts from corporations that had interests in pending legislation and that he had used his official position fraudulently to support the interests of those organizations.<sup>26</sup> Specifically, Celona admitted to three schemes: one involving a medical and assisted living center, another involving a pharmacy, and a third involving a health insurance company and a communications company.<sup>27</sup>

Between 1998 and 2003, the medical center paid Celona \$260,683.<sup>28</sup> In exchange, Celona opposed legislation that would require the center's directors to step down if it changed from a non-profit to a for-profit center, he opposed legislation that would have required non-profit organizations to make payments in lieu of taxes, and he intervened in contract disputes the center had with third parties.<sup>29</sup>

Before Celona began consulting with the pharmacy, he supported "pharmacy freedom of choice" legislation, which the pharmacy industry opposed.<sup>30</sup> In 2000, after Celona began collecting what eventually totaled \$45,000 in consulting fees, he no longer

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19. *Id.* at 9–10.

20. *Id.* at 10.

21. Associated Press, *Guilty*, CHI. TRIB., Apr. 18, 2006, at 6.

22. *Id.*

23. Matt O'Connor & Rudolph Bush, *Ryan Gets 6 1/2 Years*, CHI. TRIB., Sept. 7, 2006 at 1.

24. See 18 U.S.C. §§ 1341, 1346 (2000).

25. Press Release, U.S. Dep't of Justice, Former Senator John Celona Pleads Guilty to Federal Fraud Charges 1 (Aug. 25, 2005), available at [http://www.usdoj.gov/usao/ri/press\\_release/aug2005/celona\\_plea.pdf](http://www.usdoj.gov/usao/ri/press_release/aug2005/celona_plea.pdf) (on file with the University of Michigan Journal of Law Reform).

26. *Id.*

27. *Id.* The identities of the medical center, pharmacy, health insurer, and communications company were never publicly disclosed. *Id.*

28. *Id.* at 2.

29. *Id.*

30. *Id.*

supported the legislation.<sup>31</sup> In addition, he opposed legislation that would have allowed Canadian pharmacies to be licensed in Rhode Island, sponsored legislation that would have required manufacturers to accept returns from distributors such as the pharmacy, and accepted a free trip to a charity golf tournament in San Diego in 2003.<sup>32</sup>

In 2002, the health insurer began paying the communications company to produce a cable television show for Celona.<sup>33</sup> In return, he supported a bill that would allow insurers greater flexibility in designing their health benefits plans, and opposed a bill regulating investments by a non-profit dental insurer.<sup>34</sup>

Senator Celona's sentencing was scheduled for May 11, 2006.<sup>35</sup>

When Ohio Governor Bob Taft took office in 1999, he required his appointees to undergo ethics training.<sup>36</sup> In May 2005, Taft said that public employees "can enjoy entertainment, such as golf or dining out, with persons working for a regulated company, or one doing business with the state, only if they fully pay their own way."<sup>37</sup> Three months later, on August 17, 2005, Taft was charged with four misdemeanor counts for failing to report gifts of golf and hockey outings paid for by friends, lobbyists, and businessmen.<sup>38</sup> The gifts were reportedly worth close to \$5,800.<sup>39</sup> The scandal "has expanded into other areas and includes charges of cover-up, cronyism and ethical lapses."<sup>40</sup> Ohio Representative Chris Redfern said, "It's about a pay-to-play system that has been going on in Ohio for years . . . . Since I got here in 1999, it's been an open secret that if you contribute money, you get the state jobs you want and the state contracts you want."<sup>41</sup>

Most recently, a thirty-count indictment was returned on October 27, 2005 against former Alabama Governor Don Siegelman,

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31. *Id.*

32. *Id.*

33. *Id.* at 3.

34. *Id.*

35. Press Release, U.S. Dep't of Justice, Roger Williams Medical Center and Three Executives Are Charged with Federal Fraud Charges 4 (Jan. 5, 2006), available at [http://www.usdoj.gov/usao/ri/press\\_release/jan2006/rwu\\_indict.pdf](http://www.usdoj.gov/usao/ri/press_release/jan2006/rwu_indict.pdf) (on file with the University of Michigan Journal of Law Reform).

36. Tim Jones, *Ohio Governor Is Charged As Scandal Grows*, CHI. TRIB., Aug. 18, 2005, available at <http://www.chicagotribune.com/news.nationworld.chi-0508180156aug18,1,933533.story?coll=chi-newsnationworld-hed> (on file with the University of Michigan Journal of Law Reform).

37. *Id.*

38. Dennis Cauchon, *Rare-Coin Deal Buys Scandal for Ohio Governor*, USA TODAY, Aug. 16, 2005, at 3A; Jones, *supra* note 36.

39. Jones, *supra* note 36.

40. Cauchon, *supra* note 38.

41. *Id.*

along with an aide, former HealthSouth executive Richard Scrusby, and another state official.<sup>42</sup> Siegelman was charged with racketeering, honest services wire and mail fraud, obstruction of justice, bribery and Hobbs Act extortion.<sup>43</sup> In particular, the government alleged that Siegelman extorted close to \$300,000 from individuals under threats of harming their business interests with the state.<sup>44</sup> Additionally, he was charged with racketeering, conspiracy, and bribery in connection with Scrusby's appointment to the Alabama Certificate of Need Review Board.<sup>45</sup>

### B. Local Corruption

Chicago is known for many things: its famous skyline, its lakefront, and its centuries-old tradition of corruption in local government.<sup>46</sup> On July 18, 2005, two City of Chicago officials were arrested on charges of mail fraud.<sup>47</sup> Robert Sorich, a high-ranking official in the Mayor's Intergovernmental Affairs (IGA) Office, and Patrick Slattery, Director of Staff Services in the Department of Streets and Sanitation, were alleged to have participated in a scheme directed by Sorich, in which the interview, selection, and promotion process for certain city jobs was manipulated to the advantage of those candidates favored by high-ranking city officials.<sup>48</sup> The government alleged that an individual who had connections to political organizations, had volunteered to work on campaigns or had certain union affiliations would often be selected for

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42. Press Release, U.S. Dep't of Justice, Former Alabama Governor Don Siegelman and Others Indicted in Racketeering, Bribery and Extortion Conspiracy (Oct. 27, 2005), available at [http://www.usdoj.gov/usao/alm/Press/Siegelman\\_indictment.htm](http://www.usdoj.gov/usao/alm/Press/Siegelman_indictment.htm) (on file with the University of Michigan Journal of Law Reform).

43. *Id.*

44. *Id.*

45. *Id.*

46. See generally JAMES L. MERRINER, *GRAFTERS AND GOO GOOS: CORRUPTION AND REFORM IN CHICAGO, 1833-2003* (2004) (describing the history of political corruption in Chicago). Of course, down-staters are quick to point out that corruption in Illinois is not limited to Chicago and Springfield. See Jim Suhr & Jan Dennis, *Public Corruption Not Just in State's Big Cities*, CHI. SUN-TIMES, Aug. 26, 2005, at 57. Although Chicago City Hall and the State House capture the lion's share of the headlines, political corruption is also significant in smaller places like East St. Louis and Cairo, Illinois. *Id.*

47. Press Release, U.S. Dep't of Justice, U.S. Charges Two City of Chicago Officials with Fraudulently Rigging Hiring and Promotions 1 (July 18, 2005), available at [http://www.usdoj.gov/usao/iln/pr/chicago/2005/pr0718\\_01.pdf](http://www.usdoj.gov/usao/iln/pr/chicago/2005/pr0718_01.pdf) (on file with the University of Michigan Journal of Law Reform).

48. *Id.*

employment or promotion over other applicants with equal or superior qualifications.<sup>49</sup> Those who were pre-selected would receive inflated interview scores, or would sit for “sham interviews.”<sup>50</sup>

Under an existing federal consent decree known as the *Shakman* decree,<sup>51</sup> the City of Chicago is prohibited from making hiring and promotion decisions on the basis of political considerations for all but approximately 1,000 managerial and policy positions of the city’s roughly 38,000 total jobs.<sup>52</sup> Affidavits of cooperating witnesses, which include commissioners of city departments, describe IGA’s role in hiring and promotions for *Shakman*-covered positions.<sup>53</sup>

The U.S. Attorney’s Office alleged that IGA pre-determined who would receive a job or a promotion before interviews were conducted; that a city official received a document called “the blessed list,” which he understood to be the names of individuals the Mayor’s Office wanted to employ; that documents recovered in a raid of City Hall revealed pre-selected winners of jobs alongside the political organization or union sponsor they were associated with; and that when a city official “complained to Sorich that a particular pre-selected applicant was ‘a drunk,’ Sorich replied, ‘Do the best you can with him.’”<sup>54</sup> One pre-selected candidate died before interviews were conducted, yet he was listed as one of the individuals who would be hired. Another pre-selected candidate was given the highest interview rating possible, yet he was on active military duty in Iraq when the interview would have taken place.<sup>55</sup>

Mayor Richard M. Daley was interviewed by the U.S. Attorney’s Office in August 2005.<sup>56</sup> Although no charges have been filed against him, he appeared visibly shaken at a news conference after the questioning.<sup>57</sup> In September 2005, indictments were returned against both Sorich and Slattery, as well as Timothy McCarthy, a former assistant to Sorich and an interviewer in the Department of Aviation; John Sullivan, a former Deputy Commissioner of Streets and Sanitation who was charged with mail fraud and making false statements, and Daniel Katalinic, also a former Deputy Commis-

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49. *Id.* at 2.

50. *Id.*

51. *Shakman v. Democratic Org. of Cook County*, 569 F. Supp. 177, 178–83 (N.D. Ill. 1983). The *Shakman* decree was a permanent injunction binding the City of Chicago and other entities enforcing decisions that prohibited patronage in public employment. *See id.* at 178–79.

52. Press Release, U.S. Dep’t of Justice, *supra* note 47, at 3.

53. *Id.*

54. *Id.* at 5.

55. *Id.* at 5–6.

56. Gary Washburn, *Daley Facing His Biggest Test*, CHI. TRIB., Aug. 28, 2005, at 1.

57. *Id.*

sioner of Streets and Sanitation, who was charged with mail fraud.<sup>58</sup> Katalinic is the thirty-sixth defendant facing charges as a result of the U.S. Attorney's investigation into the City of Chicago's Hired Truck Program.<sup>59</sup> Between May and September 2005, eight members of Mayor Daley's cabinet either resigned or were fired.<sup>60</sup> In July 2006, Sorich, Slattery, McCarthy, and Sullivan were convicted for their participation in the patronage machine.<sup>61</sup> Although the powers of the city's new inspector general have been expanded and an anonymous hotline to report wrongdoing has been established, there is still little incentive for whistleblowers to come forward.<sup>62</sup>

Although Chicago City Hall has traditionally been rumored to be corrupt, in recent years, the administration of Mayor Vincent "Buddy" Cianci, Jr., in Providence, Rhode Island has certainly been more flagrantly criminal. On April 2, 2001, a federal grand jury indicted Cianci and four associates on racketeering charges for running the city of Providence as a criminal enterprise.<sup>63</sup> Another associate was charged with bribery.<sup>64</sup> The indictment alleged that Cianci used his office to obtain cash and campaign contributions from city employees and contractors, and that those who paid or otherwise complied with his requests were given benefits including leases, contracts, employment, promotions, business, or other benefits.<sup>65</sup>

Between 1991 and 1999, Mayor Cianci and associates obtained \$250,000 in campaign contributions from members of the Providence Towing Association.<sup>66</sup> In return, those who donated were listed on the Tow List, from which the Providence Police Department would select tow companies to tow cars.<sup>67</sup> In 1991, a realty company leased property to the Providence School

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58. Anna Johnson, *Five Chicago Officials Charged in Probe*, FREE REPUBLIC.COM, Sept. 22, 2005, available at <http://www.freerepublic.com/focus/f-news/1489651/posts> (on file with the University of Michigan Journal of Law Reform).

59. *Id.*

60. *City Hall Changes Planned*, DETROIT FREE PRESS, Sept. 28, 2005, at A5.

61. Rudolph Bush & Dan Mihalopoulos, *Daley Jobs Chief Guilty*, CHI. TRIB., July 7, 2006, at 1. Sorich was convicted of two counts of mail fraud and acquitted of two counts of mail fraud; McCarthy was convicted of two counts of mail fraud; Slattery was convicted of one count of mail fraud; and Sullivan was convicted of one count of making false statements to federal agents and acquitted of another count of making false statements. *Id.*

62. *City Hall Changes Planned*, *supra* note 60, at A5.

63. Press Release, U.S. Dep't of Justice, RICO Indictments (Apr. 2, 2001), available at <http://www.turnto10.com/plunderdome/1126375/detail.html> (on file with the University of Michigan Journal of Law Reform).

64. *Id.*

65. *Id.*

66. *Id.*

67. See Press Release, U.S. Dep't of Justice, *supra* note 63.

Department.<sup>68</sup> In return, some of the proceeds from the lease were paid back to Cianci and an associate.<sup>69</sup> In 1998, Mayor Cianci and two associates extorted \$15,000 from the heirs of an estate, in return for reducing back taxes.<sup>70</sup> Mayor Cianci was also charged with other acts of extortion, bribery, and fraud.<sup>71</sup>

In total, Mayor Cianci was charged with RICO,<sup>72</sup> RICO conspiracy, seven criminal RICO acts, three counts of Hobbs Act<sup>73</sup> extortion, two counts of federal bribery conspiracy and federal bribery, two counts each of mail fraud and witness tampering, one count of mail fraud conspiracy and one count of attempted extortion.<sup>74</sup> Cianci was found guilty on one count of racketeering conspiracy and sentenced to sixty-four months in prison.<sup>75</sup>

Another long-running investigation has recently seen its seventh and eighth defendants convicted, although neither is a public official.<sup>76</sup> Cleveland businessman Nate Gray and New Orleans businessman Gilbert Jackson were convicted in the U.S. District Court for the Northern District of Ohio on multiple felony counts relating to their illegal dealings with public officials.<sup>77</sup> Gray was convicted on thirty-six felony counts, including one count of RICO conspiracy, three counts of Hobbs Act conspiracy, twelve counts of Hobbs Act extortion, thirteen counts of mail fraud, and seven counts of wire fraud.<sup>78</sup> Jackson was convicted on eight similar felony counts, including RICO conspiracy, Hobbs Act conspiracy, Hobbs Act extortion, mail fraud and wire fraud.<sup>79</sup> Gray is a high school graduate who began his business career operating a gas station at the age of twenty-two.<sup>80</sup> By age forty-seven, prosecutors alleged that he was directing a large and growing enterprise in bribing local public officials around the country to bend the rules

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68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. Racketeer Influenced and Corrupt Organizations Act. See 18 U.S.C. §§ 1961–63 (2000).

73. See 18 U.S.C. § 1951 (2000).

74. See Press Release, U.S. Dep't of Justice, *supra* note 63.

75. Tracy Breton, *Operation Plunder Dome*, PROVIDENCE J., June 17, 2005, at A1.

76. Two More Convicted in Cleveland Corruption Case, [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2005/08/two\\_more\\_convic.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2005/08/two_more_convic.html) (Aug. 20, 2005).

77. Press Release, U.S. Dep't of Justice (Aug. 18, 2005), available at <http://www.usdoj.gov/usao/ohn/news/18August2005.htm> (on file with the University of Michigan Journal of Law Reform).

78. *Id.*

79. *Id.*

80. Steve Luttner, *Jury Convicts Gray in 2nd Trial*, PLAIN DEALER, Aug. 18, 2005, at A1.

and award contracts to companies that had hired him as a “consultant,” most notably in Houston and the greater Cleveland area.<sup>81</sup>

Several public officials have already been convicted. Emanuel Onunwor, former mayor of East Cleveland, was convicted on twenty-two counts, including RICO conspiracy, Hobbs Act extortion, mail fraud, bankruptcy fraud, and filing false tax returns.<sup>82</sup> Onunwor was sentenced to 108 months imprisonment and restitution to the City of East Cleveland of over \$5 million. Monique McGilbra, former Director of Building Services for the City of Houston was sentenced to 36 months imprisonment, two years supervised release, \$5,000 fine and \$200 special assessment for her guilty plea to conspiracy to commit mail and wire fraud.<sup>83</sup> Oliver Spellman, former Chief of Staff to the Mayor of Houston was sentenced to two years probation, fined \$10,000 and a special assessment of \$100 for pleading guilty to conspiracy to commit Hobbs Act extortion.<sup>84</sup> Former Cleveland City Councilman Joseph Jones was convicted in the same investigation,<sup>85</sup> and federal prosecutors have also looked at a possible relationship between Nate Gray and former Cleveland Mayor Michael R. White.<sup>86</sup>

On August 24, 2005, Paul Zambrano, former Councilman and Mayor of West Long Branch, New Jersey pleaded guilty to one count of Hobbs Act extortion.<sup>87</sup> Zambrano admitted that he accepted \$15,000 in cash to reward him for helping the informant obtain contracts with West Long Branch and other municipalities where Zambrano introduced the informant to the other public officials.<sup>88</sup> Zambrano is the fourteenth public official convicted in Operation Bid Rig.<sup>89</sup> In early 2005, criminal charges were also filed against several other local public officials in Monmouth County, New Jersey, including the mayors of Hazlet and Keyport and

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81. *Id.*

82. Press Release, U.S. Dep't of Justice (Sept. 2, 2005), available at [http://www.usdoj.gov/usao/ohn/news/02September2005\\_2.htm](http://www.usdoj.gov/usao/ohn/news/02September2005_2.htm) (on file with the University of Michigan Journal of Law Reform).

83. *Id.*

84. *Id.*

85. *Id.*

86. Luttner, *supra* note 80.

87. Press Release, U.S. Dep't of Justice, Former Mayor of West Long Branch Admits Accepting Bribes for Himself and Others (Aug. 24, 2005), available at [www.usdoj.gov/usao/nj/publicaffairs/NJ\\_Press/files/zamb0824\\_r.htm](http://www.usdoj.gov/usao/nj/publicaffairs/NJ_Press/files/zamb0824_r.htm) (on file with the University of Michigan Journal of Law Reform).

88. *Id.*

89. *Id.*

council members from Asbury Park, Far Hills, Keyport, Neptune Township, Middletown, and West Long Branch.<sup>90</sup>

Not to be outdone by New Jersey, the summer of 2005 was a particularly busy one for public corruption in Pennsylvania. Former Philadelphia City Treasurer Corey Kemp was sentenced to ten years in prison for selling his office,<sup>91</sup> and Ted LeBlanc, the Mayor of Norristown, Pennsylvania, was indicted for allegedly taking a \$10,000 bribe.<sup>92</sup> State Senator Vincent Fumo is under investigation by a federal grand jury for his relationship with a non-profit organization and possible document destruction.<sup>93</sup> Another federal grand jury has indicted Philadelphia Councilman Rick Mariano, who among other things, is suspected of having his credit card bills paid by associates in the private sector.<sup>94</sup> Mariano has been charged with honest services mail fraud, honest services wire fraud, money laundering, conspiracy, bribery, and filing a false tax return.<sup>95</sup> U.S. Attorney Patrick L. Meehan said: "I'm disappointed . . . to find corruption as pervasive as it is . . . . People on the street tell me . . . they feel it's a way of doing business. And when you see . . . whole departments playing by a different set of rules, some of that is confirmed."<sup>96</sup>

This brief survey of alleged and proven public corruption reveals several trends. First, public corruption is a serious and pervasive problem.<sup>97</sup> Improvement in all aspects of combating public corruption, including deterrence, detection and prosecution, is necessary. As U.S. Attorney Meehan made clear, the level of public corruption in the United States is higher than even someone in his position would expect. Second, there are relatively few federal criminal statutes under which corrupt public officials are charged. Hobbs Act violations, mail fraud, and RICO all make frequent appearances in the headlines, and in total there are probably fewer than ten federal criminal statutes that are used with regularity.<sup>98</sup> Because so few statutes are used to prosecute corrupt state and local offi-

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90. *Id.*

91. John Shiffman, *Probing Corruption, U.S. Not Yet Contented*, PHILADELPHIA INQUIRER, Aug. 8, 2005, at A1.

92. Keith Herbert & Jeff Shields, *Norristown Mayor Is Indicted*, PHILADELPHIA INQUIRER, July 27, 2005, at B5.

93. Shiffman, *supra* note 91.

94. *Id.*

95. Press Release, U.S. Dep't of Justice, Philadelphia City Councilman Rick Mariano and Five Others Indicted, at 1 (Oct. 25, 2005), available at <http://www.justice.gov/usao/pae/News/Pr/2005/oct/MarianoNewsmemo.pdf> (on file with the University of Michigan Journal of Law Reform).

96. Shiffman, *supra* note 91.

97. See Public Corruption, *supra* note 2.

98. See *supra* Part I.

cial, amending them to improve their effectiveness should be a relatively simple matter. Third, there were people involved in all major public corruption investigations that knew of wrongdoing but did nothing. Sometimes they later become cooperating witnesses, either through agreements with the prosecutors, or for the sake of their own conscience. However, it is clear that some people could come forward earlier but choose to not do so. Therefore, what is needed to improve the deterrence, detection, and prosecution of public corruption is an amendment to the statutes most frequently used to prosecute those crimes, which will provide an incentive for those individuals to come forward and share their information with the appropriate authorities at a much earlier stage of investigation.

## II. THE *QUI TAM* CAUSE OF ACTION

### A. *Origins of the Qui Tam Action*

Generally speaking, *qui tam* statutes confer standing on third parties, allowing them to sue on the government's behalf, where otherwise only the government, as the injured party, would have standing to sue. The phrase "*qui tam*" is short for "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which translates as "who pursues this action on our Lord the King's behalf as well as his own."<sup>99</sup> Statutes authorizing *qui tam* actions date back at least to the fourteenth century.<sup>100</sup> The early English *qui tam* statutes would typically prohibit some conduct and authorize private parties to enforce the prohibition by suing on behalf of the Crown.<sup>101</sup> If the lawsuit succeeded, the private party, known as a "relator" or "informer," would be entitled to a share of the damages or civil penalties paid by the defendant.<sup>102</sup>

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99. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768 n.1 (2000).

100. *Id.* (noting the phrase dates from "at least the time of Blackstone"); Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 599 (2005).

101. Morrison, *supra* note 100, at 599–600.

102. The terms "relator" and "informer" are generally used interchangeably in the context of *qui tam* actions, with "relator" being the preferred term in the United States. *Id.* While some commentators distinguish the two, see, e.g., Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1394–1409 (1988), this Note will not do so, and to avoid the perception that a distinction is being made, will only use the term "relator."

Initially, *qui tam* devices were also employed by private parties seeking to be heard in one of the royal courts on matters not pertaining to a particular statute. In order for a royal court (as opposed to local court, which had jurisdiction over most private wrongs) to hear a case, it was necessary to allege that the King had an interest in the matter. As the allegation of a royal interest was eventually abandoned, so too were common law *qui tam* actions, leaving only the statutory variety with us today.<sup>103</sup>

*Qui tam* actions were also common in the early days of the American republic,<sup>104</sup> although they were never as widespread in the United States as they once were in England.<sup>105</sup> The First Congress enacted six statutes that expressly authorized suits by private relators, which, if successful, would entitle both the relator and the United States to a share of the recovery.<sup>106</sup> Three federal *qui tam* statutes over 100 years old remain on the books today, along with two other statutes that suggest a private cause of action without expressly authorizing one.<sup>107</sup> However, given the limited scope of those statutes, it is not surprising that the False Claims Act is the only federal *qui tam* statute with its roots in the eighteenth or nineteenth century that has generated a large number of cases and which remains important today.<sup>108</sup>

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103. See generally Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 85 (1972).

104. See *Adams v. Woods*, 6 U.S. 336, 341 (1805) (noting that “[a]lmost every fine or forfeiture under a penal statute may be recovered by an action of debt [a *qui tam* action] as well as by information” [a government action]).

105. J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539, 553 (2000).

106. Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 342 n.3 (1989) (collecting statutes).

107. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 769 n.1. See 25 U.S.C. § 81 (2000) (providing a cause of action and share of recovery against persons contracting with Indians in an unlawful manner); 25 U.S.C. § 201 (2000) (providing a cause of action and share of recovery against persons violating Indian protection laws); 35 U.S.C. § 292(b) (2000) (providing a cause of action and share of recovery against persons falsely marking patented articles). See also 18 U.S.C. § 962 (2000) (providing for forfeiture to informer of a share of vessels privately armed against friendly nations, but not expressly authorizing a private cause of action); 46 U.S.C. § 723 (2000) (providing for a share to the informer of the forfeiture of vessels removing undersea treasure from the Florida coast to foreign nations, but without expressly authorizing a private cause of action).

108. Beck, *supra* note 105, at 555.

*B. The False Claims Act*

The modern use of *qui tam* actions in the United States can trace its roots to the mid-nineteenth Century. In the first years of the Civil War, the Union Army suffered as a result of fraudulent sales by government contractors. For example, the army had received small arms that could not be fired, and artillery shells filled with sawdust rather than explosives,<sup>109</sup> as well as rancid food, lame animals,<sup>110</sup> and moth-eaten blankets.<sup>111</sup> In 1863, the War and Treasury Departments, along with President Lincoln, urgently requested Congress to enact legislation to facilitate the prevention and punishment of fraud in connection with the procurement of supplies for the Union Army.<sup>112</sup> The result was the first iteration of the federal False Claims Act (FCA).<sup>113</sup> This original act imposed civil and criminal liability for presenting false claims against the government, for preparing a written instrument that contained fraudulent statements to aid in the payment or approval of such a claim, and for conspiring to defraud the government by obtaining payment for a false claim.<sup>114</sup> The Act provided for forfeiture of \$2,000 for each violation of the act, along with double the amount of the government's damages. Individuals were permitted to bring this action on behalf of the government, and if successful, were entitled to half of the government's recovery.<sup>115</sup> The original FCA remained in force for eighty years before being challenged.

During World War II, abuses by prospective relators led to the restriction and near-repeal of the FCA.<sup>116</sup> In 1943, Morris Marcus, upon learning of a contractor's plea of *nolo contendere* to a bid-rigging conspiracy, copied the government's indictment into an

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109. *Id.*

110. Corp. Crime Reporter, *The Top 100 False Claims Act Settlements 2* (Dec. 30, 2003), <http://www.corporatecrimereporter.com/fraudrep.pdf> (on file with the University of Michigan Journal of Law Reform).

111. *The False Claims Act: History of the Law*, [http://www.allaboutquitam.org/fca\\_history.shtml](http://www.allaboutquitam.org/fca_history.shtml) (last visited July 2, 2006) (on file with the University of Michigan Journal of Law Reform).

112. Pamela H. Bucy, *Game Theory and the Civil False Claims Act: Iterated Games and Close-Knit Groups*, 35 LOY. U. CHI. L.J. 1021, 1022 (2004); *The False Claims Act: History of the Law*, *supra* note 111.

113. Act of Mar. 2, 1863, § 3, 12 Stat. 698 (amended 1943).

114. *Id.*

115. *Id.*

116. *See generally* Beck, *supra* note 105, at 556–61.

FCA complaint and won a judgment for \$315,000.<sup>117</sup> The Supreme Court upheld the award, noting that the government's policy arguments would have been better addressed to Congress.<sup>118</sup> Anticipating this result, Attorney General Francis Biddle wrote to Congress, complaining that *qui tam* suits had become "parasitical actions," and were sometimes brought only after a government investigation.<sup>119</sup> Both houses of Congress voted to repeal the *qui tam* provisions of the FCA.<sup>120</sup> However, the House bill was not passed until the next session, necessitating a second vote in the Senate.<sup>121</sup> When the House bill reached the Senate Judiciary Committee in 1943, only one senator strongly supported keeping the FCA, and it looked as though the FCA would be repealed.<sup>122</sup> However, Senator William Langer's outspoken position that some defense contractors were "endanger[ing] the lives of our soldier boys" moved the committee to amend the FCA rather than repeal it outright.<sup>123</sup>

To address the problem of relators like Marcus enriching themselves without providing any benefit to the public, while at the same time maintaining the Act's deterrent, compensatory, and punitive aspects, Congress amended the FCA to deny jurisdiction to federal courts in *qui tam* suits based on allegations known to the government before the *qui tam* complaint was filed.<sup>124</sup> Additionally, the 1943 amendments provided that the relator had to provide supporting evidence to the Department of Justice, which then had sixty days to decide if they wanted to take exclusive control of the lawsuit.<sup>125</sup> Most dramatically, the amended FCA did not provide for a minimum fixed recovery, and set the maximum recovery for a relator at ten percent if the government intervened, and twenty-five percent if it was prosecuted privately.<sup>126</sup>

Although the 1943 amendments may have succeeded in preventing unscrupulous relators from recovering windfalls under the FCA, courts interpreting the 1943 amendments also made publicly

117. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 558 (1943) (Jackson, J., dissenting).

118. *Id.* at 546–47.

119. S. REP. NO. 77-1708, at 2 (1942).

120. See H.R. 1203, 78th Cong., 89 CONG. REC. 2800–01 (1943) (passed by House); S. 2754, 77th Cong., 88 CONG. REC. 9138 (1942) (passed by Senate).

121. *Id.*

122. See 89 CONG. REC. 7572 (1943) (statement of Sen. Van Nuys).

123. See S. REP. NO. 78-291, pt. 2, at 1 (1943).

124. See An Act to Limit Private Suits for Penalties and Damages Arising out of Frauds Against the United States, Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (1943).

125. *Id.* If the Department of Justice intervened, but did not prosecute the action with "due diligence" over a period of six months, the relator could regain control of the lawsuit. *Id.* at 608–09.

126. *Id.* at 609.

beneficial lawsuits under the FCA more difficult to commence.<sup>127</sup> In response to public pressure to stem a perceived wave of fraud against the government in the mid-1980s,<sup>128</sup> the FCA was amended again in 1986<sup>129</sup> to expand the pool of potential relators, enhance the incentives offered to them, and reduce the burden of proof on the plaintiff.<sup>130</sup> Additionally, the 1986 amendments permit the relator to remain actively involved in the case, even if the government does elect to intervene.<sup>131</sup>

Currently, the FCA imposes civil liability upon any person who, *inter alia*, “knowingly presents . . . to an officer or employee of the United States . . . a false or fraudulent claim for payment or approval.”<sup>132</sup> If found liable, the defendant may be required to pay a penalty of not less than \$5,000 and not more than \$10,000 per claim, plus three times the amount of the damages sustained by the government as a result of the defendant’s actions.<sup>133</sup> An action arising under this statute may be commenced in one of two ways. The government, through the Attorney General, may bring an action

127. See S. REP. NO. 99-345, at 4-5 (1985).

128. In 1985, the Department of Defense reported 45 of the top 100, including nine of the top ten defense contractors were under investigation for multiple allegations of fraud. *The False Claims Act: History of the Law*, *supra* note 111.

129. 31 U.S.C. §§ 3729-3733 (2000).

130. A.B.A. SECTION OF PUB. CONTRACT LAW PROCUREMENT FRAUD COMM., *QUI TAM LITIGATION UNDER THE FALSE CLAIMS ACT 1-12* (Howard W. Cox & Peter B. Hutt II eds., 2d ed. 1999); William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1801-07 (1996).

131. The relator’s control over the course of the lawsuit plays a significant role in the relator’s incentive to bring the action in the first place. In one case in which the government had intervened, the relator objected to a proposed settlement for \$234,000. See *Gravitt ex rel. United States v. Gen. Elec. Co.*, 848 F.2d 190, 190 (6th Cir. 1988) (noting that the United States and General Electric each appealed the order of the district court rejecting the recommendation of the magistrate judge that the court accept the proposed settlement, and also noting that the relator moved to dismiss both appeals); *Gravitt v. Gen. Elec. Co.*, 680 F. Supp. 1162, 1162-65 (S.D. Ohio 1988) (noting proposed settlement). The case was later settled with permission of the relator for \$3.5 million, of which the relator kept \$770,000, or twenty-two percent of the government’s recovery. PAMELA H. BUCY, *WHITE COLLAR CRIME, CASES AND MATERIALS* 715 (2d ed. 1998).

132. 31 U.S.C. § 3729(a)(1) (2000). Section 3729(a) presents seven distinct scenarios for which a person may be found liable under the False Claims Act: Presenting a false claim for payment or approval; making or using a false record to obtain fraudulent payment or approval; conspiring to defraud the government by getting a false claim paid or approved; having control of property intended for use by the government, concealing such property, or willfully delivering less property than that for which the person receives a receipt; making a receipt for property to be used by the government, without knowing the information on the receipt to be true, intending to defraud the government; knowingly receiving property from a government officer who may not sell or pledge the property; knowingly making a false record to decrease an obligation to the government. 31 U.S.C. § 3729(a)(1)-(7).

133. 31 U.S.C. § 3729(a).

on its own behalf,<sup>134</sup> or a person may bring a *qui tam* civil action “for the person and for the United States Government . . . in the name of the Government.”<sup>135</sup>

If the action is commenced by a person, the complaint is filed *in camera* and must remain under seal for at least sixty days.<sup>136</sup> The government is granted sixty days to determine whether to intervene and proceed with the action from the time it receives both the complaint and the material evidence and information.<sup>137</sup> If the government elects to proceed with the action, it assumes primary responsibility for prosecuting the case, but the relator may remain as a party to the action.<sup>138</sup> If the government elects not to proceed, the relator may proceed with the action, subject to the government’s later intervention with good cause and permission of the court.<sup>139</sup> In addition to necessary expenses and attorneys’ fees and costs, the relator is entitled to fifteen to twenty-five percent of the recovery if the government intervenes or twenty-five to thirty percent of the recovery if the government does not intervene. In any case, no more than ten percent if the information the relator provides is publicly available.<sup>140</sup>

Because the sums that the government can seek are normally quite large, the share given to the relator can often be quite substantial. The largest recoveries under the FCA include a \$731.4 million judgment and another separate \$631 million settlement, both from HCA, Inc., the country’s largest for-profit hospital chain, as well as a \$559 million settlement from TAP Pharmaceutical Products, Inc.<sup>141</sup> In total, over \$15 billion was recovered under the FCA between the 1986 amendments and the end of fiscal year 2005, including \$9.6 billion recovered under the *qui tam* provisions.<sup>142</sup> The total recovery by relators in that period was over \$1.6 billion.<sup>143</sup>

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134. See 31 U.S.C. § 3730(a) (2000).

135. 31 U.S.C. § 3730(b)(1). In *Vt. Agency v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Court upheld the Article III standing of relators to sue in the name of the government.

136. 31 U.S.C. § 3730(b)(2).

137. *Id.*

138. See 31 U.S.C. § 3730(c)(1).

139. See 31 U.S.C. § 3730(c)(3).

140. 31 U.S.C. § 3730(d)(1)–(2).

141. Taxpayers Against Fraud Education Fund, *Top 20 Cases*, <http://www.taf.org/top20.htm> (last visited July 2, 2006) (on file with the University of Michigan Journal of Law Reform).

142. Taxpayers Against Fraud Education Fund, *Statistics* (2005), <http://www.taf.org/fcastatistics2006.pdf> (on file with the University of Michigan Journal of Law Reform).

143. *Id.*

*Qui tam* actions under the FCA are most common in certain industries. During the 1980s and early 1990s, many actions under the FCA were directed at defense contractors, just as they were in 1863.<sup>144</sup> More recently the Act has been used most successfully to fight fraud in government health care programs,<sup>145</sup> particularly Medicare.<sup>146</sup> Relators recovered nearly \$280 million for actions involving fraud against the Department of Health and Human Services in fiscal year 2003 alone.<sup>147</sup> In addition to the defense and healthcare industries, the FCA is also used frequently against government procurement fraud, grant fraud, municipal bond fraud and fraud in agricultural subsidies and other programs.<sup>148</sup>

### C. Current Trends in *Qui Tam* Litigation and Legislation

Since the 1986 amendments, there has been an explosion in *qui tam* litigation. While the FCA was much ignored between 1863 and 1943, and little used between 1943 and 1986, over 4,000 cases have been filed under the FCA's *qui tam* provisions since 1986.<sup>149</sup> Many states have also enacted similar laws, some modeled on the FCA.<sup>150</sup>

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144. Fried, Frank, Harris, Shriver & Jacobson LLP, *Fraud Statistics—Department of Defense* (Oct. 1, 1986–Sept. 30, 2005), [http://www.ffhsj.com/quitam/pdf/stats\\_dod.pdf](http://www.ffhsj.com/quitam/pdf/stats_dod.pdf) (on file with the University of Michigan Journal of Law Reform); Taxpayers Against Fraud Education Fund, *What is the False Claims Act & Why Is It Important?*, <http://www.taf.org/whyfca.htm> (last visited July 2, 2006) (on file with the University of Michigan Journal of Law Reform).

145. *What is the False Claims Act and Why Is It Important?*, *supra* note 144.

146. *Id.*

147. Fried, Frank, Harris, Shriver & Jacobson LLP, *Fraud Statistics—Health and Human Services* (Oct. 1, 1986–Sept. 30, 2005), [http://www.ffhsj.com/quitam/pdf/stats\\_hhs.pdf](http://www.ffhsj.com/quitam/pdf/stats_hhs.pdf) (on file with the University of Michigan Journal of Law Reform).

148. Phillips & Cohen LLP, *Common Types of Fraud Against the Government*, [http://www.allaboutquitam.org/fca\\_other.shtml#research](http://www.allaboutquitam.org/fca_other.shtml#research) (last visited July 2, 2006) (on file with the University of Michigan Journal of Law Reform).

149. Dykema Gossett PLLC, *Litigation Law Developments: Sixth Circuit Affirms Dismissal of Qui Tam Actions for Failure to Plead Fraud with Particularity* (on file with the University of Michigan Journal of Law Reform).

150. Phillips & Cohen LLP, *State Qui Tam and False Claims Laws for Whistleblowers*, <http://www.allaboutquitam.org/statelaws.shtml> (last visited July 2, 2006) (on file with the University of Michigan Journal of Law Reform); Taxpayers Against Fraud Education Fund, *State False Claims Acts*, <http://www.taf.org/statefca.htm> (last visited July 2, 2006) (on file with the University of Michigan Journal of Law Reform). Currently, twenty states and the District of Columbia have enacted statutes similar to the federal FCA. Arkansas has a law that provides for a bounty, but does not permit a relator to initiate a lawsuit; those of Colorado, Connecticut, Michigan, Louisiana, Tennessee, and Texas apply only to medical assistance fraud. See ARK. CODE ANN. §§ 20-77-901 to -911 (West 2006); CAL. GOV'T CODE §§ 12650–12655 (Deering 2006); COL. REV. STAT. ANN. §§ 26-4-1101 to -1104 (LexisNexis 2006); CONN. GEN. STAT. ANN. §§ 53-440 to -445 (LexisNexis 2006); DEL. CODE ANN. tit. 6, §§ 1201–09 (LexisNexis

Additionally, the cities of Chicago and New York have their own local false claims laws.<sup>151</sup>

At the state level, the trend has been to expand the scope of *qui tam* litigation.<sup>152</sup> Five states allow government employees to file *qui tam* actions, so long as they first reported the fraud to the government and the government failed to act in a reasonable time.<sup>153</sup> At the federal level, the trend has been to export the *qui tam* action to other areas of law where it might be useful. This trend has been particularly effective in the area of environmental protection,<sup>154</sup> but Congress has also created private rights of action in various other areas as well.<sup>155</sup> A federal private right of action against a state government official for public corruption would be consistent with both of these trends; first, because many actions against government officials would likely be filed by government employees, and second, because *qui tam* actions are a particularly useful tool against shared problems which can be difficult to detect. This has already been noted in the context of environmental protection, but would also apply to public corruption.

### III. A PROPOSAL FOR REFORM

Part I of this Note illustrated the problem of public corruption in both state and local government.<sup>156</sup> Part II outlined the basic principles of the *qui tam* action.<sup>157</sup> Now, Part III proposes that they be joined. Federal criminal statutes used to prosecute state and

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2006); D.C. CODE ANN. §§ 2-308.03–.21 (LexisNexis 2006); FLA. STAT. ANN. §§ 68.081–.092 (LexisNexis 2006); HAW. REV. STAT. ANN. §§ 46-171 to -179, 661-21 to -29 (LexisNexis 2006), 740 ILL. COMP. STAT. ANN. §§ 175/1–175/8 (LexisNexis 2006); IND. CODE § 5-11-5.5 (2005); LA. REV. STAT. ANN. §§ 46:439.1–440.3 (2000); MASS. GEN. LAWS ch. 159, § 18 (2000); MICH. COMP. LAWS ANN. 400.610a-611 (LexisNexis 2006); NEV. REV. STAT. ANN. §§ 357.010–250 (LexisNexis 2006); N.H. REV. STAT. ANN. § 167:61 (b)-(c) (2004); N.M. STAT. ANN. §§ 27-14-1 to -15 (LexisNexis 2006); TENN. CODE ANN. §§ 71-5-181 to -186 (2000); TEX. HUM. RES. CODE ANN. §§ 36.001–.117 (Vernon 2006); UTAH CODE ANN. §§ 26-20-1 to -13 (2000); VA. CODE ANN. §§ 8.01-216.1 to -216.19 (2000).

151. CHI., ILL., MUN. CODE § 1-21-010 to -22-060 (LexisNexis 2006); N.Y. City, N.Y., Local Law 53 (May 19, 2005).

152. Dan L. Hargrove, *Soldiers of Qui Tam Fortune: Do Military Service Members have Standing to File Qui Tam Actions under the False Claims Act?*, 34 PUB. CONT. L.J. 45, 93 (2004).

153. *Id.*

154. See Federal Water Pollution Control Act, 33 U.S.C. § 1365(a) (1982) (authorizing private lawsuits against polluters to compel compliance, and against the EPA to compel discharge of enforcement duties); Clean Air Act, 42 U.S.C. § 7604 (1982).

155. See, e.g., Clayton Antitrust Act, 15 U.S.C. §§ 15, 26 (1982); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1982).

156. See *supra* Part I.

157. See *supra* Part II.

local public corruption<sup>158</sup> should be amended to include a *qui tam* cause of action against state and local officials for violations of those laws.<sup>159</sup> *Qui tam* actions offer a compelling response to a serious problem. The governmental interest in combating public corruption is significant. However, the time, expense, and detailed analysis necessary to procure an indictment for public corruption, let alone a conviction, calls for a search for alternative means of pursuing public corruption cases.<sup>160</sup> Whistleblowers who are able to supplement the work of the Department of Justice would provide such an alternative. However, whistleblowing can have severe personal consequences.<sup>161</sup> The question then becomes how to induce the potential whistleblower-relator to share the necessary information. Some significant inducement is clearly necessary.

The answer is that we must strengthen the many to discover the few whom power has corrupted.<sup>162</sup> The system of reward offered by the *qui tam* action will be able to provide such an inducement, although it will necessarily be somewhat modified from the form it takes in the FCA. Besides the improved detection and prosecution of public corruption, the addition of *qui tam* actions to criminal statutes would improve deterrence of corrupt acts and increase public confidence in the democratic system by providing a feasible method for direct intervention by members of the public at large.

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158. Those statutes used to prosecute officials in Part I, *supra*, including the Hobbs Act, 18 U.S.C. § 1951 (2005), mail fraud, 18 U.S.C. § 1341 (2005) wire fraud, 18 U.S.C. § 1343 (2005), and RICO, 18 U.S.C. §§ 1961–68 (2005), would be a good starting point, and because of their prevalence in these prosecutions, may in fact be sufficient. However, I do not intend to exhaustively list all those statutes that could or should be amended in this way. The Travel Act, 18 U.S.C. § 1952 (2005) and 18 U.S.C. § 666 (2005) might also be appropriate to amend.

159. What this Note proposes here would be specifically limited to state and local officials, and any damages resulting would be paid out of state or municipal treasuries. Application to federal officials, although probably a good idea, is beyond the scope of this Note. The *qui tam* provisions this Note proposes would not be applicable to private entities, including state contractors.

160. See Erica H. McMahon, *Colorado Republican Federal Campaign Committee v. Federal Election Commission: A Flood of Party Dollars To Wash Away Campaign Finance Laws*, 6 GEO. MASON L. REV. 365, 391 (1998) (noting the difficulty in proving bribery and corruption); Kenneth Mann, *Why Corruption is Hard to Prosecute*, JERUSALEM POST, January 30, 2004, at 13. Mann discusses difficulties prosecuting public corruption in Israel, which are equally applicable in the United States, including gathering evidence, public pressures, budgetary constraints, defense tactics, piecing together circumstantial evidence to form a case, the difficulty in encouraging witnesses to come forward, and the years necessary to gather and evaluate the necessary documents and witness statements.

161. See Edward T. Ackerman, Note, *A Partnership With the Government?: How the Inclusion of Attorney Contingency Fees in a Plaintiff's Gross Income Negatively Impacts Qui Tam Litigation*, 70 BROOK. L. REV. 213, 229 (2004).

162. See HOFFER, *supra* note 1.

Moreover, the *qui tam* action as an inducement to whistleblowing in public corruption is superior to other forms of inducements because it provides for a significant measure of control over the action to the individual whistleblower.

### A. *The Need to Combat Public Corruption*

“When a public official abuses his office, he drains the reservoir of public trust on which our democratic institutions rely.”<sup>163</sup> Justice Brandeis once noted “if the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”<sup>164</sup> The importance of combating public corruption was recognized in the U.S. Sentencing Guidelines. Upward departures for convicted corrupt public officials were permitted where “the court finds that the defendant’s conduct was part of a systemic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government.”<sup>165</sup> Recently, the Supreme Court has held that the governmental incentive in combating public corruption to preserve public confidence in the democratic system outweighs even the strong First Amendment issues at play in the political process.<sup>166</sup>

### B. *Private Attorneys General*

In the context of the FCA, Congress intended to supplement the nascent prosecutorial powers of the Attorney General by allowing private parties to bring actions in the name of the government.<sup>167</sup> Here, the prosecutorial powers of the Attorney General are clearly no longer nascent, but they are similarly limited. Private attorneys general—here the *qui tam* relator—would provide a way for prosecutors to “gain access to high-level, detailed, inside information about wrongdoing” and provide “a mechanism for private parties

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163. Press Release, U.S. Dep’t of Justice, *supra* note 7, at 2.

164. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

165. U.S. SENTENCING COMM’N, FEDERAL SENTENCING GUIDELINES MANUAL § 2C1.1 n.7 (2005).

166. See *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 143–45 (2003).

167. Ara Lovitt, Note, *Fight For Your Right to Litigate: Qui Tam, Article II, and the President*, 49 STAN. L. REV. 853, 856 (1997).

and their counsel to supplement [prosecutors'] resources.<sup>168</sup> However, enlisting the aid of a prospective relator may be more difficult than the actual prosecution.

### C. Inducement of Relators and Potential Benefits

Senator Charles Grassley has said "Whistleblowers frequently risk everything when bringing false claim cases."<sup>169</sup> Although *qui tam* relators are protected from adverse employment actions under the FCA,<sup>170</sup> there are still significant risks and burdens facing potential relators under any *qui tam* action. "Public disclosure of the filing of the complaint, in spite of the rights provided by [the FCA], will often result in termination of that relationship or in a compromised opportunity for future advancement."<sup>171</sup> Additionally, if the complaint results in suspension of a government contract, the relator's ability to find similar work elsewhere in the same industry may be jeopardized.<sup>172</sup> The relator's personal life may become difficult as a result of the action as well.<sup>173</sup>

Although the protections against direct retaliation in the FCA are necessary to the effectiveness of the Act, and no doubt would work similarly if transplanted to the criminal law, they are not sufficient to overcome the institutional hostility, or the possibility that filing an action would preclude advancement within an entire industry.<sup>174</sup> Institutional hostility would likely be even more pronounced in the political arena, where loyalty to one's party is

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168. Bucy, *supra* note 112, at 1026. Cf. Alexander Dyck et al., Who Blows the Whistle on Corporate Fraud? (Nov. 2005), available at <http://www.law.umich.edu/CentersAndPrograms/olin/papers/Fall%202005/morse.pdf> (unpublished draft on file with the University of Michigan Journal of Law Reform) (finding employees are at least as important as regulators in discovering fraud in the corporate setting).

169. *Medicaid Waste, Fraud and Abuse: Threatening the Health Care Safety Net: Hearing Before the S. Comm. on Finance*, 109th Cong. (2005) (opening statement of Sen. Charles Grassley, Chairman, Senate Comm. on Finance), available at <http://finance.senate.gov/hearings/statements/062905cgb.pdf>.

170. The FCA prohibits discharge, demotion, suspension, and harassment resulting from an employee's status as a relator. If such retaliation occurs, the relator is entitled to all relief necessary to make him whole, including reinstatement with seniority, double back pay with interest, compensation for special damages, costs, and attorney's fees. 31 U.S.C. § 3730(h) (2000).

171. *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1099 (C.D. Cal. 1989).

172. *Id.*

173. Ackerman, *supra* note 161, at 230.

174. *Id.*

often necessary for advancement. "Selling out" one's boss would likely spell the end of a burgeoning political career.

In discussing the difficulties faced by relators generally, the Eleventh Circuit has explained:

[A] *qui tam* relator suffers substantial harm . . . . First, a *qui tam* relator can suffer severe emotional strain due to the discovery of his unwilling involvement in fraudulent activity. Moreover, the actual or potential ramifications on a relator's employment can be substantial. As several courts have recognized, *qui tam* relators face the Hobson's choice of "keeping silent about the fraud, and suffering potential liability (and guilty consciences), or reporting the fraud and suffering repercussions . . . ." Finally, the relator can suffer substantial financial burdens as a result of the time and expense involved in bringing a *qui tam* action.<sup>175</sup>

Therefore, if a potential relator is professionally well-placed, he will likely only initiate a *qui tam* action if the expected gains from the lawsuit outweigh the expected gains from a continued career.<sup>176</sup> Without a sufficient financial incentive, the costs of voluntary reporting of illegal activity may outweigh the benefits.<sup>177</sup> In the government context, where power is as much an object as money, the financial returns must be even greater.

Currently, there is very little incentive for individuals with knowledge of public corruption to come forward.<sup>178</sup> Indeed, if the prospective relator is not in danger of possible prosecution and has any hopes of political advancement herself, there is a very great disincentive to report official misconduct. Therefore, the addition of a *qui tam* provision to existing federal criminal statutes would not only provide an avenue for the reporting of public corruption it would also, and most importantly, provide an incentive for its use.

Because detection of public corruption would be supplemented by insiders, the prosecution of public corruption would likely improve as well. Clearly, the more that is known to the prosecutor, and the better their access to inculpatory evidence, the easier a

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175. United States *ex rel.* Neher v. NEC Corp., 11 F.3d 136, 138 (11th Cir. 1993).

176. Ackerman, *supra* note 161, at 230.

177. *See id.*

178. The FBI has "corruption hotlines" and it is possible to leave an anonymous tip. However, absent a personal fear of prosecution, and one's own sense of civic duty, there does not appear to be any incentive to use them. *See* Public Corruption, *supra* note 2.

case will be to prove.<sup>179</sup> Because the crimes public officials are charged with are often complex or technical,<sup>180</sup> the testimony of a relator-witness may have a significant influence on a jury. Improved prosecution would also reduce the frequency of “cover-up” criminal charges brought in lieu of charges for underlying, but difficult-to-prove crimes.<sup>181</sup>

As a result of both improved detection and prosecution of public corruption, many corrupt acts may be deterred. Currently, the deterrent effect of indictment and prosecution for public corruption does not appear particularly effective.<sup>182</sup> However, the addition of *qui tam* actions may increase deterrence in at least two ways. First, public officials may be deterred from committing illegal activity because of the increased likelihood that one of his co-conspirators will “sell him out” as a result of the incentives offered under the *qui tam* provisions.<sup>183</sup> Second, the increased flow of information into the U.S. Attorneys’ Offices would likely diminish the impact of the investigatory burden that frequently precedes public corruption prosecutions.<sup>184</sup> Because of the prosecutors’ increased access to evidence, their cases are likely to be stronger, and convictions easier to obtain. Public officials may therefore be deterred from criminal activity due to the increased likelihood of criminal prosecution and conviction, above and beyond their deterrence due to *qui tam* actions generally. In short, the official might be sold out, and if he is, there is an increased likelihood that he will be prosecuted and convicted.<sup>185</sup>

There would also likely be positive secondary effects resulting from *qui tam* actions against corrupt public officials. As soon as a state pays out its first large settlement or judgment to a relator, the state legislature is likely to commit more funding and authority to

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179. Cf. Mann, *supra* note 147.

180. See, e.g., Second Superseding Indictment of Lawrence E. Warner & George H. Ryan, Sr., No. 02 CR 506 (April 2002), available at [http://www.usdoj.gov/usao/iln/indict/2003/warner\\_ryan.pdf](http://www.usdoj.gov/usao/iln/indict/2003/warner_ryan.pdf) (on file with the University of Michigan Journal of Law Reform); McMahan, *supra* note 147, at 391 (noting the difficulty in proving bribery and corruption).

181. See Stuart P. Green, *Uncovering the Cover-up Crimes*, 42 AM. CRIM. L. REV. 9, 9, 12 (2005).

182. See *id.* at 12 (noting U.S. Attorney Meehan’s statement regarding the pervasiveness of public corruption).

183. The General Accounting Office estimates over \$300 billion in fraud was deterred as a result of the FCA between 1986 and 1998. Hargrove, *supra* note 152, at 47. It does not seem unreasonable to expect a significant deterrent effect from *qui tam* actions in the public corruption arena as well, provided there is an equally attractive inducement for the relator.

184. See Mann, *supra* note 160.

185. After all, it is the corrupt acts that are problematic. If they do not occur in the first place and there is no need for prosecution, so much the better.

its inspector general's office. As a practical matter, *qui tam* actions would have the effect of making public corruption more costly than its prevention. Additionally, a strong inspector general would also increase the deterrence factor outlined above.

Secondly, as a cumulative result of all the foregoing outcomes, public confidence in the democratic system is likely to improve. People will have more faith in a system that they feel they have more influence over, corrupt acts will be deterred as a result of the *qui tam* actions, and those officials who do engage in corrupt acts and are sued under the *qui tam* provisions will likely face greater penalties, or at least a greater chance of penalties, than they otherwise would. On the whole, state and local governments will be more cleanly run, and individuals will have more faith in democracy because everyone is empowered and nearly everyone would be willing to bring a *qui tam* action if they encountered public corruption.

Lastly, if charges of public corruption are based on the accusations of those close to the defendants, accusations of politically-motivated prosecutions will likely decline.<sup>186</sup> Moreover, prosecutions of public corruption which are in fact politically motivated will likely decline as well, as the impetus for government intervention would now come from the relator. Either way, lessening the potential for political prosecutions and for false accusations of political prosecutions would serve the public good by strengthening public perception of neutrality and fairness in the criminal justice system.<sup>187</sup>

#### *D. Alternative Measures*

A final consideration in the calculus to adopt *qui tam* provisions as part of the criminal federal code governing state and local public officials is the availability and propriety of alternative measures that might accomplish the same goal. Although the proposal presented in this Note may be novel in its reliance on private parties to initiate civil actions that will likely lead to criminal prosecution,

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186. Cf. NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 147 (3d ed. 2000) (noting "potential for politically motivated prosecutions"); Michael Powell, *Scandals Plague Governor*, B. GLOBE, Aug. 8 2004, at A7 (noting the Democratic Governor of New Jersey has accused the Republican U.S. Attorney of bringing charges against him to further his career).

187. See generally Sandra Caron George, *Prosecutorial Discretion: What's Politics Got To Do with It?*, 18 GEO. J. LEGAL ETHICS 739 (2005) (noting deleterious effects of political considerations in prosecutorial discretion).

statutes supporting the involvement of the public in investigations and prosecutions are by no means uncommon.<sup>188</sup> Two devices quite similar to the *qui tam* action are the general “private attorney general” action found in a number of statutes (and of which a *qui tam* action is one type), and the “bounty system” notably employed by the Securities Exchange Commission (SEC). Although both are excellent prosecutorial tools, in this situation, the *qui tam* action is the best method to combat public corruption.

1. *Private Attorney General Statutes*—Despite its frequent use, the phrase “private attorney general” is not particularly well defined.<sup>189</sup> It is used to refer to both plaintiffs and defendants; both attorneys and clients.<sup>190</sup> However, its most frequent use may be to designate “‘bounty hunters,’ unharmed by the asserted misconduct to pursue the public good through asserting a ‘public right’ on behalf of the general public or the sovereign.”<sup>191</sup>

Professor William Rubenstein has identified three distinct forms of private attorney generals: those who substitute for the Attorney General, those who supplement the work of the Attorney General, and those who simulate the work of the Attorney General.<sup>192</sup> “Substitute” attorneys general “literally perform the exact functions” of the Attorney General’s office, although they are not themselves the Attorney General.<sup>193</sup> This could be a private attorney hired to do the work of the Attorney General, such as the appointment of David Boies to try the Microsoft antitrust case by Deputy Attorney General Joel Klein.<sup>194</sup> Additionally, a substitute attorney general exists when a public official hires a private attorney to represent her in her official capacity.<sup>195</sup>

The “simulated” attorney general falls on the opposite end of the public/private spectrum.<sup>196</sup> Rather than a hired gun who does

188. See, e.g., Clayton Antitrust Act, 15 U.S.C. §§ 15, 26 (2000); Federal Water Pollution Control Act, 33 U.S.C. § 1365 (2000); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000); Clean Air Act, 42 U.S.C. § 7604 (2000).

189. William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2130 (2004).

190. *Id.*

191. John H. Beisner et al., *Class Action “Cops”: Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1458 (2005).

192. Rubenstein, *supra* note 189, at 2142.

193. *Id.* at 2143.

194. *Id.*

195. *Id.* Although Professor Rubenstein includes *qui tam* relators among the types of substitute attorneys general, *see id.* at 2144, it is the supplemental, rather than the substitute, function of the *qui tam* relator that makes them valuable in detecting public corruption. *See id.* at 2146–47 (discussing environmental citizen-suits).

196. *Id.* at 2156.

the government's work, the "simulated" attorney general does his own work, on behalf of private clients, which also happens to vindicate a public interest.<sup>197</sup> Frequently, the attorney, representing an individual plaintiff, will secure a fund for the benefit of a group of individuals.<sup>198</sup> Recouping this fund for private clients is not typically a public function, although the attorney is typically awarded fees and costs because the action is deemed to be a contribution to the public good.<sup>199</sup>

Neither the "substitute" attorney general nor the "simulated" attorney general provide any more support to federal prosecutors in the investigatory phase of prosecution than the Justice Department could do by itself. Only the second, or "supplemental" category, in which *qui tam* relators are classified, is useful for combating public corruption. Without the additional information made available by a *qui tam* relator, the detection and prosecution of public corruption is not enhanced and the deterrent effect remains unchanged.

2. *The Bounty System*—The bounty system, in contrast to private attorney general statutes, does not allow for a private cause of action. Section 21A(e) of the Securities Exchange Act of 1934 authorizes the SEC to award a bounty to a person who provides information leading to the recovery of a civil penalty from an individual engaged in insider trading.<sup>200</sup> However, as applied by the SEC, there are several limitations that would make it difficult to apply to public corruption. First, and perhaps most obviously, the bounty is limited to civil actions.<sup>201</sup> Second, the bounty is limited to ten percent of the recovery.<sup>202</sup> This poses three problems: first in the context of public corruption, damages are far more difficult to calculate.<sup>203</sup> Second, it may take relatively little to induce a bounty hunter to report a securities violation where the repercussions are small, but a substantial reward will be required to overcome the potentially life-altering consequences of reporting public corruption.<sup>204</sup> A third concern with the bounty system is the possibility of non-payment. Under the SEC rules, the SEC is not obligated to pay any bounty.<sup>205</sup> Additionally, if the defendant is judgment-proof, the

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197. See Rubenstein, *supra* note 189, at 2154.

198. *Id.*

199. *Id.* at 2155.

200. The Securities and Exchange Act of 1934, 15 U.S.C. § 78u-1(e) (2000).

201. The Department of Justice prosecutes criminal insider trading.

202. U.S. Securities and Exchange Commission, *Bounty Program at the SEC*, <http://www.sec.gov/answers/bounty.htm> (last visited July 2, 2006) (on file with the University of Michigan Journal of Law Reform).

203. See discussion *infra* Part IV.B.

204. See discussion *supra* Part III.C.

205. *Bounty Program at the SEC*, *supra* note 202.

whistleblower would also get nothing, because the bounty comes out of the SEC's recovery.<sup>206</sup> All of these concerns would severely limit the utility of a provision applied to criminal public corruption, as gathering the information hinges on the inducement to the prospective relator.<sup>207</sup> Finally, *qui tam* is a superior alternative to a bounty because it allows the relator to bring an action and become a party to the proceedings rather than a supplier of information. The additional control over the proceedings governing his own payment is likely to positively influence a potential relator's participation in uncovering public corruption, which could simultaneously jeopardize his career.

This is not to say that in the process of molding the *qui tam* action to fit the needs of public corruption, the result would be unlike either a private attorney general action or a bounty system. In certain ways, it may resemble all three devices. For the sake of simplicity, it appears that the *qui tam* action is the best model for this scenario. However, certain changes will need to be made to the *qui tam* action to account for differences unique to federal prosecutions of public corruption in state and local governments.

#### IV. HOW TO FIT A SQUARE PEG INTO A ROUND HOLE

To be sure, the *qui tam* provisions of the False Claims Act cannot simply be grafted on to existing criminal statutes *in toto*. There are many differences that must be accounted for and modified before *qui tam* could be employed successfully and constitutionally against public officials. First, there is a question of the proper role of the federal government in the prosecution of state and local public officials. Second, there is a question of federal jurisdiction if individuals are allowed to sue state officials in federal court. Third, unlike the False Claims Act, damages in these types of cases are intangible, and far more difficult to calculate than in a case of procurement fraud. Fourth, there may be an issue of conflicts of interest where public officials gain privately from knowledge obtained in the course of their official duties. Finally, there may also be a question of fairness to the public in paying *qui tam* relators out of public funds. Although these are all valid concerns, they either

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206. *Id.*

207. See discussion *supra* Part III.C.

may be avoided by modifying the *qui tam* action, or are outweighed by the potential benefits of this proposal.

### A. Federalism Concerns

1. *The Proper Role of the Federal Government*—Clearly, the federal government has an interest in minimizing corruption within its own ranks.<sup>208</sup> The President takes an oath to “preserve, protect and defend” the Constitution. A democratic government has a duty to uphold the demarcation between public and private markets. Like any employer, the federal government can determine the compensation of its employees, and it may attempt to instill an attitude of honest public services. It may also prosecute corrupt acts as such as embezzlement and theft as crimes against society at large, regardless of its status as a victim.<sup>209</sup> However, the interest and legitimacy of federal prosecution of corrupt state and local officials is more tenuous. Assuming no federal funds are involved, what federal interest is there in preventing corruption in sub-national government?

One answer offered by Professor Brown is that the prosecution of state and local government is a part of the federal government’s “fundamental national role” in preserving the democratic system.<sup>210</sup> The conduct of government is something that the public views in unitary terms.<sup>211</sup> Therefore, because corruption at a sub-national level can adversely affect confidence in the federal government and in the democratic system as a whole, prosecuting corruption at the state and local level is a proper function of the federal government.<sup>212</sup> This was demonstrated recently by the Supreme Court’s decisions in *Sabri v. United States*<sup>213</sup> and *McConnell v. FEC*.<sup>214</sup> In these cases, the Court confirmed the ability of the federal government to “fight corruption at any level in order to protect the democratic process and public confidence in it.”<sup>215</sup> In *McConnell*, the Court held that the federal government’s “interest in combating [sic] corruption outweighs the powerful First Amendment

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208. George D. Brown, *Carte Blanche: Federal Prosecution of State and Local Officials After Sabri*, 54 CATH. U. L. REV. 403, 408–09 (2005).

209. *Id.*

210. *Id.* at 410.

211. *Id.*

212. *Id.*

213. *Sabri v. United States*, 541 U.S. 600 (2004).

214. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003).

215. Brown, *supra* note 208, at 404.

interests at play in the political process.”<sup>216</sup> In *Sabri*, the Court held that the same governmental interest also outweighs a state’s interest in prosecuting state and local officials.<sup>217</sup> In both cases, assurance of governmental integrity was given paramount importance.<sup>218</sup>

Additionally, the federal government has an interest in preventing public corruption in one city or state from harming the interests of another state or of the federal government.<sup>219</sup> “Corruption in, say, industrial permitting in state A may harm the rigor and integrity of the permitting process in state B.”<sup>220</sup> For example, B’s corrupt laxity may cause officials in A to look the other way, or lose businesses to B. Local or state police corruption could threaten joint law-enforcement initiatives, and widespread economic failure due to corrupt local officials could have a national impact.<sup>221</sup>

The constitutional basis of the federal government’s interest in combating state and local corruption has been advanced in different ways. Professor Henning contends that “[t]he Constitution reflects the deep concern of the Founders with preventing corruption . . . a concern that supports congressional power to reach misconduct by officials at all levels of government for misuse of public authority.”<sup>222</sup> This “anti-corruption legacy” supports broad interpretation of congressional power to enact statutes to combat corruption at the sub-national level, regardless of whether the states could enact similar legislation.<sup>223</sup> In particular, the Seventh Amendment’s civil jury guarantee and Article III’s provision for federal diversity jurisdiction are intended, *inter alia*, to reduce the possibility of corruption and favoritism arising out of court proceedings.<sup>224</sup>

The Guarantee Clause also provides footing for federal involvement in combating state and local corruption.<sup>225</sup> Professor Kurland has noted:

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216. *Id.* (referencing *McConnell*, 540 U.S. at 660–61).

217. *Id.* at 404–05.

218. *See id.* at 405.

219. *Id.*

220. Brown, *supra* note 208, at 410.

221. *Id.*

222. Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 Ky. L.J. 75, 81 (2003).

223. *Id.* at 82.

224. *Id.* at 89–90.

225. U.S. CONST., art. IV, § 4, cl. 1 (“The United States shall guarantee to every State in this Union a Republican Form of Government.”).

The primary federal interest in combating local corruption . . . is based on the principle that the public is entitled to honest government at all levels. The faith that the citizenry places in all levels of government is the foundation of the republic. Thus, anything that erodes that foundation is of substantial federal interest.<sup>226</sup>

There is very little that erodes a republican form of government more than corrupt officials.<sup>227</sup> Moreover, the Guarantee Clause can be seen as conceptually distinct from the limited and enumerated powers of the federal government.<sup>228</sup> The Guarantee Clause can be seen as a positive command that the federal government preserve the conditions necessary to a functional federal republic.<sup>229</sup>

Although the constitutionality of federal prosecutions does not appear to be in jeopardy, the propriety of such prosecutions is the subject of some debate. One argument against federal prosecutions is that the states and the federal government (Supremacy Clause aside) are co-equal sovereigns, and the prosecution of agents of one sovereign by another is incompatible with this division of power.<sup>230</sup> As a result, state actors are more accountable to the interventionist federal government than to their own constituents, and have much less incentive to combat corruption on their own.<sup>231</sup>

This shift of responsibility to the federal government of public corruption prosecutions may risk the imposition of “federal” values on state actors.<sup>232</sup> Professor Hills argues that the democratic values at the federal level reflect implementation of policy by professional bureaucrats, whereas the “participatory populism” which characterizes state and local government is more likely to include officials who also have full-time private interests.<sup>233</sup> Thus, public and private interests are more intertwined in sub-national political processes, and federal prosecution of corruption, particularly of crimes such as criminal conflict of interest, may not accurately reflect commu-

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226. Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 376–77 (1989).

227. *See id.* at 417, 429.

228. *Id.* at 429–35.

229. *See id.* at 432–35. However, the Supreme Court has historically viewed the Guarantee Clause primarily as a source of state autonomy than as a source of federal power. *See, e.g.,* *Printz v. United States*, 521 U.S. 898, 918–19 (1997).

230. *See* Brown, *supra* note 208, at 412.

231. *Id.* at 411–12.

232. *See* Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*, 6 THEORETICAL INQUIRIES IN L. 113, 137–44 (2005).

233. *Id.* at 115.

nity norms, which may be more accurately represented by existing state law.<sup>234</sup>

While this analysis may toll sharply in the debate on federal prosecution of state and local officials, its application to federal *qui tam* actions for violations of federal law by state and local officials is much less clear. It appears that the major factor weighing against federal prosecution is that it removes the power to decide what to criminalize and who should prosecute from the hands of the people. But rather than return this power to the states by de-federalizing corruption prosecutions, this proposal goes one step further and returns it to the people themselves. Under this proposal, state and local officials are *completely* accountable to their constituents and the judges of community norms are individual members of the community. Whatever problems may arise from federal prosecution of state and local corruption, if such prosecutions arose out of *qui tam* actions, they would be likely be seen as more legitimate, rather than less so.

2. *State Sovereign Immunity*—Although it has been established, if not entirely accepted, that the federal government may properly combat state and local corruption, it is far from established that private citizens may sue states in federal courts. The Supreme Court has articulated a principle of state sovereign immunity which is affiliated with, but not bound by, the Eleventh Amendment.<sup>235</sup> As a result, private individuals are not permitted to sue states in federal court.<sup>236</sup> This presents an obstacle in the way of enforcing *qui tam* actions against states, which are traditionally thought of as private attorney general actions. If a *qui tam* action was brought by an individual alone against a state in federal court, the claim would be dismissed.<sup>237</sup>

Although Congress may not empower private individuals to enforce federal legislation against unconsenting states, Congress may authorize the federal executive to do so.<sup>238</sup> Current *qui tam* procedure under the False Claims Act requires the federal government

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234. *Id.* at 137–44.

235. Morrison, *supra* note 100, at 619.

236. The Eleventh Amendment provides that the “Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. However, the Supreme Court has also consistently held that suits by citizens of a state against their home state in federal court are also barred by the Amendment unless the state consents to the lawsuit. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001); *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996).

237. *Hans v. Louisiana*, 134 U.S. 1 (1890).

238. Morrison, *supra* note 100, at 620.

to investigate each case that is filed, and decide if the government will intervene.<sup>239</sup> A logical solution to this jurisdictional hurdle appears to be mandating the involvement of the federal government in every case brought under this proposal, if the government can pursue the action in good faith. The benefits of the *qui tam* action would remain intact, while providing a jurisdictional basis for the cases to be heard in federal court. Moreover, granting the government a provisional power of dismissal would likely reduce predatory lawsuits that necessarily accompany *qui tam* actions.<sup>240</sup>

The Supreme Court held in *Seminole Tribe of Florida v. Florida*<sup>241</sup> that Congress cannot abrogate state sovereign immunity pursuant to its power under the Commerce Clause or unilaterally abrogate the sovereign immunity of unconsenting states.<sup>242</sup> Because a great deal of federal criminal law, including many of those laws used to prosecute state and local public corruption, are based on the Commerce Clause, it would also likely be necessary to base this proposal allowing for *qui tam* actions against state public officials on some other power of Congress.<sup>243</sup>

A likely source of congressional authority to enact this proposal would be the Spending Power.<sup>244</sup> Congress is authorized to “lay and collect Taxes, Duties, Imposts, and Excises to pay the Debts and provide for the common Defense and general Welfare of the United States.”<sup>245</sup> Given the Supreme Court’s history of deference to Congress’s interpretation of the “general Welfare,” a *qui tam* action designed to combat corruption in state and local governments

239. See 31 U.S.C.A. § 3130(b) (West 2003).

240. See Bucy, *supra* note 112, at 1026 (“Because *qui tam* actions empower private parties—regardless of their ability or ethics—to bring significant lawsuits against businesses in the name of the United States, they are subject to abuse.”); Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 62–68 (2002).

241. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

242. *Id.* at 57–73. There are two main theories of 11th Amendment interpretation: subject matter jurisdiction and common law immunity. See generally Douglas C. Melcher, *State Sovereign Immunity and Judicial Review of Interconnection Agreements Under the Telecommunications Act of 1996*, 8 COMMLAW CONCEPTUS 61, 67 (2000). The theory that is chosen may determine which powers Congress may use to abrogate state sovereign immunity. *Id.*

243. For example, both the mail fraud and wire fraud statutes contain language invoking the commerce power. See 18 U.S.C. § 1341 (2000) (“any private or commercial interstate carrier”); 18 U.S.C. § 1343 (2000) (“by means of wire, radio, television communication in interstate or foreign commerce”). The Hobbs Act also requires an effect on commerce as a jurisdictional predicate, see 18 U.S.C. § 1951 (2000), and interstate or foreign commerce is an element of a RICO violation, see 18 U.S.C. § 1962(a)-(c) (2000). See also Stephen Chippendale, Note, *More Harm than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455 (1994).

244. U.S. CONST. art. I, § 8, cl. 1.

245. *Id.*

does not appear beyond the scope of the Spending Power.<sup>246</sup> This is confirmed by the Court's recent decision in *Sabri v. United States*.<sup>247</sup> "For the Court . . . the crucial determinant was the National Government's ability to protect funds it had disbursed under the spending power by ensuring the integrity of the recipient of those funds."<sup>248</sup> By linking *qui tam* actions to the Spending Power,<sup>249</sup> Congress would be able to ensure that states, as recipients of federal funds, were not frittering the money away, or delivering less than dollar-for-dollar value to their citizens through corrupt acts.<sup>250</sup> Moreover, the Spending Power allows states to retain the option to forgo whatever federal funds are linked to the *qui tam* statute. Thus, those states and state officers bound by the federal law would not be "unconsenting" under *Seminole Tribe*.<sup>251</sup>

Finally, this proposal should also name states as permissible defendants. Although municipal governments are "persons" subject to *qui tam* liability,<sup>252</sup> states and state entities generally are not.<sup>253</sup> When Congress creates statutory language that would unilaterally abrogate state sovereign immunity and "alter the usual constitutional balance

246. Brown, *supra* note 208, at 421.

247. *Sabri v. United States*, 541 U.S. 600 (2004).

248. Brown, *supra* note 208, at 406.

249. For example, by providing that *qui tam* actions may be initiated by any person against any officer of any state which receives more than \$10,000 per year of federal funding, who has violated one of the listed federal criminal statutes.

250. *Sabri*, 541 U.S. at 606. Alternatively, a basis for federal jurisdiction might be found in an extension of *Ex parte Young*. See *Ex parte Young*, 209 U.S. 123 (1908). "The *Ex parte Young* doctrine is a well-established method for circumventing the state sovereign immunity defense." Melcher, *supra* note 242, at 78. A federal court may exercise jurisdiction over a lawsuit against a state officer if the suit seeks only prospective relief in order to "end a continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). However, here the plaintiff would be seeking damages, not injunctive relief, and a "continuing" violation of federal law would likely be difficult to show.

251. Congressional acts pursuant to the spending power are as a general matter not coercive on the states. See *e.g.*, *Sabri*, 541 U.S. at 608; *South Dakota v. Dole*, 438 U.S. 203, 207 (1987) (noting an act pursuant to the spending power must only be in pursuit of the general welfare, enable states to exercise their choice knowingly, and perhaps bear some relation to an important federal interest, in order to avoid coercion). Moreover, a "[s]tate's freedom from suit without its consent does not protect it from a suit to which it has consented." *Parden v. Terminal Ry. of Ala. State Docks Dep't*, 377 U.S. 184, 186 (1964). Additionally, by offering states a choice, the spending power avoids potential commandeering problems under *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding the federal government may not issue directives to states or command state officers to enforce federal law); see also *New York v. United States*, 505 U.S. 144, 167-68 (1992) (holding that under the spending power, Congress may encourage states to implement federal policy by offering incentives and disincentives that influence legislative choice).

252. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003).

253. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000) (holding states and state entities are not "persons" subject to *qui tam* liability under the False Claims Act, 31 U.S.C. §§ 3729-33 (2000)).

between the States and the Federal Government, [Congress] must make its intention to do so unmistakably clear in the language of the statute."<sup>254</sup> However, because the states would consent to the abrogation, this specificity is only advisable, not required.<sup>255</sup>

### B. Measuring Damages

Under the False Claims Act, damages are fairly easy to calculate. The government has paid a certain amount and has received something less than what they have paid for, or a defendant has asked for reimbursement greater than what they are entitled. Procurement, health care, and grant fraud all cause tangible losses. Public corruption is quite different. The losses suffered as a result of corrupt public activities cannot easily be measured, particularly when a significant injury is public confidence in the democratic system. How then are *qui tam* actions to compensate the government and the relator?

The most obvious solution is to provide for statutory damages. Statutory civil penalties are already in place in the Federal False Claims Act, and nearly all state equivalents.<sup>256</sup> However, under the False Claims Act, the relator's recovery is the percentage of treble damages paid by the defendant.<sup>257</sup> Because there may be no meas-

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254. *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989) (internal quotation and citation omitted); *see also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (noting the intention of Congress to abrogate state sovereign immunity must be "unmistakably clear") (internal quotation and citation omitted).

255. In instances where Congress acts unilaterally to abrogate state sovereign immunity, there is a parallel requirement that Congress must be acting "pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003). Like the specificity requirement, it is recommended that the statutory language meet this standard, but because states grant their consent, it is not required. Regardless, efforts to combat state and local level public corruption would likely fall within Congress' power to enforce the Fourteenth Amendment's guarantee of due process.

256. 31 U.S.C. § 3729(a)(7) (2000); ARK. CODE ANN. §§ 20-77-903(a)(1) (West 2006); CAL. GOV'T CODE § 12561 (Deering 2000); COL. REV. STAT. ANN. § 26-4-1104(1)(b)(II) (LexisNexis 2006); DEL. CODE ANN. § 1201(a)(7) (LexisNexis 2006); D.C. CODE ANN. §§ 2-308.14(a) (LexisNexis 2006); FLA. STAT. ANN. § 68.082(2)(g) (LexisNexis 2006h); HAW. REV. STAT. ANN. § 661-21(a)(8) (LexisNexis 2006); IND. CODE 5-11-5.5-2(b)(8) (2005); 740 ILL. COMP. STAT. ANN. § 175/3(a)(7) (LexisNexis 2006); LA. REV. STAT. ANN. §§ 46:438.6B.(1) (2000); MASS. GEN. LAWS ch. 159, § 18 5B(9) (2000); MICH. COMP. LAWS ANN. § 400.610a(15) (LexisNexis 2006); NEV. REV. STAT. ANN. § 357.040 (LexisNexis 2006); N.H. REV. STAT. ANN. § 167:61-bI (2004); TENN. CODE ANN. § 71-5-182(a)(1)(D) (2000); TEX. HUM. RES. CODE ANN. § 36.039(c)(2)(A)-(B) (1997); UTAH CODE ANN. §§ 26-20-1 to -13 (West 2006); VA. CODE ANN. § 8.01-216.3(A)(7) (2000).

257. The average recovery for a relator in all cases where there is a recovery is over \$1.1 million, whereas the statutory civil penalty is capped at \$10,000 per violation. *See* 31 U.S.C.

urable damages, unusually high statutory damages may be necessary to make up the difference between what damages can be measured and what is necessary to induce a relator to commence an action.

### C. Public Officials, Private Gain

Another concern is the propriety of public officials privately profiting from information they obtain in the course of their official duties. Because the proposal targets public officials, it is likely that some potential relators will also be public officials, simply by virtue of their vantage point within a state or municipal administration. Several false claim suits have been filed by federal employees, although courts have diverged on their standing. The Eleventh Circuit, joined recently by the Tenth Circuit, has held that federal employees may prosecute *qui tam* actions subject to the same requirements as any other relator.<sup>258</sup> In contrast, two circuits have dismissed False Claims actions by government employees. The First Circuit has held that certain government employees cannot have “independent knowledge” because their job, e.g. auditor, is to obtain the knowledge that forms the basis for the lawsuit.<sup>259</sup> The Ninth Circuit has gone even farther, holding government employees that do not voluntarily provide the information to the government are barred from bringing a claim.<sup>260</sup> In the states, the trend appears to be towards allowing state employees to bring *qui tam* actions against the state.<sup>261</sup>

While these cases are instructive, the inquiry here differs somewhat. Rather than an objective interpretation of an existing statute, what is necessary is a more normative inquiry into whether anyone should be exempted by statute from bringing an action under this proposal. As the First Circuit noted, government employees whose duty is to investigate fraud and corruption, such as the staff of an inspector general or auditor general, should not be able to recover

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§ 3729(a)(7) (2000); Robin Page West, *Employment Law: How a Qui Tam Whistleblower Case Works* (July 1999), <http://www.expertlaw.com/library/employment/qui-tam.html> (on file with the University of Michigan Journal of Law Reform).

258. United States *ex rel.* Holmes v. Consumer Ins. Group, 318 F.3d 1199 (10th Cir. 2003); United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1501 (11th Cir. 1991).

259. United States *ex rel.* LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990).

260. United States *ex rel.* Fine v. Chevron, U.S.A., 72 F.3d 740, 743–44 (9th Cir. 1995).

261. Hargrove, *supra* note 152, at 93.

in *qui tam* for finding exactly what they are employed to find.<sup>262</sup> This exemption would prevent taxpayers from having to pay for the same result twice. Other exemptions may be appropriate as well, but too many exemptions could limit the pool of potential relators to the point where the deterrent effect is significantly lessened.

## CONCLUSION

Public corruption at the state and local levels is a continuing and serious problem for government at every level. A significant and determined response is necessary. Because acts of public corruption are often known by multiple individuals, they are well-suited to measures aimed at rewarding those individuals for coming forward with incriminating information. However, it is often extremely difficult for individuals in possession of such information to do so. The *qui tam* action offers a significant response which also affords a measure of control over the proceedings to the relator, so that he can ensure that his sacrifice will not go unrewarded. Because of the ease with which a corrupt public official could be reported to the authorities, and because of the incentive offered under this proposal, the detection, prosecution, and deterrence of public corruption should improve as a result.

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262. See generally *LeBlanc*, 913 F.2d at 20 (holding that government employees who are employed to uncover fraud cannot pass the "independent knowledge" jurisdictional bar of 31 U.S.C. § 3730(e)(4) because "the fruits of [their] effort belong to [their] employer—the government"); Dorothea Beane, *Are Government Employees Proper Qui Tam Plaintiffs?*, 14 J. LEGAL MED. 279, 280 (1993).